

## **‘India Gearing up for Cross Border Insolvency’**

**Sunday, 5 day of December, 2021 from 11:30 a.m. to 1:30 p.m.**

### Jointly Organised by:

- a. Association of Corporate Advisers and Executives
- b. Centre for Financial & Regulatory Governance Studies (CFRGS) of the West Bengal National University of Juridical Sciences
- c. IBC Laws
- d. INSOL India
- e. NCLT Kolkata Bar Association
- f. International Women’s Insolvency & Restructuring Confederation-India Network  
*(in alphabetical order)*

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- a. Media Partner: Sanmarg Newspaper, largest Hindi daily
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The write-up below has been shared by the Esteemed Vice-Chancellor, The WB National University of Juridical Sciences (NUJS), Prof (Dr.) Nirmal Kanti Chakrabarti:

### **Feasibility of Recovery of assets as provided under the fugitive economic offender(FEO) Act by the means of cross border Insolvency**

Cross-border insolvency processes raises many complex issues. The pursuit of assets in a variety of jurisdictions requires careful strategic planning, especially when the laws of the different jurisdictions diverge. As a general rule, the location of assets will determine the applicable law. In some jurisdictions, assets held locally may be ring-fenced under local insolvency law giving creditors within that jurisdiction first priority. In combating Cross-border insolvency, like many other corporate laws criminal law jurisprudence, specially, criminal sanctions are applied as legislative policy. One of the strategies in criminal sanction to combat cross-border insolvency is forfeiture of assets.

A criminal asset forfeiture order can have the effect of removing assets from the pool of value available to an insolvency estate that would otherwise be available for rateables distribution to creditors. Likewise, assets held by third parties that would otherwise be subject to claw-back provisions under bankruptcy law may also be unavailable. In some cases, a debtor who is also a criminal defendant in pending proceedings may voluntarily turn over assets in settlement of a restitution action, fine, or penalty that are then used to compensate victims in preference to

creditors who would have had rights under a bankruptcy distribution scheme. When a debtor faces criminal charges, state forfeiture provisions can interfere with assets that would otherwise be subject to the jurisdiction of the court in which the insolvency or bankruptcy proceedings are being administered. State forfeiture provisions can also interfere with distributions from the bankruptcy estate. In many jurisdictions, upon commencement of an insolvency or bankruptcy case, all civil actions against the debtor is automatically stayed. The stay does not necessarily apply, however, to asset forfeiture proceedings commenced by the state. In the United States, for example, because forfeiture is considered punishment for a crime, forfeiture proceedings are not automatically stayed by a U.S. Bankruptcy Court filing by or against a debtor. In the United States, title to assets obtained through a criminal offense that are forfeited to the state are removed from the reach of bankruptcy because ownership of such assets is considered to have been transferred as of the date of the crime. A bankrupt estate consists of the assets of the debtor as of the date of commencement of bankruptcy (subject to the power to avoid fraudulent dispositions); assets forfeited as a result of a crime that occurred prior to the commencement of bankruptcy are not included. An order forfeiting funds in a bank account does not, however, forfeit funds that the debtor had previously paid from that account to third parties. A trustee in bankruptcy may assert claw-back claims and recover those funds. A criminal or civil asset forfeiture order does not divest a bankruptcy trustee of such claims. A claimant who can establish sufficient evidence of his legal interest in the property or who can establish that the property is subject to a constructive trust may be able to supersede a forfeiture order.

In cases of corruption, the state may be the beneficial owner of public funds or assets that were misappropriated, including any profits derived from that property or any property into which it has been converted. Beneficial ownership adheres unless there is a bona fide purchaser for value without notice of the breach of trust. Saadi Qaddafi used funds belonging to Libya to purchase a \$10 million property in London. The property was owned by a shell company of which Qaddafi was the beneficial owner. The English High Court found that Qaddafi held the house in constructive trust and ordered its transfer to Libya.<sup>31</sup> Article 53 of the United Nations Convention Against Corruption (UNCAC) requires states to permit the initiation of civil actions by other state parties to establish ownership of property acquired through corruption and to recognize another

state's claim as the beneficial owner. A successful state claimant in a property-based action will have priority over the defendant's other creditors (van der Does de Willebois and Brun 2013).

Despite the progress in international endeavors to recover stolen assets from corrupt officials, there is still much to improve, especially considering that an estimated two per cent of global GDP are lost every year to corruption alone. In the quest to recover stolen assets, governments frequently utilize criminal prosecution and confiscation efforts, along with civil lawsuits. Nevertheless, every one of these options are accompanied by numerous barriers to successful asset recovery, including with a deficiency in political will to investigate and charge corrupt officials; a scarcity of competence, knowledge, and funds to pursue cases or cooperate internationally; and the subsistence of a universal financial system that allows corrupt officials to speedily hide illicit funds. These challenges can obstruct justice in several corruption cases. Although endeavors to recover stolen assets in international corruption cases usually begin with criminal investigations and prosecution, victims of corruption may possibly use insolvency proceedings as an additional tool, to get to be in charge of corrupt assets seized by businesses or related parties.

Section 12 of the FEO Act vests the right and title of the property with the central government upon the passing of the confiscation order, free from all encumbrances. Thus, the central government can be considered a creditor in its capacity as a decree-holder under the IBC. This would enable the central government to participate as a foreign creditor in a foreign main proceeding. This would consequently enable it to make a claim there. This would, however, be only possible if the draft Z on Cross border insolvency is suitably amended to also include persons in addition to the corporate debtor as specified under the proposal made by the MCA on 24th of Nov 2021. This would enable state parties to participate directly in the insolvency resolution process in the foreign country and make the process more efficient.

## Deliberation on :

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#### Guest of Honour



Prof.(Dr.) Nirmal Kanti Chakrabarti  
Vice Chancellor  
WB National University  
of Juridical Sciences

#### Esteemed Speakers



Adv. Sumant Batra  
Insolvency Lawyer



Ms. Vaneeta Patnaik  
Assistant Professor (Law)  
Director CFRGS

Moderator :  
CS Adv. (Dr.) Mamta Binani  
Insolvency Professional & Advocate

05.12.2021 Sunday  
11.30 am - 1.30 pm

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