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SHOULD ENVIRONMENT CLAIMS BE GRANTED THE STATUS OF SECURED CREDITORS IN THE INSOLVENCY AND BANKRUPTCY CODE, 2016?

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ABSTRACT

Arresting climate change requires recalibration of the global financial and insolvency systems. The dichotomy between insolvency law and environmental law arises when a debtor enters insolvency and has not fulfilled its part of the bargain on the environmental regulations and the environmental claims are treated as unsecured. This incompatibility will cease to exist if environmental claims are given the same status as that of secured creditors. Evolution of insolvency laws, both, globally as well as in India, are a testament that the insolvency laws had been malleable. The insolvency literature is amenable to grant environmental claims a secured status if clarity exists in the law and the participants in the ecosystem are aware of the same. Jurisprudence across the globe is pivoting towards treating environmental claims favourably and vis-à-vis one aspect, the contamination of land and its abandonment the judgements are analogous. India has a plethora of laws on environment including for contamination of land; a charge on assets is created, effectively granting a "secured-equivalent" status, for recovery of expenses incurred by the pollution board. However, the question has not yet been tested in the Indian courts. Furthermore, based on evolving judicial precedents, it is probable that, in future, insolvency professionals and lenders to the corporate debtor may be held liable for environmental liabilities on the grounds of "capacity of influence"; probability of systemic risk exists due to climate emergency. Thus, granting a secured status to environmental claims will obviate such professional liabilities as it would be in the interest of all stakeholders to give primacy to environmental laws.

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I. INTRODUCTION

Human influence is the primary driver that has warmed the atmosphere, ocean, and land. Global warming of 1.5°C and 2°C[1] will be exceeded during the 21st century unless deep reductions in carbon dioxide (CO_2) and other greenhouse gas emissions (primarily methane) occur in the coming decades. Changes in the climate system have become larger in direct relation to increasing global warming. Global warming has resulted in an increase in the frequency and intensity of hot extremes, marine heatwaves, agricultural and ecological droughts, intense tropical cyclones, variability of the water cycle, severe wet (heavy precipitation) and dry events, unprecedented sea-level rise, receding glaciers, and reductions in Arctic Sea ice, snow cover, and permafrost.[2]

The aforesaid climate emergency calls for an appropriate response from the legislature, the judiciary, and the executive; insolvency and bankruptcy laws[3] being part of the broader legislative framework, thus have a moral obligation to adapt accordingly. Neither does such a moral obligation to adapt impinge on individual liberty. John Stuart Mill, in his essay, said, "that the individual is not accountable to society for his actions, in so far as this concern the interests of no person but himself"[4]. He added, that "actions that are prejudicial to the interests of others, the individual is accountable and may be subjected either to societal or to legal punishments, if society is of the opinion that the one or the other is requisite for its protection"[5]. Today, action on climate change is a prerequisite for societal protection.

Also, economics and associated laws evolved out of moral philosophy. Adam Smith, who is regarded as the father of economics, was a professor of moral philosophy and not economics. Smith had opposed slavery on moral grounds. Thomas Kuhn, the philosopher, and intellectual historian, argued, that early in the development of a new field, "social needs and values" are a

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[1] Such temperature rise will have severe climatic consequences, that is, frequent agricultural and ecological droughts, storms, dust storms, tropical cyclones, heavy snowfall & landslides, and flooding, etc.
[2] Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L.Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.), *2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, CAMBRIDGE UNIVERSITY PRESS (2021) https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf.
[3] Insolvency is the financial state where a person is unable to pay their debt on time. Bankruptcy is the legal process that is undertaken when a person formally declares the inability to pay their debt to creditors. However, throughout the paper, the words insolvency laws and bankruptcy laws have been used interchangeably.
[4] JOHN STUART MILL, ON LIBERTY 1859 86 (Enhanced Media Publishing, Los Angeles, CA 2001).
[5] *Id.*

major force determining what problems its practitioners take up[6]. The climate emergency today equates to the social needs and values of our time.

The Preamble[7] of the Insolvency and Bankruptcy Code, 2016 (IBC) also has an inherent morality built into it, further expounded by the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr vs. Union of India*[8]. The court stated that "It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus beneficial legislation which puts the corporate debtor back on its feet". The court further added that "repayment of financial debt infuses capital into the economy in as much as banks and financial institutions are able, with the money that has been paid back, further to lend such money to other entrepreneurs for their businesses." Thus, the social good of saving the corporate along with its personnel and judicious deployment of capital is at the core of IBC.

Currently, insolvency laws restructure or liquidate the debtor, whereas environment law seeks to safeguard the environment. A disagreement arises between the two laws when the debtor enters insolvency, has not fulfilled its part of the bargain on the environmental regulations, and the insolvency law intends to treat claims arising out of such negligence, pertaining to a period prior to the insolvency commencement date[9], as any other unsecured debt. Developing jurisprudence in different jurisdictions on the treatment of such environmental claims ensues. This paper argues that environmental claims should be granted the same status as that of 'traditional' secured creditors. This would address not only the climate emergency but also, in a roundabout manner, serve the interest of 'traditional' secured creditors, a segment that *prima-facie* will be affected by the grant of such a priority.

Some of the enlightened jurisdictions have already embarked on granting environment obligations/claims their rightful priority, albeit in limited scenarios. The broader ecosystem amidst which insolvency laws operate is in the midst of a change and may have a direct or an indirect

[6] BENJAMIN M FRIEDMAN, RELIGION AND THE RISE OF CAPITALISM (Knopf 2021).
[7] An act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues.
[8] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., AIR (2019) 4 SCC 17.
[9] All claims arising on account of environmental violations, post the insolvency commencement date, will be treated as insolvency resolution costs / administrative costs, necessary to preserve the assets of the debtor. In some jurisdictions, this may not be applicable for renounced assets.

effect on the functioning of insolvency laws. Though several adjacencies of insolvency law are undergoing a metamorphosis, two aspects are elaborated below: one from the realm of accounting and another from the domain of lending, to bring to fore the probable consequences of such a transformation.

The first aspect is from the accounting arena. IFRS Trustees at the United Nations Climate Change Conference (COP26) decided to establish the International Sustainability Standard Board (ISSB). ISSB's purpose is to develop, in the public interest, a comprehensive global baseline of sustainability disclosures for the financial markets.[10] The intersection of financial standards and sustainable standards may result in a situation of balance sheet insolvency, i.e., liabilities exceeding assets. Most companies do not recognize liabilities arising from carbon emissions produced by their operations, products, and services. This is because these emissions are priced at zero today, and thus, it is assumed that they will be priced at zero in the future too.[11] Any change in the assumptions requiring quantification of the aforesaid emissions may drive companies to balance sheet insolvency and will have a concomitant effect on a director's responsibility and liability. Director's liabilities may arise, especially in cases, where the companies use internal or shadow pricing of carbon for scenario planning. Though, not in the context of balance sheet insolvency, activists have embarked on suing boards for inaction on climate change.[12]

The second aspect is the developments in the debt market. Primarily, there are two sources of debt funds i.e., banks and bond markets. Central banks across the globe have recognized the climate

[10] MEETING REPORT, IFRS ADVISORY COUNCIL MEETING, https://www.ifrs.org/news-and-events/calendar/2021/november/ifrs-advisory-council/ (last visited Nov. 8, 2022).
[11] Robert G Eccles and John Mulliken, *Carbon Might Be Your Company's Biggest Financial Liability*, HARVARD BUSINESS REVIEW, (Oct. 7, 2021) https://hbr.org/2021/10/carbon-might-be-your-companys-biggest-financial-liability .
"Through some combination of government intervention and the development of carbon trading markets, it seems inevitable that a price will eventually be put on carbon around the world. Underscoring this, a carbon price has been proposed as part of several bills before Congress, but other mechanisms like a cap on emissions in a sector or geography would achieve the same effect. Economic models and the experience of the EU Emissions Trading System suggests that a price could likely be between \$50 and \$100 per ton of CO_2 in the near term and rise from there. At \$100 per ton that would represent five percent of the global economy. Five percent of the global economy is a huge number. But where does this liability sit? With the world's corporations.
A sad joke for corporate climate activists is that acting on climate plans is always "the next CEO's job." But every company has an uncovered "Carbon Short" position based on their emissions, and it needs to recognize this hidden liability today. This short position arises from the carbon emissions produced by their own operations (Scope 1 and 2, in the argot of climate accounting), and their products and services (Scope 3). Most companies don't recognize this liability because these emissions are priced at zero today, were priced at zero last year, and so it seems natural to assume that they will be priced at zero in the future. One could say that companies are engaging in the carbon futures market, assuming that this fundamental "input cost" will never change. Anyone who works in commodity markets knows that uncovered positions can turn from profit to significant loss in the blink of an eye".
[12] Gareth Vipers, *Shell Directors are sued over Action on Climate*, WALL STREET JOURNAL, (Feb. 9, 2023) https://www.wsj.com/articles/shell-directors-are-sued-over-action-on-climate-11675938744 .

emergency and heightened the supervision of banks. Network for Greening the Financial System, a conclave of central banks and supervisors, with over 100 members, in their first report, had recommended engaging with financial firms to ensure that climate-related risks are understood, discussed at the board level, and considered in risk management, investment decisions and are embedded into firms' strategy[13]. Thirty-eight central banks have committed to climate-related stress tests to review the resilience of large financial firms, and thirty-three central banks have committed to issue guidance on managing climate-related financial risks[14]. The Bank of England ("**BOE**") has reported on the progress banks, and insurers have made against its climate-related supervisory expectations, set out initial views between climate change and regulatory capital requirements, and has designated climate change as one of its seven strategic priorities.[15] The Reserve Bank of India ("**RBI**"), in its 2015-16 annual report, has mentioned about findings of the G20 Green Finance Study Group[16], in its 2018-19 Report on Trend and Progress of Banking in India, RBI noted the risk of a climate change on financial assets and the need to accelerate the green finance for environment-friendly sustainable development[17] and in the July 2022 discussion paper articulated broad contours of its strategy for regulated entities which included stress testing for climate-related scenarios and climate-related financial disclosures[18]. Recently, in January 2023, RBI published a discussion paper on expected credit loss[19] ("ECL") based provisioning for banks. Once implemented, this may require banks to factor in physical risks and transition risks[20] of climate change in their loss models and provide for the same in their books.[21] Under the existing

[13] *A Call for Action - Climate Change as a Source of Financial Risk, Network for Greening the Financial System,* NETWORK FOR GREENING THE FINANCIAL SYSTEM- FIRST COMPREHENSIVE REPORT, (Apr. 2019) https://www.ngfs.net/sites/default/files/medias/documents/ngfs_first_comprehensive_report_-_17042019_0.pdf.
[14] *Amount of finance committed to achieving 1.5C now at scale needed to deliver the transition,* GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, (Nov. 3, 2021) https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/.
[15] *Our response to climate change*, BANK OF ENGLAND (Jul. 6, 2023) https://www.bankofengland.co.uk/climate-change
[16] Reserve Bank of India, *Governance, Part II: The Working and Operations of the Reserve Bank of India, Chapter X: Human Resources and Organisational Management, Box X.3, Green Finance: An Analysis,* Page 117, RESERVE BANK OF INDIA ANNUAL REPORT 2015-16.
[17] Reserve Bank of India, *Chapter II: Global Banking Developments, Box II.1: Opportunities and challenges of Green Finance Report on Trend and Progress of Banking in India 2018-19*, Page 17.
[18] Reserve Bank of India, , *Discussion Paper on Climate Risk and Sustainable Finance*, July 27, 2022.
[19] Reserve Bank of India, *Discussion Paper on Introduction of Expected Credit Loss Framework for Provisioning by Banks*, RBI DEPARTMENT OF REGULATION (Jan. 16, 2023) https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/CLIMATERISK46CEE62999A4424BB731066765009961.PDF.
[20] Physical risks are physical risks to assets due to extreme climate events. Transition risks are risks of obsolescence to existing industries due to changes in regulation, policy, or technology due to climate change.
[21] IFRS 9 Financial Instruments requires entities to use reasonable and supportable information in measuring expected credit loss. Climate-induced adverse future scenarios may potentially have an impact on the probability of default as well as loss given default.

accounting framework banks, barring exceptional cases, recognize provisions for losses on an event of default whereas ECL will require banks to consider the past, present and the probable future events. Thus, physical risks that may arise due to climate change in the future, such as a coastal factory being inundated due to a rise in seawater or destruction of infrastructure due to hurricanes etc., may influence ECL. Similarly, transition risks too will have an effect; the long-term viability of thermal plants due to rise in renewables, effect on the combustion engine industry due to electric vehicles etc. The probability of default for such events will have to be considered as well as the total loss that a lender may suffer. Furthermore, as mentioned above, putting a price to carbon may result in re-casted company financials that may have a bearing on credit risk.

Vis-à-vis bonds, US$66 trillion[22] in assets, or more than half of the asset management sector globally[23] in terms of total funds managed, are committed to a net zero emissions target. A total of 291 investors are part of this initiative. A significant constituent of the asset management sector involves investing in bonds. Another set of bond holders, namely, the asset owners too, have committed to transitioning their investment portfolios to net-zero GHG emissions by 2050[24]. Additionally, green bonds are slowly creeping in vogue; European Commission has proposed a European Green Bond Standard,[25] the Securities and Exchange Board of India (SEBI) has issued guidelines on disclosure of green bond issuance in 2017 and has made Business Responsibility and Sustainability Reporting mandatory from 2022-23 for India's top 1000 listed firms. Indian companies have been issuing green bonds since 2015. The framework for Indian sovereign green bonds[26] (SGrB) was released in November 2022, wherein the Government of India will use the proceeds raised from SGrBs to finance and/or refinance expenditure (in parts or whole) for eligible green projects in nine categories.

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[22] THE NET ZERO ASSET MANAGERS, https://www.netzeroassetmanagers.org/ (last visited Nov. 8, 2022).
[23] STATISTA, https://www.statista.com/statistics/323928/global-assets-under-management/ (last visited Nov. 9, 2022).
[24] UN ENVIRONMENT PROGRAM, https://www.unepfi.org/net-zero-alliance/ (last visited Nov. 9, 2022).
[25] EUR-Lex, *Proposal for a Regulation of the European Parliament and of the Council on European green bonds*, STRASBOURG, (Jul. 6, 2021) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0391.
[26] *Framework for Sovereign Green Bonds Government of India*, https://dea.gov.in/sites/default/files/Framework%20for%20Sovereign%20Green%20Bonds.pdf (last visited Nov. 10, 2022).

Admittedly, in the initial years, "greenwashing"[27] will be rampant, but eventually, debt markets will move towards financing greener projects. As a corollary, there may be a liquidity crunch for projects that do not meet the green criterion. This is because secured creditors are assured the first piece of the pie in case a debtor files for insolvency, safeguarding their interests. However, granting a "secured-equivalent" status to environment claims reverses this equation; perversely, it forces secured creditors to engage with the debtor and adopt means that will make the business sustainable based on the current climate criterion, an aspect elaborated later in the paper.

The question is whether insolvency laws across the globe have the flexibility to grant a secured status to environmental claims. We seek an answer to the same by studying the evolution of insolvency law.

II. INSOLVENCY LAWS HAVE KEPT PACE WITH THE TIMES

"All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in second place, to prevent on the part of the insolvent debtor conduct detrimental to the interest of the creditors. In other words, bankruptcy law seeks to protect the creditors, first, from, one another and secondly from their debtor."[28]

[27] Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics***,** INVESTOPEDIA (Mar . 31, 2023), https://www.investopedia.com/terms/g/greenwashing.asp.
Greenwashing is the process of conveying a false impression or providing misleading information about how a company's products are more environmentally sound. Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly**.**
[28] LOUIS EDWARD LEVINTHAL, THE EARLY HISTORY OF BANKRUPTCY LAW 3 (Kessinger Publishing 1918).

However, it was different for much of bankruptcy history. Preferences were allowed in English bankruptcies till mid-1500s[29]. It was in 1589, in The Case of Bankrupts,[30] that the principle of

[29] Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 UNI. OF PENSYL. LAW SCH. 1, (Jan. 1919) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7675&context=penn_law_review .
"Many of the Lombards, who nearly monopolized the trade of Britain in 1300's were found to have left- the kingdom, leaving their creditors without a possibility of redress. By a Statute in 1351 it was ordained that if any merchant of the company of Lombard-merchants acknowledged himself bound in a debt, the company should answer for it. This apparently was due to the fact that the Lombard merchants made a practice of escaping from the country without satisfying their creditors. The regulation is based upon a principle quite familiar to our law-the principle that where many are interested to prevent an offense, that offense will probably be less frequently committed.
Evasions by debtors who for one reason or another had gained the favor of the King constituted a peril that had to be fought by Parliament constantly. Royal aid was given to the evading debtors by means of a letter of safe conduct issued by virtue of the Royal prerogative. This corrupt practice was frequently restrained by action of Parliament, but since the fifteenth century the kings do not appear to have abused their authority in this way.
Asylums constituted the most dangerous means of evasion by debtor. Officials who followed the debtor into the asylums were excommunicated by the Church and otherwise punished. As the number of asylums increased through the influence of the Abbots, the abuse became more and more intolerable.
In the reign of Richard II, the King decreed that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who simply sought to protect themselves from imprisonment. Fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to asylums.
The Statute of 2 Richard II, St. 2, c. 3 (1379), which provided that "in case of debt where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and often withdraw themselves and flee into places of Holy Church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their-debts and recovery, wrongfully and against good faith and reason: It is ordained "and established, that after that the said creditors have thereof brought -their writs of debt, and thereupon a capias awarded, and the Sheriff shall make his return that he hath not taken the said persons, because of such place.
By the Statute of 3 Henry VII, c. 4 (1487), all gifts were made void, where a debtor made a fraudulent transfer to friends and lived in an asylum on the rents and income. There -had been no remedy for this abuse prior to the reign of Henry VII. The Statute of 1487 gave a fairly adequate remedy where the fraudulent transfer was intended for the benefit of the debtor himself.
These statutes, it is to be noted, avoided fraudulent alienations of property for the use of the debtor himself, but not such alienations for the benefit of others, particularly favored creditors
The fundamental principle of the Act of 34 and 35 Henry VIII was an effort to remedy this situation. It aimed to establish a summary proceeding, by which the property of the fraudulent debtor should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favored creditors, should be avoided. In the case of fraudulent debtors, there should be a compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors. This, of course, involved a compulsory and summary collection of the assets. Hence the two great features of all bankruptcy law, as we know it today, have their origin in the Act of 1542: a summary collection or realization of the assets, and then an administration or distribution for the benefit of all creditors. A number of penal provisions are also' included in the statute to prevent fraud on the part of the debtor's friends or false claimants."

[30] Steve Sheppard, *The selected writings and speeches of Sir Edward Coke-,* 1 LIBT. FUND 45, (2003) http://files.libertyfund.org/files/911/0462-01_LFeBk.pdf .
"John Cook, a merchant, went bankrupt, owing Robert Tibnam £64 and another group of creditors £273, 12d. The second group of creditors got a commission in bankruptcy against Cook. Cook gave part of his goods to Tibnam in partial payment of his debt, and Tibnam sold them. But the bankruptcy commissioners sold the same goods to the group of creditors in partial satisfaction of their debts. In an important case construing the then-two-decade-old bankruptcy statute, Chief Justice Wray of the King's Bench held that the sale by the commissioners was good, that the purpose of the statute was to protect all of the creditors of a bankrupt, and that a bankrupt debtor cannot give preferential settlements to one creditor, but both debtor and creditors must accept an equal settlement for all of the creditors".

voiding preferences was upheld conclusively. On the other side of Atlantic, preferential transactions became voidable only in 1898.[31]

In the Indian context, IBC has been constantly evolving to address the concerns of various stakeholders. Section 29A, a unique concept, which specifies persons who are ineligible to be resolution applicants, was introduced in early 2018,[32] a year after the enactment of IBC. The statement of objects and reasons, which was attached to the bill when it was presented, stated that "Concerns have been raised that persons who, with their misconduct, contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors."

"In our case, there ought to be an equal distribution *secundum quantitatem debitorum suorum*; (according to amount of debts) but if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need), and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in the law, if, after that he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods to whom he pleased, being a bankrupt man, and of no credit; but the law, as hath been said before, hath appointed certain commissioners, of indifferency and credit, to make the distribution of his goods to every one of his creditors, rate and rate alike, a portion, according to the quantity of their debts, as the statute *speaketh*. Also, the case is stronger, because this gift is an assignment of the bankrupt after the commission awarded under the Great Seal, which commission is matter of record, whereof every one may take *conusance*".

[31] David A. Skeel Jr., *The Empty Idea of "Equality of Creditors*", FACULTY SCHOLARSHIP AT PENN LAW, (2018) https://scholarship.law.upenn.edu/faculty_scholarship/1724.

"Bankruptcy advocates, many of whom lived in the commercial states of the Northeast, viewed bankruptcy as essential to the development of commerce in America, and equality of creditors as a key feature of a properly functioning bankruptcy law.

Thomas Jefferson and other bankruptcy critics in the South and West, by contrast, questioned the need for a federal bankruptcy law; many critics insisted that it was perfectly appropriate for debtors to pay some of their general creditors rather than others. Critics refused to concede that preferential payments are inherently problematic.

Congressman Bailey of Texas, who had proposed an alternative to the bill that became the 1898 Act, criticized the assumption that "all debts shall stand upon exactly the same footing." "As for my part," he countered, "I do not believe that it is true in morals, and I do not believe that it ought be made true in law, that all debts are of equal obligation." Congressman Bailey then gave two illustrations: "If I owed $5000 to a man who possessed nothing else and I owed $25,000 to a man who was many times a millionaire," he said, but he could not pay both, he would not hesitate to pay the $5000 debt but not the $25,000. As finally enacted, the 1898 Act included a preference provision that took roughly the same form as the provisions in the 1841 and 1867 Acts. The trustee could retrieve any payments or other transfers made within four months of the bankruptcy, so long as the debtor was insolvent at the time of the transfer and the creditor "had reasonable cause to believe that [the transfer] was intended thereby to give a preference." The provision was important both because it was a victory for advocates of creditor equality, and because the 1898 Act would prove to be the nation's first permanent bankruptcy law, escaping the early demise of its three predecessors. Within a few years, defenders of intentionally preferential payments would wane, and the equality norm would be embraced by nearly everyone".

[32] The Insolvency and Bankruptcy Code (Amendment) Act, 2017, § 29A, No. 8, Acts of Parliament, 2018 (India).

Another example from IBC will reinforce the argument. Homebuyers were given the status of financial creditors in mid-2018.[33] The validity of such inclusion was challenged in the Supreme Court. Nevertheless, Supreme Court upheld the amendment.[34]

Thus, insolvency and bankruptcy laws have been malleable and have changed according to the circumstances of the day, which buttresses the argument that environmental claims can be granted a secured status in today's world. A secured status will be akin to the evolution of law to the next level of fairness. Nevertheless, before we embark on our journey of environmental claims in conjunction with jurisdictions, let's peruse the literature on the subject.

III.

INSOLVENCY LITERATURE ON GRANTING OF SECURED STATUS TO ENVIRONMENTAL CLAIMS

For the sake of brevity but at the same time completeness, two documents were consulted[35], i.e., UNCITRAL Legislative Guide on Secured Transactions[36] (ULGST) and UNCITRAL Legislative Guide on Insolvency Law[37] (ULGIL).

The primary objective of ULGST is to promote credit at a reasonable cost. According to ULGST, an efficient secured transactions regime seeks to establish streamlined procedures for obtaining security rights.[38] In order for a secured transactions regime to function efficiently, it is important that all parties be able to determine with a reasonable degree of certainty the extent of the rights of a grantor and third parties in assets to be encumbered. A prospective creditor must not only be able to ascertain the rights of the grantor and third parties in the assets to be encumbered but also be able to determine with certainty, at the time it agrees to extend credit, the priority that its security right in encumbered assets would enjoy relative to the rights of other creditors including an insolvency representative in the grantor's insolvency.[39] One may argue that it is difficult to

[33] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, No. 6, 2018, Gazette Notification dated June 6, 2018 (India).
[34] Pioneer Urban Land and Infrastructure Limited & Anr v. Union of India & Ors, Writ Petition (Civil) No. 43 of 2019.
[35] Applies to movable assets.
[36] United Nations, *UNCITRAL Legislative Guide on Secured Transactions* (2007) https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions.
[37] United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law.
[38] United Nations, *UNCITRAL Legislative Guide on Secured Transactions*, UN COMM. ON INT. TRD. LAW 20, (2010) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf.
[39] *Id.* at 21.

determine environment claims with certainty; such claims are inherently contingent, as clean-up costs may not have been incurred, the extent of damage cannot be ascertained, or the remedy to cure is not apparent. The timing can create further uncertainty; claims can arise either when the environment is polluted, pollution is discovered, or when pollution is cleaned. However, most jurisdictions, including India, are in the process of mandating Environment, Social & Governance ("ESG") reporting. Thus, request for mandatory ESG data, at the time of disbursal of loan, as well as incorporating such data in the periodic submissions, along with other financial data, by the borrower, will obviate uncertainty and facilitate lenders to factor the risk in their decisions.

Achieving an effective and efficient secured transactions regime requires States to consider carefully policies and principles that have traditionally underpinned this branch of law as well as the relationship between secured transactions law and the general law of obligations, property law, civil procedure law, and insolvency law. Many of the key objectives of a modern secured transactions regime can only be achieved if these traditional policies are revisited.[40]

Thus, granting security right to environmental claims per-se are not frowned upon as long as enough clarity exists beforehand. Further, ULGST states that a modern secured transactions regime should incorporate a set of detailed and precise rules, i.e., (a) rest on clearly expressed and well-understood general principles; (b) are comprehensive in scope; (c) cover a broad range of existing and future secured obligations; (d) apply to all types of encumbered asset, including future assets and proceeds; (e) provide ways for resolving priority conflicts among a wide variety of competing claimants.[41] Furthermore, the enactment must be accompanied by a relatively thorough legislative commentary that explains the origins and purposes of the law[42].

ULGST elaborates that in several jurisdictions claims for taxes and contributions to social welfare programmes and employee wages are given a priority solely based on the nature of the claim.[43] Also, in many States as a means of achieving general social goals, certain unsecured claims are re-characterized as preferential claims and given priority within or even outside insolvency proceedings over other unsecured claims.[44]

[40] *Id.* at 26.
[41] *Id.* at 191.
[42] *Id.* at 29.
[43] *Id.* at 194.
[44] *Id.* at 208-209.

Thus, basis the ULGST, environmental claims can potentially be clubbed under the umbrella of "general social goals", as elucidated above, may be granted a secured status and revisiting of existing laws is encouraged. Furthermore, if few exceptions have already been carved out; there is no reason why these cannot be expanded to encompass environmental claims.

Additionally, though in a slightly different context of assets, ULGST does state that it does not cover assets covered by national or international agreements[45]; it is highly likely that in future, we will have a defined international consensus vis-à-vis the environment.

According to ULGIL most insolvency laws grant a stay/moratorium on any proceedings/enforcements on the filing of bankruptcy. The act of stay itself modifies the security rights though only for a brief period. Furthermore, granting administrative expenses the priority too upends the established matrix.

ULGIL states that despite stay laws, action may continue to protect vital and urgent public interests and restrain activities causing environmental damage, with a caveat that to ensure transparency and predictability, it is highly desirable that an insolvency law clearly identifies the actions that are to be included within and specifically excepted from the scope of the stay.[46] Additionally, ULGIL allows to relinquish the estate's interest provided relinquishment does not violate public interest, for example, where the asset is environmentally dangerous or hazardous to public health and safety.[47]

Moreover, according to ULGIL, some insolvency laws do not afford secured creditors a first priority. Payment of secured creditors may be ranked, for example, after costs of administration and other claims, such as unpaid wage claims, tax claims, environmental claims, and personal injury claims, which are afforded the protection of priority under the insolvency law.[48]

Finally, some of the factors that may be relevant in determining whether compelling reasons exist to grant privileged status to any particular type of debt may include the need to give effect to international treaty obligations;[49] the likelihood of such a treaty in the future is high.

[45] *Id.* at 39.
[46] United Nations, *UNCITRAL Legislative Guide on Insolvency Law,* UN COMM. ON INT. TRD. LAW 86, (2010) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf.
[47] *Id.* at 109.
[48] *Id.* at 269.
[49] *Id.* at 271.

Thus, ULGIL, in its current form, raises the issues of environmental claims at a number of places in the text, though relevant importance has not been granted, as yet, to such claims by the legislature.

Summarising the aforesaid discussion, there is a climate emergency, ecosystem in which insolvency law operates is taking steps to tackle the climate emergency, historically insolvency law has evolved with the needs of the time, and insolvency literature allows for granting of higher rights to environmental claims in comparison to other unsecured claims. Given these facts, let's focus our attention on how various jurisdictions are treating environmental claims.

IV. CANADA – TOWARDS ENVIRONMENTAL NIRVANA

Canada has seen enlightened jurisprudence evolve vis-à-vis environmental claims. The question "whether the regulator's use of powers under provincial legislation to enforce a bankrupt company's compliance with end-of-life obligations ("environmental obligations") conflicts with trustee's powers under federal bankruptcy legislation, or with the order of priorities under such legislation" was answered in 2019, in the landmark Supreme Court case of *Orphan Well Association v. Grant Thornton Ltd*[50] (Redwater). A 5:2 majority proclaimed that a trustee cannot renounce assets that are subject to remediation by the environmental regulator, in the process of granting priority rights to environmental claims. The majority held that not all environmental obligations enforced by the regulator would be provable claims in bankruptcy; abandonment costs were not provable claims or debts requiring payments – they were duties.[51]

[50] Orphan Well Association v. Grant Thornton Limited, 2019 SCC 5.

[51] In brief, the facts of case: Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets: wells, pipelines and facilities and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and of the 127 gas and oil assets, 72 were inactive or spent i.e., only 55 working assets.

On Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfil abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any licenses.

GTL surmised that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would exceed the sale proceeds for the productive wells. Therefore, GTL informed the Regulator that it was taking possession and control only of productive wells and renouncing others. GTL's position was that it had no obligation to fulfil any regulatory requirements associated with the renounced assets.

V. UNITED STATES – A HALF-BAKED RENAISSANCE

An environmental claim, akin to most other unsecured claims, is treated as a general unsecured claim unless it is entitled to priority treatment as an administrative expense. However, a narrow exception was created in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[52] wherein the Supreme Court considered a trustee's power to abandon property containing toxic waste.[53] The Court held that a trustee may not abandon property in contravention of a state statute or regulation that is designed to protect the public health or safety from identified hazards.

The Regulator filed an application for declaration of renounced assets as void and required GTL to comply with orders to fulfil the end-of-life obligations. GTL brought a cross-application seeking approval to pursue a sales process excluding the renounced assets and an order directing that the Regulator could not prevent the transfer of the licenses associated with the retained assets. Meanwhile, a bankruptcy order was issued for Redwater, and GTL was appointed as trustee. GTL invoked Bankruptcy and Insolvency Act (BIA) in relation to renounced assets.
The Chambers Judge and Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted with the BIA: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the BIA by requiring that an unsecured creditor be paid ahead of the claims secured creditors.
Majority in Supreme Court opined, "Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the BIA notwithstanding the consequences this may have for the bankrupt's secured creditors".
Therefore, the trustee couldn't walk away from the disowned sites. The BIA was meant to protect trustees from having to pay for a bankrupt estate's environmental claims with their own money. It didn't mean estate could avoid its environmental obligations. Also, the abandonment costs were not provable claims or debts requiring payments—they were **duties** (to the public and nearby landowners). Therefore, these costs were outside the BIA's payment order scheme.

[52] Midlantic Nat. Bank v. New Jersey Department of Environmental Protection , 474 U.S. 494 (1986).
4th Draft, Supreme Court of the United States, Midlantic National Bank, Petitioner versus New Jersey Department of Environmental Protection, Thomas J. O'Neill, trustee in bankruptcy of Quanta Resources Corporation, Debtor, Petitioner vs. City of New York et al., on writs of certiorari to the United States Court of Appeals for the Third Circuit

[53] In brief the facts of the case: Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision by accepting oil contaminated with a toxic carcinogen. Amidst negotiations for the cleanup, Quanta filed a petition under Chapter 11 and after NJDEP had issued an order, converted the action to a liquidation under Chapter 7. An investigation of the New York facility too revealed similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The city and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law.
The Bankruptcy Court approved the abandonment, and, after the District Court affirmed, an appeal was taken to the Court of Appeals. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility, and NJDEP took a direct appeal to the Court of Appeals.
A divided Court of Appeals for the Third Circuit reversed the bankruptcy court's decisions. The Supreme Court in a 5-4 verdict, affirmed the court of appeals' decisions and refused to allow the trustee to abandon the contaminated properties. Although a trustee can abandon property which is burdensome or of inconsequential value, the Supreme Court created a narrow exception and refused to allow abandonment.
The Supreme Court concluded, "without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, the Court holds that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the

The judgment did not categorically comment on granting priority to clean-up expenses i.e., the question of law before the court was not to determine whether priority should be granted to clean-up expenses in the insolvency waterfall. ("New York is claiming expenditure as an administrative expense; that question is not before us"). Furthermore, it does not directly discuss environmental claims in bankruptcy (the focus of the question before the court was "on imminent and identifiable harm").

Additionally, there may have been external factors too that may have had an impact on the divided judgment; new bankruptcy law had been adopted in 1978, environmental disasters on the three-mile island happened in 1979, and Russel Mahler, who operated Quanta, was at the center of several notorious high-profile dumping scandals.[54]

Finally, the process that the Justices used to arrive at the judgement[55] resulted in varied interpretations of the judgement.[56] Some courts interpreted it narrowly whereas others took a broad interpretation.[57] Those ascribing to narrow view said that a trustee may abandon contaminated property if the trustee takes adequate precautions to ensure that there is no imminent danger to the public and the abandonment will not aggravate the existing situation. On the other hand, those taking a broad view said that a trustee is barred from abandoning any property if the act of abandonment would violate a state or federal law designed to protect the public health and safety. The condition for abandonment is full compliance with laws. As a trustee cannot abandon property without satisfying certain conditions, in the same vein, he can neither maintain nor possess that property without satisfying those same conditions. Thus, the cost incurred in satisfying those conditions is entitled to priority as an administrative expense.

Irrespective of the broad or the narrow interpretation, it seems that the case only addressed one sliver of the environmental issues i.e., abandonment.

public health or safety from identified hazards. Accordingly, we affirm the judgements of Court of Appeals for the Third Circuit"
The Court further stated: "This exception to the abandonment power vested in the trustee is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."

[54] Ronald Mann, *Balancing Bankruptcy and Environment Law: Midlanic National Bank vs. New Jersey Department of Environmental Protection*, J. OF SC HIST. 102-103, http://www.columbia.edu/~mr2651/Mann-2017-Journal_of_Supreme_Court_History.pdf.

[55] *Id.*

[56] Deborah E Parker, *Environmental Claims in Bankruptcy: It's a question of priorities*, 32:221 SDLR 221-284, (1995), https://digital.sandiego.edu/cgi/viewcontent.cgi?article=2639&context=sdlr.

[57] *Id.*

In context of abandonment another relevant case to consider would be *United States vs. Apex Oil Company Inc.*[58]; a reorganized debtor's liability to pay for environmental clean-up. The question before the court was whether government's claim to injunction was discharged in bankruptcy or it can be renewed in subsequent lawsuit[59]?

The court concluded that Resource Conservation Recovery Act (RCRA) requires the defendant to clean up the contaminated site and does not allow to sue for money. Thus, the clean-up order was not a claim as it does not give rise to right to payment even though Apex had to spend money for the clean-up. Thus, the claim was not dischargeable in bankruptcy.

Though, abandonment claims for contaminated lands, especially brought under RCRA, will grant primacy to environmental obligations, this isn't yet true for other environmental violations. One example should suffice to buttress the point.

In *La Paloma Generating Company LLC*[60] (La Paloma) the question before the court was whether debtor can transfer an asset with a free and clear title, under section 363 of the Bankruptcy Code, without the purchaser assuming, any obligation under the California Cap-and-Trade Program for emissions generated by the debtor during the period before the transfer of the assets.[61] The court

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[58] Oil Company, Inc. v. United States, 208 F. Supp. 2d 642 (E.D. La. 2002).

[59] In brief facts of the case: Apex Oil's Corporate predecessor operated Hartford refinery from 1967 to 1988. The leaks and spills from refinery had contaminated the ground water and the fumes created odour problems for the residents. In 1987 Apex's predecessor entered Chapter 11 and in 1990 the bankruptcy court entered confirmation discharging corporate debtor from liens and suits. Apex had discontinued refining facility and did not have contamination cleaning capability. In 2005 The Administrator of the EPA filed a suit for injunctive relief claiming that this was not discharged by the 1990 order. The district court agreed; "section 6973(a) does not allow the government to seek pecuniary relief here, the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings."

The court of appeals affirmed. The court held that the government's entitlement to a RCRA injunction is not a "claim" within the meaning of the Bankruptcy Code; the Code defines the term "claim" to include a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. The court concluded that the RCRA provision "entitles the government only to require the defendant to clean up the contaminated site at defendant's expense," but "does not authorize any form of monetary relief." The court rejected petitioner's contention that, because compliance with any clean-up order would require the expenditure of money, such an injunction would entail a "right to payment". Supreme Court denied a writ of certiorari.

[60] In re La Paloma Generating Company et. al Debtors, 588 B.R. 695 (Bankr. D. Del. 2018) (Jointly Administered). California Air Resources Board v. La Paloma Generating Company, No 1:17-CV-1698.

[61] Brief facts of the case: La Paloma owned a natural gas fired facility in California which had GHG emissions. Under the California Air Resources Boards' (CARB), cap-and-trade programme, La Paloma was supposed to submit GHG equivalent compliance instruments to CARB. The cost of compliance instruments to fulfil GHG obligations in open market would be US$ 63 million. LNV Corporation ("LNV"), La Paloma's secured creditor who was owed US$300M agreed to purchase all its assets by a credit bid for US$150M. La Paloma submitted a plan to bankruptcy court for transferring all La Paloma's assets free and clear of all claims and interests to LNV.

The court held that under section 363(f), "the trustee may sell property ... free and clear of any interest in such property of an entity other than the estate, only if (1) applicable non bankruptcy law permits sale of such property free and clear of such interest". In the instant case neither did the court find that the Regulation provides for successor liability nor is environmental liability excepted by Section 363(f) of bankruptcy code.

held that the purchaser did not assume successor liability for the debtor's obligations under cap-and-trade programme which arose prior to acquisition of debtor's assets.

Thus, in United States only a few types of environmental claims are granted a special status when such claims are being dealt in bankruptcy.

VI. UNITED KINGDOM – THE SCOTTISH ENLIGHTENMENT

The *Celtic Extraction* judgement held primacy for about two decades in which the court said that it is unacceptable that the costs of compliance with a waste management licence imposed by environmental authorities would have priority over provable debts, clearly establishing primacy of the insolvency law over the environmental laws.

However, a shift was seen in the Scottish Courts, in *Doonin Plant Limited* (2018).[62] The company carried waste management business and went into liquidation. The company had not fulfilled its remediation obligations for which a notice had been issued, both pre and post, liquidation filing. The cost of remediation exceeded funds with the company and thus liquidators sought directions from the court. The court held that remediation expenses are liquidation costs to be paid before any other debt.[63]

[62] Sellar QC, Addleshaw Goddard LLP v. Lake QC, Brodies LLP, [2018] CSOH 89.

[63] Brief facts of the case: The company carried waste management business and is registered in Scotland. In July 2015 the Court ordered that the company be wound up and appointed liquidators. Scottish Environment Protection Agency (SEPA) maintains that between 2010 and the liquidation date the company deposited waste at the site which it was not licensed to deposit. In December 2012 SEPA issued a notice requiring the company to remove waste which was not acted on. In December 2015, SEPA issued a further notice to remove controlled waste. Liquidators had realised all the company's assets other than the site. They estimate that the cost of remediation work exceeded the funds with the company. Therefore, the Liquidators sought directions from the court as the need for removal and remediation is attributable to the activities of the company prior to the liquidation date. The questions were:

1. Whether remediation costs be expenses of liquidation or contingent debt i.e., unsecured debt? Whether Liquidators are obliged to apply companies' funds to the extent available for remediation?
2. Whether liquidators' remediation will be paid in priority to remediation costs?

The court opined that remediation costs are indeed liquidation expense and thus must be paid before secured creditors. "Viewing the nature of the liability imposed by a section 59(1) notice through the prism of the directive which Part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a section 59(1) notice should be a liquidation expense".
The court can order for liquidator's remuneration be paid in priority to section 59(1) expenditure if that is necessary.

In another Scottish case *Dawson International Plc* (2018),[64] the court held that the environment regulators' ability to serve a notice created a contingent liability. Furthermore, the remediation work for past liabilities that had been going on prior to filing of liquidation cannot be stopped even though it may result in reduced distribution to creditors.

Finally, in *Paperback Collection and Recycling Limited*[65], which was placed under creditors voluntary liquidation in June 2018, the court did not stay criminal proceedings on the company stating that it did not have the jurisdiction to do so. However, the court added that even if it had the powers serious environmental offenses need not be stayed even at the cost of creditors.

VII. AUSTRALIA – SUPREME COURT OF VICTORIA TAKE UP THE CUDGELS

A discussion on the status of environmental claims has started in the courts but is yet to reach its fruition. In *Linc Energy*[66] liquidators had disclaimed land whereas the Queensland environmental authority wanted them to comply with environmental obligations. The liquidators sought directions of the court requesting permission not to comply with environment directives as well

[64] Howie QC, Shepherd & Wedderburn LLP v. Thomson QC, Roxburgh, Dodd; Lay Representative, Delibegovic-Broome QC; Burness Paull LLP, [2018] CSOH 52.
[65] Cooper v. Natural Resource Body for Wales, [2019] EWHC 2904 (Ch).
[66] Brief facts of the case: Linc Energy operated a pilot underground coal gasification project at Chinchilla in Queensland. The company owned land, a Mineral Development Licence granted under Mineral Resources Act 1989, Petroleum Facility Licence granted under Petroleum and Gas (Production and Safety) Act 2004, and Environmental Authority ("EA") issued under Environmental Protection Act 1994 ("EPA"). In Queensland, one needs to apply for an environmental authority (EA) to undertake an environmentally relevant activity (ERA). ERAs are industrial, resource or intensive agricultural activities with the potential to release contaminants into the environment.
In May 2016, the Department of Environment & Heritage Protection, issued an Environmental Protection Order ("EPO") pursuant to EPA to Linc Energy. The EPO was made whilst the company was under administration. Subsequently Linc Energy went into liquidation. The EPO required liquidators to comply with their general environment duty which included sampling gas and water, maintain infrastructure to comply with EPO and site rehabilitation.
In June 2016, the liquidators issued a notice disclaiming the land, licenses, and site infrastructure. The liquidators sought directions from the court. The court had to decide on following three questions a) whether the liquidators were justified in not complying with EPO? b) whether liquidators were justified in complying with any future EPO's and c) whether liquidators were executive directors of the company and thus would be personally liable?
The court concluded that the liquidators are not justified in causing the company not to comply with the EPO but did not decide whether the EAs are disclaimer property. Furthermore, the court said that it would be unwarranted to limit the definition of "executive officer" to exclude a liquidator.
On an appeal the Court of Appeals turned down the trial court's judgement. The court held that obligations imposed by EPO were in respect of disclaimed property; disclaimer of the land and MDL is effectively an acceptance that the disclaimer terminated the liabilities under the EPO and an inconsistency in the law of the state should be resolved in favour of insolvency provisions under the Corporation Act.

as not be classified as executive directors. The Trial Court[67] disagreed with the liquidators. However, the Court of Appeal[68] held that disclaimer was in accordance with the Corporation Act and will override the State Act.

However, the High Court's decision to not grant special leave to Queensland State Government to appeal the decision left the issue inconclusive[69].

A recent case, *EPA vs The Australian Sawmilling Company*[70] (TASCO) went a step further. The Supreme Court of Victoria set-aside the notice of liquidators disclaiming the property. The court said that disclaimer would cause prejudice to EPA and the State that is grossly out of proportion to the prejudice that setting aside the disclaimer would have on TASCO's creditors. Additionally, though the estate *per-se* did not have any property, the indemnity provided by the parent company for TASCO to the liquidator, is a property that liquidators can fall back upon for remediation costs. Also, as a matter of public policy it is inappropriate that liabilities for which liquidators have an indemnity to be passed on to the state.

Finally, liquidators were held to be the occupiers of the site and though not personally liable, they were liable to the extent of indemnity. The costs and remuneration of the liquidators was protected.

VIII. INDIA: JURISPRUDENCE NOT TESTED; RECENT JUDGEMENTS HARBINGER OF CHANGE

Environment claims have been treated like any other unsecured claim under IBC. However, interpretation of two recent judgements may create a situation wherein environmental claims may reside on the same plane as that of secured creditors.

[67] Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 53.
[68] Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection [2018] QCA 32
[69] Douglas Ross (Partner), David Proudman (Consultant), *Linc Energy – High Court refuses special leave to Qld State Government,* JOHNSON WINTER SLATTERY, (Sep 2018), https://jws.com.au/insights/articles/2018-articles/linc-energy-%E2%80%93-high-court-refuses-special-leave-to.
[70] EPA & Anor v. Australian Sawmilling Company Pty Ltd (in liq) & Ors [2020] VSC 550.

The Hon'ble Supreme Court, in *State Tax Officer vs. Rainbow Papers Limited*[71] (RPL) held that IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority which in this case was the state government under the Gujarat Value Added Tax.

A number of environmental claims arise under the Environment (Protection) Act 1986, the Air (Prevention and Control of Pollution) Act 1981, and the Water (Prevention and Control of Pollution) Act, 1974; the expenses incurred by the pollution board are recoverable as arrears of land, in effect creating a charge on assets.

Thus, a probability exists that, in the future, claims under all the acts mentioned above may be treated as secured claims.

In another judgment, National Company Law Appellate Tribunal (NCLAT) in *Jet Aircraft Maintenance Engineers Welfare Association vs Ashish Chhawchharia Resolution Professional of Jet Airways*[72]

[71] State Tax Officer v. Rainbow Papers Limited; Supreme Court of India, Civil Appeal No. 1661 of 2020 and Civil Appeal No. 2568 of 2020.
The appeal was filed against the order of NCLAT that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the Gujarat Value Added Tax, 2003, (GVAT), which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax cannot prevail over Section 53 of the IBC. The court held that financial creditors cannot secure their own dues at the cost of statutory ones owed to a government whilst approving a resolution plan.
"If a Resolution Plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC." The bench set aside the resolution plan approved by the CoC and directed that the Resolution Professional (RP) may consider a fresh plan in the light of its observations.

[72] Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors, 2022 SCC OnLine NCLAT 418; Aggrieved Workmen of Jet Airways (India) Ltd. vs Jet Airways (India) Ltd. & Ors, (2022) ibclaw.in 66 NCLAT; Bhartiya Kamgar Sena & Anr. v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. &Ors, Company Appeal (AT) (Insolvency) No. 801 of 2021; Rohit Sharma & Ors. v. Monitoring Committee Through Ashish Chhawchharia & Ors, Company Appeal (AT) (Insolvency) No. 915 of 20; All India Jet Airways Officers and Staff Association v. Ashish Chhawchharia Resolution Professional & Ors, Company Appeal (AT) (Insolvency) No. 771 of 2022; Regional P.F. Commissioner v. Ashish Chhawchharia Resolution Professional for Jet Airways (India) Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 987 of 2022.
The pertinent questions for this paper before the court can be broadly clubbed in two buckets.

1. Whether the workmen and employees are entitled to receive the payment of provident fund, gratuity and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the IBC?
2. Whether the Resolution Plan approved by the Adjudicating Authority violates the provisions of Section 30(2)(b) and 30(2)(e) of the Code since it does not provide the minimum amount to the workmen/ employees, contravenes the provisions of Industrial Disputes Act, 1947 as retrenchment compensation to the workmen/employees was

("Jet"), held that the resolution professional should confirm that the resolution plan does not contravene any of the provisions of law for the time being in force. It was held that non-compliance with provisions of the Employees Provident Funds & Miscellaneous Provisions Act 1952, the Payment of Gratuity Act 1972, and the Industrial Disputes Act 1947 were in contravention of the law in force. This was subsequently upheld by the Supreme Court[73].

Consequently, a resolution plan which does not adequately compensate for the environmental liabilities described above that create a charge by operation of law may be deemed to be in contravention of the law.

IX. TRADITIONAL SECURED CREDITORS WILL BE AMENABLE TO GRANT A SECURED STATUS TO ENVIRONMENTAL CLAIMS

Financial creditors are well informed about the business of borrowers according to the judgment of Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd & Anr. vs. Union of India*[74]. While deliberating on differences between financial creditors and operational creditors, Hon'ble court stated, "Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress…."

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not provided and demerger of entire workforce was illegal and contrary to the provision of Section 25-FF of Industrial Disputes Act?

The court held that the workmen and employees are entitled for payment of full amount of provident fund and gratuity till the date of commencement of the insolvency which amount is to be paid by the Successful Resolution Applicant consequent to approval of the Resolution Plan in addition to the 24 months workmen dues as the workmen is entitled to under Section 53(1)(b) of the Code. Also, the workmen and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(b)(iii). Moreover, the workmen are entitled to receive their dues from the Corporate Debtor for period of 24 months as per provision of Section 53(1)(b) at least to minimum liquidation value envisaged under Section 32(2)(b) read with Section 53(1).

The court further added that non-payment of full provident fund and gratuity shall lead to violation of Section 30(2)(e), hence, to save the plan the above payments have to be made. The deficiencies in the plan need to be remedied by issuing appropriate direction to the Successful Resolution Applicant to make requisite plan so that plan may become compliant of Section 30(2)(e).

Citing the judgement of Hon'ble Supreme Court in "Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others", the court said that claim of Appellant was to be satisfied in full, otherwise breach of provision of Section 30(2)(e) would have occurred. Thus, the court issued direction to the Successful Resolution Applicant to make payment of the admitted claim of the Appellant towards provident fund dues to save the plan from invalidity.

[73] Jalan Fritsch Consortium v. Regional Provident Fund Commissioner & Anr, Civil appeal no 407 of 2023 with Civil appeal no 465-469 of 2023.

[74] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors, Writ Petition (Civil) No. 99 of 2018,

Hon'ble Court added, "Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of the business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan."

Thus, Hon'ble Court has cast a greater responsibility on secured financial lenders. Moreover, jurisprudence in some countries is evolving on the subject and its adjacencies. It is highly likely that in the not-so-distant future, public interest litigation may hold insolvency practitioners and secured creditors responsible for environmental damage. The Australian case of TASCO described above is just one step away from holding administrators personally responsible. This may also have consequences for the professional liability insurance of insolvency professionals.

Moreover, in the United States, in the case of *United States v Fleet Factors Corporation,*[75] the court held that creditors would subject themselves to CERCLA liability when they participate in the management of a debtor to a degree indicating a "capacity to influence" the debtor's decision for hazardous waste disposal.[76]

In 1996, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, which amended CERCLA's liability provisions arising out of *Fleet Factors*. Though the amendment falls short of a carte-blanche immunity to lenders, the amended provision states that participation in management requires actual participation in the management and does not

[75] Brief facts of the case: Fleet Factors Corporation (Fleet) loaned Swainsboro Print Works (SPW), a textile manufacturer, working capital from 1976 to 1981. Fleet took a security interest in SPW's accounts receivable, equipment, and the land on which SPW's manufacturing facility was located. SPW filed for bankruptcy and was adjudged bankrupt, and a trustee assumed title and control over assets. Fleet foreclosed on everything except plant.
Later, the EPA discovered hazardous waste on the property and in some of the plant buildings. The EPA disposed of the waste at a cost of $400,000. The EPA sued Fleet under CERCLA for the cost of its clean-up and argued that Fleet was liable as both the current owner and operator of the SPW plant and as the owner and operator at the time of the illegal disposal of the hazardous substances. The district court held that Fleet was not the current owner and operator of the plant. The court, however, denied Fleet's motion to dismiss the action on the second basis of Fleet's liability as the "owner and operator" at the time the hazardous substances were illegally disposed. Both Fleet and the EPA appealed.
Eleventh Circuit held that secured creditor may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.
[76] Geoffrey Kres Beach, *Secured Creditor CERCLA Liability after United States v. Fleet Secured Creditor CERCLA Liability after United States v. Fleet Factors Corp. – Vindication of CERCLA's Private Enforcement Mechanism*, 1 CULR 41(1991) https://scholarship.law.edu/cgi/viewcontent.cgi?article=1753&context=lawreview.

include merely having the capacity to influence or the unexercised right to control facility. Thus, the presence of clauses in a financing agreement giving a lender the right to take action for violations of law or discharge of hazardous waste will not expose the lender to liability.[77]

Twenty-five years have passed since the aforesaid amendment, and priorities for governments may have changed during this period. Thus, it is in the interest of secured creditors if an equivalent status is granted to environmental claims. This will help to convert the "known-unknowns" to "known-knowns."

Secured creditors can grant the borrowers a time frame of 3 to 5 years wherein the borrowers upgrade to comply with the current environmental norms. In the interim, the lenders can follow a two-pronged approach; the first, to introduce stricter periodic ESG reporting requirements, and the second, to incorporate an additional covenant in existing loan documents. This additional covenant may consider the fruition of any environmental claim as an event of default. This may enable lenders to undertake appropriate and timely action. Alternatively, a grandfathering clause can be introduced, provided the shortfalls are remedied within a period of three to five years.

Simultaneously, the secured creditors can vet the projects through the lens of "The Equator Principles",[78] a financial industry benchmark existing since 2010 to assess and manage the future environment-related risks.

Furthermore, the global trend in the post-Covid world is to move towards some form of preventative restructuring i.e., filing and solving for insolvency before a company turns insolvent. In most parts of the world, sooner or later, this will bring into existence a monitoring framework to ensure that what is promised is implemented *in-toto*. Such a development will make it easy for a third party to establish that the lenders and/or the insolvency professionals too are liable for

[77] Larry Schnapf, *Congress amends CERCLA to expand lender liability protection*, 4 Nat. Res. and Env. 11, https://www.environmental-law.net.

[78] The Equator Principles (Eps) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making.
The Eps apply globally to all industry sectors and to five financial products: 1) Project Finance Advisory Services, 2) Project Finance, 3) Project-Related Corporate Loans, and 4) Bridge Loans and 5) Project-Related Refinance, and Project-Related Acquisition Finance.
Financial Institutions commit to implementing the Eps in their internal environmental and social policies, procedures and standards for financing projects and will not provide Project Finance or Project-Related Corporate Loans to projects where the client will not, or is unable to, comply with the Eps.
Eps are not intended to be applied retroactively. However, Eps apply to the expansion or upgrade of an existing project where changes in scale or scope may create significant environmental and social risks and impacts.

environmental claims as they were in a situation which was broader than mere “capacity to influence”.

Thus, to obviate such allegations which can be foreseen today, it is in the interest of all the players in the insolvency ecosystem, including ‘traditional’ secured lenders to embark on a path which grants environmental claims the same status as that of secured claims.

Also, a fear may be expressed in some quarters, that if the value of security held by 'traditional' secured creditors, is diluted by the introduction of secured-equivalent creditors in the mix, this would lead to secured creditors increasing interest rates, to safeguard themselves and increase their returns when the company is solvent. However, these fears are unfounded. Once a cost-benefit analysis of the dilution of security versus the losses arising of out of physical and transition risks, described above, is undertaken, the ‘traditional’ secured creditors will not hesitate to concede equal rights to environmental claims.

X. MODUS-OPERANDI OF INCORPORATING ENVIRONMENTAL CLAIMS IN IBC

IBC treats the costs of maintaining a going concern as insolvency resolution process costs, under section 5(13)(c), 5(23C)(c) and in Insolvency and Bankruptcy Board of India Liquidation Process Regulations 2(1)(ea). The going concern costs should include environmental compliance costs. IBC also casts a duty on insolvency professionals to comply with all the laws in force under section 17(2)(e). The combined reading of the aforesaid will entail compliance with environmental laws not only whilst keeping a going concern but also may extend to remediation of past pollution.

Environment pollution from a location perspective can take two forms. Inside the premises that the successful resolution applicant (SRA) takes over and outside such premises i.e., generally in the wider environment. The responsibility of clean-up costs for assets taken over by the SRA vests with him. However, all other remediation costs are to be borne by the Government. Section 5(13)(d) of IBC, define insolvency resolution process costs as "any cost incurred at the expense of the Government to facilitate the insolvency resolution process".

Subjecting environmental claims to section 5(13) will upend the priority and make environmental claims senior to 'traditional' secured claims. Thus, the legislature can caveat, if the cost pertains to environmental claims of past years, they will be deemed to be on the same pedestal as 'traditional' secured creditors.

Once the status of environmental claims in the waterfall is established, the next step will be to ascertain the value of these claims, especially the ones where clean-up has not yet been carried out, the methodology for clean-up is not apparent, and the extent of damage is not discernible. It is inevitable that in such scenarios, an approximation must be arrived at with the help of valuers or engineers, or a combination of the two. Necessary, amendments should be carried out to regulations to enable appropriately qualified valuers/professionals to be inducted to value such claims. ULGIL provides for such scenarios, "The insolvency law should allow unliquidated claims to be admitted provisionally, pending determination of the amount of claim by the insolvency representative." Regulation 14[79] of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016 too, provides for the same.

[79] Where the amount claimed by creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of claim based on the information available with him.

It is possible that uncertainty of valuation may result in outcomes where the value of environmental claims is disproportionate to the value of claims of secured lenders, especially during the interim period / grandfathering phase, as described above. Judgments[80] emanating from the US provide us with an innovative framework to circumvent this obstacle. In the case of *Wellman Dynamics Corporation*[81] (Wellman), a settlement was reached between the buyer and the environmental agencies. The buyer acceded that it had certain obligations under RCRA, which included financial assistance and implementing corrective measures at Wellman facility. Thus, the buyer agreed to complete excavation of material from the landfill, close the Industrial Monofill Sanitary Landfill, perform post-closure monitoring at the Wellman facility, remove the radioactive material stored above-ground and decommission the burial site. Trusts were created for fulfilling the financial obligations, wherein the total monthly transfer amounts are to be calculated based on total net sales in the trailing twelve-month period times the defined percentages, annual meetings were to be held to review progress and adjust amounts if required.

A trust mechanism for payments like the Wellman, in the interim, till the time vetting projects through a mechanism like Equator Principles becomes an established practice, will be fair to both i.e., claims of 'traditional' secured creditors as well as the claims of environmental authorities. This would turn out to be the "*loss and damage*" equivalent of insolvency laws.

XI. CONCLUSION

In none of the jurisdictions discussed above, the insolvency law provides special treatment to environmental claims or liabilities. It is the judiciary, keeping in mind the public interest, that has overextended its reach to grant special status to environmental claims, even priority in some of the cases. However, extra-judicial-legislations will result in different yardsticks in different jurisdictions and will create conflicting precedents, which will be detrimental to the cause of insolvency. Governments across the world need to wake up to climate emergency, weigh the competing options between environment and secured creditors and legislate accordingly, if required, with the help of international insolvency organizations like INSOL.

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[80] Thomas D Goslin, Weil Gotshal & Manges LLP, *Recent Developments at the intersection of Bankruptcy and Environmental Law,* LEXOLOGY (Aug. 8 , 2022) https://restructuring.weil.com/environmental/recent-developments-at-the-intersection-of-bankruptcy-and-environmental-law/#page=1.

[81] In re Wellman Dynamics Corporation, United States. Bankruptcy Court, Case No. 16-01825-als11.

The probable reason environmental claims have not been treated differently is that such a need never arose. ULGIL gives the example of labour contracts and cites the reasons for their priority status, i.e., protection of labour, social concerns, and restricting a debtor from terminating onerous contracts. Section 53(1)(b)(i) and Section 53(1)(c) of IBC are drafted with a similar intention. Today, the environment is an equally pressing social concern.

ULGIL also deals with systemic risk and allows netting or closing of financial contracts, else that would be a threat to the stability of the financial system. The aforesaid logic is incorporated in IBC, too; Section 5(8)(g) defines that a derivative transaction is to be taken at market value (in-effect a net-off), and Section 36(4)(b) of IBC states that netting off amounts are not part of liquidation estate. Thus, if the laws encapsulate systemic risk, a question will arise in not so distant a time, whether systemic risk is more important than survival risk? In fact, climate change could lead to Green Swan[82] events and be the cause of the next systemic financial crisis. "The traditional backward-looking models that merely extrapolate historical trends prevent full appreciation of systemic risk posed by climate change".[83]

Insurance companies are deeply entrenched in today's financial system and are exposed to effects of climate change on both sides of their balance sheet; investments assets are impacted by hurricanes and floods whereas liabilities are impacted by increase in claims. In case we do not grant a higher status to environment claims, the world in its business-as-usual ways, will soon encounter a huge catastrophe in coastal cities, near riverbanks and in the arctic region. The insurance liabilities arising from such a devastation will lead to a systemic risk. Recently, Florida in the United States

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[82] Patrick Bolton, Morgan Despres, Luiz Awazu Pereira Da Silva, Frederic Samama, and Romain Svartzman, The Green Swan, *Central banking and financial stability in the age of climate change*, BANQUE DE FRANCE, (Jan. 2020) https://www.bis.org/publ/othp31.pdf.
"Green swans present many features of a black swan. Climate related risks typically fit fat-tailed distributions: both physical and transition risks are characterised by deep uncertainty and nonlinearity, their chances of occurrence are not reflected in past data, and the possibility of extreme values cannot be ruled out. In this context, traditional approaches to risk management consisting in extrapolating historical data and on assumptions of normal distributions are largely irrelevant to assess future climate-related risks. That is, assessing climate-related risks requires an "epistemological break" with regard to risk management. However, green swans are different from black swans in three regards. First, although the impacts of climate change are highly uncertain, "there is a high degree of certainty that some combination of physical and transition risks will materialize in the future". That is, there is certainty about the need for ambitious actions despite prevailing uncertainty regarding the timing and nature of impacts of climate change. Second, climate catastrophes are even more serious than most systemic financial crises: they could pose an existential threat to humanity, as increasingly emphasized by climate scientists. Third, the complexity related to climate change is of a higher order than for black swans: the complex chain reactions and cascade effects associated with both physical and transition risks could generate fundamentally unpredictable environmental, geopolitical, social and economic dynamics."
[83] *Id.*

has passed a law, to establish a USD 1Bn state backed fund for insurers, as insurers ran out of reserves due to massive natural disaster related claims.[84]

The jurisdictions discussed in this paper are moving in a similar direction in treatment of abandonment of hazardous sites. IBC too provides for disclaimer of onerous property under its regulations[85] though the clause has not yet been tested in the courts.

India should modify its insolvency law to grant environmental claims a secured status else the judiciary will have to intervene if such a question comes before the court. Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam* v. *Mr. Amit Gupta & Ors.*[86] aptly described this dilemma in words. "The Court is at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. This is a matter falling within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, we do not think this Court can sit with folded hands and simply pass the buck onto the Legislature. In such an event, the Court can adopt an interpretation – a workable formula – that furthers the broad goals of the concerned legislation, while leaving it up to the legislature to formulate a comprehensive and well-considered solution to the underlying problem. To aid the legislature in this exercise, this Court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation".

[84] Daphne Zang, *Storm-Driven Insurance Insolvencies Stir State Action: Explained,* BLOOMBERG LAW (Dec. 29, 2022, 3:30 PM) https://news.bloomberglaw.com/insurance/storm-driven-insurer-insolvencies-stir-state-actions-explained.

[85] Regulation 10, Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 - Disclaimer of onerous property. (1) Where any part of the property of a corporate debtor consists of - (a) land of any tenure, burdened with onerous covenants; (b) shares or stocks in companies; (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or (d) unprofitable contracts; the liquidator may, notwithstanding that he has endeavored to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, make an application to the Adjudicating Authority within six months from the liquidation commencement date, or such extended period as may be allowed by the Adjudicating Authority, to disclaim the property or contract.

[86] Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors. Civil Appeal No. 9241 of 2019.