Ep.80 Anti Money Laundering Part 2

Intro Music: INSOL international, in conjunction with the Early Researcher Academics Committee, presents INSOL talks.

Ishana Tripathi (IT) (00.23): Welcome to INSOL Talks. We are here today as part two of our session on AML Risks and Insolvency, to delve into the Indian perspective on issues of economic offences and the evolving landscape and jurisdiction. For our session today, we have two trial lawyers of prolific experience, Aditya Vikram Bhatt and Shri Singh, who will raise some challenges and perspectives with respect to the Indian insolvency regime and the issues that arise from the anti-money laundering legislation, which is the Prevention of Money Laundering Act and the intersection between the two.

Just to set a two-line context about the insolvency law in India, the key feature of this legislation is that it suspends boards of directors immediately the minute you are admitted into insolvency. And the other component is that having a *non obstante* or an overriding clause legislatively included, the insolvency law categorically overrides the specialized money laundering law in India, which is in its own novelty, the law being the Prevention of Money Laundering Act. Now, in this context, there are many judicial pronouncements. There has been a large amount of questions of coordination. And consistently you've seen the investigative authority, which is the Enforcement Directorate, which I can allow the two persons who are speaking today on behalf of India and will talk a little bit about the regime, will talk about in terms of the intersectionality of the insolvency practitioner, the empowerment of the insolvency practitioner to run the show and run the company in distress and insolvency as a going concern, and how the proceeds of crime against this particular debtor are treated. So in this context, I want to first invite Aditya and then Shri with respect to moving into the Indian landscape and the trial landscape and the regulatory coordination landscape, to talk about where India is at when it comes to AML risks and insolvency. So, Aditya, first over to you.

Aditya Vikram Bhatt (AB) (02.55): Thank you, Ishana, wonderful to be here. Thank you for having me, Ishana. So we shifted from a regime that was administered by our high courts, our jurisdictional high courts under the Companies Act 1956 to an insolvency resolution, Insolvency and Bankruptcy Code regime in November of 2016. The regime before that, like I've said, operated under the 1956 act, the Companies Act. It was time tested in the sense that you knew both the advantages and the disadvantages of that regime fairly well. And most practitioners like us, had a, had a sort of script to deal with it. One subtext here is that there was a new Companies Act brought about in 2013, that winding up regime, that liquidation regime was never implemented. We shifted straight from 1956 to the 2016 insolvency regime.

With the coming of the insolvency regime, so what were the good things? The good things were that, one, the resolution process became integrated into the winding up process in the sense that it was a necessary precursor. It is not to say that the 1956 regime didn't have a resolution process. There was one. It was under 390-394 of the old act. But however, that was company or promoter driven, that was not driven by the resolution professional or the committee of creditors. The old regime, therefore, had its own disadvantages in that sense. The ability of the company court to *suo moto* implement a resolution plan was limited. The obvious disadvantage, in my view of shifting away from the company court has been related to tribunalization. We move from a transparent judicial process to a tribunal process that's a little more opaque. And in my view, the

incumbents there are a little more lacking in training when it comes to resolution processes and, and adjudication processes broadly.

With the insolvency regime coming in in 2016, the provisions of 29A of the act came into force. And why they're relevant is that they disabled certain entities, certain individuals, certain persons from participating in the resolution process. Who are these people? There's a whole list. But for the purpose of this discussion, we're looking at individuals who've been promoters, persons connected to the promoters, the management, people in control, guarantors with respect to the debtor company. There are different ways to look at it, but I think since the introduction of the IBC also signalled an outright policy shift that primacy is to be given to restitution to creditors, I think the thinking was that individuals or entities that have been involved or have contributed to the insolvency arising should not be then allowed to participate in a distress sale process.

Of course that, making this a statutory rule plants the assumption that it's always that the promoter or the management or the guarantor that's been, that's been the reason for the company going into insolvency. And as we obviously know that it's not necessarily true. Be that as it may, the next question that comes up is, what do we do with cases where the involvement of the promoters rises to the level of, let's say, fraud under the company's act, or one of the related offences under the principal penal statute. It used to be the penal code is now the BNS, the Nyaya Sanhita, which is basically twofold cheating and criminal breach of trust. And this is where obviously PMLA comes in, because all of these offences for 47 under the Companies Act, the cheating and criminal breach of trust offences under the IBC are basically predicate offences or scheduled offenses, so far as the PMLA is concerned.

And thus, if you are talking about, by way of illustration, if you're talking about a company being unable to pay its financial debts on time, and there's an allegation from the lender bank that the debt was secured on the basis of, let's say, fraudulent financial statements or money has been frittered away by promoters or converted for personal, personal gain by promoters. You're looking at an immediate intersection between the two regimes.

Like in other jurisdictions, the Enforcement Directorate, which is the primary law enforcement agency dealing with money laundering offences, has the ability to provisionally attach resources. Now, when it does it, as Ishana said, there are two things that happen. One is that the assets of the company are required to be available to the resolution professional or the liquidator if it's at the stage of liquidation, for distribution amongst creditors. On the other hand, there is a policy expression by the, by the legislature that proceeds of crime can be forfeited and the statute actually provides for both them being disgorged and or them, you know, being restituted to victims, and I'll come to that in a second.

So the tension therefore arises as to what happens when something is an asset of the company, but is also required in a PMLA proceeding and an attachment proceeding as proceeds of crime. Ishana has already pointed to the *non obstante* clause that's in the IBC. So let me add to the mix by telling you that there's a strong and clear *non obstante* clause in the PMLA or the anti-money laundering statute as well. And courts have done their best to resolve this tension, but I wouldn't go so far as to say that it has been resolved. For instance, the first test that courts would usually apply is that the later *non obstante* clause would prevail, and in this case the IBC's *non obstante* clause is obviously later being in 2016. That said, there are judgments that say that the *non obstante* clause in the IBC would not come in the way of the Enforcement Directorate making an attachment to start with, and also that the moratorium that Ishana referred to would not apply to

proceedings under the Prevention of Money Laundering Act initiated by the Enforcement Directorate. So that's the first sort of source of tension there is.

The next stage in this tension seems to be anecdotally and statistically, although not by clear policy decision seems to be resolved a little bit in favour of the insolvency process. We've had a couple of interesting judgments which have allowed assets that have been attached by the Enforcement Directorate to be put back in the resolution pool and made part of the resolution plan.

One, of course, is the Bhushan Power and Steel judgment. But before I go there, something that I as a practitioner, miss, is the old 456, subsection 2 of the Companies Act, 1956, which categorically said that the assets of a company in liquidation are seized off by the company court. Now, as I've mentioned earlier, the company court used to be the High court, and the High Court is a constitutional court in India. And as such, it would actually set up a very clear hierarchy and a certain level of deference that both the liquidator attached to the High Court, as well as law enforcement agencies, were compelled to follow. The current regime goes so far as to enable the resolution professional and the liquidator to take custody, but it doesn't vest the property with the court. So that's, that's something that, uh, you know, I think is a little bit of a gap.

Coming back now to Bhushan Power and Steel that I mentioned, the tension was resolved in favour of the resolution process, but I have to point out that it's on the back of an affidavit that was filed by the Enforcement Directorate, placing on record its view before the Supreme Court on the manner in which 32A, which is immunity to the resolution process from money laundering and other, and other criminal offences. And it was the Enforcement Directorate that voluntarily, in that sense, said that we will respect the policy decision of the Government of India and the legislature to enact 32A to give it retrospective effect and therefore we are able to release certain assets back to the resolution process for the completion of the, completion of the resolution process.

You also have to keep in mind that on whether the resolution should be allowed to go through, should the delays that were inherent in the system be allowed to jeopardise it. The Supreme Court took a particular view, pushed the company into liquidation, and then recalled its view on the on the back of a review petition. So in my view, Bhushan Power and Steel was decided in the specific facts of that case. And there have been other judgments as well. You know, in in the recent past that that that sale on the facts of that case.

But something that I think gives me a ray of hope is the enactment of subsection 8 in section 8, which allows the PMLA court, we're no longer talking about the tribunal that sort of initially confirms the attachment, but we, I'm talking about the court that convicts individuals or other entities of money laundering. It has the ability on an application being made to use the proceeds of crime for restitution to victims. And this has in, in my experience and in the public domain, been effectively used to restitute banks, financial creditors who the court has actively recognized as victims of money laundering. And that, I think, is a ray of sunshine. It brings matters back into the judicial process as opposed to a tribunal process. Two, it allows the court to use discretion in the right cases, move the narrative from pure disgorgement into restitution. And like I said, because it's in a court, it's a transparent and open and logical sort of forum.

So that said, I'm going to pause here and hand over to my friend Shri. I'm sure Shri will speak a little bit about the Sandesaras and Sterling judgment and issues that he sees in his day to day practice as one of India's leading anti-money laundering experts. Over to you, Shri.

Shri Singh (SS) (14.30): Thank you, thank you. Aditya, thank you for inviting me Ishana, to be part of this panel. Let me just expand from where Vikram has left off on the issues of trans border implications of India's insolvency laws, coupled with our AML practices. So, as has been traditionally understood in India, the context of extradition requests have, the experience rather has been quite time consuming in practice, resource heavy, and sometimes as a result of that, they become politically charged questions. So it is a nuclear option that is often used by law enforcement, not just limited to insolvency or money laundering, but across the board. And the response of the Indian policy maker has been to try and find ways around extradition and to see if there are any other ways in which persons who are not within the Indian jurisdiction can be persuaded to come back and join proceedings in India.

So there are a couple of methods that the policy makers have deployed. The first is, if you look at it domestically, we've passed a raft of either amendments to existing procedures or a series of new legislation, such as the Foreign Economic Offenders Act or the Money Laundering Act itself, as I was just referring to, parts of the insolvency laws and amendments to our criminal procedure that were made in 2024. The effect of all of these amendments and statutes has been that to make it difficult for an individual or a person running a conglomerate or a company sitting outside India, and to affect or litigate his or her defence in India. So we have, for the first time in 2024, changed about one hundred and fifty years of criminal practice. And we've permitted *in absentia* trials, which is something that India was not willing to look at earlier.

So as a result, the policy makers are inviting people who have left Indian shores to come back and to either participate in proceedings or to deal with the inevitable consequence of a, of an undefended trial. So quite apart from that, over the last couple of years, India has become a little better at utilising mutual legal assistance treaties, especially the MLAT between India and the UK. Interestingly, the MLAT was dated 1992, and it uses the phrase proceeds of crime in its long title, so that, that speaks to the foresight that those makers had. The MLATs are being used to by Indian authorities, at least to obtain information, to serve summons, and also to seek information from the overseas regulators or overseas institutions. The effect of MLATs in Indian cases is varied, either because we've only just started seeing maybe in the last four or five years, MLATs being issued and being responded to on timescales that make sense within a trial. Otherwise, mostly MLATs was sent out and we would not expect any replies to them. But I think over the last couple of years MLATs have been responded to and the data that has been coming in from different jurisdictions, including the UK and Switzerland, from the US, from Dubai, has been used successfully by the prosecution in trials.

Now as Marcial pointed out in his very erudite presentation, financial transactions and other areas of endeavour mean that large conglomerates are no longer bounded by the rules or laws of a single soverign. The effect of that is that when we do get information from foreign jurisdictions, the fact that there is very little attention paid to data interoperability, that is, that data that is provided by an institution or regulator in the UK to Indian authorities, is it fungible? Is it something that we can understand in terms of the relative weight that, say, a regulator in the UK would give to that information? That information, the lack of that weightage that is being attached to that information sometimes is a challenge when it is sought to be used in proceedings, especially in criminal proceedings, which are otherwise also weighed down by questions relating to burden of proof, standard of proof, and in the case of the PMLA, we have this peculiar introduction of reversal of burden of proof. So these tend to militate against the manner in which that data can be used and can be used effectively.

Apart from that, of course, there are standard bureaucratic delays in getting that information and issues relating to asset identification, and once it is identified, you know, attachment and then repatriation of those funds. So I think these are all areas where even before the governments actually start speaking to each other, it would be great if panels such as this can start interacting across the border. And to find ways in which the data that is sent or is asked for is in a manner that can be used effectively, either by prosecutors here or regulators in the UK. The failure to do so means that the conglomerates, which are sophisticated, they are not bound by reference to either domestic law in India or domestic law in the UK. They are finding ways to weaponize these, this regulatory arbitrage, and it is being used on almost a daily basis in India. So either the delay or the fact that, you know, the data is we really don't know what to do with that data. This is an area that requires some attention. And I'm sure that many, if not all of these of the panelists today will take a leading role in that. So thank you. Ishana.

IT (20.51): Thank you so much for that, Shri. We are now open to questions, but I was made a request by the teachers who are here, the lecturers from Leeds to ask the first question. Go ahead Oriana, you were very interested in a particular question with respect to extradition and how the Indian model works. So I'm going to give you the first floor.

Oriana Casasola (OC) (21.15): Yes, I'm really interested in this. I have a quite a few Indian students that participate to my cross-border insolvency module. So I have quite a few questions about the extradition, the denied extradition of the UK. And one of the questions that is purely academic is how is qualified, how insolvency and bankruptcy law are qualified in India in the sense of are they considered really adjacent to criminal law, or is there a more. So one of the speakers said that there is still a bit of, component of criminal law, if I understood correctly. So I wanted to know in cross-border scenario, what is the nature of insolvency law in India, and how this may hinder the collaboration in cross-border settings.

AB (22.15): I can take that Shri. So Oriana, the insolvency law itself is essentially a part of our civil law regime. It's not prosecutorial in that sense. There could be an element of criminal offences within the statute. And of course, you know, the tension that it has with the Companies Act or with the money laundering regime. But in itself, the, the focus is on identification of assets in India or abroad. Bringing those assets into the fold for a resolution and making creditors whole with or without a haircut. So in that sense, it's a part of our, broadly speaking, a part of our civil enforcement system rather than the criminal.

OC (22.12): Thank you.

IT (22.13): Thank you so much for that question and answer, Oriana and Aditya. I do have a question in the chat box which says the following to John. How do you deal with issues of assets from a UK perspective that are under criminal proceedings in a different jurisdiction? Could you give me a live case example?

John Cullen (JC) (23.36): I can give you my take on it. Thank you very much for the question. I can give you my take on it. I can't give you a live example as of today because for a number of different reasons, I don't have one going on. But if I were looking at assets that were in a different legal jurisdiction, the first place I would go to is whether there was any reciprocity of the, any reciprocal agreements in relation to the insolvency model law. So that would be my first play. Because if there isn't, then getting recognized in that country can obviously, can often be quite difficult as a, as having any authority to represent an estate.

Secondly, you would need to have a very good idea of what the criminal law looked like in that country. So if you know, it's certainly in my jurisdiction within the UK, I would expect any active proceedings criminally would effectively ring fence those assets if the, if action was being taken to recover them. And as an insolvency practitioner working within civil law mostly, the interests of my estate would come second.

So if I've understood that question properly, I think the easy answer is no. I don't have a live example of working within the UK trying to gain access to assets that are caught criminally abroad. But I would think it would be. I would imagine it could be very difficult, but you'd have to look at every circumstance of where it is and what was happening.

IT (25.20): Thank you for that, John, I'm getting a lot of DM questions, so feel free to raise your hand and speak your question. I have another question here on similar lines to Marcial. What is the scope that the regulatory body, such as yours has undertaken in enabling coordination of assets that are labelled proceeds of crime in issues that arise during corporate insolvencies? That's a bit of a complex question, Marcial. Do you follow?

Marcial Boo (MB) (25.59): Uh, not completely, I have to say. Uh. Um, so our job as a regulator is to ensure that insolvency practitioners comply with the rules, that they apply good standards. And so to the extent that that involves the distribution of assets or collaboration with other parties, other regulators, then obviously that's what we will focus on. So if at any time we judge that there needs to be more focus on one particular aspect of the insolvency regime, then of course, that's what we will do. And we do that, first of all, in a cooperative way. Also, you know, by talking to the insolvency practitioners, you know, our first port of call is not enforcement action. So, you know, we want to work with those we regulate to help them to do the right thing. And the vast majority do. I think that's really important to say. You know, the insolvency profession in the UK is a strong profession. It's professional, it adheres to good high standards. And as in all sectors of the economy, there are, you know, maybe 5% of people in every profession who need a bit more help to comply with the rules. And so that's where we focus our attention. But if there is a particular issue, whether it's this one or another one, where we judge that the insolvency practitioners need a bit of help or need to collaborate with others, then obviously we will point that out and we will engage with other parties.

IT (27.22): Thank you so much for breaking down that complex question. Ilaria?

Ilaria Zavoli (IZ) (27.26): Yes Ishana, Just to follow up on John's answer to the to the first question. And I believe also it pertains to Marcial's, you know, like answer again, like about like the role of regulators, especially for, you know, professional bodies representing the sector.

A few days ago, I was at another, you know, event and it was a symposium on economic crime. And then we were discussing this question of pseudo policing. And it's very criminological, obviously, but it is, I think, in line with the idea of giving functions to private actors, for instance, insolvency practitioners that might go well beyond what is actually expected of them, including those representing them, so those representing the sect. So then the question, in my view, as a criminal lawyer, because I'm not an insolvency expert, I'm a criminal law expert, would be then what is actually that we want from insolvency practitioners, from those that are working on a daily basis in insolvency? Is it just to again here we need, I think, to strike a balance just to have like a tick box exercise for anti-money laundering purposes, just to be in line with anti-money laundering obligations. Or do we want them actually to perform these pseudo policing functions? But then how can they do that without having probably the proper training, proper resources, but also to make sure that there's no overlap with what is going to happen instead,

when there is a, you know, criminal prosecutors that are taking on like the case and there is the National Crime Agency that is actually taking over, because they understand that there is criminal activity ongoing.

We cannot force a criminal or a policing function onto insolvency practitioners, because this will expand too much the function, that also will put an undue burden on the shoulders insolvency practitioners. But at the same time, they do, they are part of this public private partnership that we mentioned at the beginning. Right? And the expectations, and again, it's not just for insolvency also applies to other sectors, is that they will do their utmost best to help criminal investigations if something actually needs to be flagged up.

So there is this like blurred line if you want, and a little bit of opaque, you know, like understanding of what is actually required and where do the normal AML functions stop? And then instead we go into the criminal law territory that doesn't necessarily pertain to AML obligations and responsibility of the stakeholders like insolvency practitioners. So I think this might be also interesting from an Indian perspective, because again, as we were told, there is an overtaking, so there is actually that insolvency there is the other way around that overseeds AML most of the time. So does this mean that there is also like an inversion of the responsibilities and the roles? So there is more like duties and burden put on the shoulders from an insolvency perspective rather than a criminal law perspective.

IT (30.41): Sets the context for the question I have for Shri. So Shri, how does the Enforcement Directorate, which is the AML authority, assist an insolvency practitioner in insolvency of a debtor with respect to assets, or does it not?

SS (31.00): I'm glad you added that suffix because they don't. It's been a peculiar feature for the last seven or eight years that although the agencies that run anti-money laundering prosecutions and executions and the government bodies that regulate insolvency, they belong to the government, they've been working at what appears to be cross-purposes, because while the insolvency statements of objects and reasons of the act make it very clear, and it can't be clearer, in fact, what they say is that out of the many things that the IBC is meant to achieve, which is the law relating to insolvency, it demands an alteration in the order of priority of payment of government dues. So it is it is granular to that level in the statements of objects of interest.

But when the insolvency professional is out looking for assets with respect to a distressed entity, it will often find that the Enforcement Directorate has already reached there and is conducting its attachments for the purposes of confiscation, and the Enforcement Directorate will take a position in court saying that no, I my, I am going to seek priority over payment of a creditor. As Aditya pointed out, that has now been partly resolved by an amendment to the IBC, which has sought to retain primacy with respect to assets that are being taken charge of by the IBC professional, by the resolution professional.

Now to the IBC. So statutorily, there is a recognition that the IBC will take precedence. So we're quite some distance away from the Enforcement Directorate assisting insolvency. We are still trying to make sure that they that the Enforcement Directorate stays away from those assets, but they do do because they are an investigating agency, it must be said that they do an excellent job in identifying assets. So the level of skills that are available to IBC professionals are quite varied. There isn't a standard set of skills that they all have. Some will be better than others. But the Enforcement Directorate, over a period of time is getting much, much better at identifying assets. So that's probably one area where they could assist. And perhaps they do. The fact that they run a prosecution with a list of assets makes it probably easier for insolvency professionals in India to

access to see those. And hopefully given the way things are turning now, they'll be able to use them.

IT (33.42): That's a pretty positive note, Shri. Reducing information asymmetry seems to be the right note to be able to close this session on. I think there's a lot of food for thought here, especially when it comes to looking at and perhaps an already evolved coordination process. Many thanks to the regulator clearly there and, and an evolving, uh, regime. But I want to quote our last speaker on something he said to me, "just because you have the same nomenclature doesn't mean that the authority works in a similar fashion". And Shri said these words, and that's completely true because just because it is AML and you have AML authority doesn't mean that it's empowered or is enforced or implemented in the same fashion. And that's clearly something to think about until Ilaria and Oriana do the next conference.

I want to thank Shuai again for allowing this and want to thank each and every one of you for giving your time with this. And I'm extremely grateful for having this conversation with you. With that, thank you everyone. Thank you people who joined and thank you to ERA and INSOL International for allowing this to happen. Good evening and a good day everyone.

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