White Paper on Cross-Border Insolvency Tools and how Indian Companies can benefit from them

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ahead of the curve

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Introduction

The law relating to corporate insolvency in India, recently consolidated and codified under the Insolvency and Bankruptcy Code, 2016 (**IBC/Code)**, has brought about a marked deviation from the objective of insolvency laws that existed in the earlier times as a recovery or winding up tool. This is achieved by way of the introduction of the concept of rescue through the use of procedures titled "insolvency resolution process". The Code in its current form, however, lacks a comprehensive cross-border insolvency regime, which in turn confers limitations onto the legislation in addressing conflicts and complexities arising out of multinational insolvencies.

At present, two provisions of the Code – Sections 234 and 235 - which were introduced by the Joint Parliamentary Committee[1] to add to the draft proposed by the Bankruptcy Law Reforms Committee (**BLRC**)[2] deal with cross-border insolvency in a limited fashion. Section 234[3] provides for enforcement of the provisions of the Code internationally using bilateral agreements (or even multilateral agreements) to be entered by the Central Government of India. Further, Section 235[4] provides for a mechanism which can be adopted by the Indian insolvency tribunals called the National Company Law Tribunals (**NCLT**) to seek assistance from foreign countries, with which a reciprocal arrangement has

[1] Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 (16th Lok Sabha), Clause 62 at page 43 available at http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf (Last visited on February 02, 2022).

[2] BLRC, Department of Economic Affairs, Ministry of Finance in 2014, under the Chairmanship of Shri T.K. Viswanathan was charged to oversee the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy in India. This Committee submitted an interim report in February 2015 and a final report in November in the same year.

[3] Section 234, Insolvency and Bankruptcy Code, 2016:
Agreements with foreign countries-
(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.
(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

[4] Section 235, Insolvency and Bankruptcy Code, 2016: Letter of request to a country outside India in certain cases.
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(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.
(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

been entered into, for actions or evidences to be taken in relation to assets of the insolvent company located in the foreign country. However, till date no such bilateral agreement has been signed.

Therefore, as noted, the Code lacks a comprehensive framework for recognition of foreign insolvency proceedings, aid and assistance to foreign insolvency representatives, or even court to court coordination in terms of administration of multinational insolvency proceedings, thereby rendering this important piece of legislation a territorial flavour. However, courts in India have, on occasion, devised *ad hoc* solutions based on common law principles and global best practices to address conflicts and complexities arising out of multinational insolvencies.

This paper aims to explore and analyse the various cross-border insolvency tools and global trends and practices and their relevance to the Code and Indian companies in distress.

A. Adoption of UNCITRAL Mode law on Cross Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 (**Model Law**) has been heralded as the harbinger of standards that can be emulated by nations across the globe (with suitable modifications) for resolution of cross-border insolvency cases. A proposal for adoption of the Model Law is not new in India. Various committees engaged in suggesting bankruptcy law reforms since over 20 (twenty) years have advocated India's adoption of the Model Law.

In October 2018, the Insolvency Law Committee set up by the Ministry of Corporate Affairs, Government of India (**Ministry**) recommended introduction of a Draft Part Z on Cross-Border Insolvency[5] based upon the UNCITRAL Model Law (with modifications), to be included in the IBC (**Part Z**).

This was in furtherance of the attempt to have a common legislation subsuming within it in all the existing provisions under different legislations, such as Section 375(3)(b) of the Companies Act, 2013[6] that currently deals with winding up of an unregistered company (which may include foreign companies) due to inability to pay debts.[7] Notably, even while the company law provisions in respect of winding up are available in respect of foreign companies, the IBC, owing to its territorial applicability and lack of an internationally subscribed framework for cross-border insolvency, remains unavailable as a recourse to either offer or receive the requisite co-operation or recognition for insolvency proceedings (domestic or international alike).

Further, the current regime for enforcement of foreign decrees limits its application to decrees (not extended to entire proceedings; and which does not refer to recognizing and enforcing judgments specifically in cross-border insolvency proceedings.[8]) from reciprocating countries alone, upon filtration of certain requirements as stipulated

[5] *Report of Insolvency Law Committee on Cross Border Insolvency*, MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA (October 16, 2018) *available at* http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf *(Last visited on February 02, 2022); Public Notice* for Suggestions on Draft Chapter on Cross Border Insolvency, MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, (June 2018) *available at* http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf (Last visited on February 02, 2022);

[6] Section 375(3)(b), Companies Act, 2013:
Winding up of unregistered companies.— (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, in such manner as may be prescribed, and all the provisions of this Act, with respect to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in sub-sections (2) to (4).
(2) No unregistered company shall be wound up under this Act voluntarily.
(3) An unregistered company may be wound up under the following circumstances, namely:—
(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

[7] Report of Insolvency Law Committee on Cross Border Insolvency, MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA (October 16, 2018) *available at* http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf (Last visited on February 02, 2022).

[8] Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises & Anr., (2005) 6 Bom CR 240; see Sumikin Bussan Int'l (HK) Ltd. v. M. T. Mody & Ors., Supreme Court Case Special Leave Petition (Civil) 26680 of 2010 connected with Special Leave Petition (Civil) 3752 OF 2006.

under Section 44A of the Civil Procedure Code, 1908 (**CPC**).[9] In cases where an international creditor has obtained a judgment from a court not located in a reciprocating territory, the creditor ought to bring a suit afresh to enforce the decree in an Indian court.[10] Further the mechanism for enforcement of foreign judgments under the CPC[11] is not broad enough to include all insolvency orders such as orders regarding reorganisation processes, moratorium, administrative and interim orders etc. This problem was highlighted in the case of *Sumikin Bussan v. King Shing Enterprises*[12] where the Bombay High Court overlooked an insolvency order against Mody passed in Singapore (non-reciprocating territory) but upheld order of Hong Kong (reciprocating territory) applying rules of comity.

The absence of a framework to deal with cross-border insolvency proceedings was gravely felt in the insolvency proceedings of Jet Airways (India) Limited (Jet Airways).[13] This aviation company was faced with simultaneous insolvency proceedings, *inter alia*, in India[14] as well as in Netherlands[15]. In this case, the NCLT did not permit the Dutch Bankruptcy Trustee to intervene in insolvency resolution process of the company in India. The dismissal was backed by a lack of authority vested in the tribunal to recognize a bankruptcy order passed by a foreign court and the standing of a foreign insolvency representative, especially given that Sections 234 and 235 of the IBC were not in force then, thereby declaring the order passed by the Dutch court nullity *ab initio*.

The Model Law, which was promulgated by the United Nations in 1997 and which established the international standard in this area, has so far been adopted by 50 (out of 54) jurisdictions across the globe.[16] In addition to the developed economies like Japan, Canada, UK and USA, the emerging major economies have also adopted the Model Law. This includes two of the so-called BRICs nations (Brazil and South Africa). Out of these, Brazil has modernised its insolvency laws in 2005, and adopted the Model Law in 2020. Singapore is another recent example which adopted the Model Law in 2017[17] and has since acquired prominence as an Asian restructuring hub.

Model Law

Model Law is premised on the pillars of (a) access; (b) recognition; (c) co-operation; and (d) co-ordination.[18] It provides a definitive framework for access of foreigner representatives to domestic courts (Article 9-14), recognition of foreign proceedings (Article 15-24), cooperation with foreign courts (Article 25-27) as well as incorporates provisions for concurrent proceedings (Article 28-32).

[9] Under Section 13 read with Section 44A of the CPC, foreign judgments would be inconclusive if it fails to pass the test of the provisions laid out in Section 13 (*Middle East Bank Ltd. vs. Rajendra Singh Sethia, AIR 1991 Cal 335*). Section 13 of CPC provides that a foreign judgment can be rendered inconclusive in the event judgment has:-
i) Not been pronounced by a court of competent jurisdiction,
ii) Obtained without any merits of the case,
iii) Is not recognized by the Indian law,
iv) Violates the principles of natural justice,
v) Been obtained by fraud, and
vi) Stands to breach any Indian law in force at the time.

[10] Ibid; Sumikin Bussan Int'l (HK), 5 Bom. C. R. at ¶ 21 (explaining that foreign law is a question of fact that must be proved in execution proceedings).

[11] Section 13, Code of Civil Procedure, 1908.

[12] Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises & Anr., (2005) 6 Bom CR 240; see Sumikin Bussan Int'l (HK) Ltd. v. M. T. Mody & Ors., Supreme Court Case Special Leave Petition (Civil) 26680 of 2010 connected with Special Leave Petition (Civil) 3752 OF 2006.

[13] Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v. State Bank of India & Anr, Company Appeal (AT) (Insolvency) No. 707 of 2019.

[14] Order dated June 20, 2019 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in a Company Petition bearing No. 2205(IB)/MB/2019, filed by a financial creditor of the Company, the State Bank of India, under Section 7 of the Insolvency and Bankruptcy Code, 2016.

[15] Order dated May 21, 2019 in Petition Number C/15/288017/FT RK/19/540R filed by two trade creditors of the Company, the Ld. Noord-Holland District Court, Trade, Sub-district and Insolvency declared the Company to be in a state of bankruptcy and directed initiation of bankruptcy proceedings against the Company in accordance with the provisions of the Article 2(4) of the Bankruptcy Act, 1893 of Netherlands.

[16] 1997 – UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL, 1997) *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (Last visited on February 04, 2022).

[17] Timothy Lemay, *Singapore Enacts Legislation Implementing UNCITRAL Model Law On Cross-Border Insolvency*, UN VIENNA (2017) *available at* *Singapore enacts legislation implementing UNCITRAL Model Law on Cross-Border Insolvency (unvienna.org)*. (Last visited on February 04, 2022).

[18] Neil Hannan, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW (Springer 2017).

It facilitates a process of recognition of foreign insolvency proceedings,[19] with certain presumption in favor of the applicant[20] and upon satisfaction of the requirements,[21] the same is granted. The recognition of foreign proceedings is important in order to classify a proceeding as foreign main proceeding or non-main proceeding and it is mandated by law that the same be determined at the earliest. With its foundation entrenched in *modified universalism*, it follows the *rule of priority* as main proceedings are considered central . Modified Universalism ushers in a single centralized administration of claims and thus, upon determination of proceedings as main/ non-main proceedings, it recognizes one proceeding as the main place for administration of claims. This assists the courts in cooperating to the maximum possible extent[22] and enables an easier mechanism to seek relief for the foreign representative. Model Law, however, does not attempt harmonization of substantive insolvency laws.

B. Bilateral or Multilateral Arrangements

In contrast to a wholesale adoption of the Model Law, countries have also been seen adopting regional arrangements with nations that share commonalities in terms of geographical boundaries or cross-border trades and investments. Such insolvency arrangements put reciprocity at the foreground. A similar requirement is now being contemplated in the proposed Part Z discussed below.

Among the countries that have adopted the Model Law, more than one-third of them have opted for a reciprocity requirement,[23] with South Africa posing a further restrictive layer of reciprocity by limiting the applicability only to nations designated by its minister; or that such as Mauritius that waited out for sufficient "*reciprocity in dealing with jurisdictions that have trading or financial connections with Mauritius or that are otherwise in the public interest*" before its cross-border provisions was made operational.

A common argument for reluctance to adopt the Model Law can be the need to preserve the sovereignty of a nation or need to enact one's own laws, more so when dealing with or according treatment to assets located in one's own territorial boundaries.[24] It may also be reluctance to offer powers in the hands of jurisdictions with which a nation has not had a history of comity or mutual recognition in the past.

C. Cross-Border Insolvency Co-Operation Agreements / Protocols

In addition of the Model Law, judicial co-operation and comity continue to play an important role in effective cross-border insolvency administration. In fact, recent decades have seen a shift from the territorialism-universalist approach towards cross-border insolvency law to one grounded on co-operation and pragmatism.[25] The reason for this may be attributed to the complexities attached with identifying a predominant single set of proceedings for a multinational insolvent company having substantial global connections[26], as was seen in the Maxwell Communications Corporation[27], the Bank of Credit and Commerce International[28] and the Lehman Brothers[29] cases. It is in this context that alternative mechanisms, to avoid jurisdictional conflict between multiple courts and insolvency officials, have come to be adopted in the absence of a formal treaty. One of these mechanisms for co-ordinating multinational proceedings are the Cross-Border Insolvency Protocols/Agreements. The UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, defines a 'cross border insolvency agreement" as "*an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between between courts and insolvency representatives and between insolvency representatives, sometimes also involving*

[19] Model Law., art. 15.
[20] *Id.*, art. 16.
[21] *Id.*, art. 17.
[22] *Id.*, art. 25.
[23] S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer? 21 (3) International Insolvency Review*, 199-223 (2012).
[24] Bob Wessels, Bruce A Markell and Jason J. Kilborn, *International Cooperation in Bankruptcy Matters*, 250 (OUP 2009).
[25] Morshed Mannan, *The Prospects and Challenges of Adopting the UNCITRAL Model Law on Cross-Border Insolvency in South Asia (Bangladesh, India and Pakistan)* 20 (2015).
[26] Evan D. Flaschen and Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, TEXAS INTERNATIONAL LAW JOURNAL, 33(3), 587-612, 589 (1998).
[27] [1992] BCC 757.
[28] [1992] BCC 83.
[29] [ECF No. 4020], In re Lehman Brothers Holdings, Inc., et al., No. 08-13555 (SCC) (Bankr. S.D.N.Y. June 17, 2009).

other parties in interest".[30] There have been continual efforts at a global level to develop a comprehensive regime around strengthening this co-operation framework in cross-border insolvency cases.[31]

The Protocols implemented thus far have been influenced both by the principles of universality and certain constraints of territoriality, thereby converging on the model of modified universalism. Backed with principles of comity, co-operation and the independence of courts, the Protocols generally only seek to harmonise procedural such as sale of assets, coordination of recovery of debt for the overall benefit of the creditors, coordination for claim filing by creditors etc. rather than substantive such as choice-of-law issues between jurisdictions.[32] In India, the National Company Law Appellate Tribunal (**Appellate Authority**), in the case of *Jet Airways*[33], in exercise of its inherent powers, took cognisance of the simultaneous insolvency proceedings currently underway against a common corporate debtor –Jet Airways,[34] in India as well as in Netherlands[35]. Reckoning the absence of a territorial jurisdiction of one over the other, the Appellate Authority, *inter alia*, directed the committee of creditors of the Company to consider the prospect of co-operating with the Dutch Bankruptcy Trustee, who by virtue of an appeal filed before the Appellate Authority submitted to the jurisdiction of the Indian courts. The court eventually ordered the Indian insolvency professional to enter into an arrangement/agreement with the Dutch Bankruptcy Trustee for actions to be undertaken in relation to the assets located in Netherlands. This was subject to grant of approval for such consent terms by the Dutch court. The Insolvency Co-operation Protocol (**Jet Protocol**) thus entered into between the Dutch Bankruptcy Trustee and the Indian Insolvency Resolution Professional received an approval from both the Indian Appellate Authority as well as the Dutch Bankruptcy Court.

The Jet Protocol came as a progressive convergence in the administration of concurrent insolvency proceedings being administered per the laws of jurisdictions following two different legal systems altogether. Despite India or Netherlands not having adopted the Model Law, the Jet Protocol echoed the principles and methods of the Model Law, to the extent it recognized, *inter alia*, the Indian proceeding as the "main insolvency proceeding" and that in Netherlands as the "non-main" one.

Insolvency co-operation protocols are not new to the Indian legal system in that India has been party to world's first ever (reported) insolvency co-operation protocol entered into between the bankruptcy trustees of India and England respectively.[36] Such a mechanism has emerged as an important tool for harmonising proceedings through a framework of 'co-operation and co-ordination' among courts and parties, despite the availability of international initiatives such as the Model Law and EC Regulations. This is essentially owing to the flexibility of a private and an ad hoc arrangement that such protocols provide to facilitate coordination and suit specific circumstances across jurisdictions, irrespective of whether they have adopted Model Law or not.[37] This is especially beneficial for an emerging economy like India, as this arrangement may appease concerns relating to sovereignty and legitimacy while providing a case-specific effective and efficient mechanism for maximising the value of the assets of a company in line with the objectives of IBC.

[30] Article B (Glossary) 2(i), UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation *available* at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf (Last visited on February 02, 2022).

[31] American Law Institute: *Principles of Cooperation Among the NAFTA Countries*, 2003 (adopted in 2000); American Law Institute, *Guidelines Applicable to Court-to-Court communications in Cross-Border Cases*, 2003 (adopted by ALI in 2000 and International Insolvency Institute in 2001); *European communication and cooperation guidelines for cross-border insolvency* (developed under the aegis of the academic wing of INSOL Europe / by Professor Bob Wessels and Miguel Virgós", Nottingham: INSOL Europe, 2007); Asian Development Bank: Good Practice Standards for Insolvency Law., 2000.

[32] Bob Wessels, *Cross-Border Insolvency Agreements: What are they and are They Here to Stay?*, OVEREENKOMST EN INSOLVENTIE, SERIE ONDERNEMING EN RECHT, DEVENTEr ((Faber, J.J. van Hees and N.S.G. Vermunt (eds.), 2011).

[33] Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v. State Bank of India & Anr, Company Appeal (AT) (Insolvency) No. 707 of 2019.

[34] Order dated June 20, 2019 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in a Company Petition bearing No. 2205(IB)/MB/2019, filed by a financial creditor of the Company, the State Bank of India, under Section 7 of the Insolvency and Bankruptcy Code, 2016.

[35] Order dated May 21, 2019 in Petition Number C/15/288017/FT RK/19/540R filed by two trade creditors of the Company, the Ld. Noord-Holland District Court, Trade, Sub-district and Insolvency declared the Company to be in a state of bankruptcy and directed initiation of bankruptcy proceedings against the Company in accordance with the provisions of the Article 2(4) of the Bankruptcy Act, 1893 of Netherlands.

[36] In the case of *Re P Macfadyen & Co, ex parte Vizianagram Co Limited*, [1908] 1 KB 675.

[37] *See* Lehman protocol, a multiparty protocol being signed by various administrators of different countries.

D. Part Z on Cross Border Insolvency

In light of the drawbacks under the extant regime, as stated above, the Ministry introduced the Draft Part Z on Cross-Border Insolvency based upon the Model Law (with modifications), to be included in the IBC. Draft rules, regulations and notification for implementation of the Part Z were submitted by the Cross Border Insolvency Rules/Regulations Committee constituted by the Ministry in its report dated June 2020.[38] This was done with the objective to providing a uniform mechanism aimed at bringing about standardisation in procedures and effective cooperation among countries. The proposed framework is applicable, inter alia, in the following scenarios[39]:

a. where recognition of a foreign proceeding is sought by a foreign representative[40];

b. where assistance/co-operation is sought in India by a foreign court/representative in connection with foreign proceedings or in a foreign state in connection with proceedings under the IBC;

c. where concurrent proceedings under the IBC and in foreign jurisdictions are taking place in respect of the same corporate debtor; and

d. where foreign creditors have an interest in requesting the commencement of/participation in proceedings under the IBC.

Application for request for co-operation by foreign representatives before the NCLT is sought to be supplemented with additional information and proof of commencement and existence of foreign insolvency proceedings (and foreign representatives) with copies of orders of foreign courts affirming the same.[41]

The proceedings under the Code have been marred by (for reasons which need not be gone in here) excessive delays in resolution of companies, not only resulting in erosion in the value of the assets of the insolvent entity but also uncertainty in the international trade/business market. Absence of a well-defined framework in recognition of cross-border insolvency cases also impedes the ability of Indian companies to use international insolvency tools. Recent success stories like the completion of restructuring of the much celebrated Malaysia Airlines Group (Bhd) in record time, setting benchmark for companies undergoing debt restructuring can large parts be attributed to the English court's speed and expertise. With proposed adoption of the Model Law, Indian companies and creditors will also have such tools available at their disposal resulting in swift resolution of distressed situations and preservation of the business of the company - two objectives which have been considered the most important objectives of the Code.

While using such international tools, the user would need to consider the following important factors:

i. Extent of the "public policy" exception in India to recognition of foreign insolvency proceedings;

ii. Ability of the Indian courts to recognise foreign insolvency judgements especially when dealing with Indian-law governed debts (a reverse Gibbs problem?);

iii. Obligations of the foreign representative towards the Indian insolvency regulator while representing such proceedings in India;

iv. Inclination of the Indian courts to assist the foreign court in foreign insolvency proceedings especially when the registered office of the company is in India and the centre of main interests of the company is within the jurisdiction of the foreign court; and

v. Openness of the Indian legal regime to co-operate with a global insolvency proceeding.

[38] Report on rules and regulations for cross-border insolvency resolution, MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA (June 2020) available at *https://www.ibbi.gov.in/uploads/resources/47fe7576712190d5554e2e50ce646e2f.pdf*

[39] Clause 1 (2) of Draft Part Z.

[40] Clause 12 of Draft Part Z; Rule 6 of Draft Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020.

[41] Rule 12, Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020.

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