

**PIERCING THE MORATORIUM:
INSOLVENCY SAFEGUARDS AND CARVE-
OUTS FOR PMLA ENFORCEMENT**

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ABSTRACT

The Indian insolvency regime facilitates a market-directed time-bound insolvency resolution process. The Prevention of Money Laundering Act, 2002 (hereinafter “PMLA”) on the other hand endeavours to prevent money-laundering and connected activities. This article engages with the lacuna pertaining to the simultaneous application of IBC and PMLA wherein the ongoing insolvency proceedings are afflicted by PMLA attachment orders over CD’s property in light of the moratorium and clean slate under section 32A being enforced. The imposition of a moratorium¹ bars proceedings against the properties of a corporate debtor (“CD”).² Alternatively, PMLA bestows power for

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¹The Insolvency and Bankruptcy Code, 2016 s 14.

²The Insolvency and Bankruptcy Code, 2016 s 32A.

attachment of property involved in money laundering.³ The conflict transpires in cases where during the ongoing insolvency proceedings PMLA authorities issue summons and notices for attachment of CD's properties.⁴ Such orders directly contradict IBC provisions that forbid action against CD's asset and consequently afflict the proceedings leading to prolonged litigation. The article proceeds by emphasizing that courts have defended the primacy of IBC over PMLA. Further, IBC's provision of a clean slate and moratorium has undermined the legislative intent of PMLA and created a potential escape route for offenders. Thereafter, the article puts forth a suggestive model to be adopted within the insolvency and money laundering framework to rectify the aforementioned discrepancies. These solutions uphold the objectives of PMLA and ensure that there is no blanket precedence of IBC resolution over PMLA driven attachment of assets. These solutions are conceptualized from a cross – jurisdictional analysis of the insolvency and money laundering frameworks of USA, Canada and UK. The suggested model includes an overall structuralist approach, inter – agency co-ordination, a common database of properties ordered to be attached and proposed amendments to the SCN Notice.

³The Prevention of Money Laundering Act, 2002 s 5.

⁴*Srei Multiple Assets Investment Trust - Vision India Fund v Enforcement Directorate and Ors* [2024] MANU/NC/2649/2024 (NCLT); *JSW Steel Ltd v Mahedra Kumar Khandelwal* [2020] 2020 SCCOnline NCLAT 431 (NCLAT).

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I. INTRODUCTION

A piquant scenario often emerges where two legislations with conflicting provisions apply simultaneously. The statutory authorities exercising their power under the competing statutes are often at loggerheads. This leads to the potential operational and jurisdictional challenges. The quandary is reflected at the intersection between the Insolvency and Bankruptcy Code 2016 (hereinafter, referred to as IBC) and the Prevention of Money Laundering, 2002 (hereinafter, referred to as PMLA). The article analyzes the concurrent application of both the statutes and highlights the judicial preference of IBC over PMLA. It seeks legislative interventions for harmoniously upholding their objectives and enforce a balanced framework. Before, delving into these conundrums in depth, it is imperative to discern the legislative scheme of the respective statutes and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations.⁵

IBC is a beneficial legislation that puts the corporate debtor back on its feet, not being mere recovery legislation for creditors.⁶ The enactment of IBC, is aimed at consolidating the laws relating to reorganization and insolvency of corporate persons in a time-bound manner for maximization of value of assets, promoting entrepreneurship and balancing interests of all stakeholders. On the other hand, PMLA as per

⁵*Binani Industries Limited v Bank of Baroda* (2018) SCC OnLine NCLAT 457 (NCLAT) p 17; Insolvency and Bankruptcy Board of India, *Handbook on IBC* (IBBI, 2020)

¹<https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 10 September 2024

⁶*Glas Trust Co. LLC v Byju Raveendran* (2024) SCC OnLine SC 4064 (SC).

its objective clause,⁷ has been enacted to prevent money laundering and provide for confiscation of property derived from, or involved in money laundering. As per the statute itself, it was enacted in furtherance of the Political Declaration adopted by the Special Session of the United Nations General Assembly held from 8th to 10th June, 1998.⁸

A central issue stems from the overlapping authority granted by these statutes, leading to conflicts in their enforcement. PMLA empowers the adjudicating authority through Section 5,⁹ to order the attachment of assets of any individual, believed to be in possession of any proceeds of crime¹⁰. Further, owing to Section 71, the act itself has an overriding effect over any inconsistencies with any other law.¹¹ Standalone, the provisions of PMLA allow for proceedings to be straightforward in terms of attachment of property that is believed to be proceed of crime. Previously, concerns have arisen in cases where such property that is ordered to be attached, belongs to an insolvent corporate debtor, either about to or already undergoing Corporate Insolvency Resolution Process (CIRP).¹² The IBC entails certain exemptions for Corporate Debtors (hereinafter, referred to as CD) and their properties, once they initiate CIRP through Section 14 and 32A.

Ordinarily, IBC within Section 32A, grants a clean slate to any individual, liable for any offence committed prior to the initiation of the insolvency process.¹³ Thus, from the time that the CIRP is initiated to the time the resolution plan is approved or the liquidation order is

⁷The Prevention of Money Laundering Act, 2002.

⁸United Nations General Assembly, 'RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY Political Declaration', UNGA S-20/2 (10 June 1998) A/RES/S-20/2.

⁹The Prevention of Money Laundering Act, 2002 s 5.

¹⁰*Biswanath Bhattacharya v Union of India* (2014) 4 SCC 392 (SC).

¹¹The Insolvency and Bankruptcy Code, 2016 s 71.

¹²*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).

¹³The Insolvency and Bankruptcy Code, 2016 s 32A.

passed, the CD cannot be prosecuted. Within the same provision, no action can be taken against any property, which is included in the resolution plan.¹⁴ Such *action* includes attachment, seizure, or confiscation. Akin to Section 71, PMLA, IBC, through Section 238, allows for an overriding effect of the act in case of inconsistencies with other acts.¹⁵ Accordingly, the conflict arises in cases where the Enforcement Directorate orders for attachment of assets of an individual who is also an insolvent CD, either undergoing or about to undergo CIRP.

Upon a close scrutiny of court and tribunal's verdicts, it is well observed that courts are inclined to uphold the primacy of IBC over PMLA. This standpoint, consequently, undermines PMLA's objective to prevent money-laundering and confiscation of proceeds of crime. PMLA protects the public interest by ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth as accomplished by the attachment of assets by ED¹⁶. However, IBC provisions bar the institution of proceedings during insolvency proceedings thus restraining the claims of PMLA authorities and jeopardizing public interest.

To resolve the aforesaid dispute, the article provides an analytical framework to harmonize the public interest substantiated by PMLA and the preservation of CD's assets under IBC. Solutions are devised in a two-fold approach. Firstly, proposal derived from the cross-jurisdictional analysis tailored as per Indian context. The chosen jurisdiction includes the United States of America ('USA'), Canada, and the United Kingdom ('UK') since each of them presents a distinct resemblance with the Indian insolvency regime.

¹⁴*Manish Kumar v Union of India* (2021) 5 SCC 1 (SC).

¹⁵The Insolvency and Bankruptcy Code, 2016 s 238.

¹⁶*R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited* (1977) 4 SCC 98.

The author proposes creation of inter-agency coordination mechanisms to resolve the simultaneous application conundrum between IBC and PMLA. It argues firstly, incorporating a structuralist approach for adjudicating the competing claims; secondly, the creation of a comprehensive database of properties undergoing corporate resolution or attachment by ED, which would ensure complete disclosure of all claims over certain properties, at the very first instance; lastly improving procedural efficiency and introducing a standardized format of Show Cause Notice (SCN) issued under section 8 PMLA.

The article proceeds in four parts. The first part underpins the conundrum of intersectionality between IBC and PMLA. It opines that courts have affirmed the primacy of IBC, compromising PMLA. Further court's appreciable attempts for harmonious construction are not synthesized in practical application. Next part establishes that the objective of PMLA is undermined by the reason for the prohibition of proceeding against CD under IBC. Concerns about the possibility of the moratorium turning into an escape route are raised. Following this, recommendations are provided to address the IBC-PMLA dilemma and this suggested model is conceptualized through a cross - jurisdictional analysis of the money laundering and insolvency regimes of UK, USA and Canada.

Part four, advances instituting an inter-agency coordination mechanism that includes a structuralist approach attempting to reconcile claims within competing statutes, creation of a database for properties undergoing a resolution process of attachment by ED for transparency and disclosure of information and standardization of SCN issued by AA under PMLA. Lastly, the paper is concluded with first, a reiteration of the moot question of consideration, issues with the current jurisprudence deciding the tussle between PMLA and IBC, and alternatives and solutions for the same.

II. TRANSPIRING DISCORD: AN IBC AND PMLA INTERSECTION

Exploring the intersectionality between IBC and PMLA, this section undertakes a twofold analysis unraveling conflicting standpoints of courts and tribunals considering the following issues. *Firstly*, primacy between the statutes, and *secondly*, implications of the moratorium imposed under section 14 of IBC and application of section 32A of IBC which incorporates the clean slate theory over the attachment of assets. Establishing upon the aforementioned examination, the author argues that the present legal landscape tilts towards the primacy of IBC over PMLA. Moreover, there prevails a status quo regarding constructive harmonization of both the statutes which requires a reconsideration.

The question of primacy between PMLA and IBC ensues as both the legislations contain a “*non-obstante*” clause. Non – Obstante clause is a legislative tool used to ensure that a specific provision takes precedence over any conflicting provisions, whether within the same law or in a different legislation to avoid the operation and effect of all contrary provisions.¹⁷ Section 71 PMLA provides an overriding effect to the provisions of the PMLA, while Section 238 IBC gives overriding effect to the provisions of the IBC, thereby restricting the operation of one legislation over the other.¹⁸ The Delhi High Court addresses the issue of primacy between PMLA and IBC in *Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors*¹⁹ The appeal concerns the state’s sovereign authority to confiscate property acquired by a person through criminal activity as against the lawful claim of a third party. The appellate tribunal (under PMLA) upheld that PMLA

¹⁷*Union of India v G.M. Kokil* (1984) Supp SCC 196 (SC).

¹⁸Naman Mishra, ‘Holier than Thou? A Tussle for Primacy Between IBC And PMLA’ (CBCL, 20 May 2023) <<https://cbcl.nliu.ac.in/insolvency-law/holier-than-thou-a-tussle-for-primacy-between-ibc-and-pmla/>> accessed 29 March 2025.

¹⁹*Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors* (2019) SCC OnLine Del 7854 (DHC)

provisions will take a back seat and third parties will lay a superior claim. The High Court challenged this reasoning and upheld that PMLA's purpose and context are distinct from RDBA, the SARFAESI Act, and the Insolvency Code.²⁰ These laws must co-exist, each being construed and enforced in harmony, without one being in derogation of the other.²¹

The concurrent application of PMLA and IBC presents a legislative challenge to reconcile PMLA asset attachment orders and IBC protective provisions. The conflict arises when CD undergoing insolvency proceedings is simultaneously investigated under the PMLA.²² Section 5 of PMLA²³ empowers adjudicating authorities to order the attachment of assets of any individual that they believe to have any proceeds of crime. Particularly when the actions of such an individual would undermine the confiscation proceedings such PMLA attachment orders are met with the bar imposed under sections 14 and 32A of IBC that preserve the CD assets by prohibiting the institution or execution of proceedings against CD properties. Section 14 of the IBC effectuating moratorium states that on the date of commencement of insolvency, the Adjudicating Authority shall declare a moratorium for prohibiting the institution of suits.²⁴ Likewise, Section 32A bars proceedings against the CD from the date the resolution plan has been approved by the Adjudicating Authority.²⁵ This conjures a paradox for

²⁰‘Money Laundering Law Prevails Over Bankruptcy Act, Insolvency Code Rules Delhi High Court’ (*Manupatra*, 2 April 2019) <<https://updates.manupatra.com/roundup/contentsummary.aspx?iid=20954>> accessed 28 March 2025.

²¹*ibid.*

²²Shashwat Bhutani and Sristi Nimodia, ‘PMLA vs IBC? Analysing the validity of property attachment during the moratorium’ (*Taxmann*, 4 August 2023) <<https://www.taxmann.com/research/ibc/top-story/10501000000023158/pmla-vs-ibc-analysing-the-validity-of-property-attachment-during-the-moratorium-experts-opinion>> accessed 27 July 2024.

²³The Prevention of Money Laundering Act, 2002 s 5.

²⁴The Insolvency and Bankruptcy Code, 2016 s 14.

²⁵The Insolvency and Bankruptcy Code, 2016 s 32A.

adjudicating PMLA attachment orders and bars against proceedings under IBC. Resolving the conflict divergent standpoints have emerged.

The view that the attachment of property is permissible by the PMLA authorities has been endorsed by NCLAT in *Kiran Shah v. Directorate of Enforcement, Kolkata*²⁶, and Delhi HC in *Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement*²⁷.

In *Kiran Shah v. Directorate of Enforcement, Kolkata*, the appellant seeks to quash the PMLA orders attaching properties. In the instant case, neither the resolution plan was approved by the tribunal nor the Liquidation Proceedings had ended in the sale of Liquidation Assets of CD. NCLAT opined that Section 14 IBC 'moratorium' is not a hindrance for the 'Authority' and the Officers under PMLA to deny a person of the tainted 'Proceeds of Crime'²⁸. Furthermore, NCLT is not empowered to deal with matters falling under the purview of another authority under PMLA²⁹. Likewise, in *Rajiv Chakraborty's case*, the petitioner challenged the attachment order passed by ED in the exercise of powers conferred by the PMLA. The court examines the impact of a moratorium under Section 14 IBC over the powers of ED to enforce an attachment under PMLA. The court recognizes that the power to attach

²⁶*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).

²⁷*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.

²⁸'NCLAT: IBC-moratorium cannot prevent property attachment under PMLA; NCLT cannot exercise jurisdiction in money laundering matters' (*Agrud Partners*,) <<https://agrudpartners.com/nclat-ibc-moratorium-cannot-prevent-property-attachment-under-pmla-nclt-cannot-exercise-jurisdiction-in-money-laundering-matters/#:~:text=NCLAT%20further%20observed%20that%20Sec.%2014%20of%20IBC%20dealt%20with%20the%20provision%20of%20the%20moratorium%20but%20it%20does%20not%20hinder%20the%20Authority%20and%20Officers%20under%20PMLA%20to%20deny%20a%20person%20of%20%20Proceeds%20of%20Crime>> accessed 20 March 2025.

²⁹*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).

under the PMLA would not fall within the ken of Section 14(1)(a) IBC subjected to section 32A restrictions.³⁰

Contrastingly, the court took a distinctive standpoint from the aforementioned decisions in *Shiv Charan v Adjudicating Authority*. The question before the Bombay High Court in *Shiv Charan* was to determine whether NCLT had the jurisdiction to direct ED to release the attached properties, invoking Section 32A of IBC, since Section 32A mandates that attachments over properties of CD would cease once the CD resolution plan is approved.³¹ The court observed that the NCLT validly exercised its jurisdiction to interpret Section 32A. It also upheld that CD would be discharged from the offences allegedly committed prior to CIRP. Further, the attached properties would become free of attachment from the time the resolution plan is approved, and it is protected under Section 32A. A similar rationale was echoed in the decisions of *Bank of India v. Deputy Director Enforcement Directorate*³², *Punjab National Bank v. Deputy Director Directorate of Enforcement, Raipur*³³ that upheld Adjudicating Authority should stay the attachment after the declaration of moratorium. The rationale that underpins the primacy of IBC over PMLA as observed by the Delhi High Court in *Nitin Jain Liquidator PSL Limited v. Directorate of Enforcement*, recognized that while reconciliation between the IBC and the PMLA insofar as the present petition is concerned, needs to be answered solely on the anvil of Section 32A³⁴. The underlying principle behind the import of section was to assure the resolution applicant that its offer once accepted would

³⁰*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.

³¹*Shiv Charan v Adjudicating Authority* (2024) SCC OnLine Bom 701 (BHC).

³²*Bank of India v Deputy Director Enforcement Directorate* (2019) MP-PMLA-5595/AHD/2019.

³³*Punjab National Bank v Deputy Director Directorate of Enforcement, Raipur* FPA-PMLA-2633/RP/2018.

³⁴*Nitin Jain Liquidator PSL Limited v Directorate of Enforcement* (2021 SCC) OnLine Del 5281 (DHC)

stand sequestered from action for enforcement of outstanding claims against the corporate debtor or from penalties connected with offenses committed prior thereto³⁵ Thus objectives sought to be achieved at the forefront is maximization of the value of the assets³⁶.

It has been well observed that the scales of balance between PMLA and IBC are tilted in favour of IBC. Primarily for upholding the objective of IBC in terms of timely resolution and promotion of entrepreneurship, courts have squarely held that once the resolution plan is approved, there shall be a blanket exemption on properties of the CD from attachment³⁷ as well as a clean slate for the CD, in terms of prosecutions for offences committed prior to the resolution process being initiated.³⁸ Carrying the dicta forward, the courts have further held that even for cases where property is attached to PMLA, but it belongs to the CD, the same must be released.³⁹ This blanket exemption, while upholding the objectives of IBC, does not place due consideration to the objectives of PMLA, that are undermined in the process.

This standpoint furthermore diminishes the principle of harmonious construction that has been acknowledged by the courts to balance the objective of the statutes.⁴⁰ The Delhi High Court in *ED v Axis Bank* affirmed that PMLA and Insolvency Code must co-exist, construed, and enforced in harmony.⁴¹ This notion was refined in *Nitin Jain*

³⁵ibid.

³⁶*Manish Kumar v Union of India* (2021) 5 SCC 1 (SC).

³⁷*Enforcement Directorate v Axis Bank*, (2019) SCC OnLine Del 7854 (DHC).

³⁸*Ghanashyam Mishra & Sons (P) Ltd. v Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657

³⁹*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).

⁴⁰*Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).

⁴¹*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).

*Liquidator PSL Limited v Enforcement Directorate*⁴² where the court purported a purposive interpretation approach. Through discerning the legislative scheme, authorities discharge their obligations without encroaching upon facets reserved to be exclusively governed by one of the competing statutes. Consonantly, in *Rajiv Chakraborty*, it was reiterated that where two special legislations incorporate non-obstante clauses, it is imperative for the Court to discern the true intent and scope of the two legislations.⁴³

While these are appreciated attempts to resolve the conundrum nonetheless, they suffer limitations from an enforcement perspective. The context and intent of both statutes are distinct and not subservient to one another. Excessive jurisdictional and operational overlap drives the authorities at loggerheads constraining the application of court's verdict. Furthermore, the absence of a statutory framework or judicial guideline impedes any stark demarcation. The implementation of purposive interpretation requires necessary coordination, interface, and awareness. This underpins the necessity for courts or policymakers to cull out specific non - exhaustive factors/parameters to be considered while adjudicating the interplay between PMLA and IBC for placing a verdict on merits.

III. CHALLENGES ARISING FROM PRIMACY OF IBC OVER PMLA

A. Undermining Legislative Intent Of PMLA

IBC and PMLA, as statutes created with specific legislative intents, operate affecting completely distinct realms of rights and

⁴²*Nitin Jain Liquidator PSL Limited v Directorate of Enforcement* (2021) SCC OnLine Del 5281 (DHC).

⁴³*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.

stakeholders.⁴⁴ IBC works to effectuate resolution, impacting corporate debtors and creditors, and as a consequence ease of doing business and promotion of entrepreneurship.⁴⁵ PMLA in a contrasting realm, aims to prevent money laundering, not for any individual but for public welfare and society at large.⁴⁶ In the instance that these distinctly purposed acts intersect or clash, any interpretation or solution that favours one over the other statute would directly undermine the intent of one, while upholding the other. The two statutes, affecting the rights of varied sections and stakeholders, necessitate a harmonious understanding to balance the interests of all parties involved.

The current jurisprudence, while prioritising the rights of corporate debtors and their bona fide claims over property,⁴⁷ completely undermines the socially necessary objective of confiscation of proceeds of crime. While comparing apples and oranges, the courts have prioritised the broader goal of ensuring ease of doing business and promotion of entrepreneurship,⁴⁸ over public order, which is ensured by the prevention of money laundering.⁴⁹ The rationale of protecting the rights of all stakeholders affected by the resolution process as a priority, does not give due consideration or contemplation to the rights of the society at large, affected by money laundering. While courts themselves have acknowledged the broader need for harmonious construction of the two acts,⁵⁰ the application of a blanket exemption, without due consideration of the myriads of rights affected by money

⁴⁴The Insolvency and Bankruptcy Code, 2016 objective clause; The Prevention of Money Laundering Act 2002, objective cl.

⁴⁵Insolvency and Bankruptcy Board of India, *Handbook on IBC* (IBBI, 2020) 11 <<https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf>> accessed 10 September 2024

⁴⁶The Prevention of Money Laundering Act 2002, objective clause.

⁴⁷*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).

⁴⁸*Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).

⁴⁹*Directorate of Enforcement v Manoj Kumar Agarwal* (2021) SCC OnLine NCLAT 121 (NCLAT).

⁵⁰*P. Mohanraj v Shah Bros. Ispat (P) Ltd* (2021) 6 SCC 258 (SC).

laundering, reflects a completely contrary approach. While there is sufficient work towards protecting the interests of the individuals potentially foreseeably affected by the resolution process, the rights of innumerable faceless stakeholders within the society, affected by money laundering is not duly considered.⁵¹

A blanket exemption on the attachment of property and prosecution for offences committed prior to initiation of the resolution process does not provide PMLA with the weightage its globally recognised purpose of combating money laundering requires.⁵² Further, the rights of parties can in no way be balanced, when the stakeholders belong to completely different sections of society with no intersection of comparison whatsoever. Accordingly, any solution to this conflict that blanketly prioritises one stakeholder's rights over another, does not even attempt to balance the interests of the parties.

B. Consideration of Public Interest

In addition to the prevention of money laundering, PMLA directly works towards curbing pertinent issues of national concern. The globally recognised concerns of narcotics distribution and terror financing are all effectuated with the aid of channels of laundering money.⁵³ All from the garb of shell companies to Hawala channels of narco-financing, comprise the robust frameworks that allow such cross-border crimes to sustain.⁵⁴ Cases involving money laundering and confiscation of proceeds of crime, often arise from larger systems

⁵¹Jyoti Trehan, *Crime and Money Laundering: The Indian Perspective* (Oxford India 2004).

⁵²United Nations General Assembly, 'RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY Political Declaration', UNGA S-20/2 (10 June 1998) A/RES/S-20/2.

⁵³Jyoti Trehan (n 51)

⁵⁴Ayjaz Wani and Sameer Patil, 'Narcoterrorism Challenge to India's National Security' <<https://www.orfonline.org/research/the-narcoterrorism-challenge-to-india-s-national-security>> accessed 10 December 2024.

of narcotics distribution and terror financing and PMLA entails attachment of proceeds of crime of such predicate offences as well.⁵⁵

In contrast, the IBC aims to protect the rights of individual stakeholders affected by obstructions to the resolution process. The rights and interests of innocent corporate debtors and other stakeholders, albeit legally recognised and valid, do not justify their complete prioritisation over the security of the nation at large. Especially considering that the nation and world today, are plagued by the destruction caused by distribution and consumption of narcotics, as well as terror and Naxal financing among others.

While the individuals impacted by the lack of timely resolution appear before courts and seek remedies, this does not justify a complete lack of consideration for the larger public interest and security that is heavily impacted by the sustenance of networks of terror and narco financing. Further, a blanket exemption goes on to show a clear favour towards protecting commercial goals of promoting entrepreneurship, over protecting the interests of public security, hampered by the establishments sustaining channels of money laundering.

C. Insolvency Moratorium and Amnesty Route

The pertinent issue flagged by the imposition of the moratorium is the potential abuse of the law by providing an escape route to offenders through insolvency.⁵⁶ Moratorium under S.14 in concordance with

⁵⁵Financial Action Task Force, Mutual Evaluation Report: Anti-Money Laundering and Counter-Terrorist Financing Measures – India (September 2024) <<https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/India-MER-2024.pdf>> accessed 29 March 2025.

⁵⁶Prachi Gupta, ‘Supreme Court Widens Scope of Moratorium on Criminal Proceedings’ (*IndiaCorpLaw*, 17 April 2021) <<https://indiacorplaw.in/2021/04/supreme-court-widens-scope-of-moratorium-on-criminal-proceedings.html>> accessed 11 July 2024.

S.32 IBC renders a stay of proceedings against the corporator debtor. In the *Axis Bank case*⁵⁷, the court emphasized that through a moratorium enforced in terms of Section 14 of IBC, a person indulging in money laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason that such assets are not lawfully his to claim. Allowing this, would defeat the objective of PMLA by opening an escape route.

IV. GLOBAL INSIGHTS: COMPARATIVE ANALYSIS OF INSOLVENCY AND MONEY LAUNDERING REGIMES OF USA, CANADA AND UK

This section extrapolates alternatives to moratorium and clean slate protection under IBC. These alternatives are based on the cross-jurisdiction analysis of the United States of America, Canada and the United Kingdom. The choice of jurisdiction stems from multiple facets. The US Bankruptcy Code and IBC present a parallel structure, especially with respect to the moratorium.⁵⁸ On the other hand, Canada's provisions pertaining to Good Faith stipulate a means to preserve the bankruptcy code from becoming an escape route. Lastly, the United Kingdom prioritizes public security over the rights of corporate debtors and allows for judicial discretion in cases where the contrary is prevalent. The analysis highlights the standpoint of constructing reasonable exemptions to IBC protections balancing larger public interest vis-a-vis the objectives of insolvency tailored as per the Indian context.

⁵⁷*Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors* (2019) SCC OnLine Del 7854 (DHC).

⁵⁸Jason D. Woodard, 'Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code' (2020) 52 *Geo Wash Int'l L Rev* 393.

The reliance on these jurisdictions is grounded in multiple legal and historical considerations. Firstly, India shares a common law heritage with the United Kingdom, and its legal system has been significantly influenced by British jurisprudence. Many foundational principles of Indian corporate and financial law have their roots in English law, making the UK a relevant comparator.⁵⁹ Secondly, Indian legislators have historically drawn upon US and UK legal frameworks when drafting laws and adopting regulatory models in emerging areas of legal jurisprudence. This influence is evident in various aspects of Indian corporate and financial regulation, including insolvency and anti-money laundering laws. Thirdly, these jurisdictions provide nuanced approaches to balancing insolvency protections with the imperatives of anti-money laundering. Unlike India's blanket primacy of insolvency over money laundering, these jurisdictions employ a selective, case-specific approach where courts analyze the facts to determine whether economic security (protected by anti – money laundering laws) or creditor rights (safeguarded by insolvency mechanisms) should prevail in a given case. This flexible approach offers a more balanced framework, making these jurisdictions highly relevant for comparative analysis.

A. USA

The United States bankruptcy regime is governed by The *United States Code - Title 11 Bankruptcy*⁶⁰. One of the salient features of the code is the automatic stay established under section 362.⁶¹ On filing of a bankruptcy petition, the automatic stay is triggered such that it

⁵⁹Umakanth Varottil, 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' (2015) National University of Singapore <https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf> accessed 29 March 2025.

⁶⁰United States Code Title 11 Bankruptcy, 1978.

⁶¹United States Code Title 11 Bankruptcy 1978, s 362.

prohibits any entity from commencing or continuing any proceeding against the debtor.⁶² The stay gives the debtor a breathing spell from his creditors as it stops all collection efforts, harassment and foreclosure actions⁶³

The code instead of barring all proceedings offers exceptions to automatic stay. Section 362(b)(4) recognises police or regulatory power exemption. It permits an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power⁶⁴. Thereby, it strikes a critical balance between protecting the public interest, on the one hand, and promoting the needs of debtors and creditors in the bankruptcy process, on the other hand.

The determination of police or regulatory power exemption is based on satisfying the public interest test and pecuniary interest test. The public interest test requires the court to examine the purpose of the law that the state seeks to enforce. A proceeding that effectuates public policy is excepted from the stay.⁶⁵ The pecuniary interest determines whether the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy.⁶⁶ If the government is really protecting its

⁶²David P. Strokes, 'The Extraterritorial Reach of Bankruptcy Code's Automatic Stay: Theory vs. Practice' (2007) 33(1) BJIL <<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1225&context=bjil>> accessed 11 July 2024.

⁶³United States Code Title 11 Bankruptcy, 1978 s 362.

⁶⁴United States Code Title 11 Bankruptcy, 1978 s 362 (b)(4).

⁶⁵Linda Attreed, 'Police or Regulatory Power Exception to Automatic Stay' (2012) 4(3) JBRL <<https://www.stjohns.edu/sites/default/files/uploads/bank-research2012-no-03.pdf>> accessed 1 July 2024.

⁶⁶Rafael Ignacio Pardo, 'Bankruptcy Court Jurisdiction and Agency Action: Resolving the Nextwave of Conflict' (2001) 76 NYULR <<https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-76-3-Pardo.pdf>> accessed 3 July 2024.

pecuniary interest. Therefore, the exception to the automatic bankruptcy stay would not apply.⁶⁷

Incorporation of police power exception under IBC will sine qua non serve in harmonizing the coexistence of IBC and PMLA. Presently, section 32A of IBC proscribes any proceedings against the debtor's assets leading to the exclusion of the state's claims against assets connected to proceeds of crime. The police power exception subjected to time-bound proceedings shall scrutinize state action based on public interest tests and pecuniary tests. Subsequently, only state actions upholding the objective of public interest will be mandated as an exception to IBC provisions.

B. Canada

The Canadian insolvency is governed by the Bankruptcy and Insolvency Act (hereinafter, referred to as BIA) and the Companies Creditors Arrangement Act (hereinafter referred to as CCAA). Good faith action is a notable theme stemming from Section 4.2 of BIA⁶⁸ and 11.02(2) of CCAA respectively⁶⁹. The provisions codify obligations for the principal parties in insolvency proceedings to act in good faith.⁷⁰

⁶⁷Douglas L. Hayes, 'Police and Regulatory Power vs. Pecuniary Interests: The Bankrupt Hazardous Waste Site Owner Faces the Music. *United States v. Nicolet, INC.*, 857 F.2d 202 (3d Cir. 1988)', 1990 30(2) NRJ <<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=2046&context=nrj>> accessed 11 July 2024.

⁶⁸The Bankruptcy and Insolvency Act, 1985 c. B-3 s 4.2.

⁶⁹The Companies' Creditors Arrangement Act, 1993 C-36 s 11.02(2).

⁷⁰Linc A. Rogers, David Sieradzki and Matthew Kanter, 'What Does "Good Faith" Mean in Insolvency Proceedings?' (2015) 4 JIIC <https://www.ksvadvisory.com/docs/default-source/articles/03_what-does-good-faith-mean-in-insolvency-proceedings-co-authored-by-david-sieradzki-published-in-the-journal-of-insolvency-institute-of-canada-septem.pdf?sfvrsn=1f184fd_6> accessed 25 July 2024.

BIA states that interested persons under BIA proceedings shall act in good faith and if the interested person fails to act in good faith the court is empowered to make appropriate orders.⁷¹ CCAA on the other hand mandates that to obtain a stay extension from the commencement of any proceeding against the company other than initial application. The applicant is required to satisfy the two-fold burden of proof specified under S.11.02(3). It includes (a) circumstances that make such an order appropriate; and (b) the applicant has acted, and is acting, in good faith and with due diligence.⁷²

In the Indian context, drawing inspiration from Canadian law the author argues for the inclusion of the good faith test during the initial insolvency proceedings. The test shall endow duty upon the debtor to establish the legitimacy of the bankruptcy petition based on the standards of honesty, good faith and reasonableness. Subsequently, the court shall examine whether the petition is licit or to seek an amnesty route through a moratorium. This applicability will pave the way to dispose of the possible frivolous petition filed with the improper purpose and amnesty route.

C. United Kingdom

In the United Kingdom, the insolvency regime is governed by the Insolvency Act, 1986, which, similar to IBC, includes procedures for liquidation, and administration of insolvency proceedings.⁷³ The entire process of insolvency and resolution is governed by the insolvency practitioner, the precursor to the resolution professional in IBC.⁷⁴ Additionally, cases pertaining to potential involvement of proceeds of crime are adjudicated under the Proceeds of Crime Act, 2002, which

⁷¹ The Bankruptcy and Insolvency Act, 1985 c. B-3 s 4.2.

⁷²The Companies' Creditors Arrangement Act, 1993 C-36 s 11.02(3).

⁷³The Insolvency Act, 1986 C-45.

⁷⁴The Insolvency Act, 1986 C-85 ss 59, 60, 165, 167.

allows for restraint, freezing and confiscation of such assets.⁷⁵ Within the same, enforcement authorities are enabled to secure a form of restraint order to freeze the property of an individual or corporate debtor, to prevent their dissipation, which may later be subjected to confiscation.⁷⁶

Conflict arises in matters where assets that are proceeds of crime, belong to a corporate debtor initiating the insolvency management process. The issue pertains to the question of priority of conflicting claims, one of the adjudicating authorities for recovery of assets and the other of the individuals with bona fide claim to the property. The broader underlying national objectives, on one hand, are those of preventing money laundering and as a consequence ensuring public order, and on the other hand promoting entrepreneurship and financial security for corporate entities.⁷⁷

The UK government, as their legislative objective, prioritises the ability of the state to seize assets involved in criminal activities, and consequently curbing the social parasites of narcotics distribution, terror financing, etc. POCA, within itself, allows for adjudicating authority to seize assets even when there lie competing interests of creditors undergoing insolvency management.⁷⁸ Thus, the two statutes within themselves allow for clarity as to the overriding effect of one legislation over the other.

In addition to the legislative primacy of money laundering laws in the UK, there is judicial discretion as to the ultimate priority of competing claims. Thus, courts in the UK have the jurisdiction to balance such competing claims in favour of the corporate debtor and other corporate

⁷⁵The Proceeds of Crime Act, 2002 C-29 ss 35, 41.

⁷⁶The Proceeds of Crime Act, 2002 C-29 s 6,7.

⁷⁷The Proceeds of Crime Act, 2002 objective clause; Insolvency Act 1986, objective clause.

⁷⁸The Proceeds of Crime Act, 2002 ss 71, 306; Proceeds of Crime Act 2002, sch 11.

entities, wherever deemed necessary.⁷⁹ Some of the reasons for the confiscation of assets being prioritised have been, the return of proceeds of crime to victims, instead of its distribution to creditors, and of promotion public order and security over the rights of corporate entities.⁸⁰ Overall, the individual rights of corporate debtors have been considered secondary to the state's interest in recovering criminal proceeds.

*D. Incorporating Global Approaches: A Selective Framework for
Balancing IBC And PMLA*

Rather than enforcing a blanket rule on the primacy of either statute, a more nuanced approach is necessary. Each case should be assessed based on its unique circumstances, considering factors such as the nature of the financial misconduct, the economic implications of insolvency resolution, and the broader public interest. Lessons can be drawn from international frameworks like the USA's public interest test, Canada's good faith assessment, and the UK's discretionary approach. By ensuring a balanced adjudicatory framework, courts can uphold both the economic imperatives of IBC and the regulatory objectives of PMLA, thereby fostering a legal landscape that accommodates both corporate revival and financial integrity.

Ultimately, resolving the conflict between insolvency and anti-money laundering laws requires a departure from rigid prioritization in favor of a structured, discretionary approach. When the public interest strongly supports preventing money laundering, claims under PMLA should be prioritized. On the other hand, if the resolution and revival of the corporate debtor contribute to economic stability and protect creditor rights, IBC should take precedence. A flexible, case-specific approach would enable Indian jurisprudence to strike a more equitable

⁷⁹*Re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391.

⁸⁰*Re Stanford International Bank Ltd* (2011) EWCA Civ 280.

balance between these competing legal objectives. The proposed reforms, while feasible, necessitate significant legislative refinement, inter-institutional coordination, and procedural clarity. Moving forward, a harmonized legal framework that accommodates both regulatory objectives—preventing financial crimes while facilitating insolvency resolution—is imperative to ensuring a just and efficient adjudicatory process.

V. SOLUTIONS FOR HARMONIZING IBC AND PMLA

A. Inter – Agency Coordination Mechanism

The establishment of an inter-agency coordination mechanism in tandem with amending existing systems to reduce inefficiencies will facilitate incorporating public interest exemptions to the IBC regime specifically focusing on PMLA adjudication. Against this backdrop, the present section proposes a three-pronged solution. Firstly, incorporating a structuralist approach for settling competing claims, secondly, establishing a common database lastly, enhancing procedural efficacy through standardization of Show Cause Notice issued under PMLA section 8.

B. A Structuralist Approach: Adjudication of Competing Claims

Apex Court has an advanced teleological/ purposive interpretation approach for realizing harmonious construction between IBC and PMLA yet it overlooks the doctrine of *in omnibus quidem, maxime tamen in iure aequitas spectanda est* equity must be considered in all things, but especially in law. Since courts and tribunals have repeatedly affirmed the primacy of IBC this subsequently undermines the application of equity as the objectives of PMLA are compromised and further, this discounts the practical implications on public policy. The absence of statutory guidelines aggravates the issue and the court's

dicta for co-existence and non-derogation of the competing statutes is unable to see an intelligible synthesis in the real world.

In this context, the author proposes a structuralist approach for adjudicating the competing claims of PMLA authorities and CD in insolvency proceedings. This approach propounds a three-tier framework. Firstly, settlement of jurisdiction upholds the statutory integrity of the institutions. Determining whether the petition is maintainable before the authority under the PMLA act or NCLT based on the timeline of the order of attachment of assets with respect to insolvency proceedings pre- or post-CIRP. Secondly, establishing an asset management framework for the classification of claims. Segregation of assets categorized as tainted, untainted and mixed assets. This categorization is based on mitigating factors including value segregation of assets based on taint percentage, integration of tainted assets with clean business operations, preservation of third-party rights and creditors stakes, and effect on public policy objectives under PMLA. Lastly, setting up an escrow account should be set up to preserve mixed assets till the case is sub-judice, along with the adherence to procedural timelines of the case.

C. Common Database as Solution

Presently, the Enforcement Directorate issues notices to parties for the attachment of assets, irrespective of whether the properties are involved in the resolution process.⁸¹ This only adds to the pending litigation for cases pertaining to insolvency and money laundering. Further, the facts and circumstances pertaining to the property being involved in the resolution process, only come to light once such claims are raised before court. This adds to the hassle that the parties have to go through

⁸¹*Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).

for their rights to be exercised, in addition to the burden on courts as well as the professionals involved.

Further, once the issue of conflicting claims is brought to the court's attention, the parties then go on to advocate for the primacy of their interests. The additional steps of the issue first being represented before the courts, only after issuance of attachment notice by ED, may be negated with transparent communication and exchange of information between adjudicating authorities. In this regard, other jurisdictions too have adopted common databases of properties that are potentially proceeds of crime, or involved in the resolution process. These are, the Bankruptcy and Insolvency Register, for the UK,⁸² the Asset Forfeiture Tracking System (AFTS) in the United States,⁸³ Insolvency Registers Interconnection, and the European Criminal Records Information System in the European Union.⁸⁴ Such databases allow for the authorities to track the previous claims over certain assets. While these are not directly utilised for cases with the intersection of money laundering and insolvency, they may be utilised in India.

Within the Indian context, the persisting concern of the pendency of cases requires urgent attention, and the same can be addressed to a great extent in the realm of insolvency and money laundering. A common database, which tracks the properties involved in the resolution process, or are considered potential proceeds of crime, would allow for

⁸²Government of United Kingdom, 'Bankruptcy and Insolvency Register' <<https://www.gov.uk/search-bankruptcy-insolvency-register#:~:text=You%20can%20search%20for%20details,from%20being%20a%20company%20director>> accessed 10 September 2024.

⁸³Government of United States of America, 'Asset Forfeiture Tracking System' <<https://www.forfeiture.gov/>> accessed 10 September 2024.

⁸⁴European Union, 'Insolvency Registers Interconnection' <https://e-justice.europa.eu/110/EN/bankruptcy_and_insolvency_registers?CROATIA&member=1#:~:text=The%20National%20Insolvency%20Register%20is,insolvency%20proceedings%20from%20being%20launched> accessed 10 September 2024; European Union, 'European Criminal Records Information System' <<https://ecris.eu/>> accessed 10 September 2024.

such information to be available to the ED, and resolution professionals, right when their involvement is initiated. In this regard, ensuring communication at the very first step of interaction with competing authorities will expedite the process of exercise of rights for all stakeholders involved. This is especially pertinent as such conflicts may be resolved to a great extent without the involvement of judicial adjudication when the concerned authorities have the proper information at the initial stage of interaction itself.

D. Step towards procedural efficacy

Incorporating procedural standardization shall improve inter-agency coordination bridging the gaps between the agencies. The author proposes standardization of the Show Cause Notice (hereinafter referred to as SCN) format issued under section 8 that will effectively curb the delay in adjudication and provide clarity in proceedings. Thus, it assuages the apprehension of prolonging litigation and hindrance in the insolvency proceedings.

PMLA under section 5 read in consonance with section 8 warrants the attachment of property involved in money laundering. Section 8 PMLA expresses the procedure for decreeing the attachment of properties. It stipulates that the AA may serve an SCN of not less than 30 days to the aggrieved person.⁸⁵ Upon receiving SCN the noticee has to produce evidence indicating the sources of his income, or assets or by means of which he has acquired the property attached under Section 5(1) of the 2002 Act. Additionally, to show cause why the property “should not be declared to be the properties involved in money laundering and confiscated by the Central Government”.⁸⁶

⁸⁵The Prevention of Money Laundering Act, 2002 s 8.

⁸⁶*Vijay Madanlal Choudhary v Union of India* [2022] INSC 757, [2022] SCC Online SC 929.

Following a particular SCN format shall improve efficiency in adjudication, consistency, transparency, and coordination of respective claims between the aggrieved person and AA. The following indicative parameters are proposed to be considered included in the SCN.

1. **Necessity:** Mentioning the ‘reasons to believe’ that the person has committed an offence. Furthermore, stating the reasons justifying the necessity for the confirmation of provisional orders.
2. **Claims of authorities:** Indicating the valuation of attached properties accompanied by the methodology used to determine such valuation under the attachment orders.
3. **Notification of Rights and Safeguards:** Mandatorily elucidating safeguards such as the right to appeal under PMLA. If any person aggrieved from AA attachment orders as per Section 26(1)⁸⁷ of PMLA they can prefer to appeal against the AA orders before the Appellate Tribunal.
4. **Compliance Instructions:** Instructions substantiating requirements mentioned under section 8(1) PMLA are to be produced along with any additional prerequisite information essential to furnish in the reply to SCN by the aggrieved person.

VI. CONCLUSION

The legislature, in its creation of IBC and PMLA, as two specialised acts, has been clear in its priority of objectives for the two acts, albeit in their separate realm. The legal quandary arises when matters of money laundering and corporate insolvency overlap, leading to conflicting claims over assets. Contrary to other jurisdictions, the Indian acts governing these matters, do not provide for a priority of claims within the acts. Through judicial interpretation, the courts have come to the conclusion that the claims of corporate debtors apply to

⁸⁷The Prevention of Money Laundering Act, 2002 s 26.

those of adjudicating authority within PMLA. This entails that the exemption from attachment guaranteed within IBC applies even when properties are potential proceeds of crimes.

The priority of claims of corporate debtors for resolution of assets, and that of adjudicating authorities for attachment of assets, have created their due share of a legal conundrum. While courts have aimed to tackle the blanket exemption from attachment for assets involved in the resolution process, with harmonious construction of the two statutes, there lies significant scope for a more balanced approach. The conclusive primacy of IBC over PMLA, as argued by the author, undermines the legislative objective of PMLA, the greater goal of public security, and provides for a potential amnesty route to corporate debtors involved in criminal activities. While being contrary to the legislative object of PMLA, the blanket exemption granted by IBC, also contravenes judicial dicta of aiming for a harmonious construction of the two statutes.

Considering the lack of a concrete solution within Indian jurisprudence, the author has placed reliance on jurisdictions such as those of the USA, Canada and the UK, for reasons mentioned herein. Such a cross-jurisdictional analysis showcases that countries have adopted a discretionary or selective approach when deciding on the primacy of a set of claims over properties. While the factors considered in deciding the primacy of claims are varied for the three jurisdictions, they intersect in their balancing of the objectives of the two acts. Alongside the interests of corporate debtors, USA considers public interest, Canada considers good faith and the UK considers public order, and all of the jurisdictions aim for a balancing of interests.

Through such a jurisdictional analysis, the author offers alternatives to the blanket exemption, as guaranteed by IBC. Accordingly, in cases where public interest overwhelmingly favors the prevention of money

laundering, PMLA claims should take precedence. Conversely, where resolution and revival of the corporate debtor align with economic stability and creditor rights, IBC should prevail. By adopting a flexible, context-driven approach, Indian jurisprudence can achieve a more balanced reconciliation of competing statutory objectives.

In addition, the current pendency of cases specifically in the realm of IBC and PMLA, necessitates transparent intergovernmental communication and exchange of information, which may be facilitated through a common database for properties undergoing insolvency, or attachment due to claims of money laundering. Such a system has already been utilised by a myriad of jurisdictions such as, USA, UK and EU. Implementing such a system in India would require inter-agency coordination, legal backing, and significant technological infrastructure. However, its potential to streamline asset tracking and minimize litigation delays makes it a worthwhile reform.

Furthering this communication, the author also argues for a system of proper sharing of information by the concerned stakeholders, reflecting the factors of public interest and rights of creditors, in case competing claims arise over properties. These solutions aim to, first, balance the rights of all impacted stakeholders, second, duly consider the objectives of both PMLA and IBC and ensure that the complex meshwork of the facts and circumstances of each case is given its due consideration in adjudication over conflicting claims.