



# BANKRUPTCY LAWS

**- A comparative analysis:  
United States and India**

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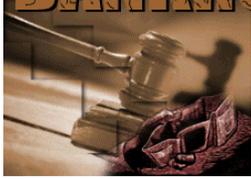
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# **BANKRUPTCY LAWS**



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Nishith Desai Associates (NDA) is a research based, multi-skilled law firm based in Mumbai, Silicon Valley and Bangalore. NDA specializes in globalization of Indian corporates, information technology, international financial and tax laws, corporate and securities laws, mergers & acquisitions, media and entertainment laws and telecom laws. NDA was awarded "Indian Law Firm of the Year 2000" and "Asian Law firm of the Year (Pro-bono)-2001" by the International Financial Law Review, a Euromoney Publication. NDA has also been ranked as having a leading practice in Private Equity, Media and Entertainment and IT and telecommunications law for 2001-02 by the Global Counsel 3000.

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## 1. Legislations

What legislation is applicable to bankruptcies and reorganizations in India?

### United States

The applicable US laws are:

- Bankruptcy Code, 1978. (Title 11 of the United States Code, Ss 101-1330)
- Title 28 of the United States Code (Bankruptcy judicial system)
- Federal Rules of Bankruptcy Procedure.

### India

The applicable Indian laws are:

- The Companies Act, 1956 (“**Companies Act**”),
- Sick Industrial Companies (Special Provisions) Act, 1985 (“**SICA**”) (applicable to scheduled industries<sup>1</sup> only) and the
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The Companies Act provides for three types of winding up: (a) by the court (b) voluntary (members and creditors) and (c) subject to the supervision of the court. Please note that in certain specific cases such as Non-Banking Financial Companies and Banking Companies, there will be certain additional requirements for the winding up process under the Banking Regulation Act and the RBI Guidelines for NBFCs, respectively.

Reconstruction of companies is regulated by the provisions of the SICA. The Companies Act has been recently amended by the Companies (Second Amendment) Act, 2002 (the “**Amendment Act**”), which has been passed by the Parliament, but has not yet come into force (i.e. has not been notified yet). The Amendment Act seeks to replace the SICA and proposes to transfer the powers of the erstwhile Board for Industrial and Financial Reconstruction<sup>2</sup> (“**BIFR**”) to the National Company Law Tribunal sought to be established under the Amendment Act.

Please note that the above legislations are applicable to corporate entities only. Liquidation/restructuring of other entities like trusts, and partnerships would be governed by the provisions of the Indian Trusts Act, 1882 and the Indian Partnerships Act, 1932, respectively.

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<sup>1</sup> The scheduled industries are those industries which are listed in the First Schedule to the Industries (Development and Regulation) Act, 1951 which includes industries such as banking, cement, transport, etc.

<sup>2</sup> Established under Section 4 of the SICA.

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## **2. Excluded entities**

What entities are excluded from bankruptcy proceedings and what legislations apply to them?

### **United States**

Domestic insurance companies, banks, certain small business investment companies, foreign insurance companies may not seek relief and as such excluded from the bankruptcy code. Federal banking laws and state insurance laws govern banks and insurance companies whereas a small investment company is subject to Small Business Investment Act, 1958. Apart from these entities decedents estates and non-business trusts subject to state laws are also excluded from the application of the above stated US laws.

### **India**

Statutory companies and government companies may be excluded from the provisions of the Companies Act relating to winding up provided that the statute under which they are formed specifically stipulates that the company will not be governed by the winding up provisions of the Companies Act.

## **3. Secured lending and credit (immovables)**

What are the principal types of security devices that are taken on immovable property?

### **United States**

The principal type of security device for real property (immovable) is the real estate mortgage, which is governed by the laws of the state, in which the real estate is located.

### **India**

Similar to the U.S., the principal type of security device on immovable property would be a mortgage. In most states in India, the mortgage over an immovable property is typically structured as an English mortgage *i.e.* a mortgage created by deposit of title deeds with the mortgagee.

## **4. Secured lending and credit (movables)**

What are the principal types of security devices that are taken on moveable property?

### **United States**

Security interests in movables, or personal property, are governed by Article 9 of the Uniform Commercial Code, as adopted in the relevant state. Additionally, Article 8 of the Uniform Commercial Code governs security interests in securities.

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### India

Security interest in movable property is regulated by the Indian Transfer of Property Act, 1882 and the Sale of Goods Act, 1930. The various types of security interests in relation to moveable property are pledge, hypothecation, lien, etc.

Any charge on movable property and immovable property of a company has to be registered with the Registrar of Companies (“**ROC**”) under Section 125 of the Companies Act in the prescribed form. Failure to register would render the charge void against the liquidator and any creditor of the company.

### **5. Unsecured credit**

What remedies are available to unsecured creditors (e.g. seizures, attachments, judgments, etc.)? Are the processes difficult or time-consuming? Do any special procedures apply to foreign creditors?

### United States

The laws of different states must be consulted with respect to particulars of unsecured creditor remedies. Generally speaking, a lawsuit is required to obtain a judgment from which a judgment lien can ensue. The judgment lien is enforced by a levy- the taking of possession of the property by the appropriate law enforcement officer. Prejudgment attachment and garnishment are also available as remedies, depending on the legal requirements of a particular state. A foreign creditor can also pursue the same remedies.

### India

The right of an unsecured creditor to make a claim on the property would depend on the provisions of various legislations such as the Companies Act, 1956, the Transfer of Property Act, 1882 and the Limitation Act, 1963.

An unsecured creditor will be required to obtain a judgment and decree in his favor for the purposes of enforcing his claim on the property. An order for the attachment of property will be executed in accordance with the provisions of the Order XXI of the Code of Civil Procedure 1908 which *inter alia* contains provisions relating to notice of garnishment, etc.

The position for foreign creditors is not different from the domestic creditors as the Companies Act does not differentiate between them. However, a foreign creditor may have to seek the approval of the Reserve Bank of India (“**RBI**”) for remitting the proceeds out of India.

### **6. Courts**

What court(s) are involved in the bankruptcy process? Are there restrictions on the matters that the court(s) can deal with?

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### **United States**

A case under the Bankruptcy Code shall be conducted by a Bankruptcy Court. Bankruptcy Courts are part of federal judicial system. This court has jurisdiction over all matters arising under the Bankruptcy Code.

If the matter deals with bankruptcy as a non-core issue, then the authority of the Bankruptcy Court will be limited and this court in such a situation would send their findings to the United States District court for a final disposal of the matter. However, in such a case the parties may consent to the final order being passed by the bankruptcy judge.

### **India**

Under the Companies Act, a winding up can be done in any of the three following ways: (a) by the court (b) voluntary and (c) subject to the supervision of the court. In all the three cases the High Court of the state where the registered office of the company is situated would have jurisdiction over the winding up proceedings. The High Court may at its discretion transfer the proceedings to a district court or another High Court.

The Companies Act does not place any restriction on the powers of the High Court in relation to winding up proceedings. In fact, the courts have wide powers to commence winding up proceedings e.g. if the court is of the view that it is "just and equitable" to commence the same.

## **7. Voluntary Liquidations / Involuntary liquidation**

What are the requirements for a debtor to commence an involuntary liquidation? What are the effects of the commencement of the liquidation?

### **United States**

A business debtor that has a place of business or property in the United States may commence a Chapter 7 case/liquidation.

### **India**

Creditors can petition the court for commencing winding up proceedings against a company if it has not repaid a debt in excess of Rs. 500<sup>3</sup>. The petition has to be filed with the High Court of the state where the registered office of the company is situate. This is referred to as creditors voluntary winding up and the commencement of the winding up will result in the appointment of a liquidator.

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<sup>3</sup> This limit is sought to be increased to Rs. 1,00,000 by the Amendment Act.

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## **8. Voluntary reorganizations**

What are the requirements for a debtor to commence a financial reorganization? What are the effects of the commencement of the reorganization?

### **United States**

There are no particular requirements for filing a voluntary Chapter 11 petition for reorganization. Neither stockbrokers nor Company Broker's can file such a reorganization petition under Chapter 11, although Chapter 7 liquidation relief is available.

When a Chapter 11 petition is filed, the business continues to be in operation as before, under the control of the debtor, who is now called as "debtor in possession". On motion and for a cause, the Bankruptcy Court may appoint a trustee or an examiner. A trustee will supplant the debtor but an examiner will not. A committee of unsecured creditors will be appointed by the US Trustee's Office in order to supervise the debtor in possession and negotiate a plan of reorganization with a debtor.

### **India**

Under SICA, if a company becomes a "sick industrial company"<sup>4</sup> which has at the end of a financial year accumulated losses equal to or exceeding its entire net worth, then within 60 days of the company becoming sick, the board of directors of the company shall make a reference to the BIFR. Once the proceedings commence before the BIFR, the company is protected from suits, recovery proceedings and winding up petitions. The prior approval of the BIFR will be required to carry on the business of the company and the same will be carried out in accordance with their instructions.

## **9. Involuntary reorganizations**

What are the requirements for creditors to commence involuntary reorganizations? What the effects of the commencement of the reorganization?

### **United states**

Requirement of filing an involuntary reorganization is governed by Chapter11 and Chapter 7.

### **India**

Currently, there are no provisions for creditors to commence involuntary reorganizations.

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<sup>4</sup> A "sick industrial company" is defined to mean an industrial company being a company registered for not less than 5 years.

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## **10. Doing business in reorganizations**

Under what conditions can the debtor carry on business during reorganizations? What conditions apply to the use and sale of assets, the availability of credit, the position of creditors who supplied goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

### **United States**

Chapter 11 permits a business to continue without special court permission. The debtor in possession can use/dispose off/lease assets in the ordinary course of business without notice or a hearing. For other cases notice and opportunity for a court hearing are required. Cash collateral, as defined in the Code may not be used without the consent of the secured party or on approval of the court. Post petition financing may be obtained with an administrative expenses first priority, or with a priority over all other administrative expenses and with a lien on the unsecured assets, a junior lien on assets subject to a security interest and, under certain circumstances, with priority over an existing lien.

Creditors who supply goods and services after the filing of the petition are entitled to an administrative expense first priority. The committee of unsecured creditors or any other committees ordered/appointed by the court, monitor the business activities of the debtor in possession, receive periodic financial reports, and are consulted on business decisions that require court's approval. The court on timely objection or motion has approval control over activities not in the ordinary course of business, as well as the exercise of the debtor in possession's business judgment in determining whether to assume or reject any executory contract, including an existing lease.

### **India**

In order to continue operations when the reorganization is pending with the BIFR, the prior approval of the BIFR will have to be sought by the company and the business can be carried out only on the directions of the BIFR. Regarding the sale of assets during the interim period pending reorganization, the company can seek the special approval of the BIFR for sale of the assets which may be granted at the discretion of the BIFR. The BIFR has the power to restrict the sale of the assets if it is of the view that the sale would not be in public interest.

In the reorganization process, the creditors and courts have no role to play. If the BIFR is of the view that the company cannot be revived it will refer the matter to the High Court for the company to be wound up.

## **11. Successful reorganizations**

What features are mandatory in a reorganization plan? How are creditors classified for purposes of a plan and how is the plan approved?

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### **United States**

The reorganization plan states the classes of creditors and equity interest holders dealt with by the plan, which classes are left unimpaired by the plan, which classes are impaired by the plan and how the members of these classes are treated by the plan. The plan must provide for same treatment inside the same class, unless a member wants to be treated differently. The classes are composed of creditors or interest holders who have substantially similar claims or interest in terms of their legal rights. A class may accept or reject a plan by a majority vote in number and two-thirds in amount of the claim that vote. If interest holders are impaired, a two-thirds majority in amount of the allowed interest that vote is required. If all the impaired classes vote for the plan, the Court will confirm it, after being satisfied on its feasibility. Impaired classes shall receive their due according to Chapter Seven Scheme (the best interest of creditors test). If there is a dissenting class, the plan may still be confirmed by the Court, if the Court finds that the plan is fair and equitable (the absolute priority rule) as to the dissenting class (use of the cram down approach).

### **India**

There are several details that are required to be provided by the operating agencies that are appointed by the BIFR to draw up a scheme for reorganization, which includes method of the sale of the assets of the company, the change in the interests and rights of shareholders, etc. The Amendment Act also provides for such details to be submitted to the National Company Law Tribunal.

## **12. Unsuccessful reorganizations**

How is a proposed reorganization defeated and what is the effect of a plan not being approved? What happens if there is default by the debtor in performing the approved plan?

### **United States**

A proposed reorganization may be defeated by class rejection or failure to effect a cram down over dissenting classes votes. Negative findings by the Court on a matter for which it must make an independent judgment, such as feasibility or best interests of the creditor, may also result in disapproval. If after the disapproval the company cannot present a modified plan, which is duly approved then the Chapter 11 case shall be dismissed or converted to a Chapter 7 liquidation case. It may be liquidated under Chapter 11 itself. If there is a default the liquidation can be converted to a Chapter 7.

### **India**

A reorganization will be defeated if the BIFR<sup>5</sup> is of the view that the company cannot be revived, in which case it will refer the matter to the High Court for the company to be wound up.

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<sup>5</sup> Subsequent to the Amendment Act coming into force, these powers will be exercised by the National Company Law Tribunal.

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### **13. Bankruptcy Process**

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? Can creditors initiate proceedings to pursue remedies against third parties or changes in the administration of the case?

#### **United States**

Various notices are sent to the creditors, including notice of the commencement of the case, time & place for the mandatory meeting of the creditors, the existence of the automatic stay, the deadline if any, for filing claims etc. Thereafter the trustee holds a meeting of the creditor at which the debtor must appear for examination by the trustee and the creditors. Creditors may elect a trustee at the meeting in a chapter 7 case otherwise the interim trustee becomes a trustee and if a trustee is ordered in a chapter 11 case, creditors may request an election in this regard. In a chapter 11 case, a committee of unsecured creditors will be appointed, and the court may order for appointment of other committees such as the shareholders committee. Creditors act through these committees, may, with court approval, bring certain proceedings against third parties if the debtor in possession refuses to do so. Creditors may also individually or through the committees seek changes in the administration of the chapter 11 case such as filing a motion for the appointment of the trustee.

#### **India**

In case of a winding up by the court, no prior notice is given to the creditors by the court. In case of a voluntary winding up by the creditors, the board of the company will have to call for a meeting of the creditors to be held one day after the general meeting of the shareholders and the notice for the creditor's meeting has to be sent out simultaneously with the notice to the shareholders for the general meeting.

### **14. Claims and Appeals**

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does creditor appeal a disallowance?

#### **United States**

Creditors claims are submitted by filing a proof of claim before the deadline in a Chapter 7 case, which is 90 days after the first date set for meeting of creditors, or before the bar date fixed by the court in a Chapter 11 Case. If an objection to a proof of claim is not filed, the claim is deemed allowed. If an objection is filed, a trial will be held in the bankruptcy court. If the Court disallows the claim, an appeal may be preferred to the US district court or the bankruptcy appellate panel (if one exists in that district). In a Chapter 11 case, if a claim is listed by the debtor as undisputed, non-contingent and unliquidated, it is deemed filed and allowed.

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### **India**

In a creditors winding up, the creditor will petition the court to commence winding up proceedings if the company has been given notice of the debt due to him and the debt has remained unpaid for three weeks from the date of the notice. There is no specific procedure for disallowing creditors claims.

### **15. Priority claims**

What are the major (a) governmental and (b) non-governmental privileged and priority claims in liquidations and reorganizations? Which priority and privileged claims have priority over secured creditors?

### **United States**

Governmental claims for income taxes less than three years old are entitled to an eighth priority. Other major priority claims include first priority for expenses of administration (which includes fees of professionals retained by the trustee), debtor in possession and appointed committees in Chapter 11 Cases, and wage and employees benefit plan claims limited in amount and time have a third and fourth priority respectively. Priority claims are unsecured claims and none has priority over secured claims.

### **India**

In liquidations it is workmen's dues, which are given the utmost priority. The priority of charges is as follows:

- Workmen's dues;
- Government dues;
- Secured creditors; and
- Unsecured creditors.

### **16. Distributors**

How and when are distributions made to creditors in liquidations and reorganizations?

### **United States**

In Chapter 7 liquidation case, distribution is made to creditors after assets have been sold, claims are processed and essential litigation is completed in other words, towards the conclusion of the case. In a Chapter 11 case, distribution is made pursuant to terms of the confirmed plan.

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### India

Distributions are made by the Liquidator after receiving the approval of the High Court in liquidations. The distribution may be made in cash (after the assets are sold) or an in-specie distribution of the assets of the company.

In a reorganization process, the distributions will be made in accordance with the scheme of reorganization as approved by the BIFR.

### **17. Voidable transactions**

What types of transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

### United States

Generally voidable preferences and fraudulent transfers may be set-aside in a case under bankruptcy Code. A voidable preference is a transfer to a creditor for an antecedent debt made within 90 days before filing the petition commencing the case, where the debtor is insolvent, the effect of which is to give the creditor more than what he will receive under Chapter 7 liquidation case. A fraudulent transfer is defined as per state law or is one that is made with intent to hinder, delay or defraud the creditor, or is constructively fraudulent *i.e.* made without an equivalent value, when the debtor is insolvent, engaged in business with an unreasonably small capital or in debts beyond his ability to repay them. The result of setting aside the transfer in either case is to require the property or its assets to be transferred back to the estate. In the case of a voidable preference that is recovered the creditor is left with an unsecured debt against the estate.

### India

Any transfer of property in whatever manner done by or against a company six months prior to the commencement of winding up proceedings will be deemed to be a fraudulent preference and shall be invalid.

### **18. Directors and Officers**

Do corporate officers and directors have personal liabilities for any pre-bankruptcies or action or particular types of claims? Can they be subject to other sanctions for other reasons?

### United States

Corporate Officers and Directors do not have bankruptcy-related personal liability. Their liability arises due to the breach of fiduciary duty under a state law. There may be individual liability for non-payment by the business of certain pay-roll taxes to the government.

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### **India**

Under the Companies Act, in the event that a director/officer of a company which subsequently goes into winding up, he/she will be punishable with imprisonment upto two years as well as a fine, if he/she: (a) induces a person to give credit to a company under false pretences or under a fraud or (b) transfers the property of the company with the intent to defraud the creditors or (c) conceals the property of the company from the creditors.

### **19. Creditor enforcement**

Are there processes by which a business can be liquidated outside of the bankruptcy processes? Outside of court proceedings? How are these processes carried out and what are the consequences?

### **United States**

Depending on the state law there may be ways to initiate bankruptcy liquidation of a business. A statutory or common law assignment for the benefit of creditors may not be available to creditors pursuant to which the debtor assigns to assignee all of his assets, the proceeds of which are distributed to the creditors by the assignee.

An equity state or federal court receivership may also be available. If the proceeding is fully carried out the result will be a liquidation of the business. Also such a proceeding may permit creditors to commence an involuntary case under Chapter 7 or Chapter 11 of the Bankruptcy Code.

### **India**

Currently, there are no provisions for liquidation of a business outside the winding up provisions under the Companies Act. However, a secured creditor can enforce his security outside the winding up proceedings. Further, under the Securitisation and Reconstruction of financial assets and Enforcement of Security Interest Act, 2002, certain additional powers are available to financial institutions/banks for enforcing the security.

### **20. Informal restructurings**

Can a restructuring be carried out without formal proceedings? If so, how are such restructurings implemented?

### **United States**

A restructuring may be carried through an out of court workout without judicial proceedings. A substantial number of creditors must agree to the plan because no one creditor can force another creditor to release its claim. If insufficient consents are received for the out of court workout to succeed, there may still be a sufficient number and amount of consents to meet the plan

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acceptance requirements of Chapter 11, and the plan and votes may then be used in what is called pre-packaged Chapter 11 case.

### **India**

In India, restructuring without formal proceedings (i.e. out-of-court proceedings) are not permitted for corporate entities. Provisions relating to amalgamation / reconstruction under the Companies Act do envisage Court intervention (sanctioning of such schemes by the Court). In the case of sick companies, the restructuring would be carried out by the BIFR.

### **21. Corporate procedures**

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

### **United States**

A voluntary dissolution of assets may occur through sale of assets and payments to creditors. Compared to a bankruptcy case, there is much less formality and cost, no court supervision and no statutory protections.

### **India**

A company can be wound up voluntarily if the period fixed under the Articles of Association has expired or on the happening of the event /s specified therein. The procedural requirements are more or less the same as in case of compulsory winding up. Even under voluntary winding up, the Court<sup>6</sup> would have to pass the final order for dissolution of the company with effect from the date mentioned in that order.

### **22. Conclusion of case**

How are liquidation and reorganisation cases formally concluded?

### **United States**

The formal conclusion is by bankruptcy court order closing the case. This occurs when the case has been fully administered.

### **India**

Liquidation cases are formally concluded by an order of the High Court – the High Court of that State in which the registered office of the company is situated would have jurisdiction for such

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<sup>6</sup> This power is proposed to be transferred to the National Company Law Tribunal as per the Amendment Act.

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winding up proceedings. Reorganization cases are concluded by the BIFR approving the scheme of reconstruction drawn up by the operating agencies.

### **23. International cases**

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

#### **United States**

The Bankruptcy Code contains provisions allowing the Bankruptcy Court to assist the foreign representative in foreign insolvency proceedings with respect to actions, creditors and property located in United States. The court may also dismiss or suspend a domestic case in favour of foreign proceedings. The Court will be watchful of the due process rights of local creditors and their fair treatment in the foreign proceedings. The United States is not a signatory to any treaty on international insolvency. Some but not all states have enacted a foreign judgment recognition statute which, if certain requirements are met, permit the recognition and enforcement of a foreign money judgment.

#### **India**

US is not a reciprocating territory as envisaged under section 44A of the Civil Procedure Code, 1908, and hence judgments of US courts would not be automatically executable in India. For enforcing decrees of the US courts a suit upon the foreign judgment will have to be filed in the Indian Court to enforce the foreign judgment. It would take considerable time to obtain a decree in such a suit and to enforce it in an execution proceeding in India.

Under Section 13 Code of Civil Procedure, 1908, enforcement of a foreign judgment could be refused in the following circumstances: -

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases which such law is applicable;
- where the proceeding in which judgement was obtained are opposed to natural justice;
- where it has been obtained by fraud;
- where it sustains a claim founded on a breach of any law in force in India.

As regards enforcement of foreign awards wherein the parties share a legal relationship of commercial nature, then benefit could be taken of the New York Convention (“NYC”) of which US and India are both parties. The arbitral award passed in US would be enforceable in India as a decree of the Indian Court.

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No; India is not a party to any treaty on international insolvency. As regards international arbitration, India is a party to the Geneva Protocol, 1923, the Geneva Convention, 1927 and also to the NYC as stated above.

#### **24. Pending legislation**

Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments or orders?

##### **United States**

There is a legislation mostly affecting consumer bankruptcy but also affecting some aspects of business bankruptcy. Part of the pending legislation includes model law of UNCITRAL.

##### **India**

- Companies (Second Amendment) Act, 2002 is pending to be notified. The relevant changes have been discussed under the relevant questions. Further, please find attached herewith a power point presentation on the salient features of this Act.
- The Securitisation and Reconstruction of financial assets and Enforcement of Security Interest Act, 2002 relating to the enforcement of security has been recently enacted.