LIQUIDATION OF COMPANY UNDER INSOLVENCY PROCEEDINGS: A LEGAL APPRAISAL OF NEPALESE COMPANY LAW

A Thesis

Submitted to

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For the Award of

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Submitted By

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CERTIFICATION

This is to certify that Mr. Shyam Bahadur Karki has completed his thesis entitled "Liquidation of Company under Insolvency Proceeding: A Legal Appraisal of Nepalese Company Law" under the supervision of Prof. Dr. Tara Prasad Sapkota, former Dean, Faculty of law, Tribhuvan University. The researcher has fulfilled all the requirements for the degree of Doctor of Philosophy in Law at Tribhuvan University, Nepal. The matter expressed in this thesis is original except where indicated by special reference in the footnotes.

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Date: October 2025

DECLARATION OF CANDIDATE

I declare that the subject matter expressed in the thesis entitled "LIQUIDATION OF COMPANY UNDER INSOLVENCY PROCEEDING: A LEGAL APPRAISAL OF NEPALESE COMPANY LAW" is my own work and that to the best of my knowledge and belief, original except where indicated by special reference in the footnote. The thesis has not been presented either in full or in part, to any other institutions for any consideration.

……..

Shyam Bahadur Karki

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LETTER OF RECOMMENDATIONS

This thesis is prepared by Mr. Shyam Bahadur Karki, a Ph.D. Scholar under my supervision and guidance. This is pursuant to the requirement of the Ph.D. in law. I, hereby, recommend this thesis for the award of the Degree of Doctor of Philosophy (Ph.D.) in Law as per the university requirement.

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Prof. Dr. Tara Prasad Sapkota

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Date: October 2025

Preface

The thesis titled 'Liquidation of Company under Insolvency Proceedings: A Legal Appraisal of Nepalese Company Law' has demonstrated wider range of issues involved in the process of liquidation of a company.

The thesis has been able to explain various laws and regulations for the effective liquidation of company under the insolvency proceedings. The establishing company has objective in the economy can be stability and growth, maximization of value of assets, striking balance between liquidation and reorganization, ensuring equitable treatment of similarly situated creditors, provision for timely, efficient and impartial resolution of insolvency, preservation of the insolvency estate to allow equitable distribution to creditors, ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information, recognition of existing creditors' rights and establishment of clear rules for ranking of priority claims and establishment of a framework for cross-border insolvency.

Nepal insolvency regime is not matured as other jurisdictions. The major laws applicable in Nepal for corporate insolvency process are as under Companies Act, 2006; Insolvency Act, 2006; Nepal Rastra Bank Act, 2002, Banks and Financial Institutions Act, 2017 and *Secured Transaction Act, 2006*. The liquidation of a company is more into the hardship faced in process of proper functioning and within the framework established in law and rules. Nepal has also adopted some reflections of the international model in terms of reading the issues in the insolvency and liquidation process.

The United Nations Commission on International Trade Law (UNCITRAL) model is considered as one of best model for the effective and lawful termination of company. This model is widely accepted and celebrated in the process of liquidation and insolvency process so that the company can be well liquidated and is possible can revive in lawful manner.

The laws relating to insolvency in Nepal has demonstrated all the basic requirements in the process of a company looking for the liquidation and insolvency process. The involvement of the court has also helped to see the impact of such process in the liquidation process so that overall impact in process can be well studied.

Nepal has a few provisions as regards cross border insolvency and also has recognized foreign creditors. The Insolvency Act, 2006 has not addressed the entire problem related to the insolvency of a multinational company. However, Section 157(7) of the Companies Act, 2006 provides that a foreign company conducting its business in Nepal shall be governed by the prevailing laws of Nepal. The Insolvency Act covers only the companies formed under the Companies Act and all other Government enterprises and agencies with limited liability as determined by the Government of Nepal. The Insolvency Act has also no provision on the insolvency of a company formed as a branch of a foreign company.

The law on insolvency should prescribe a flexible but transparent system for disposal of assets efficiently and at maximum value. Claim of secured creditors should rank *pari passu* with the workman and government dues. The law should also provide for mechanism to recognize and records claims of unsecured creditors. Despite being a member of WTO, Nepal has not adopted the UNCITRAL Model Law on cross border insolvency. There is a shortage of policies for it in the prevailing Insolvency Act, 2006. Hence, the thesis has exemplified the meaningful consideration in the way of liquidation of the company under insolvency proceedings in Nepal.

Acknowledgement

This thesis entitled 'Liquidation of Company under Insolvency Proceeding: A Legal Appraisal of Nepalese Company Law' is the researcher's doctoral thesis submitted to the Faculty of Law, Tribhuvan University, Kathmandu. Liquidation of company under insolvency proceeding is a challenging issue in the corporate sector. Liquidation of company itself is big concern relating to company which is insolvent due to a number of causes. This type of liquidation relates with beginning to ending insolvency proceedings which aid business or company-legal entity exit from market economy very early.

This work would not have got the present shape without the motivating supervision of Prof. Dr. Tara Prasad Sapkota, former Dean, Faculty of Law, Tribhuvan University. So, I am highly indebted to him not only for his valuable academic suggestions provided to me but also for his support and motivation while undertaking this research work.

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I am further thankful to the staffs of Dean's office, Nepal Law Campus and Nepal Law Campus library specially, Bijay Kumar Pokharel, former library chief and chief administration officer and Mek Bahadur Rana and central law library for their support in helping me search required materials for this work.

Last but not the least, my sincere thanks go to my loving sons Pragya Karki and Bigya Karki as well as my beloved wife Mrs. Pramila Karki for their mental, physical and academic support in preparing this thesis in this shape. April 05, 2025.

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Ph.D. Research Scholar

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Abbreviations/ Acronyms

§	:	Section
§§	:	Sections
AD	:	Amino Dominic
BAFIA	:	Bank and Financial Institutions Act
BASEL	:	Bank for International Settlements
BC	:	Before Christ
BIFR	:	Board for Industrial and Financial Reconstruction
BS	:	Bikram Sambat
CBISRC	:	Cross Board Insolvency Rules Committee
CC	:	Committee of Creditors
CEO	:	Chief Executive Officer
CIRP	:	Corporate Insolvency Resolution Process
C'M	:	Creditors' Meeting
CO.	:	Company
COMI	:	Center of Main Interest
CRO	:	Company Registrar Office
e.g.	:	For example
EBL	:	Enterprise Bankruptcy Law
Ed.	:	Editor
Ed.	:	Edition
EPF	:	Employee Provident Fund
etc.	:	et cetera
EU	:	European Union
FSP	:	Financial Service Providers

i.e.	:	That is
IA	:	Interim Administrator
IAO	:	Insolvency Administration Office
IBBI	:	Insolvency and Bankruptcy Board of India
Id.	:	Idem (the same)
ILC	:	Insolvency Law Committee
Inc.	:	Incorporation
INR	:	Indian Rupee
IO	:	Investigation officer
IRP	:	Interim Resolution Professional
ISS	:	Issue
Ltd.	:	Limited
MSME	:	Micro, Small and Medium Enterprise
NCLAT	:	National Company Law Appellate Tribunal
NCLT	:	National Company Law Tribunal
NDB	:	Nepal Development Bank
NJA	:	National Judicial Academy
NKP	:	Nepal Kanoon Patrika
No.	:	Number
NRB	:	Nepal Rastra Bank
OECD	:	Organization of Economic Cooperation and Development
Pvt.	:	Private
RDDBFI	:	Recovery of Debts Due to Banks and Financial Institutions
RM	:	Restructuring Manager
RP	:	Resolution Professional

SARFAESI	:	Securitization and Reconstruction of Financial Asserts and Enforcement of Security Interest
SICA	:	Sick Industrial Companies Act
SPC	:	Special People's Court
UK	:	United Kingdom
UN	:	United Nations
UNCITRAL	:	United Nations Commission on International Trade Law
UNO	:	United Nations Organization
US	:	United States
USA	:	United Nations of America
V	:	Versus
Vs	:	Versus
Viz.	:	Namely
Vol.	:	Volume
WTO	:	World Trade Organization

Abstract

This study primarily focuses on liquidation of company with reference to insolvent company, insolvency, insolvency proceedings from beginning to ending of liquidation of company. For this purpose, this study has been divided into seven chapters on the basis of objectives of the study.

First of all, chapter first focuses on general introduction, including introduction, problems of the study, objectives of the study, significance of the study, scope of the study, limitation of the study, research methodology and the like and also concerns with literature review of some books, journal articles, periodicals and dissertation/Ph.D. thesis.

Chapter two basically attempts to explore the conceptual framework of liquidation of company through various perspectives i.e., concepts and meaning of liquidation, insolvency and its causes, reorganization, test of insolvency, dissolution and differences between insolvency and bankruptcy, liquidation and dissolution etc. Moreover, this chapter also analyses a brief assessment of evolution of liquidation of company governing laws whether the company is solvent or insolvent. It clarifies the development of liquidation of company which is insolvent, linking with concept of individual insolvency since when Muluki Ain, 1853 has incorporated the provision regarding insolvency under 'Damasahiko Mahal'. It explains the efforts of legal reform in the field of liquidation of company in the legal history of Nepal.

Chapter three explores various instruments made in international as well as regional level in relation to insolvency liquidation of company related aspects such as Asian Development Bank's principles, World Bank's principles and guidelines, European Union Regulations, United Nations Commission on International Trade Law (UNCITRAL) on Model Law on cross border insolvency etc. Some of the countries have adopted UNCITRAL Model Law on cross border insolvency for making

uniformity in their legal systems but Nepal has not adopted the Model Law on cross border insolvency.

Chapter four discusses about insolvency and liquidation regimes of some selected countries. It explains law and practices of such countries, some of which are common law countries viz., United Kingdom (UK), United State of American (USA), India, and some are civil and socialist law countries, viz., France, China etc. relating to provisions and practices of liquidation of company.

Chapter five extensively reviews of Nepal's regulatory framework governing liquidation of insolvent company across legislations, policies and reforms. It analyses critically the important laws such as Companies Act, 2006, Insolvency Act, 2006, Bank and Financial Institutions Act, 2006, Insurance Act, 2022 etc. in respect of liquidation of company related matters such as liquidation, insolvency, stakeholders making application for initiating insolvency proceeding, investigation officer and his report, restructuring manager and plan/scheme and report of RM, liquidator, his role in administration of liquidation proceeding, order of priority of payment, report of liquidator as regards dissolution of company, cross border insolvency issues in Nepal and the like.

Chapter six clarifies with national and international court practices, which aid in legal reform and development with respect to issues related with insolvency liquidation.

Last and seventh chapter draws the findings, conclusions and suggestions of entire works of the study.

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CHAPTER – I

GENERAL INTRODUCTION

1.1. Introduction

The international community has attempted to reconcile growing tensions and conflict since with active presence of acceleration to international community. Approximately forty-seven years ago, the international community made its first concerted attempt at multilateral accord in the arena of international economic relations. Named for the international conference on economic relations which took place shortly after World War II, the Bretton Woods System was originally designed as an integrated effort by the international community to encourage trade liberalization and multilateral economic cooperation.[1]

The framers of that system believed that the disastrous tariff and trade policies of the 1930s had contributed to the outbreak of the Second World War.[2] This establishment has created the new era of international trade and transaction across several jurisdictions considering the need and help the multiple player needed for their economic growth and development. The new international world order in terms of reading and analyzing the cross-border movement of goods and services. This is the era of trade, industry and commerce or business in a broad sense. Due to fast development of business or commercial sector, today the whole world is converting into a global village. Nepal is not an exception to this reality and has also adopted a membership of World Trade

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[1] Ronald Labonte, *International governance and World Trade Organization (WTO) reform. Critical Public Health* 12, no. 1, 65-86 (2002).

[2] Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade*,16 *Mich. J. Int'l L.*: 349 (1994).

Organization (WTO) in April 2004. The WTO membership of Nepal was negotiated at several stages with proper calculation of risk and benefit as seen for larger developing countries.

To build up an economically sound nation, it is essential to open all the doors for running business activities in the country. As such business organization or company can also be incorporated and operated in the country. Companies are the principal participants in the market economy. The company is most favored vehicle for trade and commerce for a number of reasons including the relative case of managing diverse ownership, management organization and structure, financing of large ventures and undertakings, perpetual succession and limited liability.[3] It contributes in generating employment and increasing revenue of the government. But all the times all types of companies may not be operative. In other word, something's there may occur some adverse situations before a company carrying on business, that is a company may have to face some problems such as financial crisis either, which gives birth to insolvency of company, and insolvency that also leads to liquidation of a company. As a consequence, a company gets dissolved.

A company, being a juristic person, is dissolved in accordance with the liquidation procedures set out in the company law. After completion of affairs of liquidation of company there remains only a little bit formality to declare dissolution of the company. Declaration of dissolution of a company is the end of the life of a company and it is, therefore, the consequence of completion of affairs of liquidation of company.

This study presented herein under Liquidation of Company under Insolvency Proceedings: A legal Appraisal of Nepalese Company Law" deal with law relating to liquidation of company namely Insolvency Act, 2006 in Nepal.

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[3] Yagya Nepal, *The Role and Importance of the Corporate Insolvency or Bankruptcy Law in the Market Economy*, 1, Bus. L.J. 52 (2006).

The grounds on which a petition can be lodged with for the dissolution of such company and the procedure to be followed thereafter. Overview of Nepali Law assists in understanding the concept of liquidation in Nepali law. The regulation of corporate bankruptcy plays a key role in the economy, but its analysis most often comes to the front in times of economic crisis. The reason for that is, firms that have irrecoverable liabilities may inflict significant damage on the operations of their business partners as well as on the revenues of the national budget.[4]

The companies were governed by diverse sets of laws in Nepal. Damasahiko Mahal of Muluki Ain, 1853 as codified law of Nepal was applied on individual bankruptcy. Insolvency is known as "Damasahi" in Nepal. Such provision had been first inserted under Chapter "Damasahiko" of Muluki Ain of 1853. But this provision dealt only with individual insolvency and present Insolvency Act, 2006 is the first law governing corporate insolvency or insolvency of a legal entity.

Concept of liquidation of company has its own history. In context to Nepal, for the first time, this concept was introduced by the Nepal Company Kanoon, 1936. This tradition has been being pursued in the Company Acts issued at different times in Nepal. First Nepal Company Kanoon, 1936 was applied on the companies in Nepal.

The Kanoon "had also provided the grounds for liquidation of company. Similarly, in 1950 another Company Act was promulgated, Companies Act, 1964, Companies Ordinance, 2005 and Companies Act, 2006 were promulgated respectively in Nepal, all of which have provided relevant provisions which are concerned with companies, expressed grounds for liquidations of companies, but each of these Acts was or is limited only to procedure of liquidation of company which was or is solvent and

[4] Koroseczné Pavlin Rita, Doctoral (Ph.D.) Thesis, *An Analysis of the Liquidated Enterprises in Hungary,* Kaposvár University, Hungary (2016).

Insolvency Act, 2006 (Previously Insolvency Ordinance, 2005) is the law relating to procedure of insolvent company meaning being unable to pay debts to creditors.

Thus now, in Nepal, there are mainly two existing Acts relating to liquidation of company which deal with liquidation procedures to be followed prior to dissolution of company, grounds for liquidation, conditions of being solvent and insolvent, appointment, powers and duties of liquidator and other necessary provisions relating to liquidation of company. In addition, there are also other specific types of laws in Nepal to this regard. They are specially Bank and Financial Institutions Act, 2017 and Insurance Act, 2022 which deal with provisions on liquidation of failing bank and financial institutions as well as insurance companies.

The all companies to undergo liquidation are small businesses as they are much more exposed to changes in the economic environment than larger firms. Therefore, studying the trends related to the emergence of insolvency that can be observed at small enterprises may be valuable for all economic entities for assessing the risk of a future liquidation in the case of their own respective business partners. The company looking for the liquidation mapping are based on key indicators contained in publicly accessible financial reports, based on which it is possible to establish a distinction between liquidated companies and enterprises of normal operation, and next, by observing trends in liquidated companies' assets, defining a financial indicator based formula that is capable of revealing whether the legal basis of management liability can be established.

The company liquidation and insolvency are interconnected and one becomes reasons for the others so that insolvency is defined in a way the company is liquidated. Whenever legal disciplines overlap interesting scenarios occur and differences in opinions create intellectual tension. One such interesting scenario occurs when employees' rights are affected during a company's liquidation or business rescue. The employees of a company are normally the last persons to find out that a company is struggling financially. They are also the only stakeholders who are in no position to negotiate their risk should the company

be liquidated. It is therefore necessary to evaluate the rights given to employees during a company's liquidation and business rescue.[5]

Roman developed insolvency law. Debtors could sequestered estate of debtors if the debt is unpaid and could be sold out for the benefit of creditors. However, debtor could request magistrate to relinquish the right of creditors. Previously, it was the matter of criminal law but nowadays it is the matter of civil law. With the development of time, as supported by industrialization and globalization, it was the urgent need of society to handle the issue of corporate body to sustain liberal market economy. Cork Committee Report of 1982 highlights on following aim of insolvency law.[6]

There is no long history of insolvency law in Nepal. The issue of personal bankruptcy was established in Muluki Ain, 1853. It was also continued by Muluki Ain, 1963. Yet, no case on the issue of personal bankruptcy has been found in Nepal. It has also covered by Civil Code, 2017. Initially, Insolvency Ordinance was issued in 2005 which was converted into Insolvency Act, 2006. During that time, insolvency laws were scattered in different laws. At that time, Company law was specific law for insolvency of company in early time.

Partnership Act also mentioned insolvency procedure. Office of the Company Registrar used to handle insolvency issue. After the enactment of Insolvency Act, 2006, it established Insolvency Administration Office, Liquidator and court procedures. Under this law, those institutions having regulators, regulators have to file the application in court for insolvency process and if regulators allows for other concerned creditor or shareholder to request for insolvency, it may be allowed.

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[5] Joubert Engela Petronella, *A Comparative Study of the Effects of Liquidation or Business Rescue Proceedings on the Rights of the Employees of a Company, Pretoria: University of South Africa (DLaw-thesis)* (2018).

[6] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles*, Cambridge University Press, New York, 29-30 (2d ed. 2009).

In common parlance, insolvency refers to distribution of collective amount in equitable manner. It is synonymously used with bankruptcy, liquidation, and impoverishment. In fact, bankruptcy means dearth of cash flow, insolvency means loss in balance sheet and liquidation means divide of total remaining asset for dissolution. If a company is unable to pay debt or liability exceeds assets, it is deemed to be insolvent and liability is paid based on equity. So, cash flow test and balance sheet test are important issues of insolvency process.[7] 'In the UK, unlike the United States, the term 'bankruptcy' is reserved for the insolvency of individuals and companies do not go into bankruptcy. Business insolvency is largely dealt with by the corporate insolvency system rather than by the personal insolvency system, although some insolvent businesses will be owned by individuals and be subject to bankruptcy law. This dichotomy mirrors the separate provisions of earlier times for insolvent traders (called bankruptcy law) and for other insolvent individuals (called insolvency law).'[8] Insolvency is different than solvency because solvency refers to the capability of paying all the debts to all creditors, which can also go for voluntary insolvency.

1.2. Statement of the Problem

In today's commercial era, there are different types of laws governing commercial sector. Company law is also one specific law which incorporates the provisions on liquidation of company. Nepal has made liquidation provision by making company law. Companies Act 2006 and Insolvency Act 2006 are the existing companies laws in Nepal. However, the provisions relating to liquidation of a company are not sufficient in today's commercial era and the provisions on liquidation of company are in scattered

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7 Julie Murphy-O'Connor, *Liability of Director and Shareholder, in Law Society of Ireland, Insolvency Law,* Cavendish Publishing Limited, London, 43 (2003).

8 Fiona Tolmie, *Corporate and Personal Insolvency Law,* Cavendish Publishing, Limited, London, 7 (2d. 2003).

form even today. There are absence of provisions of liquidation recognized by UNCITRAL Model Law on cross border insolvency, lack of provision in respect of liquidation /winding up of a solvent company by creditor (s) and court, delay in establishing Insolvency Administration Office conducting administrative activities on insolvency, contradictions among different Nepalese statues to this regard, etc.

1.3. Research Questions

This study has the following research questions:

i. What are the existing laws and policies of Nepal relating to liquidation of companies under insolvency proceeding?

ii. What are the international standards and practices on liquidation of companies under insolvency proceeding specially in cross border insolvency?

iii. Are the existing laws and policies of Nepal relating to liquidation of companies under insolvency proceeding adequate?

iv. Are the institutional arrangements appropriate for effective functioning of the liquidation of companies under insolvency issues in Nepal?

v. What is the judicial response and trend on liquidation of companies under insolvency issues in Nepal?

1.4. Objectives of the Study

This study has following objectives:

i. To assess the laws and policies of Nepal relating to liquidation of companies under insolvency proceeding.

ii. To compare and analyze the international standards and practices on liquidation of companies under insolvency proceeding specially in cross border insolvency.

iii. To evaluate the adequacy of the laws and policies of Nepal on liquidation of companies under insolvency proceeding?

iv. To examine and evaluate the institutional arrangement for effective functioning of the liquidation of companies under insolvency in Nepal?

v. To analyze the role of judiciary of Nepal on liquidation of companies under insolvency in Nepal.

1.5. Significance of the Study

This is the era of liberalization, economic competition all around this global world among the countries to restructure their business and company laws have been powerful in order to enable the sustainable economic reform, basic legal framework for companies is a must. In this scenario, Nepal has signed the United Nations Commission on International Trade Law (in short UNCITRAL). The UNCITRAL is considered as the legislative guide on insolvency law as well as law for commercial arbitration disputes.

In fact this study is the first kind in the history of Nepal. This study has great significance to explore the existing national legal provisions on liquidation of company under insolvency proceedings. Liquidation is one of the way to exist from market economy. That is why, this study deserves great significance.

Nepalese legal system is based on common law principles more in comparison to civil law principles. If we could understand well the impacts of liquidation of companies on the economic and legal systems, this can greatly help not only companies but also individuals to understand the concept of liquidation of companies. Because of this, the findings from this study will be beneficial for academic researcher as well as the experts and lawyers by helping them in various areas, for instance, in planning the strategies of liquidation of companies.

1.6. Scope of the Study

The topic of this study seems to be wide but it is intended to explore a targeted subject matter that is based on the objectives mentioned earlier. Primarily, the scope of the study is intended to be unique that analyses the particular issues of liquidation of a company which is insolvent or going to be insolvent in Nepal.

This study has covered the legal provisions of Nepal related to the liquidation of company under insolvency proceedings and the scope of this study is limited to laws of liquidation in Nepal, mainly under Insolvency Act, 2006. The researcher focuses specially on the provisions for liquidation in Nepal and how far the provision of Nepal control and regulate the liquidation. The study incorporates conceptual understanding of insolvency and liquidations, prerequisites of liquidations, grounds for liquidation with insolvency specially, liquidator's position and procedure for liquidation in Nepal. In addition, the study also briefly covers the legal provisions of some selected countries in terms of liquidation and also some international efforts towards insolvency liquidation and court verdicts to this regard. However, the main concern of this study is to explore the liquidation of company under insolvency proceedings in Nepalese company law.

1.7. Limitation of the Study

This study does not cover all the aspects pertaining to this field of study. This study is limited to liquidation of insolvent company under company law in Nepal only and not going beyond it, that is, liquidation of solvent company is not analysed in this study. Due to some constraints the researcher has focused mainly on the existing laws and related international standards covering insolvency liquidations of company in Nepal, position of liquidator and judiciary etc., and also legal provision of some selected countries briefly to this regard.

1.8. Methodology of the study

The method adopted in conducting this study is doctrinal and the materials used for legal study are primary. The materials have been collected via consulting relevant books, dictionaries, encyclopedia, and law journals on liquidation of company under insolvency proceedings. Besides, internet for current and relevant issues has also been consulted in this study. Hence, while presenting this study both primary and secondary sources of law have been adopted.

Collected information and data have been systematically analysed. Infact, methodology can be understood as a systematized process of collecting, analysing and presenting data and information of the study.[9]

Basically, this study is based on pure theoretical research and is designed based on descriptive-analytical research design. After research designed made by the researcher first, the researcher has accordingly carried out the study by collecting data from both primary and secondary sources, particularly, on liquidation of company which is insolvent, insolvency and its proceedings, cross border insolvency issue, role of liquidator, court verdicts to this regard, international efforts to this regard etc., and finally making presentation in this study after analysing the collected data.

The data has been collected from primary sources as well as secondary sources. For primary information, statutes, court verdicts and international instruments etc. have been adopted and for the collection of secondary data/information, various books, research works, doctoral study, dissertation, research articles, journal articles, official publications, internet/websites sources have been used.

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[9] Bal Bahadur Mukhia, *Legal Research and Methodology at Glimse,* Malati and Aditya, Kathmandu, 16-17 (Rep. 2016).

First, data have been presented systematically in sentences diagram, tables and information and data have been presented and analyzed according to the research methodology to get the real findings of the study.

Any scholarly work citation of creative literature or other relevant materials which have been already done by others need to provide ground for authenticity and testimony to the given work. As the citation is standard method of acknowledging source of knowledge, ideas and information that any researcher can use in research. Therefore, the researcher of this study has followed "A Bluebook" a uniform rule of citation (21st edition) in the footnotes and APA Rules (7th edition) in the Bibliography as a sole reference**.**

1.9. Review of Literature

In the day to day developing and competitive commercial/business sector, liquidation of company is a crucial issue. No deep study has been done on this topic in Nepal so far. Just a few books, articles dealing with a little bit effort on this topic can be found.

There are very few materials available in the market related with the topic i.e. liquidation of company under insolvency proceedings: A Legal Apraisal of Nepalese Company Law. This research is based on a pre-research work, study based books, and research based articles with having relevant knowledge. Some doctoral theses/dissertations, research works, published research based books, published research based articles, case laws and some unpublished research works as well have been reviewed and used in the course of this study.

Undoubtly, review of literature is crucial for research and also one of the partial requirements falling within the research methodology. Hence, the researcher has visited various libraries and e-libraries available in Nepal to collect required data relevant to the subjects. The researcher has reviewed some relevant literature written by various prominent authors, prepared by researchers, edited by various academicians, and

published by various governmental and non-governmental bodies, academic and educational institutions, national and international organizations. The data or information for the purpose of this study are collected from two sources (a) primary source and (b) secondary source. The former is source of law which consists of constitution, codes/acts, Rules and regulations, judicial decisions, international instruments and legal frameworks and the latter covers relevant books, research articles, research report, journals, thesis/dissertation, seminar, website and the like. Both types of data are well reviewed by the researcher. The literature to be reviewed are as follows:

1.9 (A) Dissertation/Thesis/Report

1. PAUDEL (2010)[10]

Sharan Shankar Paudel's, Dissertation entitled "Comparative Analysis of Corporate Insolvency Law: International Practices and Nepalese Perspective" is an important work relevant to the subject. The researcher has described various the terms-insolvency, corporate rescue, and its measures (such as: restructuring), classification of insolvency viz., individual and corporate, insolvency and solvency, insolvency and winding up distinction, distinction between insolvency and liquidation, significance of insolvency law and proceedings, globalization and insolvency law reform in Asia, laws on insolvency in different countries, like UK, USA, Japan, Korea, India, Nepal etc., international principles and guidance on insolvency regime from World Bank, Asian Development Bank, UNCITRAL respectively, comparison between different insolvency legislations of different countries, national and international court practices under dynamic insolvency regime. The researcher has also indicated different areas of reformation. The dissertation is useful to the researcher to know matters on insolvency, legislations and court practices of some countries in the world.

[10] Sharan Shankar Paudel, *Comparative Analysis of Corporate Insolvency Law: International Practices and Nepalese Perspective* (Dec. 2010), LL.M. Dissertation, Tribhuvan University, Nepal.

2. GAUTAM (2007)[11]

Moti Raj Gautam's Dissertation titled "Analysis of Existing Legal Provision on Corporate Insolvency Area of Nepal" is an important research to the subject. The researcher has discussed on insolvency law, its features, insolvency and its types, viz. individual and corporate, remedies of insolvency such as: reorganization and liquidation, provisions of Insolvency Act, 2006 and Companies Act, 2006, analysis of Nepalese corporate insolvency law, major defects under insolvency law. The researcher has also pointed out problems and areas to be reformed in Nepalese insolvency law. The research is good one which helps to the researcher to know and gain ideas of matters on corporate insolvency and related laws to this regard.

3. ALLAIL (2018)[12]

Belal Allail's thesis entitled "Windining up of companies under Companies laws of Syria and India: A Comparative Study" is relevant to this topic to some extent. The researcher has divided this study into 8 Chapters. The researcher has discussed some terms in details. The researcher has attempted to trace out the history of insolvency laws of Syria and India for understanding insolvency regimes. The researcher has compared Syrian insolvency law with Indian insolvency law. The researcher has attempt to clarify divers terms, such as state of inability to pay debts, insolvency, bankruptcy, liquidation, liquidation proceedings, liquidator, his power and duties, liabilities, dissolution of company and so on. The researcher has also analyzed some relevant court verdicts and made some suggestions for reforming some areas lacked in the laws of both Syria

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[11] Moti Raj Gautam, *Analysis of Existing Legal Provision on Corporate Insolvency Area of Nepal* (June 2007), LL.M. Dissertation, Tribhuban University, Kathmandu, Nepal.

[12] Belal Allail, *Windining up of Companies under Companies Laws of Syria and India: A Comparative Study* (2018) Ph.D. Thesis, Aligarh Muslim University (UP) India.

and India. This study helps the researcher to understand Syrian and Indian liquidation proceedings.

4. **SAMINATHAN R. (2021)[13]**

A case study entitled 'A Study on liquidation of companies under companies Act compared with Liquidation or Companies under Insolvency and Bankruptcy Code' done by Dr. Saminathan et.al. is suitable to this topic to some extent. The authors have discussed about the historical stages of legislation to liquidation of, particularly, a company which is unable to pay debts to its creditors, prior to introduction to IB Code, 2016 in India. The author have shown a chart presenting liquidation process under this Code in India and analyzed cases relating to insolvency including liquidation. Synergy and Bhusan steel, and also debt recovering regimes in India. This study is useful to the researcher to know about case study on insolvency in India.

5. NIGAM(2011)[14]

Nirjhar Nigam presented the dissertation entitled "Essays on corporate default process: UK and France" on 21-02-2011 is relevant to this topic. The dissertation is divided into 6 Chapters. All the Chapters are divided with a view to capturing the default process. The researcher has expressed some aspects of liquidation under Chapter 2. The aspects expressed by the researcher are the corporate bankruptcy process; from default to legal: solution, liquidation and its

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[13] Saminathana et al., *A Study on Liquidation of Companies under Companies Act compared with Liquidation of Companies under Insolvency and Bankruptcy Code,* Research Gate (Mar. 2021), https://www.researchgate.net./publication/349807377-a-study-on-liquidation-of-companies-under-companies-act-coppared-with-liquidation-or-companies-under-insolvency-and-bankruptcy-code. (accessed Dec. 23, 2024)

[14] Nirjhar Nigam, *Essays on Corporate Default Process: UK and France* (21/02/2011), Ph.D. Thesis, Universite De Strasbourg, 266 (21-02-2011), http://orbi/4.Qni./4/thesis/pdf/ (accessed May 29, 2023).

consequences and the like. The researcher has discussed some legal indexes to explain recoveries. This dissertation is helpful to the researcher to know about the legal regimes of France and UK even in relation to liquidation of companies.

1.9 (B) Books

1. MAYSON et al., (2000)[15]

The book with the title "Mayson, French & Ryan on Company Law" is an important work regarding company insolvency and liquidation in England and also relevant to this study. The authors have included company insolvency and liquidation under Chapter 20 of the book. The authors have discussed on various aspects under this Chapter such as: nature of company insolvency and liquidation procedures, administrative receivership, administration, voluntary arrangement, voluntary liquidation, compulsory liquidation containing petition, petitioners, circumstances in which compulsory liquidation may be ordered, liquidation on making order, first meeting, liquidation committee and effects of director, appointment of provisional liquidator, commencement of winding up, going into liquidation, investigation of the affairs of a company in liquidation and the like. The authors have also described last stage of the life of the company-dissolution of company where company ends its legal personality, dissolves relationship between company and members, and ceases to be party to any legal relationship. According to the authors in Britain the final end of a company's legal personality on completion of winding up is regarded as the point of dissolution but on the continent this is regarded simply as the end of winding up.

[15] Stephen W. Mayson et al., *Mayson, French & Ryan on Company Law,* Universal Law Publishing Co. Pvt. Ltd, Delhi (First Indian Rep. 2000).

2. MCELECHERAN et. al (2005)[16]

The book "Commercial Insolvency in Canada" is an important reference. The book has pointed out commercial insolvency as a business problem. The book has discussed about insolvency legislation, proceedings to liquidate commercial assets, proceedings to restructure a business, role of creditor representatives i.e. trustees in bankruptcy, chief restructuring officers, receivers, liquidators and the like, role of the court in Bankruptcy and Insolvency Act, (BIA), in winding up and Restructuring Act (BURA), in companies' Creditors Arrangement Act (CCAA) proceedings and in receivership proceedings, rights and remedies of unsecured creditors i.e. bankruptcy proceeding, administration of the bankrupt's estate, rights and remedies of secured creditors, commercial reorganization etc. The book has also described the provisions of BIA, BURA and CCAA and cross border insolvency as per necessity. The book helps to know the concept of commercial insolvency and legal provisions of the Acts mentioned above. The book is also useful to the researcher.

3. AIYAR(1998)[17]

The book entitled Law of Bankruptcy by S.K. Aiyar is an important book related with the subject. The book covers the law of bankruptcy, the provincial Insolvency Law and Presidency Town Insolvency Law of India. The author has highlighted various provisions of these laws such as: liquidation and its types, liquidator, role of the court etc. The author has also described the fraudulent activities of directors or officials of the company, which lead to the company bankrupt. The book helps the researcher to know the laws regarding bankruptcy in India.

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[16] Kevin P. McElecheran, *Commercial Insolvency in Canada,* Butterworths Lexis Nexis, Canada Inc., Canada (2005).

[17] S.K. Aiyar, *Law of Bankruptcy,* Universal Book Agency, India (1998).

4. SEALY & MILMAN (1987)[18]

The book "Annotated Guide to the Insolvency Legislation" is an important book and is relevant to the study. The authors have incorporated Insolvency Act, 1986, Company Directors Disqualification Act, 1986 and Insolvency Rules, 1986 in the book which describes various provisions relating to the subject. The authors have discussed about company insolvency and company winding up under the first group of parts-companies. The provisions set out in the group are company voluntary arrangement, administration orders, receivership, winding up of companies registered under the Companies Acts consisting of preliminary, voluntary winding up, member's and creditors' voluntary winding up, winding up by the court, liquidators etc. in England, Wales and Scotland. The book is useful to the researcher to know the legal provisions to this regard in these countries.

5. JUSTICE NARAYANA (1990)[19]

The book “Law of Insolvency (Bankruptcy)” is an important and relevant book to the subject. The author has included the provincial Insolvency Act, 1920, the Presidency Towns Insolvency Act, 1909, the Insolvency Rules, 1958, and Bombay Insolvency Rules, 1910 in the book. The author has analyzed various aspects regarding insolvency (or bankruptcy) in India. The various aspects are constitution and power of court, proceeding from act of insolvency to discharge acts of insolvency, administration of property, method of proof of debts, penalties, summary administration, appeals and so on. The author has dealt with all these aspects in details and also discussed about case law in related area. The Acts and Rules stated by the author in the book are important to the researcher to know the history of insolvency law of India along with the various aspects relevant to the subject.

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[18] Len Sealy & David Milman, *Annotated Guide to the Insolvency Legislation*, Commerce Clearing House (CCH) Incorporated, Riverheads, Illinois, USA (15th ed. 1999).

[19] P.S. Narayana, *Law of Insolvency (Bankruptcy),* Asia Law House, Hyderabed, India (7th ed.1990).

6. SHUKLA (1948)[20]

The book titled "Mercantile Law" written by M.C. Shukla is an important work regarding the subject. The author has dealt with various areas in the book. The author has divided the book into 22 Chapters and Chapters 12 and 16 are related with the study. Under Chapter 12, the author has discussed on the law of insolvency that consists of definitions of insolvency and insolvent, persons may or may not be adjudged, acts of insolvency, procedure, petition, persons making petition, hearing upon petition, insolvent property, official, assigner, receiver and official receiver, discharge of insolvent, penalties and the like. Similarly, the author has dealt with winding up of company under Chapter 16. The author has described winding up and winding up by court, grounds for compulsory winding up, parties to make petition, procedure, voluntary winding up and creditors voluntary winding up, winding up under supervision, consequences of winding up, offences antecedent to or in course of winding up, liquidator and liquidator in compulsory as well as in voluntary winding up, power and duties of liquidator etc. The book helps the researcher to know a title bit basic concepts, related laws and case law as well in Indian context.

7. FLETCHER (1998)[21]

The book entitled "Insolvency in Private International Law" by Ian F. Fletcher, is relevant to the study to some extent. The author has discussed about the insolvency law in national to international perspective. The author has critically analyses international insolvency from the national approaches which consists of theory and principle in cross border insolvency, insolvency of companies etc.,

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[20] M.C. Shukla, *Mercantile Law,* S. Chand & Company Ltd., New Delhi (Rep. 1999).

[21] Ian F. Fletcher, *Insolvency in Private International Law,* Oxford University Press Inc., New York, (2d ed. 2005).

judicial assistance in cross border insolvencies, international regulation of international insolvency from the regional initiatives and also international regulation of international insolvency from the global initiatives. The book is useful for the researcher to know the various countries recognizing cross border insolvency in recent times.

8. BOURNE (1994)[22]

The book "Company Law" is an important reference regarding the subject. The author has included the matter relevant to the study under Unit 6 of the book. The author has explained the matters regarding priorities in a liquidation, receivership, voluntary arrangements, administration, liquidation, compulsory winding up, voluntary liquidation, progress of the liquidation, fair dealing provisions, malapractice, fraudulent trading, takeovers, reconstructions and amalgations. The book helps the researcher to know English concepts to this regard.

9. CHAWLA & GARG (1992)[23]

The book on "Company Law, Secretarial Practice and Business Communication" is an important reference to the study. The book is divided into 25 Chapters and most of the matters dealt under Chapter 25 'winding up' is relevant to the subject. The book explains meaning and modes of winding up, winding up by court, petition for winding up, consequences of winding up order, official liquidator, committee of inspection, general powers of the court, compulsory winding up, voluntary winding up, winding up subject to supervision of court and the like. The authors have discussed about these matters and laws governing winding up of a company. The book helps the researcher to know legal provisions regarding winding up either in Indian context.

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[22] Nicholas Bourne, *Company Law,* Cavendish Publishing Limited, London (1994).

[23] R.C. Chawla & K.C. Garg, *Company Law, Secretarial Practice and Business Communication,* Kalyani Publishers, New Delhi (Rep 1992).

10. KAPOOR (1993)[24]

The book entitled "Company Adhiniyam" by N.D. Kapoor, Dinkar Pagare & Bharat Bhushan is relevant to the subject. The authors have divided the book into 18 Chapters and discussed about winding up under Chapter 18. The Chapters describes winding up and modes thereof, petition, commencement of winding up, consequences of winding up order, liquidator and duties and powers of liquidator, committee of inspection, consequences of winding up, winding up of insolvent companies and so on. The book is useful to the researcher to know insolvency and winding of a company in Indian perspective.

11. KUCHHAL (2000)[25]

The book title on "Mercantile Law" by M.C. Kuchhal is an important book to the study. The author has divided the book into 8 Parts and Part 6 covers law of insolvency. The book describes insolvency law containing definition of insolvent, insolvency courts, person may be adjudged insolvent, acts of insolvency, procedure of insolvency consisting of petition, admission and hearing of petition, interim receiver and interim orders etc., property and debts of insolvent, discharge of insolvent and the like. The book helps the researcher to know concepts and legal provisions of insolvency and insolvency law in India.

12. GIRVIN et. al. (1932)[26]

The book entitled "Charlesworth's Company Law" by Stephen D. Girvin, Sandra Frishy and Alastair Hudson is a relevant book to the study. The authors have discussed about matters and legal provisions regarding insolvency, winding up etc. under Chapters 26 to 31. The authors describe corporate insolvency,

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[24] N.D. Kapoor et al. Company Adhiniyam, Sultan Chand & Sons, New Delhi (Rep. 1998).

[25] M.C. Kuchhal, *Mercantile Law,* Vikas Publishing House Pvt. Ltd., New Delhi (Rep. 2000).

[26] Stephen D Girvin, et al., *Charlesworth's Company Law,* Sweet & Maxwell, London (South Asian Edition 2011).

insolvency practitioners and voluntary arrangement under Chapter 26, law of receivership, receivers and other officeholders under Chapter 27, administration procedure, appointment, powers and duties, vacation of office of administrator etc. under Chapter 28, winding up by the court, persons making petition for winding up of the court, withdrawal and hearing of petition, consequences of winding up order, proceedings after winding up, liquidator as office holders, property of the company, liquidator in winding up by the court, appointment, resignation, removal, duties and powers of the liquidator etc. under Chapter 29. The authors describe voluntary winding up, its kinds, compulsory liquidation after commencement of voluntary liquidation etc. under Chapter 30 and contributories and creditors: completion of winding up, completion of winding up by the court etc. under Chapter 31. The book helps the researcher to know concepts of various matters and legislation relating to insolvency, winding up and liquidation as well in England.

13. JORDAN & WARNER (1987)[27]

The book "Commercial Law" is more relevant literature for the work. The book deals with bankruptcy and related legislation and Chapter 4-Security Interests in Bankruptcy. The book explores bankruptcy and its types, eligibility for bankruptcy petition in bankruptcy and automatic stay, trustee in bankruptcy, meeting of creditors, claims in bankruptcy, distribution of assets to unsecured creditor, discharge, effects of discharge on security interests, reaffirmation of discharged debts, automatic stay and adequate protection with related cases. The book helps the researcher to know some matters, legislation and cases on bankruptcy in the United States of America.

[27] Robert L. Jordan & William D. Warner, *Commercial Law,* Foundation Press Inc., New York (2d. 1987).

14. PENNINGTON (1979)[28]

The book title on "Company Law" written by Robert R. Pennington is a reference book to the study. The author has described winding up under Part V and Chapters 23–25. The author describes jurisdiction, petitioners, grounds for winding up and procedure under Chapter 23–Winding up by the court, winding up resolutions, members' and creditors' voluntary winding up, compulsory winding up of a company in voluntary liquidation and winding up subject to the supervision of the court under Chapter 24-voluntary winding up, and effect of a winding up order or resolution, inspections, investigations and examinations, powers of the liquidator, assets in the winding up, duties of the liquidator, dissolution of a company etc. under Chapter 25-Rules common to all liquidations. The book is useful to the researcher to know legal provisions in relation with the matters concerning winding up in England.

15. SINGH (1966)[29]

The book "Company Law" is an important work to the study. The author has discussed about winding up and related matters to the effect under Chapters 21–23. The author describes such matters as set out in the related legislations. The author describes winding up and its types, i.e. compulsory and voluntary, grounds of winding up by tribunal consisting of inability to pay debts, (such as commercial insolvency), sick company, just and equitable grounds etc., advertisement of petition, persons applying application, powers of tribunal, commencement of winding up order, jurisdiction of tribunal, debt recovery tribunal, appointment of liquidator, direction for filing statement of affairs, report of company liquidator, custody of company's property, powers and duties of company liquidator stay of

[28] Robert R. Pennington, *Company Law,* Butterworths & Co. (Publishers) Ltd., London (4th ed. 1979).

[29] Avtar Singh, *Company Law,* Eastern Book Company, Lucknow (16th ed. 2015).

winding up, dissolution of company etc., under Chapter 21 and also describes voluntary winding up as well as provisions applicable to every mode of winding up under Chapters 22 and 23 respectively. The book helps the researcher to know the detail legal provisions in respect of winding up of a company in Indian context.

16. ROW (1920)[30]

The book entitled "Sanjiva Row's Law of Insolvency" is an important work to the subject. The book deals with the Provincial Insolvency Act, 1920 of India with case decisions as per need. The book explores the insolvency provisions set out in the Act. The major provisions of the Act described by the author are object, scheme and purpose of the Act, meaning of insolvency, interpretation of statutes, such as: reference to statement of objects and reasons in interpreting statutes, construction and interpretation of the Act, aid of preamble delegation of powers involves delegation of duties also, conflict between Rules and Parent Act-Parent Act prevails, marginal notes, how far afford guidance, plain construction of statute leading to hardship-duty of court, notification under the Act, intention of the legislature to be inferred from actual words, absurd construction to be avoided, illustrations and their value, grammatical construction etc., insolvency and arbitration, bankruptcy and general principles of bankruptcy and the like. The book helps the researcher to know the provisions of Indian Provincial Insolvency Act.

17. DAVIES (1954)[31]

The book with title "Gower' & Davies' Principles of Modern Company Law" is an important reference to the study. The author has discussed about winding up under its Appendix- A Note on, winding up and dissolution. The book deals with

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[30] Sanjiva Row, *Sanjiva Row's Law of Insolvency,* Law Book Company (P) Ltd., India (N.D.).

[31] Paul L. Davies, *Gower & Davies' Principles of Modern Company Law,* Sweet & Maxwell, London (7th ed. 2003).

the matters as to winding up according to English Insolvency Act, 1986 and Insolvency Rules. The author describes winding up and its types, i.e. compulsory winding up by the court and voluntary winding up and its divisions i.e. members' and creditors' voluntary winding up, appointment of liquidator after winding up order, appointment of provisional liquidator by the court – official receiver attached to the court after the presentation of winding up petition under winding up by the court, appointment of a licensed insolvency practitioner as a liquidator under member's voluntary winging up, nomination of a qualified insolvency practioner as a liquidator, formation of liquidation committee under creditors' voluntary winding up and powers and duties of liquidator in all types of winding up. The book helps the researcher to know the matters relating to winding up and related legislation to this regard in England and Wales.

18. UPRETI (1986)[32]

The book on "Company Kanoon" written by Bharat Raj Upreti is an important subject regarding Nepalese law on liquidation of company. The author has divided the book into 15 Units and deals with dissolution of company under Unit 13. The author describes dissolution of company, modes of dissolution, i.e. deregistration or striking off from the register, voluntary liquidation and compulsory liquidation under law of insolvency, pre conditions and grounds of voluntary liquidation, commencement of voluntary liquidation, appointment of liquidator and auditor, punishment, process of deregistration of company, restoration of deregistered company etc. But the author has not discussed on insolvency in details. However, the book is useful to the researcher to know legal provision of Nepal in relation to dissolution of company.

[32] Bharat Raj Upreti, *Company Kanoon,* Nepal Kanoon Samaj, Anamnagar, Kathmandu (1986).

19. UPRETI (2006)[33]

The book titled "Introduction to Law of Insolvency" is an important and relevant work regarding insolvency legislation in Nepal. The author describes insolvency, grounds for testing insolvency, i.e. balance sheet test and cash flow or commercial test, company falling into economic difficulties, state of starting insolvency proceedings, and state of being insolvent, options available to the creditors, restructuring procedures, liquidation of company and its types and causes, international efforts to reform law of insolvency, matters covered by Insolvency Act, 2006, such as: one law two system-convertible design, corporate structure, special provision on insolvency practitioner, separate court to supervise and hear insolvency proceedings, time bound process, foreign creditor to claim, persons starting insolvency proceedings, viz. insolvent company, creditors, shareholders, debenture holders, liquidator, Rastra Bank and Insurance Board, commencement of insolvency proceedings, appointment of investigation officer, hearing of insolvency proceedings and issuing interim order, investigation of insolvency proceedings, creditors' meeting, order to commence insolvency proceedings, report of investigation officer, court order restructuring of insolvent company, appointment and report of restructuring manager, restructuring programme, liquidation of company, appointment, functions, duties and rights of liquidator, creditors' claims and priority of payment, void transactions, insolvency administration and practitioner, punishment, compensation and recovery of expenses, role of court in insolvency proceedings and so on. The book is very helpful to the researcher to know insolvency and legislation thereon in Nepal.

[33] Bharat Raj Upreti, *Introduction to Law of Insolvency,* Kanoon Anusandhan and Bikas Forum (FREEDEAL), Kathmandu (2006).

20. REGMI (2007)[34]

The book "Banking Law in Nepal" is a relevant work to the study. The author has divided the book into 12 Chapters. The book describes insolvency and liquidation under Chapter 12–Resolution, Insolvency and Liquidation. The matters described by the author are insolvency, liquidation and its types, viz. compulsory and voluntary liquidation, declaration of insolvency, restructuring and appointment of restructuring manager, procedure of liquidation, appointment of liquidator, right and duties and report of the liquidator, meetings of the creditors, time for the claim, priority of claims, void transactions. The author has also discussed on Cross Border Insolvency. The book is centralized on the discussion of the theoretical aspects of insolvency and liquidation of company, in particular, banking companies. The book is very useful to the researcher to know insolvency and liquidation of banking companies in Nepal.

21. KARKI (2022)[35]

The book entitled "Business Law" is an important book to the subject. The authors have divided the book into 23 Chapters. The book deals with liquidation of company under Chapters 22–Law of company and Insolvency. The authors describe Nepalese law of insolvency, features of Insolvency Act, 2006, insolvency and procedures of insolvency of company, investigation of insolvency proceedings, reorganization and its procedures, dissolution of company such as: voluntary liquidation and its conditions and procedures and compulsory liquidation and its cases or grounds and procedures, appointment, functions, duties and powers of liquidator. The authors have highlighted the matters as to liquidation of company as per Companies Act, 2006 and Insolvency Act, 2006. The book helps to the researcher to know Nepalese insolvency legislation either.

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[34] Resham Raj Regmi, *Banking Law in Nepal,* Lumbini Prakasan, Kathmandu (2d ed. 2020).

[35] S.B. Karki et al., *Business Law,* KEC Publication Pvt. Ltd., Kathmandu (9th ed. 2022).

22. BHANDARI (1995)[36]

The book "Company and Corporation Law" is a reference book to the subject. The book deals with liquidation under Unit 4. The book covers and describes liquidation, winding up and its kinds, i.e. winding up by court and voluntary winding up, cases of winding up by court, conditions under which a company is deemed to be able to pay debt and enable to pay debt, persons making petition to wind up a company, execution of winding up order and appointment, powers and duties of liquidator, voluntary winding up and its kinds, conditions for voluntary winding up, appointment, powers and duties of liquidator, deregistration of company and conditions there for and so on. The author has discussed on liquidation and winding up along with liquidation legislations prevailed in Nepal, India and England. The book is fruitful to the researcher to know laws of these countries and some case laws on liquidation.

23. UPRETI (2016)[37]

The book titled "Company Exit in Nepal: Policies And Practices" is an important book regarding liquidation of company in Nepal. The author highlights and describes Companies Act, 2006, voluntary liquidation of company under the Act, liquidation of company able to pay its debts, appointment, powers and duties of liquidator, and Insolvency Act, 2006, process for insolvency under the Act, appointment, functions, duties and powers of the liquidator, restructuring, appointment, functions, duties and powers of the liquidator, restructuring, appointment of inquiry officer, appointment, rights and duties of restructuring manager by the court, case study of Nepal Development Bank as regards liquidation of bank, suggestions on the areas to be reformed and the like. The book helps the researcher to know mainly Companies Act and Insolvency Act to this regard in Nepal.

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[36] Surendra Bhandari, *Company and Corporation Law,* Athrai Pustak Bhandar, Kathmandu (1995).

[37] Labisha Upreti, *Company Exit in Nepal: Policies and Practices,* Samridhi Foundation, Kathmandu, Nepal (2016).

24. DR. PARANJAPE (2007)[38]

The book titled "Company Law" is an important work regarding the topic. The author has divided the book into 26 Chapters Chapter 22 deals with winding up. The book explores winding up, distinction between winding up and insolvency, winding up and dissolution, modes of winding up i.e. compulsory, voluntary and winding up subject to supervision of court, grounds or circumstances for compulsory winding up by court, persons entitled to be heard in winding up petition for winding up by court, persons making petition, commencement of winding up, appeal from winding up order, appointment of provisional liquidator, effect of winding up, procedure of winding up by tribunal, appointment of official liquidator and his fees, report, powers and duties of official liquidator, general powers of the court in relation to winding up, voluntary winding up, publication of resolution, effect of voluntary winding up, kinds of voluntary winding up, i.e. members' voluntary winding up containing declaration of solvency, appointment of liquidator etc., creditors' voluntary winding up consisting of appointment of liquidator, committee of inspection etc., and provisions applicable to both kinds of voluntary winding up such as statement of affairs, powers and remuneration of liquidator etc., winding up subject to supervision of court and the like. The author has described almost all the matters on winding up and legislations relating to it in depth. The book helps to the researcher to know the matters and legislations in respect of winding up of company in India.

25. KEAY (2001)[39]

The book titled "Mcpherson's Law of Company Liquidation" is an important relevant book regarding the subject i.e. liquidation of company, winding up procedure etc. The book deals with matters on company liquidation under 17

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[38] N.V. Paranjape, *Company Law,* Central Law Agency, Allahabad (4th ed. 2007).

[39] Andrew R. Keay, *Mcpherson's Law of Company Liquidation,* Sweet & Maxwell Limited, London (2001).

Chapters. The author has critically described the various terms under Chapter 1 (i.e. Introduction), such as: nature of the winding up process, the purpose of winding up, outline of winding up procedure, and winding up process contains modes of winding up and its principle forms-voluntary winding up and winding up by the court, effects of winding up, the liquidator, collection of assets, discharging liabilities, distribution of surplus assets, dissolution. The author has also compared liquidation with bankruptcy, and viewed that these two terms have different procedural rules. The author has discussed on administrative receiver etc. moreover, the author has examined creditors' petition for winding up order, contributories' petition, provisional liquidation, administrative organs of winding up, i.e. liquidator, general meeting etc., liquidation committee, contributories, division and distribution of assets, creditors, divisions of assets among creditors, distribution of surplus assets, investigation and examinations, misconduct and prosecutions, and conclusion of winding up proceedings in England.

26. KEENAN (1966)[40]

The book written by Denis Keenan "Smith & Keenan's Company Law for Students" is a reference book to the study. The author has divided the book into 26 Chapters, and the book covers and deals with corporate insolvency under Chapter 23. The author has described winding up generally and contextually and discussed on winding up and its types i.e. compulsory winding up and voluntary winding up, voluntary winding up consisting of declaration of solvency, forms of voluntary winding up i.e., members' and creditors' voluntary winding up, appointment of liquidator and call for meeting by liquidator under the former and

[40] Denis Keenan, *Smith & Keenan's Company Law for Students,* Financial Times Pitman Publishing, San Francisco, London (11th ed. 1999).

under the latter, appointment of liquidator, final meetings and dissolution, application to court, rights of creditors and contributories. Furthermore, the author has pointed out alternatives to winding up such as: striking off, restoration to the register, offences and penalties. As regards the second winding up, the author has discussed on winding up by the court which entails grounds, petition, liquidator, statement of affairs, investigation by official receivers, public examination of officers, effect of winding up, powers of liquidator, collection of the assets, insolvency, protection of employees, completion of winding up and the like.

27. POLLARD (1994)[41]

The book, "Corporate Insolvency: Employment and Pension Rights" is a relevant book regarding the subject. The author has divided the book into 15 Chapters and 4 Appendixes. The book deals with insolvency proceedings under Chapter 3. The author covers a description of the insolvency regimes in England and Wales, in particular, the insolvency regimes governed by Insolvency Act, 1986 and Rules 1986. The author describes about options on insolvency, liquidation either, it may be liquidation by court or it may be voluntary liquidation. The author includes various matters regarding court liquidation such as: grounds for petition and appointment of provisional liquidator. Moreover, the author includes various matters concerning voluntary liquidation such as: resolution for winding up, forms of voluntary winding up i.e., members' and creditors' voluntary winding up. The author views that generally control of the winding up remains with the shareholders and control passes to the creditors in members voluntary winding up respectively. The author has also discussed on some provisions applicable to all

[41] David Pollard, *Corporate Insolvency: Employment and Pension Rights,* Butterworths, Edinburgh and Dublin, London (2d ed. 2000).

liquidations such as: role of the liquidator, payment priority, court receiver, contractual receiver, administrative receivers, position of insolvency practitioners, effect of insolvency on legal proceedings etc.

28. NEUPANE (2020)[42]

The book "Company Law" is an important book regarding the subject i.e. insolvency proceedings etc. The author has divided the book into 17 Chapters. Chapter 15 deals with winding up of the companies. The author discusses on various matters relating to winding up based mainly Nepalese legislations. The author describes winding up, its kinds i.e. compulsory winding up containing grounds under which a company may be wound up by the court, application for insolvency proceedings and preferential payment, and voluntary winding up and its kinds, like members' and creditors' voluntary winding up, appointment, powers and duties of liquidator, striking off the company, special provisions of winding up of the dormant companies and restructuring of companies. The book helps the researcher to be familiar with legal approach to winding up in Nepal.

29. BIRDS et. al. (1997)[43]

The book "Boyle & Birds' Company Law" is a relevant reference to the topic. The authors have divided the book into 17 Chapters, and Chapter 17 deals with corporate reconstruction and insolvency. The authors describe insolvency, regulation of insolvency practitioner, voluntary arrangement and administration. Moreover, the authors explore compulsory liquidation of companies containing

[42] Avtar Neupane*, Company Law,* Pairavi Book House Pvt. Ltd., Kathmandu (2020).

[43] John Birds et al., *Boyle & Birds' Company Law,* Universal Publishing Co. Pvt. Ltd., Delhi (First Indian Rep. 1997).

compulsory winding up, grounds for a compulsory winding up order, person presenting a petition, its hearing, commencement of the winding up, effect of winding up order, provisional liquidator, appointment, status, duties and powers of liquidator and ceasing to act as liquidation and liquidation committee. Further, the authors describe voluntary liquidation of company which entails resolutions for voluntary winding up, declaration of solvency, liquidation committee, powers and duties of voluntary liquidator, ceasing to act as a voluntary liquidation, relationship between voluntary liquidation and other insolvency related problems, and again the authors discuss on conduct of the liquidation consisting of creditors' claims, company's assets, order of payment of debts and liabilities, contributories, special provisions of liquidators and other office holders in insolvency proceedings such as office holders, dissolution of companies and the like. The authors have examined the matters on corporate reconstruction and insolvency from both theoretical points of view and English legal points of view.

30. IYENGAR (1988)[44]

The book written by T.R. Srinivasa Iyengar "Iyenger's Companies Winding Up" is a reference book to the subject i.e. liquidation of company etc. The book deals with winding up of the companies. The author describes the matters relating to winding up as recognized by and set out in Indian Companies Act, 1988. The matters are winding up and its types, i.e. compulsory winding up by court and voluntary winding up viz. members' and creditors' voluntary winding up, and winding up subject to supervision of court, provisions applicable to every mode of winding up such as: proof and ranking of claims, offences, effect of winding up etc. and the author also differentiates winding up from bankruptcy.

[44] T.R. Srinivasa Iyengar, *Iyenger's Companies Winding Up*, The Law Book Company (P.) Ltd., Allahabad (2d ed. 1988).

31. Dr. PADMA & RAO (2012)[45]

The book written by Dr. T. Padma & R.K.G Rao "The Principles of Corporate Law-1" is a relevant book to the study. The author discusses on various terms in the book, such as: winding up, modes of winding up containing types of winding up i.e. compulsory winding up under the order of the tribunal/court and voluntary winding up and its kinds viz. members' and creditors' voluntary winding up. Moreover, the author discusses about winding up by court (also known as compulsory winding up) which deals with various cases such as: special resolution, inability to pay debts, just and equitable grounds etc. The author again describes procedure of winding up, appointment of provisional liquidator, powers of liquidators, consequences of winding up of a company and the like.

32. DINE (1991)[46]

The book entitled "Company Law" is a reference book to the study. Chapter 17 of book deals with insolvency and corporate reconstruction as per the provisions set out in Insolvency Act, 1986 and Rules, 1986 in UK. The author discusses on administration, limitation on jurisdiction, time when to make an order, person making application, service of petition and its hearing, notice of order and its effects, power and duties of the administrator, voluntary arrangements, involvement of the court, meetings, administrative receivership and liquidation of company. The author further describes two forms of winding up by the court and voluntarily by the members, liquidator and his powers and duties, order of payments of debts, avoiding antecedent transactions, fraudulent transaction, summary remedy against delinquent directors, destination of the money, dissolution and so on.

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[45] T. Padma & R.K.G. Rao, *the Principles of Corporate Law-I,* ALT Publications, Hyderabad (2012).

[46] Janet Dine, *Company Law,* Macmillan Press Ltd., London (2d ed. 1994).

33. BATRA (2017)[47]

The book entitled 'Corporate Insolvency: Law and Practice by Sumant Batra concerns with corporate insolvency, i.e. insolvency of legal entity. The book dealing with corporate insolvency under Parts I-V is appropriate to this research topic. The book covers the provisions of Insolvency and Bankruptcy Code, 2016 of India to this regard. The author has explored legal provisions even on the matter regarding insolvency, resolution and liquidation in this book. Diverse terms such as creditor, debt, and default, insolvency, insolvency professional, resolution, liquidation etc. have been clearly defined in this book. The author has explained proceedings regarding resolution and liquidation of an insolvent company. The author has also included and discussed about proceedings of diverse regulations such as Liquidation Process Regulations, 2016, the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 etc. The book is useful to the researcher to know about law and practice of corporate insolvency.

34. AMIRISETTY (Dr.) (2022)[48]

The book title 'Lectures on Bankruptcy and Insolvency Laws' is a relevant book to this topic. The author has divided this book into three parts and explored general provisions relating to insolvency, restructuring and liquidation. Again, the author has discussed about major provisions of Insolvency and Bankruptcy Code, 2016, Insolvency Resolution and Liquidation Process for Corporate Persons Regulation, 2016, Insolvency and Bankruptcy Board of India, Regulation of Insolvency Professionals, Insolvency Professional Agencies, Information

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[47] Sumant Batra, *Corporate Insolvency: Law and Practice,* EBC, Lucknow (2017).

[48] Raja Mogili Amirisetty, *Lectures on Bankruptcy and Insolvency Laws,* Asia Law House, Hyderabad (2d ed. 2022).

Utilities etc. and also discussed about amendments made to the Insolvency and Bankruptcy Code, 2016 at different times. The book is fruitful to the researcher to know about diverse provisions set out in different statutes.

35. KUMAR (2024)[49]

The Book 'Key to Insolvency and Bankruptcy Code' is an important book. This book is relevant to this topic. The author has divided this book into 41 Chapters, including 3 Annexures. The author has explored provisions as to liquidation mainly under Chapters 22-28 of the book. The provisions discussed by the author are as same as the provisions laid down in Insolvency and Bankruptcy Code, 2016 of India. The author has inserted some important leading cases relevant to the matters.

Chapter 22 deals with liquidation process; Chapter 23 liquidator's powers and duties, Chapter 24 claims and roles of the liquidator, Chapter 25 preference, undervalued and extortionate credit transactions, Chapter 26 secured creditor and liquidation proceedings, Chapter 27 distribution of assets and Chapter 28 dissolution of corporate debtor or company. The book is useful to the researcher to know about detail provisions of IB Code, 2016.

36. JAIN (Dr.) (2024)[50]

The book 'Bharat's Guide to Insolvency & Bankruptcy Code' is also relevant, which is divided by the author into two volumes. They cover basics on insolvency and bankruptcy and explore diverse terms and include diverse Acts and Regulations, such as Insolvency and Bankruptcy Code, 2016, Insolvency and

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[49] Narendra Kumar, *Key to Insolvency and Bankruptcy Code,* Universal Lexis Nexis, Haryana (2d ed. 2024).

[50] D.K. Jain, *Bharat's Guide to Insolvency & Bankruptcy Code,* Bharat Law House Pvt. Ltd., New Delhi (4th ed., 2024).

Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and so forth. The author has discussed corporate resolution process, liquidation and the like with their explanation in details and illustrated diverse related cases decided by the court in this book. The book is fruitful to the researcher to understand insolvency liquidation process of India.

37. JAIN (2022)[51]

Anoop Jain's book entitled 'Corporate Restructuring, Insolvency, Liquidation and Winding up' is relevant to this topic. The author has divided this book into 2 parts; which entail 16 Chapters under Part A and remaining under Part B. Part A deals with corporate restructuring and Part B corporate insolvency. The author has discussed about liquidation process and related matters under Part B, including provisions on IB Code, 2016. SARFAESI Act, 2002 and so forth. The author has explained liquidation process made under IB Code, 2016 which covers initiation of liquidation, resolution professional to act as liquidator and his powers and duties, liquidation estate, consolidation, verification, admission or rejection etc. of claims, distribution of assets and at last dissolution of company. The author has also explored cross border insolvency in this book. The book helps the researcher to know the legal provisions on liquidation incorporated in Insolvency and Bankruptcy Code, 2016 of India.

38. MYLSAMY & SUMAN (2021)[52]

The book titled 'Supreme court on Insolvency and Bankruptcy Code', collected and written by A.K. Mylsamy & P.S. Suman is a reference book to this topic. The book has been divided into 5 parts and the book deals with liquidation process

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[51] Anoop Jain, *Corporate Restructuring, Insolvency, Liquidation and Winding up,* AJ Publications, India (19th ed. 2022).

[52] A.K. Mylsamy & P.S. Suman, *Supreme Court on Insolvency and Bankruptcy Code,* Lexis Nexis, Haryana, India (2021).

under Chapter 3 of Part 2. The authors have explored liquidation process which entails initiation of liquidation of corporate debtor (or company), liquidator with relevant cases, claims with relevant cases, transactions with relevant cases, distributions of assets with relevant cases, and dissolution of company. The book is useful to the researcher to know liquidation process and its relevant cases in context to India.

39. WALMSLEY (ed.) (1993)[53]

The book title with "Butterworths Company Law' Handbook, edited by Keith Walmsley is a relevant book to this study. The editor has included diverse legislations in this book and Insolvency Act, 1986 is one of the legislations. The editor has highlighted the provisions of Insolvency Act, Insolvency Rules, 1986, Insolvency Regulations, 1986 etc. under Part II of this book which deals with liquidation of companies which are insolvent. The book is helpful to the researcher to know the diverse legislations on insolvency and liquidation process in the UK.

40. BAILEY & GROVES (2023)[54]

The book entitled 'Corporate Insolvency: Law and Practice' written by Edward Bailey & Hugo Groves is relevant to this study. This book has been divided into A-I Parts and 36 Chapters. The Authors have explored all the insolvency proceeding of English Insolvency Act, 1986. The authors have discussed the matters on winding up or liquidation under Chapter 12-15 and dissolution under Chapter 19. The authors have highlighted history of liquidation law in the UK, methods of winding up, jurisdiction of the court, powers, duties, responsibilities,

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[53] Keith Walmsley, *Butterworth's Company Law Handbook,* Butterworths, London (9th ed. 1993).

[54] Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice,* Butterworths Lexis Nexis, London, (Indian Rep. 2023).

remuneration of the liquidator, dissolution and declaring dissolution void and the like. The book is useful to the researcher to know about conceptual matters and legal provisions thereon of the English legal regimes in respect of liquidation of company.

41. LUBBEN (2021)[55]

The book of the author title ' American Business Bankruptcy' is very important and relevant to this topic. The author has divided this book into 5 parts. In Particular, part 1 discusses business bankruptcy basics, part 5 deals with business bankruptcy elements and part 3 explores liquidation. The author has discussed about the matters with the legal provisions made under US Bankruptcy Code, recently amended in 2005 and with appropriate court verdicts. This book is useful to the researcher to know legal provisions of Bankruptcy Code in relation to liquidation.

1. 9 (C) Articles

1. KHANAL (Dr.) (2019)[56]

The article entitled "Liquidation of the Bank and Financial Institution in Nepalese Perspective: An Overview" is an important article regarding the subject. In this article, the author has analyzed the law relating to liquidation of bank and financial institution in Nepal. The author has discussed on various aspects in the article. The aspects are liquidation, its types, viz., voluntary liquidation and its forms-members' and creditors' voluntary liquidation, compulsory liquidation, two tests of corporate insolvency such as: cash flow and balance sheet, voluntary liquidation of a solvent company, reasons for liquidation, voluntary and compulsory liquidation, procedures of voluntary and compulsory liquidation,

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[55] Stephen J. Lubben, *American Business Bankruptcy: A Primer,* Eward Elgar Publishing Inc., Macsachusetts, USA (2d ed. 2021).

[56] Shambhu Prasad Khanal, *Liquidation of the Bank and Financial Institution in Nepalese Perspective: An Overview,* 5 L. J. (2019).

report of liquidator, submission of debt claims, power of the court, cancelation of registration of company, special provisions on liquidation of banks and financial institutions containing voluntary liquidation of bank and financial institution, initiation of voluntary liquidation, transaction to be suspended etc. The author highlights that liquidation of bank and financial institutions through legal means is not an easy task, rather than it is a very complex one. The author has viewed that it is necessary to conduct further study including the interim orders issued and decisions made by Nepalese courts and the court has to have adequate knowledge about the real scenario of liquidation process and its implementation status.

2. PHUYAL (2019)[57]

The Article "Comparative Study of Insolvency Law of Nepal with Insolvency And Bankruptcy Code of India" is a relevant article to the study. The article covers insolvency legislations not only of Nepal but also of India. The author has attempted to identify insolvency law in the global perspective either. The author describes historical development of insolvency law of these two countries, compares some aspects adopted by Nepalese insolvency law with Indian insolvency law. The aspects compared by the author are application procedure, liquidation of company, restructuring of company, institution of application, adjudicating authority, insolvency professional management and control, sale of assets, creditors' committee, initiation of liquidation, order of distribution of assets. The author points out that there are no sufficient provisions in Nepalese insolvency law in comparison with Indian insolvency law such as: no provision of cross border insolvency in Nepal.

[57] Sujan Phuyal, *Comparative Study of Insolvency Law of Nepal with Insolvency and Bankruptcy Code of India,* 7 L. J. (2019).

3. NEPAL (2003)[58]

The article entitled "The Role And Importance Of The Corporate Insolvency Or Bankruptcy Law In The Market Economy" is an important article to the study. The author describes insolvency and bankruptcy and origin of bankruptcy, types of insolvency viz. individual and corporate insolvency, two types of remedies available to insolvent company such as: liquidation and rehabilitation under insolvency law. The author also points out role and importance of corporate insolvency law, need of insolvency law in market economy, various sectors such as: Commercial affairs, stability and order, efficiency, fair treatment and so on. The author indicates corporate insolvency as a mechanism of corporate governance. Furthermore the author views corporate insolvency law as an inevitable measure to restrict corporate fraud and protection of the private credit to promote commerce.

4. POUDEL (2008)[59]

The article titled "Corporate Insolvency and Power of Court: Nepalese Perspective" is a relevant article regarding the subject. The author explores various terms concerning corporate insolvency in the article. The author describes corporate insolvency court process set out in the Nepalese corporate insolvency law such as: application and hearing of application, power of commercial bench in respect of restructuring plan, appointment and report of the restructuring manager, order to liquidate a company in case of failure of implementing restructuring plan. Moreover, the author analyses about international court practices in various issues raised under insolvency regime in Nepal. The issues

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[58] Nepal, *Supra* note 3.

[59] Sharan Shankar Paudel, *Corporate Insolvency and Power of Court: Nepalese Perspective,* 6 Nyayadoot Sammelan Bishesh (2008).

are disputes involved proprietary claims, order binding upon or affecting the right of the third parties, issues involved creditors voting right, issues involved transaction at an undervalue. The author indicates, in order to obtain better result that it would be necessary to consult the international court practices in various issues and to be familiar with related legislations such as: Secured Transactions Act, 2006 etc. while deciding by the court in Nepal.

5. PANDIT (2015)[60]

The article titled "Insolvency Process of Banks and Financial Institutions under Court Supervision: A Nepali Perspective" is a reference regarding the subject. The author describes insolvency process of banks and financial institutions under supervision of court in Nepal. The author indicates insolvency law that mainly deals exploring restructuring possibilities of a sick business entity, protecting creditors' right, winding up business and providing safe exit to misfortune debtors. In Nepal, only after promulgating Insolvency Ordinance, 2005 later converted into Insolvency Act, 2006, such types of aspects have begun to come into practice. Now, Nepalese Insolvency Act, 2006 relates to corporate insolvency mainly to insolvency of companies. In the case of insolvency process of banks and financial institutions, it is required to get pre approval of Nepal Rastra Bank. For the first time in Nepal, Commercial Bench decided the case on insolvency of Nepal Development Bank under Insolvency Act, 2006. The author points out that cases on insolvency has no long history and reminds the concerned that such practice should be continued under court supervision as established international practice.

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[60] Keshari Raj Pandit, *Insolvency Process of Banks and Financial Institutions under Court Supervision: A Nepali Perspective,* 19 *NJA L. J.* (2015).

6. REGMI (2009)[61]

The article "Liquidation v. Insolvency: Confusion in Practice..." is a relevant article to the study. The author has critically analyzed liquidation and insolvency in context to Nepal. The author signifies that every liquidation process whether it is by the order of the court or voluntary takes place from the appointment of liquidator under Companies Act, 2006 and Insolvency Act, 2006 and mainly Companies Act, 2006 deals with the process of voluntary liquidation and Insolvency Act, 2006 deals with the process of the compulsory liquidation of company as well as of specific sectors like banking, insurance, etc. The author explores that in the case of bank and financial institutions Insolvency Act, 2006 and Banks and Financial Institutions Act, 2006 deal with liquidation of banking companies which creates confusion in practice. The author has also dealt with various provisions set out in the Companies Act, and in the Insolvency Act such as: voluntary liquidation, that is, liquidation of solvent company, process of insolvency, court procedure, process of restructuring, appointment of liquidator, report of liquidator, meeting of the creditors, time for the claim, priority of claims, void transactions, special cases of banking companies and insurance companies (some provisions are also applied as set out in Banks and Financial Institutions Act, Beema (Insurance) Act, 1992. Moreover, the author has also explored insolvency in international perspective and focused on the need of adaptation of UNCITRAL model law on cross border insolvency in Nepal. This opinion expressed by the author cannot be ignored.

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[61] Resham Raj Regmi, *Liquidation vs. Insolvency: Confusion in Practice...* 14 Bus. L. J. (2009).

7. PAUDEL (2006)[62]

The article entitled "Insolvency and Liquidation in Nepal: An Overview" is an important article regarding the subject. The article covers insolvency and liquidation in Nepal. The author has examined insolvency, bankruptcy, liquidation and restructuring, distinguished bankruptcy from insolvency which relates to natural person and corporate person respectively. The author has described some matters and provisions on corporate insolvency and its liquidation governed by Nepalese insolvency legislations viz, mainly Companies Act, 2006 and Insolvency Act, 2006. The matters described by the author are declaration of insolvency, proceedings of liquidation, appointment and report of the liquidator, meeting of the creditors, time for the claim, priority of claims, void transactions, insolvency in international perspective. The author views that Insolvency Act, 2006 has not differentiated between the bankruptcy and insolvency but the said Act just relates to corporate insolvency and not other. The author points out the lacking of adaptation of UNCITRAL model law on cross border insolvency in Nepal though today's globalized age affecting each and every country, everywhere and each and every sectors.

8. NEPAL ECONOMIC FORUM (2012)[63]

The article "Insolvency in the Nepali Context" is a relevant work to the study. The article describes the history of insolvency legislation in Nepal and laws on insolvency in Srilanka, India and Bangladesh, comparing laws of these countries with laws of Nepal to this regard. The article differentiates between insolvency and liquidation and also explores current challenges in Nepalese law on

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[62] Tara Prakash Paudel, *Insolvency and Liquidation in Nepal: An Overview,* 19 *Nepal L. Rev.* (2006).

[63] Insolvency in the Nepali Context, Nepal Economic Forum (Sep. 2012), https://nepaleconomicforum.org/reports/nefsearch-3/insolvency-in-nepali-context (accessed Oct 13, 2024)

insolvency, Insolvency Act, 2006 holds the number of contradictions with other Acts such as: Clauses of the Banks and Financial Institutions Acts, 1996 etc. The article focuses on some areas to be reformed, e.g. though there are gaps in the laws on insolvency because Nepalese Insolvency Act is based on the Insolvency Acts of other countries, some provisions on Insolvency process are necessary to be made clear and flexible through amending the existing laws on insolvency in Nepal.

9. UPRETI (2007)[64]

The article written by Bharat Raj Upreti, Asian Insolvency Systems: Closing the Implementation, "Latest Trends and Developments in Insolvency Law in Nepal" is a relevant article to the subject, i.e., liquidation of company, insolvency practitioners etc. The author explores a brief overview of the Nepalese legal system containing introduction, court system and parliamentary system, history of insolvency law in Nepal covering provision of Damasahiko Mahal (i.e. personal bankruptcy) of Muluki Ain 1853 to Insolvency Ordinance, 2005. The ordinance entails access, supervision, stay orders and avoidance of transaction, reorganization, recognization of private sector insolvency professionals, the insolvency administrative office, creditors' meeting and creditors' committees, payment priority, the implication of liquidation orders, implementation, problems etc. Further, the author points out some aspects to be reformed and included some new area in the insolvency law in Nepal, such as: in the area of cross border insolvency and so on.

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[64] Bharat Raj Upreti, *Latest Trends and Developments in Insolvency Law in Nepal* (OECD, 26 Nov. 2007), https://www.researchgate.net/publication/293809665-latest-trends-and-development-in-insolvency-law-in-nepal (accessed Aug. 2, 2021).

10. IMPERIAL LAW ASSOCIATES (2020)[65]

The article "Liquidation of Companies in Nepal" is focusing on process of liquidation of companies in Nepal. The article describes insolvency proceedings which apply in the companies which are insolvent or going to be insolvent in near future and restructuring of such companies as well. The Associates' work on governing laws, methods of liquidation i.e. voluntary liquidation containing its conditions, timeline for liquidation of company, its procedure which includes declaration of solvency, appointment and remuneration of liquidator and auditor etc., and compulsory or forced liquidation, its conditions and procedure such as: application to the court, its hearing, appointment and report of inquiry officer, appointment, powers and duties of liquidator, restructuring and its procedure which entails restructuring program, appointment of restructuring manager etc.

11. ACHARYA (2020)[66]

The article written by Suman Acharya "Insolvency Issue in Corporate Law: A Reference of Nepal" is a relevant work to the study. The article is focusing on that insolvency is the outcome of corporate failure caused by any sort of incidences. The author covers introduction to insolvency, historical evolution of insolvency law, insolvency laws in Nepal viz. Companies Act, 2006, Insolvency Act, 2006, Nepal Rastra Bank Act, 2002, Banks and Financial Institutions Act, 2017 and Secured Transaction Act, 2006 in the article. The author describes other matters either which are insolvency and its types-individual, corporate,

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[65] Liquidation of Companies in Nepal, Imperial Law Associates (14 Nov. 2020), https://www.lawimperial.com/liquidation-of-companies-in-Nepal (accessed Apr. 30, 2021).

[66] Suman Acharya, *Insolvency Issue in Corporate Law: A Reference of Nepal,* Social Science Research Network (Posted on May 4, 2020), https://poseidon01.ssrn.com/pdf. (accessed May 10, 2021).

receivership and examiner-ship, under voluntary liquidation members' and creditors' voluntary liquidation for solvent and insolvent company respectively and provisional liquidation. Moreover, the author describes international efforts and aspects to insolvency law such as: World Bank and UNCITRAL, features of Insolvency Act, 2006 which is closely related with corporate insolvency, liquidation of banks and financial institutions in Nepal and governing laws, like Insolvency Act, Banks and Financial Institutions Act etc. The author also discusses on some case laws relating to the issue in the article.

12. KARKI (2015)[67]

The article on "Reorganization of Company under Nepalese Insolvency Act, 2006: An Overview" is a reference to the subject i.e. insolvency. The author explores that reorganization is an opportunity available to a company which becomes insolvent or going to be insolvent in future, and liquidation and reorganization both are results of insolvency proceedings. The author discusses on insolvency and reorganization as well as other provisions set out in Insolvency Act, 2006 in Nepal. The provisions are reorganization procedure consisting of appointment of reorganization manager, meeting of the creditors, report of the manager, claim and objection to approved reorganization plan, consequences of approval of the plan, implementation of reorganization plan, termination of the plan etc. The author focuses on that reorganization motivates investors or creditors and persons concerned so that an attention should be paid in appointment of the reorganization manager.

[67] S.B. Karki, *Reorganization of Company under Nepalese Insolvency Act, 2006: An Overview,* 2 Discovery Dynamics – J. Res & Dev. (July, 2015).

13. MUNNERY (2023)[68]

The article entitled 'What is the corporate Insolvency Test for a Limited Company?' is relevant to the topic. The author has discussed about, particularly the types of corporate insolvency test. The tests are cash flow test indicating inability to pay debts when they fall due, balance sheet test and legal action test. This article is useful to the researcher to understand cash flow test, balance sheet test and legal action test.

14. UPRETI (2014)[69]

The article entitled 'Resolution of Bank and Insurance Company Failure' is a relevant article to the topic. The author has discussed informal and formal process for resolution of failing bank and insurance companies and liquidation process of failing banks and financial institution which is initiated by NRB in Nepal. The author has also explored some major provisions of general insolvency law i.e., Insolvency Act, 2006 and special laws i.e. Nepal Rastra Bank Act, 2002; Bank and Financial Institution Act, 2006; Insurance Act, 1992; cooperative Act, 1992 etc. The author has again explored the stages of insolvency process, those are investigation phase, reorganization phase and liquidation phase and has also pointed out problems as well as recommended some ways for reforming the existing legal frameworks to this regard. This article is useful to the researcher to derive perception on Nepali legal regimes on resolution of bank and insurance companies which have failed in Nepal.

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[68] Jonathan Munnery, *What is the Corporate Insolvency Test for a Limited Company?*, Begbies Traynor Group (21/06/2023), https://www.begbiestraynorgroup.com/articles/insolvency/what-is-the-corporate-insolvency-test-for-a-limited-company-in-the-uk (accessed June 21, 2023).

[69] Bharat Raj Upreti, *Resolution of Bank and Insurance Company Failure,* New Business Age (Sept 2014), https://www.newbusinessage.com-magazineArticles/view/927-resolution-of-bank-and-insurance- company-failure (accessed Nov. 1, 2023).

1.10. Organization of the Study

This study has been organized into Seven Chapters in order to make the study more specific, precise and impressive.

First chapter of the study will elaborate general introduction (methodology) which provides general information relating to the questions and introduction, problem statement, significance of the study, research objective, limitation of the study, literature review, and research methodology of the study and describes the review of relevant literature of the study. Second Chapter attempts to explore the conceptual framework of specially liquidation of company and related matters with it and also explores the historical development of law relating to liquidation of insolvent company in Nepal. Third chapter discusses about international instruments on insolvency regimes. Fourth chapter observes comparative study on insolvency law of some selected countries. Fifth chapter analyses the existing legal provision on liquidation of company in Nepal. Sixth chapter examines the national and international court practices and seventh chapter draws the findings, conclusions and suggestions.

CHAPTER – II
LIQUIDATION OF COMPANY UNDER INSOLVENCY PROCEEDING: CONCEPTUAL FRAMEWORK

2.1 Outline of Insolvency Proceedings

The researcher, in the present chapter, shall discuss insolvency proceeding, the historical evolution, concept of company, liquidation insolvency etc. of companies. The concept of company evolved with the society's development to carry on business, before which, there existed the concept of barter and people used to exchange goods as per society's needs and requirements. With the passing of time, law regarding company came into scene as the prime tool for both globalization and legal transplantation.

Insolvency is one of the reasons that can lead to insolvency proceedings, in which legal action can be taken against an insolvent company, and its assets can be liquidated to pay off debts that are due.

In common parlance, proceeding is a process to be followed in case of failure to do something. Hence, insolvency proceedings are understood to be the collective proceedings taken when an entity or company fails to meet its financial obligations and pay its debts when they are due. Insolvency proceedings encompasses the partial or full disposal of debtor's business and the appointment of a liquidator. Such proceedings may entail liquidation either by court or creditor(s), Administration conciliation etc. under insolvency enactments.

Proceedings to liquidate a solvent or an insolvent company are insolvency proceedings since they occur pursuant to the insolvency enactments. A liquidator may be anyone who administers or liquidates assets of which the debtor has been divested. A liquidator may include more than one liquidators, administrators, investigation officers etc. Court

is a judicial body that opens insolvency proceedings or takes decisions in the course of insolvency proceedings.

Insolvency proceedings sometimes may be the result of bad financial management, changing market trends, heightened expenses and reduced income.

Insolvency proceedings are formal measures taken to deal with debts of a company. They cover diverse types of insolvency proceedings of a company. However, some types of company can be dissolved without going through insolvency proceedings. For example, a company which is not in operation can be dissolved without going liquidation and the name of such company can be struck off the register.

In Nepal, investigation, restructuring and liquidation come within the area of insolvency proceedings. Former two proceedings are the prerequisites of liquidation. Under the Insolvency Act, 2006, when a company fails to make payments to creditors, the court takes charge of investigation. The company itself can make application for investigation.

It is notable that not all types of companies involved in insolvency proceedings are insolvent. Insolvency may occur if there is doubt that a company is insolvent or going to be insolvent.

2.2 Concept of Company

A company is one of the folds of persons. The company is created under or by law that is why the company is called a legal/ corporate/ artificial or juristic person. Though the company has no physical existence, it is deemed to be capable of rights and duties of its own.

The English word company is derived from the Late Latin word "Companio'- combination of "com" meaning with and "panio" meaning bread, i.e. one who eats bread with you.[70]

[70] Company, Wikipedia (2019), https://www.en.m.wikipedia.org/wiki/company (accessed Mar. 6, 2022).

Earlier a company was defined as the association of some persons united for a common objective. Later on definition developed to include the incorporated company or a corporation as a single person distinct from the individuals constituting it[71]. Later on, with the vivid difference in a company as well as partnership, the partnership was defined distinct from the company as a mere collection or an aggregation of individuals[72].

A company is termed as the body corporate. The reason behind it is that the persons who constitute it are made into one body by incorporating it as per law, and clothing it with legal personality's fiction is introduced for the purpose of bestowing the character and features of individuality and performance on a collective and changing body of men[73].

Literally, the word company means a group of persons associated to obtain some common objectives, such as: business, charity and research. The company is a voluntary association of persons formed to carry on business activities for fulfilling the objective or earning profits by collecting capital and selling shares.

The term "company has no strictly technical and legal meaning".[74]

As defined in Black's Law Dictionary, "a company is a society or association of persons, in considerable number, interested in a common object and united themselves for the prosecution usually of some commercial or industrial undertaking, or other legitimate business.[75]

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[71] Sir F. Pollock, *Alfred Edward Randall,* 26 L. Q. Rev., Stevens & Sons, London, 263 (1910) as cited in Allail, *Supra* note 12, at 10.

[72] R.S. N. Pillai, *Legal Aspect of Business (Mercantile Law),* S. Chand publishing, New Delhi, 828 (2011).

[73] G.C. Ventata Subbarao, *Analytical and Historical Jurisprudence (Jurisprudence and Ancient Law)*, Andhra Law Times, Hyderabad, 364 (3d ed. 1986).

[74] Buckley J in Stanley, Re (1906) 1 ch 131, 34.

[75] Black's Law Dictionary, 274 (7th ed. 1999).

After enactment of Limited Liability Act, 1856 in UK, a depth discussion had been made in a case with respect to company as, "a company is a legal person or legal entity separate from, and capable of surviving beyond the lives of its members, capable of rights and duties of its own and endowed with potential of perpetual succession".[76]

"The term company implies an association of a number of people for some common object or objects. The purposes for which men and women may wish to associate are multifarious, ranging from those as basic as marriage to ... those as sophisticated as British Industry or a political party. However in common parlance the word "company" is a normally reserved for those associated from economic purposes, i.e. to carry on a business for gain".[77]

"Company is a voluntary association of persons formed for some common purpose, with capital divisible into parts, known as shares, and with limited liability. A company is a creation of law and is sometimes known as an artificial person with a perpetual succession and a common seal. A company is a legal entity, separate from its members and can sue and be used in its corporate names".[78]

In India, "a company means a company incorporated under Companies Act, 2013 or under any previous laws."[79]

In Nepal," a company means any company incorporated under Companies Act, 2006."[80]

In this way, because of the different aspects of the term company it is deemed difficult to define company unanimously. Even so, a company is a voluntary associations of some persons interested to carry on lawful undertaking for profit with capital divisible

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[76] Salomon v. Salomon & Co. (1897) AC 22 (1895-9) All ER Rep. 9 C.F.

[77] Davies, *Supra* note 31.

[78] N.C. Jain, *Dictionary of Banking,* AIT BS Publisheys, New Delhi, 127 (2d ed. 2010).

[79] Indian Companies Act, 2013, §3 (2).

[80] Companies Act, 2006, §2 (a).

into transferable shares, with limited liability, having a corporate body and common seal. The company, being a legal person, is separate and distinct from its members who are individuals. The company has perpetual succession, i.e. its life is independent of the lives of its members, giving immortality to the company. In this sense, company's members may come and may go. It does not affect the company until it is dissolved.[81]... except for some situations company remains unaffected by the death, loss of sense or insolvency of an individual member of the company.[82] As soon as incorporation, the company enjoys similar rights and owes similar obligations as an individual but, not being a citizen, the company has no fundamental rights under the constitution.[83]

A company has different forms. A company may be either a private company or a public company.

2.3 Law Governing Company

Company is governed by law made by the state sovereignty. Almost all the nations in the world have their own laws governing companies.

In particular, law of companies and law of insolvency govern companies and company incorporation to insolvency, liquidation and dissolution. Some aspects of which are discussed below:

(i) Law of Company

Law of company has a significant role in the field of industry, trade and commerce in the modern world because business has reserved most of the parts of this kind. Undoubtly, a company has been playing a vital role in the development of business. Today big type of corporations or institutions or organizations of insurance, bank, industry etc. are operative as company with the participation of

[81] Shukla, *Supra* note 20, at 433.

[82] Company, Wikipedia (2019), https://www.en.m.wikipedia.org/company (accessed Mar. 6, 2022).

[83] Tata E. & L. Co. Ltd. v. State of Bihar (1965) S.C. J. 605.

private or public or government or non-government, indigenous or foreign faces.[84] The form of the company is totally different from the sole trading and partnership. Basically, it is found that the latter two organizations have been accepted differently due to developed law coupled with them.

Incorporation and dissolution of the company happens as per law, i.e. company law. The law determines the definitions, types, procedure regarding incorporation, liquidation, dissolution, rights and obligations, legal status etc. of the company.

Many Acts relating to company have been enacted with the object of developing business of the nation by means of company at different times. The development process of company Act, in UK, was started in the beginning of seventeenth century. Now, Companies Act 2006 governs the rules concerning liquidation of company in UK. In context to India, Company Act, 1850 was issued based upon the English Company Act, 1844. Now in India Companies Act, 2013 deals with matters on liquidation of company. In Nepali context, Nepal Company Kanoon1936 is considered to be the first step in development of company law. Now in Nepal the Companies Act, 2006 and the Insolvency Act, 2006 as a part of the former are operative.

(ii) Law of Insolvency

Law relating to insolvency plays a vital role in the modern business regime. This sort of law deals with different provisions such as procedures regarding reorganization of company which may become insolvent, insolvency proceedings against a company which is insolvent or procedures regarding liquidation of company, provisions such as protection of rights and interests of both the debtor and creditor and the like.

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[84] S.B. Karki et al., *Supra* note 35, at 314.

Before enactment of law relating to insolvency by the state, debtor was treated in an inhuman manner. Even in Britain the debtor who was unable to pay the debt was punished and had to be ready to serve as a servant to the creditor, until the debt was recovered.[85] It was realized in course of time that such treatment was inhumane. As a consequences different countries in the world started enacting law of insolvency to regulate relationship between debtor and creditor in just and proper manner.

The main goals of the law of insolvency are (i) to release debtor from the liability of the debt so that the debtor becomes free for fresh star or new business and (ii) to adjust and allotment the remaining property equitably among the creditors that the debtor holds.

A main aim of insolvency law is to replace this free-for all with a legal regime in which creditors' rights and remedies are suspended and a process established for the orderly collection and realization of the debtors' assets and the fair distribution of this according to creditors 'claims'.[86]

In Britain, law relating to insolvency formally came into force in 1986, which governed both the individual and corporate insolvency. Now, Insolvency Act, 2000 and Insolvency Rules, 2016 are major laws governing provisions of liquation of company in UK. In India, there were two Acts relating to insolvency, namely (a) the Presidency Towns Insolvency Act, 1909 and (b) the Provincial Insolvency Act, 1920. The provisions of these Acts were similar in many respects. The Company Act, 1956 also governed the liquidation proceedings of a company

[85] Bharat Raj Upreti, *Workshop Paper submitted on One Day Interaction Program* held in Kathmandu, Commercial Law, 36 (2005).

[86] Finch, *Supra* note 6.

which failed to pay debt. Now, in India Insolvency and Bankruptcy Code, 2016, governs this matter.

In Nepal, for the first time a little bit provision relating to insolvency was incorporated under the Damasaliko Mahal of Muluki Ain, 1853. The Ain was replaced by the MulukiAin of 1963. The provision incorporated in the Ain was relating to personal bankruptcy. This provision was also replaced by Muluki Civil Code, 2018. This Code has also made provision under Chapter 3 "Provision on Natural Person" of Part 2.

Ordinance on Insolvency was promulgated in 2005 and the Ordinance was converted into new Insolvency Act, 2006. This Act came into force on 20th Dec. 2006. This Act covers the matters of corporate insolvency and not the matter of personal or individual insolvency.

2.4 Principle of Insolvency Law

Basically, insolvency law is that branch of law which is issued in relation to administration, insolvency proceedings of companies which are insolvent or going to be insolvent, being unable to pay debts to creditors or which are facing financial crises and in relation to restructuring of such company in Nepali perspective. In line with above statement, the principles of insolvency are as follows[87]:

i) It provides an option to maximize the value of assets of a company;

ii) It attempts to balance between restructuring and liquidation;

iii) It provides for equitable treatment of similarly situated creditors, situated foreign and other domestic creditors;

[87] Shree Prakash Upreti, *Business Law*, Samjhana Publication Pvt. Ltd., Kathmandu, 240-41 (3d ed. 2018).

iv) It grants an option for timely, efficient and impartial resolution of insolvencies;

v) It prevents the premature dismemberment of the debtor's assets by individual creditors;

vi) It gives a transparent procedure that contains incentives for gathering and dispensing information;

vii) It recognizes right of the existing creditor and respects the priority of claims with a predictable and established process; and

viii) It establishes a teamwork for cross border insolvencies, with recognition of foreign proceedings.

2.5 Liquidation of Company

2.5.1 Concept and Definition

There are many methods of putting an end to the life of a company. Liquidation is also one of the methods to that effect. Liquidation proceeds dissolution. Liquidation relates with those affairs, consequence of which results dissolution. Liquidation of a company is not, in itself, dissolution of the company. It is the prior stage of dissolution. At the end of liquidation, there remains no asset or property, no liability etc. of the company. There remains only dissolution, that is, only one formality to end the legal existence as a company.

Simply speaking the term 'liquidation' is a process. Liquidation is a process to bring about an end to the life of company. Liquidation is also termed as 'winding up' because these two terms are used interchangeably. Liquidation of a company refers to a process including the closing a company down and collecting its assets, distribution of its liabilities etc.

Winding up of a company as defined by the Black's law Dictionary," the process of settling the accounts and liquidating the assets of partnership or corporation for the purpose of making distribution of net assets to shareholders or partners and dissolving the concern".[88]

Liquidation is a process of realizing upon assets and of discharging liabilities in concluding the affairs of a business/ company etc."[89]

"Liquidation of a company means a situation where the registration of a company is cancelled by fulfilling the procedures referred to in Companies Act, 2006."[90]

As defined by Prof. Gower the term winding up of a company is, "the process whereby its life is ended and its property is administered for the benefit of its creditors and members. An administrator called a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights."[91]

Thus, liquidation or winding up of company is a process under which the management of a company, by closing its transaction, is taken all and whole assets of company are controlled by an independent official called liquidator. In other words, after the appointment of the liquidator, the directors and officers of the company relieve of their office, and the liquidator takes all properties, accounts etc. of the company under his responsibility and control. Similarly, the liquidator exercises all the managerial powers of the company and conducts the liquidation proceedings of the company. In this course, the liabilities (debts) are determined and paid out by a liquidator on the basis of

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88 *Supra* note 75, at 250.

89 Shankar Kumar Shrestha, *Dictionary of Law and Justice (English-English-Nepali),* Pairvi Prakashan, 523 (3d ed. 2019).

90 Insolvency Act, 2006, §2(d).

91 LCB Gower, *The Principles of Modern Company Law,* Stevens and Sons Ltd. London, 647 (3d ed.1969).

priority of payment of the liabilities. Even after the payment of debts if the assets of a company remain, the liquidator distributes such assets among the members pursuant to the Company Act and articles of a company. Thus, the process of liquidation/ winding up of a company consists of the realization of the assets, payment of the liabilities and distribution of surplus, if any, amongst the members of the company.

After the completion of the liquidation proceedings, the company loses its institutional or legal existence. It may be, however, noted that the company can file a suit against anybody and anybody can do so against the company during the process of liquidation (i.e., during the time between the commencement of liquidation and completion thereof).

In conclusion, the process of liquidation consists of the realization of the assets, determination and payment of the liabilities as well as distribution of surplus assets, if any, amongst the members of the company in proportion.

2.5.2 Modes/Types of Liquidation of Company

A company can be liquidated in different ways or modes i.e., compulsorily and voluntarily. But there are different processes, activities and nature regarding liquidation. So, the modes of liquidation of the company are not applicable in all types of companies.

In Nepal, there are separate legal provisions governing liquidation of a solvent company and an insolvent company. Generally, the Companies Act, 2006 governs the former's liquidation and the Insolvency Act, 2006 the latter's liquidation.

Whatever it is, in Nepal, a company may be liquidated in the following modes or ways, which can also be regarded as types of liquidation:

- Voluntary liquidation, and
- Compulsory liquidation

(i) Voluntary liquidation

A voluntary liquidation/ winding up of a company means a winding up by the members of the company voluntarily. In other words, the winding up without intervention of the court or the office is called voluntary winding up of a company. The company, through its members, decides to wind up its affairs. Such winding up of a company depends upon the intention of the company and its members. Because of such optional kind, it has been said to be voluntary. Voluntary winding up of a company is also known as liquidation of a solvent company.

The Companies Act, 2006 has made some provisions to that effect. The shareholders of the company, which has not become insolvent under the existing law on insolvency, may liquidate the company voluntarily.[92]

Thus, a company, financial condition of which is sound or solvent, may be wound up voluntarily. But an insolvent company may not be wound up voluntarily.

Even after the commencement of the liquidation proceedings, the corporate status and power of the company continues until the company is dissolved, but it requires to stop its business, except so for as may be necessary, for beneficial winding up[93] Therefore, in this course, the company can also stop its transaction as per necessity.

(ii) Compulsory/Mandatory Liquidation

Most of the liquidation/ winding up fall under this sort of liquidation. A company which is wound up without its will is called compulsory winding up of the company. A company may be wound up at an order of the court. Hence, compulsory winding up is such a winding up under which the court is to make an

[92] Companies Act, 2006, §126 (1).

[93] Hari Pd Jayantila & Co. v. ITO (1966) SC 148.

order. Compulsory liquidation is, therefore, also called liquidation or winding up by the court order or by an order of the court.

A company can be liquidated by the court when a number of situations takes place- the most common being when the company is unable to pay its debts.[94] Such liquidation can be applied to a solvent or an insolvent company. But it, in practice, is most often invoked in relation to insolvent companies. Court proceedings are required for initiating this procedure.[95]

The Companies Act, 2006 does not provide for compulsory liquidation. But the Act has provisioned that the court may issue an order to liquidate a company doing acts contrary to the rights and interests of the shareholders. In this sense, liquidation of a company is possible even under the provision of this Act. Besides this Act, the Insolvency Act, 2006 has also made separate provision in respect of liquidation of a company which has become insolvent. Liquidation of such company also comes within compulsory liquidation. Therefore, liquidation of two folds of companies falls under compulsory liquidation/ winding up, according to these Acts. They are discussed here under:

(A) Liquidation of an Insolvent Company

Liquidation of a company which has become insolvent or is in financial crisis, becomes compulsory. Where a company is unable to pay its debts or other liabilities, liquidation of such company is called liquidation of an insolvent company. A company is said to be insolvent where the amount of debts or liabilities to be paid to the creditors of the company by it is more than the price of the properties of the company. For liquidating such type of

[94] Girvin et al., *Supra* note 26.

[95] Derek French, *Mayson, French & Ryan on Company Law,* Oxford University Press, UK, 697 (35th ed. 2018-2019).

company, that is, for liquidating a company unable to meet its entire liabilities or to repay its debts or other liabilities it has to be petitioned to the court. That is why, the company does not choose to liquidate a company of its own motion. A petition may be presented either by the company itself, or by its creditors, or by its shareholders or by its debenture-holders or by regulatory authority of corporate body[96].

(B) Liquidation of Company doing acts against the Shareholder's Interests

In some exceptional cases, an order of liquidating a company may be issued as remedy for the protection of the right and interests of the shareholder of the company. This sort of liquidation is called liquidation of a company doing acts against the shareholder's interests. If any shareholder makes a petition to the court for liquidating a company, and the court may, if feels reasonable, order to liquidate the company.[97]

In addition to the modes stated above, another type of liquidation can also be found.

(iii) Provisional Liquidation

It is such a process which exists under the corporate insolvency laws of some common law jurisdictions. Under this process an application has been made for liquidating a company by the court but before hearing and determining the application by the court a liquidator is appointed by the court on a provisional ground. Duties of such liquidator are to only safeguard the assets of the company and to maintain the status quo pending the hearing of the application. The liquidator cannot claim against the company or cannot try to distribute the assets of the company to its creditors because such liquidator is appointed only for the time between after submission of application and before its hearing.[98]

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[96] Insolvency Act, 2006, §4(1).

[97] Companies Act, 2006, §139 (4(f)).

[98] Provisional Liquidation, Wikipedia, https://www.en.m.wikipedia.org/wiki/provisional-liquidation (accessed Mar. 15, 2022).

2.5.3 Advantages and Disadvantages of Liquidation

(a) Advantages of Liquidation

Following are the some main advantages of liquidation:

a) Pressure from the creditors can be removed.

b) Liquidation brings matters to termination for an insolvent company which struggles for surviving.

c) Liquidation creates such an environment where the directors and/or shareholders can purchase assets at reasonable price.

d) Liquidation provides opportunity to directors to find new employment or to start new business.

e) As soon as liquidation has been completed, there remains nothing to file annual accounts etc.

(b) Disadvantages of Liquidation

Some main disadvantages of liquidation are as follows:

a) After liquidation has been completed, business can no longer trade in the same or similar company name again in the future.

b) Creditors and suppliers can lose money incurred in trading.

c) Employees can lose their employments

d) Business reputation, business assent and trading licenses can be lost.

2.6 Insolvency: As a Ground for Liquidation of Companies

Insolvency is one of the grounds which leads to the liquidation of a company and requires separate procedures than normal liquidation.

The researcher highlights the differences between insolvency and bankruptcy and insolvency and liquidation and so on.

Nepal has separate companies law and also insolvency law. The Insolvency Act, 2006 is such law which governs insolvency procedures. General insolvency procedures for traders are applicable to business companies with legal personality.

Similarly, there is a civil regime set out in chapter 3 of part 2 of Muluki Civil Code, 2018 in Nepal which is called bankruptcy. It is applicable only to natural person.

2.6.1 Concept and Definition of Insolvency

In law concept of insolvency is not same in one legislation to another, like some legislations apply the insolvency provisions on traders and non-traders as Indian legislation, English legislation etc. In such legislations, there is no concept of insolvency independent from the concept of bankruptcy whereas other legislation such as French legislation etc. considers that the insolvency is different from bankruptcy, each one has a special concept, like they apply the insolvency provisions of traders only and the bankruptcy provisions apply to non-traders.

Insolvency is considered as the legal status of company that causes to pay up the debts to creditors. It is one of the conditions that leads to company to get liquidated and dissolved. In case insolvency takes place, the liabilities of the debtors (Insolvent) company are settled before dissolution.

In most of the jurisdictions, declaration of insolvency is initiated by the creditors, by the court, and by the company itself. It is designated to provide relief and pretention to debtors who have gotten over their needs. It also provides a fair measure for distributing assets of a debtor among the creditors[99].

[99] Allail, *Supra* note 12.

There is no single definition of insolvency. Some of the scholars define it as a situation where the debtor fails to pay the amount on time or the debtor's liabilities exceed the assets, and some of the scholars define it as collective proceeding against the debtor who is unable to pay debt.[100]

In general sense insolvency is a state of being unable to pay debts. The term "insolvency refers to an adverse financial condition of a person. Insolvency generally signifies".[101]

"Insolvency means the condition of being unable to pay debt as they fall due or in the usual course of business".[102]

"Insolvency means the condition of being unable to pay debts as they mature."[103]

"The state of being unable to pay debts. Similarly, insolvent and insolvency are general terms, but are usually applied to companies. Individuals are usually described as bankrupt once they have been declared so by a court."[104]

"Insolvency means a state of being unable or appearing to be unable to pay any or all of the debts due and payable to or payable in the future to creditors or a situation where the amount of liabilities of a company exceeds the value of the assets."[105]

The term insolvency is closely related with the term 'insolvent'. The term 'insolvent' may be employed to designate[106]; (a) A debtor whose assets are not sufficient to pay

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[100]Davies, *Supra* note 31, at 839.

[101]ADB Report on Insolvency Law Reform in Nepal (Prepared by RW Harmer), TA NEP 3461, 93 (Oct. 25, 2000).

[102]*Supra* note 75, at 280.

[103]Shrestha, *Supra* note 89, at 450.

[104]P.H. Collin, *Law Dictionary,* Universal Book Stall, New Delhi, 123 (Rep. 1996).

[105]Insolvency Act, 2006, §2(b).

[106]P. Ramanath Aiyar (ed.), *The Law Lexicon with legal maxim Latin Terms and Words and Phrases,* Wadhwa and Company Law Publishers, New Delhi, 953 (2d ed. 1977).

his debts, (b) a debtor who is not able to pay all his debts from his own means, or whose property is not in such a situation that all his debts may be collected out of it by legal process or as is more frequently the case, (c) a debtor who is not able to pay his debts in the usual course of business or meet his pecuniary engagements. So too the term may be used as referring only to one who has been judicially declared to be insolvent.

But no one can be called insolvent unless a competent court declares him an insolvent.[107]

The terms insolvent and insolvency are synonymous with the terms bankruptcy and bankrupt. In English law the terms bankrupt and bankruptcy are used in the same sense as the terms insolvent and insolvency in India.[108]

The word 'bankruptcy' has come from the fusion of two Latin words bancus or banque (The table or cupboard of businessman) + ruptus (to break down). The literal meaning of bankruptcy is one whose shop or place of trade is broken or gone[109].

Insolvency is new concept with reference to Nepal. In Nepal, insolvency is combination of two terms – state of inability of company to pay debts and state of liabilities greater than assets of company. But the company cannot declare itself insolvent. The court has a sole power to declare it insolvent.[110]

In Nepal, the terms bankrupt and bankruptcy and insolvent and insolvency are dealt with in two Acts. Chapter 3 "Provision on Natural Person" of Part 2 of Muluki Civil Code, 2017 with the terms bankruptcy and bankrupt and Insolvency Act, 2006 deals with insolvent and insolvency.

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[107]Arun Kumar Sen & Jitendra Kumar Mitra, *Commercial Law,* The World Press Private Limited, Culcutta, 360 (Rep. 1997).

[108]Shukla, *Supra* note 20, at 352.

[109]Wharton's Law Lexis cited in Moti Raj Gautam, *Supra* note 11, at 10.

[110]Insolvency Act, 2006.

Thus, insolvency is the state or situation of not being able to pay money owed to a creditor(s) by a company or in the usual course of business. Although insolvency and bankruptcy are used in the same sense, they are different from each other in the legal sense.

Insolvency: Mainly, it refers to a state of being unable to pay debts to creditors. Nepali law also defines it.

Insolvent: It refers to a person who has been adjudged insolvent. No Nepali law has defined it. So, a company who is in the state of insolvency is referred as insolvent.

Bankruptcy: It occurs when a person's debts and other liabilities to be borne by him exceed his assets. Nepali law also defines it.[111]

Bankrupt: If a debts or claim of a creditor is settled from the assets of a person, he is deemed to be bankrupt. Nepali law also defines it.[112]

2.6.2 Types of Insolvency

Insolvency may be either individual or corporate insolvency.

(a) **Individual Insolvency:** This is related with natural person. Muluki Civil Code, 2017 has under Chapter 3 "Provision on Natural Person" of Part 2 dealt with the rules concerning natural person or individual insolvency.

(b) **Corporate Insolvency**: This is related with the legal person. Such persons or companies are of two types (a) general companies and (b) special companies. The former types of companies are established under the Company Act and the latter types of companies are established in accordance with the Special Act

[111] Muluki Civil Code, 2017, § 54 (1).

[112] *Id.* § 54(3).

such as Insurance Act, Banking and Financial Institution Act etc. Corporate insolvency is globally accepted and the Nepalese Insolvency Act, 2006 deals with the rules concerning this sort of insolvency.

Differences between Individual Insolvency and Corporate Insolvency

They are different from each other in the following ways:

(a) **Personal debts or insolvency depends on personal attitude and consideration:** This entails a consideration to whom the law should apply. The first issue is whether the law should distinguish between individual debtors and corporate debtors. It is highly probable that different policy considerations and different social and other attitudes will be relevant to each of these areas. Policies towards individual (or personal) debt or insolvency will often evidence cultural attitudes that are not as relevant to corporate or commercial insolvency. Some examples are found in attitudes towards the incurring of personal debt; the effect of bankruptcy upon the status of individuals; attitudes towards providing relief for unmanageable personal debt; and providing for discharge from insolvency or bankruptcy.

(b) **Corporate insolvency based on economic and commercial consideration:** The policies which are applicable to corporate insolvency will be based on economic and commercial considerations. These should usually reflect the important part that corporations play in a market economy and that insolvency procedures and techniques affecting corporations should largely reflect economic expectations and commercial needs, as well. These will not normally be relevant to individual insolvency.

Therefore, we need to confirm either apply separate insolvency laws to individuals and corporations, or in the case of a single insolvency law, to clearly distinguish between them in that law. Some characteristics might be common to both, for example, dealing

with claims of creditors; priorities between creditors; and so on but it may be necessary to have distinctly different provisions concerning vital elements, such as threshold entry requirements, general meeting of company, board division requirements and so forth.

On the other hand, further consideration is under what branch (individual or corporate) should individual business activities, including unincorporated partnership of individuals fall. The precedents from the experience of many countries suggest that, although individual business activities form part of commercial activity, such cases are best dealt with under the regime for individual insolvency because, ultimately, the proprietor(s) of an unincorporated business are personally liable without limitation for the liabilities of the business.

2.6.3 Factors of Insolvency

Generally, insolvency involves the following factors:

(i) Insolvency is applicable to company (legal person) and not to individual (natural person).

(ii) There should be business transaction for this purpose.

(iii) There should be sufficient grounds or proofs that the debtor has suffered from financial difficulty.

(iv) The company may be said being insolvent either by balance sheet test or by cash flow test.

(v) Priority to reorganization program is provided to a company which may become insolvent.

(vi) Liquidation to release the debtor for fresh start is available.

2.6.4 Test of Insolvency

While testing a company whether being insolvent or not any or both of the following conditions are to be applied:

(a) Balance Sheet Test/Insolvency

Balance Sheet Test or Insolvency is one form of insolvency or test. Sometimes, also known as technical insolvency balance sheet insolvency is one issue that prevents a company from being unable to pay its debts and it focusses on the value of the company's assets and liabilities reflected in the company's books. It occurs when a company does not have enough assets to pay its debts.

In case the value of the liabilities of a company is greater in comparison to the total value of its assets, a company is deemed to be insolvent.

A company may be insolvent even though it has no debts currently outstanding where its liabilities, present and future, certain or contingent, exceed the total of its assets. It is termed as balance sheet insolvency.[113]

Balance sheet insolvency means that liabilities of a company are greater than its total assets (liquid and illiquid). In other words, under balance sheet insolvency liabilities exceed assets, viz. the value of a company's assets is less than the amount of its liabilities. That company has negative net assets. That is why, balance sheet insolvency is connected with assets versus liabilities. For instance, an insolvent farmer may be allowed to hire people to help harvest the crop, because not harvesting and selling the crop would be some worse for his creditors.

(b) Cash Flow Test/Insolvency

Also known as actual or equitable insolvency or the ability to pay test or commercial test, in case a company is appearing to have not enough accessible cash to pay any or all of the debts due and payable to creditors, then it can be evidence of company insolvency.

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113 Baily & Groves, *Supra* note 54.

A company may be insolvent if it cannot meet its debts as they fall due, even though it has a substantial balance of assets over liabilities. It is called as a cash flow insolvency[114].

Cash flow insolvency refers to a lack of liquid assets to fulfill debt obligations. In this, the debtor (company) may have considerable assets but lack cash on hand. For instance, a person may own a big house and a valuable car, but not have enough liquid assets to pay a debt when it falls due. Such insolvency can sometimes be resolved by negotiation.

Cash flow insolvency is one issue that prevents a company from being unable to pay its debts. For instance, the creditors may wait for repayment, giving the company a reasonable amount of time to sell less liquid assets, converting them into cash. In such situation, the company agrees to pay a penalty. Thus, cash flow insolvency considers income sources that are available to the company and expenditure obligations, it has to meet. It relates with cash flow versus liabilities.

Nepalese Insolvency Act, 2006 has also recognized both the tests above.[115] Thus, failure of either two tests mentioned above can point out a company insolvency.

2.6.5 Reasons of Insolvency

There are some common reasons behind insolvency. They are as under:

(a) Poor Decision Making

A single decision cannot be in favour of business. Thus joint decision is a must otherwise a single decision can lead to a business failure.

(b) Bad Financial Management

Bad financial management is another major reason to lead to a business failure.

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[114] *Id.*

[115] §2(b).

(c) Absence of Expertise in Commercial Operation

Another reason of insolvency is absence of expertise in commercial operation which can also lead to a business failure.

(d) Market Condition

Market condition also plays a vital role in leading to insolvent business.

(e) Competition

There is great competition in the market. So ignoring competitors is a great loss to business which leads to a business failure.

(f) Over Reliance

Over reliance on one or two major parties, i.e. clients or customers can also lead to a business failure.

(g) Lack of Budgeting

Lack of budgeting in business operation is also one of the reasons which results in insolvency.

(h) Too much Debt

Over borrowing money is a reason of business failure.

2.6.6 State/Circumstance of Insolvency

Insolvency is a financial situation defined by two sets of criterias or grounds. To be deemed insolvent, a company's accounts will show that:

- It is unable to pay its debts when they fall due and.
- The value of its assets is less than the value of its liabilities.

In case of appearance of these criterias, actions have to be taken which are the processes that lead to liquidation.

2.6.7 Bankruptcy versus Insolvency

Simply bankruptcy and insolvency seems similar but they are not so in many respects. The key differences between them can be pointed out here under:

i. Bankruptcy refers to individuals whereas insolvency refers to companies.

ii. Bankruptcy is a legal declaration and process while insolvency is a state of financial distress.

iii. Bankruptcy is permanent and the final stage but insolvency can be temporary and the initial stage.

iv. Bankruptcy is the last resort whereas insolvency is not the last resort.

v. Bankruptcy takes place when it remains untreated for a long term but insolvency takes place when the value of assets of the company is less in comparison to the value of its liabilities.

vi. An insolvent persons is not bankrupt but a person who is bankrupt conclusively is insolvent.

vii. Bankruptcy is a specific legal procedure whereas insolvency is a broader term entailing any financial distress or crises.

viii. Bankruptcy proceedings are initiated voluntarily by the debtor or non-voluntarily by the creditors. But insolvency proceedings are non-voluntarily in nature.

ix. Bankruptcy proceedings involve court supervision whereas insolvency can be handled outside of the court, that is, bankruptcy involves formal court proceedings but insolvency may or may not involve legal proceedings.

2.6.8 Insolvency versus Liquidation

In a layman sense, insolvency and liquidation are the same. However, insolvency is different from liquidation in some respects. Liquidation and insolvency are often used interchangeably by those who are unfamiliar with the processes involved. But there is a clear difference between these two terms-liquidation and insolvency.

Liquidation is used to describe the process required to end a company whereas insolvency is a state that can prompt the end of a company and is one of the possible reasons for ceasing to trade and closing down the business.[116]

[116]What is the Difference between Liquidation and Insolvency? Smith & Barnes (Oct 29, 2021), https://www.smithandbarnesinsolvency.co.uk/blog/what-is-the-difference-between-liquidation-and-insolvency? (accessed Dec. 2, 2023).

Insolvency is a state of financial distress of a company wherein the company is unable to pay its debts on time but liquidation is a process to end the legal existence of a company by closing its business under the supervision of in particular, a liquidator.

Although insolvency is a trigger causing liquidation, for liquidation a company is not compulsorily necessary to be insolvent. In other words, solvent company financial position of which is sound can also get liquidated. It is depends on company itself, shareholders or creditors i.e. it is a case of voluntary liquidation. In the case of compulsory liquidation of company (including insolvent company), company is bound to go for the liquidation because of the financial distress or other unavoidable reasons.[117]

Moreover, during insolvency proceedings an opportunity of restructuring is also available to a company which becomes insolvent or is in financial distress[118] before issuance of order by the court to liquidate such company. But liquidation generally continues until a company is dissolved.

2.7 Reorganization of Company

Reorganization of a company is also a new concept adopted in Nepal. What we normally understand restructuring is reorganization. Reorganization is one of the ways of reforming financial structure of a company. With the help of reorganization a company can get a new life and be motivated to carry out its transaction in different way.

Simply speaking, to reorganize means to organize again, or in a new way. Reorganization is synonymous with the term restructuring. Thus, both the terms

[117] Paudel, *supra* note 62, at 169.

[118] Karki et al., *supra* note 35, at 385.

reorganization and restructuring are used in the same sense in connection with a company.

“Reorganization is action of reorganizing a company in a different way.”[119]

"Reorganization means financial restructuring of a corporation, especially in the repayment of debts under a plan created by a trustee and approved by a court."[120]

The Nepalese Insolvency Act, 2006 has defined the term reorganization as "a process to be adopted under this Act in order to a company which may become insolvent because of financial difficulty".[121]

Thus, reorganization or restructuring is an act, action or process under which a company which may become insolvent because of financial difficulty is reorganized in a different way so that the company needs not be liquidated. Reorganization is an opportunity provided to a company.

2.8 Dissolution of Company

A natural person is born and dies naturally whereas a legal person is born and dies legally. A company being an artificial person cannot face natural death because it is created by law. The life and death of the company depend upon the law.

In general, the term 'dissolution' implies 'liquidation', and hence both terms dissolution and liquidation seem quite similar. But in fact, the former denotes an ending of, and the latter a process to end something. Hence, dissolution differs from liquidation. The term dissolution of 'company' means the termination of legal existence and legal personality of company. In this sense, dissolution is the final result of the completion of liquidation/

[119]Collin, *supra* note 104, at 207.

[120] *Supra* note 75, at 291.

[121]§2 (e).

winding up proceedings of the company. Due to the completion of the winding up or liquidation of a company, it comes to an end, which is known as dissolution.

The dissolution of a company is similar to the death of a living person. On its dissolution the company ceases to exist[122]. A company, which has been dissolved, no longer exists as a corporate entity capable of holding property or of being sued in any court. The transaction of a company is completely closed as soon as the company is dissolved.

Dissolution of a company takes place for different reasons such as winding up of a company (i.e. through special resolution, order by the court). In Nepal, a company can be dissolved in case a resolution is passed to liquidate a company voluntarily or in case the court issues an order with such object or in case the office itself deregisters or cancels the registration of a company.[123] A company may be dissolved, mainly: (a) on the ground of the liquidator's report, and (b) on the ground of the decision of the company itself.

Dissolution is generally final but it can be revived by the court by declaring the dissolution void. Even in Nepal, the rehabilitation or restoration of the dissolved company takes place in some cases. The case is that in case of deregistration of a company by the office itself, the court may, upon receipt of a petition made in this respect, order to restore the company, if it deems reasonable. In such case, the company is considered to have been in existence from the date of its restoration. In other cases, no company may be rehabilitated or restored, dissolution is valid.[124]

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[122] Coxon v. Gorst (1891) 2 Ch., 73.

[123] Companies Act, 2006 §§ 132 & 136 and Insolvency Act, 2006 §47.

[124] Companies Act, 2006, §137 (1) & (2).

2.9 Evolution of Law Relating to Liquidation of Company in Nepal

2.9.1 Introduction

Looking at the Nepali history, the evolution of law took place with the transplantation of culture and idea. The principles were established in the laws with the advent of modernization, and corporate laws of Nepal to a large extent are influenced directly by Indian law but indirectly by the British law.

This shall suggest the importance of Nepali law and recent development contributing evolution of company in Nepal shall be discussed to address the historical development of company and government regulation of its affairs.

Generally, company law is enacted for smooth and speedy development of business in the country through a company registration. Because of this Nepal has been enacting such type of law at different times. Company law deals with different matters, such as: incorporation, liquidation, dissolution and so on. But for some reason sometimes any sort of companies may get liquidated.

Evolution of law relating to liquidation of company in Nepal can be discussed from two angles:

(A) Development of Law relating to Liquidation of Company (Solvent company) under Law of Company and

(B) Development of Law relating to Liquidation of Company (Insolvent company) under Law of Insolvency

2.9.2 Development of Law relating to Liquidation of Company (Solvent Company) under Law of Company

In Nepal, generally, company law governs the provisions regarding liquidation of company which is solvent in nature.

Nepal has neither a long history of law relating to company nor law relating to liquidation of company. It is deemed that, in Nepal, enactment of the company law had

begun from the period of Second World War.[125]Generally, the law of company deals with almost all matters from incorporation to liquidation or dissolution of a company. The law of company itself includes the provisions concerning liquidation of the company. In this sense, the law relating to liquidation is born as soon as a company is incorporated in accordance with law. In Nepal, for the first time, it is found that the provision concerning liquidation came into existence when Nepal Company Kanoon was enacted in 1936.[126] So, Nepal Company Kanoon (Law) is deemed to be the first law of Nepal giving birth to liquidation. The life of the law relating to liquidation, therefore, is as same as the law of company even in Nepal.

The law relating to liquidation of company is necessary to be discussed under the law of company enacted in different time periods in Nepal. Mainly, the historical evolution of law relating to liquidation of company can be discussed along with the law governing it in the following three stages:

(i) Ancient Period (1936 - 1950)

In this stage, the Nepal Company Kanoon (Law), 1936 was promulgated to incorporate, operate and regulate a company being established by joint stock with a view to obtaining commercial purpose. This law is deemed to be the first law in the history of Nepal[127] and promulgated during the then Prime Minister Juddha Shamsher Rana seemed to have been influenced by the British Companies Act, 1929. For almost all provisions were similar in both Nepal Company Kanoon and

[125]Bhandari, *supra* note 36, at 5.

[126]Bharat Raj Upreti, *Company Kanoon*, Kanoon Anusandhan and Bikas Forum (FREEDEAL), Kathmandu, 65 (2d ed. 2007).

[127]*Id.* at 63-64.

British Company Law. Under this law, Biratnagar Jute Mill was formed for the first time as a joint stock company.[128]

Nepal Company Kanoon had 95 Sections. This law had set out some provisions as regards liquidation of company under sections 75-93,[129] including provisions regarding appointment of liquidator, rights and duties of the liquidator and provision regarding concerned office regulating liquidation proceedings.

(ii) Middle Period (1950-1964)

This period began from 1950 and ended in 1964. In this period, the law relating to companies was first enacted in the name of Nepal Company Act, 1950 but later on the term 'Law' was amended in the name of 'Act' in 1961. This Act was the product of the establishment of democracy in Nepal. This Act was amended three times during this period. This Act is deemed to be the modified, modernized and developed form of the Nepal Company Law (Kanoon) 1936. But the Act had also introduced some new concepts to this regard. This Act, having 160 Sections, was enacted as a separate law but this Act did not repeal the previous law of 1937. This Act came into force on 15th Sep 1950.

This Act had made different provisions concerning liquidation of companies. According to this Act, the power to liquidate the registered company or general company remained vested in Taluk Adda (also known as Udhyog Parishad) or the court itself.[130] The Act had provided some grounds under which such company

[128]Bhandari, *supra* note 36, at 5.

[129]Upreti, *supra* note 126, at 64-65.

[130] Nepal Company Act, 1950, §120.

could be liquidated[131]such as: where a company filed an application after passing resolution to liquidate the company and so forth.

If any ground occurred, the Taluk Adda had to appoint an experienced and reliable person or institute or firm or company as a liquidator for the purpose of liquidation.[132] For this, the liquidator was entitled to reasonable remuneration.[133] After appointment the liquidator had to perform functions with the permission of the Taluk Adda and the Court.[134] The liquidator had to maintain the book about the affairs of the meeting,[135] to submit the statement of income and expenditure to the Taluk Adda twice a year until remained on his post.[136] The liquidator had to clear payment on the priority basis.[137] Moreover, the liquidator had to also discharge other duties and the Taluk Adda had to also receive the complaint and had to give its decision upon the functions done and decision given by the liquidator.[138] The Act had provided some certain powers to the court too,[139] which the court could enjoy when an order was issued to liquidate a company and so forth. After clearance of all accounts and transactions of the company being liquidated, the company was deemed to have liquidated from the date of furnishing notice of liquidation of the company by the Taluk Adda. Moreover, the related person who was dissatisfied with the order or decision given by the

[131] *Id.*§121.

[132] *Id.*§122 (a).

[133] *Id.* §122 (c).

[134] *Id.*§123 & 137.

[135] *Id.*§124.

[136] *Id.*§125 (a).

[137] *Id.* §135 (a).

[138] *Id.*§126.

[139] *Id.* §§127-133.

Taluk Adda or the Court to liquidate the company, could file an appeal with the office hearing the appeal in accordance with Muluki Ain.[140]

(iii) Modern Period (1964 - Till Now)

This period can be discussed in the following stages:

(a) First Stage (1964 - 1996)

This stage started when Company Act, 1950 was repealed and Company Act, 1964 was enforced in 1964. This Act was amended four times during this stage. The life of this Act was very long in comparison to other laws before this Act was enacted. This Act had 13 Chapters, 152 Sections and 11 Schedules. This Act came into force from 24th Nov. 1964.

The Company Act, 1964 was enacted as per demand of times. It was said in the Preamble of Company Act, 1964 that "whereas it is expedient to make legal provisions relating to companies in keeping with the requirements of the country, the times and existing circumstances; therefore this Act was made."

This Act had dealt with various matters including liquidation of the company under its chapter 9. This Act had recognized two types of liquidation of company[141] liquidation by the concerned Department[142] and voluntary liquidation. The Act had prescribed some conditions under which the concerned Department (hereinafter refer to Department) could order to liquidate a company,[143] such as: in case of submission of an application to

[140] *Id.* §134.

[141] *Id.* §§116 & 128.

[142] Concerned Department as defined in Sections 2(s) of Company Act, 1964 means "Department of Industry or Office as designed by His Majesty's Government."

[143] Nepal Company Act, 1950 §116.

the department by passing a special resolution in a general meeting to liquidate a company etc. Upon receipt of an application, the department, if deemed reasonable, could issue an order to liquidate a company and the company required to close its business except in so far as many be necessary, and all the powers of directors would, ipso facto, lapse from the date of such order.[144] The Act had also provided a right to a person who was not happy with the order issued by the department to file an appeal with the Supreme Court.[145]

As per the Act, while issuing an order to liquidate a company the department had to also appoint a government liquidator (hereinafter refer to liquidator) for the purpose of liquidation and an auditor for the purpose of auditing accounts kept by the liquidator and determining their remuneration as well[146]. After appointment the liquidator had to take all the necessary documents, assets of the company under his custody[147], and he had to do various functions and exercise the powers during liquidation proceedings along with duties.[148]With respect to voluntary liquidation, the Act had also set out some provisions including conditions in which a company could be liquidated voluntarily. While passing a resolution to liquidate a company voluntarily one or more liquidators and auditors had to be appointed by the company,[149] and a notice thereof had to be furnished to the department and

[144]*Id.* §117.

[145]*Id.* §118.

[146]*Id.* §119.

[147]*Id.* §120.

[148]*Id.* §§121-125.

[149]*Id.* §128.

published in the leading newspapers within fifteen days of passing such resolution.[150] After passing resolution, the company had to stop its business except in so far as it is necessary to continue such business.[151] The liquidator had to exercise all such powers as where exercised by government liquidator.[152] During liquidation proceeding the liquidator had to pay off in the dept in priority basis[153] and present his report before general meeting of the company.[154] Besides, the liquidator had to submit his final report to the department and the department had to publish a notice of liquidation of company.[155]

(b) Second Stage (1996-2005)

This stage started as soon as the Company Act, 1996 was issued. This Act replaced the former Act of 1964. This Act came into force on 5th Mar. 1996. After the restoration of democracy in Nepal, This Act was enacted and it is the first Act which came after introducing the free market economy in the country. No amendment was made to this Act during this stage. The Act had provisioned 14 Chapters and 144 Sections.

This Act was another law governing liquidation of companies in Nepal. This Act had dealt with the matters relating to liquidation, especially under its Chapter 10. Unlike the Company Act, 1964, the Act of 1996 had adopted 3

[150] *Id.* §129.

[151] *Id.* §130.

[152] *Id.* §131.

[153] *Id.* §§125 & 132.

[154] *Id.* §136.

[155] *Id.* §137.

ways of liquidating a company[156]. In case of liquidation by the office[157], an order was issued by the office, if felt appropriate, to liquidate a company in some conditions[158]. This Act had provided the rules regarding procedures of liquidation of a company.[159] After issuance of such order, the company could not operate any business transactions unless otherwise provided for in this Act and all the powers of directors would ipso facto terminated from the date of such order.[160] While issuing such order the office had to appoint a liquidator for the purpose of liquidation and an auditor to audit the accounts kept by the liquidator and they were entitled to remuneration as fixed by the office.[161] The liquidator could enjoy some powers.[162] After appointment the liquidator had to take all the books, documents and assets of the company under his control,[163] to convene the creditors' meeting.[164] Similarly, the Act had also provisioned some conditions under which a public company can be liquidated voluntarily.[165] Where the company passed a resolution for liquidating such company, the general meeting had to appoint one or more liquidators and one or more auditors for the purpose of liquidation of company and for the purpose of auditing accounts kept by

[156]Company Act, 1996 §§ 101, 111 & 131.

[157]Office as defined in Section 2(s) means, "the Company Registrar Office of His Majesty's Government."

[158] Company Act, 1996, §101 (1).

[159]*Id.* §, 102.

[160]*Id.* §, 101(2).

[161]*Id.* §, 103.

[162]*Id.* §, 105.

[163]*Id.* §, 104.

[164]*Id.* §, 106 (1).

[165]*Id.* §, 111 (1-3).

the liquidator respectively and had to fix their remuneration. With respect to a private company, it could be liquidated in accordance with procedures laid down in its Memorandum, Articles or Unanimous Agreement.[166] Unless otherwise mentioned elsewhere in this Act, the company was bound to close its business transactions, after a resolution had been passed for its voluntary liquidation.[167]

Besides, after appointment the liquidator had to convene general meeting of the company[168] and also had to submit the accounts to the office.[169]The Act had provided the rules as to settlement of debt and accordingly the payment had to be paid off on the priority basis.[170]After completion of the entire liquidation proceeding the liquidator had to send a report to the office along with the fixed audited report. Upon receipt of such report, the office, if thought appropriate, would issue an order for liquidation of company and the company was supposed to be liquidated.[171]

The company Act had also empowered the court to issue an order for liquidation of company. Any shareholder of the company could make an application to the district court for a remedy if a company was engaged or likely to engage in activities contrary to his interest or if a company was not doing or going to do what it should have done. Upon receipt of such

[166]*Id.* §, 111 (4).

[167]*Id.* §, 113.

[168]*Id.* §, 106.

[169]*Id.* §, 108.

[170]*Id.* §, 109.

[171]*Id.* §, 118 (1).

application the court could, if thought reasonable, issue an order to liquidate the company for a remedy.[172]

Thus, comparatively, this Act had included some other new concepts in addition to the former, and attempted to make some provisions clear. However, in the case of liquidation by court this Act was totally silent about the procedure to be followed.

(iii) Third Stage (1996-2006)

This stage begins when Companies Ordinance, 2005 has been promulgated in 2005. The Companies Ordinance, 2005 repealed the Company Act, 1996 and came into force since Dec. 20, 2005. This Ordinance was issued to amend and consolidate forthwith the law relating to companies. After having seriously discussed upon the provisions concerning companies for sometimes, this Ordinance was replaced by enacting new Companies Act, 2006 with a view to amending and consolidating forthwith the law relating to companies. This Act has repealed some provisions of the former Companies Ordinance and has adopted some new concepts too. This Act has comprised almost all contemporary aspects of modern business.

The Companies Act, 2006 came into force from 10th Nov. 2006. This Act has contained 21 Chapters and 188 Sections. It has been said in the preamble of this Act, "whereas it is expedient to amend and consolidate the law relating to companies in order to bring about dynamism in the economic development of the country by promoting investment in the industry, trade and business sectors

[172] *Id.* §131 (1) (3) & (4) (d).

through economic liberalization and make the incorporation, operation and administration of companies much easier, simpler and more transparent; therefore be it enacted by the House of Representatives.

One of the major provisions made by this Act is the provision relating to liquidation of company which is solvent in nature. With the enactment of new Companies Law (i.e. Companies Act, 2006) there are following forms of companies in Nepal, which can be registered under the Companies Act, 2006:

I. Registered Company

A company incorporated under general company law is known as registered company. In Nepal, the companies which are registered under the Companies Act, 2006 or under any previous company law, with the office of Company Registrar are registered company.

II. Company Limited by Shares

Companies limited by shares are those where the members' liability is limited to the amount of uncalled share capital. The Companies Act, 2006 lays down that the liability of a shareholder of a company incorporated under the companies Act in relation to its transactions shall be limited on to the maximum value of shares which he has subscribed or undertaken to subscribe.[173]

III. Company Limited by Guarantee

A company limited by guarantee is such company, the liability of whose members is limited to the amount that they guarantee to contribute when it is liquidated. As per the Companies Act, 2006, non-profit distributing

[173] § 8.

companies are registered as limited by guarantee companies.[174] This Act again states that no member of the company shall be liable for the debts and liabilities of the company except in the case where any member accepts such liability in writing with specialization of the limit of such liability, his liability shall be limited to the extent of that limit[175].

IV. Company not Distributing Profits

A company incorporated with an object not distributing its profits is termed as company not distributing profits. The Companies Act, 2006 defines it as a company incorporated under Chapter 9 of the Act on condition that it shall not be entitled to distribute or pay its members any dividends or other moneys out of the profits earned or savings made for the attainment of any objectives[176].

The company not distributing profits can be incorporated with some conditions. They are as follows:

a) To protect common interest of group of persons or the society's welfare;

b) To manages to keep on the members not less than five persons;

c) To terminate the company automatically in case of merger, deregistration or death of any members of such company;

d) Not to transfer the membership by any manner;

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[174] § 16 (1) (a).

[175] § 167 (1) (b).

[176] § 2 (h).

e) Not to include any term like 'Co' Pvt., Ltd., except the prior consent of the office of Company Registrar;

f) To the extension of any branch the office of Company Registrar's consent is necessary.

V. Government Company

A company is considered as government company where it secures majority of shares in a company. The Companies Act, 2006 has not defined such company but provided for the conversion of a corporation owned by government of Nepal into a public company[177]. There shall be no restriction on the number of promoter shareholders in a government owned company.[178]

VI. Listed Company

A company whose shares are listed with the stock exchange market is known as a listed company. The Companies Act, 2006 has recognized it. The Act defines a listed company as a public company, shares of which are listed with the stock exchange market[179]. The Act lays down that a listed capital with paid up capital of Rs. 30 million or more or a company which is fully or partly owned by the government shall form an audit committee under the chairmanship of a director who is not involved in the day to day operations of the company and consisting of at least 3 members[180].

[177] § 173 (1).

[178] § 173 (2).

[179] § 2 (g).

[180] § 164 (1).

VII. Foreign Company

A company being operated in foreign country is known as foreign company. The Companies Act, 2006 defines a foreign company as a company incorporated outside Nepal[181]. No foreign company shall carry on any business or transaction in Nepal without having a branch office of such company registered with the office of such company registered with the office pursuant to Section 154 or established such office without having a liaison office registered[182].

VIII. One Person Company

Also known as a single person company, one person company is a company which is incorporated under company law. The Companies Act, 2006 enables the incorporation of the one person company. It states that one person company can be incorporated by any person desirous of undertaking any enterprise with profit motive may, either single (solely) or jointly with others, for the fulfillment of one or more objectives[183]. Notwithstanding anything contained in Section 4 (1) of the Companies Act, 2006, if a single promoter agrees to accepts the articles of association in the format prescribed for the incorporation of a company with a single promoter of single shareholder he is required to submit the articles of association of the proposed company[184]. The single shareholder company is not required to call meeting of the board of directors and its general meeting of the shareholder[185].

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[181] § 2 (f).

[182] § 154 (1).

[183] § 3 (1).

[184] § 4 (2).

[185] § 152.

Its concept was originally introduced with a view to restrict the liability of the promoter to the extent of the investment made in such company whereas in case sole proprietor firm, the liability extends to the personal assets of such sole proprietor.[186]

IX. Public Company

A company whose shares are put into public for sale in open market and can be purchased by general public is known as a public company. The Companies Act, 2006 defines a public company as company other than private company[187]. The public company shall require a minimum of 7 promoters for its incorporation provided, however, that 7 promoters shall not be required for the incorporation of another public company by any public company[188]. In case of a public company, a copy of the agreement, if any, entered into between the promoters prior to the incorporation of company shall be submitted in the application for the incorporation of public company[189]. Some notable points in relation to public company are:

- It shall add the word 'Limited' (in short 'Ltd.') after its name and as the last word;[190]
- It shall sell its shares and debentures publicly;[191]

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[186] Ramesh Kumar Miryala & Ravi Aluvala, *Trends, Challenges & Innovations in Management,* 3 Zenon Academic Publishing (2015), cited in Allail, *supra* note 12 at 53.

[187] § 2 (c).

[188] § 3 (2).

[189] Companies Act, 2006 § 4 (1) (c).

[190] *Id.* § 10 (b).

[191] *Id.* § 10 (c).

- It shall have a minimum of 10 million rupees except as otherwise provided in the prevailing laws or in a notification by the Government of Nepal in the Nepal Gazette that the paid up capital of any particular company shall be in excess of the said required minimum.[192]

X. Private Company

A company which is owned by individuals or small group of shareholders is regarded as a private company. The Companies Act, 2006 defines a private company as a private company incorporated under this act. The Act provides that the number of shareholders of a private company shall not exceed 101.[193] The Act states that a company incorporated under the Companies Act, 2006 shall abide by the following terms in addition to those set forth in the companies Act, memorandum and articles of association.[194]

(i) A private company shall add the words 'private limited' to its name as the last words,[195]

(ii) A private company shall not sell its shares and debentures publicly,[196]

(iii) A private company shall not pledge or otherwise transfer title to its securities to any person other than its shareholder without fulfilling the procedures contained in the memorandum of association or consensus agreement.[197]

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[192] *Id.* § 11.

[193] § 9 (1).

[194] § 10.

[195] § 10 (b).

[196] § 10 (c).

[197] § 10 (d).

XI. Holding or Parent Company

A company which control another company is considered as holding or parent company. The Companies Act, 2006 defines the terms as a company having control over a subsidiary company.[198] A holding company controls its subsidiary company as following:[199]

- By holding direct or indirect control over the formation of the board of directors and
- By holding majority of shares of the company.

XII. Subsidiary Company

A company controlled by a holding company is regarded as a subsidiary company. The Companies Act, 2006 defines a subsidiary company as a company controlled by a holding company. The Act states that if any company becomes a subsidiary company of any other company, the former company shall also be a subsidiary company of the holding company controlling the latter company.[200] No subsidiary company shall purchase the shares or debentures of the holding company or make investment in the holding company in any other manner.[201]

2.9.3 Development of Law relating to Liquidation of Company (Insolvent Company) under Law of Insolvency

This can be discussed in two folds:

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[198] § 2 (d).

[199] § 142 (1).

[200] § 142 (2).

[201] § 144.

(a) Muluki Ain (1853-1963 & Muluki Civil Code, 2017)

In Nepal, law of insolvency which is considered to be a part of company law deals with the provisions as to liquidation of company which is insolvent. Actually, Muluki Ain, 1853 is deemed to be the first written law in respect of insolvency concept in the history of Nepal.

Concept of insolvency had been adopted in third Part of 'Damasahi ko' under first Muluki Ain, 1853 issued under the regency of then king Surendra Bir Bikram Shah Dev, and the Act came into force since Dec. 23, 1853 After a very long time, this Ain was repealed and new Muluki Ain, 1963 (2020 B.S.) came into existence. The Ain of 1963 had incorporated the rules regarding insolvency under its chapter 'Damasahiko Mahal'. With the pace of time this Ain was also replaced by Muluki Civil Code, 2017 (formerly Muluki Ain, 1963) which came into force from 17th Sep. 2017. This present Code has provisioned the rules as to insolvency in its Chapter 3 "Provision on Natural Person" of part 2. The rules incorporated in this Code are purely related with insolvency of natural person (also called Bankruptcy) and not legal person. i.e. company which is insolvent.

In this way, all the provisions adopted and incorporated in all MulukiAin or Muluki Civil Code discussed above are the attempts towards development of insolvency of natural person and such provisions, except some concepts do not fall under the area of this study.

(b) Insolvency Ordinance/Act (2005/2006 to till Date)

The Insolvency Ordinance, 2005 is the first legislation in the history of Nepal, which has dealt with the provisions relating to company which is insolvent. This Ordinance was issued on 23rd Sep 2005. Before enactment of this Ordinance, the process had been commenced in 2002 with the technical assistance grant from the

Asian Development Bank, the Ordinance forthwith was converted into Insolvency Act. The Act come into force from 20th Dec. 2006. This Act has provisioned 9 Chapters and 77 Sections. It is said in its preamble that, "Whereas, it is expedient to make legal provisions immediately in relation to the administration, insolvency proceedings of companies which are insolvent or going to be insolvent being unable to pay debts to creditors or which are facing financial difficulties, and in relation to the restructuring of such companies, therefore be it enacted by the House of Representatives".

Analysis-especially pros and cons of the legal instruments is required? Thus, one of the major objectives of the Insolvency Act is to make legal provisions governing the administration and proceedings of companies which become insolvent or likely become insolvent.

Being a separate and single law, the Insolvency Act, 2006 is concerned with insolvency of legal person, especially a company which is insolvent in nature. Hence, the Insolvency Act, 2006 is a law which governs the matters of legal/corporate insolvency and not the matter of personal insolvency or individual insolvency.

Both the Companies Act, 2006 and Insolvency Act, 2006 have made some provisions relating to liquidation of company. They are provisions on Company Registrar Office, Commercial Bench, Insolvency Administration Office, Professional Practitioners, such as inquiry officer, liquidator, auditor etc. Moreover, the Insolvency Act has adopted 'One Law Two System' including restructuring and liquidation. The provisions of this Act are applicable only to companies incorporated under Companies Act, 2006 and corporate body with limited liability and so forth.

Conclusion

The evolution of the companies in Nepal is based specially on the common law approach. Laws in Nepal are highly influenced by a foreign country law, mainly direct influence of Indian law and indirect influence of English law.

The company's definition developed gradually with the passing of time. Earlier, the most preferable business entities of the people were sole proprietorship and partnership wherein the persons used to invest and earn profits out of the business for themselves.[202]

Now needs and wants of the customers have changed and customer began to search other form of business in the place of such entities from where they could fulfill their needs and wants. Due to limited fund invested in such entities the form of company came into existence with a view to satisfying customers. And increment of incorporation of companies took place rapidly. But in the course of development of companies several issues were faced by the members and creditors as well, which demanded the end of the corporation (companies). It was considered as the dissolution of the company which necessitated the concept of liquidation in order to determine the rights of members and creditors as well in the shares of the companies. The liquidation of the company, the process later on was recognized to be the members' and creditors' power to bring an end to the business or corporations for the reasons as the inability to carry on the business, or insolvency etc. It further was categorized as the voluntary liquidation and compulsory liquidation under the regulation of law.[203]

Nepali Companies Act, 2006 and Insolvency Act, 2006 govern the affairs of company, from its incorporation to the dissolution, and lay down the reasons and procedure of liquidation of companies in Nepal. Thus, both the Companies Act and Insolvency Act and liquidation procedure therein have been developing since the codification and regulation of laws. The liquidation procedure also developed with the emergence of new types and forms of the company.

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[202] Allail, *supra* note 12, at 55.

[203] *Id.* at 55-56.

CHAPTER III

INTERNATIONAL INSTRUMENTS ON INSOLVENCY REGIME

3.1 World Bank Principles and Guidelines for Effective Insolvency and Creditors' Right System, 2001[204]

Principle 21: Approval of Plan

The law should establish clear criteria for plan approval based on fairness to similar creditors, recognition of relative priorities and majority acceptance. The law should also provide for approval over the rejection of minority creditors if the plan complies with rules of fairness and offers the opposing creditors or classes an amount equal to or greater than would be received under a liquidation proceeding. Some provision for possible adjournment of a plan and decision of meeting should be made, but under strict time limits. If a plan is not approved, the debtor should automatically be liquidated.

Nepalese law has adopted this principles to some extent, if the court grant to prepare restructure plan, investigation officer should convey the creditors' meeting under Section 21 of the Insolvency Act, 2006 by furnishing proper notice, then creditors and other stakeholders may able to discuss in meeting as democratic process and they are free to accept or reject the plan. In this way the law has provided space for equal treatment among creditors.

Principle 22: Implementation and Amendment of plan

The law should provide a means for monitoring effective implementation of the plan, requiring the debtor to make periodic reports to the court on the status of implementation

[204] https://www.worldbank.org (accessed Nov. 10, 2017).

and progress during the plan period. A plan should be capable of amendment (by vote of the creditors) if it is upon the interests of the creditors. The law should provide for the possible termination of a plan and for the debtor to be liquidated.

Nepalese law has not expressly outlined to make such periodic report and submit to the court during the implementation of plan. Court may designate the restructure manager under Sub-Section 2 of Section 34 of Insolvency Act, 2006, as the authority to supervise and manage the implementation of the scheme (plan). In case it is found impossible to implement the part or whole scheme can be amended with the consent of creditors otherwise the company to be liquidated.

Monitoring the Plan: Our law does not have sufficient legal provision concerning the monitoring matter. No provision about court retains jurisdiction over the debtor during implementation of the plan. Law has not designated strict monitoring mechanism concerning the implementation of the plan.

Principle 23: Discharge and Binding Effects

To ensure that the rehabilitated enterprise has the best chance of succeeding, the law should provide for a discharge or alteration of debts and claims that should be discharged or otherwise altered under the plan. Where approval of the plan has been procured by fraud, the plan should be subject to challenge, reconsidered or set aside.

If the plan is found improperly prepared after the approval of the court that resulted failure to implement our law has not expressly mentioned whether court can issue order to appoint another restructuring officer to prepare alternative plan or not. As per the legal provision, court has only power to terminate restructuring plan under such failure ground.

Principle 27: Role of the Courts

Bankruptcy (also insolvency) cases should be overseen and disposed by an independent court and assigned, where practical, to judge with specialized bankruptcy expertise.

Significant benefits can be gained by creating specialized bankruptcy courts. The law should provide for a court or other tribunal to have a general, no-intrusive, supervisory role in the rehabilitation process. The court/tribunal or regulatory authority should be obliged to accept the decision reached by the creditors that a plan be approved or that the debtor be liquidated.

Jurisdiction/ Nature of the Court: Our existing law has not intended to establish the separate insolvency court. As per the definition of the court there is only the space for commercial bench within regular court. Whereas the complexity of issue and dynamic avenues of insolvency regime require separate specialized insolvency court. Jurisdiction of the court comprises: debtor, secured creditor, officers, and holders of equity interests, matters related to the debtor, their assets or relations with creditors. Court has discretionary power to reject plan otherwise accept by a statutory majority of creditors. Court has discretion to impose a plan to dissenting minority of creditors. Law has expected to have active role of the court in assessing the legal validity of plans and investigation while parties abuse in the process. Law has no more clarity regarding the matter of discretion to investigate or initiate an examination of the debtor, transactions, events or alleged wrongdoing and direct authority to impose penalties or sanctions for wrongdoing.

Dispute Resolution Functions

Principle 28: Performance Standards of the Court, Qualification and Training of Judges

Standards should be adopted to measure the competent performance and services of a bankruptcy court. These standards should serve as a basis for evaluating and improving courts. They should be enforced by adequate qualification criteria as well as training and continuing education for judges. It needs to have the competence, quality performance of courts with jurisdiction over insolvency case regularly. There are no

any provisions in the Insolvency Act, 2006 which addresses performance standards for evaluation or supervision of the courts or judges' compliance with statutory or other requirement.

Judges appointment: It is also the important subject matter authority of appointment, criteria for qualification and selection of the judge while appointing the judge some of the significant factor i.e., education level, minimum age, level of legal experience, level of business experience, previous experience, contribution to the community, high character and political standing, legal competency, gender, ethnicity and or geographic diversity. The assurance term of office of judges, their security, sufficient facility including other strong enforcement mechanism for the implementation of insolvency proceeding empower such competent role of the court.

Insolvency law has prescribed short time frame for proceeding but our traditional mechanism of court system has not changed yet. Procedure and time frame are not perceived to predictable and reliable.

Principle 29: Court Organization

The court should be organized so that all concerned parties including the administrator, debtor and all creditors are dealt with fairly, objectively and transparently. In general, publicly available court operating rules, case practice and case management regulations should govern the court and other participants in the process. The court's internal operations should allocate responsibility and authority to maximize use of resource. The court should institutionalize, streamline and standardize court practices and procedures.

Regarding this principle the mid-term strategic plan no. 10 of judiciary of Nepal has mentioned to empower the research oriented disciplinary mechanism in order to make

more transparence and responsible justice system. The main expected achievement is to control financial or administrative irregularity by implementing law and policy.[205] However, no any remarkable output can be achieved yet.

Finding: The most important factor is funding. As per the demand of judiciary for fund the ministry of finance provides very low fund which does not meet the requirement. [206]

Principle 30: Transparency and Accountability

Insolvency systems should be based on transparency and accountability. Rules should ensure ready access to court records, court hearings, debtor and financial data and other public information.

As per the principle of transparency and accountability our forthcoming court rule need to be addressed publicly availability of court decision, easy access to obtain notice information and decision making process considered to be generally transparent.

Principle 31: Judicial Decision Making and Enforcement

Judicial decision making should encourage consensual resolution among parties where possible and otherwise undertake timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law. The court must have clear authority and effective methods of enforcement its judgments.

When the petition is filed to initiate insolvency proceeding court can ask to concern authority to provide details and recommendation of the Bank and financial institution or insurance company. Court should follow the continue hearing upon the application until final verdict comes up. While entering into the process court has no power to refer the issue for alternative dispute resolution mechanism. Law has not expressly

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[205] A Report on Mid-term Strategic Plan and Evaluation, Supreme Court, Nepal 53 (2007).

[206] *Id.* at 38.

mentioned in what degree of discretionary power can be exercised by judge while making decision in particular case.

In our legal provision, there is fixed time limit that the court has to perform with prompt and proper manner but we Nepali have been suffering delay decision and lengthy process for long time in Nepalese judicial regime. Researcher could not find such legal provision and framework to address that matter under the insolvency law. The court should utilize optimum access of latest information technology while forwarding insolvency proceeding.

Principle 32: Integrity of the Court

Court operations and decisions should be based on rules and regulations to avoid corruption and undue influence. The court must be free from conflicts of interest, bias and lapses in judicial ethics, objectivity and impartiality.

As regards integrity of the court, there are no separate court regulation as well as standards/guideline or code of conduct for judges and staff under the insolvency proceeding in Nepal.

Independence of Judiciary: Nowadays independence of judiciary is so far as beautifully decorated in letter of law but no much more in practice. If so, of course the proposed commercial bench shall not be sided from same influence. Judicial conflict of interest, bias, ethics, objectivity and impartiality are major component to deal with independent of court. Judge's involvement in external activities or involvement in equity share in particular company directly or indirectly might caused the failure to deal with insolvency issue of such company.

3.2 Asian Development Bank (ADB) Survey, Indication and Recommendations[207]

Debt Recovery and Security Enforcement Processes

It appears that in many of the RETA economies the process of debt recovery through the court system is long and tedious.

Implications of Inefficient Court Enforcement Processes under Formal Insolvency Law

Process

Indications, such as those pose two possible major repercussions for an insolvency law. First, if corporation is unable to pay the debt, secured or otherwise, it may be assumed, with some degree of certainty, that the debtor is insolvent or fast approaching that state of affairs. If so, then it is the interests of all these affected (the creditors, the debtor and its shareholders and management), that the debtor should be required or forced to submit to a form of insolvency administration-whether formal or informal and whether liquidation or reorganization.

However, it may be expected that a corporate debtor will not come up in proceeding voluntarily unless some pressure is applied. The principal source of that pressure will come from the actions of individual creditors who pursue their individual enforcement rights. If the pursuit of those rights is restricted or delayed because of either an inadequate civil court process or other legal process system, there will be no pressure on the insolvent corporation to do anything. As a result, the corporation will not usually take any remedial action with the risk that its financial position will deteriorate to the cost and prejudice of persons who transact business with it.

[207]http://www.adb.org (accessed Nov. 15, 2023).

Attitudes to Legal Processes and Problems with the Insolvency Law

Attitudes to Strict Legal Processes

It has been suggested that in many of the RETA economies, there appears to be a cultural attitude, particularly evident in the commercial society, which views dispute resolution and problem solving as best suited to non-confrontational negotiation and mediation. Consistent with that, there also appears to be a distinct version to the use of strict legal processes (which require a somewhat rigid adherence to legal system organization, function and methodology) for the resolution of commercial disputes and problems.

Case Management of Corporate Insolvencies

The functions of such an agency include such important things as taking possession of and securing assets; winding down business operations; assessment and verification of claims of creditors; valuation and sale of assets; recovery of proceeds and dividends to creditors. Training and education in these areas are considerable and immediate importance in many of the economies.

There is a risk that many of these actual or potential benefits may be dimmed or lost. The economic cycle produces troughs and crests. It is an unfortunate fact of life that the onset of crests erases memories of the troughs. Economic and commercial conditions have commenced to improve in the region and it is, therefore, important that the impetus for review and reform is consolidated. It is appropriate, therefore, that the RETA should conclude with a summary of the assessment of the application of good practice standards and further recommendations for reform.

Organization for Economic Co-operation and Development (OECD)

This principle has emerged after the great financial crisis in 1990, which identified weakness to economic and financial vulnerability and to guide enhances the corporate governance. Basically, some of the pertinent principles of corporate governance

enunciated by OECD such as: ensuring the basis for an effective corporate governance framework which consist transparent and efficient markets that rely on rule of law, division of responsibility among different supervision regulatory and enforcement Authorities. Likewise, shareholders right and key ownership function, the equal treatment of shareholders, role of stakeholder in corporate governance, disclosure, transparency and responsibilities of board. Even though those principles are not mandatory, that promote foreign investment, supports to enable financial sustainability, empower to prevent from being financial crisis such as: collapse, liquidation, insolvent or any other unsound situation.

Bank for International Settlement (Basel Committee)

It was established by the Central Bank Governors of the group of ten countries. It is known as committee of banking supervisory authorities which also issued principle or guidelines for enhancing corporate governance for banking organization. The committee has developed core principle for effective banking supervision. In 1999, twenty-five basic principles were published to assist banking supervisors in promoting in the adoption of sound corporate governance practices by banking organizations in their countries. The ultimate goal of those principles is for good corporate governance in banking sector and much more support from not being financial distress and strengthen sustainability to maintain sound financial environment.

3.3 Uncitral Legislative Guide on Insolvency Law [208]

The purpose of the model law is to provide effective mechanism for dealing with cases of cross-border insolvency so as to promote the objectives of:

a) Co-operation between courts and other competent authorities of this state and foreign states involved in cases of cross-border insolvency;

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208 UNCITRAL Legislative Guide on Insolvency Law, http://www.uncitral.org (accessed Jan. 10, 2021).

b) Greater legal certainty for trade and investment;

c) Fair and efficient administration of cross-boarder insolvency that protects the interest of all creditors and other interested person including the debtor;

d) Protection and maximization of the value of the debtor's assets and

e) Facilitation of the rescue of financially troubled business thereby protecting investment and preserving employment.

Many countries have already adopted the UNCITRAL Model Law on cross border insolvency with or without modifications. Basically, Model law suggests different provisions in insolvency law to facilitate the international insolvency and execution of insolvency in foreign nation. Particularly it comprises, right and duties of foreign representative, right of foreign creditors, recognition of foreign proceeding and co-operation and co-ordination of proceeding. Model Law can be conceived as a vehicle for the harmonization of laws. It is legislative text that is recommended to state for incorporation into their national law. Unlike an international convention a model law does not require the state enacting it to notify the UN or other states which may have enacted as accordance, may modify or leave out some of its provisions.

Some of the Priority Claims

Tax claim: Priority is often accorded to government tax claim to protect public revenue, but has also been justified on a number of other grounds.

Employee claims: In a majority of states workers claims (including wages leave or holiday pay, allowances pay) constitute a class of priority claims in insolvency in a number of cases higher priority.

Competent Courts

An additional issue of jurisdiction is the question of which court is competent to commence insolvency proceedings and to resolve matters arising during the proceedings. The competence for commencement and all later issues arising under trail

of insolvency proceedings may lie with the same court of a State or different courts will have competence for different issues. To increase the transparency and case of use of the insolvency law for the benefit of debtors, creditors and third parties (especially where they are from a foreign country), it should be made clear in the law which courts have jurisdiction for which functions. Although provisions specifying which courts have jurisdiction over insolvency proceedings may not always be included in the insolvency law, a reference to the provisions of the law other than the insolvency law that specifies court jurisdiction might usefully be included in the insolvency law.

Contents of Legislative Provisions

(A) Eligibility

The insolvency law should govern insolvency proceedings against all debtors that engage in economic activities, whether natural or legal persons, including state-owned enterprises and whether or not those economic activities are conducted for profit.

Exclusions from the application of the insolvency law should be limited and clearly identified in the insolvency law.

(B) Jurisdiction

The insolvency law should specify which debtors have sufficient connection to the State to be subject to its insolvency law. Different approaches may be taken to identifying appropriate connecting factors, but the grounds upon which a debtor can be subject to the insolvency law should include that -

a. The debtor has its centre of main interests (COMI) in the State; or

b. the debtor has an establishment in the state.

The insolvency law should establish a presumption that, in the absence of proof to the contrary, a legal person's COMI is in the State in which it has its registered

office, and a natural person's centre of main interests is in the State in which that person has their habitual residence.

The insolvency law should clearly indicate (or include a reference to the relevant law that establishes) that the court jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings.

(C) Conversion to Liquidation

The insolvency law should provide that the court may convert reorganization proceeding to liquidation where -

a. Plan is not proposed within time limit specified by law and the court does not grant an extension of time;

b. A proposed plan is not approved;

c. An approved plan is not confirmed;

d. An approved or a confirmed plan is successfully challenged and

e. There is substantial breach by the debtor of the terms of the plan or an inability to implement the plan.

(D) Challenge to Plan

After court's conformation many of those insolvency laws that require conformation by the court provide for the plan to be challenged in the court subsequent to the conformation hearing (in some cases within specified time period) on the basis that the court is required to be satisfied to a number of conditions before confirming a plan, the ground for challenge after conformation would generally be narrower than the ground for challenge at the time of conformation and be limited; for example, fraud.

(E) Steps required for Court Confirmation

Where the insolvency law requires the court to confirm a plan it will normally be expected to confirm the plan that has been approved by the requisite majority of creditors (whether voting in classes or otherwise). As some states have made enable the court to play an active role in binding creditor by making the plan enforceable upon a class of creditors that has not approved the plan. This may require the court to undertake upon a class of creditors that has not approved the plan this may require the court to undertake a role that is in the nature of a legal formality. It does not require the court to examine the commercial basis upon which creditors voted in support obtained (i.e. there is no evidence of fraud in the approval process) and that certain conditions were satisfied.

(F) Court Confirmation of a Plan

No all states require the court to confirm a plan that has been approved by creditors' approval by the requisite majority of creditors is all that is required for the plan to become effective, and dissenting creditors will be bound by virtue of the operation of the insolvency law. In those systems the court will still have role to play in respect of review of the plan, where dissenting creditor or other parties' interest including the debtor challenge the plan itself or the means by which approval was procured.

Right of debtor: Such right of natural person debtor in insolvency proceeding may be affected by obligation under international and regional treaties such as the international convenient on civil and political right and European convention on Human right.

Right to be heard: The legal provision should be outlined to access information and retain personal property.

CHAPTER - IV

LIQUIDATION OF COMPANY UNDER INSOLVENCY PROCEEDINGS IN SOME SELECTED COUNTRIES

4.1 Background

Liquidation of company is related to even to the term insolvency of company. Insolvency is one of the grounds for liquidating a company. The concept of insolvency is also closely connected with the term bankruptcy because it is deemed that insolvency is inspired and evolved by the development of individual bankruptcy. In the incipient stage, bankruptcy law was applicable as regards bankruptcy of natural person only.

Hence, concepts of bankruptcy and insolvency dates back years, which the laws enacted as regards company in itself began to incorporate.

The concept of liquidation of company began to exist in this world with the birth of company when the concept of legal person such as company and corporation with limited liability was developed[209], because of this insolvency law was enlarged upon such legal person (corporate entities).

Before the concept of limited liability of legal entity came into practice formally, there was vast discrimination between the debtor and creditor. Creditors could exercise almost all rights, powers and accesses over the debtors... the vast majority of civilizations had a particular barbaric attitude towards the debtors.[210] Creditors could hurt unnecessarily and abuse of power unreasonably and treat upon the debtor and

[209]Paudel, *supra* note 10, at 31..

[210]Levinthal, *The Early History of Bankruptcy Law* (1918) 66 (5) U. Pa.L. Rev., 237 as cited in History of Insolvency Law 5 (3 Sep. 2014), https: //www.supremecourt: justice. nsw.gov.au/pdf/history-of-insolvency-law (accessed Sep. 3, 2022).

control over the property only for their own interest. But honest creditors were unable to have such access and power to recover from investment. There might be inequal sharing among the creditors and high possibility of conflict of interests. On the other hand, the company was bound to bear unnecessary hardless and it created negative impact in business sector. As a result, debtor had to be indebted and could not have easy way of exit for new business.

In such situation it is highly required that there should be adjustment of loan and settlement of conflict of interests where creditors are able to discuss and free to pass resolution for themselves to liquidate the company. As a consequences, creditor can share his recovery of investment in equal manner and debtor can get rid of the loan (debt).[211]

In present era of global dynamic scenario, industrialization and globalization push up the requirement of separate law dealing with liquidation of company under insolvency issue in corporate sector. Company has distinct legal personality and perpetual successor but all the companies may not be long lasting. Therefore, the company which is suffering with financial difficulties and is unable to sustain by fulfilling the liabilities and debts, may have various alternatives. Among them one alternative available to such company is liquidation. This remedy may be possible only under the competent laws relating to insolvency. Insolvency law aims to displace the sick company which is impossible to vitalize and leave the space for the market to the competent company.[212]

Under this, legal regimes on insolvency liquidation of the following countries are discussed:

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[211]Paudel, *supra* note 10, at 32-33.

[212]*Id.* at. 33.

4.2 United Kingdom

4.2.1 Law governing liquidation of company from Past to Present in the UK

United Kingdom (hereinafter 'UK') is English speaking country. The UK is considered to be the mother of almost all concepts regarding laws. The UK is such a country where naturally much of the insolvency laws derive. Prior to 1283 the English common law "Knew no process whereby a man could pledge his body or liberty for payment of a debt.[213] Twice in 1283 and 1285 the UK passed legislation providing for the imprisonment of the debtor after acknowledgement of a debt and a failure to pay.[214] In 1542 the UK enacted the first legislation dealing with Bankruptcy, An Act against such persons as do make Bankrupt.[215] Some of the laws for bankrupts can be seen tracing back to Ancient Babylon. Bankrupts were seen as crooks, and the Act stated is aim to prevent "crafty debtors"' escaping the realm. A more human approach was evolved in the Bankruptcy Act, 1705, under which the Lord Chancellors had power to discharge bankrupts, once disclosure of all assets and various procedures had been fulfilled. In Fowler v. Padget Lord Kenyon reasserted the old sentiment[216] that, "Bankruptcy is considered as crime and a bankrupt in the old law is called an offenders".

In the UK, the bankrupt was bonded to his creditors. As per the Insolvent Debtors Act, 1813, debtors could request release after 14 days in jail by taking oath that their assets would not exceed 20 pounds, but if any of their creditors objected, they had to stay inside. Attitudes were changing however, and the Bankrupts Act, 1825 allowed people

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[213] LexisNexis Butterworths, *Encyclopedia of the Laws of England* 2(3d ed.), at 80-83 cited in Levinthal, *supra* note 210, at 8.

[214] Statute of Action-Burnell (1283), 11 Edw I and State of Merchants (1285) 13 Edw I, cited *Id.*

[215] 34 & 35 Henry III, C4, cited in Edelman et al., The Evolution of Bankruptcy and Insolvency Laws and the Case of the Deed of Company Arrangement, at 573, https://www.hcourt.gov.aus/pdf/ (accessed Oct. 18, 2022).

[216] Paudel, *supra* note 10, at 33.

to initiate proceedings for their own bankruptcy.[217] From the late 18th and into to the early 19th century, there was an effort for reforming bankruptcy law.[218] Attitudes towards corporations were also quickly changing. Since the South Sea Bubble Disaster companies were viewed as inefficient and dangerous. But with the industrial revolution in full swing that changed. The Joint Stock Companies Act, 1844 allowed people to incorporate company without permission through a Royal Charter....[219]

The Joint Stock Companies Winding up Act, 1844 allowed for companies to be wound up in the Bankruptcy Court, and for the bankruptcy of companies to proceed without it necessarily extending to the bankruptcy of individual shareholders.[220] In 1848, legislation was passed enabling shareholders to make petition for the winding up of their company in Chancery.[221] This was part of a reaction against unlimited liability.[222] Because of existence of Bankruptcy Court and Chancery there was overlap of jurisdiction between Bankruptcy Court and Chancery which led to tension...[223] and at the same time the winding up of companies was moved out of the bankruptcy arena and under the companies Act.[224]

... In 1856, the Joint Stock Companies Act, 1856 was passed which consolidated the companies legislation in one, and the modern corporate insolvency law was born in UK.

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[217] *Id.* at 33-34.

[218] Allsop and Dargan, *Chapter 16 The History of Bankruptcy and Insolvency Law in England and Australia in Gleeson, Watson and Pedan,* Historical Foundations of Australian Law, 11, 'Commercial Common Law' [The Federation Press, 434 (2013)], cited in *supra* note 210, at 12.

[219] Paudel, *supra* note 10, at 34.

[220] Joint Stock Companies Act, (1844), 7 & 8 Vic. C 110 (1844 Act), Cited in *Supra* note 210 at 16.

[221] Joint Stock Companies Act 1848, 11 & 12 Vic. C. 45, *supra* note 210 at 16.

[222] Taylor Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth Century, Britain (Oxford University Press, 2013), 94, Cited in *supra* note 210 at 15.

[223] *Id.at 16.*

[224] Companies Act (1862) 25 & 26 Vic. C 89, *supra* note 210 at 17.

In 1869, the Bankruptcy Act, 1869 was passed allowing all people, rather than just traders to make petition for bankruptcy.

The Cork Committee chaired by Kenneth Cork produced the Report of the review Committee on Insolvency Law and Practice (1982) …. The Cork Report was followed by a white Paper in 1984, A revised framework for Insolvency law (Cmnd9175 (1984)), and these led to the Insolvency Act, 1986.[225] The Insolvency Act, 1986 is a central concern but the Enterprises Act, 2002 effected a number of highly significant changes.[226] Public concerns about the effectiveness of the regulation of the insolvency profession have resulted in a complete restructuring of the professional regulatory regime via the Small Business Enterprise and Employment Act, 2015.[227] The world of credit, moreover was also changed dramatically in the last decade or so and this has created both challenges and opportunities.[228] The rise of distressed debt market has come to bear on the role of corporate insolvency law in regulating situations of corporate distress.[229] This market provides an exit for creditor who see no potential surplus and who would otherwise resort to enforcement and sale through formal, legal processes.[230]

In the UK there are various legislations governing liquidation under insolvency matters. The most relevant legislations are as under:

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[225] E. Warren, *Bankruptcy Policy* 54, U. Chic. L. Rev., 198, 775-814 cited in Paudel, *Supra* note 69 at 35.

[226] Vanessa Finch & David Milman, *Corporate Insolvency Law: perspective and Principles,* Cambridge University Press, UK, 16 (3d ed. 2017).

[227] *Id.* at 17.

[228] *Id.*

[229] *Id.* at 18.

[230] *Id.*

- Insolvency Act, 1986 (as amended)
- Companies Act, 2006.
- Insolvency Rules, 1986 (as amended)
- Enterprise and Regulatory Reform Act, 2013

4.2.2 Liquidation of company under Insolvency Proceedings in the UK

In the UK, there are also over 30 special or modified regimes.... They apply to specific sectors and types of companies. Financial institutions, certain regulated entities (including utilities) and Charities are instances. Mainly the Banking Act, 2009 governs rescue and insolvency procedure for banks.[231]

In the UK, there are basically two kinds of laws i.e. insolvency law and bankruptcy law.

The former regulates companies formed in the UK which are unable to repay their debts and the latter concerns the rules for natural person. The term insolvency is generally used for companies formed under the Companies Act, 2006.[232] Insolvency means unable to pay debts.[233]

Under English law insolvency is determined on the basis of cash flow test, balance sheet test and specific test (legal test) as well and the company is considered to be insolvent if it is unable to pay its debts. As per cash flow test a company is insolvent if it is currently or will in the future be unable to pay its debts as and when they fall due for payment.[234] Under balance sheet test, a company is insolvent if the value of the

[231]Kate Stephenson, *UK: Restructuring & Insolvency Comparative Guide,* Mondaq (Oct. 25, 2023), https://www.mondaq.com/uk/insolvencybankruptcyre-structuring/93030/restructuring-insolvency-comparative-guide (accessed Aug. 25, 2025).

[232]United Kingdom Insolvency Law, Wikipedia, https://www.en.m.wikipedia.org/wiki/united-kingdom-insolvency-law (accessed 30 Oct. 2021).

[233]Insolvency Act, 1986 §122(1) (f).

[234]*Id.* §123 (1) (e).

company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.[235] The UK law has also embodied specific test for insolvency under Section 122 (1) (a) of the Insolvency Act, 1986. It states that if a company owes an undisputed debt to a creditor of more than £750, the creditor sends a written demand, but after 21 days the sum is not forthcoming, this is evidence that a company is insolvent.

In the UK law, there are various options under insolvency proceedings. Insolvency proceeding usually occurs after less formal arrangements have failed.[236] As a company nears insolvency, the UK law provides three key procedures. They are (a) company voluntary arrangement (CVA), (b) administration, and (c) Liquidation.[237]

(a) Company Voluntary Arrangement (CVA)[238]

A CVA is a formal insolvency procedure that allows the company to potentially accept less repayment with creditors in the hope of avoiding more costly administration or liquidation procedure and less in returns overall. It indicates an arrangement (or scheme of arrangements) approved by the court in which the company was formally agreed terms with its creditors for the settlement of its debts. The arrangement can be proposed by the administrator where the company is in administration, or the liquidator, when the company is being wound up or the directors in other circumstances. Before making proposal a petition can be filed with the court for a moratorium. The moratorium stops creditors from taking action against the company or its property for up to 4 weeks. Under a CVA the company is not required to demonstrate that it is, or is likely to become insolvent

[235] *Id.* §123 (2).

[236] Gerald Irwin, *What is an Insolvency proceeding?,* Irwin (2022), https://www.irwin-insolvency.com.uk/what-is-an-insolvency-proceeding? (accessed 16 June 2023).

[237] Stephenson, *supra* note 231.

[238] Insolvency Act, 1986 §§ 1-7.

(even though his procedure is available to the companies) under the Insolvency Act, 1986. A licensed insolvency practitioner is appointed as a supervisor to manage the CVA. If the CVA fails, the company is usually put into liquidation.[239]

(b) Administration

Administration in another formal insolvency procedure. If the directors are seeking to rescue the business as a going concern and a CVA is not appropriate, then an administration can be used instead.[240] It was first introduced in the insolvency Act, 1986 which was substantially revised by the Enterprise Act, 2002. The Act preferred that a company which is insolvent can go under administration. Administration is designed to hold a business together while plans are formed either to put in a place financial restructuring to rescue the company or to sell the business and assets to produce a better result for creditors than liquidation. Administration can also be used in case of failure to achieve neither of these purposes, simply as a mechanism to realise property to distribute the proceeds to the secured or preferential creditors.[241]

The court, directors, or bank can appoint a licensed insolvency practitioner as administrator which places a moratorium around the company while preventing legal actions.[242]The moratorium lasts for one year, but can be extended with the

[239]Insolvency, Wikipedia, https://www.en.m.wikipedia.org/wiki/insolvency; (accessed Apr. 22, 2021).

[240] Heather Bamforth, *Types of Formal Insolvency Procedures* (Feb 20, 2021), https://www.armstrongwatson.co.uk/Types-of-formal-insolvency-procedures (accessed 12 May 2021).

[241]Insolvency in Brief, Price Waterhous Coopers (2009), http://www.pwc.co.uk/insolvency-in-brief; (accessed 12 Mar., 2023).

[242]Sandra, *The Six Different Types of Insolvency Explained,* McAlister & Co. (17 Feb. 2023), https://www.info.mcalisterco.co.uk/blog/six-different-types-of-insolvency-explained (accessed 16 Jun. 2023).

administration.[243] Once an administrator is appointed the directors are replaced by him.[244]

The administrator has to prepare a statement of proposals in relation to how the purposes will be achieved within 8 weeks of appointment, which in nearly all cases have to be approved by the creditors.[245] One particular form of administration that is becoming more common is called pre-pack administration. In this process, immediately after appointment, the administrator completes a pre-arranged sale of the business of the company, often to its directors or owners.[246]

Being an officer of the court, the administrator has to perform his functions in the interests of creditors as a whole.[247] The administrator can have the company dissolved if all assets worth realising have been realised and distributed to creditors.[248] Within 12 months (or longer if extended) and after the administrator has either achieved the purposes of the administration or decided they are no longer achievable, he will put the company into liquidation to distribute the remaining funds.[249]

(c) Liquidation

Liquidation (also winding up) is another important insolvency procedures. This procedure contains the procedure of a company which is insolvent. Under the UK

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[243]Insolvency Act, 1986, 31 Para 76.

[244]*Id.* Para 67.

[245]Stephenson, *supra* note 231.

[246]Insolvency, Wikipedia, https://www.en.m.wikipedia.org/wiki/insolvency (accessed 22 Apr. 2021).

[247]Insolvency Act, 1986, Schedule B1 para 3(2).

[248]Insolvency in Brief, *supra* note 241..

[249]Sarah Lawson, *An Introduction to English Insolvency Procedures,* Dentons (29 Oct. 2020), https://www.dentons.com/en/insights/articles,an-introduction-to-English-insolvency-procedures (accessed 27 Feb. 2023).

law there are two routes (a) company voluntary liquidation, and (b) compulsory liquidation to liquidating an insolvent company.[250]

(i) Creditor Voluntary Liquidation/CVL

Creditor voluntary Liquidation (hence the name "CVL") is directors-led insolvency procedures. A CVL takes place when the directors donot swear a statutory declaration of solvency.[251] Sometimes a member voluntary liquidation (MVL) can also come within a CVL if the liquidator discovers that the company will not be paid in full within the time specified in the declaration of solvency.[252]

A CVL is an insolvent liquidation: the company is unable to pay its debts within the meaning of Section 123 of the Insolvency Act, 1986. It is started by the members who pass an extra-ordinary resolution to wind up the company.[253] Winding up commences from the passing of the resolution.[254] A meeting of the creditors must be held within 14 days of the resolution to liquidate the company.[255]

Both the company (members) and creditors can nominate a person to be liquidator.[256] The creditors' nominee prevails unless they appoint liquidator.[257] The company and creditors can establish a liquidation

[250]Finch & Milman, *supra* note 226 at 21.

[251] Insolvency Act, 1986 § 90.

[252] *Id.* § 95 (1).

[253] *Id.* § 84 (1) (c).

[254] *Id.* § 86.

[255] *Id.* § 98 (1).

[256] *Id.* § 100 (1).

[257] *Id.* § 100 (2).

committee of up to 5 persons.[258]The liquidation committee supervises over the liquidator, while he collects in and realises the assets of company, ascertains claims, distributes dividends to creditors and investigates the causes behind failure of the company.[259] The liquidator is responsible for realizing the assets gold distributing the proceeds.[260]The liquidator has to submit his report to the final meetings of the members and creditors[261] and to inform the Registrar about such meeting and to submit a copy of such report.[262] When the report is Registered by the Registrar the company is dissolved.[263]

(ii) Compulsory Liquidation

In the UK, compulsory liquidation (also winding up) takes place after the courts makes an order to have a company wound up. Compulsory liquidation is only method by which a creditors can initiate winding up. A winding up petition can be presented by a creditor, the directors, the company shareholders and, in certain circumstances, the Department for Business, Energy and Industrial Strategy.[264]The petition to the court must be based on one or more grounds such as the inability of the company to pay its debts, as per Section 122 (f) of the Insolvency Act, 1986.

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[258] *Id.* § 101 (1).

[259] Finch & Milman, *Supra* note 226, at 21.

[260] Insolvency Act, 1986, § 103.

[261] *Id.* 105 § (2).

[262] *Id.* §106 (1).

[263] *Id.* § 201 (c).

[264]Finch & Milman, *supra* note 226, at 21.

The compulsory liquidation commences when the court makes an order to wind up a company[265] and the official receiver becomes a liquidator.[266] The official receiver, must, within 12 weeks from the day of winding up order, summon the meeting of the creditors and contributories in order to appoint a licensed insolvency practioner to take over the job of liquidator and appoint a liquidation committee.[267] On appointment, the directors' power to bind the company automatically ceases.[268] The liquidator is responsible for realizing the assets and distributing the proceeds.[269]The liquidator must present his report to final meeting of the members and creditors[270]and to inform the Registrar and submits a copy of his report.[271] When the Registrar registers the report, the company is dissolved 3 months later.[272]

The liquidator, while settling claims, is to settle such claims on the basis of priority. The Insolvency Act, 1986 has clearly set out the order of priority of claims to be settled when company enters liquidation. Generally, the priority of claims on the company's assets are determined in the following order:[273]

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[265]Insolvency Act, 1986 § 129 (2).

[266]*Id.* § 136 (2).

[267]*Id.* §136 (5) (A).

[268]*Id.* §§ 91 (2) & 103.

[269]*Id.* § 143.

[270]*Id.* § 146.

[271]*Id.* §106.

[272]*Id.* §205 (2).

[273]Liquidation, Wikipedia, https://www.en.m.wikipedia.org/wiki//liquuidation (accessed 25 Mar., 2023).

- Liquidators costs and expenses;
- Creditors with fixed charge over assets;
- Cost incurred by an administrator;
- Amounts owing to employees by wages/superannuation;
- Payments owing with respect to worker's injuries;
- Amounts owing to employees for leave;
- Retrenchment payments owing to employees;
- Creditors with floating charge over assets;
- Creditors without security over assets and
- Shareholders.

4.2.3 Cross Border Insolvency in the UK

The UK was one of the EU member states at the time when the European Council (EC) Regulation on Insolvency Proceedings, 2002 had been adopted, except Denmark.[274] The Regulation provided that only the EU member state in which the centre of main interest (COMI) was located could open main proceedings, although secondary proceedings could also be opened in any other EU member State where there was an establishment. The former was concerned with the petition of the debtor company's assets and undertaking but the latter only with local assets.[275] For the first time, the

[274]Susan Kelly et al., *A Practical Guide to UK Insolvency Proceedings,* Squire Patton Boggs (Apr. 2011), https://www.squirepattonboggs.com/-/media/files/ingights/publications/20211/04/practical-guide-to-uk-insolvency-proceedings (accessed 24 Nov. 2022).

[275]Hamish Anderson, *An Introduction to Corporate Insolvency Law,* 08, Plym. L. & Crim. Just. Rev., 45 (2016), https://pearl.plymouth ac.uk/pdf/an-introduction-to-corporate-insolvency-laws (accessed 3 Apr. 2023).

Regulation set out the rules on jurisdiction to commence insolvency proceedings after 29 may 2002 and the law governing those proceedings across the EU.[276]

The UK exited from the EU on 31 January 2021.Before exit of the UK from the EU, foreign debtor's use of administration, CVAs or liquidation was regulated in part by the Recast Insolvency Regulation (EU) 2015/848 of 20 May 2015 (the RIR) updated form of the EC Regulation, which required that the COMI of the debtor be in England for the English Insolvency to be opened as a main proceeding and recognized by the court of EU member states.[277]

Following the end of the transitional period, and because the Brexit deal reached between the UK and the EU does not deal with cross border insolvency, the benefit of the RIR as between the UK and the EU is lost. However, the RIR will continue to apply to insolvencies where the main proceedings were opened before the expiry of the transitional period (31 December, 2020).[278] While English courts now can open a plenary insolvency proceeding in relation to a foreign debtor, there are real questions as to how and whether an English court judgment in respect of a foreign debtor will be recognized in other jurisdiction, particularly in the EU Member States. The principle of mutual recognition of proceedings and judgments included within the RIR no longer apply in respect of administration, CVAs and liquidations started in the UK.[279]

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[276] Alan Bannett & Karolina Lewandoska, *What is the Impact of Brexit on Cross-Border Insolvency?* The Gazettee, (25 Mar. 2021), https://www.thegazette.co.uk/all-notices/content/103914/what-is-the-impact-of-brexit-on-cross-border-insolvency (accessed 29 Mar. 2023).

[277] Karen McMaster et al., *The Insolvency Review: United Kingdom-England & Wales,* The Law Reviews (25 Oct. 2022), http://thelawreviews.co.uk/title/theinsolvency-review/united-kingdom-england-wales (accessed 13 Jan. 2023).

[278] Kelly et al., *supra* note 274.

[279] McMaster et al., *supra* note 277.

The UK has adopted the UNCITRAL Model Law on Cross Border Insolvency, 1997 and implemented the Model Law via the Cross Border Insolvency Regulation (CBIR) 2006. By virtue of Brexit, EU insolvency proceedings are no longer recognized automatically in the UK. To obtain recognition of those proceedings adebtor or a foreign representative appointed in foreign insolvency proceedings can petition the English court.[280] Moratorium relief on creditor action is automatically granted on recognition of a foreign main proceeding. The court can also grant other relief.... The court can offer assistance and relief either under Section 426 of the Insolvency Act, 1986, which provides for cooperation both between jurisdictions with the UK and between the UK and other designated (mainly commonwealth) jurisdiction.[281]The English court can apply English insolvency law or the law of the requesting court (jurisdiction) but like the CBIR, Section 426 cannot be used to recognize and enforce foreign judgments.[282]If both the CBIR and Section 426 do not apply, the English court on the ground of inherent authority, cooperates with foreign insolvency representatives and recognizes foreign insolvency proceedings, in instances where the relevant foreign office-holder has satisfied the common law principles developed by the courts in England.[283]

4.3 USA

4.3.1 Law Governing Liquidation of Company in US from Past to Present

America (hereinafter 'US/USA') is an American English speaking country. The US has enacted laws relating to insolvency (also bankruptcy), after being independence in

[280] Philip Wells & Lucy Aconley, *Cross-Border Recognition of Insolvency and Restructuring Proceedings Post-Brexit,* 188, Allen & Overy (Mar. 2021), https://www.allenovery.com/pdf (accessed 23 Mar. 2023).

[281]Levinthal, *Supra* note 214.

[282] Wells & Aconley, *supra* note 280 at 189.

[283] Rubin v. Eurofinance SA & Ors [2012] UK-SC 46.

1776. In the US, the bankruptcy law governs both individual and companies. Insolvency proceedings are determined only by federal court under federal law. There is no state level statute relating to insolvency regime. After Bankruptcy Amedment Act and Federal Judgeship Act of 1984, insolvency Court was established as a part of Federal District court and Insolvency Court was established in all District Court.[284]

The US bankruptcy law has its own history. During colonial times and into the early US bankruptcy laws were criminal laws.[285] In 13 colonies of the US, laws as to the payment and collection of debt were executed depending upon English common law. If the debtors were unable to repay debts and had property that would be confiscated and assigned to the creditors, or the debtors were imprisoned.[286]When the US was declared independent, the US started exacting bankruptcy laws either. The US constitution was ratified in 1789.[287] Article 1,Section 8,Clause 4of the US constitution, 1789 has authorized congress to enact "Uniform laws on the subject of bankruptcies throughout the US." The bankruptcy clause can be found as a part of a larger package of provisions, which includes the better-known commerce clause designed to create a national economy.[288]

The first official bankruptcy law, in the US, was enacted in 1800 in response to land speculation. This was promptly repealed in 1803.[289] The Act was very pro-creditor

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[284]Poudel, *Supra* note 10, at 35.

[285]Donald L. Swanson, *Some Bankruptcy Law History: Debtor Benefits are Always Touth Sell (Part I, Ancient Days to 1803),* Mediatba (Jan 17, 2023), https://mediatbankry.com/2023/d/17/some-bankruptcy-law-history-debtor- benefits–are–always-a-tough-sell-part-I-ancient-days-to-1803 (accessed 16 Apr. 2023).

[286]Francis Regis Noel, *A History of the Bankruptcy Law,* C.H. Potter & Company, 35-36 (1919).

[287]*Supra* note 285.

[288]Lubben, *Supra* note 55, at 3.

[289]A Brief History of Bankruptcy, Bankruptcy Data (2022), https://www.bankruptcydata.com/free/history/a-brief-history-of-bankruptcy (accessed, Nov. 24, 2022).

oriented. Only involuntary bankruptcy cases were allowed, and only merchants could be debtor.[290]Creditors could make a petition regarding bankruptcy against a debtor.[291] The Act allowed discharges only if two-thirds of creditors (in number and dollar amount) agreed.[292] In 1841, the second bankruptcy law was passed in the wake of the panics of 1837 and 1839, which allowed both voluntary and involuntary bankruptcy.[293]This Act was repealed in early 1843, under which, for the first time debtors could initiate their own bankruptcy cases.[294] After about 24 years of repeal of the Act of 1841 in 1867, next bankruptcy Act was passed following a financial crisis. This recognized both voluntary and involuntary bankruptcy cases. This Act also introduced the concept of the composition agreement, which was the predecessor to the plan the reorganization under prevailing bankruptcy law. This Act of 1867 was repealed in 1878.[295]These early Acts and the Bankruptcy Act of 1898, known as the Nelson Act[296]established the modern concepts of debtor-creditor relations.[297] In 1898, the another Bankruptcy Act was enacted, which was a watershed in American Bankruptcy law. The Act of 1898 set out more provisions for the debtor than under prior bankruptcy

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[290]Robert Jacobvitz, *A Relatively short History of Bankruptcy Law in the United States,* National Conference of Bankruptcy Judges (27 Feb. 2019), https://ncbjmeeting.org/2019 'blog' /2019/02/27/a-relatively-short-history-of-the-bankruptcy-laws-in-the-united-states (accessed 16 Apr. 2023).

[291]Bradley Hansen, *Bankruptcy Law in the United States,* Economic History Association by Robert Whaples (ed.) (14 Aug. 2001), https://eh.net/encyclopedia/bankruptcy-law-in-the-united-states (accessed 16 Apr. 2023).

[292]United States Courts, *The Evolution of US Bankruptcy Law,* https://www.*rib*.uscourts.gov /newhome/docs/the-evolution-of-u-s-bankruptcy-law/pdf/ (accessed 13 Apr. 2023).

[293]*Id.*

[294]Jacobvitz, *supra* note 290.

[295]*Id.*

[296]Act of July 1, 1898, Ch. 541, 30 Stat. 544.

[297]History of Bankruptcy Law in the United States, Wikipedia, https://www.wikipedia.org/ wiki/history-of-bankruptcy-law-in-the-united-states/ (accessed, Apr. 11, 2023).

law but this Act allowed a debtor to claim exemptions only under state law and provided for both voluntary and involuntary bankruptcy cases.[298] This Act was the first to give companies in distress an option of being protected from their creditors.[299]The Act was designated to aid creditors in liquidation of an insolvent debtor's assets, but one of the important features of prevailing bankruptcy law is the provision for reorganization of insolvent corporations.[300] In 1938 amendments was made to the Act of 1898 through enacting the Chandler Act. The Chandler Act included several chapters such as chapter X and XI regulating corporate plans arrangement and so on. This Act covered the concepts of classification of claims under plans of arrangements, the appointment of trustees and the like.[301]

The Bankruptcy Reform Act 1978 replaced the Act of 1898. The Act, commonly referred to as the Bankruptcy Code, constituted a major overhaul of the bankruptcy system. The Act covered cases filed before October 1, 1979 and consisted of 4 titles.[302]Chapter 11replaced chapters X and XI, chapters XIII became Chapter 13. Eligible debtors are entitled to commence bankruptcy cases under chapters 7, 11, 12, 13 or 15. Certain creditors are given right to commence involuntary bankruptcy cases under some of the chapters. Debtor can obtain a discharge of debts to attain a "fresh start" upon making certain requirements, with exceptions.[303] The Act of 1978 was

[298]Jacobvitz, *supra* note 290.

[299]A Brief History of U.S. Bankruptcy Law, The Law Office of Mark B. French (15 Dec. 20144), https://markfrenchlaw.com/12/15/2014/a-brief-history-of-u-s-bankruptcy-law/ (accessed Apr. 16, 2023).

[300]Hansen, *supra* note 291.

[301]Jacobvitz, *supra* note 290.

[302]History of Bankruptcy Law in the United States, *supra* note 297.

[303]Jacobvitz, *supra* note 290.

implemented during the 1980s. In 1982, the US Supreme Court[304]declared the Bankruptcy court's enlarged jurisdiction established by this Act unconstitutional. The decision led to the Bankruptcy Amendment Act of 1984 and in the same year Federal Judgeship Act was enacted by which Insolvency Court was established as a part of Federal District Court and insolvency court was established in all districts courts.[305] In 1994, the Code was again amended by the Bankruptcy Reform Acts of 1994. This Act made several important changes to the Code, affecting both consumer and business bankruptcy, and benefiting both debtors and creditors.[306]

In 2005, another amendment was made to the Bankruptcy Code through enacting the Bankruptcy Abuse Prevention Protection Act of 2005, which, in particular, concerns with consumer and cross border bankruptcy. Among other things, the Act of 2005establishes a means test for individual debtors, makes credit counseling and condition for relief, and requires financial management training for Chapter 7 and 13 debtors to obtain discharge.[307]

From the above discussion, it is obvious that Bankruptcy Code of 1978 is the major bankruptcy law in America governing bankruptcy (also insolvency) cases. The Code has been amended many times and it is in operation in America till now.

In the US bankruptcy or insolvency proceedings are dealt with by Bankruptcy Code codified in title 11 of the United States Code (USC). Title 11 consists of 9 Chapters, 6 of which relates with the filing of a petition and the remaining Chapters provide rules

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[304]Northern Pipeline Construction Co. v. Morathan Pipeline Co.

[305]Paudel, *supra* note 10, at 305.

[306]Jack Murray, *A Brief History of Bankruptcy Law*/Blog/15/09/2016/ https://blog/firstam.com/ commercial/a-brief-history-of-bankruptcy/-law (accessed 24 Nov. 2022).

[307]Jacobvitz, *supra* note 290.

governing bankruptcy cases in general. In addition, there are some other laws too relating to bankruptcy. Such as the Federal Rules of Bankruptcy procedure (Often called the Bankruptcy Rules) and Local Rules of each Bankruptcy Court govern the procedural aspects of the bankruptcy process.[308] While bankruptcy cases are filed in US Bankruptcy Court (units of US District Courts), and Federal Law govern procedures in bankruptcy cases, state laws are often applied when determining property rights. For example, law governing the validity of liens or rules protecting from creditors (known as exemption) derive from state law plays a vital role in many bankruptcy cases it is often unwise to recognize some bankruptcy issues across state lines.[309]

4.3.2 Liquidation of Company under Insolvency Proceeding in the US

Now in the US, US Bankruptcy Code provides for the following different forms of insolvency proceedings:

a) Chapter 7 dealing with liquidation

b) Chapter 9 dealing with the adjustment of a financially troubled municipalities

c) Chapter 11 dealing with reorganization

d) Chapter 12 dealing with the adjustment of debts of financially troubled family farmer or fisherman

e) Chapter 13 dealing with the adjustment of debts of an individual with regular income and

f) Chapter 15 dealing with cross border issues.

The nutshell, to generalize the above chapter-wise insolvency proceedings, the following insolvency proceedings can be the found in the United States:

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[308]United States Courts, *Process-Basic-Bankruptcy Basics,* https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (accessed 12 May, 2022).

[309]Paudel, *Supra* note 10, at 55.

(i) Liquidation;

(ii) Reorganization;

(iii) Family farmer and

(iv) Consumer debt adjustment.

The liquidation (chapter 7) and re-organization (chapter 11) are concerned with cooperate insolvency and the family farmer and consumer debt adjustment with individual insolvency.

Whatever it is, the US Bankruptcy Code provides for two main types of insolvency proceedings (i) chapter 7 liquidation and (ii) chapter 11 reorganization. Each of these two has not same procedures and forms but they provide for permanent relief from certain debts.[310]

Although this study is primarily concerned with liquidation, it is useful to know about reorganization in the US briefly.

(i) Reorganization

Reorganization is one of the most significant forms of insolvency proceedings. Chapter 11 is more like a reset. The goal of this chapter is a discharge of debt. It provides businesses a chance to operate while they restructure the debts and assets to pay back creditors.[311] So, chapter 11 allows for reorganization of a debtor (company).

In the case of reorganization, a company can be solvent or insolvent. It does not need to be insolvent or failing to pay its debts on time to seek chapter 11 relief

[310] Bankruptcy FAQs, Justia (Oct. 2022), https:// www.justia.com/bankruptcy/faqs/ (accessed 6 Apr. 2023).

[311] What is Bankruptcy? Debt, https:// www.debt.org/bankrupty/what-is-bankruptcy? (accessed 16 Apr. 2023).

and there is no specific eligibility test or other requirement that a debtor's liabilities exceed its assets or that it cannot pay its debts as they become due.[312]Reorganization can be voluntary and involuntary. Commencement of the procedure is by court filing either voluntary, where it is initiated by a debtor filing a petition for relief with a US Bankruptcy Court. A debtor is eligible for Chapter 11 proceeding if it is domiciled or has a place of business or any property in the US.[313]Upon the commencement of a bankruptcy case, the automatic stay immediately protects the debtor and its assets from creditor.[314] Upon filing the petition, the debtor is automatically becomes a debtor in possession and the business continues to operate.[315] The debtor remains so until a reorganization plan is confirmed, the case is dismissed or converted to Chapter 7 or Chapter11 trustee is appointed.[316] In the case of an involuntary filing, typically three creditors are required to jointly petition to commence an involuntary case.[317] Upon the filing of a petition, the court can, on request of the interested party appoint a trustee to operate business.[318]If a trustee is not appointed, the debtor continues to operate the business and to use, acquire or dispose of property as if the case had not be commenced.[319]

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312 Gerad Uzzi, *Restructuring and Insolvency in the United States: Overview,* Westlaw, https://content.next.westlaw.com/practical_law/document/ld4restructuring-and-insolvency-in-the-united-states-overview (accessed 5 Dec. 2022).

313 11 USC §109 (a).

314 *Id.*§ 362 (a).

315 *Id.*§ 1101 (1).

316 *Id.*§ 1107 (a).

317 *Id.*§ 303 (a).

318 *Id.*§ 1104 (a).

319 *Id.*§ 1104.

The primary goal of Chapter 11 proceeding is to formulate a comprehensive reorganization plan that will ultimately rehabilitate financially troubled debtors.[320] As soon as is practicable after the order for relief, the court has to appoint a committee of unsecured creditors: the creditors' committee (CC).[321]Among other things, the most important functions of the committee are to participate in the formulations of a reorganization plan and to decide whether to recommend it to the creditors.[322]

A debtor is required to propose a Chapter 11 plan within 120 days, which cannot be extended without court order for cause.[323] No other party can file a plan during this period of time. The Bankruptcy Court can extend the period of exclusivity for upto 18 months, if the debtor can provide sufficient cause for the court to do so.[324]Any proposed plan has, among other things, to divide eligible holders of claims and interests into classes.[325] The debtor can file a proposed Chapter 11 plan at anytime.[326] When a plan is proposed, creditors who are adversely affected by the plan can then vote in favour of or against it.[327]A class of creditors has accepted, that is, voted in favour of a proposed plan if creditors... that hold at least two-thirds in amount and more than one half in number of the allowed claims of

[320] Tamir v. US Trustee, 566 B.R. 278, 283 (D. Me. 2016)

[321] 11 USC § 1102 (a).

[322] *Id.* §1103 (c) (3).

[323] *Id.*§ 1121.

[324] *Id.*§ 1121 (d).

[325] *Id.*§ 1126.

[326] *Id.*§1121 (a).

[327] *Id.*§ 1126 (a).

class of such class have voted in favour of the plan.[328] As soon as voting deadlines expires, the court has to hold a hearing to decide whether the plan shall become effective, that is, whether to confirm the plan.[329]A plan will be considered only if it satisfies certain requirements, including that the debtor's creditors will not receive less than they would under a Chapter 7 liquidation (the best interest test)[330] the plan is feasible,[331] and if there are dissenting creditors, that the plan does not discriminate ungainly and is fair and equitable (the absolute priority rules).[332]The reorganization plan is subject to court approval, at which point it is generally binding on all debtors, creditors and other parties.[333] If the plan is not confirmed, Chapter 11 case can be converted to a Chapter 7 case (liquidation).[334]

(ii) Liquidation

In the US, business entities are eligible for Chapter 7 bankruptcy. Businesses generally file for Chapter 7 liquidation …. A Chapter 7 bankruptcy terminates the company's operations and takes the company completely out of business.[335]

Chapter 7 liquidation is also known as a straight bankruptcy.[336]The most important and common form of insolvency proceeding in the US is liquidation,

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328 *Id.*§ 1126 (c).

329 *Id.*§ 1128 (a).

330 *Id.*§ 1129 (a) (7).

331 *Id.*§ 1129 (a) (11).

332 *Id.*§ 1129 (b) (1).

333 *Id.* §§ 1121, 1129 & 1141.

334 *Id.* §§ 348 & 1112 (b).

335 Chapter 7 Bankruptcy, Cornell Law (July 2022), https://www.law.cornell.edu/wex/chapter-7-bankruptcy (accessed 8 May 2023).

336 Bankruptcy, Wikipedia, https://www.wikipedia.org/wiki/bankruptcy (accessed Apr. 10, 2023).

which the US Bankruptcy Code has included under Chapter 7. This chapter covers the process of liquidation. The US code provides for, among other things, individual and business liquidation under chapter 7. So, in the US both individual and business (entity) can file for bankruptcy under chapter 7. The goal of Chapter 7 is a discharge of debts, Chapter 7 liquidation may be the best choice when the business has no viable future.[337] Chapter 7's primary purpose is to liquidate the debtor's assets in order to satisfy the debtor's creditors.[338] Hence, Chapter 7 can be seen as a conclusion.

Chapter 7 may be a viable option to Chapter 11 when the going concern value of a debtor's business and properties has been lost. Chapter 7 may be preferable if the liquidity needed to administer the high costs of Chapter 11 or to continue or restart business operations is unavailable or if incumbent management is untrustworthy, unreliable or uncooperative.[339]Failure of reorganization plan under Chapter 11 is another ground to file for Chapter 7 relief.[340]

Like reorganization, liquidation can be either voluntary or involuntary. Commencement of the procedure is by the court filing either by voluntary, where it is initiated by a debtor filing a petition for relief with a US Bankruptcy Court. A person who resides or has a domicile, a place of business or property in the US can be a debtor.[341]Thus, as a person, corporation is eligible for Chapter 7,[342] which

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[337] Rosemary Carlson, *What is Business Bankruptcy.* The Balance Money (18 Jan, 2020), https://www.thebalancemoney.com/what-is-business-bankruptcy-393017 (accessed 24 Apr. 2023).

[338] E.g., In re Cohen, 141, B. R.1, 1 (Bankr.D. Mass.1992).

[339] Paul Leake & Carl T. Tullson, Insolvency 2021, USA: Law and Practice, Skadden (Nov. 2021), https://www.skadden.com/publication/2011/11/pdf/ (accessed 28 May, 2023).

[340] 11 USC § § 348 & 1112 (b).

[341] *Id.*§ 109 (a).

[342] Lubben, *supra* note 55, at 10.

includes company either. Even in the case of liquidation, upon the commencement of a bankruptcy case, the automatic stay immediately protects the debtor and its assets from creditor intervention.[343]

Involuntary petition is initiated by creditors, if a debtor (company) has 12 or more creditors, then an involuntary petition must be initiated by 3 or more creditors that hold non-contingent, undisputed claims against such company.[344] If the debtor has less than 12 creditors, a single creditor can file the petition.[345] If the petition is not timely controverted, the court will order relief against the debtor in an involuntary case.[346] Thus, in the case of businesses, a troubled company (debtor) can be forced by creditors to file for insolvency. After the petition is filed, the business ceases to exist unless the trustee decides to continue operations.[347]

Chapter 7 is a trustee controlled liquidation. The Chapter 7 procedure is administered by a trustee. Upon the commencement of the Chapter 7 case, the incumbent management and directors of the company are automatically replaced by an interim trustee appointed by the US trustee.[348] Such trustee remains unless creditors elect a different permanent Chapter 7 trustee.[349] The trustee is required to investigate the financial affairs of the company and liquidate and distribute the

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343 *II USC* 362 (a).

344 *Id.* § 303 (b).

345 Alan Kornberg & Elizabeth McColm, *Restructuring & Insolvency Laws & Regulations,* USA: 2022-2023, (11/05/2022), www.icgl.com/practice/area/restructuring-&-insolvency-USA (accessed 16 Jan., 2023).

346 11 USC§ 303 (h).

347 US Bankruptcy Code, *Corporate Finance Institute* (18 Jan. 2023), https://corporatefinance institute.com/resources/commercial-lending/us-bankrupcy-code/ (accessed 11 Apr. 2023).

348 11 USC § 701 (a).

349 *Id.*§ 702.

debtor's property as expeditiously as possible.[350]The trustee collects and sells the debtor's assets in one or more 363 sales, and uses net proceeds, if any, to pay creditors in accordance with statutory priorities set by Section 726 of the US Code.

Under Section 726, there are 6 classes of claims, and each class must be paid in full before the next lower class is paid anything. The debtor is only paid if all other classes of claims have been paid in full (secured creditors are assumed to have received the value of their collateral out-side). While distributing, first comes priority claims as defined under Section 507, including administrative claims. Following priority claims, property of the estate is distributed next under Section 726 (a) to general unsecured creditors who filed timely claims come before creditors who filed late claims.[351]

The debtor is only distributed if all these claims have been distributed in full.[352]Creditors can be distributed by the trustee without court approval of any distribution plan. At the conclusion of a Chapter 7 case, the trustee has to file a final report and a final account of its administration of the estate.[353] Unless any concerned party objects to it, the court will issue a final decree and the clerk of the court will close the case.[354]

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350 *Id.*§ 704.

351 *Id.* § 726 (a) (2) & (3).

352 *Id.* § 726 (a) (6).

353 Leake & Tullson, *supra* note 339, at 28.

354 Cara O'Neill, *When Does My Chapter 7 Banruptcy Case End?* Nolo (4/10/2024), https://www.nolo.com/legal-encyclopedia/when-does-my-chapter-7-bankruptcy-case-end.html (accessed 2 Sept. 2023).

4.3.3 Special Regimes on Liquidation Proceeding in the US

In the US, there are other some special laws governing liquidation proceedings of financial institutions such as insurance company, bank etc. These special types of laws are supplementary to US Bankruptcy Code. As for examples:

- Securities Investor Protection Act of 1970 (SIPA);
- The Dodd-Frank Wall Street Reform and Consumer Protection Act;[355]
- Commodity Exchange Act of 1936;
- Federal Deposit Insurance Act.[356]

4.3.4 Cross Border Insolvency Issue in the US

The United States has adopted United Nation Commission on International Trade Law (UNCITRAL) Model Law on cross border insolvency under Chapter 15 of the US Bankruptcy Code by enacting the Bankruptcy Abuse Prevention and Consumer Protection Act since 2005. Chapter 15 is intended to provide an effective mechanism for dealing with cases of cross border and enables a foreign representative to seek recognition in the US of a foreign insolvency.

Pursuant to Section 109 (a) of the US Code if a company has a domicile, place of business or any property in the US, the company can file a petition under either Chapter 7 liquidation or Chapter 11 reorganization. The foreign representative of such company can also commence Charter 15 case in the US for recognition of judicial or

[355] Pub.L.No. 111-203 (2010).

[356] Pub.L.No. 81-797 (1950).

administrative proceedings in a foreign country.[357] While filing a petition for recognition of the foreign proceeding, the petition has also to include certain documents such as letters of existence of the foreign proceeding, the appointment of the foreign representative and a summary of the foreign proceedings to date.[358]

Upon the filing of such petition by the foreign representative and after notice and a hearing a foreign proceeding is granted automatic and mandatory recognition in the US under Section 1517 of the US Code. Once the bankruptcy court has entered a recognition order concerning the foreign proceeding whether main or non-main[359] an automatic stay is possible under the US Code but automatic relief is only granted upon recognition of a foreign main proceeding.[360]Certain discretionary relief under Section 1521 of the US Code can be granted in a foreign proceeding as either main or non-main.

4.4 France

4.4.1 Law Governing Liquidation of company in France from Past to Present

France is one of the countries of European Union (EU) and a French languages peaking country. France is the key follower of civil law family in the world.

At an early date, France introduced Germanic Principle of priority. In the old Countumes of Ala is, in the first half of the 13thcentury, we find:" totz les, pretz, Per rons dels deutes, vengutz em paga als crezedors", which in olim's translation is interpreted to mean that the creditors were satisfied in the order of the date the debts

[357] Kornberg & McColm, *Supra* note 345.

[358] 11 USC § 1515.

[359] *Id.* § 1517.

[360] *Id.* § 1520 (a) (1).

were contracted.[361] Actual insolvency proceedings originated in the annual fairs of Champagne and Brie, while taking part in one of these fairs, if a debtor was unable to pay his debts he could be imprisoned and his goods could be attached and distributed among his creditors. This early bankruptcy system was adopted in Lyon in 1420 when the fair of Champagne was moved to that city.... During the 15th and 16th centuries it inserted a number of provisions adopted from the Italian law.[362]In 1667, the French Bankruptcy Law was restated in the Reglements de la place de change de la ville de Lyon and later was inserted in the Ordonnance Du Commerce of 1673. This was the first French Commercial code.[363] The Code's provisions regulated both voluntary assignments for the creditors' benefit made by the merchants (Title X) and the proceedings and effects flowing from bankruptcy (Title XI).[364]

In 1807, the bankruptcy law was first passed in the name of Code de Commerce and the Ordonnance Du Code of 1673 was the basis of Book III of the Code de Commerce. This code relates to bankruptcy.[365] The Code de Commerce was intended to supplement the provisions of the Code Civil with respect to issues of Commercial law.... The original version of the Code de Commerce of 5 September 1807, which came into effect on 1 January 1808, is one of the so-called Napoleonic Grands Codes alongside,

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361 Olim III 2, at 1487, cited in LE Levinthal, 244-45(1918), https://scholarship.law.upenn.edu/pdf/The-early-history-of-bankruptcy-law (accessed 9 Nov. 2002).

362 J. H. Dalhuisen, *Compositions in Bankruptcy,* 14 (1968), cited in John Hansberger, Bankruptcy in France, II L. Rev. Du Barreau Canadian, 62 (1974), https://canlii.org/bankruptcy-in-France, (accessed 30 May 2023).

363 John Hansberger, *Bankruptcy in France,* II L. 61 (1974), https://canlii.org/bankruptcy-in-France, (accessed 30 May, 2023).

364 Bankruptcy, Britannica, https://www.britinnica.com/bankruptcy/ (accessed 30 Oct. 2021).

365 Hansberger, *supra* note 363.

interalia, the Code Civil.[366] This Code applied only to debtors who were in business was governed by the Code Civil (Civil Code)[367]. Several amendments and reforms have been made to the Code de Commerce till date of this study.

In 1938 the bankruptcy provisions of the Code was reformed for the first time….Among other things, bankruptcy resulted from an order made by the tribunal de commerce.... The trustee was required to make an inventory of the bankrupt's property. He could liquidate the property or in certain cases was permitted to carry on the bankrupt's business.[368]

Throughout the second half of the 19th century there was the limited civil procedures available for collective execution and lack of alternative procedures based upon both subjective and objective grounds arising out of the cessation of payments by a debtor.[369]A system of judicial liquidations was also introduced. It was la liquidation judiciare,[370]which allowed the settlement of bankruptcy cases without the still infamous name of faillite.[371]

After the 1st world war, legislation was enacted to assist the honest but unfortune debtor to escape bankruptcy or the liquidation judiciare[372] Again in 1935 an amendment was

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366 Gebhard Rehm, Code De Commerce, Max-Eup (2012), https://max-eup 2012.mpipriv.de/index.php/code-de-commerce (accessed 4 June, 2023).

367 See, for example, Arts. 1276, 1446, 1613, 1865 (5), 2003 & 2032.

368 Hansberger, *supra* note 363, at 63.

369 *Id.*

370 Law of Mar. 4th, 1889.

371 Pierre Cyrille Haut Coeur & Nadine Levratto, *Bankruptcy Law and Practice in XIXth Century France,* Hout Coeur-Levratto, https://houtcoeur-levratto-prasad/pdf/bankruptcy-law-and-practice-in-XIXth-century-France (accessed, 29 May 2023).

372 Hansberger, *supra* note 363, at 65.

made to the law in order to both simplify and speed up the administration.[373] Because of the increment in a number of merchants who failed to observe normal standards of commercial morality, in 1947 the law was again amended in an attempt to improve such standards by ensuring that bankrupts were effectively barred from participating in the commercial life of the community.[374]Several amendments had been made to the legislation before the reforms of 1955. The reforms prompted business rescue and introduced a new system of recovery proceeding known as reglement judiciare, which provided for the re-establishment of the debtor in business as an alternative to liquidation.[375]

In 1955, a commission was formed to reform the Code de Commerce. Among other things, these reforms extended the sanctions against debtors who had committed bankruptcy offences and were adjudged bankruptcy.[376] The next reformwas made to the Code de Commerce in 1967, which among other things, tried to reconcile the traditional notions of punishing the man with the modern concept of preserving an economic enterprise,[377] and embodied provision on a moratorium for businesses that were not yet in a state of cessation of payments and set the framework for present day French insolvency law.[378]

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373 *Id.*

374 *Id.*

375 Katherine Bridge, *Insolvency-a Second Chance,* 04, Law in Transition, European Bank for Reconstruction and Development, 28 & 33 (2013); https://www.ebrd.com/insolvence-a-second-chance/pdf (accessed 4 Jun. 2023).

376 Hansberger, *supra* note 363.

377 *Id.* at 69.

378 Bridge, *supra* note 375.

Again book VI of the Code has been modified by inserting new provisions on restructuring and insolvency proceedings at several times. The dates of modification are 1985 and 1994,[379] 2005, 2008, 2010, 2014, 2016, 2019, 2020 and more recently 2021.[380]

Thus, French insolvency law has been reformed or modified at several times and Book VI of French Commercial Code governs the matters relating to even liquidation of company in France. The Book VI is dedicated to companies facing difficulties.

Generally, the following legislations regulate the liquidation proceedings in Frances:

a. Book VI of French Commercial Code, and

b. EU Regulation

There are also some other specific provisions which apply to regulated sectors, such as banking and insurance.

4.4.2 Liquidation of Company under Insolvency proceedings in France

In France there are several forms of insolvency proceedings which the French Insolvency (Bankruptcy) law or Code De Commerce under Book VI of Commercial law governs. French insolvency law has incorporated various changes brought into it through amendment or reforms till date of the study from its enactment in France.

In France, following two forms of Insolvency proceedings come within the French insolvency proceeding:

a. Out of court proceedings and

b. Formal in court proceedings.

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[379] Nigam, *supra* note 14.

[380] Saam Golshani et al., *Insolvency 2022: Law and Practice,* White & Case (25 Nov. 2022). <https://www.whitecase.com/insight-our-thinking/insolvency-2022-law-and-practice (accessed 17 Feb. 2023).

Although this study is concerned with liquidation proceeding, other insolvency proceedings can be discussed briefly for the general knowledge.

(a) Out of court proceedings

These, in particular, deal with companies that are not in the state of cessation of payments or insolvency. The proceedings coming into these proceedings (i) Ad hoc proceeding/mandat ad hoc), (ii) conciliation proceeding (conciliateur) and (iii) accelerated safeguard proceeding.

Also known as mandat ad hoc, ad hoc proceeding is a voluntary preventive and confidential proceeding whereby difficulties can be resolved. Such proceeding is opened at the request of the company (debtor). Its objective is to restore the position of the company prior to the suspension of payments. An ad hoc representative is appointed to reach an agreement between the company and some of its creditors as regards to payment time frame and so on.[381]

Like ad hoc proceeding conciliation proceeding is also a voluntary one. It is available to a company that is facing difficulties, provided that it is solvent or has not been insolvent for more than 45 days. Such proceeding is opened when the company requests to restore the position prior to the suspensions of payment. Under this proceeding a conciliator is appointed, and he tries to resolve the financial difficulties of the company, seeks to reach an agreement between the company and its main creditors with respect to the payments of debts in several installments and / or waiving of part of the debts.[382]

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[381] Guillaume Plantin et al., *Reforming French Bankruptcy Law,* 7/7Du Conseil D'analyse Economique (June 2013) 1, 4, https://www.cae-eco.fr/static/pdf/cae-note007-en.pdf (accessed 5 June, 2023).

[382] Restructuring, Baker & Mckenzie, 23 Dec. 2016 https://bakermekenzie.com/wp-content/uploads/sites23/20162/121/global-restructuring-insolvency-guidenews-logo (accessed 30 May 2023).

Accelerated safeguard proceeding was introduced in 2019 into French insolvency laws. It is no longer limited to companies reaching certain thresholds. It is available to all corporate entities. That is to say, it serves as a secure outline to implement the plan that had been already negotiated during conciliation proceeding. Its objective is to adopt a safeguard plan, which takes place throughout the constitution of affected parties' class, either with an approval of each class or through a cross-class cram-down.[383]

(b) Formal in Court Proceeding

This is court monitered proceeding. Fall the following forms of proceedings under formal in court proceedings:(a) safeguard proceeding (b) reorganization proceeding and (c) liquidation proceeding.

(i) Safeguard Proceeding

Safeguard proceeding (also sauvegarde) is a preventive procedure and available to a company on a voluntary basis, when it is facing difficulties that cannot be overcome. It is opened at the company's request that is solvent. Its objectives are to enable the company to continue its activity to maintain employment and to clear its debts.[384] Upon the commencement, there is an observation period which can last from 6-12 months.[385]

Such proceeding can only be initiated by the company.[386] The company continues to carry on the business under the insolvency practitioner's supervision. There is automatic freezing of assets upon the commencement

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[383] Saam Golshani & Alexis A hojabr, *The Insolvency Review: France,* The Law Reviews (25 Oct. 2022), https://thelawreviews.com.uk/title/the-insolvency-review/france (accessed 3 June 2023).

[384] French Commercial Code, Art L. 620-1.

[385] *Id.* L. 621-3.

[386] *Id.* L 620-2.

of the proceedings.[387]During the observation period the court can, any time on the motion of the creditor; order for partial cessation of business's operations.[388]

During such proceeding the company has to submit a plan, which will be adopted either through individual consultation of affected parties or through a class based consultation if the relevant thresholds are met or in case of voluntary application.[389] Safeguard proceeding come to an end once the plan is approved or ordered by the court. The proceeding can also end if the company becomes insolvent during the observation period. Safeguard proceeding is then converted into reorganization or liquidation proceeding.[390]

(ii) Reorganization Proceeding

Reorganization proceeding is known by the name "redressement judiciaire" It is quite similar to the safeguard proceeding except the facts that (a) it is compulsory as it occurs when the company is insolvent (i.e. cessation des paicements" or cessation of payments meaning a company is notable to pay its debts with its available property), and (b) within this proceeding, the directors/managers can be replaced by the administrator.[391]

If a company is insolvent, reorganization proceedings can be opened either voluntarily or involuntarily. In the former case, the debtor company must petition the court and in the latter case, the petition can be lodged with the

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[387] *Id.* L 622-21, I.

[388] *Id.* L622-10.

[389] Golshani & Hojabr, *Supra* note 383.

[390] French Commercial Code, Art. L. 622-10.

[391] Nigam, *supra* note 14 at 141.

court by the creditor or the public prosecutor or through conversion from safeguard.[392]Reorganization proceeding must be requested to be commenced within 45 days of the company's insolvency.[393] While issuing order of opening reorganization proceeding an observation period of 6 months also begins, which can be extended once by the court for an additional 6 months period.[394]During the observation period, financial, economic and employment situation of the company is assessed and a proposed rescue plan is drafted.[395]

Once reorganization plan is approved by the court, there is an automatic stay of all actions against the company which extends individuals acting as guarantor or joint debtor under the 2021 Ordinance.[396] Upon commencement, an insolvency judge is appointed by the court to oversee. Similarly, the court appoints an administrator in order to assist the management of the company and appoints a creditors' representative to represent the creditors' interests and assess proof of claims....[397] At the end of the observation period, the court decides to approve either (a) a continuation plan that has been adopted either through individual consultation of affected parties or through a class-based consultation or (b)

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[392] Saam Golshani et al., *France: Restructuring & Insolvency,* White & Case (25 Aug. 2023), https://whitecase.com/sites/default/files/2023-08/the-legal-500-restructuring-and-insolvency-pdf (accessed Aug. 13, 2025).

[393] French Commercial Code, Art. L. 613-4.

[394] *Id.* L. 621-3.

[395] Golshani & Hojabr, *supra* note 383.

[396] Paul Talbourdet & Joanna Gumpelson, *Restructuring and Insolvency in France: Overview,* Thomson Reuters (1 May, 2022), https://uk.practicallaw.thomsonreuters.com/1-501-6905/restructuring-and-insolvency-in-france-overview (accessed 7 June 2023).

[397] *Id.*

a sale plan that has been prepared during the observation period by the debtor or administrator.[398] If no reorganization plan nor sale plan can be contemplated, the court then decides to converted reorganization proceedings into a judicial liquidation proceedings.[399]

(iii) Liquidation Proceeding

Also known as "liquidation judiciaire" liquidation proceeding is one of the most common form of judicial proceeding with respect to insolvent company (debtor). Like reorganization proceeding, liquidation proceeding can also be voluntary where the liquidation proceeding initiated by the company and involuntary where the liquidation proceeding can be initiated by the creditor or public prosecutor or through conversion from safeguard and reorganization.[400]

As stated in Article L640-1 of the French Commercial Code, a liquidation proceeding is available to any company mentioned in its Article L640-2, who is in a state of cessation of payment (insolvency) and whose reorganization appears clearly impossible. Thus for initiating liquidation proceeding, following two grounds are a must:

(a) Cessation of payments, i.e. insolvency and

(b) Impossibility of company's reorganization.

The objective of liquidation proceeding is to terminate the business by selling assets of the company to repay the creditors' to the greatest extent

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[398] Golshani et al., *Supra* note 380.

[399] Menu Du Jour-Restructuring and Insolvency Options in France: Something for everyone? Clifford Chance (Mar. 1, 2022), https://www.cliffordchance.com/content/dam/2022/03/menu-du-jour-restructring-and-insolvency-option-in-France-something-for-everyone-pdf (accessed 29 June, 2023).

[400] Golshani et al., *supra* note 392.

possible.[401] In case of grounds mentioned above, the distressed company must file a request with the court to commence liquidation proceeding within 45 days from the date on which it becomes insolvent on condition that conciliation proceedings are not in progress.[402] Commencing liquidation proceeding can also be requested by a creditor or a public prosecutor.[403] In order to file for liquidation proceeding the company is required to demonstrate that it is cash flow insolvent and the recovery is clearly impossible.[404]In the order of commencing liquidation proceeding, the court appoints a supervisory judge and a liquidator.[405] Within a month of his appointment, the liquidator draws up a report on the company's situation.[406]There is no maximum duration for liquidation proceedings, and in practice, the duration will depend on the ongoing litigation, the size of the company and the value of its assets. There is a simplified liquidation proceedings available for small business which lasts for a maximum of 1 years.[407]

The order commencing liquidation proceedings trigger an automatic stay for proceedings against the company and its assets. All pre-filing creditors are barred from enforcing their rights to seek payment from the debtor (with

401 French Commercial Code, Article L. 640-1.

402 *Id.* L. 640-4.

403 *Id.* L. 640-5.

404 Fabrice Grillo et al., *In brief: Liquidation and Reorganization Processes in France,* Lexology (3 Dec. 2019), https://www.lexology.com/library/detail.aspx?g=1bdfb128-0898-in-brief-liquidation-and-reorganization-processes-in-france (accessed 13 June 2023).

405 French Commercial Code, Art. L. 641-1.

406 *Id.* L. 641-2

407 Golshan et al., *Supra* note 380.

some limited exceptions). In liquidation proceedings, secured creditors benefiting from a pledge over a movable asset is entitled to enforce their security interest through a court monitored allocation process. Bust this right is not available to mortgage creditors.[408]

Generally, creditors must submit a statement of their claims within 2 months from the date of court order commencing liquidation proceeding in the official Gazette for Civil and Commercial Announcements (BODACC). Creditors residing outside of France avail of an extension period of up to 4 months to declare their claims. Within 8 days of the commencing order of liquidation proceedings, the company must also submit a list of its known creditors and is deemed to act as its creditors' proxy, submitting their claims on their behalf, subject to the creditors' own declaration of claims rectifying or adjusting the company's list.[409] In case of failure to submit a claim within this time limit, the creditors are deemed to be unable to participate in the subsequent distribution of funds as part of the plan.[410]During liquidation proceedings, however, a liquidator is appointed by the court and the management of the company is usually (but not necessarily) divested of all nights and disposal of assets. Given the severity of the financial difficulties faced by the company, the business is usually managed entirely by the liquidator.[411]The liquidator must carry out liquidation operations at the

[408] French Commercial Code, Arts. L. 622-7, L. 622-21, L. 622-22, L.622-28 & L. 622-30.

[409] Grillo et al., *supra* note 404.

[410] Golshani et al., *supra* note 380.

[411] *Id.*

same time as the verification of the claims.[412] The liquidator must inform the supervisory judge, the company and the public prosecutor of the progress of the proceedings at least every 3 months.[413] Where the number of persons hired by the business of the sales turnover, exceeds thresholds or where necessary, the court can also appoint an administrator for managing the business.[414]

Liquidation proceedings are concluded when all debts are repaid as per priority rule or the liquidator is able to obtain sufficient proceeds to repay all debts or when the continuation of the liquidation proceeding is impossible due to a shortfall of assets or the continuation of liquidation proceeding is considered to be no longer justified due to difficulties in selling remaining assets. If the company is in ongoing judicial proceedings, the insolvency court can, however, close the liquidation proceeding, subject to a representative being appointed that is required to continue the ongoing judicial proceedings on behalf of the liquidated company and allocate the proceeds obtained from such proceeding to the creditors of the liquidated company.[415]

The liquidator is under obligation to settle the claims on the priority basis. In liquidation proceedings, employment claims, procedural costs and new

[412] French Commercial Code Art. L. 641-4.

[413] *Id.* L. 641-7.

[414] *Id.* L. 641-10.

[415] Grillo et al., *supra* note 404.

money claims have a very favourable ranking under French insolvency law. The priority of payment is as given below [416]

(a) Any allowances granted by the supervisory judge by way of remuneration to manage individual debtor (C. Com., L. 631-11);

(b) Claims benefited from the wage super-privilege (Labour Code, L.3253-2, L.3253-4 and L.7313-8);

(c) Legal costs arising after the opening judgment;

(d) Claims benefiting from the privilege of sums due to farm producers (C. Com., L. 624-21);

(e) Claims benefiting from the "new money" privilege or conciliation privilege (C. Com, L-611-11);

(f) Claims secured by real estate security interests, classified amongst each other in accordiance with the ranking provided for in the Civil Code;

(g) Claims benefiting from the privilege of wages (where not paid by the AGS) (Labour Code, L.3263-6, L.3253-8 to 3253-12);

(h) Claims benefiting from the "post money" privilege (C. Com, L. 626-10 and L.622-17-1112°);

(i) "Meritorious" claims resulting from the performance of ongoing contracts and for which the contracting party has agreed to receive deserved payment (C. C.622-13 and L. 622-17, 1113°);

(j) Claims benefiting from the privilege of wages (where paid by the AGS) (Labour code, L.3253-8);

[416] Golshani et al., *supra* note 380.

(k) Other post claims and prior claims for which payment is authorized;

(1) Claims benefiting from the Treasury's lien (except for indirect taxes);

(m) Claims secured by movable securities or the lessor's lien;

(n) Tax and social security claims (indirect taxes); and

(o) Unsecured claims, pro rate to their amount.

It is noted that this priority order is not relevant to all creditors, e.g. creditors benefiting from a retention right over assets as regards their claim related to such asset are treated separately.

4.4.3 Cross Border Insolvency Issues

France has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross border insolvency (1997). However, the EU Insolvency Regulation has introduced some provisions to facilitate the coordination of insolvency proceedings opened against companies that are part of the same group.[417] Thus, being a member state of European Union, EU Regulation applies even to France.

The principle legislation applicable to cross border insolvency including France and other EU member states (except Denmark) is the European Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) as amended, in particular, by Regulation (EU) No. 2018/946 of the European Parliament and of the Council of 4 July, 2018 (The EU Insolvency Regulation).[418]

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[417] *Id.*

[418] *Id.*

The EU Insolvency Regulation provides that courts of the member states in which a debtor's COMI (Centreof Main Interests) is located have jurisdiction to commence the main insolvency proceedings relating to such debtor.[419]

A COMI is deemed to be the place of registered office of the debtor. The presumption is that COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertained by third parties.[420]

Secondary proceedings can subsequently be commenced as regards an establishment located in another EU member state. If a debtor has an establishment in France but its COMI is in another EU member state, under the Insolvency Regulation, secondary proceedings are also appropriate.[421]

There is a principle that in states where the Insolvency Regulation does not apply and insolvency judgments are rendered in a jurisdiction that does not have a treaty with France, judgments are not recognized in France. Their recognition is subject to the exequatur (court declaration) process.[422] Thus, insolvency judgments rendered in a jurisdiction that is party to a treaty with France are recognized and enforceable in France.

4.5 China (People's Republic of China/ PRC)

4.5.1 Law Governing Liquidation of Company in China from Past to Present

China, officially the People's Republic of China, a Chinese language speaking country. China is one of the world's largest countries by land-mass. The Chinese insolvency law is a mixture of the US and the UK insolvency/bankruptcy laws, i.e., based on Anglo-American insolvency regimes.

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[419] Golshani & Hojabr, s*upra* note 383.

[420] Golshani et al., *supra* note 380.

[421] Talbourdet & Gumpelson, *supra* note 396.

[422] Golshani et al., *supra* note 380.

There was no bankruptcy (also insolvency) law in early imperial china, for all land and property belonged to the emperor. Legally, concept of private property did not exist.[423] However, local customs developed for dealing with debtor/creditor problems. The debtor would divide all of his possessions among his creditors.[424]The debt, if unpaid, would be passed from generation to generation, thus forever condemning the descendants of the debtor to a life of indentured poverty.[425]

There was no an insolvency system in china until the later Qing Dynasty. Before 1906 when first Chinese Bankruptcy Law was enacted, the Chinese society was dominated by a feudal legal tradition and ideology, i.e. "the debtor of a father should be paid by his son (Fu ZhaiZiHuan)". During that period of time, there was no an equal status between a creditor and a debtor. [426]

China's first bankruptcy law is the Chinese Bankruptcy Code, which was enacted by the Qing Dynasty (1644 - 1912) in 1906 and which had 69 Articles. [427]The law applied primarily to merchants (natural person traders), although it also extended to joint stock

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[423] Stephen Baister, *Efficiency versus Ideology-The Insolvency Law of the People's Republic of China,* 8 Trolley's Insolvency Law & Practice 166 (1996), Cited in Leslie A. Burton, An overview of Insolvency Proceedings in Asia, 6, 117 (2000), http://digitalcommons.law.ggu.edu.6/7 (accessed Nov. 7, 2021).

[424] *Id.*

[425] Roman Tomasic et al., *Insolvency Law, Administration and Culture in Six Asian Legal Systems,* 6. Aust. Corp. L. J., 277 (1996), citied in Burton, *Supra* note*,* 423.

[426] Gu Minkang, *Are the Bankruptcy Proceedings "SOE-Friendly"?– – History and New Developments in China,* Goettingen, https://www.uni-goettingen.de/kat/1/pdf/arg-the-bankruptcy-proceedings-soefriendly-history-and-new-developments-in-china (accessed 17 Apr. 2023)

[427] Lihong Zhang, *An Updated Overview on Chinese Bankruptcy Law,* Nuovodirttodellesocieta, https://www.nuovodirittodellesocieta.it/updated-overview-on-chinese-bankruptcy-law (accessed 17 Apr. 2023).

companies who had suffered a loss in trade or in an unexpected situation. The law provided primarily for a voluntary mechanism through an administrative.[428] Some of the traditional provisions of the bankruptcy law were present in this law, such as creditors were required to establish their claims, no creditors could receive favorable treatment etc. [429] In large part, local custom was still used to resolve debtor/creditor disputes, a practice which was recognized and approved by the Chinese Supreme Court.[430] The law of 1906 was repealed in 1098, 2 years later after it came into force. During the regime of the Kuo Mingtang, Bankruptcy law was passed in 1935. Among other things, a judicially managed process also facilited compromises and additionally provided for bankruptcy proceedings through a judicial process. The law was directed principally at individual traders but also extended to companies....[431] The law lasted only 15 years. In 1949, when China became communist, all previous republican laws were abolished, and virtually all private enterprises became state owned.[432] In China, there existed no bankruptcy laws for reasons similar to those imperial times: the enterprises were all owned by the state, and the state cannot be declared bankrupt.[433] The Bankruptcy Regulation of Shenyang in Liaoning province was the regulation that was implemented in 1985 for industrial enterprises that would be declared as insolvent. The civil law was implemented in the year 1986 and that was the first time bankruptcy

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[428] Ronald Winston Harmer, *Insolvency Law and Reform in the People's Republic of China,* 64/6, Fordham L. Rev., 2556, 2567 (1996), https://ir.lawnet.fordham.edu/insolvency-law-and-reform-in-the-people's-republic-of-china (accessed 8 Nov. 2021).

[429] *Id.*

[430] Tomasic, *supra* note 425, at 429.

[431] Harmer, *supra* note 428, at 257.

[432] Baister, *supra* note 423.

[433] *Id.*

was declared under a law. The law of Enterprise Bankruptcy 1986 was applied to only state owned enterprises with separate legal personality.[434]The law of civil procedure, 1991 was applicable to enterprise with legal person status and not applied to enterprise owned by whole persons.[435] The company law was enacted in 1993, which helps in identifying the need for the appointment of special liquidation committee for a company which had already been regarded as bankrupt. [436]

Now China has for the first time in its history, a unified and comprehensive bankruptcy law governing all types of enterprises, including foreign investment vehicles and state owned enterprises.[437]The Enterprise Bankruptcy Law of the PRC, 2006 (hereinafter EBL) came into force on June 2007. The EBL repealed the former EBL of 1986. But the EBL still applies to only corporate person. That is why, individuals still cannot seek relief in China.[438]A chief shift in the 2006 law allows for qualifying Chinese companies to opt for corporate reorganization or rehabilitation rather than the forced liquidation bankruptcy of the past.[439] During the past 25 years China has undergone one of the greatest social and economic transformations in human history. In less than 2

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434 Tissa Maria Joshy & Uma V.R., *Bankruptcy Law in India and China: A comparative Study,* 04/02 Int'l. J. Soc. Sc. & Eco Res, 1346, 1348 (Feb. 2019), www.ijsser.org/bankruptcy-law-in-india-and-china-a-comparative-study (accessed 17 Apr. 2023).

435 *Id.*

436 *Id.*

437 Law of the People's Reuplic of China on Enterpise Banruptcy: China, Baker & Mckenzie (2018), https://www.bakermckenzie.com/wp-content/uploads/sites/23/2019/02/Flyer-enterprise-bankruptcy-law-in-china-october-2018/pdf (accessed 12 May 2023).

438 RenYimin & Zhu Yun, *The Insolvency Review: China,* The Law Reviews (Oct 25, 2022), https://thelawreviews.com.uk/title/the-insolvency-review-china (accessed 10 May 2023).

439 James H.M. Sprayregen et al., *The Middle Kindgom's Chapter 11?: China's New Bankruptcy Law Comes into Sight,* 23 A.M. BANKR. INST. J 34,60 (2005) cited in Ravi Bendapudi, People's Republic of China Bankruptcy Law, 6, Santa Clara J. Int'l L. 205, 212 (2008), http://digitalcommons.law.scu.edu/scujil/6/D (accessed 10 May 2023).

generations china has transformed from a struggling communist country, bent on isolation, into a pillar of the world' economic and political systems…. The legal system has struggled to keep pace with the demands of a more open and dynamic market economy. The Chinese bankruptcy law, specially is undergoing major changes to deal with the economy.…[440]

In 2006, China's first rescue oriented law was passed. Its objectives are to facilitate more corporate reorganizations, to establish a market based corporate insolvency profession and to enhance cross-border insolvencies.[441]

4.5.2 Liquidation of Company under Insolvency Proceeding in China

In china, all insolvency proceedings are principally governed by EBL and also supplemented by various judicial interpretations issued by the Supreme People's Court (SPC).[442] Insolvency proceedings cover reconciliation, reorganization or insolvency liquidation. Hence, these three options are jointly referred to as insolvency proceedings.[443]

Main insolvency procedures in China are bankruptcy/insolvency, rectification and compromise …. Insolvency will lead to the ultimate liquidation of a business but rectification and compromise both aim to rehabilitate the debtor . . ., and generally these three proceedings are determined on the basis of test for insolvency.[444]

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[440] Weijing Wu, *Commencement of Bankruptcy Proceedings in China: Key Issues in the Proposed New Enterprise Bankruptcy Law,* 35 VICT. U. WELLINGTON L. REV. 239, 240 (2004), cited in Bendapudi, *Id.* at 205, http://*Id.*

[441] Zhang Zinian, *Resolving Corporate Insolvencies in China: the Gap between Law and Reality,* 27 U. Miami Int'l & Comp. L. Rev. 370, 371(7-7-2020), https://repository.law.miami.edu/umiclr/27/2/9,resolving-corporate-insolvencies-in-china-the-gap-between-law-and-reality (accessed 12 May 2023).

[442] A Guide to Asia Pacific and Insolvency Procedures: China, Clifford Chance (2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/08/a-guide-to-asia-pacific-restructuring-and-insolvency-procedure.pdf, 27 (2021) (accessed Aug. 9, 2025).

[443] Restructuring and Insolvency Law in China, CMS Law, https://cms.law/en/int/expert-guides/cms/expert-guide-to-restructuring-and-insolvency-law-in-china (accessed 8 May 2023).

[444] *Supra* note 422.

In China, insolvency proceedings may be either voluntary or involuntary. In the case of voluntary insolvency a debtor can file petition and in the case of involuntary insolvency creditor can do so.[445] For the purpose of voluntary petition only a debtor must meet both tests: cash flow test i.e. the debtor is unable to pay debts when due and balance sheet test, i.e. the debtor lacks sufficient assets to pay debts.[446] But in the case of involuntary petition, a creditor can petition when only the cash flow test is triggered i.e. a debtor is unable to pay its debts when due.[447] Moreover, a debtor, in the case of voluntary case, can select any of three options: conciliation, reorganization or liquidation,[448] on the other hand, in a voluntary case, creditors can elect only two options reorganization or liquidation.[449]

Pursuant to Article 2 of the EBL, this law generally applies to all insolvent legal entities, whether privately owned or state owned. Jurisdiction over insolvency cases rests with the court of the place where the insolvent enterprises is domiciled.[450]

Whatever it is, this study is concerned with liquidation but other two forms of insolvency proceedings are also discussed in brief.

(a) Conciliation

Conciliation is also referred to composition or compromise or reconciliation or settlement. The EBL deals with conciliation under Chapter IX and provides for a streamlined reorganization of unsecured claims, while leaving the secured creditors' right unaffected. Conciliation is an option available to an insolvent debtor company rather than restructure or liquidate. The Chinese insolvency law allows an insolvent company to negotiate a conciliation agreement with its creditors after the insolvency proceedings have commenced. The company can either file the petition directly or it can do so after the court has accepted a petition

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445 Enterprise Bankruptcy Law, Art 7.

446 *Id.* Art. 2.

447 David L. Eaton et al., *China's New Enterprise Bankruptcy Law,* Kirkland (Oct. 2006), www.Kirkland.com/china's-new-enterprise-bankruptcy-law-pdf (accessed 21 May 2023).

448 Enterprise Bankruptcy Law Art. 7.

449 *Id.*

450 *Id.* Art. 3.

for insolvency proceedings, but before the court has declared the debtor insolvent.[451] It must also be approved by the court and a majority of creditors that represent two-thirds of the total unsecured claims.[452] The conciliation (agreement) when approved by the court is binding both debtor and creditor who have conciliated.[453] If the conciliation is terminated and declared the debtor as insolvent, for the debtor is unable or fails to implement the conciliation, payment made to the creditors under the agreement remain valid, unpaid amounts are treated as claim in the liquidation, and the creditors are no longer bound by any agreements to adjust their claims as part of the conciliation. [454]

(b) Reorganization

The EBL deals with reorganization under Chapter VIII, which provides for the restructuring of debts. Reorganization is a rescue option to restructure viable business. The debtor, its creditors or the debtor's equity holders holding more than a 10% interest may petition a court to commence a reorganization proceeding prior to the debtor company being declared insolvent.[455] The Chinese bankruptcy law provides an automatic stay in limited circumstances.[456] After the court accepts the insolvency petition, the law stays any attachment on or any enforcement procedures against the debtor's property and any civil litigation against the debtor as well. [457]If the court accepts the petition an administrator is appointed by the court when the petition is accepted,[458] and a reorganization plan

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[451] *Id.* Art. 95.

[452] *Id.* Art. 97.

[453] *Id.* Art. 99.

[454] *Id.* Arts. 103-4.

[455] *Id.* Art. 70.

[456] *Supra* note 447.

[457] Enterprise Bankruptcy Law, Arts. 19-21 & 75.

[458] *Id.* Art. 13.

must be submitted by the company or the administrator within 6 months (with an extension of 3 months, if approved by the court). [459] If a plan is not submitted on time, the reorganization is terminated and a liquidation proceeding follows. [460]

Upon receipt of the plan, the court convenes a creditors meeting within 30 days to review the plan. [461] The plan must be approved by a simple majority of the creditors holding at least two-thirds of the total amounts of claims, in each class present at the creditors' meeting. [462]

If the reorganization plan is approved, the secured creditors are prohibited from realizing their claims during the implementation of the reorganization plan.[463] If the debtor is unable or fails to implement reorganization plan the court can terminate the reorganization plan.[464] If the court orders a liquidation, the creditors are no longer bound by any promise to adjust their claims as part of the restructuring.[465]

(c) Liquidation

Liquidation is main insolvency proceeding in China. The EBL deals with liquidation under chapter X, which provides for the termination of operations as well as the sale and distribution of assets of the debtor (company) under a specific basis.

If the company fails to pay its due debts, either the creditors or debtor itself or person responsible (which is normally the liquidation group) can petition the court

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459 *Id.* Art. 79.

460 *Id.*

461 *Id.* Art. 84.

462 *Id.* Arts. 82, 84.

463 *Id.* Art. 92.

464 *Id.* Art. 93.

465 *Id.*

for liquidation. When the insolvency proceedings begin with reorganization, it can be transferred into liquidation if the parties fail to form a reorganization plan in the relevant proceeding.[466]or implement the reorganization plan.[467]

The EBL, under Article 2(1), has specified some grounds for initiating liquidation proceedings, which are as under:

a. Where a company fails to clear off its debts as due and

b. Where the assets of a company are not enough to pay off all of its debts or

c. Where the company is clearly incapable of clearing off its debts.

If a petition is filed with the court and, on examination, the court deems the petition appropriate, the court decides whether or not to accept it.[468]If the court accepts, it is then served on the petitioner,[469] and at the time when the petition is accepted, the court appoints an administrator.[470] Upon acceptance of the petition by the court, contracts entered into before the acceptance but not yet fully performed, the administrator can rescind or continue. The administrator has to notify the other party of his decision within 2 months from the day of acceptance or 30 days after receiving a reminder from the other party. Failure to do so deems to have rescinded the contract.[471]

When a court accepts a petition, all litigation or enforcement proceedings against the company are automatically suspended and no creditors can request repayment separately.[472] When an administrator is appointed, the administrator supervises

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466 *Id.*

467 *Id.*

468 *Id.* Arts. 10 – 12.

469 *Id.* Art. 14.

470 *Id.* Art. 13.

471 *Id.* Art. 18.

472 *Id.* Arts 19 - 21.

the procedure and controls the company's affairs. The administrator has to report to the court and is supervised by the creditors' meeting and creditors' committee.[473]

The EBL explicitly sets out the hierarchy of debts to determine priority of payment, which must be made in the following order;[474]

- A secured creditor by the specific property of the insolvent gets first priority in being repaid with the specific property;
- Second, insolvency expenses;
- Third, common benefits (i.e., certain debts incurred after the court accepts the insolvency petition);
- Fourth, employees' claims, such as unpaid salaries;
- Fifth, social security expenses and insurance claims and
- Sixth, unsecured claims in insolvency.

Where there are no property for the company to distribute, the administrator is required to request the court which terminates the liquidation proceedings and when the insolvent's properties have been distributed, the administrator must deliver the court a report on the distribution of the properties in a timely manner and request the court to terminate the proceedings. Where the administrator requests the court to terminate the proceedings, it must decide within 15 days whether to brief the proceedings to a close. Any decision to terminate proceedings must be announced.[475]

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[473] *Id* Art. 23.

[474] *Id.* Arts.109 & 113.

[475] *Id.* Arts.120 & 121.

4.5.3 Cross-Border Insolvency Issue

China is neither a party to any international treaties nor United Nations Commission on International Trade Law (UNCITRAL) Model Law or European Union (EU) Regulation relating to insolvency proceedings. However, China has entered into several bilateral treaties consisting of provisions for reorganizing and enforcing foreign courts' judgments and orders. [476]

As has already been stated, the major requirement in order to make petition for insolvency is that the debtor company's domicile is in China. Pursuant to Article 5, paragraph 2 of the EBL 2006, once the proceedings for insolvency is commenced according to the said law, it covers not only debtor company's property in China but also extends to the company's property situated outside the territory of China. In addition, the EBL allows that if any legal effective judgment or ruling has been made by a foreign court and involves any of the company's property in China, the company has to petition the court to recognize and enforce it, subject to the following conditions:[477]

(a) The basic principles of Chinese Law are not violated;

(b) The sovereignty and security or social public interests of China are not geopardised and

(c) The legitimate rights and interests of Chinese creditors are not impaired.

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[476] Xiuchao Yin & Zhiguo Yang, *Restructuring and Insolvency in china: Overview,* Thomson Reuters, https://uk.practicallaw.thomsonreuters.com/7-502-0018/restructuring-and-insolvency-in-china-overview (accessed 11 May 2023).

[477] Enterprise Bankruptcy Law, Art. 5.

4.6 India

4.6.1 Law Governing Liquidation of Company in India from Past to Present

India, a major emerging economy, is the second largest country from the population view point in the world. India has presently, in particular, Insolvency and Bankruptcy Code, 2016 (Thereinafter "IB Code") dealing with matters of insolvency. Now Indian Insolvency regime is more creditor friendly, but before the enactment of IB Code, Indian insolvency regime was debtor friendly. That is to say, the IB Code moves India to the creditor friendly jurisdiction.[478] Before the enactment of IB Code there was no single law to deal with insolvency and bankruptcy. The IB Code consolidates the existing framework by creating a single law for insolvency and bankruptcy in India.

Law of insolvency in India has its own history. The law of insolvency in India owes its origin to English law. Before the British came into India, there was no law of insolvency in the country.[479]The statutes passed in the 16th century and subsequent years contained only redimentary provisions regarding bankruptcy.[480] The earliest insolvency legislation can be traced to Section 23 & Section 24 of the Government of India Act, 1800 (39 & 40 Geo III C 79), which provided insolvency jurisdiction of the Supreme Court. In 1828, statute 9 (Geo. IV C 73) was passed, which can be said to be the

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[478] Karan Singh Chandhiok, *India: Restructuring & Insolvency Comparative Guide,* Mondaq (Apr. 26, 2021), https:// www.mandaq.com/india/insolvencybankruptcyre-structuring/939078/restructuringinsolvency-comparative-guide (accessed 10 Sep. 2022).

[479] Institute of Company Securities of India, Insolvency-Law and Practice: module 3, Elective Paper 9.8 (2020/09), https://www.icsi.edumedia/webmmoduels/insolvecny/practice/pdf/insolvency-law-and-practice: module-3-elective-paper-9.8 (accessed 18 Nov. 2022).

[480] Harshal Sadhwani, *The Indian Bankruptcy Laws and How are They different from UK and US,* Legal Service India, https://www.legelserviceindia.com/legal/article-3356-the-indian-bankruptcy-laws-and-how-are-they-different-from-uk-and-us.html (accessed Feb. 5, 2023).

beginning of the special insolvency legislation in India. Under this Act, the relief for insolvent debtors were provided in the Presidency Towns.[481]

In 1848, Indian Insolvency Act, 1848 was passed. Moreover, the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 were passed respectively. Based on the English Bankruptcy law, both Acts dealt with insolvency regimes in India. The Act of 1909 is urban area insolvency Act, which prevailed specially within the territory of Calcutta, Madras and Mumbai and the Act of 1920 which applied to the whole of India except the territory covered by the Act of 1909. Most of the provisions were similar except some procedural matters. However, there was no single separate insolvency law to deal with company insolvency. The procedure under the Presidency Towns Insolvency Act was generally sticker than the Provincial Insolvency Act.[482]

Under the Constitution of India, 1950 the 'Bankruptcy' & 'Insolvency' were specified in the concurrent List. However, among other things, winding up of corporation was under the Union List. On the grounds of these powers, the Companies Act, 1956 was enacted in 1956, which dealt with all aspects of the winding up. But there was no definition of insolvency and bankruptcy in the 1956's Act. The Act dealt only with the inability to pay debts. However, all procedural purposes, it was the only law governing insolvency of companies. Under this law, the High courts constituted the adjudicating authority for winding up related matters. Similarly, the 1956's Act consisted of certain provisions through which the company or its creditors could seek to reorganize it. However, these were general provisions and not specific to insolvency or bankruptcy situations.[483] There was another statute named Sick Industrial Companies (special provisions) Act,

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[481] *Supra* note 479, at 2.

[482] *Supra* note 25, at 487.

[483] Rajeswari Sengupta et al., *Evolution of the Insolvency Framework for non-Financial Firms in India,* Indira Gandhi Institute of Development Research (June 2016), http://www.igidr.ac.in/pdf/publication/wp.2016-018.pdf (accessed Aug. 17, 2025).

1985 (hereinafter SICA) was passed in India, which governed the restructuring of sick or potentially sick companies in certain specified industries. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 provided for the establishment of assets reconstruction companies which would undertake the management/realization of non-performing loans acquired from secured creditors by taking over, charge the management. While winding up and schemes of agreement are carried out under the aegis of the courts, the Board of Industrial and Financial Reconstruction has been formed (under SICA) for the reconstruction/rescue of sick companies.[484]

Before SICA was passed based on the recommendation of Shri T. Tiwari Committee which was formed in 1981 to examine the country's industrial climate but SICA was repealed in 2033. As and when the time passed several Acts, such as Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993, SARFAESI Act, 2022 were passed with effect from December 1, 2016. SICA has been repealed by Sick Industrial Companies (special provisions) Act, 2003. This has resulted in the dissolution of Board for Industrial and Financial Reconstruction (BIFR) and other bodies formed under the SICA. In the course of development of insolvency law, in 1999, Justice STUDYB. Eradi Committee was set up to examine and make recommendations for changes in existing laws as to matters related to winding up and liquidation of companies. A report submitted by the Committee suggested that the jurisdiction and powers should be shifted to a separate National Tribunal from the High courts. In 2002, the companies (second amendment) Act was passed which lead to setting up National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT). Again, Committee formed under Chairpersonship of Dr. J.J. Irani suggested that neutral forum should be formed which should have expertise in dealing with the

[484] Paudel, *supra* note 10, at 80.

commercial and technical aspects of insolvency law and also suggested that the insolvency process should be applied to all enterprises and corporate entities, including Micro, Small and Medium Enterprises (MSMEs) except Bodies Financial Institutions and Insurance Companies. In addition, the committee suggested that Sick Industrial companies should be repealed by an insolvent company and both the creditors and debtors have fair access to the insolvency system upon showing proof of default.

In 2013, Companies Act was amended and the provisions were laid down for the constitution of NCLT and NCLAT.

In 2015, Bankruptcy Law Reforms Committee was formed under chairpersonship of Dr. T.K. Viswanathan with a view to examining the existing policy in place and creating a Uniform Work of Insolvency and Bankruptcy of individuals and all legal entities. As a result of report submitted by the Committee, the Insolvency and Bankruptcy Code (hereinafter IB Code) 2016 was passed and the Code came into force on 1 December 2016.[485]

All prior laws and enactments dealing with insolvency and bankruptcy have been consolidated into a single law- Insolvency and Bankruptcy Code, 2016. The code has repealed few statutes such as Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 and amended some statutes such as Sick Industrial Companies (Special Provisions) Repeal Act, 2013, Companies Act, 2013, SARFESI Act, 2002....[486] The Insolvency and Bankruptcy Code, 2016 contains 255 Sections, II Schedules and is divided into 5 parts.

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[485] Sadhwani, *supra* note, 480, at 2.

[486] Shreyanshiit, *The Evolution of Corporate Insolvency Laws in India,* Legal Service India, https://www.legalserviceindia.com/legal/article-8526-the-evolution-of-corperate-insolvency-laws-in-Inda.html (accessed Nov. 1, 2022).

4.6.2 Liquidation of Company under Insolvency Proceeding in India

There are following major laws governing matters relating to insolvency liquidation in India:

a. Companies Act, 2013 (as amended);
b. Insolvency and Bankruptcy Code, 2016 (as amended) and
c. Insolvency and Bankruptcy Board of India (Liquidation process) Regulations, 2016.

Companies Act, 2013 deals specially with matters as to winding up by tribunal on any grounds such as passing of special resolution by a company etc. Under Section 271 of the Act. But Insolvency and Bankruptcy Code, 2016 deals with matters of voluntary winding up of a company which is solvent i.e. able to pay its debts and involuntary liquidation of a company which is insolvent i.e. unable to pay its debts.

Although winding up and liquidation are considered to be similar in Indian context winding up, as stated under Section 2 (94A) of Companies Act, 2013, means winding up under this Act or liquidation under Insolvency and Bankruptcy Code, 2016, as applicable. However, Companies Act, 2013 deals purely with winding up and insolvency and Bankruptcy Code 2016 deals with both winding up and liquidation of company. In addition, under Companies Act, 2013 a company can undergo a winding up proceeding as per Section 271.

The IB Code covers all corporate entities except financial services entities (e.g. banks, insurers and pension funds). Except this, there is no special regime applicable in specific sectors. But the IB Code allows the government, in consultation with the financial services regulators, to notify Financial Service Providers (FSP) or categories of FSP for the purpose of insolvency and liquidation proceedings in such manner as

may be prescribed[487]. From this it is obvious that winding up or liquidation procedures are now governed by the arrangements of the Act of 2013 and the IB Code, 2016. And the IB Code has included inability to pay debts as a ground for initiating insolvency proceeding of a company.

The IB Code brings all kinds of companies, partnership firms, proprietorship firms or any other person incorporated with limited liability under any law and applies to matters as to insolvency and liquidation of company where company is deemed to be insolvent. The IB Code relates to restructuring and insolvency of companies. Therefore, the IB Code provides for two stages of insolvency proceedings (i) restructuring, and (ii) liquidation.

Although this study is concerned only with liquidation of company, which is insolvent, restructuring is also discussed briefly before undergoing a liquidation. That is why, under India the IB Code direct liquidation is no longer possible for insolvent company.

(a) Restructuring

Restructuring (also rescue) is the first stage before a company is liquidated under the IB Code. The IB Code deals with restructuring proceeding called Corporate Insolvency Resolution Process (hereinafter CIRP) under Chapter II of Part II. Where a company (corporate debtor) is unable to pay its debts and commits a default[488]in payment of debts of INR (Indian Rupee) 1 crore[489] the financial creditor or the operational creditor or the company itself is able to initiate CIRP.[490]

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[487] Chandhiok, s*upra* note 478.

[488] 'Default' according to Section 3 (12) of Insolvency and Bankruptcy Code, 2016, means "non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or corporate."

[489] Insolvency and Bankruptcy Code, 2016 § 4.

[490] *Id.* § 6.

On the ground as mentioned above, the financial creditor or the operational creditor or company itself can file an application to initiate CIRP before the Adjudicating Authority, i.e. National Company Law Tribunal with jurisdiction over the registered office of the company.[491]Upon the receipt of the application NCLT can admit or reject the application. If the application is complete NCLT admits the application and initiates CIRP. Once the process commences a moratorium prohibiting various acts by or against the company also comes into play, which continues till completion of CIRP[492] and NCLT appoints a Resolution Professional (hereinafter 'RP') to act as Interim Resolution Professional (hereinafter 'IRP') within 14 days from insolvency commencement date.[493]

CIRP shall be completed within 180 days of admission of application by NCLT. However, NCLT can grant a one-time extension of 90 days for completing the process.[494] RP is required to categorize the claims made in the application by the applicant systematically, and make an analysis of the same.[495] After the Company's financial position has been analysed and determined based on the all claims received against the company, IRP is required to constitute a Committee of Creditors (hereinafter 'COC'). All financial creditors are a part of the COC. All financial information required by the COC are made available to them by RP within 7 days of such request.[496] The COC meets first within 7 days of its constitution and decides by 66% of votes either to replace IRP by another RP or

[491] *Id.* § 60.

[492] *Id.* §§ 13-14.

[493] *Id.* § 16.

[494] *Id.* § 12.

[495] *Id.* §18 (b).

[496] *Id.* § 21.

to confirm IRP as RP. In case of failure to decide the name of RP within 10 days, NCLT can order IRP to continue until new one is appointed.[497] When RP is appointed, the power and duties conferred on IRD are transferred to RP. After this, RP manages the company during the pendency of CIRP period and conducts the entire CIRP.[498]RP prepares information memorandum for the purpose of enabling resolution applicant to prepare resolution plan.[499]After examining the plans submitted by the creditors, RP is required to place all plans before the COC for their consideration. The resolution plan must have the consent of at least 66% of voting share of the creditors.[500] RP is required to submit the approved resolution plan to NCLT. If NCLT is happy with such plan, it sanctions it, which becomes binding on the company and all the stakeholders involved in the resolution plans. If no decision is made during CIRP, NCLT orders liquidation of the company.[501]

(b) Liquidation

In India, liquidation is the last stage of insolvency proceeding under the IB Code, 2016. When the objective of the IB Code to revive the distressed Company under CIRP, cannot be achieved, then liquidation stage comes into effect. Chapter III specially Sections 33-54 of the IB Code provides for liquidation proceeding of the company (Corporate debtor).

No stakeholder can initiate the liquidation proceeding against the company under the IB Code rather regarded it as the last resort to be used in circumstances where

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497 *Id.* § 22.

498 *Id.* § 23.

499 *Id.* § 29.

500 *Id.* § 30.

501 *Id.* § 31.

the resolution process of the company fails.[502] Section 33 of the IB Code states some circumstances under which company can be put into liquidation. They are as follows:

(a) If no resolution plan is received before the expiry of insolvency resolution process period;

(b) If NCLT rejects resolution plan for non-compliance with the requirements of the IB Code;

(c) If COC decides to liquidate the company on the basis of vote of majority and

(d) If the company contravenes resolution plan approved by NCLT and any affected person applies for liquidation of the company.

On any of the above circumstances NCLT orders liquidation of the company. It is mandatory for NCLT to order liquidation of the company. Upon passing of liquidation order moratorium comes into scene. During liquidation proceeding no suit or other proceedings can be initiated by or against the company except with permission of NCLT.[503]However, this moratorium does not bar the rights of the secured creditor to do anything stated under Section 52 of the IB Code.

While passing the order of liquidation by NCLT, if any insolvency professional had been previously appointed for CIRP, he can act as a liquidator for the company either unless he is replaced by NCLT.[504] NCLT can direct Insolvency and Bankruptcy Board of India (hereinafter 'IBBI') to propose the name of another insolvency professional to

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[502] Pradhumna, *The Process of Liquidation under IBC, 2016,* Legal Service India, https://www.legalserviceindia.com/legal/article-3309/the-process-of-liquidation-under-ibc-2016.html (accessed July 9, 2023).

[503] Insolvency and Bankruptcy Code, 2016 § 14.

[504] *Id.* § 34 (4).

be appointed as liquidator[505] On receipt of the name proposed by the Board, NCLT by an order appoints such proposed insolvency professional as the liquidator. On appointment of a liquidator, all powers of the board of directors, and key managerial personnel of the company[506] cease to have effect and are vested in the liquidator.[507]National Company Law Appellate Tribunal held that after passing the order of liquidation, COC has no role to play and they are merely claimant, they are unable even to seek replacement of liquidator in absence of any such provision in law.[508]

Soon after his appointment as liquidator, he is required to make public announcement in form B of Schedule 11 of IBBI, liquidation regulations, 2016 within 7 days. The public announcement calls upon stakeholders to submit their claims within 30 days from commencement date of liquidation.[509] The liquidator can take control of the assets of the company, manage and represent them whenever necessary to verifying and inviting claims from the creditor under Section 35 of the IB Code. The liquidator can either admit or reject the creditor's claim. If the liquidator rejects a claim, he records in writing the reasons for such rejection. The same is communicated to the creditor and the company within 7 days of his decision.[510]

The Liquidator is under obligation to verify and consolidate all creditors' claims,[511] settle claims of all creditors and distribute the proceeds in the order of priority specified

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[505] *Id.* § 34 (5).

[506] *Id.* § 34 (7).

[507] *Id.* § 34 (2).

[508] Punjab National Bank v. Kiran Shah, the liquidator of ORG Information (Jan. 22, 2022).

[509] Regulation 12 of IBBI (Liquidation Process) Regulations, 2016.

[510] Insolvency and Bankruptcy Code, 2016 § 40.

[511] *Id.* § 38.

under Section 53 of IB Code, popularly known as 'Waterfall mechanism.' As per the said Section, order of priority of payment of debts are as follows:

i. IRP costs and liquidation costs, to be paid in full;
ii. Secured dues, if the security has been relinquished and workmen's dues upto12 months,
iii. Any dues and unpaid wages of employees up to 12 months before the date of liquidation, i study Unsecured financial creditors, study Dues to government (upto 2 years) and unpaid dues to secured creditor, where the security has been realized,
vi. Any other remaining debts and dues,
vii. Preference shareholders and
viii. Equity shareholders and partners of the company.

Once the assets have been completely liquidated, the liquidator has to make an application for dissolution of the company before NCLT, and NCLT orders dissolution of the same from the date of said order. Within 7 days, company of such order is required to be filed with authority where the company is registered.[512] Once the company gets dissolved no liabilities survive.

4.6.3 Cross Border Insolvency Issue

Though India is seen as an emerging economy, it has not yet adopted UNCITRAL Model Law on cross border insolvency. But Insolvency and Bankruptcy Code, 2016 and Code of Civil Procedure, 1908 have included a little bit provisions to this regard.

The Code of Civil Procedure, under Section 44 A, allows Indian courts to enforce and recognize orders and judgments of foreign courts from reciprocating countries.

For Indian proceedings to be recognized abroad, that country's Law will apply.[513] Recent legislation in comparison to former Code of Civil Procedure, with respect to cross border insolvency in India is Insolvency and Bankruptcy Code, 2016. The IB

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[512] *Id.* § 54.

[513] Binay J. Kattadiyil & Nitika Manchanda, *Cross Border Insolvency Framework in India,* ICSI Institute of Insolvency Professional, 9, Int'l J.M. edu. Res. (Apr. 2000); https://icsiiip.in-images/pdf/cross-border-insolvency-framework-in-India (accessed 30 Feb. 2021).

Code provides two provisions under Section 234 and Section 235. Provisions of these Sections assist in disputes of cross border insolvency.

Section 234 empowers the Central Government to enter into bilateral agreement with any country. Outside India for enforcing the provisions of the IB Code whereas Section 235 empowers the adjudicating authority under the IB Code to request a court in another country where an agreement under Section 234 has been reached to deal with assets situated in that country. But there is no system in place to deal with cross border insolvency issues where the debtor's assets or creditors are situated in a jurisdiction with which no bilateral agreement has been reached[514].

Thus, it is being considered that India has not sufficient provisions on cross border insolvency. For the purpose of reforming existing regime relating to cross border insolvency based on UNCITRAL Model Law, several committees have been formed time to time. For example, Insolvency Law Committee (hereinafter 'ILC') submitted its first report in March 2018 in respect of amendments to the IB Code, 2016. However, as regard cross border insolvency based on UNCITRAL Model Law, ILC recommended to insert separate Chapter in the IB Code. Accordingly, ILC recommended its second report to Government in October 2018 on adoption of UNCITRAL Model Law.[515]

Again in January 2020, Cross Border Insolvency Rules/Regulations Committee (hereinafter 'CBIRC') was formed for making recommendations on the Rules and Regulations required to operationalise the ILC Report. CBIRC has issued its first report in November 2021.[516]

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514 Aditi Avashia, *Cross Border Insolvency in India, Insolvency and Bankruptcy Code Laws* (Feb. 26, 2023), www.ibclaws.in/cross-border-insolvency-in-India (accessed 10 Apr. 2020).

515 Manasi Lad-Gudhate, *Cross Border Insolvency,* The Institute of Company Secretaries of India (Apr. 10, 2015), https://www.icsi.edu.media/webmodules/CSJ/April/15Article/pdf/cross-border-insolvency (accessed 25 June 2018).

516 Neha Malu & Shreyan Srivastava, *Cross Border Insolvency in India-a Logn Due Dream,* Vinod Kothari (Feb. 1, 2022); https://www.vinodkothari.com/2022/02/cross-border-insolvency-in-India-a-long-due-dream (accessed 15 Dec. 2021).

CHAPTER – V

ANALYSIS OF LIQUIDATION OF COMPANY UNDER EXISTING NEPALESE INSOLVENCY REGIMES

5.1 Background

In Nepal, there are several legal provisions dealing with liquidation of company. The laws on insolvency deal with insolvency proceedings including liquidation of company being insolvent. Some of them are general laws and some are specific laws. In absence of specific laws dealing with liquidation of an entity carrying out special types of business (transaction) general law on corporate insolvency applies thereto. This law principally applies to companies incorporated under the Companies Act, 2006.

Both the general law and specific law have directly or indirectly recognize that liquidation may be voluntary or involuntary (also compulsory / mandatory). Only difference between voluntary liquidation and involuntary liquidation is primarily ability to pay debts. Voluntary liquidation is that where, the company is solvent, i.e. able to pay its debts and involuntary liquidation is that where the company is insolvent i.e. unable to pay its debts.

5.2 General Law on Liquidation of Company

In particular, general law on liquidation of company includes the following Acts, Rules and Directives in Nepal:

- Companies Act, 2006;
- Insolvency Act, 2006;
- Companies Directives, 2015 and
- Insolvency Regulations, 2007.

(i) Companies Act, 2006

The companies Act, 2006 came into effect by replacing the provision of the Companies Act, 1996 dealing with liquidation of company with limited liability. The existing Act deals only with the procedure of voluntary liquidation of solvent company. Chapter 10 of the Act provides various provisions which apply to voluntary liquidation which takes place when the company is able to pay all of its debts.

This study deals only in liquidation of the company being insolvent under insolvency proceedings. So, detailed discussion of the said topic is explored under the heading below:

(ii) Insolvency Act, 2006

The Insolvency Act, 2006 is the first enactment in relation to insolvency liquidation proceedings of a company incorporated under the Companies Act, 2006 and any corporate body with limited liability.[517] This Act was promulgated to make legal provisions immediately in connection with the administration, insolvency proceedings of companies which are insolvent or going to be insolvent being unable to pay debts to creditors or which are facing financial difficulties and in connection with restructuring of such companies.[518]

The Act is based on the principle of 'One Law, Two Systems', that is to say the Act deals with restructuring/ reorganization and liquidation of an insolvent company under insolvency proceedings.

[517] Insolvency Act, 2006 § 2(a) & 4.

[518] *Id.* Preamble.

5.3 Features of Insolvency Act, 2006

For the first time in Nepal, an Act named Insolvency Act, 2006 was promulgated on November 20, 2006 with the following objectives:[519]

a. To administer insolvency proceedings of companies which are insolvent or going to be insolvent; or

b. To restructure the companies which are insolvent or going to be insolvent.

The IA has its own features, which are as follows:

1. Mainly procedural based type law

The IA is mainly procedural based type law because according to its preamble this act has been enacted to provide for the administration, insolvency proceedings and restructuring of the companies which are insolvent or going to be insolvent and the company which is facing financial distress. However, this Act is also a substantive type of law because this Act has also provided rights and duties, liabilities to the creditor, debtor and stakeholder as well. It can aid to exit insolvent companies from the mark et:

2. Application of the Insolvency Act

The IA has confined the jurisdiction of its own application. This Act includes only those companies with limited liabilities which are incorporated under the Companies Act and those companies which are outlined by the Government by notification through Gazette. The legal provisions of this Act do not apply to natural person (individual), firm registered under Private Firm Registration Act, 1957, partnership firm registered under Partnership Act, 1963, the organization with unlimited liability, ownership of which fully or partially undertaken by the

[519] *Id.* Preamble.

Nepal Government, corporation established under Nepalese Corporation Act, 1964 is an example of such organization.

3. Concept of One Law Two Systems

The IA has incorporated the concepts of one law two systems-conversion of liquidation into restructuring and restructuring into liquidation. In other words, this Act provides for conversion of restructuring into liquidation where a restructuring fails and conversion of liquidation into restructuring where it is found appropriate during the liquidation proceedings.

4. Stakeholders Making Petition

The IA has stipulated provisions as per which different stakeholders such as company itself, liquidator, creditor(s), shareholder(s), or debenture holder (s), from among them in the case of the creditors of the insolvent company, who have extended at least 10% and in the case of shareholder or debenture holder 5% and some other requirements fulfilling with prescribed format can make a petition to the court for the purpose of initiating insolvency proceedings.

5. Obtaining license for carrying out insolvency proceedings

The IA has made has intended to have vital role of insolvency professionals and made some provisions on their appointment and any person who wants to work as insolvency professional such as investigation officer, restructuring manager and liquidator, can be appointed for such role but such person is required to obtain license from IAO for carrying out insolvency proceedings under the prevailing Act by fulfilling requirements prescribed by the IA. Such requirement is equally applicable to liquidator being appointed to conduct voluntary liquidation of solvent company under the Companies Act, 2006.

6. Separate Commercial Bench

This is a new concept which the IA incorporated for the first time. The IA has focused on separate commercial bench as an insolvency court to look into the insolvency proceedings in different stages. In each and every stages of such proceedings, the court has supervisory power, and the court exercises such power and make decision on the issues raised during such proceeding. Because of this the judges need to have particular experience and expertise to tackle the dynamic insolvency issues.

7. Creditors' Meetings and Committees

The IA has for the first time made provision of creditors' meeting (CM) and creditors' committees (CC). The Act requires material consultation with creditors in the course of insolvency proceedings. The investigation officer is to call a creditors' meeting before the financial report is submitted to the court. Moreover, the liquidator is to also require to call such meeting for the purpose of submission of report to the court whereas creditors can also form a committee of maximum 5 members to assist the liquidator in the liquidation process.

8. Time bound process on insolvency

Being dynamic process, insolvency proceeding needs to be performed within pre-determined time frame. If so, it is beneficial to the parties involved in the insolvency process. Keeping this aspect in mind, the IA has determined time frame for each process of insolvency proceedings and such process should be concluded within the time frame determined in this Act.

There has been also time frame determined for order to be issued and decision to be made by the court. The investigation officer is obliged to submit his report to the court within the time prescribed by the court and the restructuring manager has to also submit restructuring scheme to the court by preparing within time

prescribed by the court. Upon receipt of such reports, the court is to make decision on the issues recommended in the reports within 7 days. The unhappy creditor upon the restructuring scheme is required to make complain to the court within 7 days and time of 7 days is to also be provided to reply on the questions raised in such report. Similarly, creditors are provided time not exceeding 15 days to submit their claims before the liquidator.[520]

9. Claim by Foreign Creditors

Regarding claims of creditors and mode of payment, the IA 2006 has adopted the principle of equal treatment among the creditors, where the foreign creditors are allowed to forward their claims to the liquidator or restructuring managers appointed to proceed insolvency proceedings of the insolvent company.

10. Enforcement Authorities of the Act

There has been set up some enforcement authorities. They are as follows:

- Commercial bench as insolvency court;
- Office of the company registrar and
- Insolvency administration office.

11. Implication of Liquidation Order

The IA deals with implication of liquidation orders under liquidation proceedings, the management of a company, by closing its transaction as per necessity is taken all and whole assets of the company are controlled by the liquidator. That is, the liquidator assumes that after appointment, all directors and officers of the company are relieved of their office and the liquidator takes all properties, accounts etc. of the company under his responsibility and control and exercise all the managerial powers of the company.

[520] *Id.* §§ 5,6,12,13,14,22,24 & 26.

12. Order of Priority of Payment

The IA has made important changes in the matter or order of payment priority. After the settlement of the expenses of investigation, restructuring or liquidation, employees and workers get priority.

5.4 Difference between Bankruptcy and Insolvency in Nepal

The researcher would like to overview the distinctions between bankruptcy and insolvency in Nepal. Therefore, the following points are also notable before pursuing the phenomenon of insolvency in Nepali regime:

SN	Bankruptcy System under Muluki Civil Code, 2017	Insolvency System under Insolvency Act, 2006
1.	Muluki Civil Code, 2017 is the main law governing bankruptcy.	Whereas Insolvency Act, 2006 is the main law which governs insolvency.
2.	Bankruptcy relates to individual or natural person	But insolvency relates to legal entity or corporate person.
3.	Muluki Civil Code, 2017 defines bankruptcy in Section 54(1) as bankruptcy occurs when a person's debts and other liabilities to be borne by him exceed his assts.	On the other hand, Insolvency Act, 2006 defines insolvency as being insolvent in Section 2(b) meaning the state of being unable, or appearing to be unable to pay any or all of the debts due and payable or payable in the future to the creditors, or the amount of liabilities of company that increase than the value of the assets.

SN	Bankruptcy System under Muluki Civil Code, 2017	Insolvency System under Insolvency Act, 2006
4.	Muluki Civil Code, 2017 entails and defines the term 'bankrupt' in Section 54(3) as if a debts or claim of a creditor is settled from the assets of such person, he is deemed to become bankrupt.	Whereas Insolvency Act, 2063 has not defined the term 'insolvent' though entails the term insolvent.
5.	The provisions incorporated under Chapter 3, part 2 of Muluki Civil Code, 2017 are applicable only to natural person.	But the provisions of Insolvency Act, 2006 are applicable only to legal entity or company.
6.	Under this provision, upon the receipt of petition for initiating bankruptcy proceeding, a notice of 35 days must be given to creditor(s) or group of creditors	Whereas, under this, there is no such provision of notice.
7.	Under this, concerned parties can exercise reconciliation even though the court has given order to initiate bankruptcy proceedings.	However, under this, in the case of insolvency there is no such provision.
8.	Under this, the bankrupt's status remains for a period of 12 years from the date of declaration of bankrupt and the court can also terminate the previous order to declare bankrupt if he clears all the	But there is no such provision in Insolvency Act, 2006.

SN	Bankruptcy System under Muluki Civil Code, 2017	Insolvency System under Insolvency Act, 2006
	debts and the bankruptcy's status gets terminated after 1 year from the date of declaring bankrupt.	
9.	Section 54 (2)(c) of Muluki Civil Code, 2017 states that creditor means creditor, creditors or group of creditors who hold 50% or more debts out of the total debts of the person likely to become bankrupt.	Whereas, Section 2 (i) of Insolvency Act, 2006 says that creditor means a person who is entitled to receive payment from an insolvent company or a company likely to become insolvent and this term also includes a secured creditor.

5.5 Provisions on Liquidation of Company which is insolvent

Being final resort, liquidation of a company which is insolvent comes under the insolvency proceedings. Any company which is insolvent can also be liquidated but such company cannot be liquidated automatically when one intends to do so. Liquidation proceeding starts basically when a symptom of company being insolvent appears.

- **Declaration of Insolvency**

  As per the Insolvency Act, 2006, a company is required to be declared insolvent first. When a company is declared insolvent, application can be filed in the court for initiating insolvency proceedings. The conditions under which a company can be declared insolvent, are as follows:[521]

  a. If the general meeting of the shareholders' or board of directors adopts special resolution that the company has become insolvent; or

[521] *Id.* § 7 (1).

b. If the company fails to pay the debt within 35 days from the receipt of court's order for such effect; or

c. If the company fails to pay debt the debt within 35 days from the issuance of notice by the creditor or fails to file an application in the court to nullify by the notice issued by the creditor.

d. If it is proved from any other fact that the liabilities of the company exceed the value of its assets or the company itself accepts the fact that it has become insolvent.[522]

- **Phases of Insolvency Proceedings**

The Insolvency Act provides two or three phases for completing insolvency proceedings. When insolvency leads to insolvency proceedings, first of all investigation phase comes into scene, which is equally important both to restructuring phase and liquidation phase respectively. The investigation phase must be followed with respect either to restructuring or liquidation of an insolvent company. Going for restructuring or liquidation depends upon the Court's discretion. But without order of the court such proceeding cannot be commenced against such company.[523] The Commercial Bench of the High Court has jurisdiction on such matter.[524] The Insolvency Ordinance was promulgated to address mainly corporate insolvency issues. The Insolvency Act, 2006 was enacted under the Financial Sector Reform Program. This Act is specially related to insolvency of company. The Act has brought the insolvency proceeding under the direct supervision of the court. Section 2(g) of the IA defines court as

[522] *Id.* § 7(2).

[523] *Id.* §3.

[524] *Id.*

commercial bench of any court established by Government of Nepal with consultation of Supreme Court.

As regards first phase, i.e. investigation phase insolvency proceeding must be commenced first, if company is unable to pay its debts (claims) of all the creditors.

- **Stakeholders Making Application**

For the purpose of initiating insolvency proceeding an application must be made before the court.[525]And in general, an application as per Section 4(a) to (e) of the Insolvency Act can be made by any of the following stakeholders for the commencement of insolvency proceedings:

(a) Insolvent company itself;

(b) At least 10% of company's creditors;

(c) Shareholder(s) subscribing at least 5% of the total shares;

(d) Debenture-holder(s) subscribing at least 5% of debentures out of company's total debentures;

(e) A liquidator appointed to liquidate the company.[526]

(f) Authorized body/authority/regulatory framed to manage a special type of business[527]i.e. in the case of bank and financial institution carrying on banking and financial business/transaction or in the case of companies carrying on insurance business, no application can be made without

[525] *Id.* § 4 & 8.

[526] If, after having commenced liquidation proceeding of a company under Chapter 10 of the Companies Act, 2006, the liquidator is happy with that the company is insolvent and is not able to pay debts required to be paid or to discharge liabilities required to be discharged in full, he is required to make an application for a review of insolvency of the company under the existing law on insolvency (Section 129, Companies Act, 2006).

[527] Insolvency Act, 2006, § 4 (f).

obtaining prior approval of Nepal Rastra Bank and Insurance Board respectively. In the case of company which cannot undergo voluntary liquidation without the approval of the competent body or authority except bank or financial institution or insurance business.[528]

In the case of shareholder or debenture holder permission of the court is required while making application for insolvency proceeding, and the terms and conditions mentioned in the permission letter of the court must be complied.[529]

If such application is made by the company itself or the creditor (s) or the liquidator, the application must be accompanied with reason for doing so, short description of the company's financial condition and the evidence supporting the fact that the company has become insolvent and other necessary details.[530]

In the case of application being made by the company itself, the necessary details include the followings:[531]

- A document certified by the board of directors of company, declaring that the company has become insolvent;
- A special resolution adopted by the board of directors of company to initiate the insolvency proceeding and
- Certified copies of balance sheet and audit report available at the time of making application for initiating insolvency proceedings.

[528] *Id.* § 4(1).

[529] *Id.* § 4(4).

[530] *Id. § 4(3).*

[531] *Id. § 4(3) (a.)*

In the case of application being made by the creditor, the necessary details include the following:[532]

- A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;
- The data on which the company borrowed the debt claimed by the creditor stating the reason why the company borrowed the debt;
- Particulars of the due amount and stating that the amount is payable immediately and
- The reason and ground on which the creditor believes that the company has become insolvent.

In the case of application being made by the liquidator, the necessary details include the following.[533]

- Evidence providing that the company has appointed liquidator for the purpose of liquidation of the company and
- The opinion expressed by the liquidator and ground of such appointment on the matter of making application for insolvency proceeding.

➢ **Notice for payment of debts**

It is pre-requisite that before making application for initiating insolvency proceeding, a notice of 35 days must be furnished to the registered office of the company (ROC) for the payment of debt and if the company is not able to make payment to the creditor within 35 days from the date of such notice given dully,

[532] *Id. § 4(3) (b).*

[533] *Id. § 4(3) (c).*

an application can be made after the expiry of such time limit served on the concerned company.[534]

- **Application to nullify the notice issued for payment of debt:**

The IA, 2006 has under Section 6 stated the following provisions in respect of application to nullify notice issued by the creditors for payment of debt.

(1) Where the notice received pursuant to Section 5 of the IA is not reasonable or where there are any other reason for not repaying the debt immediately, the concerned company can file an application to the court in order to nullify the notice, not later than 35 days after the date of receipt of that notice.

(2) Where the application referred to in Sub-Section (1) is filed, the court shall issue a notice summoning the creditor giving the notice referred to in Section 5 of the IA to appear before the court within 7 days; the notice to be so issued shall also be accompanied by such application's copy.

(3) The court can make a decision to nullity or not to nullify the notice issued pursuant to Section 5 of the IA no later than 7 days after the date of the creditor's appearance pursuant to Sub-Section (2) or after the date of expiration of the time prescribed for the appearance before the court where the creditor has failed to made such appearance.

(4) The court can issue an order to nullify the notice pursuant to Section 5 in any of the following conditions:

(i) There is a clear dispute as to whether the creditor has extended debt to the company or not; and

(ii) The debt due to be paid by the company to the creditor does not appear to be payable immediately.

[534] *Id.* § 5(1) & 4 (2).

(5) Where the court issues an order pursuant to Sub-Section (4) of the IA, no notice that is issued to pay the debt can be given to the company again on the same matter nor can an application be made for the initiation of insolvency proceedings until the condition set forth in that Sub-Section continues to exit.

(6) Where the court rejects to issue an order pursuant to Sub Section (4), the company shall pay the creditor's debt no later than 35 days from that date.

- **Action to be taken on application[535]**

The IA 2006 has under Section 9 made the following provisions regarding action to be taken upon receipt of application:

(1) Where an application is filed under Section 4 of the IA for insolvency proceedings the court shall register the application and appoint the date for its hearing within 15 days.

(2) Except where a company has itself filed an application for insolvency proceedings, if the same is registered under Sub-Section (1), an order may be made by the court to the concerned company to submit a written statement with reasons, if any, for not initiating such proceedings within 7 days and shall be served on the Registered Office of such company.

(3) If the court deems appropriate, it may order the authority referred to in Sub Section (1) of section 8 of the IA as per necessity to submit statements to the court for not initiating any proceedings as demanded by the applicant before the data appointed for hearing and notice thereof can be published at least twice in any daily newspaper of national level prescribed by the court so that the shareholders, creditors of the concerned company and the Stock

[535] *Id.* § 9.

Exchange, as well, where such company has been listed in the Stock Exchange get such information.

(4) Any company or person who has received the notice can submit statements in writing for not initiating the insolvency proceedings within the time specified by the court.

- **Decision to be made upon keeping on hearing**[536]

As soon as insolvency application is registered and the date is appointed for the hearing upon the application, the court keeps hearing upon the application. Such hearing continues until the court arrives at a decision. However, if the court becomes unable to conclude the hearing or reach to that decision on the day when it was started, the hearing must be continued even the next day. On completion and decision thereupon made by the court, it shall order to appoint insolvency professional as an investigation officer for the purpose of making insolvency among the panel list approved by the office.

- **Issuance of Interim Order by the Court**

The court may issue an interim order in the course of the hearing on application if there exists any of the following circumstances which may prejudice the interest of the creditor (s) or any other concerned person.[537]

a. If the company's assets have been disposed in an improper manner;

b. If the company's management has not been carried out properly and

c. If any legal action is going on which prejudices the company's assets.

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[536] *Id.* § 10.

[537] *Id.* § 11 (1).

The court may, while issuing such order under Sub Section (1), issue an order restraining from doing any or all of the following acts[538]

i. Transfer, sale, deposit, mortgage or pledge of any assets of the company other than that business which the company has been carrying on in the ordinary course of business;

ii. Transfer of share or altering the status of the shareholders;

iii. Freezing or enforcing any assets of the company by any person; or study Initiating any legal action, by any creditor/person, against the company's assets.

For this purpose, the court may issue an order to the office to appoint any appropriate person as interim administrator (IA) for the company's interim management during the currency of such order.[539]

But once the application is made, it cannot be withdrawn without permission of the court.[540]

- **Management of Company and Report by the Board.**

Although the court gives an order to investigate the insolvency proceedings, the Board of Directors of the company can carry out the management and ordinary transactions of the company during the investigation period under the officer's supervision.[541] But the officer can carry out by himself the management and ordinary transaction if the court authorizes him to do so.[542] However, the officer

[538] *Id.* § 11 (2).

[539] *Id.* § 11 (3)).

[540] *Id.* § 12

[541] *Id.* § 15 (1).

[542] *Id.* § 15 (3).

can carry out the special transaction only with obtaining permission of the court.[543]

Similarly, at the time when such order is given by the court or within a period of 1 year prior to such order, the person holding the office of director of the company has to submit to the court a report in the format of Schedule 3[544] on the financial situation and transactions of the company as at the time of his retirement.[545]

- **Automatic Suspension**

When the court gives an order to institute the insolvency proceedings no act or actions stated below can be done or taken without the court's permission, and if being done such act or actions being done or taken but not yet completed are automatically suspended:[546]

a) Transferring, selling and disposing of the company's shares or changing the status of shareholder;

b) Transferring, selling or disposing of or mortgaging or pledging the company's as collateral;

c) Attaching company's assets or realizing any collateral under any judgment or order;

d) Repossessing any property by the lesser or any action leased to the company to be taken by him to this regard;

e) Paying any debt where payment was outstanding which had become payable at the time of order given by the court to institute insolvency

[543] *Id.* § 15 (4).

[544] Insolvency Regulations, 2007.

[545] Insolvency Act, 2006 § 16.

[546] *Id* § 19(1).

proceeding with respect to the concerned company or pledging of a collateral in consideration thereof and

f) Transferring or withdrawing monies in the company's fund.

After the appointment, the investigation officer is required to independently make a detail investigation and to determine whether-[547]

- the financial situation of the company can be improved or not to give an order for immediate liquidation;
- the time limit fixed for investigation needs to be extended or not;
- an order should be given for restructuring of the company through restructuring scheme or not;
- the company is insolvent or is likely to be insolvent or not.

➢ **Submission of Report by Investigation Officer (IO)**

During the investigation process the officer has to investigate the financial and business situation of the company and submit a report thereof to the court within the period of investigation.[548] But before submitting such report, the officer is bound to convey the creditors' meeting (CM) to discuss his report about the future plan of insolvent company,[549] where all the creditors can make any claim as a creditor[550] and CM takes decision by majority.[551] The report to be submitted by the officer has to contain the reasons and grounds with respect to his

[547] *Id.* § 13.

[548] *Id.* § 18(1).

[549] *Id.* § 21(1).

[550] *Id.* § 21(4).

[551] *Id.* § 21(7).

determination and among other things, the actual financial situation of the company, details of investigation and opinion and findings of the officer.[552]

After having received the report of the investigation officer, the court can give any of the following orders within 7 days of submission of the report under Sub-Section 1 of Section 18, or a resolution adopted in the creditors' meeting or restructuring scheme submitted by the company, if any received by it-[553]

- To immediately liquidate the company;
- To implement the restructuring scheme;
- To wait for the period specified by the court if the company can be improved without liquidating;
- To extend the period for making further investigation and
- To dismiss the insolvency proceeding.

➢ **Restructuring Phase**

In case two orders stated above i.e., to liquidate the company and to implement the restructuring scheme are given by the court, two options are available to a person desiring to apply for the insolvency proceedings. First option is direct liquidation and second one is indirect liquidation under the Insolvency Act, 2006. Under the latter option, prior to going for liquidation, restructuring (scheme) phase must be passed first. The court can, if it considers reasonable, give an order to implement restructuring scheme within 7 days after the receipt of the report submitted by the investigation officer[554] and gives an order to appoint an insolvency professional as a Restructuring Manager (RM).[555] After his

[552] *Id.* § 18(2).

[553] *Id.* § 22.

[554] *Id.* § 22(1).

[555] *Id.* § 22(2).

appointment, the RM is required to prepare a restructuring plan in writing for the purpose of operating and implementing such plan, which must contain the followings:[556]

- To alter the capital structure of the company by capitalization of its debt;
- To settle the claim of the creditor by selling any portion of the company's assets;
- To change the nature of the claims of the creditors of the company and issue securities consideration thereof;
- To get the creditors of the company to participate in capital investment by issuing shares in consideration of their claims;
- To merger the company with any other company;
- To change the company's management; or
- To do any other necessary thing considered appropriate by the court to restructure the company.

After having prepared restructuring plan, the RM must furnish a notice to all creditors within 15 days from the date of commencement of his work in advance of at least 7 days to submit their claims within 15 days of issuance of such notice. Within 15 days of the receipt of the claim submitted by the creditors, the RM is bound to convene the creditors' meeting and to send copy of such plan to each creditor along with the notice in advance of at least 7 days and the creditors, after detailed discussion over the plan on the following matters on the majority basis:[557]

- To accept with or without amendment on such plan or
- To liquidate the company immediately without accepting such plan.

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[556] *Id.* § 23.

[557] *Id.* § 24(7).

As soon as the RM prepares the report he is under obligation to submit his report to the court about transactions, assets and financial situation of the company whether its restructuring plan, if any, proposed.[558]

The restructuring plan adopted and approved by the creditors' meeting with respect to any of above matters is further submitted to the court for approval, if approved, the plan will be implemented.[559] Once approved by the court it is binding on all creditors, directors, shareholders and even secured creditors.[560] Where the secured creditors vote in favor of the plan or express their consent there on or if the court's order is that the secured creditor is also bound by such plan,[561] and the company has to implement such plan.[562] But if the company fails to implement it, the court gives an order to liquidate such company at the same time when the court gives and order to terminate such plan.[563]

- **Liquidation Phase**

In this sense, it can be said that there are two options- direct liquidation and indirect liquidation. Under the former option where the court gives an order to liquidate the insolvent company upon the receipt of the investigation officer's report. On the other hand, the court gives an order for liquidation of the insolvent company only after failure of the restructuring plan. So, in any of these cases whether the court gives an order for liquidating the insolvent company on the basis of the IO's report or due to failure of restructuring plan, a liquidator is appointed for conducting liquidation proceedings. Thus, if the court gives an order for liquidation, at the time of giving such order, the court also gives an order

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[558] *Id.* § 25(1).

[559] *Id.* § 24 (9)

[560] *Id.* § 28.

[561] *Id.* § 29(1)

[562] *Id.* § 34(1).

[563] *Id.* § 36(2).

to appoint one person as the liquidator amongst the persons eligible to carry on insolvency business and as soon as such order is given liquidation proceedings of the company is deemed to have commenced.[564]

Consequences of the Commencement of the Liquidation Proceeding[565]

When the liquidator is appointed, the director and officers of the company are relieved of their office and the liquidator is entitled to exercise all the managerial powers which were exercised by the directors and officers. The liquidator assumes company's control, takes into his custody all assets, properties and books of accounts except the properties in possession of secured creditors and terminates the services of all employers except the few retained by him to help him manage the company. The supreme court of Nepal has also recognized this provision.[566] Even during the period of currency of liquidation proceedings, all provisions concerning ipso facto suspension under Section 19 of the Insolvency Act will apply except for;

(a) Implementation of secured creditor's right to execute or
(b) Implementation of the lessor's right of any property leased to the company to redeem it as per the Insolvency Act.

5.6 Liquidator

(i) Appointment of the Liquidator

Liquidator is a professional person appointed to conduct the affairs of the liquidation. In Nepal, appointment of a liquidator is compulsory for conducting liquidation proceedings of a company whether it is solvent or insolvent.

The insolvency Act, 2006 defines the term liquidator in Section 2 (q) as "Liquidator means a person who is appointed by an order of the court or a

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564 *Id.* § 37.

565 *Id.* § 38.

566 Shambhu Prasad Nepal v. Cabinet Secretariat et al. NKP (2006), Decision No. 6149, at 145.

resolution adopted by a meeting of creditors to liquidate the affairs of a company, and this expression also includes the office."

When the company fails to implement the restructuring plan or upon the receipt of the report of the IO, the court can, if thinks appropriate, give an order to liquidate the company and at the time of issuance of such order, the court also gives an order to appoint one person as a liquidator from amongst the persons who are able to carry on insolvency proceedings.[567]

The Insolvency Act, 2006 has talked about the eligible criteria for a liquidator under Chapter 8. Thus, no person can be appointed as liquidator who has not obtained a license from the office.[568] If a person who has not obtained the license is appointed as a liquidator, such an appointment is ipso facto void.[569] So, only licensee can be appointed as a liquidator. For obtained a license from the office a person can make an application, along with prescribed fee, to the office in the format of Schedule 6.[570]Any person meeting following requirements can apply for obtaining license-[571]

- Having completed the age of 35 years;
- Being a member of the prescribed professional association;
- Having acquired at least Bachelor's degree in commercial law, commerce, management, accounts or any other prescribed subject from a recognized university;
- Having domicile in the state of Nepal and
- Being competent to carry on insolvency practice under the Insolvency Act, 2006.

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[567] Insolvency Act, 2006 § 37 (1).

[568] Insolvency Administration Office.

[569] Insolvency Act, 2006 § 63.

[570] Insolvency Regulations, 2007.

[571] Insolvency Act, 2006 § 64(2).

If the liquidator appointed for conducting liquidation proceedings falls vacant due to suspension or cancellation of license under Sub Section (1) of Section 66 for any other reason, the court can give an order to appoint any other person being eligible for liquidator to fill the vacancy under this Act.[572]

(ii) Remuneration of the Liquidator

The liquidator is entitled to charge remuneration for the conduct of liquidation proceedings under the Insolvency Act, 2006. The liquidator is paid remuneration from the liquidation estate proceeds under Section 57 of the said Act. It is paid according to the decision of the CM under this Act. Remuneration is fixed by the CM from time to time. In case the CM fails to do so, the court can fix the remuneration of the liquidator on the basis of report of the office.[573]

(iii) Announcement in Newspaper

The liquidator must, for calling debt claims against the insolvent company, announce in a newspaper. That is, the liquidator is required to furnish a notice to all creditors of the company to submit their debt claims during the time period of 15 days of such notice announcement in the format of Schedule 4,[574] and such notice must also be published at least twice in a national newspaper with circulation.[575] National newspaper is the notional daily newspaper being published in Nepali or English language defined by Nepal Press Council as (A) Class.[576]

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[572] *Id.* § 67.

[573] *Id.* § 68.

[574] Insolvency Regulation, 2007.

[575] Insolvency Act, 2006 § 45(1) & (2).

[576] Company Directives, 2015, Rule 2 (f).

(iv) Functions, Duties and Power of the Liquidator

In the course of conducting liquidation proceedings the liquidator has the functions, duties and powers which are, in addition to other provisions provided for in the Insolvency Act, 2006, as follows:[577]

a) To institute or defend legal proceedings on behalf of the company.

b) To appoint employees to assist in the performance of his duties.

c) To call up all unpaid shares of the company from the shareholders.

d) To execute or cause to execute all acts and deeds or documents and to use the seal of the company for that purpose.

e) To borrow loans on the security of the assets of the company.

f) If, in the opinion of the liquidator, sale or disposal of any property or termination of any contract or liability would be beneficial to the company, to sell and dispose or such property or terminate such contract or liability.

g) To make compromise with any creditor or any person claiming to be a creditor of the company in relation to the claim made by him.

h) To make compromise with any person against whom the company may claim any debt, liability or any other claim.

i) To sell company's assets and distribute the proceeds as required amount under the Insolvency Act, 2006.

j) To do or cause to do all such other things as are necessary for liquidating the company.

[577] Insolvency Act, 2006 § 40(1).

In addition, the duties to perform the following functions of the liquidator are:[578]

i. To collect, protect and sell the company's assets;

ii. To examine the business and financial situation of the company;

iii. To admit debt claims of the creditors subject to Chapter 6 of the Insolvency Act, 2006;

To distribute the proceeds received from the sale of the company's assets to the creditors, on the basis of the order of priority fixed for payment of liability under Section 57 of the Insolvency Act, 2006-

To convene the creditors' meeting;

vi. To prepare a report of his affairs and submit to the court and the office;

vii. To facilitate the cancellation of company's registration;

viii. To investigate whether any director, officer or shareholder of the company or any other person has committed any fraud, cheating or deception against the company or its creditors and to take legal actions against such person.

Moreover, the liquidator can perform other functions, such as to get back any property of the company if it is used by anybody or to institute legal actions to get back such property or the proceeds of void transaction provided that the liquidator shall not be entitled to make any expenses that might not be paid from the company's assets.[579]

(v) Removal of the Liquidator

No person shall operate insolvency practice without obtaining a license from the IAO under the Insolvency Act, 2006[580]. So, if a complaint is made against

[578] *Id.* § 40 (2).

[579] *Id.*§40(3).

[580] *Id.* § 63 (1).

liquidator appointed under this Act, the court may issue an order to remove him on the ground that:

a) he has failed to perform function in accordance with this Act while carrying out the insolvency proceedings of any company assigned to him; or

b) His conduct is found opposed to this Act.[581]

Moreover, the Companies Act, 2006 has also provisioned that the liquidator can be removed by the same method used for his appointment if[582]; he performs functions against:

- The insolvency professional code of conduct; or
- Company's interest; or
- Any prevailing laws.

But prior to removal of the liquidator, the consent of the body implementing such order must be taken and he has to be given an opportunity to defend himself.[583]

(vi) Liability of the Liquidator

The central concern, even in liquidation of insolvent company, is the conduct of the liquidator involved therein. In case such liquidator performs functions opposed to prevailing laws and so on during the phase of liquidation, the court imposes liability in the name of fine or imprisonment upon such liquidator who is responsible for such adverse outcomes.

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[581] *Id.* § 70 (1).

[582] *Id.* § 127 (8).

[583] Companies Act, 2006, Provisio clause to Companies Act, 2006 § 127 (8), & Insolvency Act, 2006 § 70(2).

A liquidator is punished with a fine from Rs. 25000 to 50,000 or with imprisonment for a maximum 2 years or with both punishment where with ulterior motive, recklessness or mala intention:[584]

a) he does not call the creditor's meeting; or

b) he makes payment of loans or liabilities opposed to the order of priority; or

c) he fails to maintain such books of account and accounts as required to be maintained under the Companies Act, 2006; or

d) he fails to take over such books of accounts and documents as required to be taken over; or

e) he maintains false accounts; or

f) he fails to submit any report required to be submitted; or

g) he fails to handover cash, goods in kind or books to be handed over by him on the termination of his assignment.

(vii) Claims and Realization

(1) Submission, Admission and Rejection of Claims

Once the liquidator is appointed, his first duty, among other duties, is to collect, consolidate and verify the following claims of the company's stakeholders:

a) In the case of Creditor's Claims[585]

The creditor of an insolvent company is required to submit debt claim outstanding for payment or payable in the format of Schedule 5.[586] Within the time limit as prescribed by the liquidator as the case may be. Along with such claim, the creditor must also submit the evidence

[584] Companies Act, 2006 § 160(d).

[585] *Id.* § 48.

[586] Insolvency Regulations, 2007, Rules 7(1).

and proof, if any, where the liquidator demands. Upon the receipt of such claim, the liquidator verifies it, and may either admit or reject it in full or in part. In case of rejection of such claim in full or in part, the claimant must be furnished a written notice stating reasons thereof within 7 days from such rejection. If a person is not happy with such notice received he can appeal in the court for review within 15 days. Even a foreign creditor lending money to the company enforceable as per the prevailing laws can submit debt claim against such company.

b) In the Case of Claim for Interests[587]

If an insolvent company which has obtained debt under the condition of paying interest on it under a contract entered into at the time of obtaining such debt, such interest can also be included while submitting debt claim. However, no interest can be claimed after the date when the court gives an order for liquidating company.

c) In the case of Claim for Undetermined or Contingent Liability[588]

Except in the case of debt claim made by the creditor of an insolvent company, any claim on any liability of which value has not yet determined, such as loss or compensation arising from non-performance or otherwise breach of contract by such company or by omission for civil wrong or contingent liability such as given by the company under a guarantee which has not yet taken place can be presented under the debt climbing made by the creditor. As such the liquidator can either admit or reject such claim after having verified. In case of rejection by the liquidator, the claimant must be furnished a

[587] Insolvency Act, 2006 § 49.

[588] *Id.* § 50.

written notice stating reasons thereof within 7 days from such rejection, and if admitted, the liquidator shall also determine the estimated value of such claim. However, the liquidator can apply to the court and upon the receipt of the application, the court shall determine the estimated value of such claim. Any person who is not happy with the rejection of claim the estimated value of such claim by the liquidator can apply to the court within 15 days from the date of the receipt of the notice thereof.

d) In the case of Secured Creditor's Claim[589]

The Insolvency Act, 2006 permits the right of secured creditor in liquidation proceeding. A secured creditor has right to make a debt claim against the insolvent company at any time. Upon the receipt of such claim, the liquidator can either admit or reject such claim. A claim made by the secured creditor is limited to an amount representing the difference between the amount to be paid by the company to the secured creditor received from the secured market value of the property and the amount payable by the company to the secured creditor. If dispute arises between the secured creditor and the insolvent company with respect to the difference between the value of the secured property and the amount outstanding and payable, such a dispute is referred to the court and it is determined as per the court's decision.

(2) Realization of Assets and Distribution of Proceeds

The liquidator has some functions, duties and powers for carrying on the business of the company for its beneficial liquidation and to sell the movable or immovable property of the company, with the power for transferring such

[589] *Id.* § 54.

property to any person. Therefore, the Insolvency Act has adopted cautious approach that the market is required to endeavour and rescue (restructure) the company and to just liquidate it if the rescue fails.

Although the order of liquidation is given restructuring of the company's business is also possible under the Insolvency Act.[590] While conducting liquidation proceedings if the liquidator thinks appropriate that the restructuring of the company can be adopted and approved by the creditors' meeting after having studied and examined the business and assets of the company, nature of the goods or services to be produced by the company and market potentiality thereof, the liquidator can make to the court an application by stating reasons for an order to suspend the liquidation process for a certain time period for the purpose of implementation of the restructuring scheme under the Insolvency Act, 2006. If the court is happy with such application, it can give an order to implement the restructuring scheme by suspending the order on liquidation given earlier for a certain time. After that such order is implemented under the Insolvency Act, 2006.

In case of failure of attempt to rescue the company's business, the liquidator must verify the debt claims, take into his custody of all the assets, property, accounts of books etc. as specified in the Act. After that the liquidator must take steps in selling of the assets of the company according to law to this regard.

The next step to be taken by the liquidator under liquidation proceeding is to invite and settle the debt claims of the creditors and claimants and distribute proceeding as per the provisions of the Act. Thus, the Act provides waterfall mechanism which states about the priority and order of

[590] *Id.* § 39.

distribution of proceeds towards the sale of assets among stakeholders of the company. As regards priority of claims all who is in the same categories of priority must be equally treated. Next priority only comes when the previous is cleared.

Employees and workers get priority after the cost of restructuring and liquidation are settled. Outstanding payments to employees and workers have been categorized into two parts for the purpose of priority. Wages and remuneration have priority. There is no ceiling on the payment but working directors do not have priority in the payment of their remuneration. In addition, the government is no longer a preferred creditor. Governmental claims on items, such as taxes are treated as unsecured debt, just as any other unsecured debt payable to a non- governmental debtor.

The liquidator, while settling liabilities of the company under the Insolvency Act, 2006 distributes the available proceeds as per the priority order of payment which are as follows:[591]

(a) All expenses concerning the appointment of Interim Administrator and functions performed by him under Sub Section (4) of Section 11 of the Act and his remuneration.

(b) Other costs to be settled as per Chapter 2 of the Act.

(c) All expenses concerning the appointment of Investigation Officer and functions performed by him under Sub Section (3) & (4) of section 10 of the Act and his remuneration.

(d) All expenses concerning the appointment of Restructuring Manager and functions performed by him under Chapter 4 of the Act and his remuneration.

[591] *Id* § 57(1).

(e) All debts obtained by the Investigation Officer and Restructuring Manager during investigation period and restructuring scheme period respectively.

(f) All expenses concerning the appointment of the liquidator and functions performed by him under Sub-Section (1) of Section 37 of the Act and his remuneration.

(g) Wages and remuneration due and payable to the workers or employees, except director of the company at the time when the court gives an order to restructurer or liquidate the company.

(h) Amount due to workers or employees, expect director of the company at the time of the issuance of the order for restructuring or liquidating the company in consideration of annual home and sick leave gratuity and employee provident fund, if any.

(i) All other amounts admitted by the liquidator as the case may be.

(j) Distribution to the preference shareholders and common shareholders respectively on the priority order if there remains amount after having paid as mentioned order of priority.[592]

(VIII) Mode of settling liabilities[593]

The liquidator can, while settling liabilities of the creditor(s) under Chapter 6, do so following at one time or at different times.

(IX) Avoidance of Transactions[594]

The IA authorizes that the court can, after the submission of application from the liquidator with proof, declare the following transactions invalidate or void:

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[592] *Id.* § 57 (4).

[593] *Id.* § 58.

[594] *Id.* § 59 (1).

a. Preferential transactions carried on immediately before or after 6 months from the commencement of insolvency proceedings.

b. Preferential transactions carried on with a related person of the company immediately before or after 1 year from the commencement of insolvency proceedings.

c. An under value transaction has been carried on immediately before or after 1 year from the commencement of insolvency proceedings.

d. Any fraudulent transaction carried on before or after 2 year from the commencement of insolvency proceedings.

As regards the transactions mentioned above, the concerned person can prove the following things in his defense[595] that;

i. the company was not insolvent when the transactions were carried on;

ii. he has not obtained any benefit from the transactions;

iii. There was no any reasonable reason to suspect that the company was insolvent when any benefit was obtained from the transactions or the company might become insolvent by the reason of the transaction.

Where the court is happy with the application made by the liquidator as per Sub Sections (1) and (2) of Section 59 of the IA that a transaction is a voidable transaction, the court can give the following orders[596].

a. An order requiring a person to pay the liquidator some or all of the amounts paid by the company under the transaction;

b. An order requiring a person to transfer to the liquidator the asset or its equivalent value that the person received as the result of such transactions;

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[595] *Id.* § 60.

[596] *Id.* § 61 (1).

c. An order releasing or discharging partly or fully a debt, security or guarantee furnished by the company as the result of such transactions;

d. An order declaring any remission, release, or any agreement given or entered into between the company and any other person as a consequences of the voidable transaction and unenforceable as the case may require;

e. In case any other additional order is required to enforce any of the above orders, the court can also give any other further order.[597]

(X) Issuance of order by the court as regards company being under liquidation proceedings.[598]

The court may at any time issue any of the following orders as regards any insolvent company which is undergoing liquidation proceedings:

(i) An order to suspend or terminate liquidation of a company;

(ii) An order to give order to handover the company's assets to the liquidator;

(iii) An order to pay calls made for payment;

(iv) An order to stop a person who is suspected of having any property of the company in his possession; and

(v) An order to arrest a person who obstructs the liquidator in the performance of his functions or duties or in exercise of powers of the liquidator.

(XI) Dissolution of Insolvent Company

There is no mention of the time period of liquidation to complete the liquidation proceedings in Nepal. But such time period may be specified by the court and the liquidator shall terminate the liquidation within such time period.

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[597] *Id.* § 61 (2).

[598] *Id.* § 46.

The liquidator must complete liquidation proceeding within the time limit as specified by the court at the time when he is appointed.[599] During the time limit specified by the court, the liquidator must prepare a progress report concerning liquidation of company within the period of 3 months (90 days) of his appointment and submit to the court and the office the report.[600] It must contain[601] (a) amount of issued, subscribed and paid up capital, (b) estimated values of assets and liabilities, (c) the liquidator's opinion regarding cause of financial failure, (d) the liquidator's opinion, whether it is necessary for further investigation as regards promotion, formation and conduct of the company and its directors and shareholders (e) other necessary things which the liquidator thinks appropriate.

The liquidator shall adhere to this period of time although it may be extended in case of necessity. The liquidator has to submit the final report of liquidation proceedings. That is why, the liquidator is, on the completion of liquidation proceedings, required to prepare a report on the properties recovered, payments made to the creditors and distributions to the shareholders, on behalf of the company and submit such report certifying that the company has been liquidated, accompanied by the auditor's report, to the IAO.[602] But when the liquidator appointed as per the Insolvency Act, 2006 shall send to the IAO regarding the information of completion of liquidation proceedings of such company, the office shall keep record of liquidation of such company and after such record the company shall be deemed to be liquidated.[603]

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[599] *Id.* § 22(2).

[600] *Id.* § 42 (1).

[601] *Id.* § 42 (2).

[602] Companies Act, 2006 § 131 (f).

[603] *Id.* § 132 (3) & (4).

When the sales of liquidation assets are done among the shareholders is completed according to the order of priority of payment under Section 57 of the Insolvency Act, 2006, the first will be the expenses concerning the functions discharged by the interim administrator (IA) and his remuneration.

(XII) Creditor's Meeting

During the liquidation process the liquidator is, while preparing his progress report, under obligation to call the creditors' meeting from time to time as per necessity.[604] For the purpose of calling such meeting, the liquidator is to furnish notice indicating the venue, data, time and agenda of the meeting to every creditor in order to know their views on the insolvent company's future plan in advance of at least 7 days and such notice must also be published at least twice in a national level daily newspaper.[605] Such notice can also be given by a letter, telex, telefare, email or any other electronic means of communication that can be recorded.[606]

The liquidator shall chair the meeting.[607] The meeting may be conducted and adjourned as per necessity.[608] The directors of the company may present in the meeting and answer any questions of creditors raised by them with respect to business and financial situation of the company.[609] The meeting so called may constitute creditors' committee having not more than 5 members (creditors) in

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[604] *Id.* § 43(1).

[605] *Id.* § 21 (2).

[606] *Id.* § 21 (3).

[607] *Id.* 43(3).

[608] *Id.* § 24 (5).

[609] *Id.* § 24 (6).

order to facilitate the liquidator in the liquidation process of company[610] and its rules of procedures and other necessary matters are as prescribed by the meeting of creditors.[611]

(XIII) Opening and Operating Separate Bank Account[612]

After appointment and while conducting insolvency proceedings under the IA, 2006, the liquidator has to open and operate a separate bank account of each insolvent company to which he has been appointed. He has to deposit all amounts received by him with such account, and the surplus fund deposited in such account shall be spent only in the prescribed sectors.

Similarly, the liquidator as the case may be shall also maintain other accounts and books of record as per necessity to clearly reflect the full and actual affairs of the insolvency proceedings to each insolvent company and shall submit the statements of such account and book to the court or to the IAO as per necessity. The liquidator shall, at the end of his duties have such accounts and book and the statements thereof maintained by him under this Section audited in accordance with the laws and submit the same to the IOA.

When all the liquidation proceedings are completely wound up of the company and liquidation of the assets is also done then the liquidator must, for cancellation of registration of such company pursuant to Section 47 of this Act, send a necessary statement thereof to the company registrar office within 7 days of completion of such proceedings.[613] Upon the receipt of such statement the Office

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[610] *Id.* § 44(1).

[611] *Id.* § 44 (2).

[612] *Id.* § 69.

[613] Insolvency Regulations, 2007, Rule 14(1).

keeps record of cancellation of such company,[614] and the company is automatically deemed to be dissolved.[615] After that the office is to publish a notice of dissolution of company in the national daily newspaper at least twice.[616]

(XIV) Major Authorities administering Insolvency & Liquidation

(A) Insolvency Administration Office

Insolvency administration office (herein after referred to IAO) is one of the prerequisites which issues license to the insolvency practitioner. As defined in Section 2(n) of the Insolvency Act, 2006, insolvency practitioner means a person licensed under Section 64 to carry on business relating to insolvency.

The insolvency Act, 2006 has made an important provision on establishment of Insolvency administration office with an object to regulating the procedure and safeguarding the files and documents prepared by the insolvency practitioners. The Act has provided that after the commencement of this Act Nepal government may, by notification in the Nepal Garzette, establish an insolvency administration office to perform the function as a regulator of insolvency profession.[617]

So, IAO performs functions as a regulator of the insolvency profession and the custodian of the files and documents generated by insolvency professionals. The investigation officer[618], restructuring manager[619] or the liquidator[620] has to also file report or periodical progress reports to the IAO. When an insolvency

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[614] *Id,* Rule 14 (2).

[615] *Id,* Rule 14 (3).

[616] *Id,* Rule 14 (4).

[617] Insolvency Act, 2006 § 65 (1).

[618] *Id.* § 18 (4).

[619] *Id.* § 24.

[620] *Id.* § 42 (1).

proceeding has been completed the documents and records have to be delivered by restructuring manager or liquidator even to the IAO for recording and safe custody[621]. Being a separate regulator, the IAO performs the following functions:[622]

i. To administer insolvency profession;

ii. To register insolvency practitioner, issue license to them, and renew it;

iii. To carry out general supervision of the management of insolvent companies;

To formulate codes of conduct for insolvency practitioners;

To keep records on each insolvent company; and

vi. To perform all other function as prescribed.

The IAO can also give an order to suspend or cancel the license[623] on the following grounds[624]

i. If the licensee does any act prohibited by the IA;

ii. If the licensee does any act required to be done under the IA recklessly or does not do properly;

iii. If the person licensed to practice insolvency himself becomes bankrupt; and

If the person licensed to practice insolvency is convicted by the court in the cases such as corruption, cheating, forgery or fraud.

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[621] *Id.* § 69 (4) (5).

[622] *Id.* § 65 (2).

[623] *Id.* § 66(1).

[624] *Id.* § 66 (3).

(B) Office of the Company Registrar/OCR

Office of the Company Registrar (herein after referred to OCR) is the most important office handling liquidation proceedings of a company whether it is solvent or insolvent. It is a government body of Nepal which has a vital position in administration of companies from its incorporation to dissolution.

The Companies Act, 2006 defines office of the company Registrar as office and office means the company's Registrar office set up by the Government of Nepal for the administration of companies.[625]

Now OCR is in the major position of company administration as well as insolvency proceedings in limited area regarding insolvency proceedings even until the establishment of Insolvency Administration Office (IAO) handling insolvency administration of companies. Major law governing insolvency proceeding in Nepal is the Insolvency Act, 2006. The Insolvency Act provides the supervisory authority to the OCR which is not a judicial body. The OCR itself is burdened with other administrative matters to be able to supervise the insolvency proceeding. The Act provides that the liquidator has power to cancel the registration of company[626] but for this purpose, he has to submit a statement to the OCR within 7 days after having completed liquidation proceedings[627] and upon the receipt of such statement, the OCR keeps record of cancellation of registration of such companies[628] and the company is automatically deemed to be dissolved[629]. After that the OCR is to publish a notice of dissolution of company in the national daily newspaper at least twice.[630]

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[625] § 2(25).

[626] Insolvency Act, 2006 § 47.

[627] Insolvency Regulation, 2007, Rule 14(1)

[628] *Id.* Rule 14 (2).

[629] *Id.* Rule 14(3)

[630] *Id.* Rule 14(4).

(C) Court

Court here refers to Commercial Bench. Commercial Bench is in a form of regular court in Nepal. Government of Nepal started to establish Commercial Bench in the Appellate/High court since 2056 B.S. (1999). Commercial Bench is provided with jurisdiction to look after even cases of Companies Act, 2006 and Insolvency Act, 2006.

After the establishment of Commercial Bench, a procedure for the same was supposed to be made. Companies Act, 2006 has provided that the lawsuits under this Act should follow summary procedure and the Insolvency Act, 2006 provides for a procedure within itself and that procedure is being followed now generally.

The first and foremost reason behind the establishment of commercial Bench is the need for speedy justice, easy access and quick legal remedies for the commercial sector. That is why, during the investigation period, restructuring period, implementation of restructuring scheme period to period of liquidation the court plays a vital role.[631]

In Nepal, both Companies Act, 2006 and Insolvency Act, 2006 have defined the terms commercial Bench as a form of court. Accordingly, court means the commercial bench of a court as designated by the Government of Nepal in consultation with the Supreme Court, by notification in the Nepal Gazette.[632]

Court comes within the formal proceedings under certain boundary of legal provisions that guide the proceedings. Court is considered as a neutral umpire, facilator and supervisor under insolvency proceedings.

The court can exercise its power during the insolvency proceedings of a company. In case a petition is made to the court either by company itself or by execditor(s) or by shareholder(s) or by debenture holder(s) or by liquidator or by regulatory

[631] Upreti, *supra* note 33, at 214.

[632] Companies Act, 2006 § 2(z8).

authority for commencing insolvency proceeding, the court should to conscious on the following matters concerning the order to be issued whether or not to initiate insolvency proceedings:[633]

i. Sufficient proof and reasonable grounds,

ii. Fulfillment of pre-conditions or due process as prescribed by law,

iii. Whether or not the petition substantially against the creditors such as secured creditors, shareholders, and statkeholders and

iv. Possibility of alternative remedy.

If the court gives an order to commence insolvency proceedings, the court also gives an order to appoint an investigation officer (IO)[634] to determine either the company should be restructured or to be liquidated. On the completion of hearing upon the petition, the court gives decisions whether or not to initiate insolvency proceedings[635]. The court may suspend enforcement of security till the decision comes upon the petition. If the court gives decision to initiate insolvency proceedings there will be automatic suspension on the enforcement of security.[636]

After appointment, the IO has to submit investigation report to the court within the prescribed time period.[637] In case the IO requests the court to extend time period due to incompletion of investigation of company's financial condition and the court also convinces on the request of the IO, the court may permit to do so.[638]

The court may issue any of the following orders within 7 days from the date of receipt of report submitted by IO; investigating the company's financial and

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[633] Paudel, *supra* note 58.

[634] Insolvency Act, 2006 § 10(3).

[635] *Id.* § 10(2).

[636] *Id.* § 19(1).

[637] *Id.* § 13 (2).

[638] *Id.* § 14(1).

business condition. The resolution adopted by the creditors' meeting or restructuring scheme presented by the company or any other resolution adopted by the company:[639]

i. To liquidate the company immediately;

ii. To implement the restructuring scheme of the company;

iii. To wait for the period specified by the court in case the company can be improved without liquidating;

iv. To extend the period for making further investigation and

v. To dismiss the insolvency proceedings.

Each copy of such report submitted to court pursuant to section 18(1) of Insolvency Act must also be sent to the concerned company and the IAO.[640]

In case the court thinks appropriate to issue an order to restructure company other than to liquidate it, the court appoints a restructuring manager (RM) for operating restructuring scheme or program and the RM is required to perform and implement such scheme within the time period specified by the court.[641] In case such scheme cannot be implemented wholly or partly in its existing form then the scheme may be altered and changed by adopting resolution of creditors' meeting and by approving by the court. Then the court can issue an order to terminate restructuring scheme on the ground of failure of implementing the scheme by the company and the court shall also issue an order to liquidate the company[642].

When the court gives an order for liquidation of company, then the court also gives an order to appoint liquidator for liquidating the company[643]. The liquidator

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[639] *Id.* § 22 (1).

[640] *Id.* § 18(4).

[641] *Id.* § 22(2).

[642] *Id.* § 35 and 36.

[643] *Id.* § 37(1).

will take over all assets of the company. Then services of the employees stand terminated.[644] The liquidator may, if he so deems, following a study and examination of the business and assets of the company, the nature of the goods or services to be produced by the company and market feasibility that restructure scheme of the company may be adopted and approved by the creditors' meeting, file a petition to the court specifying reasons thereof for its order to suspend for a specified period the order issued by the court to liquidate the company and for an order to implement a restructuring scheme under the Insolvency Act, 2006.[645] If the court is satisfied with the contents of petition as stated above the court may give an order to implement a restructuring scheme by suspending for a specified period of order issued by it earlier to liquidate the company.[646]

Notwithstanding anything contained elsewhere in chapter 5 (liquidation of company) of this Act, the court may issue following orders at any time in relation to any company which is in the liquidation proceedings:[647]

i. To suspend or terminate the liquidation proceedings of the company; or

ii. To cause to handover the assets of the company to the liquidator; or

iii. To pay the amounts due on calls made for payment; or

iv. To prohibit the use of any assets of the company by anyone, if anyone is suspected to use it; or

v. To arrest any person who obstructs the liquidator in discharging his functions and duties or exercising his powers.

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[644] *Id.* § 38(1) (b) (c)

[645] *Id.* § 39 (1).

[646] *Id.* § 39 (2).

[647] *Id.* § 46.

Moreover, the court may also issue any of the following orders in case the liquidator makes an application under Section 59(1) & (2) of the Insolvency Act, 2006, and the court is satisfied on the application:[648]

i. To order the concerned person to pay to the liquidator some or all of the amounts paid by the company in relation to the transaction;

ii. To order the concerned person to handover to the liquidator the assets so transacted or the value equivalent to that;

iii. To order that the debt obtained by the company through the means of such transaction or the security or guarantee furnished by the company for that debt, be wholly or partly remitted or released;

iv. To order that any remission or assignment made or agreement executed between the company and any other person as a consequence of the avoidable transaction will be void, ineffective or non-enforceable; and

In case any other additional order is required to enforce any of the above orders, the court may also give any other further order[649].

5.7 Specific Laws on Liquidation of Company

Under this mainly fall the following enactments:

(a) Bank and Financial Institutions Act, 2017

Prior to promulgation of Bank and Financial Institutions Ordinance, 2005 (2062 B.S.) there were different enactments in a scattered form, such as Commercial Bank Act, 1974, Finance Company Act, 1986, Development Bank Act, 1996. All these Acts were replaced and consolidated by Bank and Financial Institution Ordinance, 2004 (2061 B.S.) and later it is converted into Bank and Financial

[648] *Id.* § 61(c).

[649] *Id.* § 61 (2).

Institutions Act (BAFIA), 2006 (2063 B.S.) which was again replaced by Bank and Financial Institutions Act, 2017. This Act is in operation in Nepal so far.

This prevailing Act has covered both the voluntary and mandatory liquidation under Chapters 11 and 12 respectively. But under the Act of 2006, bank or financial institution could be voluntarily liquidated only with the prior approval of Nepal Rasta Bank (NRB).[650] There was no provision on mandatory liquidation. The Act of 2017 has determined, and dealt with the separate procedures to be followed for mandatory liquidation of failing bank or financial institution under Chapter 12 itself. As for examples, for commencing mandatory liquidation NRB can make an application before the court.[651] Any depositor except NRB, having a representation of 25% of the total deposit[652] or any person eligible to make application for mandatory liquidation as per prevailing insolvency law can also make an application before the court for such liquidation with the prior approval of NRB.[653]

Section 94 of Bank and Financial Institutions Act, 2017 as regards banking companies determines the priority of claims and the liabilities of bank or financial institution subjected to mandatory liquidation are to be settled in the following order of priority:

i. All expenses incurred in liquidation;

ii. Amount up to the amount paid for deposit security/ insurance made as per the laws in force subject not to exceed the ceiling of total approved claimed amount of the depositor of the amount equivalent to the paid amount if

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650 Bank and Financial Institutions Act, 2006 §76.

651 *Id.* § 78(1).

652 *Id.* § 78 (3) (a) .

653 *Id.* § 78 (3) (b).

payment has been made to the security/insurance organization incorporated under the laws in force for security of deposit;

iii. Deposits remaining after payment made to the deposit insurer;

Salary, allowances and amounts for other liabilities payable to the bank and financial institution's employees;

Amount payable to Nepal Government, local bodies, and the Rastra Bank;

vi. Outstanding amounts payable to other bank or financial institutions as fees or valuation amount;

vii. Amounts payable for other creditors and claims;

viii. Shareholders as per laws in force.

Similarly, Section 81 of Nepal Rastra Bank Act, 2058 B.S. (2002) states, when the company for which resolution process is initiated by the Nepal Rastra Bank as per Chapter 9A of this Act, order of the payment priority is as under:

(a) All necessary expenses incurred in liquidation process, including the expenses spent by the Rastra Bank and Special Administration Team (SAT) for the sake of implementation of the Nepal Rastra Bank Act, expenses for the remuneration and facility of the staff, fee of the professional employed for the service as to this and other related expenses;

(b) Amount up to insurance guarantee held as per laws in force so as not to exceed the limit of the total claimed amount of the depositor or the amount equal to the payment if that has been made for the depositor by the institution established as per law that carries out insurance guarantee;

(c) Deposit remained after payment as mentioned in (b) above;

(d) Approved claim of the persons valid as secured creditors as per law;

(e) 2% amount out of the amount received from the sale of the property of such commercial bank or financial institution, by creating a separate account[654]

(f) Upon paying to the depositors and secured creditors, the tax, change, fee to be paid and submitted as per law in force is required to be proportionately distributed by the liquidator[655], to the other creditor or approved claimants and shareholders or that commercial bank or financial institution, or the persons having ownership by other ways on the ground of priority prescribed as per law in force.[656]

(b) Insurance Act, 2022

The Insurance Act, 2022 (2079 BS) came into effect by replacing the Insurance Act, 1992. The Act of 1992 dealt with some aspects of failing insurance companies under Sections 13, 16, 18 and 41 B. But this Act of 2022 has incorporated almost all aspects of failing insurance companies and determined insolvency proceedings to be followed for liquidation of such companies specially under Chapter 15 and provision relating to insurance claim is dealt with under Chapter sixteen.[657] The special management group can recommend the Authority [658] to commence insolvency proceedings and on completion of such proceeding, the Authority can cancel the business license of such company.[659] This provision dealt with by this Act is new and separate to this regard in context to Nepal.

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654 *Id.* § *88I (5)*

655 *Id.* § *88 (3)*

656 *Id.* § *88I(6).*

657 Insurance Act, 2022 § 109.

658 Nepal Insurance Authority.

659 *Insurance Act, 2022* § 137 (1) (d).

Similarly, the Insurance Act, 2022 has also incorporated the order of settlement of claims or liabilities in Section 121. It states that payment of liabilities needs to be settled on the following grounds of priority:

(i) Expenses incurred in liquidation or insolvency process;

(ii) Amount to be paid or amount outstanding to the insured;

(iii) Tax, charge and fee to be paid to the Nepal Government;

(iv) Amount of regulation fee to be paid to the authority;

(v) Remuneration or commission to be obtained by the insurance mediator;

(vi) Amount for insurance outstanding to other insurer;

(vii) Salary, allowances, provident fund, gratuity and other amounts outstanding to employees;

(viii) Other liabilities to be borne by the insurer;

(ix) Other liabilities to be paid or discharged by the insurer;

(x) Amount to be obtained by the shareholder (s).

(c) Cooperative Act, 2018

In Nepal, Cooperative Act, 2015 came into force by replacing Cooperative Act, 1991.In the Act of 1991, there was not any provision on insolvency of cooperatives. Only Section 42 related to appointment of liquidator. But the prevailing Act of 2018 deals with some aspects of failing cooperatives. After taking decision to dissolve such cooperatives, the board can make an application before registrar for obtaining approval to canceal registration of the cooperatives[660]. In case of cancellation of registration of cooperatives, the registrar appoints a liquidator.[661] Sections 90 and 91 of the Act deal with provisions of liquidation and remaining assets of failing cooperative.

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[660] Cooperative Act, 2018 § 88 (1).

[661] *Id.* § 89.

(d) Partnership Act, 1964

Nepal Partnership Act, 1964 also deals with provision of dissolution of partnership. Partnership can be dissolved when a partner becomes insolvent.[662] Section 39 authorizes concerned Department to appoint one or more liquidators.

5.8 Cross Boarder Insolvency Issue

Although Nepal is a member of United Nations Organization (UNO), World Trade Organization (WTO) and other international organization, Nepal has not adopted United Nation Commission on International Trade Law (UNCITRAL) Model Law on cross border insolvency. Nepalese insolvency law has slightly mentioned about the allowing the foreign creditor to make claim but there is not obvious articulated provision on cross border insolvency, recognization and enforcement mechanisms.

The Companies Act, 2006 has under Section 158(7) incorporated a little bit provision that in the case of transactions carried on by the foreign company in Nepal, the Nepalese prevailing law on insolvency applies. But the Insolvency Act, 2006 applies merely to companies incorporated with limited liability as per Nepalese Companies Act and government institutions or bodies with limited liability operating as prescribed by Government of Nepal. This Act has failed to mention other things about the insolvency of companies registered and operated in Nepal as a branch of foreign companies incorporated abroad. Because there is lack of clear policy options to this regard.

[662] Partnership Act, 1964 § 33.

CHAPTER–VI

NATIONAL AND INTERRATIONAL COURT PRACTICES UNDER INSOLVENCY REGIME

6.1 Nepalese Court Practices

Nepal Rastra Bank V. Nepal Development Bank, 2009[663]

The Nepal Development Bank's liquidation (Insolvency) is the first case after the promulgation of Insolvency Act, 2006 in Nepalese commercial history. Though several cases of liquidation have been concluding under the authoritative provisions articulated by company law, it is a new and important in the sense not only applying the separate law and legal provisions but also special commercial bench exercised its power and authority granted by insolvency law and regulation as a new experience.

The case has been studied on the basis of the documents and arguments presented, pleaded before the commercial bench, High Court (Previously Appellate Court) Patan Lalitpur where the case was filed by the researcher. The case related with bank and financial institution not only directly concern with public depositor but was also serious concern about the impact upon entire financial system of the nation, for the time being. It is a verge of reputation, goodwill and public confidence towards the bank and financial institution, when such institution suffers from financial distress.

The case is initiated under Section 4 of the Insolvency Act, 2006 by the regulatory body Nepal Rastra Bank (NRB) where bank and financial institution suffer with financial distress or difficulties on the one hand, regulatory body can exercise the power and authority as well as entertain insolvency proceedings, on the other hand, regulatory

[663] Unpublished case No. 109, Decision date 17 January 2009, Commercial Bench, Patan High Court.

body (in this case NRB) is authorized to exercise certain power for taking appropriate action in order to reform, restructure and rescue, while fulfilling its duty as prescribed in Nepal Rastra Bank Act, 2002, before entering the court jurisdiction.

Background

The alleged Nepal Development Bank (NDB) was incorporated, dated 1997 Apr. 16 under the prevailing Companies Act, 1997 for the time being and was authorized to carry business on financial transactions by NRB under Nepal Rastra Bank Act, 2002 from 1998 Feb 24 onwards, such authority affirmed by Ordinance, later on Bank and Financial Institutions Act, 2006 classified in 'Kha' group. After three years of banking business, NRB started to issue directives order and correspondence to the bank in order to take reformative action to bank by itself showing the reason of non performing banking business properly. There are several issuances of directive and actions, taken by NRB while exercising its power and jurisdiction provided by prevailing Act, Regulation and NRB Directives (From 2002-2007). Basically, Directives were issued to raise fund, recovery of loan, to sale and manage non-banking estates etc. NDB was alleged violation of NRB directives, non-enforcement of directions, bank has not been properly running as per the basic standard, norms, principle and guidelines of corporate governance, disqualified board members handing the bank within their vested interest by providing loan to the financial institution, which is against the prevailing laws. Most of these mentioned correspondences and confrontation between NDB and NRB were raised before the commencement of Insolvency Act, 2006 and after the commencement of NRB Act, 2002 (which was commenced repealing NRB Act, 1955).

Application filed by NRB to Initiate Insolvency Proceedings

NRB filed petition on the legal ground of Section 86 (Chha) of NRB Act, 2002 and Sections 4 and 37 of the Insolvency Act, 2006. As stated in application, regarding the financial position of bank it had 32 crore paid up capital for the time being of its establishment and during the 11 years period till 2008. Net loss was figured 67.87 crore.

The total liability of the bank became 141 crores. Likewise, primary capital and capital fund was reached 41.36 and 30.53 as negative indicator. So, this financial position indicates the crisis stated in petition/application.

In the application, NRB claimed with some reason and ground to justify its action and become to file application, such as alleged bank violated NRB directives time to time, neglecting the reformative action plan for the betterment of financial position of the bank further changed that the bank was being run within the limited directors' interest, their own way denying the directions of NRB .In this connection, by exercising the part (B) of Sub Section 1 of Section 100 of NRB Act, 2002. NRB issued restriction order not to collect deposit from 2004 July 8 being unsatisfied with NRB's justification in this regard. Furthermore, director of NDB was fined by NRB due to non-fulfilling his duty and responsibility.

NDB was declared the financial problematic by NRB exercising its power granted by Section 86 (b) of NRB Act, 2002 and action was taken under Section 86 (c) to follow the reformative direction for one year till 2008. In this case, NRB did not takeover the management and control the board by deputing its officials or by itself unlike to the Nepal Bangladesh Bank in which case NRB had controlled the board and the management was undertaken declaring the problematic bank to rescue and become succeed to reform the bank from the state of financial distress.

NDB explored grounds as per the evidence that the bank is in insolvent situation. Regarding the management, it was found, the bank was illegally controlled by the chairman Uttam Pun on his own interest, while the field inspection of the bank he failed to submit evidence of qualification and other required document asked by NRB. NRB stated that was illegal and found malafide intention of Uttam Pun who was disqualified person holding board member at the same time holding chief executive officer. Director Uttam Pun was charged with 5 lakh fine, in the allegation of violation or not compliance the direction of NRB to remove from director. It was alleged that there was absence of

minimum corporate good governance norms and standard within management and operation system in the bank.

In another point, NRB claimed entire financial position of the bank shows that it is impossible to run in prudent financial position since its paid up capital, total loss, capital fund etc. reflect very poor situation.

So, in accordance with the definition articulated in Section 2 (b) of Insolvency Act, 2006, insolvency is a situation where the liabilities exceed the total value of the property of the company or unable to pay its debts which is matured of to be paid in future. NRB deserves and has exercised the power and authority to inspect, monitor, investigate restructuring activities, which was carried out before to file for liquidation in case of insolvent bank and financial institution. Further stated that if NRB feels happy with the ground that financially troubled institution could not be possible to rescue from insolvent position, then the petition can be filed directly before the court to liquidate the institution. So, the NRB came into conclusion there was no option other than to liquidate the bank. Thus, the main claim was presented to initiate the liquidation proceedings by liquidator and issue order to the liquidator to make allotment of the debtor property on priority basis prescribed by Section 77 of Bank and financial Intuition Act, 2006.

Another claim was that the restriction already made by NRB to seize all bank accounts and deposit of NDB in different banks and financial institutions including Nepal Cooperative need to be continued by the order of the court until the liquidator after his appointment otherwise order or administered.

The immediate special order to be issued in favour of small public depositors who have been operating saving and fixed account, those small public depositors are to be allowed to withdraw their saving from the seized amount in the bank account and from the amount to the NDB by Nepal Cooperative.

Further, claimed made by NRB that the interim, or any appropriate order should be issued to liquidate the Nepal Development Bank under the Section 11 of Insolvency Act, 2006.

Written Answer by NDB

Company is competent to settle the due or payable amount from its assets or value of the property. It has not been suffering such financial distress as claimed by NRB. All the possible reformative action plan and scheme was explored towards the NRB but NRB was reluctant to hear such argument, instead of showing the serious concern of the bank. NDB argued that NRB had been taking several one sided action against the bank, which would be the main hurdle to reform and restructure the bank for the financial betterment.

Bank argued it had explored plan to raise capital fund under which right shares were issued to meet the 32 crore capital fund, out of which applications filed to subscribe around 8 lakhs shares and remaining shares were planning to sale strategic partner but NRB restricted to collect, deposit loan investment and branch expansion.

NRB has no right to initiate the insolvency proceedings directly, without obtaining prior approval from the concern authority as per the requirement mentioned in Section 8 (1) of the same Act. However, NRB field the case without having such approval or not submitting such required document. So, the petition should be quashed ipso facto, defended by NDB.

Regarding the financial position and liability: It was stated in written answer of NDB that bank has been running in healthy financial situation and its liability had not exceeded the property and assets value of its own. So, the shareholders of the bank submitted the proposal to operate in sound financial position with depositing certain amount of bank guarantee. In this connection there was an agreement reached between Badri Prasad Bhattrai's group and NDB committing to meet and arrange the required capital structure.

Ground to deem insolvent: The important defence was explored that NRB's action was against the principle of natural Justice. Section 7 of the Insolvency Act, 2006 provided the determination of insolvency, either general meeting of the shareholders adopts a special resolution that the company has become insolvent or the meeting of the board of directors of the company takes such a decision, or the company fails to pay debts within a period of thirty five (35) days from the date of receipt of the court's order, in case the company fails to pay the debts within a period of thirty five days from the date on which the creditor served it with a notice to pay the debt or in case the company does not file a petition to the court within the said time-limit to nullify the notice.

As above mentioned ground and arguments, the bank has competent financial position to satisfy the liability, reformative action plan was explored with the commitment and the case was being litigated within the court whether to grant an order to operate the bank or not and it was under trail in the meantime. NRB has brought the case for liquidation with mala-fide intention. Bank has been running smoothly with basic standards, norms and principle of corporate governance under Bank and Financial Institution Act, 2006 and NRB Act, 2002. The contentions of the NRB in its petition have no reliable, baseless and not justifiable ground. So, so the petition should be quashed.

Investigating Officer's Report

The investigating officer had prepared the report to show the financial position and other ground whether the bank can be restructured or not. As stated in the report of investigating officer, description given in profit and loss situation, the position of the bank can be seen to some extent progress in profit for the fiscal year of 2008/09. However, the total loss explored in the report amount of 64.41 crores. The situations of capital fund indicate that negative by 46.91 & 32.69 respectively.

In the report, cash and stock, capital fund, investment, position of loan, non-banking assets, other assets as well as deposits and other liability have been explored in

descriptive form. The grounds, for possibility of bringing positive situation from negative capital fund of the bank, were suggested mainly two ways: one is internal source mobilization and additional share capital arrangement.

Further, the report presumed that around minimum 27.47 to maximum 35.61 crore amount possible to be recovered from loan, share sale, investment, selling non-banking assets, further if enable to achieve the amount of 32 crore through selling right share then capital fund will be meet the ceiling, fixed by NRB.

Grounds to Operate Bank through Restructuring Scheme

The right share was issued with the approval of NRB and Security Board of Nepal to meet the capital fund up to 64 crore. However, only 1/4 out of the estimated amount of right shares was subscribed and no application filed for remaining right shares. Bank guarantee, the amount of 24 crores, had submitted by the Badri Prasad Bhattrai and his group, including the share investment in Gorkha Hydro power from the NDB and recover amount comprising the 10 crore amount of bank guarantee issued from Kist Bank was also submitted by Nabin Pun.

Regarding the matured amount payable to NDB from the debtor, some of positive and reliable evidence, like cheque was received as advance money to sale house and land, commitment letter and applications, proposal to purchase non-banking assets were presented which are positive indicators to recover debt by Bank.

In the report, the conclusion has drawn with observing, investigating and finding some evidence documents, proposal applications etc. that it would be better to restructure the bank rather than to liquidate by finding the alternative or options, if any, which are reliable and reasonable. It is not only the concern of the numbers of public depositors it is also the serious concern of entire financial system of the nation and impact towards such institutions. Further, it is the risk of national capital drain. After analyzing and realizing the reliable positive indicators it was requited with suggestion that it would be appropriate and reasonable to restructure the bank rather than to liquidate it.

Verdict of the Court

Court observed thoroughly, the petition field by NRB, written answer from NDB, report of investigating officer and arguments of legal professionals for and against the petition while hearing the case on due date in commercial bench. To draw the verdict court has analysed the following points:

a. **Financial Position:** Regarding the financial position, as per the directives of NRB to raise the capital fund it was unable to sale sufficient amount of right share which was issued to meet up to 64 crores from 32 crores. Very nominal amount right shares were subscribed from shareholders.

b. **Loss and Liability:** According to the report submitted by investigating officer, it was stated that bank has been suffering from loss from several consecutive years. It is acknowledged that the bank is having negative indicator of capital fund as mentioned in the report. The total liability of bank has been reached 141 crores.

c. **Problem in Recovery of Loan:** Report stated the loan provide by the bank can be recovered 10.81 crore and amount presumed to obtain from the sale of non-banking assets and return of share investment calculated amount 35 crore, presented without analysis of factual evidence and proof.

d. There was not ensure with reliable basis that due amount could be recovered even it had not been possible by issuing directive by NRB during several years back.

Regarding restructuring

The proposal submitted by Badri Prasad Bhattrai and his group to operate bank with the restructuring scheme with bank guarantee of 24 crore is allowable as per NRB policy and it is not permitted by legal provisions that one can invest to the bank and financial institution from barrowed money of other similar bank and financial institution. It has been also affirmed by the BASEL core principle stated in decision. Strategic partner Sunand Bahadur Shrestha designated CEO and his group entered into

the board and management of the bank with plan of action but unable to operate for the betterment of the bank ultimately they become left the bank by resigning their positions.

After analyzing, observing and reviewing upon the documents, evidence and positions of the bank and further plan, on the absence of reliable and reasonable ground to restructure the bank, the court reached the decision and order, NDB is to be liquidated immediately by exercising the power granted under Section 22.

After the order of the court, liquidation process of NDB has begun formally by the liquidator Narayan Bajaj who was appointed as liquidator by the commercial bench of the Patan Appellate court. He has been handling and performing liquidation proceedings according to the provision of prevailing Insolvency Act. Under the liquidation process, he found some complication to settle the financial matter, as he said one of the serious problems he pointed out that who will be the first recipient of the money is still confusing as various acts that deal with such issue contradict to each other as stated by liquidator which can be seen in different legal provisions. Bank and Financial Institutions (BAFI) Act has provisioned that individual depositors will be the first recipients of money after the expenses of the liquidator have been deducted. The bank is being liquidated as per the Insolvency Act, which has provisioned and listed expenses of the liquidator, employee and other liability in its priority, should be treated on a equal footing. If the liquidated company doesn't have money for clearing all the liabilities, it should be cleared on a proportional basis".[664] On the other hand, the Employee Provident Fund (EPF) Act has provisioned that the EPF should be given first priority in such payments in the ill-fated NDB. The court has given the direction to submit the progress report of the liquidation proceedings but not fixed the time limit to complete his business.

[664] www.nepalnews.com (accessed Dec.4, 2019).

Analysis of the Verdict of the Court

Positive Aspect: Commercial bench for the first time has initiated the insolvency proceedings properly applying the several legal provisions of Insolvency Act, 2006 in this Nepal Development Bank case, though the petition was with the claim under NRB Act, together with the provision of Insolvency Act to liquidate the bank. The court interpreted to distinguish the jurisdiction that the issue arises under NRB Act for liquidation falls under the jurisdiction of regulatory body NRB and the liquidation due to insolvency falls under special commercial bench. There are several grounds articulated in NRB Act, which empower NRB to file the petition against the regulated or governed body for liquidation directly before the Appellate Court (presently High Court).

Shortcomings: Investigating officer appointed by court to accomplish financial investigation of the alleged bank in order to reflect the financial position so that the court may determine whether the bank is to be restructured or liquidated. The court set aside the report of investigating officer who had suggested and demanded for restructuring the bank with the possible grounds thereof. The court decided with dissatisfaction upon the report of investigating officer on the legal technical ground without scrutinizing the factual financial position and strategic plan as well. In developed countries, restructuring is considered prime concern and provided the time and platform for discussion and negotiation to make strategic plan/scheme even the formal proceedings is being forwarded. In this regard our court seemed depending upon formality and legal technicality rather than flexible and factual commercial stand point. Perhaps, the report of the investigating officer has been recognized in developed countries' practice but not necessarily always happen same.

When the court gave order to commence the insolvency proceedings, consequently the court gave other some orders such as, investigating officer's appointment and to undertake management as well as regular business of the bank under general

supervision of the same officer. Further, the court ordered to return money deposited by the small depositors including general public by making basic standard thereof in cooperation with NDB and NRB. It can be considered pros and cons aspect, allowing the small depositors to withdraw their amount to the limit under prescribed standard their confidence towards the banking business as well, as per their necessity on the other hand it may be pre-mature order before determining the financial position whether the bank can be restructured or not.

As our initial practice in NDB case shows that the prime attention and concentration of the court can be seen into legal technicality and quick exit or release through liquidation where the restructuring plan was presented and investigating officer had suggested the possibility of reform and demanding to restructure rather than to liquidate. Though, the discretionary power was granted to the court whether to restructure or to liquidate the bank, the decision should be based on financial factual situation since investigating officer suggesting the positive indicator to reform then the court may have option to extend the time frame and comprehensive study employed by some other expertise investigating team so that the actual state of financial position can be reflected ease to determine whether to restructure or to liquidate. However, the court concentrated only within the legal technicality and applied as it is.

Nepal Rastra Bank v. Himalaya Finance Ltd.[665]

Written Petition by Nepal Rastra Bank

The present petition, duly filed under Section 4 of the Insolvency Act, 2006 by Nepal Rastra Bank, states as follows:

Based on the financial indicators of Himalaya Finance Ltd., located in Sundhara, Kathmandu, and upon assessing its current situation, the total assets of the company

[665] Unpublished case No. 0052, Decision No. 5, Decision Date 2016 Sep. 10, Commercial Bench, Patan High Court.

amount to Rs. 43.76 crores, while its liabilities stand at Rs. 73 crores, exceeding its total assets by approximately Rs. 28 crores. Regarding its management status, it has been observed that the Chairperson and members of the Board of Directors have resigned from their positions, resulting in a crisis in the Board's existence. The company is unable to continue its operations in the foreseeable future due to ongoing legal cases involving most of the company's shareholders, while the General Manager and Deputy General Manager remain out of contact. From a corporate governance perspective, most of the company's transactions were conducted under oral directives from the General Manager, transactions were carried out without proper vouchers, auditing was neglected, directives issued by Nepal Rastra Bank on corporate governance were ignored, and corrective measures were not taken despite repeated opportunities provided under By-rule 3(b) of the Bylaws on Prompt Corrective Action of Banks and Financial Institutions, 2007. Additionally, no reforms were implemented even after the institution was declared problematic under Section 86B of the Nepal Rastra Bank Act, 2002 on 11.01.2013, despite directives for correction being issued. If the institution were allowed to continue its operations, it would become financially unviable, as operating costs would escalate, and the interests of depositors and shareholders could not be secured. Therefore, it is requested that this Court issue an order to initiate insolvency/liquidation proceedings against the institution under Sections 10(2) and 10(3) of the Insolvency Act, 2006.

Written Submission/Reply by Himalaya Finance Ltd.

A notice was issued and served to Himalaya Finance Ltd., requiring it to submit a written statement within seven days, excluding travel time, if there were any grounds, reasons, or evidence to oppose the liquidation proceedings under this petition. In its written statement, Himalaya Finance Ltd. responded that the primary reason for initiating insolvency proceedings against the company was that its liabilities exceeded its total assets and its financial indicators, as specified by Nepal Rastra Bank, were unfavorable.

However, at present, depositors have expressed their willingness to convert their deposits, which constitute the company's major liabilities, into capital ownership on a pro-rata basis, in order to ensure the smooth operation of the company. In this regard, approximately 64 percent of depositors' deposits have already been converted into capital ownership, and additional corrective measures have been initiated. Therefore, the company may be in a position to resume operations, and it requests an opportunity to prepare accordingly. Thus, we seek a review of the petition seeking liquidation and request an appropriate order for restructuring under Sections 22(b)(c) and 23(2)(a)(c)(f) & (g) of the Insolvency Act, 2006.

Appointment of Investigation Officer

Under Section 10(3) of the Insolvency Act, 2006 and pursuant to the Court's order dated 19.01.2015, Liquidator Mr. Sudarshan Raj Pandey (Certificate No. 33/2007) was duly appointed as the Inquiry Officer. His report was received on 09.08.2015.

Report of the Investigation Officer

Upon reviewing the petition, arguments, submissions, and documentary evidence in the case file, and considering whether to proceed with the liquidation of Himalaya Finance Ltd., it was found that Nepal Rastra Bank, in its petition, had contended that from a financial perspective, the liabilities of Himalaya Finance Ltd. exceeded its assets, its management was untenable, and its corporate governance was in poor condition. Section 7(2) of the Insolvency Act, 2006 states that a company shall be deemed insolvent if its liabilities exceed its assets or if the company itself admits to being insolvent. Based on this legal provision, an examination of the company's status revealed that recoverable assets from Himalaya Finance Ltd. amounted to Rs. 25 crores 30 lakhs, whereas its liabilities totaled approximately Rs. 77 crores 84 lakhs, confirming its insolvency. While the possibility of a merger or acquisition was considered, it was determined that this was not viable due to the company's substantial liabilities.

Furthermore, as per Nepal Rastra Bank's directive dated 23.07.2015, the minimum paid-up capital required for a finance company to operate was Rs. 80 crores, whereas the disputed finance company's paid-up capital was only Rs. 14 crores. Additionally, the company's financial instability made it unattractive to potential investors. No proposals for restructuring had been received, and even the company's legal representative acknowledged that liquidation was the only viable option. The Inquiry Officer convened a meeting of promoters on 05.08.2015 to discuss future plans, and the meeting concluded that liquidation was the most appropriate course of action.

Opinion of the Court

In this way, a petition has been filed by the regulatory agency Nepal Rastra Bank seeking the prosecution of liquidation process, on a ground that the liabilities of company outmatch its assets. From the report of Inquiry Officer duly appointed by the Court also, it has been confirmed that the company's liabilities exceed its assets. They serve to substantiate the petition claim raised on behalf of Nepal Rastra Bank.

However, the disputed Himalaya Finance Company has failed to show any ground or reason as to why the company should not be moved towards the liquidation process. The meeting of promoters held on 05.08.2015 also suggested that liquidation shall be a suitable option for the company. The prospect of company's restructuring also seems null from the report of Inquiry Officer which was derived from the assessment of company's financial and business status, and he also recommends the liquidation path. As such, it is hereby held that the disputed company, Himalaya Finance Ltd. should be moved towards the liquidation proceedings pursuant to the petition claim and Section 22(1)(a) of the Insolvency Act, 2006.

As it has been held to institute liquidation proceedings as per the petitioner's claim, let this case be struck off the registry and as regards other matters, let it be done as follows for the execution of this order.

Particulars of the case

a) An insolvency practitioner has to be appointed as a company liquidator for instituting the liquidation proceedings pursuant to Sections 22(2) and 37(1) of the Insolvency Act, 2006. To this end, let the names of 3 individuals each from both parties of Nepal Rastra Bank and Himalaya Finance Ltd. be summoned within 15 days, together with their certificate numbers, experiences in the field, contact telephone number, and their consent letter to carry on the liquidation work, and submitted before this Bench once the name list is obtained or the time line expires, for appointment as a liquidator to run the proceedings thereof.

b) Pursuant to Section 37(2) of the Insolvency Act, 2006, the liquidation proceedings shall be deemed to have commenced with the appointment of liquidator by the Court and being so, let Nepal Rastra Bank and Himalaya Finance Ltd. be intimated of the appointment of liquidator for that purpose, once he or she is appointed.

c) While assigning an appointment letter to the liquidator being appointed as per the order of Bench, let him or her be intimated that he or she is required to accomplish the liquidation proceedings within one year pursuant to Section 22(4) of the Insolvency Act, 2006.

d) Let the liquidator be required to file a time bound action plan within one month of his or her appointment by detailing which activities shall be discharged within which timeframe in course of proceeding with the company liquidation process.

e) Let the liquidator be intimated that his or her functions, duties and powers shall be as specified in the Insolvency Act, 2006.

f) Let the liquidator be intimated that he or she is required to file an action plan at this Court within the first 3 months of his or her appointment detailing the matters as specified in Section 42(2) of the Insolvency Act, 2006 and afterwards, the

progress report of liquidation proceedings of the company be submitted every 3 months.

g) Let the reports received be filed at the Bench at the earliest for study and appraisal pursuant to Section 40(2)(f) of the Insolvency Act, 2006.

h) Let the liquidator be intimated that his or her remuneration shall be as laid down in Section 68 of the Insolvency Act, 2006.

i) Let the liquidator be intimated that he or she is required to pay off the parties as per the order of priority as set out in Section 77 of the Banks and Financial Institutions Act, 2007, in course of clearing the liabilities of this Company.

j) Should any impediment or hindrance arise in the execution of this order, let the same be furnished at the Bench and its order be followed.

Nepal Rastra Bank v. Crystal Finance Ltd.[666]

Writ Petition by Nepal Rastra Bank

While conducting an on-site inspection based on the unaudited financial statements of Crystal Finance Ltd. for the end of March 2011, various directives were issued. A special inspection was conducted on 10.01.2012, and special directives were given. However, there was no improvement in the institution's state of affairs. Since By-law 3(e) of the Bye-laws on the Prompt Corrective Action of Banks and Financial Institutions, 2007 seemed to be applicable in this case, and pursuant to Section 86B of the Nepal Rastra Bank Act, 2002, the financial institution was declared problematic. A directive was issued for the company to file its clarification within 35 days under Section 86C of the said Act, unless further action was required. However, the respondent company failed to fulfill the required actions by the end of July 2013, and even up to the present day. Consequently, the company was again declared a

[666] Unpublished case No. 0069, Decision No. 1, Decision Date 2016 Nov.6. Commercial Bench, Patan High Court.

problematic financial institution under Section 86B of the Nepal Rastra Bank Act, 2002, and a letter was dispatched to the company to this effect under Section 86C of the same Act. Various directives were also issued, pursuant to the decision of the Board of Directors of Nepal Rastra Bank, dated 20.09.2012, with the condition that they be complied with within six months from that date. A time frame was granted for corrective measures, and a firm by the name of SC Lal Associates was appointed to conduct a Due Diligence Audit (DDA) of the company's assets and liabilities to assess the financial and managerial status of the company by an independent entity. The firm conducted the audit and submitted its report after studying the unaudited financial statements of the company up to February end of 2013. According to the DDA report, the company's reserve fund was negative by Rs. 41.72 crores, corporate governance was poor, bad loans accounted for 74 percent of the total credit, there was a lack of necessary directives and guidelines for daily operations, the collateral against non-recoverable loans was not auctioned or accepted as non-banking assets, and the collaterals were assessed contrary to established methods. There was no possibility for the company to pay off the deposits of its depositors and other liabilities, given the state of its loans and advances.

The company could not operate as a going concern, and the financial indicators for the period between 2013 Feb. and 2015 June were also negative. As such, this Bank sought clarification from the financial institution on why it should not be dissolved pursuant to Bye-law 3(e)(iii) of the Bye-laws on the Prompt Corrective Action of Banks and Financial Institutions, 2007 and Section 86G of the Nepal Rastra Bank Act, 2002. Though the company responded that it should not be dissolved, it was declared a problematic institution on 23.09.2012 under Section 86B, and various directives were issued for reforms pursuant to Section 86C of the same Act. However, no corrections were made, and according to the unaudited financial statements up to the end of June 2015, the capital fund ratio was negative by 62.36 percent.

Loan recovery did not meet the set goals, depositors could not be paid off, and financial liabilities exceeded financial assets. A strategic partner could not be introduced for improvements, and repeated directives were issued for corrective action, along with monitoring efforts. Despite these efforts, the situation deteriorated further, and the financial institution could not be deemed a going concern, as confirmed by the DDA report. Therefore, following a meeting of the Board of Directors of Nepal Rastra Bank on 27.10.2014, it was decided to liquidate Crystal Finance Ltd. pursuant to Section 86G of the Nepal Rastra Bank Act, 2002 and Section 74(1)(h) of the Banks and Financial Institutions Act, 2006. This petition has been filed at this Court, which includes the following claims or pleas:

a) Let an order of liquidation be issued pursuant to Section 86G of the Nepal Rastra Bank Act, 2002, and a liquidator be appointed to conduct the liquidation proceedings.

b) Let an order be issued to the liquidator for paying off the liabilities as determined by Section 77 of the Banks and Financial Institutions Act, 2006.

c) Let an order be issued for freezing the accounts of Crystal Finance Ltd. maintained at various banks and financial institutions in the interests of depositors and other parties.

d) Let the process of liquidating the institution be completed at the earliest.

Written Submission/Reply by Crystal Finance

The written reply filed by the respondent, Crystal Finance Ltd., reads as follows: Nepal Rastra Bank conducted a special inspection on 10.01.2012 and an on-site inspection based on the unaudited financial statement for the end of Chaitra 2067 BS (2011), while the institution was still operational. By citing reasons such as the capital fund being negative by 30.4 percent, the Bank declared us a problematic financial institution pursuant to Bye-rule 3(e) of the Bye-laws on the Prompt Corrective Action of Banks

and Financial Institutions, 2007 and Section 86B of the Nepal Rastra Bank Act, 2002, and issued 12-point directives under Section 86C of the same Act. The provisions under Section 86G of the Nepal Rastra Bank Act, 2002 and Section 74(1)(h) of the Banks and Financial Institutions Act, 2006 are not independent or complete in themselves. In fact, the Insolvency Act, 2006 must be compulsorily invoked in such circumstances. Therefore, this petition should be set aside as no claim has been made under the Insolvency Act. Pursuant to Section 42 of the Banks and Financial Institutions Act, 2006, action may be taken under Section 37 of the said Act, and as such, liquidation is not a reasonable action for the inadequacy of the capital fund.

When Nepal Rastra Bank issued restrictive directives on 23.09.2012, imposing a total ban on collecting and renewing deposits, granting additional loans and guarantees, opening new branches, and purchasing fixed assets, the business as per the institutional objectives could not be carried out. When the institution tried to introduce a strategic partner, it could not materialize due to the inaction of Nepal Rastra Bank. Corporate good governance has been ensured pursuant to Section 22 of the Banks and Financial Institutions Act, 2006 and Section 92 of the Companies Act, 2006 as well. The strategic partner was willing to make additional investments for running and managing the institution, and there is potential for opting for the merger and acquisition process. The assets of the institution still outweigh its liabilities. Hence, there is no justification for liquidating this institution, and accordingly, the petition should be set aside.

Analysis and Opinion of the Court

There seems to be no dispute regarding the fact that Crystal Finance Company Ltd. has been an institution licensed by Nepal Rastra Bank to conduct financial transactions since 2002. From the contents of the petition, it is evident that the petitioner, Nepal Rastra Bank, issued various directives to the institution after conducting an on-site inspection based on the financial statements up to the end of 2011 March. The inspection report revealed that loans were disbursed to companies affiliated with the

directors and to the directors themselves, family members of the promoters drew various loans, guarantees were issued to companies linked to the family members of the promoters, loans were disbursed without collateral or surety, and collaterals were released without the debts being repaid, thus violating prudential banking norms. As a result, Nepal Rastra Bank declared the institution a problematic institution under Section 86B of the Nepal Rastra Bank Act, 2002, and various directives were issued for reforms. The petitioner bank appears to have conducted a special inspection on 10.01.2012. Upon reviewing the report of this inspection, it was found that the institution paid interest to Marvelous Remit Pvt. Ltd. without collateral, included unrealized cheques when submitting deposit details to other banks and financial institutions, failed to pay off debts owed to other banks and financial institutions, did not undertake transparent accounting even while renting an office space, and the cash reserve was short by Rs. 39,56,211.33 on the day of the inspection (10.01.2012) according to the institution's trial balance. It was also noted that the paid-up capital was duly maintained. Upon comparing the inspection report for the end of March 2011, the DDA report for the end of March 2013, and the key financial indicators up to the end of June 2014, it was found that the consolidated profits and capital fund were in a negative state, the loan flow was minimal, the percentage of bad loans had increased, and non-performing assets amounted to 98.88 percent.

Though the submitter of the written reply has claimed that the institution need not be liquidated as its assets still outmatch its liabilities, upon examining its clarification tendered to the petitioner bank, the outstanding liabilities of the institution amount to Rs. 47.91 crores, including Rs. 1.32 crores to be paid to individual depositors, Rs. 39.73 crores to institutional depositors, and Rs. 6.86 crores to settle interbank borrowings. The assets of the institution amount to Rs. 20.94 crores. The institution claims solvency based on the fact that it still has Rs. 61.76 crores in loans to be recovered. However, as the non-performing assets of the institution stand at 98.88 percent, there is no certainty

that those dues will ever be recovered. Hence, the institution cannot be deemed a going concern. From the contents of the written reply, it has also been admitted that when the petitioner bank conducted an on-site inspection at the end of March 2011 based on the unaudited financial statement, it showed that the institution's capital fund was negative by 30.4 percent. Accordingly, the bank issued 12-point directives to the institution pursuant to Bye-rule 3(e) of the Bye-laws on the Prompt Corrective Action of Banks and Financial Institutions, 2007 and Section 86C of the Nepal Rastra Bank Act, 2002. However, the institution has labeled those directives as unlawful and claimed that its capital fund could not be raised because it could not operate independently due to the restrictions imposed by those directives. From that contention itself, it cannot be presumed that the finance company has duly and fully complied with those directives.

- Though the company submitting the written reply has contended that a strategic partner is ready to manage and run the institution and inject extra capital, and that the option of merger and acquisition remains open, the institution has not presented any objective grounds while filing its clarification before the petitioner bank. Pursuant to Section 49(1) of the Banks and Financial Institutions Act, 2006, it is clearly provided that Nepal Rastra Bank reserves full powers to regulate and organize the actions of licensed institutions. Following Section 79(1) of the Nepal Rastra Bank Act, 2002, the bank enjoys full powers to regulate the proceedings of banks and financial institutions. Section 86G of the same Act clearly stipulates that while taking action against any problematic commercial bank or financial institution under Section 86C, if the bank believes that such a commercial bank or financial institution is unable to fulfill its liabilities or has fallen into the condition of being unable to operate properly, the bank may decide to subject such a commercial bank or financial institution to liquidation by filing a petition at the Appellate Court. Moreover, the provisions in Sections 86C and 86E are discretionary for the bank and not mandatory. Therefore, the claim raised

in the written reply that the petitioner bank is first required to take the institution under its control and regulate it cannot be considered obligatory. The institution has also admitted that it could not maintain the capital fund as directed by the petitioner bank. It has been seen from the bank's inspection report that the institution acted in contravention of Section 48 of the Banks and Financial Institutions Act, 2006, which cannot be negated by the respondent. Hence, it cannot be said that the respondent, Crystal Finance Company Ltd., was being run in line with prudential banking norms.

- The present petition also requests the liquidation of the respondent Crystal Finance Company Ltd., the appointment of a liquidator to this effect, and the initiation of liquidation proceedings pursuant to Section 86C of the Nepal Rastra Bank Act, 2002 and Section 74(1)(h) of the Banks and Financial Institutions Act, 2006, and the clearing of its liabilities under Section 77 of the same Act. This petition, which is duly filed by Nepal Rastra Bank, the regulatory agency for banks and financial institutions, under the special Acts of the Nepal Rastra Bank Act, 2002 and the Banks and Financial Institutions Act, 2006, cannot be quashed merely on the grounds that the petition was not filed under the Insolvency Act, which applies to other companies, organizations, and firms that have gone bankrupt, disregarding the relevant laws. The provisions of insolvency specifically apply to the assets and liabilities, whereas liquidation or dissolution concerns other regulatory aspects. Hence, insolvency and liquidation are two different matters. Once an institution is up for liquidation, its liabilities must be cleared from its assets. Accordingly, the order of outstanding liabilities has been duly specified in Section 77 of the Banks and Financial Institutions Act, 2006. This issue is not just about the assets and liabilities of the respondent institution alone. At present, the petitioner and regulator, Nepal Rastra Bank, has submitted that the institution has violated prudential banking norms contrary to the Banks

and Financial Institutions Act, 2006 and the Directives issued by the bank itself. Furthermore, the institution has not been a going concern. The finance company, which submitted the written reply, has not been able to negate those claims. From the contents of the clarification filed by the respondent institution before the bank, it is evident that its liabilities outmatch its assets. Hence, the court could not concur with the arguments and submissions of the learned senior advocates and advocates representing the respondent.

- Based on the grounds and reasons analyzed above, it is found that the respondent Crystal Finance Company Ltd. was not functioning in accordance with the Nepal Rastra Bank Act, 2002, the Banks and Financial Institutions Act, 2006, the Unified Directives issued by the bank, and prudential banking norms. As such, it was declared problematic pursuant to Section 86B of the Nepal Rastra Bank Act, 2002, and directives were issued to enforce corrective measures, which the institution failed to observe. The share of non-performing assets amounted to 99 percent, and the institution defaulted in paying off its depositors. Since the financial assets of the institution could not satisfy its financial liabilities and the paid-up capital was not maintained as per the petitioner bank's directives, it cannot be assumed to be a going concern. Therefore, it is hereby held that the respondent Crystal Finance Company Ltd. needs to be liquidated pursuant to the petition plea and the decision of the Board of Directors of Nepal Rastra Bank, which sought to proceed with its liquidation process in pursuance of Section 86G of the Nepal Rastra Bank Act, 2002 and Section 74(1)(h) of the Banks and Financial Institutions Act, 2006. It is hereby ordered that the accounts of the institution, frozen by the petitioner bank in the interests of depositors, remain frozen as usual unless ordered otherwise by the liquidator. Let the liquidation proceedings be instituted and the task of paying off the parties be initiated as per

the order of priority set out in Section 77 of the Banks and Financial Institutions Act, 2006. In order to accomplish these duties, a liquidator has to be appointed pursuant to the petition plea. Let the names of three individuals from each party be summoned within 15 days, along with their certificate numbers, experience in the field, contact telephone numbers, email and physical addresses, and their consent letter to carry out the liquidation work. These details should be submitted before this bench once the name list is obtained or the timeline expires, for appointment as a liquidator. Moreover, as the liquidation proceedings must be completed on time, let the notice of the appointment of the liquidator be communicated to both parties, and let the liquidator be informed of the following terms of reference (ToR).

Particulars of the Case

(a) An appointment shall be so given to the liquidator as to accomplish the liquidation of institution within 1 year and 6 months.

(b) An action plan has to be filed at this Court within one month of liquidator's appointment detailing which activities shall be completed by when. Once that action plan is approved, the liquidation proceedings of institution have to commence. The liquidation process should be given continuity by filing the progress report of pertinent activities, every three months.

(c) The remuneration of liquidator shall be as laid down in Section 68 of the Insolvency Act, 2006.

(d) Should any impediment or hindrance arise in the liquidation proceedings being undertaken as per the submitted action plan, let the Court be intimated of the same and let the order issued by this Court be followed in such a circumstance.

Kirendra Bahadur Pradhanang v. Hetauda Textile Mills Ltd.[667]

Ratio: The petitioner was serving as an assistant to the liquidator. Once a company has been liquidated or dissolved, then there seems no legal arrangement or situation whereby his status could be retained.

Facts: The brief facts and conclusion of this petition duly presented before this Court being under its jurisdiction as per Section 107(2) of the Interim Constitution of Nepal, 2007 have been as follows:

1. The petition duly filed at this Court by the petitioner read as follows:

   I, the petitioner, was appointed for performing the prescribed court related duties by the Ministry of Industries since 12.07.2002. A decision was taken to liquidate the Hetauda Textile Mills on 23.12.2002 and I was appointed as an assistant to the liquidator in which I remained till December 2008. Later, the Government of Nepal decided to revoke the decision to liquidate and to rerun the Mills. Accordingly, I was assigned the charge of Head of Kathmandu Office of that Mills on 24.03.2009. As I was serving in that capacity, another decision was taken on 04.11.2009 to liquidate the Mills once again and to grant continuity to my service as well. Thus, even after the appointment of liquidator, I continued being in service. The liquidator held animosity against me as I was not only unsupportive but also vocal against many of his illicit acts such as not returning the loan amounts pursuant to the decision of 16.11.2009, not seeking appointment of auditor contrary to the provisions of Companies Act, deriving financial benefits more than what he was authorized to, trying to deliberately prolong the liquidation process, issuing purchase orders contrary to the Public Procurement Act and Rules, involving only those individuals who are close to him and offer him commission in the Mills' duties, and others. As long as I was in that Office, it would have been harder for him to act with impunity.

[667] NKP, 2018 Issue 1, Decision No. 9940, SC.

Hence, without affording me any opportunity of defence, and without any valid reason, the respondent liquidator discharged me from service by invoking an inapplicable ground under Section 127(5) of the Companies Act, 2006 on 07.06.2010. His said act is in flagrant violation of Articles 12(3)(f), 13, 18 and 27 of the Interim Constitution of Nepal, 2007 and Section 127(5) of the Companies Act, 2006 as well as Section 88 of the Labour Act, 1992 which provides that in case of an employee of an enterprise, it shall be as prescribed by the Rules or By-Rules of that enterprise.

As I have been deprived of the right to be heard under the canons of natural justice and as I also do not have any other adequate and effective means of legal remedy, I have moved this Court with a petition seeking the revocation of the acts and decisions that discharged me unfairly from service together with the letter of 07.06.2010 under Article 107(2) of the Interim Constitution of Nepal, 2007. I also pray the Court for issuance of an order of mandamus as well as other pertinent orders requiring the respondents to pay off my salaries and allowances till the date of my reinstatement.

An order of this Court of 30.06.2010 read as follows: What has happened in this connection? Why an order as sought by the petitioner need not be issued? In case there is no reason for issuing an order as prayed, then let the respondents be required to file their written replies to this effect within 15 days from the date of this order, barring the travel time. Let this petition be duly presented at the Bench once the written replies are received or once the deadline above duly expires. Let a date of 09.07.2010 be listed for discussions on whether an interim order needs to be issued or not and let the respondents be notified of the same.

The written reply furnished by liquidator Daman Bahadur Bishta for himself and on behalf of the respondent Hetauda Textile Mills (in liquidation) read as follows: Once I had been appointed as the liquidator, all the directors and officials of company are ipso facto relieved of their duties pursuant to Section 127(4) of the

Companies Act, 2006 and the liquidator assumes authority over the same. Likewise, as per Section 127(5) of the Act, the liquidator can maintain the needful workers and staffers for his or her assistance and may not retain, if not required.

There is no binding provision in the Act requiring compulsory reinstatement of employees and a ban on terminating their services. As the respondent was appointed in contract, Government of Nepal decided to liquidate the Mills on 04.11.2009, he was supposed to be ipso facto relieved of his duties. However, I gave continuity to his services as an assistant to me, the liquidator. When the liquidation process reached finality, there was no impediment to discharge him pursuant to Section 127(4), (5) of the Companies Act, 2006 and the Interim Constitution of Nepal, 2007. As such, I pray to set the petition of respondent aside.

An order of this Court of 12.07.2010 read as follows: Upon delving on the request of petitioner to issue an interim order, while he was appointed as an assistant to the liquidator vide the letter of no. 2003/04, Ref No. 21, dated 01.04.2003, his term or tenure was designated as "until another provision". The assistant was not a permanent staffer but was appointed provisionally "until another provision". His service ended duly as per Section 127(5) of the Companies Act, 2006. Hence, there seems no situation to issue an interim order as sought forthwith. Being so, let law take its course.

The Bench duly studied the documents enclosed in the case file together with the petition in the present case duly submitted as per the daily cause list.

Learned Advocate Mr. Bishnu Prasad Baskota, representing the petitioner Kirendra Bahadur Pradhananga argued that his client was appointed into the service of Hetauda Textile Mills Ltd. on 12.07.2002. As the government decided to liquidate the Mills on 23.12.2002, the petitioner was appointed as an assistant to the liquidator in which he remained until December 2008. As the government revoked its earlier decision of liquidation and determined to rerun it again, he was

assigned the responsibility of Head of Kathmandu Office of the Mills on 24.03.2009. As he was continuing with his service, the government decided to liquidate the Mills once again on 04.11.2009. It was also decided to retain the services of 12 employees and security guards which were in contract duties while the liquidator was appointed earlier.

However, the petitioner has been discharged vide a letter of 07.06.2010. This decision to terminate his services was taken without affording the petitioner an opportunity of defence contrary to the canons of natural justice and the provision of Section 127(5) of the Companies Act, 2006. Hence, I pray that the arbitrary and discretionary act of respondent liquidator to sever the services of petitioner be quashed by an order of certiorari, reinstate him in his duties and to pay off his salary and allowances from the date of his dismissal to the date of his reinstatement in service.

Learned Senior Advocate Mr. Harihar Dahal, representing the respondent Hetauda Textile Mills Ltd also argued that the status of Mills is different prior and post liquidation. Once a new liquidator has been appointed, the appointment of all previous staffers has ipso facto ended pursuant to Section 127(4) of the Companies Act, 2006. A notice of Ministry of Finance, Government of Nepal stating the liquidation of Hetauda Textile Mills Ltd. vide a decision of 26.01.2011 has already been published in the Nepal Gazette. As the liquidation process has already been accomplished, there seems no circumstance to issue an order as prayed by the petitioner. Hence, let the writ petition be set aside. Now, it has to be determined whether an order as sought by the petitioner needs to be issued or not.

2. Here, the scenario so appears that the petitioner was appointed for performing the prescribed court related duties by the Ministry of Industries since 12.07.2002. A decision was taken to liquidate the Hetauda Textile Mills on 23.12.2002 and he was appointed as an assistant to the liquidator in which I remained till December

2008. Later, the Government of Nepal decided to revoke the decision to liquidate and to rerun the Mills. Accordingly, he was assigned the charge of Head of Kathmandu Office of that Mills on 24.03.2009. As he was serving in that capacity, another decision was taken on 04.11.2009 to liquidate the Mills once again and to grant continuity to his service along with the services of 12 employees and security guards which were in contract duties while the liquidator was appointed earlier.

However, the petitioner Kirendra Bahadur Pradhananga was relived of his service vide a letter of 07.06.2010. Hence, the plea of petitioner is that the decision to terminate his services taken without affording him an opportunity of defence falls contrary to the canons of natural justice and the provision of Section 127(5) of the Companies Act, 2006. Hence, he prays that the arbitrary and discretionary act of respondent liquidator to sever the services of petitioner be quashed by an order of certiorari and reinstate him in his duties by an order of mandamus.

Conversely, the written replies of respondents including Hetauda Textile Mills contend that as the respondent was appointed in contract, Government of Nepal decided to liquidate the Mills on 04.11.2009, he was supposed to be ipso facto relieved of his duties. However, I gave continuity to his services as an assistant to me, the liquidator. When the liquidation process reached finality, there was no impediment to discharge him pursuant to Section 127(4), (5) of the Companies Act, 2006 as well.

As such, they have prayed to set the petition aside. Pursuant to Section 127(4) of the Companies Act 2006, *after a liquidator is appointed the directors and officers of the company shall relieved of their office and the liquidator shall exercise all such powers with respect to the operation and management of company as may be exercisable by the directors and officers of the company.* Likewise, as per Section 127(5) of the same Act, *the service of employees of a company shall, ipso facto, be terminated after the liquidator commences the operation and*

management of the company. Provided, however, that the liquidator may retain or appoint necessary employees for his/her support and assistance.

Here, it seems that though the petitioner joined service on 12.07.2002, a decision was made to liquidate the Mills on 23.12.2002. As soon as the liquidation proceeding commenced, his services had been ipso facto terminated. His services were retained only for the purpose of liquidation. Though it was later decided to revoke the decision to liquidate and to rerun the Mills on 24.03.2009, the government ultimately liquidated the company on 25.01.2013. Thus, though the petitioner had been an employee with the Hetauda Textile Mills, with the decision of its liquidation, he seems to have served in a capacity of assistant to the liquidator. He also has not challenged the very decisions to liquidate the Mills.

3. Thus, as a decision was taken to liquidate the Hetauda Textile Mills Ltd. was taken vide a letter of 16.11.2009, a notice of Ministry of Finance, Government of Nepal to this effect vide a decision of 26.01.2011 of Council of Ministers, Government of Nepal in exercise of the power conferred by Section 16(1) of the Privatization Act 1993, has already been published in the Nepal Gazette (Nepal Gazette, Vol. 62, Kathmandu, 26.01.2003, Additional Issues 22+1). Pursuant to the decision of 26.01.2011, the assets of Mills were valuated by the liquidator and duly handed over to the Industrial Enterprises Management Board, thus effectively rendering the very purpose of petition claim ineffective. The petitioner was serving as an assistant to the liquidator. Once a company has been liquidated or dissolved, then there seems no legal arrangement or situation whereby his status could be retained.

There can be no discord to the fact that it shall be compatible to the canons of natural justice that an opportunity of defence be duly afforded if any decision is to be taken against the concerned party. Nonetheless, when the very existence of Hetauda Textile Mills Ltd. has been ended as per the statutory provisions, the expectations and pleas of the petition itself do not seem to be legitimate and

plausible when the petitioner could not remain in service of company. Principally, as the company has already been dissolved, there seems no circumstance and rationale to issue a writ order, this writ petition is hereby set aside. Let this case be struck off registry and the case file be duly returned.

OPINION

The existence of legal personality of a company and the associated for any particular purposes attached to the company is separate concept. The work of assistance in the liquidation process is subject to the main appointed liquidator and their job is reciprocally based on the existence of company as in operation. Since, the above mentioned company is already cease to operate, the claim raised by the parties is not necessarily required and decision is in line with the principles of law and justice.

Hari Bhakta Shresta et. al study College of Applied Business[668]

Facts of the Case

The brief facts and conclusion of the present case duly filed as an appeal under Section 9(1) of the Administration of Justice Act, 2016 from the complainants' and respondents' side against the verdict of Appellate Court, Patan of 19.12.2011 have been as follows:

Letter of Complaint of Hari Bhakta Shrestha et al.

The letter of complaints dated 02.04.2010 read as follows:

1. The College of Applied Business had been registered as a non-profit trust comprising of a 10-member board of trustees led by its Chair Hari Bhakta Shrestha and a representative of the Tribhuvan University and was being run at Tangal of Kathmandu. One of the complaints, I, Ramesh Pandey, Member Secretary and Principal had summoned a meeting of board of trustees to discuss

[668] NKP, 2023, Issue 5, Decision No. 11091, SC.

and decide various agenda on 15.02.2010. As Vice Chair of Board of Trustees Mohan Bahadur Pandey, Member Secretary and College Principal Ramesh Pandey, members Trivendra Raj Panta and Rashindra Prasad Yadav have signed in the minutes, even without discussing the present agenda, individuals including Bal Krishna Man Suwal, one of the respondents, forcibly seized the minute book and fled the meeting scene. As a complaint was filed against them ay the Metropolitan Police Sector of Kamal Pokhari, an investigation is underway against the respondents as per the laws.

Pursuant to the College Statute, there has been a 8-member board of trustees, respondents Ramesh Man Singh and Rishi Raj Gautam, who have been removed as board members, and respondents Hari Prasad Pokhrel, Hira Lal Shrestha and Hari Bahadur Dallakoti were falsely claimed as trustee members by the respondents Bal Krishna Man Suwal, Kishor Prasad Bhattarai and Ghanendra Fago who held a meeting on 09.03.2010 and decided to register the college as a non-profit company under the Companies Act, 2006. Thus, they aimed at transferring the perpetual existence of college to a company and they also have prepared minute books, memorandum of association and articles of association and submitted the same at the Office of Company Registrar.

2. Section 16 of the Companies Act, 2006 provides for the registration of a company by an entrepreneur in a condition of not distributing profit. However, as the company was registered by the respondents, instead of deriving a new name and starting a new venture, they intended to appropriate the college by converting it into a company which was being run by a board of trustees of the CAB. As we were preventing the respondents from running the institution in their way, they seized the minute book and filed memorandum and articles at the Office of Company Registrar by stating fake details and making a fake impression in this regard. As such, they caused to make a decision to register the company on

11.03.2010 and also acquired a certificate of incorporation, which is inconsistent with Section 166 and thus revokable under Section 180 of the Act.

Hence, in course of regular meeting of the college on 15.02.2010, pursuant to its Statute by setting out the agenda for discussion, as signatures were being placed, Bal Krishna Man Suwal and other respondents forcibly seized the minute book of meeting and fled the scene. Legal action is underway in this connection. Meanwhile, by convening a meeting of individuals on 09.03.2010 involving who are either removed as member of board of trustees or who were never such members, they have converted the college under our ownership, into a nonprofit company pursuant to the Companies Act 2006. In pursuit of this unlawful decision, they also prepared the memorandum and articles of a nonprofit company and included certain provisions such as transferring the assets and liabilities of that company, not accruing profit in the company's name, raising a company, registering it on 11.03.2010 and obtaining a certificate of incorporation of the same. As such, we pray for the revocation of the unlawful decision of that date, certificate of incorporation and all decisions made against our interests pursuant to Section 180 of the said Act.

As the acts of respondents have been contrary to Sections 3(3), 4, 5, 166 and 167 (of Chapter 19) which also run afoul to Sections 160 (a), (l) and 161 (h) of the Act, let the respondents committing such an unlawful act as per Section 159 and hence they be punished with fine and jail term pursuant to Section 160 of the Act.

The Statement of Defense

The statements of defence of 8 individuals including Prof. Bal Krishna Man Suwal, the Chairperson of College of Applied Business, registered as a non-profit company at the Office of Company Registrar with the regd. no. 233/2009/10 and having its office in Kathmandu Metropolitan City, Ward No. 5, Kathmandu district dated 26.04.2010 as

well as of the Director and Principal Ghanendra Fago, on behalf of the College of Applied Business and its board of directors, read as follows:

- Guided with a view to run an educational institution by collective spirit and decision process, developing it as a quality academic organization for advancing management education in a developing country and contributing towards the sector of higher education, the College of Applied Business was brought to operation with the involvement of individuals including Bal Krishna Man Suwal, one of the filers of written reply, and Resham Pandey, one of the respondents. Though we had tried repeatedly for running the college in a well-organized manner, respondent Ramesh Pandey tried to ruin the future of college.

  As such, many decisions including the reconstitution of board of trustees were made in its meeting of 15.02.2010. The meeting of 09.03.2010 of the board of trustees granted corporate existence and identity and decided to register it as a nonprofit company. Accordingly, the first annual general meeting (AGM) of the company was held on 31.01.2011 and the college is now in operation. The principal demand of respondent complainants is to revoke the decision of Office of Company Registrar of 11.03.2010 which ruled to convert the College of Applied Business with them as founders or directors, as a company not distributing profits. However, they have failed to name the Office as one of the respondents though first challenging its decision.

- The company has been registered by the Office of Company Registrar and a certificate of incorporation issued pursuant to Section 5 of Companies Act 2006. As per Section 166 of the Act, the company has been registered with a condition of not distributing profits and to be dedicated towards pure social benefit with an educative objective in mind. Nothing has violated the provisions of that Act. The Companies Act has no provision whatsoever for the erasure of corporate existence of company simply on the basis of respondents' claims. The entire acts and

decisions pertaining to the registration of company executed by us, the filers of written replies, are consistent with the laws and the Statute of the then College of Applied Business.

Thus, it is evident that the respondents have no locus standi in filing the instant case, the Office of Company Registrar, the administrative agency responsible for deciding on the company registration, the complaint has been filed on the basis of fake and false statements, the respondents lack clean hands, a nonprofit company by the name of College of Applied Business by fulfilling the entire processes laid down by the Companies Act 2006, there is no circumstance for the erasure of corporate existence of the company pursuant to the Act, and we have taken into consideration the paramount interests of the college, its students, teachers and staffers by checking the overly individualistic decision process, administrative and financial irregularities happening in the College by the respondents.

Hence, as the college is being run as a company not distributing its profits, with an objective of running it is a pure social institution. These facts manifest that the claims of respondents have been baseless, unlawful and false. So, we pray that the letter of complaint of respondents be quashed and let justice be delivered on us.

Order of the Appellate Court, Patan

The order letter of Appellate Court, Patan of 20.03.2011 read as follows:

- Let the file including the entire papers and the letter of decision of 15.01.1998 of Tribhuvan University to grant affiliation to the College of Applied Business stated in Para 1 of the letter of complaint, be summoned from the University. Let the file including the permit to run classes of Grade 11 in management faculty to the complainant on 10.07.2000 by the Higher Secondary Education Board be summoned from the Board. The original minute book of College of Applied

Business be summoned from the respondents on the date of cause list. Let the file including complaint filed by the applicants/complainants against the respondents/filers of written replies on 24.02.2010 at the District Administration Office, Kathmandu as stated in Para 9 of the written reply be summoned from the said Office.

Verdict of the Appellate Court, Patan

The verdict of Appellate Court, Patan of 19.12.2011 read as follows:

- As the complainants seem to be stakeholders pursuant to Section 159(1) of the Companies Act 2006, they possess the locus standi to file this instant case. There is also no ambiguity regarding the jurisdiction of this Bench following the conferral of power to the Commercial Bench of this Court by a notice published on 20.07.2009. In the absence of a unanimous decision of the initial trustees of College of Applied Business, it has been found that, contrary to its Statute, the respondents added some individuals as trustees vide a decision of meeting held on 15.02.2010. Another meeting of 09.03.2010 attended by the added trustees decided to register the college as a company not distributing profits under Section 166 of the Companies Act 2006, and also framed the memorandum and articles of the proposed company on its basis. In line with the request of respondents, the Office of Company Registrar approved the memorandum and articles and registered the company as sought by the respondents on 11.03.2010.

  Without an unanimous decision of founder trustees, the previous college decided to retain the affiliations of Tribhuvan University and Higher Secondary Education Board and to maintain the founder trustees and founder members of the new institution ipso facto, and that the entire assets and liabilities to devolve upon the new company and the company to bear the costs of its incorporation. The same details were also incorporated in Clauses 6, 9(1)(a) and 14 of its memorandum

and the name of company was also kept same as the previous college in Clauses 17 and 39 of the memorandum.

Thus, the acts of respondents in breach of Companies Act 2006 also seem to be improper in their own right. Being so, subject to the condition that the existence and registration of company shall remain intact, those acts of the respondents as well as the said provisions in the company's memorandum and articles are hereby held to be ipso facto inoperative pursuant to Section 180 of the Act. As the Office of Company Registrar has already decided to register the new company on 11.03.2010 by fulfilling the process under the Act and as the registration of a company cannot be annulled as per Section 180 of the Act; that decision cannot be invalidated as sought by the complainants. Likewise, the plea of complainants seeking punishment for the respondents under Section 160 of the Act upon revoking the company registration also fails to suffice.

Memorandum of Appeal of Hari Bhakta Shrestha et al.

- The respondents other than Bal Krishna Man Suwal are not even the founder trustees under the board of trustees of College of Applied Business. Pursuant to its Statute, nobody can remove the founder trustees from the board on the basis of majority nor can their responsibilities be altered. The Appellate Court of Patan also has not denied this fact. As per the same Statute, the meeting of 15.02.2010 altered the responsibilities of founder trustees, appointed new Principal and Treasurer by trespassing the preset agenda. Once the attendees had signed on the minutes of meeting and as the Chairperson was awaited, suddenly, the respondents seized the minutes and made decisions as per their whim, even in agenda not listed for discussion. The same meeting inducted 3 new individuals as new trustees with a view to ensure their majority in the board. The verdict of High Court has itself invalidated that decision; however, it has retained the same office bearers and members. In doing so, the Court has nullified the respondent company

as the perpetual successor of the original college. It has also rendered the concerned provisions of memorandum and articles of respondent company inoperative. Once the Appellate Court, Patan has ruled as such, then the name of college could not be retained by the respondents as the College of Applied Business which is grounded on the decisions made in the meetings of 15.02.2010 and 09.03.2010.

Moreover, the new office bearers have been selected on that basis as shareholders or members of company, who have signed and approved its memorandum and filed it before the Office of Company Registrar. On this ground, the decision of Office of Company Registrar to register the new company on 11.03.2010 should not stand in legal terms.

- Hence, as stated above, the decision to register a company with the same name of existing college seems inconsistent with Sections 3(3), 4, 5 and 166 of the Companies Act 2006, and as such revokable under Section 180 of the Act. However, the High Court failed to repeal that act of respondents and also to impose punishment against them as sought under Section 160(a) of the same Act. As such, the judgement of Appellate Court, Patan seems to be flawed to that extent and hence we pray for its annulment to that degree and let justice be served on us.

Memorandum of Appeal of Kishor Prasad Bhattarai et al.

- The basis of judgement evinced in the judgement of Appellate Court, Patan that no prior intimation was made to the Chairperson and Vice Chairperson in matters other than set out in advance and that decisions have been made without discussing the serious matters therein, is itself contrary to the documentary evidence filed by this company and the then Statute. Written and oral intimation on the agendas poised for discussion was made to the then respondents Chairperson Hari Bhakta Shrestha and then Member Secretary Ramesh Pandey

much in advance to the meeting of 15.02.2010. In fact, written intimation was made to the Chairperson and Member Secretary of the then board of trustees vide letters dated 13.08.2009, 05.01.2010 and 18.01.2010.

Despite repeated requests of ours, the then Chairperson and Member Secretary continuously excluded those matters from being discussed in meetings. Being compelled, we had duly notified the respondents that the aforementioned topics would feature in the meeting scheduled for 22.01.2010 upon the approval of Chairperson. At this premise, it seems that the Commercial Bench of Appellate Court, Patan assumed jurisdiction on where it does not have and admitted the complaints of respondents which even lack the locus standi in the present case.

Likewise, its perception that the decisions made on 15.02.2010 and 09.03.2010 by the meetings held as per the then Statute as not binding on the college itself as well as its ruling to invalidate certain provisions from the memorandum and articles of the College of Applied Business, a company not distributing profits, seem to be incongruent to Section 159(1)(2), 180, 184(a), 185 and 186 of the Companies Act 2006 as well as the proviso of Section 54 of the Evidence Act 1974, and the then Statute of college. This judgement of Appellate Court, Patan also runs aground to the legal principles and precedents enunciated by the respected Supreme Court as well as ultra vires, without locus standi and beyond the plaint of complainants. Being so, we pray for the revocation of that verdict to such extent.

Memorandum of Appeal of College of Applied Business et al.

- As regards the reshuffle of official responsibilities of the office bearers in the then board of trustees made by the meeting of 15.02.2010, and the conversion of the College of Applied Business into a company not distributing profits made by the meeting of 09.03.2010 of board of trustees, as well as the registration of College as a non-profit company pursuant to Section 166 of the Companies Act 2006,

which is currently operating in that capacity, the complainants have sought the revocation of its registration decision. The Appellate Court of Patan was supposed to rule on whether that plaint sustains or not.

However, it showed needless judicial activism and nullified certain provisions in the company's memorandum and articles, which amounts to a breach of law. The verdict has failed to state on the basis of which legal provision the said provisions of memorandum and articles have been held as revokable. Pursuant to Section 166(3) of the Companies Act 2006, a minimum of 5 founders shall have to remain in case of a company not distributing profits.

However, the Court judgement to retain the registration of company as usual, but to quash the arrangement of company incorporation and the details of founders' name and address seems to be flawed and paradoxical in plain sight. Thus, we pray that the verdict of Commercial Bench of Appellate Court, Patan invalidating the decisions of 15.02.2010 and 09.03.2010 to convert the College into a company not distributing profits, be duly set aside.

Order of this Court of 10.06.2015

- As in the present case, appeals have been filed from both the parties, for the purpose of No. 202 of the Chapter on Court Proceedings of the Muluki Ain, let the appeals of each other be shared between them and let the appeals be duly presented at the Bench once this process is discharged.

Concluding Section

- In the present case duly submitted at this Bench following its progression through daily and weekly cause list, the Bench studied the entire documents enclosed in case file together with the appeal pleas.
- Learned Senior Advocates Mr. Mahadev Yadav and Harihar Dahal, and learned advocates Mr. Kedar Dahal, Mr. Nagendra Gautam and Ms. Laxmi Sapkota

representing the appellant/complainant Hari Bhakta Shrestha et al. argued that when the decision of respondents for retaining the name of College as the name of company itself has not been sustained, then the registration and name of the company registered pursuant to that decision should not stand either. The respondents had the option to register and run the company in another name. However, they chose to register company in the same name which would mislead the stakeholders. Still, they filed before the Office of Company Registrar for registering the respondent company in the same name of college to which the Office decided to register it on 11.03.2010. This decision of Office should not stand in legal terms. However, the Appellate Court, Patan has erred in its judgement to the extent of maintaining the company registration as usual. Hence, let the plaints of complainant be duly addressed in this connection.

- Learned Senior Advocates Mr. Bachchu Singh Khadka and Mr. Chandra Kanta Gyawali, and learned Advocates Mr. Bidur Prasad Dhungana, Mr. Eg Raj Pokhrel and Mr. Raj Kumar Khatiwada representing the appellant/filers of written replies Kishor Prasad Bhattarai et al. argued that the decision of 15.02.2010 that reshuffled the responsibilities of officials in the then board of trustees is binding on the college. The High Court is not entitled to invalidate the provisions of company's memorandum and articles by traversing beyond the pleas of complainants.
- Hence, the verdict of Commercial Bench of Appellate Court, Patan that nullified the decision of 09.03.2010 of the college's board of trustees which ruled to register the college as a company is contrary to Section 159(1), (2) and 180 also of the Companies Act, 2006. Thus, they pleaded for setting that verdict aside and delivering justice for the respondents.
- Here, it is learnt that the College of Applied Business was being run as a non-profit trust. A meeting of the board of trustees was held on 15.02.2010 in which

once the attendees signed off their presence and even before the pre-set agenda could be discussed, the respondents seized the meeting minutes. Then they convened another meeting on 09.03.2010 in which they included members who have been removed from and who have never been in the board, and also decided to register the college as a company not distributing profit under the Companies Act, 2006. They have also prepared its memorandum and articles and presented them accordingly at the Office of Company Registrar by stating fake details and making a fake impression in this regard. As such, they caused to make a decision to register the company on 11.03.2010 and also acquired a certificate of incorporation.

The complainants argue that they have instituted separate legal action as to the seizing of minute books and subsequent absconding. It is provided in the company's memorandum and articles of the company not distributing profits that the assets and liabilities of this college shall devolve to the new company as well as many other unlawful arrangements. Hence, the complainants have prayed the Court for setting the registration of company aside pursuant to Section 180 of the Companies Act 2006 and to punish the respondents to the maximum extent under Section 160 of the same Act.

In contrast, the written replies of respondents contended that the decision of Office of Company Registrar to register the college as a company by undertaking the entire process and conditions of Companies Act 2006, has been lawful. Section 180 of the Act provides for the repeal of only those acts that had been contrary to the memorandum and articles, but the decision of Office of Company Registrar cannot be set aside. The existence of companies registered under the Act can be ended only on the basis of provisions of that Act and the Insolvency Act, 2006. The meeting of 15.02.2010 of board of the board of trustees which ruled for company registration was attended by 9 out of the 10 trustees and is

legitimate. As such, the respondents prayed for setting the complaints of appellants as well as the decision authorizing to institute the lawsuit of 29.03.2010 aside as they have been ultra vires to Section 159(1) of the Companies Act, 2006.

Hearing both the parties, the Commercial Bench of Appellate Court, Patan determined in its judgement that no unanimous decision of founder trustees could be found as per the then Statute of college, the meeting of respondents decided that the entire assets and liabilities of college to devolve on the new company and the company to bear the costs of its incorporation, to retain the affiliations that the previous college had obtained, and to maintain the founder trustees and founder members of the new institution ipso facto. The same details were also incorporated in Clauses 6, 9(1)(a) and 14 of its memorandum which run aground to the Companies Act, 2006.

As such, the High Court ruled to retain the name and existence of company as usual, but invalidated the other decisions made by respondents as well as the relevant provisions inserted into its memorandum and articles. However, it held that the plea of complainants seeking punishment on the respondents under Section 160 of the Act could not sustain. Both the complainants and respondents have moved this Court their appeals against the said judgement.

- Pursuant to the Statute of College of Applied Business, the founder trustees cannot be removed from the board and no alterations can be made in the board without the unanimous decision of founder trustees. However, the respondents decided on the basis of majority to register the college as a company not distributing profits under the Companies Act, and to make the company as a perpetual successor of the college. These proceedings have already been nullified by the Appellate Court, Patan.

  In this scenario, the principal appeal plea of complainants including that of Hari Bhakta Shrestha, Chairperson of the board of trustees of College of Applied

Business, seems to repeal the verdict of High Court to the extent that it allowed for retaining the name of college in a manner that clashes with the already existing one, and to sustain the decision of Office of Company Registrar to register the company, as it has been flawed to that degree. They also have pleaded to punish the respondents under Section 160 of the Act.

- Similarly, the principal appeal plea of respondents including that of Kishor Prasad Bhattarai, the director and College of Applied Business (Regd. No. 233/2010/11), seems to be that the decision of board of trustees of college has been made in line with its Statute. Whereas the complainants have sought to repeal the decision to register the college, the High Court was supposed to determine whether the claim of complainants in this regard shall hold out or not.

  However, the Court overstepped and instead quashed certain provisions in its memorandum and articles. The judgement is silent on under which law have those provisions been quashed. The Court ruled to retain the company's registration, but chose to set the decisions of 15.02.2010 and 09.03.2010 aside, which seems to be faulty on plain sight. Moreover, the respondents also have argued that the complainants even lack the locus standi to file a lawsuit and the High Court is also not entitled to make a decision in the said matter. Hence, let the verdict of Appellate Court, Patan and the plaint of complainants be duly revoked.
- In the present case with the above facts and appeal pleas, upon listening to the logical arguments of the learned Senior Advocates and Advocates representing both the parties, and while delving on the decision, the following issues need to be determined at the onset:

  a) Whether the complainants possess the locus standi to report in the said matter or not?

  b) Whether this case falls within the jurisdiction of Commercial Bench or not?

c) Whether the entire decisions and proceedings including the revocation of company's registration made by the respondents should be annulled or not as per the pleas of complainants? Whether the respondents should be subject to punishment under Section 160 of the Companies Act, 2006 or not?

d) Whether the judgement of Commercial Bench of Appellate Court, Patan is appropriate or not? And whether the appeal plea of the complainants and filers of written replies sustain or not?

- Now, upon delving on the first issue of whether the complainants possess the locus standi to report in the said matter or not, the filers of written replies have stated in their replies that the complainants have been the trustees of College of Applied Business and they are not involved in the company not distributing profits, i.e. the College of Applied Business, duly incorporated under the Companies Act, 2006. They are neither the shareholders, creditors nor stakeholders of this College, and being so, they lack the locus standi to lodge a complaint against this company. They have repeated the same stand before this Court as well. Thus, it has become expedient to first determine whether the complainants possess the essential locus standi to file this lawsuit before broaching the issues raised in the premise of present case.
- It is learnt that, with a view to afford quality education from the private sector, the College of Applied Business has been founded as a trust not distributing profit, and has been running higher secondary and bachelor level programs upon obtaining affiliation from the Higher Secondary Education Board on 28.06.2000 and from the Tribhuvan University on 15.01.1998. In order for running the college, it has developed a Statute, filed it before the Board and has been operating accordingly. There seems no discord to these facts.

  Upon going through the Statute enclosed in case file, it has provided for two distinct classes of trustees: founder trustee and ordinary trustee. It has designated

7 individuals including Hari Bhakta Shrestha, Mohan Bahadur Pandey, Bal Krishna Man Suwal as the founding trustees. The appellant complainants, in their complaint, have mentioned that the respondents made unilateral decisions by seizing the minutes of the meeting of board of trustees held on 15.02.2010, they reconstituted the board by including individuals who have never been the board members via the meeting of 09.03.2010, which further decided to incorporate the college as a non-profit company under the Companies Act, 2006. Hence, they have challenged the decisions made in the meetings of 15.02.2010 and 09.03.2010.

Here, Section 159(1) of the Companies Act, 2006 provides Complaints and proceedings relating to cases under this Act in the following terms: *(1) In respect of any matter under this Act, a case may be filed and proceedings taken only with a complaint made by the Office or the director, officer, shareholder or member or creditor of a company or any other concerned person.*

- Upon examining the said statutory provision, it is evident that in respect of any matter under this Act, a case may be filed and proceedings taken only with a complaint made by the Office or the director, officer, shareholder or member or creditor of a company or any other concerned person. There is no discord to the fact that the decision to incorporate the college as a non-profit company under the Companies Act, 2006 was taken as per the resolution of meeting of board of trustees of the College of Applied Business held on 09.03.2010.

  In such a circumstance, it cannot be held that the complainants who used to be the Chairperson and members at the then board of trustees lack concern or stake on the decision and proceedings of the respondents which decided to alter the status of college by converting it into a company, to devolve the liabilities of college to the present company, the costs of incorporation to be borne by the present company, and to insert the relevant provisions in its memorandum and

articles - especially when all these decisions and proceedings were done in their absence.

In addition, the meeting of board of trustees convened on 09.03.2010 also decided to maintain the Chairperson, Vice Chairperson and members of the then board of trustees including Hari Bhakta Shrestha, Mohan Bahadur Pandey and Ramesh Pandey as the founding members of the company not distributing profits, the dissolution of which the complainants have sought. On the basis of the very same decision, that company has been incorporated. From that decision as well as the pertinent provisions inserted into its memorandum and articles to this end, it is evident that the appellant complainants have been pushed to be involved in that company not distributing profits.

Upon examining the minutes of different dates enclosed in the case file, the relevant decisions have not been made in the presence or signature of the individuals that had been in the earlier board of trustees. Hence, it cannot be presumed that their consent or approval has been solicited while making those decisions. It also cannot be held that the decisions made without the consent of complainants including the conversion of legal status of the college itself, have not negatively impacted their rights and interests.

The prime objective of Section 159 of Companies Act, 2006 seems to afford suitable remedy for the aggrieved party in case the financial or other interests of company, its creditors or shareholders or other stakeholders are unfairly compromised following any adverse act or decision to this end. From the above decisions on company incorporation, it cannot be said that the affected complainants, who also happen to be valid stakeholders, are prevented from challenging such decisions as per Section 159(1) of Companies Act, 2006. Thus, the complainants have the requisite locus standi to file plaint in the said matters.

- Now, moving towards the second issue of whether this case falls within the jurisdiction of Commercial Bench or not, the chief contention of filers of respondents/written replies seems that the Commercial Bench is authorized to hear only those complaints that have resulted once the company is already incorporated, and on that note, it is not entitled to quash the decisions of 15.02.2010 and 09.03.2010 and to invalidate the provisions of a company's memorandum and articles. Section 159(2) of Companies Act, 2006 provides in this context that: *Except in cases where jurisdiction is expressly given to the Office on any matter under this Act, the Court shall have power to hear and settle the cases on offenses punishable under this Act, the mattes on which a complaint or application can be made to the Court as mentioned in various Sections of this Act and matters of compensation for amounts in controversy.*

  The same Act, in Section 2(z8) defines a Court as *the commercial bench of a court specified by the Government Nepal by a notification in the Nepal Gazette, with the consent of the Supreme Court.* Pursuant to a notice published at the Nepal Gazette on 20.07.2009, a commercial bench was designated in the then Appellate Court, Patan as well for hearing the cases under this Act. Section 159(2) of Companies Act, 2006 provides for *on any matter under this Act* upon which a complaint or application may be filed at the Commercial Bench of the Court under different Sections of the Act.

  Thus, upon examining the jurisdiction of commercial bench, the provision of Sub Section (2) should be read in conjunction with Sub Section (1). The Sub Section (1) provides that a case may be filed and proceedings taken only with a complaint made by the Office or the director, officer, shareholder or member or creditor of a company or any other concerned person. In this context, while interpreting Sub Section (2), we should agree that the Commercial Bench indeed possesses jurisdiction to hear the cases for rendering remedies ensured by Sub Section (1).

As per the deliberation made in the above paragraphs, the decision and actions to incorporate a company not distributing profits, which the complainants are seeking revocation thereof, have indeed imposed negative impacts on the rights, interests and concerns of these complainants. When there is a locus standi for the complainants to file a complaint, then it cannot be said that the Commercial Bench lacks a jurisdiction to hear the complaints filed by them.

- In addition, Section 180 of the Companies Act, 2006 specifies that *Except as otherwise provided in this Act or the memorandum of association or articles of association, where any act or action required to be done or taken under this Act or the memorandum of association or articles of association has not been done or taken or any act or action prohibited the under has been done or taken by any company or in respect of such company, such act or action shall be void.* This statutory provision seems to stress that if anyone performs an act or fails to perform an act as per the Act, memorandum and articles, save for those acts being expressly excluded in the company's memorandum and articles, then such acts or omissions shall be repealed.

  In such a case, it cannot be held that the complaints over the acts alleged to be ultra vires to the Companies Act, do not fall under the jurisdiction of Commercial Bench. The expression *any company or in respect of such company* indicates an expansion of jurisdiction of the Commercial Bench as regards the functions of a company. That expression has not limited the jurisdiction of Commercial Bench to the decisions of a company only, but also has expanded to enable the Bench for setting aside the other relevant decisions made in course of company's usual functions. Thus, a narrow interpretation of the jurisdiction of Commercial Bench which would limit its purview only for the formal decisions of a company.

  In case there is a precondition of Section 180 of the Companies Act 2006, then the Bench is entitled to quash any decision in which the acts of a company or

other concerns of stakeholders is inherent. In this light, Section 4(2)(c) and (d) of the Companies Act, 2006 provide that *in the case of a public company, a copy of the agreement, if any, entered into between the promoters prior to the incorporation of the company, and in the case of a private company, a copy of the consensus agreement, if any, entered into, shall have to be presented compulsorily during the company's incorporation.*

In fact, as the company would not have been incorporated by that time, then it cannot be made a party in such decisions or proceedings. Only the promoters or shareholders can be made parties as regards such transactions. Even as those acts were not made in the name of company as no decisions were made at the company level, those acts expressly pertain to the company matters and the expression *on any matter under this Act* used in Section 159(2) of the Companies Act 2006, or the expression *in respect of such company* used in Section 180 of the same Act, which suggests that even the agreements sealed, acts done or decisions made prior to the incorporation of company are included in that expression. Thus, these matters well come under the purview of Commercial Bench.

In the instant case, though there has been no pre-incorporation agreement between the complainants and respondents, a decision seems to have been made from the meeting of board of trustees as per the Statute of College of Applied Business, which is still functional, for maintaining the founder trustees of that College as the founding promoters of the company not distributing profits. The company incorporation process has commenced on the basis of that decision also and those decisions seem to be concerned with the company the registration of which is now sought to be annulled. As Section 180 of the Act has authorized the Commercial Bench for quashing those decisions, the pleas of respondents that the Commercial Bench is not entitled to entertain such cases, cannot be held as being lawful.

- Now, upon examining the third issue of whether the entire decisions and proceedings including the revocation of company's registration made by the respondents should be annulled or not as per the pleas of complainants and whether the respondents should be subject to punishment under Section 160 of the Companies Act, 2006 or not; the complainants in their plaint have protested that the respondents decided to convert the college into a company in an unauthorized manner by causing the attendance of individuals who are not even the members of board of trustees as per the Statute of college. As such, they have prayed for the repeal of the decision of registering the company made on 11.03.2010 and all incidental decisions thereto, pursuant to Section 180 of the Companies Act 2006, and to punish the respondents to the full extent under Section 160 of the same Act.

  Indeed, there seems no discord to the fact pursuant to the Companies Act, 2006 that any person desirous of undertaking any enterprise with profit motive may, either singly or jointly with others, incorporate a company for the attainment of one or more objectives set forth in the memorandum of association as an autonomous body corporate with perpetual succession. Nonetheless, the incorporation, functioning and management should be done pursuant to the ideals of transparency and corporate good governance. One of the underlying objectives behind the adoption of Companies Act, 2006 is to maintain corporate good governance in the companies as well. In order to attain the very same objectives, the Act has laid down several terms, conditions and preconditions as regards the incorporation, functioning and management of companies as well as provided for remedies to the company's shareholders, directors or other concerned stakeholders who face loss or damage due to the acts and omissions of a company.

- In the present appeal, there seems no discord to the fact that the complainants including Hari Bhakta Shrestha and respondents including Bal Krishna Man

Suwal had been involved with the College of Applied Business in the past. Upon studying the College Statute, it seems to have provided that individuals including Hari Bhakta Shrestha, Mohan Bahadur Pandey, Bal Krishna Man Suwal, Dr. Govinda Ram Agrawal, Ram Krishna Regmi, Trivendra Raj Panta and Ramesh Panta have been the founder trustees in the board of trustees. Other individuals who might subsequently be added by the board shall remain as ordinary trustees only. A majority of complainants including Hari Bhakta Shrestha seem to be the founder trustees of the college. Pursuant to the same Statute, a board meeting was convened on 15.02.2010 made one of the respondents Bal Krishna Man Suwal the Chairperson of board as well as reconstituted the board by adding other members as well.

Pursuant to the decision of the reconstituted board on 09.03.2010, a process was set into motion for converting the college into a company not distributing profits under the Companies Act, 2006. However, the complainants are alleging that the respondents have seized the minutes of board meeting on 15.02.2010 and took them away. Upon going through the minutes raised on 09.03.2010, there seems no attendance of other founder trustees as per the College's Statute. The company's memorandum and articles prepared as per the decision of 09.03.2010 to incorporate a company not distributing profits which further ruled that the new company shall shoulder the entire liabilities of College of Applied Business.

However, while making such decision, the consent and approval of the founder trustees as per the College Statute was lacking. In the absence of a majority of founder trustees, a decision was taken by the meeting of 15.02.2010 by showing the presence of ordinary trustees added by the meeting itself. Indeed, though the College Statute is not as underlying a document as memorandum or articles, the conduct of respondents has long recognized that Statute on par with the memorandum and articles of college. The board as per the same Statute has made

various decisions on the operation of college and the respondents are also contending that the decisions of 15.02.2010 and 09.03.2010, the annulment of which is sought by the complainants, have been made as per the College Statute. In this light, they could not deny the legal existence of that Statute by their own conduct. Thus, here the respondents seem to have been bound by the estoppel of their own conduct. Then, the claim of complainants that the consent and approval of a majority of founder trustees are essential as per the Statute for making any decision on the operation and management of college, cannot be held as otherwise.

This way, a decision has been made for converting the college into a company not distributing profits under the Companies Act, 2006 by a meeting not marked by the presence of a majority of founder trustees, as required by the Statute itself. That decision has resulted in an adverse impact on the statutory existence, reputation and assets of College of Applied Business which has been running duly since long time back. Hence, the decisions of 15.02.2010 and 09.03.2010 of the then board of trustees of college which ruled for converting the college into a company not distributing profits under the Companies Act, 2006 does not stand in the wake of justice and hence have to be set aside.

- Thus, upon delving on the appeal plea of complainants that when the decision of 09.03.2010 of board of trustees of College of Applied Business that resolved to convert the college into a company not distributing profits under the Companies Act, 2006 is deemed fit for repeal, then the decision of 11.03.2010 made by the Office of Company Registrar to register the Company should also not sustain, it so seems that: The prevailing company laws seem to have prescribed certain preconditions for the deregistration of a company in cases other than voluntary liquidation. Since the liquidation or deregistration of a company amounts to the end of its institutional life, it should not simply be taken as a mere procedural

process only. It is a statutory status of the company as well. Hence, no company can be deregistered or dissolved except as per the Companies Act, 2006. Going by Section 136(1) of that Act, the Office of Company Registrar may deregister a company only under the following circumstances:

(a) If the promoter of the company makes an application, showing a reason for the failure to commence the business of the company, and accompanied by the prescribed fees, for the cancellation of the registration of the company;

(b) If the company is in default in submitting to the Office the returns as referred to in Section 80 or fails pay the fine as referred to in Section 81 for 3 consecutive financial years; or

(c) If based on the proofs received in the course of administration of the company, the Office has a reasonable ground to believe that the company is not carrying on its business or the company is not in operation.

- Upon mulling the above statutory provisions, in case there is presence of any precondition stated in Section 136(1) of the Act, the Office of Company Registrar may deregister a company. However, the Act has not conferred that power on the Commercial Bench and nor is a presence of any precondition laid down by Section 136(1) of the Act for deregistering a company, in the current case. Hence, the registration of company cannot be written off as sought by the complainants.

- Though there is no condition for cancelling the registration of company as sought by the complainants, Sections 159(2) and 180 of the Companies Act 2006, as regards maintaining corporate good governance in companies, have authorized the Commercial Bench to nullify the decisions and acts made in any company or with respect to any company. In such a context, it cannot be presumed that the commercial Bench is unable to repeal those decisions or proceedings detrimental to the financial or other interests or concerns of the company or its stakeholders

and contrary to the corporate good governance of a company. In the instant case, though the decision to convert the college running under a separate Statute into a company not distributing profits under the Companies Act, 2006 is held to be against that Statute and thus revocable, there is no circumstance whereby the company's registration can be annulled.

Hence, only the company's registration may be held intact, but the decision of board of trustees that the trustees of previous college shall remain as the founding members in the company and that the entire liabilities of the college as well as the costs of incorporation shall be borne by the newly incorporated company not distributing profits, as well as the relevant provisions made in the company's memorandum and articles cannot be held as usual.

In case the stipulations in memorandum and articles are to be kept intact, then the company's name shall match with that of college and the matter of bearing the liabilities of college and the operation as well as incorporation costs shall also be contrary to the laws. Thus, out of the provisions of memorandum and articles, Clauses 6, 9(1) (a), 14 and 17 of the memorandum and Rule 39 of the articles are found to be revocable under Section 180 of the Companies Act, 2006.

- This way, pursuant to the request of complainants, in the event of decision made by the board of trustees of College of Applied Business to raise a company not distributing profits is to be repealed, but the company registration could not be quashed, then it would lead to a situation whereby two educational institutions by the same name and objectives are to remain in parallel existence. Going by Section 6(1) of the Companies Act 2006, the Office of Company Registrar may refuse to register a company in case the name of the proposed company is identical with the name by which a company in existence has been previously registered or so resembles the name of that company as it might cause misleading.

Nonetheless, as the college is being run as per the Statute of College of Applied Business and not registered under the Companies Act 2006, its name does not seem to match with a company that has been registered and maintained prior. Still, the decisions of 15.02.2010 and 09.03.2010 for incorporating that college as a company and the concerned provisions in the company's memorandum and articles are held to be revocable. In this premise, when another institution is running its academic programs per se by obtaining affiliations from the concerned agencies since 1997, then if another company (college) not distributing profits is to be registered pursuant to the Companies Act 2006, with an identical name, then it would lead to illusion among the students, parents, stakeholders of the college and the masses alike.

There has been a provision in Section 6(1) (a) of the Companies Act, 2006 which reads that: *The Office may refuse to register a company if the name of the proposed company in identical with the name by which a company in existence has been previously registered or so resembles the name of that company as it might cause misleading.* The legislative intent behind this stipulation seems to prevent any illusion among the public leading to any sort inconvenience for them. Though the institution previously registered and maintained was not a company in a technical sense, if two institutions having identical objectives and nature continue to coexist, then there are adequate and reasonable grounds to believe that it may cause illusion among the public leading to inconvenience. Hence, it is not found proper to allow retaining two different colleges with similar names. The name of College of Applied Business (non-profit company) has to be changed.

Being so, the verdict of Appellate Court, Patan seems to be implausible to the extent of it allowing the company to operate in the same name. Nonetheless, there seems no circumstance to punish the respondents as sought by the complainants pursuant to Section 160 of the Companies Act, 2006.

- Hence, pursuant to the plaint of complainants, it is hereby held that the verdict of Appellate Court, Patan of 19.12.2011 to quash the decision of 15.02.2010 to reconstitute the board of trustees of the College of Applied Business and the decision of 09.03.2010 to incorporate the college as a company not distributing profits and the newly incorporated company to bear the liabilities of college as well as the costs of incorporation, as well as to invalidate the pertinent provisions in the company's memorandum and articles, seems to be appropriate, and is thereby upheld.

  However, as the verdict of Appellate Court, Patan to uphold the name of company registered as not distributing profits, i.e. College of Applied Business, that is identical to the name of an already existing college seems to be implausible. Hence, pursuant to Section 180 of the Companies Act 2006, it is hereby held that the said name of company is revoked and the company is required to change its name by pursuing the process under law. The plaint of complainants to punish the respondents pursuant to Section 160 of the Companies Act, 2006 and of the respondents to quash the complaint both fail to suffice. Let the following be done as regards other matters:

Particulars Section of the case

As stated in the conclusion section above, the verdict of Appellate Court, Patan has been partially reversed, and as it is hereby held that the name of company not distributing profits, i.e. the College of Applied Business is revoked pursuant to Section 180 of the Companies Act, 2006 and the company is also required to change its name, let a correspondence be made to the Office of Company Registrar by enclosing a copy of this verdict for acting in accordance 1

Let the copies of this verdict be served to the stakeholders requesting for the same by charging the fees as per the law 2

Let this case be struck off registry and let the case file be returned to the Records Section upon uploading this verdict into the electronic system 3

OPINION

The decision taken in order to endorsing the claim is in line with the existing company law and their particulars. The company law has clear provisioned in process of any changes required in initial identity of the existence of the company so that the early decision and appeal decision are seen in conformity with established principles of company law and practices. Section 6 of the company act has clear provision of refusal of name of the incorporation on several grounds so that the claim is within legal framework.

6.2 Indian Court Practices

By approaching the judicial decisions, Researchers attempt to trace the development of the IBC, 2016 by mentioning the critical issues which started from the 1[st669] years of its operation. Followings are the judgments by Supreme Court of India and by NCLAT which throws a light on the development and the progress by IBC in governing the insolvency of companies.

Commercial Insolvency

The expression "commercial insolvency" was explained by Sir James in European Life Assurance Society, Re "not in any technical sense but plainly and commercially insolvent, that is to say, its assets are such and existing liabilities are such, as to make it reasonably certain- as to make the court feel satisfied that is existing and probable assets would be insufficient to meet the existing liabilities." Thus, in Coimbatore Transport Ltd. study Governor General in Council, a company was ordered to wind up as it was unable to pay its taxes in spite of demands, nor was it able to furnish security. Where the assets of a company were taken over by the state and in replay to the creditors' claim and petitions, the company was only telling them that it was trying to

[669] SC 2017 SCC 1025.

retrieve those assets and there was nothing to show any benefit to the creditors in the continuity of the company, the court ordered winding up. [670]

Solvency Test

In Alliance Credit and Investment Ltd. study Khaitan Hostambe Spinets Ltd. (1997), the possibility of a company being able to realize by the sale of its assets an amount exceeding its liabilities is not sufficient to hold that company is commercially solvent. The test is whether the company shall be able to meet its current liabilities and whether the existing assets would be sufficient to meet the future demand which the company remains a going concern.

Sudhiya v. Bihar National Insurance Co, AIR 1941

Where at the relevant time there is reasonable hope of tiding over the difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, it may not be ordered to be wound up on this ground.

The court allowed the company time to pay. Where there was a complicated dispute between parties which involved a detailed analysis of the financial liability (if any) of the company, the petition to wind up the company was held to be not proper.[671]

Public Interest

The court can also take into account the public interest. The Bombay High Court had to face a case in which a company's business came to a standstill owing to paucity of working capital. The court explained the extent to which public interest has entered into the management of companies and thought it improper to destroy a company which had worked for nearly 87 years and had acquired experience and expertise in the

[670] Shree Laxmi Traders Ltd. Re 1987, 62 Com Cas 49.

[671] Amadues Trading Ltd, Re The times, (Apr. 1, 1997) Palmer in Company Law, May 4.

manufacturing of structural boat building and ship repairing, and held that the best order to make is to appoint a special officer to collect, realize, preserve and maintain the assets of the company and also to make the necessary investigations.[672]

Dolphin International Ltd. v. Gavs Laboratories (P) Ltd.[673]

The apex court has held that no winding up of the company can be ordered on the ground that the "Company is unable to pay debts" when its balance sheet is showing good business and also furnished bank guarantee as per interim order. A company needed to carry out which were no in its interest, but were an unavoidable price of obtaining a sought after advantage. In other words, for the company to continue to use the overdraft facilities, the bank required security. It may not have been in the interests of the company to grant security, as such but it was necessary step to take. If it is proved, satisfaction of the court that the company is unable to pay its debts, particulars of the debt must be given and there should be an averment that the company was unable to pay its debts,[674] in reference to the concept of "unable to pay debts." It has been observed that through it is not necessary that there should be a statutory demand or any demand at all, the court would not be easily satisfied that a company is unable to pay its debts from the mere non-payment of a debts which was never demanded of it.[675]

Steel Konnect (India) Private Ltd. v. Hero Fincorp Limited Company[676]

The case decided on the matter of the suspension of the powers of Board of Directors of the company after the appointment of the interim resolution professional under

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672 Avtar Singh, *Company Law,* Eastern Book Company, Lucknow, 657 (15th ed. 2007).

673 S.C. Tripathi, *New Company Law,* Central Law Publications, Darbhanga Colony, Allahadba, 321 (2d ed. 2006).

674 Kalra Iron Stores v Faridabad Fabricators (P) Ltd. (1992).

675 Singh, *supra* note 672, at 655.

676 Company Appeal (AT) (Insolvency) No. 51 2017.

Section 17 of the insolvency and Bankruptcy Code, 2016. Application was filed in the present case to initiate the Corporate Insolvency Resolution Process and the appeal against such was filed with the contentions that there was no post filing notice and record of default or any evidences as specified by the IBC, 2016.

Respondents contended that appellants do not have any locus to file the appeal as all the powers are suspended under Section 17 1 (a) and (b) of the IBC 2016, after the appointment of the interim resolution professional. However, NCLAT rejected the contention and held that: "Interim resolution professional has not been vested with the powers to sue any person on behalf of the corporate debtors but such interim resolution professional may bring to the notice the adjudicating authority for appropriate order".

It was further held by the NCLAT that such corporate debtors or any aggrieved person can file an appeal under Section 61 of the IBC, 2016, because the appointment of the interim resolution under section 17 of IBC suspends the 'powers' of the board of director (s) and not the suspension of the board of director (s), therefore, it was observed that though the order under section 7 and 8 of IB suspend the functions of Board of Directors, members and other directors of the company for the period of 180 days or 270 (extension of 90) days but they remain such for the purpose of Companies Act, 2013 under the records of the Registrar.

The plea was rejected by the NCLAT on the grounds that the opportunity of being heard was given to the appellants before passing the order under Section 7 of the IBC 2016, and therefore no question to dismiss such order lies on the ground of non- fulfillment of natural justice principles.

Rubina Chadha v. AMR Infrastructure Ltd.[677]

In the present case, originally the petition was filed before Delhi High court under Section 433 (e) of the Companies Act, 1956 which was transferred to the NCLT.

[677] Company Appeal (AT) (Insolvency) No. 08 of 2017.

However, before such authority it could not be proved that whether the parties are operational creditor or financial creditor and thus the petition was dismissed.

NCLAT observed that NCLT does not have power to decide under section 434 of the companies Act, 2013 which says regarding the transfer of cases from the courts to the company law tribunal after the establishment of Company Law Tribunal with effect from 2016. Therefore, the matter was transferred to the Ministry of Corporate Affairs, Government of India, New Delhi. Such claims would be entertained by Interim Resolution Professional under IBC, 2016.

"The then rule 5 has been substituted, and pursuant to which all petitions under Clause (e) of Section 433 of the Companies Act, 1956, which were pending before High Court, and where petition has not been served as required under Rule 26 of the companies Court Rules, 1959 have been transferred to the tribunal having territorial jurisdiction, were to be considered as the petitions under Part-II of the present Code."

Nikhil Mehta & Sons v. AMR Infrastructure Ltd.[678]

In this case, Memorandum of understanding was reached with respondent AMR for the being a residential flat, a shop and office space in project Kessel-I Valley, one mall and one home which were developed by the corporate debtor. The money which was agreed upon by the parties to be against the consideration for the time value of money, given by the financial creditor was a debt under Section 3 (11) of the IBC, 2016.

Therefore, it was held that: the Language of the memorandum of understanding makes it clear that the appellants are the 'investors' and has chosen 'committed return plan' and the respondent agreed to pay monthly return plan committed return to the investors (appellants). Thus, the amount constitutes as the debt under Section 3 (11) of the code, 2016.

[678] Company Appeal (AT) (Insolvency) No. 07 of 2017.

Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd.[679]

The question in the present case was whether the moratorium should take into recourse the personal assets and the properties of the promoters of the company debtors. NCLT held that "Insolvency resolution process will include only the assets of the corporate debtor and not any assets, movable or immovable property of the third party, like any promoter or director or other and so far as guarantor is concerned, there was no expression of any opinion, as they fall within the meaning of corporate debtor individually, as distinct from the principal debtor who has taken a loan. In the appeal, has upheld the view of Ld. NCLT"

Prowess International Pvt. Lt. v. Parker Hannifin India Pvt. Ltd.[680]

Corporate debtor settled the dispute with the operational creditor after knowing that the order has been passed by the adjudicating authority and other creditors applied pursuant to the notice of such order and filed an Interlocutory application for withdrawal of the petition. NCLT rejected the withdrawal of the application as such cannot be allowed once it is accepted.

Further, NCLAT holds that once the resolution plan is agreed upon and accepted by the court, it is not mandatory that the order is to be given after waiting for 180 days and such can be approved after recording its satisfaction that all the creditors have been paid or satisfied and any other creditors do not claim any amount in absence of default and required to close the insolvency resolution process.

Era infra engineering Ltd. v. Prideco Commercial Projects.[681]

If the application under Section 9 is made and admitted without giving an opportunity of being heard to the debtor, it would not be maintainable as in contravention to the

[679] Company Appeal (AT) (Insolvency) No. 116 of 2017.

[680] Company Appeal (AT) (Insol.) No. 89 of 2017.

[681] Company Appeal (AT) (Insol.) No. 31 of 2017.

principles of natural justice and thus the merits of the application admitted would be set aside.

If such an application is reversed then all the actions taken by the insolvency resolution professional shall be declared as illegal.

6.3 Different Developed Countries' Court Practices

Cornhill Insurance PLC. v. Improvement Service Limited (1986)[682]

The case is concerning the presentation of petition of a winding up.

Facts of the case in Brief

Improvement Service Ltd claimed money under an insurance policy covering damage by fire to their building from their insurers, Cornhill Insurance Plc (now part of Allianz) after a takeover in 1986 pound 65000 was paid out already under the insurance policy. The solicitors of Improvement Services Ltd agreed with the loss adjusters at Cornhill that pound 1154 was owed still: for some damage to plaster and damage to a injection machine lance. But Cornhill was not paying up. The solicitors repeated demands. They were not heard. So, they went to the Chancery Court and presented a petition to wind up the company on the ground that it was insolvent under the Insolvency Act, 1986, Sections 122 (1) and 123 (1) (a). Straight away Cornhill Insurance claimed that Improvement Services Ltd. was engaged in frivolous, Vexatious litigation and applied for an injunction to restrain the winding up petition. It brought to the court it accounts, showing how much money it had. It was granted an interim injunction, but the matter still needed to be given a full hearing on continuing the injunction.

Judgment of the Court

Harman J refused the continuing injunction on the substantive hearing holding that the defendants were entitled to present a petition. "In his view the correct test in

[682] I WLR 114, High Court Chancery Division (date: 22 July 1985).

approaching these matters is exemplified first by Ungoed-Thomas J who was a great master of equity in Mann v Goldstein (1968) I WRL where he said: "When the creditor's debts is clearly established it seems to him to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, by paying the debt."

That appears to him to be sound reasoning and sound law, he reinforced it by a reference to In re A Company (1950) 94 SJ 369, where Vaisey J, in a matter in which counsel of the utmost distinction in Chancery at that time, both leading and Junior, appeared, said that where a company was well known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion of financial embarrassment: "Rich men and rich company who did not pay their debts had only themselves to blame if it were thought they could not pay them."

In his view those words apply to this case also. This is a case of a rich company which could pay an undoubted debt and has chosen-he thought he must use that word-not to do so from that time to till the date. In his view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding up petition, and for him it was wrong to make the ex parte order which he made on that time.

He concedes that the matter is sad and unfortunate because it may be there was other and out of court remedies which might effectively have got the money before now. Nonetheless, judge further stated that it was his business to give people their rights, according to their proper entitlement in the law and not to force them into other courses, and in his judgment each defendant was entitled to say: I am undoubtedly owed pound 1154. If you do not pay me I must suspect you can't. Therefore, I can properly swear

that you are insolvent. He so holds and therefore refuses to make any order on this motion in favor of the plaintiff.

Effect of the Verdict

Cornhill Insurance's debt was paid very sharply after this decision.

Karsner v. McMath (2005)[683]

Facts of the Case in Brief

Gerald Karsanerwas the administrator of an insolvent Worsted company, in an appeal joined to another two companies. Barry Mcmath was one of the employees claiming that his right to compensation for employer's failure to consult the workforce about redundancies was payable in priority to the expenses of administration. TULRCA 1992, Section 188 gives the right to be consulted 90 days in advance where there are twenty or more dismissals, Section 189 gives the right to a "protective award" in lieu of consultation and Section 190 specifies this should be one week's pay per missed week. Mr. Mc math's contract had been adopted (in priority to administration expenses) under Insolvency Act, 1986 Schedule B1 para 99 and so was owed any 'liability arising under a contract of employment. Were protective award in that category? Peter Smith J in one case had held that they were payable in priority and Etherton J in the other had held they were not.

Judgment of the court

Neuberger LJ held that protective payments under TULRCA 1992, Section 188 are not payable in priority to administration expenses. He noted that if a broad interpretation to 'wages and salary' is given under then it could hurt the purpose of rescuing insolvent companies. This was inspired by the Cork Report and underpinned the Insolvency Act, 1986. This accords with the natural meaning of the Act of 1986 Para 99 (5) and the list

[683] EWCA Civ 1072, Court of Appeal.

of payments in Para 99 (6) and accorded with the policy considerations surrounding rescue. In particular, any administrator would not decide that a rescue is possible if they know damages for failure to consult the workers who are retained and have their contracts adopted get super-priority for more than the work they do, Clarke LJ and Jacob LJ concurred in the judgment.

Hammonds v. Pro-Fit USA Ltd (2007)[684]

Fact of the Case in Brief

The applicant is a well known firm of solicitors. It is ex-client, the respondent company owned intellectual property (IP) rights and confidential information relating to the design and use of interlining, which are strips of fabric used in waistbands and other garments parts. Their relationship arose after the company became insolvent in a dispute with an American corporation to whom it had granted a license conferring IP rights; after employing the service of various other solicitors the company eventually instructed Hammonds to advise it and carry out other commercial work. The applicant's total fee was 556,000 which the respondent failed to pay. Negotiation ensued for the restructuring of this debt, as well as debts owed to other creditors, but they collapsed, whereupon Hammonds indicated that it would have to take insolvency proceedings. It was around this time when the respondent alleged negligence on the applicant's part in the provision of its advice and services and, indeed initiated a claim for damages of a sum in excess of legal fees. Hammonds was particularly concerned that during the restructuring negotiations, the substantial undervalue, and this promoted it to apply under Insolvency Act, 1986 to have the respondent placed in administration.

In contesting the application the respondent invoked the court's practice of dismissing a petition for a winding-up order where a company disputed the petitioner's debt or had a cross-claim against the person. The scope and operation of this practice is where

[684] https://www.bankruptcycooley.com, (accessed Nov. 15, 2016).

disputed debts are involved, well-illustrated in case like Mann study Goldstein (1968) 1W.R 1091, Stonegate Security Ltd study Gergory (1980) Ch 576 and Re Clabridge Shipping Co. SA (1998) BCC 988. Such practice, the company asserted, existed for administration orders. However, its part, Hammonds contented that even if the respondent's cross-claim for damages in negligence was genuine, which it disputed, the practice for winding-up petitions had no parallel under the administration regime, nor should one be countenanced.

Decision of the Court

After thorough review of the authorities Warren J decided in favor of the applicant. There was no practice that a court will dismiss an application for an administration order where the company in question disputes the applicant's debt or, as here, has a cross-claim against it; what is more, no such practice should be adopted. Rather the discretionary power conferred on the courts by the legislation was at large, and should remain so. Certainly, the existence of a cross-claim can be a factor to be taken into account in the exercise of that discretion but that was as far as it went, and there were no ground for promoting it to the status of practice in administration proceedings.

The decision carry out, there is sharp distinction to be made between winding-up and administration orders. The former brings the life of the company to an end, where the latter is designed to revive, and to seek to ensure the continued life of the company if at all possible. The former is in the nature of a final order; latter is again, by its very nature, an interim measure.

Buffets Holdings v. FP1 LLC (2008 Aug)[685]

The Buffets Holdings debtors operate a large steak-buffet restaurant chain, which includes more than 600 company-operated restaurants. Prior to seeking Chapter 11 relief in Delaware in January 2008, the Buffets Holdings debtors participated in a series

[685] https://www.mondaq.com/article.asp (accessed Nov. 20, 2018).

of financial restructuring transactions that ultimately allowed them to refinance their secured debt and issue a dividend to their shareholders. The financial restructuring included a sale/lease back transaction that involved 29 of the debtors' restaurant locations. As part of this sale/leaseback transaction, the debtors entered into certain master lease agreements that governed the debtors' leases on their individual restaurant locations. After their Chapter 11 filing, the Buffets Holdings debtors, in an attempt to streamline their operations, sought to assume and reject certain individual leases without assuming or rejecting the related master lease agreements that governed the individual leases. In response, FP1 LLC and FP2 LLC, the debtors' landlords under the master lease agreements, filed objections and argued that the debtors could not separate the individual leases from their respective master lease agreements and therefore had to assume or reject the master lease agreements as a whole. After considering the parties' respective positions, the bankruptey court agreed with the landlords' position.

Finally, while the Buffets Holdings court based its holding upon the plain language of the master lease agreements, the court also examined the course of prior dealings between the debtors and the landlords. From this examination, the bankruptcy court determined that the negotiations between the parties provided further evidence that the parties intended the master lease agreements to be indivisible. Specifically, the bankruptcy court noted that the landlords insisted on the master lease structure, and the debtors agreed to it to obtain favorable lease terms and to gain treatment of the leases as "operating leases" for accounting purposes. Thus, the Buffets Holdings court decided that even if the master lease agreements had been ambiguous, the course of dealings between the parties indicated their intent to treat the agreements as single, integrated contracts.

In conclusion, the Buffets Holdings opinion could have far-reaching implications for bankruptcy and non-bankruptcy practitioners alike. Non bankruptcy practitioners and business professionals should take note of the bankruptcy court's decision when structuring leasing arrangements. How these agreements are structured will have a

direct impact on the ability of a company to utilize the benefits of Section 365 of the Bankruptcy Code in the event of a future bankruptcy filing. In turn, once a company finds itself in financial distress, restructuring professional should review all master lease/contract arrangements to determine whether the agreements are severable in light of the Buffets Holdings decision. Further, restructuring professionals should assess the economic impact on the company's business in the event a bankruptcy court were to follow the Buffets Holdings ruling.

In Nepalese context, restructuring manager should look upon such agreements if any made by debtor with third party whether or not carry conflict of interest as well as the direct or indirect impact on the ability of a company to ensure benefit, viability and sustainability.

Bear Stearns' Cayman v. US Bankruptcy Court (2007)[686]

Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. and Bear-Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, LTD funds were limited liability companies formed under the Cayman Islands "exempted companies" laws and ran their businesses through New York, the U.S. become more creative in looking to protect their U.S. assets from creditors. Cayman Islands liquidation proceedings filed by those funds. Cayman liquidators had sought to protect against seizure of U.S. assets by filing petitions under U.S. Law. It was demanded that proceeding to recognize either "foreign main proceedings" or "foreign non-main proceedings."

Court Verdict

The court held the proceedings were not eligible to be recognized both. The liquidators, as "foreign representatives" are eligible to file involuntary petitions under the

[686] https://www.mondaq.com/article.Asp (accessed Oct. 25, 2017).

Bankruptcy Code, which the court held preceded the adoption of prescribed chapter and operates separately from it.

In addition, the court noted that the liquidators are free to commence other actions in U.S. courts which are not based on Chapter 15. Once such action might be to seek comity from a U.S. court with respect to the Cayman liquidation proceedings and to seek an injunction of actions in the U.S. based on the argument that the Cayman proceedings (including the stay of suits against the fund) should be honored in the U.S. This is likely also to be controversial and, if successful, would be a more limited form of relief than what is available under Chapter 15. In any event, the decision reinforces the notion that those funds need to consider all of their options in structuring appropriate relief requested in the U.S.

Selim v. McGrath (Oct. 17, 2003 Aus.)[687]

In Selim v. McGrath a challenge was made by the owner of Pan Pharmaceuticals Limited (Pan) to the way creditor voting rights were dealt with by the voluntary administrator was dismissed in the Supreme Court of New South Wales.In this case Justice Barnett found that every step taken by the administrator, Tony McGrath, was absolutely right.

Fact of the Case in Brief

Pan appointed voluntary administrators after its Therapeutic Goods Administration (TGA) license was suspended and Pan products manufactured after May 2003 were recalled. Deed of Company Arrangement (DOCA) was proposed to transfer Pan's business to Sydney businessman Fred Bart. At the second creditors' meeting (the meeting), the central question was whether (a) the proposed DOCA should be approved; (b) Pan should be wound up; or (c) the administration should be brought to an end. The meeting was chaired by voluntary administrator Tony McGrath. At the meeting the creditors resolved to reject the proposed DOCA and Mr. McGrath subsequently used

687 https://www.aar.com.au (accessed Nov. 23, 2017).

his casting vote as chairman to support the resolution to put Pan into liquidation. Pan's founder and major shareholder Jim Selim challenged Mr. McGrath's decision to liquidate the company and various other decisions made by Mr. McGrath at the meeting, and sought to avoid Pan's liquidation by having those decisions reviewed or reversed. At the first creditors' meeting, Mr. McGrath had allowed voting by 357 pharmacists who had sold Pan Products. At the second creditors' meeting, Mr. McGrath refused to allow voting by 417 consumers and retailers who had bought Pan Products. Mr. Selim argued that if 357 pharmacists who sold Pan Products were entitled to vote, then so were the 417 consumers and retailers who bought them. Justice Barrett endorsed Mr. McGrath's decisions, found that he had complied with his obligations as set out in the Corporations Act and Corporations Registry, dismissed Mr. Selim's application, and ordered costs against him.

As a consequence of the TGA product recall, losses were sustained and Pan had a number of potential creditors, including: those with a direct contractual relationship, such as sponsors, trade creditors, and employees; and those without a contractual relationship, such as retailers (including pharmacists), health professionals and consumers.

Implications

The judgment fully endorsed the decisions taken by Mr. McGrath. Justice Barrett's judgment is a useful guide to identify who can and who cannot vote at a creditors' meeting.

Re Matthew Ellis Ltd (1933)[688]

The money must be intended to benefit the company

The company was insolvent and obtained a loan from its chairman. He was also a partner in the firm which supplied the company with the majority of its stock. The firm

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688 Michael Ottley, *Brief case on Company Law,* Cavendish Publishing Limited, London Sydney, 141-144 (2d ed. 2002).

would only supply further stock if past debts were fully paid off. The chairman advanced money to the company was that without the money advanced by the chairman the company would not be supplied stock and would cease trading.

Decision of the Court

The charge was valid in respect of the proportion that was used to pay off the debt. The benefit to the company would not be supplied stock and would cease trading.

Re Armstrong with worth Securities (1947)[689]

From 1896 the company carried on an agreement business. From 1918 until 1933 the company kept records of accident in the work place which involved their employees when the company insured against such accidents. The liquidator advertised for any creditors to come forward when the company went into liquidation in September 1943 but did not have regard to the records kept by the company of accidents and their victims.

Court Decision

The liquidator had not fulfilled his duties he had a duty to contact all known creditors. He should have made use of the company records when working out who were creditors of the same company.

Re William Leitch Brothers (No 1) 1932[690]

The company was incorporated in December 1926. By the end of 1929 the company was in serious financial difficulties, and by 30 March 1930 the company was unable to pay its debts. William Leitch, a director of the firm knew that the company owed 6, 500 and would not able to pay it. However, he proceeded to borrow a further 6000. In June of that year, the company was wound up and the liquidator wanted the court to find. Mr. Leitch personally liable for the debts of the company.

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689 *Id.* at 146.

690 *Id.* at 140.

Court Verdict

Mr. Leitch was found guilty of fraudulent trading. The test should be subjective that is what was the knowledge of the particular director at the time? In other words, the court is not concerning with the question of what reasonable director would have believed had been the same position.

CHAPTER-VII

FINDINGS, CONCLUSIONS AND SUGGESTIONS

7.1 Findings

Professor Schmitthoff's description of a developing international business law has been borne out by the growing commercial understandings and practices of an international business community concerned with cross-border insolvencies. Even Professor Goode's more restricted definition of an international commercial law or law merchant as one confined to 'the international practice of merchants' is arguably appropriate. It supports Lord Hoffmann's approach in *McGrath* v *Riddell* in relying upon an inherent jurisdiction of superior courts in common law jurisdictions to cooperate with relevant foreign courts in managing concurrent cross-border proceedings.

If the company itself is rescued and returned to solvency, the advantage to employees is obvious since most of them will retain their jobs, although some retrenchments may be unavoidable to reduce costs. The laws applicable in Nepal for corporate insolvency process are as under. Company Act, 2006; Insolvency Act, 2006; Nepal Rastra Bank Act, 2002; Banks and Financial Institutions Act, 2017; Secured Transaction Act, 2006 and other scattered laws.

UNCITRAL (2005) mentions that designing the key objectives and structure of the effective and efficient insolvency law are the crucial part. Establishing key objectives in the economy can be stability and growth, maximization of value of assets, striking balance between liquidation and reorganization, ensuring equitable treatment of similarly situated creditors, provision for timely, efficient and impartial resolution of insolvency, preservation of the insolvency estate to allow equitable distribution to creditors, ensuring a transparent and predictable insolvency law that contains incentives

for gathering and dispensing information, recognition of existing creditors' rights and establishment of clear rules for ranking of priority claims and establishment of a framework for cross-border insolvency.

7.1.1. What are the existing laws and policies of Nepal relating to liquidation of companies under insolvency proceeding?

The liquidation of companies under the insolvency proceedings are expected to meet several criteria as set by law and specific where a company is not able to meet its financial liabilities. The availability of financial assets for proper functioning of the companies are considered as respiratory organs for survival. There are mainly two forms of tests used by the insolvency legislation in relation to determine whether it is solvency or insolvency-balance sheet test and cash flow test. The insolvency is considered as natural process of liquidation of a company when reaches at level of non-operation due to financial hardship in anyway. The way company operates and in similar, they have right to die in case non-functions due to various factors. The company has to test their assets are sufficient to meet liabilities and the latter is based on the ability to pay the debts. In Nepal, the equivalent word to insolvency is "*damasahi*."

Insolvency is one of the major reasons for liquidation of a company. But the Nepalese Insolvency Act, 2006 fails to define the term 'insolvency'. Rather the Act defines the terms being insolvent, that is, a company which is insolvent. Liquidation of a company, also known as winding up of a company, is a process of realization of the assets, payment of the liabilities (debts) and distribution of surplus, if any, among the members of the company but Companies Act, 2006 of Nepal fails to define the term liquidation of company. However, the Insolvency Act, 2006 has defined this term with reference to insolvency and Insolvency may be either individual insolvency or corporate insolvency.

In some countries, insolvency is also called with bankruptcy and there is distinction between individual insolvency and corporate insolvency under insolvency or

bankruptcy legislation, and insolvency and insolvent are also distinct from bankruptcy and bankrupt. Bankruptcy is a state of being unable to repay outstanding debts or liabilities to creditors and bankrupt is normally used as a term to mean a person who has been declared by the court as bankrupt under the relevant law. Similarly, insolvent refers to a person who is not able to repay debts. In some jurisdictions, the term bankruptcy is only used with respect to a natural person and in some, it is used in both cases, i.e. in relation to both natural and legal persons.

Banks and financial institution should provide the information to central bank about situation of insolvency and the state of dissolution. 12 If bank and financial institution cannot function properly and if so is recommended by the Special Administration Team, Nepal Rastra Bank furnish application to the court for the sake of liquidating such commercial bank or financial institution. However, in the insolvency process of banks and financial institutions, some of the provision of Insolvency Act, 2006 will not be applicable for the issue covered in this Act. Central bank can declare insolvent or potential insolvent banks and financial institutions as a problematic bank.

Banks and Financial Institutions Act, 2017 has mentioned voluntary winding-up and compulsory winding of banks and financial institutions. Banks and financial institution willing to voluntary liquidation should get theoretical consent and should immediately inform Office of the Company Registrar and should publish notice in national newspaper. The approval of voluntary liquidation will not cause any type of adverse effect on the rights and interests of the depositors and other creditors.

For the purpose of mandatory liquidation, Nepal Rastra Bank files application in the court after publishing notice in national daily newspaper. With the approval of Rastra Bank, joint application of the depositors having representation of more than 25 percent of the total deposit, who do not get the payment of the payable deposits or of more than one percent of the depositors and the person competent to file application for mandatory liquidation according to the prevailing law relating to insolvency can file application to

the court. Mandatory liquidation is followed once the financial indicators of banks and financial institutions are negative and deteriorated. Once this process starts, all transaction of banks and financial institutions will be suspended. Appointment of liquidator and its salary will be as prescribed by the central bank after the appointment, liquidator should prepare the record of assets and liabilities immediately and should submit there as well. Gradually, termination of transaction, notice for submitting claims, acceptance of rejection of claims, classification of claims, meeting of creditor, etc. are mentioned. Liquidator has power to sell the assets and manage overall scenario of liquidating banks and financial institutions.

7.1.2 What are the international standards and practices on liquidation of companies under insolvency proceeding specially in cross border insolvency?

Writing some fifty years ago, Professor Schmitt Hoff referred to the rise of international commercial law as one of the most significant legal developments of the time. He referred to three stages in its historical development. It began in the Middle Ages as "a body of truly international customary rules governing the cosmopolitan community of international merchants" with an international character and uniformity derived from "the unifying character of the law of the fairs, the universality of the customs of the sea, the special courts dealing with commercial disputes, and the activities of the notary public".

In this first stage, international commercial law, or the law merchant as it is sometimes known, comprised the customs of the markets and fairs; as well as maritime customs relating to trade. They were often created in response to the difficulties of trading at a distance, and included areas of law such as agency; bailment; and bills of exchange. The influence of these laws may well be reflected in the fact that many civil law countries still restrict their insolvency law to merchants or traders. Another aspect that reflects many modern insolvency laws is the notion of the equal treatment of foreign

creditors and local creditors –merchants were protected travelling from fair to fair and restrictions against foreign merchants were prohibited.

While there has been cross-border (in the sense of inter-community) trade and commerce from time immemorial, the recent global financial crisis has starkly demonstrated a new phenomenon - the internationalization of national economies. Improvements in technology have facilitated the easy movement of people as well as tangible and intangible assets around the world. Firms have increasingly operated on a global basis with integrated production of goods, delivery of services, provision of capital and coordinated business systems that take little notice of national boundaries. Governments, whether in developed or developing nations, have initiated policies to facilitate global trade and commerce, resulting in greater interdependence.

The presence of such foreign elements in an insolvency is typically due to a business having engaged to a greater or lesser extent in international trade and commerce. Insolvency law has been described as "the root of commercial and financial law" and as it provides the policy framework to determining claims where a business has failed, it is "arguably the most important of all commercial legal disciplines". '[D]ivergent attitudes to debts and debtors' in domestic insolvency laws is an important dimension to assessing commercial risk in doing business in that jurisdiction or State. Thus, the evolving international insolvency law to cope with cross-border insolvencies is an integral element of international commercial law.

The history of legislation dealing with insolvency dates back to 1541 when statute on bankruptcy was passed in England which is considered to be the first statue in this regard. By the statute, the power of dealing with bankrupt and his effects was vested in the Lord Chanceller and other high officers. The statute was directed entirely against fraudulent debtors. Now, England has a new Insolvency Act, 1985.

In England, there was an early statutory recognition of international commercial law, for example in 1303 a Statute, Carta Mercatoria, recognised the law merchant as an

independent source of law, exempted foreign traders from local taxes, and gave them freedom to trade throughout England. Local merchant courts, such as the Borough and Pie Powder Courts, operated during the fairs, and judges and juries comprised of merchants identified the applicable customs, although there were some written sources such as the Red Book of Bristol. The medieval law merchant varied with the markets and products covered "but the common outstanding feature was that both this law and the courts that administered it were autonomous." Other common factors were "their customary character, summary jurisdiction, and spirit of equity and common sense that was not concerned with technicalities."

In the second stage during the eighteenth and nineteenth centuries when there was a developing notion of 'national sovereignty', international commercial law was gradually incorporated into domestic laws in England and on the continent through adoption as part of the common law or of civil codes. In England, the older courts started to disappear, and eventually the requirements that the defendant had to be a merchant and that commercial law or custom was applicable disappeared. In 1765, Lord Mansfield in Pillans study Van Mierop stated that "the law of merchants and the law of the land are the same" although he recognized that "commercial law was to evolve alongside commercial practice", which left commercial custom and practices as a potential independent source of law, although more in the nature of courtesy or comitas.

In addition to England, some other countries have also laws in this regard. In USA, the first Bankruptcy Act was enacted in 1880. Now, there is Bankruptcy Code, 1978 in USA, which has incorporated the modern principles of insolvency law. In France, the Bankruptcy Law was passed in the name of Code de Commerce in 1807. Also known as Commercial Code, the *Code of 1807* has been modified from time to time. Now, Book VI of the French Commercial Code governs the matters regarding insolvency and liquidation of an insolvent company.

The first enactment on bankruptcy in China was passed in 1906 in the name of Bankruptcy Code. Now, China has the Enterprise Bankruptcy Law, 2006 which governs all the matters concerning insolvency or bankruptcy liquidation in China. In India, formal insolvency laws were first enacted in 1909 in the name of the Presidency Towns Insolvency Act, 1909 and in 1920, in the name of Provincial Insolvency Act, 1920. Now, India has separate laws on insolvency and bankruptcy with Insolvency and Bankruptcy Code, 2016 dealing with insolvency and bankruptcy liquidation matters. The ever greater frequency and value of modern international transactions and the lack of legal certainty caused by domestic laws, such as insolvency law, that were never intended to deal with international transactions are having an impact. Professor Dalhousie observes a legal transnationalisation process occurring in recent decades and the emergence of an international commercial and financial legal order, with a residual role for the application of national law identified through the most appropriate private international law rules. Professor Berger describes a strong similarity in the genesis for theories on international commercial law, referring to "the combined perspective of comparative law, usages, customs and practices of international commerce and trade leads to the evolution of transnational legal principles, rules and standards which are applied in practices in order to arrive at economically sensible solutions to transnational commercial disputes."

International insolvency law is an element of this emerging international commercial and financial legal order. In recent decades, the limitations of domestic solutions to resolve complex international insolvencies of enterprise groups 12 that engage in global trade and commerce have prompted responses at a multilateral level – for example on a global basis, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (Model Law) and on a regional level, the European Insolvency Regulation (EIR). Yet even these initiatives as adopted by a large number of trading nations have their limitations when faced with the

complexities inherent in the liquidation of a Lehman Brothers financial services firm or the restructuring of a Nortel telecommunications business. Instead, debtors, creditors, financiers and others through their professional advisers are utilising Cross-border Insolvency Agreements (CBI Agreements).

CBI Agreements are arrangements agreed upon by the parties to facilitate cross-border cooperation and coordination of multiple insolvency proceedings in different jurisdictions whether concerning a single debtor or an enterprise group. They have been approved by courts, in common law and civil law jurisdictions alike, although this is not necessary for their effectiveness. They represent a commercial response to international insolvency issues that complements domestic insolvency and private international laws, which are proving inadequate to produce timely and effective outcomes for a globalised business community.

Model insolvency laws have been drafted with a view to harmonisation, if not uniformity. UNCITRAL produced a Legislative Guide on Insolvency Law (2004) 47 which is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations". However, UNCITRAL has noted that the rate of adoption of their legislative standards has varied significantly.

The World Bank produced their own guidelines entitled Principles for Effective Insolvency and Creditor Rights Systems (2005). These Guidelines 'emphasize contextual integrated solutions and the policy choices involved in developing those solutions'. Significantly, the International Monetary Fund (IMF) and the World Bank at times require bankruptcy reform in developing countries as a condition of loan support, thus promoting the convergence of insolvency law. States within regional economic groupings have also attempted to arrive at uniform insolvency laws through insolvency treaties. Although never implemented, the first draft EC Convention on Bankruptcy and Related Matters (1970) contained draft uniform provisions. It would

have required contracting states to enact a 'Uniform Law' into domestic law, while permitting states to make reservations on their incorporation.

Its provisions covered 'relation back'; actions for fraud against creditors; the doctrine of set-off; the extension of the bankruptcy of firms or legal entities to persons directing or managing them; and proof of the spouse's claim to property, which would otherwise be presumed to be acquired with the funds of the bankrupt; and the bankruptcy of the vendor in the case of a contract of sale with retention of title. However, the 'Uniform Law' did not feature in subsequent draft European insolvency conventions which essentially approached international insolvency issues through uniform recognition and enforcement.

In addition to specific insolvency texts, multilateral bodies are drafting Legislative Guides on related commercial topics. UNCITRAL has concluded a number of texts on international trade law issues that have the potential to intersect with insolvency laws. UNCITRAL's Working Group VI on Security Interests closely collaborated with UNCITRAL's Working Group V (Insolvency) to produce the UNCITRAL Legislative Guide on Secured Transactions (2007). The aim of this project was to ensure coordination of the treatment of security interests in insolvency with the UNCITRAL Legislative Guide on Insolvency Law. UNCITRAL cooperated closely with the Permanent Bureau of the Hague Conference on Private International Law in the preparation of the chapter on conflict of laws. It also coordinated with the International Institute on Private International Law (UNIDROIT) to avoid overlap with the Convention on International Interests in Mobile Equipment (Cape Town, 2001) and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 2009).

The UNCITRAL Supplement on Security Rights in Intellectual Property (2010) may also be relevant to resolving cross-border insolvency issues where interests in intellectual property are involved. In preparing the supplementary legislative guide,

Working Group VI on Security Interests referred certain insolvency-related matters to Working Group V (Insolvency Law). It also cooperated with the World Intellectual Property Organization (WIPO) and other observer intellectual property organizations from the public and the private sector to ensure that the Supplement would be sufficiently coordinated with law relating to intellectual property.

States have achieved more success in addressing cross-border insolvency issues by adopting a uniform approach to choice of law through regional cross-border insolvency treaties or conventions. This has meant that, even with member States' different domestic insolvency laws, a uniform referral to an applicable local or foreign law should result in the same outcome, regardless of the Member State in which the dispute arose. The Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden (1933) recognises the law of the place of insolvency adjudication (the 'home state') as determining almost all the effects of the order in all member states without the need for further formalities.

Article 1 specifies recognition of the divesting of the administration of the debtor's property; the extent of the assets and the property therein; the bankrupt's rights and obligations during the bankruptcy; the administration of the bankrupt's property and transactions in respect thereof; the rights of creditors in respect of the payment of their claims; the allocation of the assets; the composition with creditors or other mode of settlement. There is also an immediate general stay of creditor action.

UNCITRAL has promoted uniform recognition laws through States adopting a Model Law on Cross-border Insolvency 1997 (Model Law) and this approach is having much more widespread success in addressing cross border insolvency. At the time of writing, UNCITRAL's Model Law has been adopted in 19 jurisdictions, including Australia (2008), Canada (2009), Great Britain (2006), Greece (2010), Japan (2000), New Zealand (2006), Republic of Korea (2006), and the United States of America (2005). It

contains uniform recognition laws – and provides a mechanism for cooperation between jurisdictions and the coordination of concurrent proceedings.

The four key principles underpinning the Model Law encourage uniform approaches to recognition and enforcement. The access principle establishes the circumstances in which a 'foreign representative' has rights of access to the receiving court in the enacting State from which recognition and relief is sought. Under the recognition principle, the receiving court may make an order recognizing the foreign proceedings (either as a foreign main or non-main proceeding. The relief principle applies to three distinct situations. Interim relief may be granted to protect assets within the jurisdiction of the receiving court where an application for recognition is pending. Automatic relief applies if a receiving court recognises the foreign proceedings as a main proceeding. Discretionary relief is available, in addition to automatic relief, in respect of main proceedings and also available where a receiving court recognises the foreign proceedings as non-main proceedings.

The cooperation and coordination principle places obligations on both courts and insolvency representatives in different jurisdictions to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors. Articles 25-26 mandate a local court or insolvency representative to co-operate with foreign courts or foreign representatives - either directly or through representatives. Article 27 provides examples of appropriate means of cooperation.

Article 27(d) refers to the "Approval or implementation by courts of agreements concerning the coordination of proceedings". Increasingly, this is being implemented through the use of CBI Agreements (sometimes known as Protocols) which are approved by the courts. In Australia, Court Practice Notes refer parties to the ALI/III Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases and the UNCITRAL Practice Guide on Cross-border Insolvency Agreements in formulating

a proposed framework for cooperation under the Model Law. In Canada, the Ontario Superior Court of Justice has officially approved the adoption of CBI Agreements or Protocols for matters on the Commercial List in Toronto.

7.1.3 Are the existing laws and policies of Nepal relating to liquidation of companies under insolvency proceeding adequate?

In Nepalese context, first enactment on insolvency could be found in the Muluki Ain of 1853. The Ain had the provision on insolvency under Chapter of *'Damashi ko'*, but the Chapter was related only with individual bankruptcy and not with corporate insolvency. The first enactment governing liquidation of company with limited liability was promulgated in 1936 in the name of *"Nepal Company Kanoon"*. The Kanoon (Law) did not provide for detailed provisions but covered both voluntary and involuntary liquidations of companies.

The first law governing insolvency and liquidation of an insolvent company is the Insolvency Act, 2006 which had been promulgated first in 2005 as Insolvency Ordinance. This Act is a special law in relation to corporate insolvency. In comparison with the laws on insolvency in other countries, Nepalese Insolvency law is very new born, i.e. it was passed only in 2006 as a separate law governing corporate insolvency, including liquidation of a company which becomes insolvent.

The Insolvency Act, 2006 adopts the principle of "one law-two systems", which covers both restructuring and liquidation of insolvent company with limited liability and also includes liquidation of bank and financial institutions as well as insurance companies in Nepal.

Under the Nepalese Insolvency Act, for initiating insolvency proceedings to liquidate an insolvent company, ten percent of the creditors or five percent of the total shareholders of the company or five percent of the debenture-holders can apply before the court. i.e. commercial bench of the court as designated by the Government of Nepal.

The court has supervisory powers over the insolvency proceedings. The court may also issue a stay order to the concerned party in order to protect the assets of the company in insolvency proceeding. Such order generally remains in force until the implementation of restructuring plan or completion of liquidation of the insolvent company. Moreover, the restructuring can be converted into liquidation if the restructuring fails or liquidation can be converted into restructuring if it is found appropriate.

The Insolvency Act has set out two phases for completing restructuring proceedings or generally, three phases for liquidation proceedings. To restructure the company or to liquidate the company which becomes insolvent, it depends on the order of court. The court can, upon receipt of the report submitted by the inquiry officer, issue an order either to implement the restructuring scheme/plan or to liquidate the company. A company can only be liquidated if the court gives an order to implement the restructuring plan and if such plan fails. But if the court gives an order to liquidate the company without giving order to implement such plan, direct liquidation proceeding can be initiated immediately.

In the first phase, an inquiry officer is appointed by the court, and the court can, upon receipt of his report, pass various orders i.e. to implement restructuring pan of the insolvent company, to liquidate such company, etc. If the court makes an order to implement the restructuring plan, the second phase begins, and there is no possibility of proceeding with the liquidation of such company until the failure of restructuring plan, and no direct liquidation proceeding can take place under such order. The third phase begins if the court passes an order to liquidate the insolvent company instead of requiring it to implement the restructuring plan. If a direct liquidation proceeding takes place, completion of it brings the insolvent company to an end and there remains nothing of such company.

After an order of liquidating a company and appointment of a liquidator is made, the liquidator assumes all the powers and authorities of the board of directors and takes control of all the assets and property of the company. The liquidator performs all the duties and exercises all the powers as per necessity until the Office of Company Registrar strikes out the name of the dissolved company from its register. The liquidator has to complete liquidation proceedings within the time limit as fixed by the court. But no definite time limit is prescribed in the Insolvency Act, 2006.

However, there is ambiguous language concerning the conflict of interest and impartiality of liquidator. The provision incorporated in Section 127 of the Companies Act, 2006 is equally applicable in case of liquidation of a company under the Insolvency Act, 2006. As per the provision of this Section, in case of voluntary liquidation of company, after the appointment of the liquidator by the company, the directors of the board and officers of the company are relieved of their office and the liquidator exercises all such powers in relation to the operating and management of the company as may be exercised by the directors and officers of the company.

Nepalese law is not in a line to address potential conflict of interests between the former executives and liquidator appointed for conducting liquidation. While it is stated that the directors are removed from their positions, no terms obviously state that the board as such has absolutely no power to interfere in the liquidator's proceedings. Without an obvious statement as such, the board may feel they still have the power to advise the liquidator on liquidation proceedings. A failure of the liquidator to observe complete impartiality in the exercise of his or her duties may give rise to a perception of a prima facie conflict of interest that warrants removal of that liquidator. It is very important for liquidator to remain independent in the liquidation of a company.

During the process of insolvency, the Insolvency Act, 2006 requires material consultation with creditors. The inquiry officer appointed by the court is under obligation to call a creditors' meeting prior to submitting final report to the court. As

regards order of payment of liability, expenses of restructuring and liquidation are settled first and employees and workers get priority in the process.

7.1.4 Are the institutional arrangements appropriate for effective functioning of the liquidation of companies under insolvency in Nepal?

Although the Insolvency Act has come into existence and is in operation, it has not been effective to provide fair and effective opportunity for a restart and safe exit from the business. One of the major factors responsible for this is Blacklisting Directives issued by the Nepal Rastra Bank which create barriers that defeat the purpose of the Insolvency Act. A debtor is automatically blacklisted on his failure to repay the loan obtained by him and the creditor initiates recovery action. Similarly, a debtor is automatically blacklisted once the insolvency proceeding is initiated in the court.

There are some laws which either directly contradict or are inconsistent with the purpose of Insolvency Act, 2006. For example, Section 57 of the Income Tax Act, 2002 prohibits any company or corporate body from transferring the losses to the next 4 years if there is change in the ownership status of such company or body in the proportion of more than fifty percent.

Among other things, the liquidator settles the payment of liability on a priority basis. There are different priorities adopted and practiced in different countries' laws concerning the settlement of amounts among the concerned parties. The courts in some occasions affirmed insolvency practitioner's cost in first priority and in some occasions, government revenue and employees' wages and provident fund found the first preference. In context of Nepal, there are different laws having different provisions regarding the ranking and priority. Such laws are Insurance Act, Banks and Financial Institutions Act and Insolvency Act, which are not in line and uniform. Section 77 of Banks and Financial Institutions Act, Section 121 of Insurance Act, 2022, and Section 57 of Insolvency Act, 2006 have prescribed the priority of payment differently for the single purpose.

7.1.5 What is the judicial response and trend on liquidation of companies under insolvency in Nepal?

The judiciary has made several response across various jurisdictions on insolvency related subject matters such as in *Hammonds* vs. *Pro-Fit USA Ltd* (2007): It was the issue of nonpayment of solicitor fee, who applied for a cross-claim. Court distinguished between winding-up and administration orders because first issue deals with the end of the company and is a final order whereas second issue deals with the revival of the company and is an interim measure. So, there can be the issue of cross-claim against negligence as discretionary part of the court but cannot be established directly because cross-claim petition and winding-up process cannot go parallel. Similarly, the Nepalese court has also made judgment in relation to the liquidation of companies under insolvency proceedings.

The insolvency is one of three company exit procedures as allowed by the Nepalese legal system – the first two being cancellation of registration and voluntary liquidation of company. Being insolvent simply means that a company is unable to clear its debts and has been running under alarm-triggering losses for a substantial period of time. The Insolvency Act 2006 governs insolvency dealings in the country and allows for a number of parties to file for insolvency at the High Court: the company itself, or creditors/shareholders/debenture-holders of the company.

The regulatory body under which the company is registered (such as the Insurance Board for all insurance companies or the Nepal Rastra Bank for all banks and financial institutions in the country) can also file for insolvency if it has amassed substantial evidence that the company in question is unable to pay its debts. There are two options that a company can undergo once the High Court accepts the case – either liquidation (which would imply selling off all assets to settle debts, and closing the company) or

restructuration (modifying operations in order to rescue the business by cutting costs and selling assets or even changing ownership if needed.

Currently, commercial bench has been established in different high court. Such bench hears the issue of insolvency and relevant issues. In case of the regulator issues, Nepal Rastra Bank files insolvency case in Patan High Court, which works as a decision maker, facilitator and supervisor of insolvency process. Some of the examples of court law are as under. Developed countries prefer voluntary arrangement or possible rescue scheme in order to quickly exit from insolvent state prior to entering the formal proceedings unlike the Nepalese trend and practice. There might be several reasons out of them - the law and legal provisions have not granted space to its procedure and mechanism. During the period of insolvency proceedings, the court plays a vital role whether it is to give order for initiating or concluding such proceedings. Finally, the court issues an order to liquidate the company. Since there is a possibility of many issues and disputes arising on the application of insolvency law, it is important to train the judges of court (Commercial Bench) to be set up for the purpose. As per Section 10(2) and (3) of the Insolvency Act, an inquiry officer needs to be appointed for conducting investigation on insolvency, but there is lack of such experts in this field.

No insolvency proceedings can be initiated without the order of the court in Nepal. That is why laws of developed countries have detailed provisions to empower the court to direct the insolvency proceedings and authorize any appropriate order in due course until the final stage of liquidation. Some of the Nepalese legal provisions are also in line with these countries but not that much. Under Section 46 of the Insolvency Act, 2006, power of the court to suspend the liquidation proceedings or to terminate the proceeding may override the incremental performance of liquidator. The Act has not prescribed any detailed grounds to exercise such kind of discretionary power by the court. Basically, the court practices of developed countries specify that adjudicators are

considered as neutral umpires, and judges are required much more conscious to protect the creditors' right as well as business affairs of the insolvent company.

Insolvency laws of most countries have considered court as a powerful body and its crucial role as a center point. In developed countries, there is an arrangement like administration system, budget, trained and competent human resources, organization of court and management to deal with insolvency issue by insolvency practitioners such as liquidator; but in Nepal there is weak administration system, lack of trained and competent human resources, and poor physical and institutional mechanism.

The Insolvency Act, 2006 relies heavily on the efficiency and integrity of private sector insolvency practitioners as set out in Section 65 which deals with the minimum requirements for being appointed as liquidator to conduct liquidation proceedings, and any person willing to carry out insolvency practice has to obtain license from the Insolvency Administration Office (IAO) to be established by the Government of Nepal. The objective of Office is to administer insolvency practice but it is yet to be incorporated. This Section states that in absence of the Office, the Government of Nepal may design any of its offices to perform the functions of the IAO. Presently, two government bodies, namely, Office of the Company Registrar (OCR) and Commercial Bench of the High Court are true administrators of the insolvency practice in Nepal.

In the opinion of some experts, one of the biggest problems with the Bench is the lack of trained human resources to deal with the multiple complexities of commercial law. Despite a National Judicial Academy (NJA) having been established in 2004 in order to train lawyers in a variety of fields, including that of commercial law, these trainings are far from rigorous and are carried only as small lecture sessions and hardly entail follow up. Although the Commercial Bench is important from initiating to concluding the insolvency proceeding, including liquidation of an insolvent company, it has only supervisory authority over such proceedings.

Nepal has a few provisions as regards cross border insolvency and also has recognized foreign creditors. The Insolvency Act, 2006 has not addressed the entire problem related to the insolvency of a multinational company. However, Section 157(7) of the Companies Act, 2006 provides that a foreign company conducting its business in Nepal shall be governed by the prevailing laws of Nepal. The Insolvency Act covers only the companies formed under the Companies Act and all other Government enterprises and agencies with limited liability as determined by the Government of Nepal. The Insolvency Act has also no provision on the insolvency of a company formed as a branch of a foreign company.

There is no provision of withdrawal of application once made for initiating insolvency proceeding under the Insolvency Act except when permitted by the court. There is also an absence of provision on compromise in the Act if both creditor(s) and debtor want to make consensus on the matter of settlement of liquidation insolvency proceedings. In developed countries, parties to disputes on insolvency matter are allowed in a platform, to negotiate and discuss upon their more advantageous plan where it is possible even under due process of formal proceedings. Therefore, such provision should be made by amending insolvency law in force.

After a case is filed under insolvency, the court will review the evidences and host a hearing in 15 days' time. During this time period, the company in question is allowed to offer evidence-based counter arguments as to why it should not be declared insolvent and forced to liquidate its assets. When the court decides it has found no reason to stall the insolvency procedure, it will appoint an inquiry officer to re-evaluate the company's financial state of affairs. This investigation often lasts for a period of 90 days after which the inquiry officer will generate a report explaining whether the company could be restructured or needs to be liquidated. The Appellate Court then, based on the inquiry officer's report, holds a meeting with the applicant on finalizing the best course of action.

Liquidation under insolvency is the last resort for any company. Naturally then, regulatory bodies or creditors of the company will not have filed for application without substantial homework. In particular, when the insolvency filer is a regulatory body – well aware of government proceedings and following due process – the inquiry official appointment, whose work can again be reviewed by the liquidator makes for redundancy. While appointment for an inquiry official is warranted in cases of body/bodies not too familiar with the due process, the decision to twice review a regulatory body's decision (first by the inquiry official and second by the appointed manager/liquidator) could be relaxed – for it may only work to lengthen the procedure.

7.2 Conclusions

Liquidation is one of the ways of putting an entity i.e. company to an end. Insolvency is one of the major reasons which leads to liquidation of a company and is a result of failure of corporate person (or company). If the company's liability is higher than asset and if there is no condition of a going concern, then such company is referred for liquidation. Here, cash flow test and balance sheet test play a decisive role in determining insolvency of company.

The law governing liquidation of an insolvent company bears a long history, which first emerged as individual insolvency or bankruptcy in this world. Corporate insolvency emerged from the time of *limited liability concept* incorporated by the English Limited Liability Company Act, 1855. In the USA, first Bankruptcy Act was passed in 1880 within the authoritative provision of the US constitution. In France, the first law on bankruptcy was passed in 1807 as the Code de Commerce (also known as Commercial Code). In China, the first bankruptcy law was passed in 1906 in the name of Bankruptcy Code. There were two enactments on insolvency in India. In 1909, the Presidency Towns Insolvency Act was passed and the Provincial Insolvency Act was adopted in 1920. Both of them applied on a territorial basis.

In context of Nepal, individual insolvency law was first passed in 1853 under *"Damasahiko Mahal"* of the Muluki Ain. There was a provision on liquidation of a company in the Nepal Company Kanoon 1936, law on corporate insolvency was incorporated only in 2006 when the first special law in the form of Insolvency Act was passed, and this Act is applicable to companies with limited liability; and also includes bank and financial institutions and insurance companies and their liquidation.

The Insolvency Act, 2006 is based on modern principles of insolvency law which permits Nepal to deal with a financially distressed company and its liquidation. There are various guidelines and principles and some of which have been incorporated in the Insolvency Act and such guidelines, principles, good standard and practices, cross border insolvency law in international efforts help Nepal to make insolvency law more effective, establish and maintain proper mechanism for conducting insolvency proceedings and implementation system to be well regulated as well.

Following "one law-two systems", the Insolvency Act, 2006 has incorporated both the concepts of restructuring and liquidation. Further, the Act has provided from transmission to liquidation in case of failure of restructuring and transmission to restructuring if it is found appropriate during the liquidation process. Through this Act, timely insolvency process will help the company which has fallen insolvent.

Liquidation of an insolvent company is possible only when the court appoints an inquiry officer to investigate insolvency matters, in response to an application made by the concerned party and upon receipt of the report of officer, the court passes an order to implement restructuring scheme/plan and if such plan fails or when the court issues an order to liquidate the company instead of ordering to implement the plan. Therefore, as per the Act, the insolvent company is bound to pass only one phase i.e. investigation phase or both phases i.e. investigation phase and restructuring phase for moving into the liquidation phase. Thus, to refer the insolvent company for liquidation immediately or only after the failure of the restructuring plan depends upon the court's decision. This remains as the discretionary power of the court.

No insolvency proceedings can be initiated without a court order, and hence the judges of the court play a vital role in handling and properly settling the issues on insolvency and liquidation. The judges have sparse theoretical background on insolvency law and the Nepalese courts have handled very few insolvency-related cases i.e. liquidation, and also lack practical experience. So, it is imperative to provide necessary training to the judges to overcome some big challenges in near future.

In case of liquidation of an insolvent company, involvement of insolvency practitioners is more important, and their consultations are well received from the commencement to conclusion of insolvency proceedings. It is necessary to build the capacity of inquiry officer, restructuring managers and also liquidator as well as entire staff of the court. The private sector professionals such as restructuring manager and liquidator also need to be endowed with timely training.

During the process of insolvency and liquidation, the Insolvency Administration Office plays a key role. So, that Office is to be sufficiently equipped with the required human as well as financial resources.

If the legal complications can be removed, the mechanisms can be strengthened, availability of trained administrator can be ensured and insolvency proceeding can be handled properly through a competent court, it would be a great precursor to maintain economic sustainability, corporate governance and financial soundness of Nepal.

Blacklisting provision is also a potential challenge which serves to defeat the purpose of the Insolvency Act, 2006. Under this provision, once a company is insolvent, such company, its directors and shareholders involved remain blacklisted with prohibition to draw credit facility. In contrast, the Act aims to offer safe exit to the insolvent companies in case of genuine insolvency and punish the directors/shareholders where any wrongdoing is involved.

The insolvency professionals are appointed as liquidators who can accelerate the liquidation process to be concluded in a time bound manner. The Insolvency Act, 2006

states that the completion of the proceeding should be within a period as fixed by the court from the date of its initiation.

Thus, the Act provides a legal framework with a time bound proceeding for the company to implement restructuring plan or for exiting the market by liquidation process.

7.3 Suggestions

Considering the discussion above, the researcher would like to make some suggestions for improving the prevailing legal as well as practical problems as under, which hopefully will be useful for the concerned scholars, entities and so forth. The researcher has further divided suggestions into the three following different parts catering to the three organs of a State, viz. the executive, the legislature and the judiciary, each of which may have a vital role in the reforms of insolvency process:

1) Suggestion for the Executive

i) Upon receipt of application, the court appoints an inquiry officer to submit his or her report and the officer investigates on insolvency matters by following due process. To this end, the officer is given a time period of 90 days. But when the company is referred for liquidation and a liquidator is appointed, the works of inquiry officer can again be reviewed by the liquidator. So, if a decision is to be taken twice on a same insolvency purpose, it may only work to lengthen the procedure, and therefore, such provision should be adjusted in a less time-consuming way.

ii) The law on insolvency should prescribe a flexible but transparent system for disposal of assets efficiently and at maximum value. Claim of secured creditors should rank *pari passu* with the workman and government dues. The law should also provide for mechanism to recognize and records claims of unsecured creditors.

iii) There are contradictions between BAFIA (Banks and Financial Institutions Act), 2017 and Insolvency Act, 2006 as regards priority of payment.

Following BAFIA, the individual depositors get first priority in payment whereas as per the Insolvency Act, employees and other liabilities receive first preference in payment. So, uniformity in payment of liabilities should be made in different laws of Nepal through amendment in the prevailing laws on insolvency.

iv) It is an uphill task to implement the provisions of Insolvency Act, 2006 in line with its objectives. So, in order to achieve the objectives, implementation of the Act should be timely rechecked. The Act is a uniform law. There is a need to bring into effect all the provisions of the Act, such as to bring into existence the proposed Insolvency Administration Office.

v) Establishment of Insolvency Administration office is supposed to provide all services in relation to insolvency cases through a single particular branch of government. This body would simplify the procedure and became a single point solution to all those applying for it, which aids to reduce time and save cost to be spent in the proceedings. Again, this body would make exit easier for insolvent companies. But the office is yet to be incorporated. Therefore, the government should take steps to establish such Office by issuing effective direction along with amendment in the insolvency law at the earliest.

vi) There are various international arrangements on cross border insolvency issues. The United Nations Commission on International Trade Law (UNCITRAL) is one, which has also proposed a model law for bringing uniformity in the cross-border insolvency laws to be enacted by various countries. It primarily concerns with the insolvency of multinational (multilateral) companies and aims to facilitate the courts, monitoring agencies and insolvency administrators of various countries. This is beneficial even for Nepal because we are also having business relations with so many countries.

vii) The Blacklisting Directive issued by the Central Bank is as another barrier, which discourages business rather than encourages the same. So, there is a need to remove such barriers in doing business and as such, this sort of disabling provision should be revised.

viii) A code of conduct should be framed and rigorously enforced for insolvency professionals such as the liquidator, inquiry officer and restructuring manager as well as other key players of the company.

2) Suggestions for the Legislature

a) As per the Insolvency Act, 2006, prior to applying for initiating insolvency proceedings, one needs to fulfill certain pre-conditions. A period of 35 days needs to be exhausted from the date of notice concerning recovery of debt given to the debtor. There is another provision to challenge the notice within 7 days. These provisions create needless delay in proceedings and leaves the space for shrewd practice. Therefore, this provision should be amended in the insolvency law.

b) There is a clear provision under Section 46 of the Insolvency Act, 2006 which empowers the court to exercise full discretionary powers without any reasonable ground. However, such provision encourages the adjudicator to abuse the power assigned on him or her. Therefore, there should be outlined certain grounds through amendment in the insolvency law.

c) There is no provision of withdrawal of application once made for initiating insolvency proceeding under the Insolvency Act except when permitted by the court. There is also an absence of provision on compromise in the Act if both creditor(s) and debtor want to make consensus on the matter of settlement of liquidation insolvency proceedings. In developed countries, parties to disputes on insolvency matter are allowed in a platform, to negotiate and discuss upon their more advantageous plan where it is

possible even under due process of formal proceedings. Therefore, such provision should be made by amending insolvency law in force.

d) Under the Insolvency Act, 2006 it is deemed that once a liquidator is appointed, the directors and officers of the company are relieved of their office, and all powers are passed to the liquidator. But in reality, the board may feel that they still have power to advise the liquidator on the way to proceedings. Therefore, the Act needs to clarify on the independence of liquidator in respect of proceedings, and to state clearly that the board has no power to influence liquidation proceedings after liquidator's appointment through amendment in the prevailing insolvency law.

e) Creditors who provide credit to the debtors may be either secured or unsecured and thus they do not remain in the same status. But the prevailing Insolvency Act, 2006 does not differentiate between such creditors. So, there should be clearly differentiated between different forms of creditors and the priority list of creditors should be prepared in the insolvency law itself through amendment.

f) Insolvency and liquidation are not one and the same concepts. Insolvency is a state of being unable to pay debts of the creditors and liquidation is the process putting a company to an end where, a liquidator takes control of the company, realizes its assets and distributes the proceeds to the creditors, shareholders etc. in the order of priority. Therefore, these both terms should be defined and differentiated clearly by amending the insolvency law.

g) Although Nepal has insolvency regulation, there is absence of detailed legal provisions. Therefore, the insolvency regulations/rules and court regulations should be amended with clear provisions relating to those grounds to determine the state of insolvency of a company in line with the rules and regulations of developed countries, such as the UK, USA etc.

h) Despite being a member of WTO, Nepal has not adopted the UNCITRAL Model Law on cross border insolvency. There is a shortage of policies for it in the prevailing Insolvency Act, 2006. If a parent company based on borders outsides of Nepal closes, what does this mean for its branches in Nepal? There is no pertinent provision to this effect in Nepal. Therefore, like other developed countries, Nepal also needs to adopt UNCITRAL Model Law on cross border insolvency by modifying or consolidating its provisions as required to meet international standards and tackle insolvency problems among the countries, that is, there should be a sound arrangement for cross border insolvency and it presupposes amendments in the insolvency law or passage of new and special laws in this regard. This will help maintain relation and coordination between the institutions established for the conduct and supervision of insolvency proceedings like Insolvency Administration Office, domestic courts and similar types of institutions in other countries.

i) The Court has no power to issue order for alternative dispute settlement once it is entered in insolvency proceedings before the court. So, this matter also needs to be taken into account.

3) Suggestions for the Judiciary

i) The Commercial bench under High Court works as a commercial court (court). But it has not been established as a commercial court in reality. It is a supervisory body which plays key role from the commencement to conclusion of insolvency proceedings. Without court's order, no proceedings can be initiated. So, the Commercial Bench should be developed as a commercial court. The need for specialized court will further enhance the qualities of judicial proceedings specific involving the matters relating to liquidation and insolvency issues.

ii) In case a competent and specialized commercial court is ensured, the liquidation process can be completed sooner and parties may have more opportunities to explore further process of restructuring their business with new ideas and issues. There shall arise no question as to delay in proceedings. In order to make the judges and legal professionals competent in commercial law practices, focus should be on specialized rigorous training which enables them to understand and handle even new cases whether they are of home country or foreign countries.

iii) The nature of commercial cases are very complicated and largely may involve various issues across several jurisdictions based on transaction and issues involved. The judiciary must have in-house capacity enhancement program module for concerned authorities so that the liquidation and insolvency can be better understood by them. The availability of training/exposure and other will improve their capacity to deal with such cases.

4) Suggestions for Banks, Financial Institutions, BODs of Companies, shareholders, Depositors and Employees.

i) The banking and financial institution need to consider the issues of liquidation and insolvency as in line with the international practices and at last moment when the institution are not having any alternatives left for restructuring of the institution.

ii) The internal capacity enhancement in terms of financial calculation of the banking and financial institution has to be priority of the respective institution so that there may be higher possibilities of rebirth of those institution.

iii) The re-structuring of banking and financial institution has to be also priority for assisting the economy before liquidation happens. The government also

have to work in close connection with similar agencies looking for the liquidation and empower a healthy process so that much more difficulties in process will not be hurdled for these institution,

iv) The baking along with other key stakeholder in the market sector need to empower their capacities to deal with the issues of liquidation and insolvency based on positive remarks and values of liquidation and also these institution has to take lesson from other agencies dealing with such cases/practices.

v) The various stakeholder of the corporate entities need to have properly communicated with their respective liabilities and benefit in the process and for it the institution should have clear provision as in case of needed in liquidation process and insolvency issues.

5) Suggestion for future research

This study has attempted to find the best possible outcome. This study is also not free of limitations. Theoretically the study can be focused only by briefly reviewing some relevant legal provisions and further reviewing them from the perspective of liquidation of company. This study explains the conditions and reasons behind liquidation of the company. But there are still many areas that need to be studied.

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Annex 1

Insolvency Act, 2006

Preamble: Whereas, it is expedient to make legal provisions immediately in relation to the administration, insolvency proceedings of companies which are insolvent or go in g to be insolvent being unable to pay debts to creditors or which are facing financial difficulties, and in relation to the restructuring of such companies;

Now, therefore, be it enacted by the House of Representatives in the First Year of the issuance of the Proclamation of the House of Representatives, 2063(2006).

Chapter - 1

Preliminary

1. Short title and commencement:

   (1) This Act may be called "Insolvency Act, 2006 (2006)."

   (2) It shall come into force immediately.

2. Definitions:

   Unless the subject or the context otherwise requires, in this Act,-

   (a) "company" means a company incorporated under the companies law in force, and this expression also includes such other body corporate with limited liability as specified by the Government of Nepal by notification in the Nepal Gazette;

   (b) "being insolvent" means a state of being unable, or appearing to be unable, to pay any or all of the debts due and payable to or payable in the future to creditors or a situation where the amount of liabilities of a company exceeds the value of the assets;

(c) "financial difficulty" means a situation where company becomes or may become insolvent immediately or in the near future if the company is not restructured made pursuant to this Act;

(d) "liquidation of company" means a situation where the registration of a company is canceled by fulfilling the procedures referred to in this Act;

(e) "restructuring" means a process to be adopted under this Act in order to a company which may become insolvent because of financial difficulty;

(f) "restructuring program" means a restructuring program as referred to in Chapter-4;

(g) "Court" means the commercial bench of such court as designated by the Government of Nepal, in consultation with the Supreme Court, by notification in the Nepal Gazette;

(h) "debt" means a certain amount due and payable immediately or as claimed due and payable;

(i) "creditor" means a person who is entitled to receive payment from a company which has become insolvent or may become insolvent; and this expression also includes a secured creditor;

(j) "security" means any or all property furnished as pledge, mortgage or any other kind of security of a debt;

(k) "secured creditor" means a creditor that lends money to a company against a security;

(l) "company which has become insolvent" means a situation where an order has been issued under this Act for the liquidation of the company;

(m) "Office" means the Insolvency Administration Office established pursuant to Section 65;

(n) "insolvency practitioner" means a person licensed under Section 64 to carry on business relating to insolvency;

(o) "inquiry officer" means an inquiry officer appointed pursuant to Section 10;

(p) "restructuring manager" means a person who is appointed by order of the Court pursuant to Sub-section (2) of Section 22 to operate and manage the restructuring scheme of a company;

(q) "liquidator" means a person who is appointed by an order of the Court or a resolution adopted by a meeting of creditors to liquidate the affairs of a company, and this expression also includes the Office;

(r) "associated person" means any director, officer, shareholder of a company which has become insolvent or any director, officer or shareholder of a company that is holding or subsidiary company of such company; and this expression also includes the husband, wife, son, daughter, adopted son, adopted daughter, father, mother, step mother, elder brother, younger brother, elder sister, younger sister of any director, officer, shareholder of that company or of a company that is holding or a subsidiary of such company;

(s) "prescribed" or "as prescribed" means prescribed or as prescribed by the Rules framed under this Company.

Chapter-2

Insolvency Proceedings

3. Prohibition on commencing insolvency proceedings without order of Court: Save as ordered by the Court pursuant to this Act, no person shall commence insolvency proceedings against any company.

4. Application to be made for insolvency proceedings: (1) where it is required to institute insolvency proceedings against any company, any of the following

persons may make an application to the Court in the prescribed form for the institution of such proceedings:

(a) A company itself which has become insolvent;

(b) Out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money;

(c) Shareholder or shareholders that has or have subscribed at least five percent of shares, out of the total shareholders of a company;

(d) Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures, out of the total debenture-holders of a company;

(e) A liquidator who has been appointed to liquidate a company; or

(f) In the case of a company that carries on any specific type of business set forth in Section 8, a body authorized to administer and regulate such business.

(2) In order for an application to be made pursuant to Sub-section (1), a period of thirty five days shall have been expired after a notice issued to pay the debt referred to in Section 5 has been duly served on the concerned company.

(3) Every application to be made pursuant to Sub-section (1) shall be accompanied by the reason for making the application, short description of the financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details, as well:

(a) Where the company itself which has become insolvent makes such application:

(1) A document certified by the board of directors of the company, mentioning that the company has become insolvent;

(2) A special resolution adopted by the board of directors of the company to institute the insolvency proceedings pursuant to this Act;

(3) Certified copies of the balance sheet and audit report of the company available at the time of making application for the institution of insolvency proceedings.

(b) Where the creditor of a company which has become insolvent makes such application:

(1) A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;

(2) The date on which the company borrowed the debt claimed by the creditor and the reason why the debt was borrowed;

(3) Description that the amount referred to in Clause (1) is due and such amount is payable immediately;

(4) That the debtor believes or the reason and ground the debtor has to believe that the company in respect of which demand is made for insolvency proceedings has become insolvent.

(c) Where the liquidator makes such application:

(1) Evidence that the company in respect of which application is made for insolvency proceedings has appointed the liquidator for the purposes of liquidation of the company; and

(2) The opinion expressed by the liquidator on the matter that the company in respect of which application is made for insolvency proceedings has become insolvent, and the ground for such opinion.

(4) Notwithstanding anything contained elsewhere in this Section, any shareholder or debenture-holder of a company shall obtain permission of the Court to make an application for insolvency proceedings pursuant to Clause (c) or (d) of Sub-section (1), and the shareholder

or debenture-holder may, if so permitted, make an application on such terms and conditions as may be specified by the Court.

(5) The Court shall not give permission referred to in Sub-section (4) unless and until sufficient evidence proving that the company has become insolvent is produced.

5. Notice to be given for payment of debt: (1) Prior to making an application to the Court pursuant to Section 4 for insolvency proceedings, a notice shall be sent to the registered office of the company in the prescribed form for the payment of debt.

(2) The notice referred to in Sub-section (1) shall be signed by the creditor himself or herself or by a person authorized by the creditor, on his or her behalf.

6. Application to void notice issued for payment of debt: (1) Where the notice received pursuant to Section 5 is not reasonable or where there are any other reason for not repaying the debt immediately, the concerned company may make an application to the Court in order to void the notice, not later than thirty five days after the date of receipt of that notice.

(2) Where the application referred to in Sub-section (1) is made, the Court shall issue a notice summoning the creditor giving the notice referred to in Section 5 to appear before the Court within seven days; the notice to be so issued shall also be accompanied by a copy of such application.

(3) The Court may make a decision to void or not to void the notice issued pursuant to Section 5 no later than seven days after the date of appearance of the creditor pursuant to Sub-section (2) or after the date of expiration of the time prescribed for the appearance before the Court where the creditor has failed to make such appearance.

(4) The Court may issue an order to void the notice issued pursuant Section 5 on the following condition:

(a) There is a clear dispute as to whether the creditor has extended debt to the company or not; or

(b) The debt due to be paid by the company to the credit does not appear to be payable immediately.

(5) Where the Court issues an order pursuant to Sub-section (4), no notice that is issued to pay the debt can be given to the company again on the same matter nor can an application be made for the institution of insolvency proceedings until the condition set forth in that Sub-section continues to exist.

(6) Where the Court does not issue an order pursuant to Subsection (4), the company shall pay the debt of creditor no later than thirty five days from that date.

7. **Company deemed to have become insolvent:** (1) Save as proved otherwise, a company shall be deemed to have become insolvent on the following condition:

(a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or

(b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or

(c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

(2) Nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

8. Application for insolvency proceedings: (1) notwithstanding anything contained in Section 4, no application may be made to the Court for insolvency proceedings in relation to the following company without obtaining prior approval of the following authority:

(a) In the case of a bank or financial institution carrying on banking and financial business, the Nepal Rastra Bank, or

(b) In the case of an insurance company carrying on insurance business, the Insurance Board formed pursuant to the Insurance Act, 2049(—), or

(c) In the case of a company which cannot undergo voluntary liquidation without approval of the competent body or authority, except that mentioned in Clause (a) or (b), such authority.

(2) Every application to be made for insolvency proceedings in relation to a company mentioned in Sub-section (1) shall be accompanied by a copy of the approval given by the authority set forth in that Sub-section for that purpose.

9. Action on application: (1) Where an application is made to institute, or cause to be instituted, insolvency proceedings in relation to any company pursuant to Section 4, the Court shall register the application where it has been made duly and so appoint the date for hearing the same that such hearing can take place within fifteen days.

(2) Except where a company itself makes an application for insolvency proceedings, after the registration of an application referred to in Sub-section (1), a notice shall be issued in the name of the concerned company to submit

statements in writing, if any, for not instituting such proceedings within seven days and be delivered to the registered office of such company.

(3) Where the Court considers reasonable, it may, prior to the hearing on an application referred to in this Section, and as per necessity, order the authority set forth in Sub-section (1) of Section 8 to submit statements of reasons, if any, for not instituting any proceedings as requested by the applicant prior to the date appointed for hearing and shall publish a notice thereof at least twice in any daily newspaper of national circulation so that the shareholders, creditors of the concerned company or any other persons having dealing with the concerned company and the Stock Exchange, as well, where such company is enlisted in the Stock Exchange get such information.

(4) Any company or person that receives a notice issued or published pursuant to Sub-section (2) or (3) shall submit statements in writing, accompanied by the reason, if any, for not instituting the insolvency proceedings of the concerned, within the time specified by the Court.

10. Decision to be made upon keeping on hearing: (1) Notwithstanding anything contained in the laws in force, the Court shall keep on hearing an application made pursuant to this Chapter after commencement of the hearing on the application on the day appointed for the hearing on the application pending the final settlement thereof and make a decision thereon. Provided that this provision shall not prevent the keeping of hearing on that matter on the day on which the Court remains open where the hearing cannot be completed or decision cannot be made on the day of hearing because of time constraint.

(2) Upon the completion of hearing referred to in Sub-section (1), the Court shall make an order to institute or not to institute insolvency proceedings in relation to the company concerned.

(3) In making an order pursuant to Sub-section (2), the Court shall order to appoint an insolvency professional as an inquiry official for the purposes of making insolvency related inquiry.

(4) In making appointment of an inquiry authority pursuant to Subsection(3), a person whom the Court thinks fit, out of the persons whose names are included in the list approved by the Office for that purpose, shall be appointed.

11. Power to issue interim order: (1) Where, in making hearing on an application made to the Court pursuant to Section 4, it appears that there exists in the company any of the following situations which may prejudice the interests of the creditor or any other person having dealing with the company, the Court may, on an application by the concerned party or at its own discretion, issue an interim order:

(a) The assets of the company have been sold and disposed of wrongfully or there exists a possibility of such sale and disposal;

(b) The management of the company has not been carried out properly; (c) Any legal action is going to be instituted or such action is going to be enforced or there exists a possibility of such enforcement in such a manner as to prejudice the assets of the company.

(2) In issuing an interim order pursuant to Sub-section (1), the Court may issue order restraining from doing any or all of the following acts:

(a) Transferring, selling and disposing of, or otherwise mortgaging or pledging, any assets of the Company, other than that business of the company which it has been carrying on in the ordinary course of business;

(b) Transferring the shares of the company in any manner or altering the status of the shareholders of the company in any manner;

(c) Withholding or foreclosing any assets of the company by any person; or (d) Instituting any legal action or keeping on such action or taking any action or foreclosing by any creditor or person against the assets of the company or any assets owned or possessed or foreclosed by the company.

(3) Where an order is issued by the Court pursuant to Sub-section (2), information thereof shall be given to the concerned company, company registrar and Office, and where the Court thinks fit, it may also issue order requiring to publish such information in a daily paper of national circulation in a manner that the general public can get such information.

(4) The Court may, if it considers necessary, issue order to appoint any appropriate person as the interim administration of the company for the interim management of the company during the currency of the interim order.

(5) The functions, duties and powers of the interim administrator appointed pursuant to Sub-section (4) shall be as prescribed by the Court at the time of such appointment.

(6) Notwithstanding anything contained elsewhere in this Act, where the Court issues order for inquiry into insolvency proceedings or dismisses the application, the interim order issued pursuant to this Section shall ipso facto be ineffective.

12. Application not to be withdrawn: Notwithstanding anything contained in the laws in force, an application made to the Court for insolvency proceedings pursuant to Section 4 cannot be withdrawn except as permitted by the Court.

Chapter-3

Inquiry into Insolvency Proceedings

13. To inquire into insolvency proceedings: (1) Where the Court issues order to inquire into insolvency proceedings pursuant to Sub-section (3) of Section 10, the

inquiry official shall independently inquire into the financial situation of the concerned company in order to determine the following:

(a) Whether or not there should be issued an order for immediate liquidation of the company by the reason that its financial situation cannot be improved;

(b) Whether or not the period of inquiry as referred to in Section 14 should be extended;

(c) Whether or not there should be issued an order for the restructuring of the company through the restructuring program;

(d) Whether or not the company has become or is likely to become insolvent.

(2) The inquiry official shall make inquiry pursuant to Sub-section (1) and submit an inquiry report to the Court within the period specified by the Court, and such report shall contain, inter alia, the resolution, if any, adopted by the meeting of creditors, the company's report and evaluation and recommendation made by the official.

14. Power to extend period of insolvency proceedings: (1)Where the inquiry officer, showing a reasonable reason why the financial situation of the company cannot be inquired into within the period of inquiry as specified pursuant to Sub-section (2) of Section 13, makes an application to the Court for the extension of that period, the Court may, if it finds the reasonable ground , extend the period as appropriate.

(2) Where the period of inquiry is extended pursuant to Subsection (1), the information thereof shall be given to the concerned company.

15. Management of company during inquiry period: (1) notwithstanding anything contained in the laws in force, the board of director of the company shall carry out the management and ordinary transactions of the company during the period

of inquiry of insolvency proceedings, under the regular supervision of the inquiry official.

(2) Notwithstanding anything contained in Sub-section (1), where the inquiry officer submits to the Court a report indicating that the board of directors of the company has not operated the company properly, the Court may issue an order to remove the board of directors and order the inquiry officer to carry out the management and ordinary transactions of the company.

(3) Where the Court orders the inquiry officer to carry out the management and ordinary transactions of the company pursuant to Subsection (2), the inquiry officer shall carry out the transactions accordingly.

(4) Where any special transaction such as the sale of the assets or business of the company shall be carried out in the course of operating the ordinary business of the company pursuant to Sub-section (3), an application setting out the reason therefore shall be made to the Court for permission, and where the Court issues an order granting such permission, the inquiry officer may carry out such transaction.

16. **Report to be made by director:** A person who has held the office of director of the company at the time when the Court has issued an order to inquire into insolvency proceedings pursuant to Sub-section (3) of Section 10 or during the period of one year prior thereto, shall submit to the Court a report on the financial situation and transactions of the company as at the time of his or her retirement, in the prescribed format.

17. **Power to raise loans:** (1)Where the inquiry officer considers the need of any amount to keep on the company or operate the ordinary transactions of the company, the inquiry officer may borrow loans from any person, with or without furnishing necessary security.

(2) Any loans borrowed pursuant to Sub-section (1) shall be deemed to be the amount spent during the period of inquiry into insolvency proceedings and such amount shall be paid in order of priority as provided in this Act. Provided that where the security furnished by the company to borrow a loan has already been furnished as a security with any person, the order of priority shall not apply in relation to the claim for security except in the case where the inquiry official has made an agreement of a person entitled to claim the same.

18. Report to be submitted by inquiry officer: (1) The inquiry officer shall inquire into the financial and business situation of the company and submit a report thereof to the Court within the period of inquiry.

(2) The inquiry officer shall determine any one matter set forth in Sub-section (1) of Section 13 and make a recommendation report referred to in Sub-section (1) containing the reasons and grounds for such determination, and such report shall contain, inter alia, the actual financial situation of the company, details obtained by the inquiry official upon making inquiry and his or her opinion and findings.

(3) Where the recommendation made pursuant to Sub-section (2) has been submitted to the meeting of creditors, whether a majority of the creditors attending such meeting has accepted such recommendation or not shall also be mentioned.

(4) A copy of the report submitted pursuant to Sub-section (1) shall be sent to each of the concerned company and the Office; and the concerned company and the Office shall make arrangements to maintain the report so received that the shareholders, directors and creditors of the Company may inspect such report.

19. Ipso facto suspension: (1) Notwithstanding anything contained in the laws in force, where the Court issues order to institute insolvency proceedings in relation of any company pursuant to Sub-section (2) of Section 10, any of the following

acts or actions shall not be done or taken; and any acts or actions being done or taken but not completed shall ipso facto be suspended:

(a) Transferring, selling and disposing of the shares of the company or altering the status of any shareholder;

(b) Transferring, selling and disposing of any assets of the company or mortgaging or pledging the same as collateral in any manner;

(c) Foreclosing any assets of the company or realizing any security according to any judgment or order;

(d) Preempting any property leased to the company by the lessor or instituting any legal action in relation thereto;

(e) Paying any debt whose payment was outstanding or which had become payable at the time when the court made order to institute insolvency proceedings pursuant to Sub-section (2) of Section 10 or pledging of a security in consideration thereof; and

(f) Transferring or withdrawing moneys in the fund of the company.

(2) Notwithstanding anything contained in Sub-section (1), where any person makes an application to the Court claiming that the automatic suspension of any transaction pursuant to the said Sub-section will cause a loss to that person, the Court may, if it holds that the statements of the applicant are reasonable and that this does not prejudice the interests of the company or its creditors, issue an order to do any transaction.

20. Prohibition on cutting down essential services: Notwithstanding anything contained in the laws in force, where the Court orders the institution of insolvency proceedings in relation to any company pursuant to Sub-section (2) of Section 10, no institution or person providing essential services such as electricity, drinking water, drainage, gas and telephone or any other telecommunication service to

such company shall stop or cut down such services during the period between the date of the said order and the date of completion of the said proceedings, except without permission of the Court.

21. Meeting of creditors to be convened: (1) The inquiry officer shall, before submitting his or her report to the Court, convene a meeting of the creditors of the company to discuss his or her report in order to know the views of the creditors on the future plan of the company which has become insolvent, and every person who is identified as a creditor of the company from the accounts and other records of the company shall also be invited to attend such meeting.

(2) A notice indicating the venue, date, time and agenda of the meeting shall be given to every person identified as a creditor under Subsection (1) in advance of at least seven days, and the notice shall also be published at least two times in a daily newspaper of national circulation.

(3) While giving a notice pursuant to Sub-section (2), it may be given by a letter, telex, telefax, e-mail or any other means of electronic communication which can be recorded.

(4) Where any person other than a person mentioned in Sub-section (1) makes any claim against the company as a creditor, the inquiry official may ask that person to submit evidence thereof and detailed description of the claim against the company.

(5) The inquiry official may dismiss the claim of a person who fails to submit the evidence or description referred to in Sub-section (4); and where the claim is so dismissed, such person shall not be entitled to attend the meeting of creditors. Provided that a person shall not be considered to be a creditor of the company by the reason only that the person has taken part in the meeting of creditors.

(6) The inquiry official shall chair the meeting of creditors.

(7) The meeting of creditors shall make decision by majority. In the event of a tie, decision shall be made by lot. The inquiry official may ascertain the voting right of creditors in proportion to the claim made on the debts due to be paid immediately by or payable by the Company and specify the mode of voting.

(8) The directors of the company or the officers invited by the inquiry official may participate in the meeting of creditors. Provided that they shall not be entitled to take part in voting.

(9) Except where any concerned person makes an application to the Court showing the reasons and grounds that injustice has been done to that person, no question may be raised in any court about the meeting of creditors and the business executed by it.

22. Power to Court to make order: (1) The Court may, if it considers appropriate, make any of the following orders, within seven days after the receipt of the report submitted by the inquiry officer pursuant to Sub-section (1) of Section 18, the resolution adopted by the meeting of creditors or the restructuring scheme submitted by the company or any other resolution adopted:

(a) To immediately liquidate the company;

(b) To implement the restructuring program of the company;

(c) In the event of possibility of improvement without liquidating the company immediately, to stay until the period specified by the court;

(d) To extend the period of insolvency proceedings as specified by the Court for the submission of report by making further inquiry; or

(e) To quash the order issued pursuant to Sub-section (2) of Section 10.

(2) Where an order is made under Sub-section (1) to liquidate the company or implement the restructuring scheme, the Court shall make an order to appoint an

insolvency practitioner as the liquidator of the company or to operate the restructuring scheme of the company and implement the liquidation or restructuring scheme of the Company; and the person so appointed shall perform such act within such period as specified by the Court at the time of his or her appointment.

(3) Notwithstanding anything contained elsewhere in this Section, where the inquiry officer makes an application for any of the following orders as per the understanding reached between any company which has become insolvent or of which situation requires its immediate liquidation or showing the reason that even though a company has become insolvent, there is a situation that the proposal on the restructuring scheme prepared for the improvement of the company can be considered in a meeting of creditors to be convened pursuant to Chapter-4, the Court may, if it considers so appropriate, make such order:

(a) To end the inquiry into insolvency proceedings before the expiry of that period;

(b) To waive the requirement to convene the meeting of creditors by the inquiry official; or

(c) To liquidate the company or carry out the restructuring of the company.

(4) Where the Court considers it reasonable to make any order other than that mentioned in Sub-section (1) or (3), it may also make such order.

Chapter-4

Restructuring Scheme of Company

23. Restructuring program to be prepared: (1) Where the Court makes an order to restructure any company pursuant to Sub-section (2) of Section 22, the restructuring manager shall prepare a restructuring scheme of the company in writing.

(2) The scheme prepared pursuant to Sub-section (1) shall contain the following programs:

(a) To capitalize the debt of the company and alter the capital structure;

(b) To pay the claims of creditors by selling any portion of the assets of the company;

(c) To change the nature of claims of creditors of the company and issue securities for the same;

(d) To get the creditors of the company to participate in capital investment by issuing shares in consideration for their claims;

(e) To amalgamate the company with any other company;

(f) To change the management of the company; or

(g) To do any such other act which the Court considers appropriate to restructure the company.

24. To call meeting of creditors: (1) The restructuring manager appointed by order of the Court to make restructuring of the company pursuant to Subsection (2) of Section 22 shall give a notice, meeting the requirements set forth in sub-sections (2) and (3) of Section 21, to all creditors to submit their respective claims, along with their respective proofs and evidences, no later than 15 days after the manager has commenced the business, and such notice shall be published in a daily newspaper of national circulation for at least two times; and such notice may also be put on the website.

(2) All creditors who have any kinds of credit claims against the company shall submit to the restructuring manager statements of credit claims with or without security, along with evidence substantiating such claims no later than fifteen days after the issuance of the notice as referred to in Sub-section (1).

(3) No later than fifteen days after the receipt of statements of claims pursuant to Sub-section (2), the restructuring manager shall call a meeting of creditors, by fulfilling the requirements set forth in sub-sections (2) and (3) of Section 21. In calling such meeting, a copy of the restructuring program shall be sent along with that notice.

(4) The restructuring manager shall chair the meeting called pursuant to Sub-section (3).

(5) The meeting of creditors may be conducted and adjourned as per necessity. Provided that such meeting shall not be adjourned in a manner that it exceeds the period of restructuring.

(6) The directors of the company may attend the meeting of creditors and answer the questions raised by the creditors in relation to the business and financial situation of the company.

(7) The meeting of creditors called pursuant to Sub-section (3) shall discuss the details of restructuring program presented by the restructuring manager and adopt a resolution on any of the following matters, subject to Sub-section (7) of Section 21:

(a) To adopt, with or without amendment, the proposal on restructuring submitted by the restructuring manager, or

(b) To immediately liquate the company without accepting the resolution referred to in Clause (a).

(8) Notwithstanding anything contained in Sub-section (7), the secured creditor shall not be entitled to vote.

(9) The restructuring program adopted and approved pursuant to Sub-section (7) or the resolution adopted to reject the program and liquidate the company shall

be submitted to the Court for approval; and if the Court issues order approving that resolution, it shall be implemented.

25. Report to be submitted by restructuring manager: (1) The restructuring manager shall, within the period of restructuring, submit to the Court a report, accompanied by the transactions, assets and financial situation of the company and its restructuring program, if any proposed.

(2) The report referred to in Sub-section (1) shall, where a restructuring program is proposed, state the following matters in relation to such program.

(a) Summary and analysis of the proposed program;

(b) Details of effects likely to be caused to the creditors of the company from the implementation of the proposed program;

(c) A comparison between the consideration and effects that would have been available to the creditors if the company had been liquidated immediately and the consideration effects that may be available to the creditors on the implementation of the restructuring program; and

(d) Opinion and description, accompanied by the finding of the restructuring manager that the company would not be insolvent if the restructuring program was implemented.

(3) There shall be no formal form and structure of a restructuring program prepared pursuant to Sub-section (1), except the set forth below:

(a) All details of the program to be implemented by the company in the future and written details of the relevant proposal;

(b) Details of the matter that the creditors of company will get more benefits if the company is not liquidated immediately but restructured and if the program is implemented;

(c) Details of the matter that no portion of the proposed program is illegal or prohibited by the laws in force;

(d) Details that if the program is implemented, the company will be rescued from insolvency or will not become insolvent.

(4) The program prepared pursuant to this Section shall also contain details of payment of expenses incurred during the inquiry period of insolvency proceedings or the restructuring period and of the remuneration of the inquiry officer or the restructuring manager.

26. To make information in the event of failure to submit details of restructuring program: (1) Where it is not possible to submit the details of the restructuring program of the company to the Court within the restructuring period, the restructuring manager shall make an application, accompanied by the reasons, to the Court.

(2) Where an application is made pursuant to Sub-section (1), the Court may, if it considers to be reasonable, invalidate the order to make restructuring and issue an order to liquidate the company.

27. Claim and objection to approved restructuring program: (1) A creditor who is not agreed with the proposal of restructuring program approved pursuant to Sub-section (7) of Section 24 may make an application of claim and objection within seven days, setting out the following grounds and reasons:

(a) The restructuring program approved by a majority in the meeting of creditors is not in the interest of the creditors other than the secured creditors;

(b) A serious irregularity has been committed in calling or conducting the meeting of creditors, and the program approved by that meeting is not in the interest of the creditors other than the secured creditors;

(c) Any false or misleading information has been given or material information has been concealed in relation to the company or its restructuring program.

(2) Where an application referred to in Sub-section (1), the Court shall order the company and the restructuring manager to submit written statements in relation thereto within a period of seven days.

(3) On receipt of written statements referred to in Sub-section (2) or on the expiry ration of the period for the submission of such written statements, the Court shall hear the application referred to in Sub-section (1) and may, if the application is found to be based on grounds, invalidate to make ineffective the resolution on the restructuring program adopted in the meeting of creditors.

(4) If the Court invalidates to make ineffective the resolution adopted in the meeting of creditors and approved pursuant to Sub-section (3), the Court shall issue order to liquidate the company immediately.

(5) Information of the order issued pursuant to Sub-section (3) or (4) shall be given to the concerned company and the restructuring manager.

28. Consequence of approval of restructuring program by Court: If the Court issues an order to approve the restructuring program adopted by the meeting of creditors pursuant to Sub-section (9) of Section 24, the program shall be binding on all creditors of the company, directors and shareholders of the company, other than the secured creditors of the company; and the restructuring period shall end on that date.

29. Not to affect secured creditors: (1) No restructuring program adopted by a meeting of creditors and approved by the Court pursuant to this Chapter shall, except on the following condition, prevent the secured creditors from executing or otherwise dealing the security:

(a) Where the secured creditor votes in favor of the restructuring program or otherwise gives his or her consent that such program will be acceptable to him or her; or

(b) Where the Court orders that that program shall be binding to the secured creditor.

(2) The Court may, if it is satisfied with the following matters, issue order referred to in Clause (b) of Sub-section (1):

(a) Where the secured creditor executes the security that he or she has taken, it may substantially prejudice the achievements to be made from the implementation of the restructuring program;

(b) Where such program adequately protects the right of the secured creditor to the security, and the security.

30. Not to affect the right of owner of any property or of any lessor: (1) No restructuring program adopted by a meeting of creditors and approved by the Court pursuant to this Chapter shall, except on the following condition, prevent the owner of any property used or possessed or owned by the company or the lessor of such property if it has been leased from executing the right to such property or returning the same: (a) Where the owner or lessor of such property votes in favor of such program or otherwise gives his or her consent in writing that such program will be acceptable to him or her; or (b) Where the Court orders that the program shall be binding to the owner or lessor of such property.

(2) The Court may, if it is satisfied with the following matters, issue order referred to in Clause (b) of Sub-section (1):

(a) Where the owner or lessor of such property gets back that property, it may substantially prejudice the achievements to be made from the implementation of the restructuring program;

(b) Where such restructuring program adequately protects that property and the right of the owner or lessor of such property.

31. Restructuring manager is to operate company: (1) The restructuring manager shall operate the company during the currency of the restructuring period.

(2) In operating the company pursuant to Sub-section (1), the manager may exercise the following powers:

(a) Management and control of the business, properties and transactions of the company;

(b) Termination, sale and disposal of any business or property of the company;

(c) Doing or exercising any such act or power that the company or its officer may do or exercise.

(3) In exercising the powers referred to in Sub-section (2), the restructuring manager shall have power to inspect all books of account, ledgers, records, accounts and documents of the company.

(4) In doing or exercising any act or power set forth in this Section, the restructuring manager shall act in capacity of an agent of the company.

(5) If so sought by the restructuring manager, the director and other officer of the company shall provide any kind of such assistance as may be necessary for the management and control of the company.

(6) No director and officer of the company shall, except with written direction of the restructuring manager, exercise any power or do any act of the company in capacity of the director or officer of the company.

(7) The director of the company shall provide such information about the company and its business, property and transaction to the restructuring manager as sought by the restructuring manager.

32. Power of restructuring manager to borrow loan: (1)Where, in acting as the manager of the company, the restructuring manager considers any amount to be necessary to keep on running the company or operate the business and transaction of the company, he or she may borrow loan with or without furnishing the company's property as security.

(2) The amount of loan borrowed pursuant to Sub-section (1) and terms thereof shall be as set forth in Section 17.

33. Ceiling of remittance of loan of company: Where as per the agreement of creditors, the restructuring program provides for the remission or alteration in the terms of any loan or any portion of the loan not secured, such remission or alteration may be made in accordance with that program.

34. Implementation of restructuring program: (1) The company shall be responsible for implementing the restructuring program adopted by the meeting of creditors and approved by the Court pursuant to this Chapter.

(2) The Court shall designate the restructuring manager for the supervision and management of the implementation of the program referred to in Sub-section (1).

35. Alteration in an amendment to restructuring program: (1) Where it appears that the restructuring program cannot be implemented wholly or partly at the time of implementation of that program but that program can be implemented if it is altered or amended, the restructuring manager shall call a meeting of creditors in order to alter or amend that program.

(2) Where the meeting called pursuant to Sub-section (1) adopts a resolution altering or amending the program, it shall be submitted to the Court for approval.

(3) Where it is reasonable to approve the program submitted pursuant to Sub-section (2) for the interest of creditors, the Court may order to that effect.

(4) The program approved pursuant to Sub-section (3) shall be implemented as per such alteration or amendment.

36. Termination of restructuring program: (1) Where the company has already implemented the restructuring program or the Court, on application by the restructuring manager, makes an order to terminate the program because of the company's failure to implement it, such program shall terminate.

(2) Where the Court issues an order to terminate the restructuring program because of the company's failure to implement it pursuant to Subsection (1), it shall also issue an order to liquidate such company.

Chapter-5

Liquidation of Company

37. Liquidation of company on issuance of order for liquidation: (1)Where the Court makes an order to liquidate a company pursuant to this Act, the Court shall make an order to appoint one person as the liquidator, from amongst the persons who are entitled to carry on insolvency business at the time of making of such order.

(2) Following the making of order pursuant to Sub-section (1), the liquidation proceedings of the company shall be deemed to have commenced.

38. Consequences on the commencement of liquidation proceedings: (1) On the commencement of the liquidation proceedings of any company, the following provisions shall govern the following matters in relation to such company:

(a) Where the director and officer of the company are relieved of office, the liquidator shall exercise all such powers as may be exercisable by the director and officer of the company in relation to the management of that company;

(b) The liquidator shall take in his or her custody and control all assets, accounts and books of account of the company, except the properties in possession of secured creditors;

(c) Except as ordered otherwise by the liquidator, the service of all employees appointed by the company shall terminate.

(2) The provision relation to ipso facto suspension set forth in Section shall, except for the following matter, apply during the period of currency of liquidation proceedings:

(a) Implementation of the right of secured creditors to execute pursuant to this Act; or

(b) Implementation of the right of the lessor of any property leased to the company to redeem the property pursuant to this Act.

39. Conversion of liquidation of company into restructuring program: (1)Where, based on the study and examination of the business and assets of the company, nature of the goods or services to be produced by the company and market potentiality thereof, the liquidator thinks that the restructuring program of the company can be adopted by a meeting of creditors and approved, the liquidator may make an application, accompanied by the reasons, to the Court for an order to keep pending the order on liquidation of company issued by the Court pursuant to this Act for a certain period of time and to implement the restructuring program pursuant to this Act.

(2) Where the Court is satisfied with the contents of the application received pursuant to Sub-section (1), it may issue an order to suspend the order on liquidation of a company issued previously for any certain period of time and implement the restructuring program.

(3) Where an order is issued pursuant to Sub-section (2), the order shall be implemented pursuant to this Act.

40. Functions, duties and powers of liquidator: (1) The functions, duties and powers of the liquidator in addition to the other provisions set forth in this Act shall be as follows,:

(a) To institute or defend any case or legal action on behalf of the company;

(b) To appoint employees to assist in the discharge of his or her functions; (c) Where any installment on any share of the company is due, to make a call on the shareholder for payment of such installment;

(d) To do and execute, or cause to be done and executed, all such acts and deeds or documents as required to be done and executed on behalf of the company and in the name of the company and use the seal of the company for that purpose;

(e) To borrow loans against security of the assets of the company;

(f) Where the liquidator considers that the sale and disposal of any property or termination of any contract or liability will render benefits to the company, to sell and dispose of such property or terminate such contract or liability;

(g) To enter into compromise with any creditor of the company or any person who claims to be a creditor of the company in relation to the claim made by such creditor or person;

(h) To enter into compromise with any person against whom the company may make a claim in relation to any loan, liability or any other claim; (i) To sell the assets of the company and distribute the proceeds of such sale pursuant to this Act; and

(j) To perform, or cause to be performed, all such other acts as may be necessary to liquidate the company.

(2) It shall be the duty of the liquidator to perform the following functions, in addition to those set forth in Sub-section (1):

(a) To collect, protect and sell the assets of the company;

(b) To examine the business and financial situation of the company;

(c) To accept debt claim of any creditor subject to Chapter-6;

(d) To distribute the proceeds of sale of the assets of the company subject to the order of priority determined for the payment of liability pursuant to this Act;

(e) To call and conduct the meeting of creditors;

(f) To prepare a report on his or her acts and actions and present it to the Court and the Office;

(g) To facilitate the cancellation of registration of the company; and

(h) To examine or inquire into whether any director or employee or shareholder of the company or any person has committed any fraud, cheating or deception against the company or its creditors and institute necessary legal action against such person.

(3) In addition to the functions, duties and powers set forth in Subsection (1) or (2), the liquidator may also perform other functions such as to get back any property of the company if such property is used by any person or to institute legal action to get back such property or amount involved in a void transaction. Provided that the liquidator shall not be entitled to make such expenses as may not be payable from the assets of the company.

(4) Even though the company does not have adequate amount to pay necessary expenses or remuneration to the liquidator for the exercise of the powers or performance of the duties set forth in Sub-section (1), (2) or (3), the liquidator shall exercise such powers and perform such duties.

(5) Where the liquidator faces any difficulty with the exercise of any power or the performance of any duty pursuant to this Chapter, the liquidator may make an application to the Court for the removal of such difficulty; and where an application is so made, the Court may, if it holds the application to be reasonable, remove difficulty.

41. Money to be lent by creditor: (1) Where any act to be done by any company which has become insolvent may render or yield benefit or advantage to the creditors, any creditor of such company may advance money to the liquidator to do such act.

(2) Any amount borrowed pursuant to Sub-section (1) shall be paid from the amount received from such act.

(3) Any creditor may make an application to the Court for any order for making payment of a debt claim accepted by the company from the amount received pursuant to Sub-section (1).

(4) Where an application is made pursuant to Sub-section (3), the Court may, if it considers reasonable that such loan can be repaid from the amount referred to in Sub-section (1), make an order for that purpose.

42. Report to be submitted by liquidator: (1) The liquidator shall prepare a progress report on the proceedings carried out in relation to the company and submit it to the Court and the Office no later than three months after the date of his or her appointment.

(2) The report submitted pursuant to Sub-section (1) shall state the following matters, in addition to other matters:

(a) The amount of issued capital of the company, capital that the shareholders have undertaken to subscribe and paid-up capital;

(b) Estimated value of the assets and liabilities of the company;

(c) Opinion of the liquidator in relation to the reason for financial failure of the company;

(d) Opinion of the liquidator on the need to further examine or inquire into the promotion, incorporation of the company or the affairs of the company and its directors and shareholders;

(e) Such other necessary matters as the liquidator considers appropriate.

43. To call meeting of creditors: (1) The liquidator shall, prior to preparing his or her report pursuant to Section 42 and thereafter from time to time as per necessity, call a meeting of creditors of the company.

(2) A meeting of creditors shall be called pursuant to Sub-section (1) by fulfilling the requirements set forth in sub-sections (2) and (3) of Section 21.

(3) The liquidator shall chair the meeting of creditors.

(4) The provisions of Section 24 shall apply, mutatis mutandis, to the other matters relating to the meeting of creditors.

44. Power to form committee of creditors: (1) A meeting of creditors held pursuant to Section 43 may form a committee consisting of a maximum of five creditors in order to assist the liquidator in relation to the liquidation of the company.

(2) The scope of work of the committee formed pursuant to Subsection (1), rules of procedures relating to its meeting or other necessary matters shall be as specified by the meeting of creditors at the time of its formation.

45. To give time limit for submission of debt claim: (1) The liquidator shall give a notice with the time limit of fifteen days to all creditors of the company which has become insolvent to submit their respective debt claims in the prescribed format.

(2) The notice given pursuant to Sub-section (1) shall be published at least twice in a newspaper of national circulation.

(3) The liquidator may reject any claims of the creditors who have not made claim within the time limit referred to in Sub-section (1). Provided that where any creditor makes an application, accompanied by the reason for failure to submit his or her claim within that time limit, to the liquidator, the liquidator may accept such claim if the contents of such application are found reasonable.

46. Power of the Court to make order in relation to liquidation of company: Notwithstanding anything contained elsewhere in this Chapter, the Court may at any time issue the following order in respect of any company which is undergoing liquidation proceedings:

(a) To suspend or terminate the liquidation of the company;

(b) To require to hand over the assets of the company to the liquidator;

(c) To pay any call made for payment of installment;

(d) Where there is a doubt that any person is possessing or using any property of the company, to stop such possession or use; or

(e) To arrest any person who causes any hindrance in or obstruction to the performance of functions or duties or the exercise of powers by the liquidators.

47. Cancellation of registration of company: Any liquidator appointed to liquidate any company pursuant to this Chapter shall, while liquidate the company, cancel the registration of the company by following the procedures determined by this Act or by other laws in force.

Chapter-6

Claims of Creditors and Mode of Payment

48. Creditors to submit claims: (1) A creditor of the company which has become insolvent shall submit a claim for the loan due and outstanding or

payable by such company to him or her, in the prescribed format within the time limit specified by the restructuring manager or liquidator.

(2) While submitting a claim pursuant to Sub-section (1), the creditor shall also submit the proof and evidence substantiating such claim, if any, where the restructuring manager or liquidator demands such proof and evidence.

(3) The restructuring manager or liquidator shall examine the submitted pursuant to Sub-section (2) and may accept or reject such claim wholly or partly.

(4) Where the restructuring manager or liquidator accepts or rejects the claim wholly or partly pursuant to Sub-section (3), the manager or liquidator shall give written information thereof, accompanied by the reasons for such acceptance or rejection, to the creditor submitting the claim no later than seven days.

(5) The creditor who is not satisfied with the information received pursuant to Sub-section (4) may make an application to the Appellate Court for review no later than fifteen days.

(6) Even a foreign creditor who has lent money to the company pursuant to the laws in force may, if he or she has any debt claim against the company, submit a claim pursuant to this Section.

49. Claim for interest: Where any company which has become insolvent has borrowed a loan on the condition of paying interest on it according to the agreement entered into at the time of borrowing such loan, such interest may also be included in the claim made pursuant to Sub-section (1) of Section 48. Provided that no interest may be claimed for the period after the date of issue by the Court of an order to liquidate the company or implement the restructuring program of the company.

50. Claims on undetermined or contingent liability: (1) Except as set forth in Section 48, any claim on any liability of an undetermined value which

has resulted from any loss caused by the company, or from any compensation to be paid by the company to anyone as a result of its failure to comply with any contract or for having violated any contract, or from any other action which creates a civil obligation, or any claim on any contingent obligation of the company whose value is yet to be determined but which has resulted from the failure of a debtor to fulfill any obligation for which the company has provided guarantee under any guarantee agreement may be presented pursuant to Sub-section (1) of Section 48.

(2) Where a claim is received pursuant to Sub-section (1), the restructuring manager or liquidator shall either accept or reject such claim pursuant to Sub-section (3) of Section 48 and give a notice thereof pursuant to Sub-section (4) of the said Section.

(3) Where such claim is accepted pursuant to Sub-section (2), the restructuring manager or liquidator shall also determine the estimated value of such claim.

(4) Notwithstanding anything contained in Sub-section (3), the restructuring manager or liquidator may make an application to the Court to have the value of such claim determined; and where an petition is so made, the Court shall determine the estimated value of such claim.

(5) Any person who is not satisfied with the decision to reject the claim pursuant to Sub-section (2) or with the value of such claim determined pursuant to Sub-section (3) may make a complaint to the Court within fifteen days from the date of receipt of the notice thereof.

51. Immature claims: The restructuring manager or liquidator may make prescribed exemption from the debt claims relating to immature debts made against the company.

52. Claims involving foreign exchange: Any claims made in relation to any debt or other liability in a foreign currency under this Act shall be settled by calculating the value in the Nepali currency according to the exchange rate fixed by the Nepal Rastra Bank for the day on which an application is made to the Court for the liquidation, insolvency of the company or its restructuring.

53. Adjustment of debts: (1) Where there has been any other transaction between a company which has become insolvent and any creditor who makes a debt claim against the company, the debt or such debt claim or transaction shall be adjusted as follows:

(a) To determine the amount due to be paid by one party to the other party;

(b) To deduct the amount payable by one party to the other party from the amount determined pursuant to Clause (a);

(c) To fix only the amount that remains after making deduction pursuant to Clause (b) as the claim of debt payable by the company.

(2) Notwithstanding anything contained in Sub-section (1), any person who has supplied to or obtained a debt from the company when that person has knowledge or had a reasonable reason to have knowledge that the company has become insolvent shall not be entitled to make a claim to have the amount due to be paid to that person by the company deducted from the amount payable by that person to the company. Explanation: For the purposes of this Section, the expression "company which has become insolvent" shall mean a company in relation to which an application has been filed in the Court for the restructuring or liquidation of that company.

54. Right of secured creditor to make claim: (1) A secured creditor may make a debt claim against the company at any time; and the restructuring manager or

liquidator may accept or reject that claim pursuant to Sub-section (3) of Section 48.

(2) The amount to be claimed pursuant to Sub-section (1) shall be limited to the difference between the amount received from the property according to its market value and the amount payable by the company to the secured creditor.

(3) Where there arises a dispute between the secured creditor and the company which has become insolvent in relation to the difference between the value of the secured property and the amount outstanding and payable pursuant to Sub-section (2), a party who is not satisfied with that matter may make an application to the Court; and the Court may examine the application so made and determine the difference.

55. Shareholder's claim: Where any creditor who is also a shareholder of a company which has become insolvent makes a claim against the company, and where that creditor has not paid any amount due on his or her share and where the time has already matured to pay such amount or there may arise a situation requiring him or her to pay the same, his or her claim up to the extent of the amount likely to be so paid shall not be accepted.

56. Deemed to be creditor if debt is accepted: (1) Where a debt claim made by a person making a claim against the company which has become insolvent is accepted pursuant to this Chapter, that person shall acquire the status of creditor.

(2) A person who acquires the status of creditor pursuant to Subsection (1) shall acquire the right to participate in a meeting of creditors, exercise the voting right to the extent of the accepted debt claim and receive payment of the amount of debt under this Act.

57. Order of settlement of liabilities: (1) While settling the liabilities of a company which is being liquidated under this Act, the liquidator shall

make payment of liabilities from the available funds according to the following order of priority:

(a) All expenses associated with the functions discharged by the interim administrator appointed pursuant to Sub-section (4) of Section 11 and remuneration;

(b) Other amounts to be settled pursuant to Chapter-2;

(c) All expenses associated with the functions discharged by the inquiry officer appointed pursuant to sub-sections (3) and (4) of Section 10 and remuneration;

(d) All expenses associated with the functions discharged by the restructuring manager appointed pursuant to Sub-section (2) of Section 22 and remuneration;

(e) All debts of the company borrowed during the period of investigation of the insolvency proceedings;

(f) All debts of the company borrowed during the period of the restructuring program of the company;

(g) All expenses associated with the functions discharged by the liquidator appointed pursuant to Sub-section (1) of Section 37 and remuneration;

(h) Wages and remuneration due and payable to the workers or employees of the company at the time of the issue of the order under this Act to liquidate or restructure the company; Provided that no director of the company shall be entitled to such amount.

(i) Amounts payable to the workers or employees of the company in consideration of home leave, sick leave, gratuity and employee provident fund, if any, at the time of the issue of the order under this Act to liquidate

or restructure the company; Provided that no director of the company shall be entitled to such amount.

(j) All other amounts in consideration of debt claims accepted by the liquidator.

(2) Every liability falling in the order of priority referred to in Subsection (1) shall be treated equally; and all liabilities falling in such order shall be settled fully. Provided that if such liabilities cannot be settled fully, they shall be settled proportionately.

(3) Where any liability of the company is insured, the amount receivable under such insurance contract shall be paid to that person who is entitled to it.

(4) Where the liabilities mentioned in Sub-section (1), (2) or (3) are settled fully, the surplus shall be used by the liquidator to pay interest payable on debts from the date of the order issued to liquidate or restructure the company to the date of acceptance of the debt claim. The amount remaining after such payment shall be distributed among the preference shareholders, and the remaining amount shall be distributed among the other shareholders proportionately.

58. Mode of settling liabilities: While settling the liabilities of the creditors pursuant to this Chapter, the liquidator may do so at one time or at different times

Chapter-7

Voidable Transactions

59. Voidable transactions: (1) Where any company has become insolvent, the following transactions shall be void:

(a) Preferential transactions carried on in advance of six months immediately preceding the commencement of the insolvency proceedings or within the period of six months after the commencement of the proceedings;

(b) Preferential transactions carried on with the associated persons of the company in advance of one year immediately preceding the commencement of the insolvency proceedings or within the period of one year after the commencement of the proceedings; Explanation: For the purposes of Clause s (a) and (b), the expression "preferential transactions" shall mean any transactions done or entered into with a provision for payment of amount that exceeds the payment which any creditor of the company other than a secured creditor would have been entitled to get if the creditor had made a claim against the company at the time of its liquidation.

(c) Any under-valued transactions have been carried on in advance of one year immediately preceding the commencement of the insolvency proceedings or within the period of one year after the commencement of the proceedings and the company has become insolvent as a consequence of such transaction or other under-valued transactions carried on after the commencement of the insolvency proceedings; Explanation: For the purposes of this Clause , the expression "under-valued transactions" shall mean any transactions in relation to which the company has received a value that is lower than the prevailing market value or has not received any value at all for any consideration given by the company to the other party to the transactions.

(d) All fraudulent transactions carried on in advance of two years immediately preceding the commencement of the insolvency proceedings or within the period of two years after the commencement of the proceedings; Explanation: For the purposes of this Clause , the expression "fraudulent transactions" shall mean any transactions carried on, in relation to any assets of the company, with ulterior motive to cheat the creditors of the

company or delay making payments to them or prejudice the rights of the creditors.

(2) The liquidator shall make an application to the Court to have the transactions referred to in Sub-section (1) declared void.

(3) While making an application pursuant to Sub-section (2), the liquidator shall prove that the company was insolvent when such transactions were carried on or the company has become insolvent by the reason of such transactions.

(4) Where any associated person of the company is found involved in the proceeding carried out in relation to void any voidable transactions, it shall be presumed that the company was insolvent when such transactions were carried on or the company has become insolvent by the reason of such transactions.

60. To defend voidable transactions: (1) The associated person may prove the following matters in his or her defense: (a) That the company was not insolvent when the transactions were carried on; (b) That he or she has not derived any benefit from the transactions; (c) That the company was insolvent when any benefit was derived from the transactions or there was no reasonable reason to suspect that the company might become insolvent by the reason of the transactions.

61. Powers of the Court in relation to voidable transactions: (1) Where the Court is satisfied that any transaction is voidable, the Court may issue orders as follows: (a) To order the concerned person to pay to the liquidator some or all of the amounts paid by the company in connection with such transaction; (b) To order the concerned person to hand over to the liquidator the asset so transacted or an amount equivalent thereto; (c) To order that the debt obtained by the company through such transaction, or the collateral or guarantee furnished by the company for that debt be fully or partly remitted or released; (d) To order that any remission

or assignment made or agreement entered into between the company and any other person in consequence of the voidable transaction be void, inoperative or unenforceable.

(2) The Court may also issue any such other additional order any may be required to enforce the order issued pursuant to Sub-section (1).

62. Right to claim amount paid in consideration of preferential transaction:

Any creditor who pays any amount to the liquidator in relation to any preferential transaction made with the company, according to the order of the Court or for any other reason, may make a claim for that amount as a debt claim against the company in liquidation.

Chapter-8

Insolvency Practice, and Regulation and Administration Thereof

63. Prohibition on carrying on insolvency practice without license: (1) No person shall operate insolvency practice without obtaining a license from the Office pursuant to this Act. (2) Any person who has not obtained the license pursuant to Subsection (1) shall not be appointed as the inquiry officer, restructuring manager or liquidator in the course of carrying out insolvency proceedings under this Act. Where any person other than a licensee is appointed as the inquiry officer, restructuring manager or liquidator, such appointment shall ipso facto be void.

64. Application to be made for license: (1) A person who is desirous of obtaining a license pursuant to Sub-section (1) of Section 63 shall make an application, along with the prescribed fee, to the Office in the prescribed format.

(2) A person who makes an application pursuant to Sub-section (1) shall meet the following conditions: (a) Have completed the age of thirty five years; (b) Being a member of the prescribed professional association; (c) Having acquired at least bachelor's degree in commercial law, commerce, management, accounts or any

other prescribed subject from a recognized university; (d) Having abode in the State of Nepal; (e) Being competent to carry on insolvency practice under this Act.

(3) On receipt of an application under Sub-section (1), the Office shall, if it considers appropriate to issue a license to carry on the insolvency practice, issue the license in the prescribed format.

(4) The license issued pursuant to Sub-section (3) shall be renewed as prescribed.

65. Establishment of Insolvency Administration Office: (1) After the commencement of this Act, the Government of Nepal shall establish an Insolvency Administration Office, by notification in the Nepal Gazette. Pending the establishment of such Office, the Government of Nepal may designate any of its offices to perform the functions of the Insolvency Administration Office.

(2) The Office established pursuant to Sub-section (1) shall perform the following functions:

(a) To administer insolvency practice;

(b) To register insolvency practitioners, issue licenses to them, and renew such licenses;

(c) To carry out general supervision of the management of companies which have become insolvent;

(d) To conduct investigations of the code of office required to be observed by insolvency practitioners;

(e) To maintain records of each company which has become insolvent; and

(f) To perform such other functions as prescribed.

66. Power to suspend or cancel license: (1) Where a complaint is made that any person licensed pursuant to Sub-section (3) of Section 64 has not performed the

functions as set forth in the license or the Office makes a report to that effect or the Court itself so considers, then the Court may institute action in this respect and issue an order suspending or canceling the license of such person.

(2) Prior to issuing any order pursuant to Sub-section (1), such person shall be provided with an opportunity to defend himself or herself.

(3) The Court may issue the order referred to in Sub-section (1) on the following grounds:

(a) Where the licensee does any act that is prohibited under this Act;

(b) Where the licensee does any acts required to be done under this Act in a reckless manner or fails to act such acts in a proper manner;

(c) Where the person licensed to practice insolvency himself or herself becomes insolvent;

(d) Where the person licensed to practice insolvency is convicted by a court of corruption, cheating, forgery or fraud.

67. Vacancies to be filled by Court: Where the office of the restructuring manager or liquidator appointed under this Act falls vacant as a result of the suspension or cancellation of license pursuant to Sub-section (1) of Section 66 or for any other reason, the Court may issue an order to appoint any other person who has possessed the qualification referred to in this Act to fill the vacancy by fulfilling the procedures followed while making the original appointment.

68. Remuneration: (1) The remuneration of the inquiry official, restructuring manager or liquidator appointed under this Act shall be as fixed by the meeting of creditors from time to time.

(2) Where remuneration cannot be fixed pursuant to Sub-section (1), the Court may specify such remuneration on the basis of the report of the Office.

69. Separate account to be opened: (1) The restructuring manager or liquidator appointed under this Act shall, while conducting insolvency proceedings under this Act, open and operate a separate bank account of every company to which he or she has been appointed.

(2) All amounts received by him or her shall be paid into the bank account opened pursuant to Sub-section (1).

(3) Any amount balance in the bank account opened pursuant to Sub-section (1) shall be invested only in the prescribed fields.

(4) In addition to those mentioned in Sub-section (1), the restructuring manager or liquidator shall maintain other accounts and books of accounts clearly reflecting the full and actual affairs of the insolvency proceedings of every company which has become insolvent and submit the statements of such accounts and books to the Court or the Office, as per necessity.

(5) The restructuring manager or liquidator shall, on performance of his or her duties, shall have the accounts and books of accounts, as well as the statements thereof, maintained by him or her pursuant to this Section audited in accordance with the laws and hand them over the same to the Office.

70. Power to remove by order of Court: (1) Where a complaint is made that a restructuring manager or liquidator appointed pursuant to this Act has failed to work in accordance with this Act while carrying out the insolvency proceedings of any company assigned to him or her or where his or her conduct is found to be contrary to this Act, the Court may issue an order to remove him or her.

(2) The concerned person shall not be deprived of an opportunity to defend himself or herself, prior to issuing the order referred to in Subsection (1).

71. Reply to be made: Where the Court or the Office asks the restructuring manager or liquidator appointed pursuant to this Act any question in relation to any act or action done or taken by him or her, he or she shall make a reply to such question promptly.

Chapter-9

Miscellaneous

72. Offense and punishment: (1) A person shall be deemed to have committed an offense under this Act if he or she commits, or causes the commission of, any of the following acts:

(a) Where a person holding the office of director of a company does not submit to the Court a report on the financial condition and transaction of the company in the prescribed format under Section 16;

(b) Where any person acts as an insolvency practitioner without obtaining a license from the Office pursuant to this Act;

(c) Where the director of a company deliberately conceals the fact that the company has become insolvent or is going to become insolvent;

(d) Where an insolvency practitioner fails to discharge any such function in good faith as required to be discharged by him or her under this Act; or

(e) Where any director or employee or shareholder or other person of a company commits any act of fraud or forgery against, or cheats or misleads, the company or its creditors.

(2) The Court may punish any director who commits the offense referred to in Clause (a) of Sub-section (1) with a fine not exceeding fifty thousand rupees.

(3) The Court may punish any person who commits the offense referred to in Clause (b) of Sub-section (1) with a fine from ten thousand rupees to fifty thousand rupees.

(4) Any director who commits the offense referred to in Clause (c) of Sub-section (1) shall be punished with a fine not exceeding two hundred thousand rupees; and the director shall pay such fine personally.

(5) Where any company, creditor or concerned party suffers any loss as a result of the failure of an insolvency practitioner to discharge such function in good faith as required to be discharged by him or her as mentioned in Clause (d) of Sub-section (1), compensation for such loss shall be recovered from such practitioner, and he or she may also be punished with a fine not exceeding five hundred thousand rupees.

(6) The Court may punish any director, employee, shareholder or other person who commits the offense referred to in Clause (e) of Subsection (1) with imprisonment for a term from one year to two years and with a fine from one hundred thousand rupees to five hundred thousand rupees; and the amount involved in the offense shall also be recovered from such offender.

73. Cases to be filed: Where any person appears to have committed any of the offenses referred to in Section 72, the liquidator, Office or concerned party may file a case, along with the grounds for the same, in the concerned court.

74. Recovery of expenses and compensation: (1) Where any person makes an appeal to the concerned court against any order issued or decision made by the Court in relation to the insolvency proceedings instituted under this Act and the order or decision of the Court is also substantiated by the appellate level, the other party shall be entitled to have all expenses which he or she had to incurred in the course of such action recovered from the person making such appeal.

(2) Where it appears that the insolvency proceedings have prolonged as a result of any action instituted by any person pursuant to Subsection (1), which has resulted in any loss or damage to the concerned company or its creditors or shareholders, the Court may also order such person to pay compensation for the actual loss or damage.

75. Power to frame Rules: The Government of Nepal may frame necessary rules in order to implement the objectives of this Act.

76. Power to frame manuals: The Office may frame necessary manuals in order to facilitate the insolvency proceedings.

77. Effect of inoperativeness of the Insolvency Ordinance, 2005(2005): With the Insolvency Ordinance, 2005 (2005) being inoperative, unless a different intention appears, the inoperativeness shall not:

(a) revive anything not in force or existing at the time at which the Ordinance became inoperative;

(b) affect the matter in operation as per the Ordinance or anything duly done or any punishment suffered thereunder;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Ordinance;

(d) affect any penalty, punishment or forfeiture incurred under the Ordinance;

(e) affect any action or remedy made or taken in respect of any such right, privilege, obligation, liability, penalty or punishment as aforesaid; and any such legal proceeding or remedy may be instituted, continued or enforced as if the Ordinance were in force.

Annex 2

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]

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]*.

Article 5. Authorization of [insert the title of the person or body administering 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 hard 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].

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.

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 reviewed 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.