

# Environmental Claims Under Indian Insolvency Law: Concepts and Challenges

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**Abstract:** The intersection between claims arising from environmental liability and insolvency of the entity concerned has grown increasingly complex. Over the years, India has seen enactment of several laws and proactive judicial decisions to ensure liability from environmental harm is addressed through application of no-fault and absolute liability principles. A consequence of these principles is, if an entity harms the environment, they must bear the cost of clean-up. If the entity defaults on the compensation payment or is unable to pay, then, under the Insolvency and Bankruptcy Code 2016 (IBC) they may be able to declare insolvency. When admitted under insolvency, a moratorium on all claims is imposed. Once resolution has taken place, the corporate debtor is provided with a “fresh start”, relieving the debtor from all its previous debts and liabilities. If the debtor goes into liquidation through the waterfall mechanism, financial creditors are given priority over environmental claimants who would mostly be categorized either as contingent claimants or decree holders. In these scenarios, insolvency law supersedes environmental law/policy by design, creating a visible human rights implication. While the IBC seems to be agnostic to social causes, there are other avenues to deal with social causes, such as the Public Liability Insurance Act which deals with hazardous environmental accidents in a limited way. In the paper, we argue that insurance, compared to insolvency, provides a better framework to resolve environmental liabilities and that the insurance schemes should remain intact regardless of a fresh start.

**Keywords:** insolvency, insurance, fresh start, environmental claims, public liability.

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## INTRODUCTION

The Indian Insolvency and Bankruptcy Code (hereinafter “the IBC”), much heralded for its novel approach, was introduced in 2016. The IBC had an instantaneous positive impact on India’s Ease of Doing Business (hereinafter “EoDB”) rank,<sup>1</sup> an index which the World Bank annually published.<sup>2</sup> In 2021, the World Bank replaced the EoDB index with another approach to assess the business and investment climate worldwide, called the “Business Enabling Environment” Index (hereinafter “BEE”).<sup>3</sup> In light of the recent focus

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1. RAJIV KUMAR & DESH GAURAV SEKHRI, IBC: EVOLVING ROLE IN IMPROVING INVESTMENT CLIMATE IN INDIA, IN *INSOLVENCY AND BANKRUPTCY REGIME IN INDIA – A NARRATIVE 21* (Insolvency and Bankr. Bd. of India, 2020).

2. *See generally* WORLD BANK GROUP, *DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES* (2020).

3. *World Bank Group to Discontinue Doing Business Report*, WORLD BANK (Sept. 16, 2021), <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business->

on how businesses deal with environmental obligation, the pre-concept note on BEE detailed how the indicator on Insolvency Resolution within BEE measures “the debtor’s ability to discharge environmental liabilities.”<sup>4</sup> The Insolvency Resolution indicator “also measure(s) whether the reorganization plan and liquidation proceedings must address environmental issues and ensure compliance with environmental law.”<sup>5</sup> The interplay between insolvency and environmental laws has seen some research in jurisdictions such as the United States,<sup>6</sup> United Kingdom,<sup>7</sup> Canada<sup>8</sup>, and Australia.<sup>9</sup> However, only recently has an index which evaluates business regimes taken into account the interplay between environmental law and insolvency.<sup>10</sup>

There are many instances of environmental liability interacting with insolvency in jurisdictions across the world which help explain the interplay. In the United States, coal companies strategically use bankruptcy to manage and evade environmental liabilities by “either [filing] for bankruptcy themselves, or ... spin[ing] off or sell[ing] underfunded subsidiaries laden with environmental and retiree obligations.”<sup>11</sup> The underfunded subsidiaries then usually file for bankruptcy themselves, eventually liquidating with it the environmental obligations.

In the United Kingdom, strategic insolvency may be used to manage and evade liabilities. In a recent case, the directors knew of the risk of the company facing administration (insolvency in the UK is termed administration) in the future due to its environmental liability yet paid out a hefty dividend to their sole shareholder, the parent company, within the statutory framework.<sup>12</sup> The subsidiary eventually defaulted and entered administration, where environmental and other liabilities were sought to be extinguished through liquidation.<sup>13</sup> It is to be noted though, such transactions may be scrutinized under

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report; WORLD BANK, PRE-CONCEPT NOTE: BUSINESS ENABLING ENVIRONMENT (BEE) 1 (2022).

4. WORLD BANK, PRE-CONCEPT NOTE: BUSINESS ENABLING ENVIRONMENT (BEE) 55 (2022).

5. *Id.*

6. See generally Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879 (2019); Blanca Mamutse, *Environmental Liabilities in Insolvency—an Area Ripe for Reform?*, INT’L J. L. BUILT ENV’T. (2016); David Neiman, *International Insolvency and Environmental Obligations: A Prelude to Resolving the Conflicting Policies of a Clean Slate Versus a Clean Site in Transnational Bankruptcies*, 8 FORDHAM J. CORP. & FIN. L. 789 (2003).

7. Andrew Keay & Paula de Prez, *Insolvency and Environmental Principles: A Case Study in a Conflict of Public Interests*, 3 ENV’T. L. REV. 90 (2001).

8. Nicolas Chaput, *Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment?* (2012) (LLM Thesis, University of Toronto) (on file with the University of Toronto).

9. Christopher Symes, *Environmental Protection Orders and Insolvency: It is Onerous to Disclaim, or to Prioritize or to Resolve the Conflict of Two Public Interests*, 37 AUSTL. RES. ENERGY L. J. 29 (2018).

10. See generally Namrata Nair & Medha Shekar, *Green Insolvency: Perspective and Policy Prescription*, in EXPLORING NEW PERSPECTIVES ON INSOLVENCY 351 (IBBI 2022) (reaching this conclusion after conducting a comprehensive literature review); see generally WORLD BANK, *supra* note 4.

11. Macey and Salovaara, *supra* note 6, at 906.

12. BTI 2014 LLC v. Sequana SA [2022] UKSC 25, [2019] Civ 112 (appeal taken from EWCA) (Eng.) (finding that the directors had a responsibility to the company’s creditors even before insolvency was initiated if they knew insolvency would likely be initiated. While this case was decided on the aspect of the directors’ responsibility to the creditors of the company if they had prior knowledge of the risk of insolvency, it showed the approach companies try to take by overloading the subsidiary with environmental liability while underfunding the subsidiary. Therefore, in such cases, when the subsidiary is declared insolvent and liquidated, the environmental liability ceases to exist).

13. *Id.*

the look back period or the director's duty to the creditors may void such bad faith transactions (as was the outcome of the case).<sup>14</sup>

Now assume a case in India where environmental pollution occurs and causes massive loss of life and damage to property. If the polluting company defaults and is admitted to insolvency under IBC, a halt or moratorium on cases against the company is imposed. A stay on any ongoing cases is also automatically granted and no new cases are accepted against the company.<sup>15</sup> The parties with ongoing litigation will have to register their claim with the resolution professional,<sup>16</sup> who labels these as contingent claims.<sup>17</sup> A contingent claim is a claim whose exact value depends on a contingency, such as the outcome of an arbitration or a trial. Consequently, contingent claims are often assigned a nominal value, such as one rupee.<sup>18</sup> Classifying a claim as contingent gains significance as the IBC differentiates between types of creditors.<sup>19</sup> This hierarchy is prescribed in the waterfall mechanism,<sup>20</sup> according to which the different types of creditors get priority in recovery. As contingent claimants rank lower in priority,<sup>21</sup> they get paltry returns, if any.<sup>22</sup>

Insolvency law is seen as agnostic to social causes and issues. It predominantly tries to categorize and structure creditor rights to best allow for the struggling company to be given one last chance.<sup>23</sup> Environmental claimants would be categorized as tortious right holders, who are given lower priority compared to contractual right holders, as is reflected in the waterfall mechanism.<sup>24</sup> This prioritization does not mean insolvency law overrides social causes. It merely leaves social causes to be resolved under a different framework. It is also important to understand insolvency as a consequence and not the cause.<sup>25</sup>

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14. *Id.*

15. *See* The Insolvency and Bankruptcy Code, 2016, § 14 (India) (halting all litigation when a moratorium under §14 of the IBC is declared and barring the execution of decrees or orders already obtained before the moratorium's declaration).

16. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Reg. 9A (India).

17. *Id.* Reg. 14.

18. Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others, (2020) 8 SCC 531 (India) (upholding the Resolution Professional assigning a nominal value of Rs.1 to all of the contingent claims).

19. The Insolvency and Bankruptcy Code, 2016, § 3(10) (India) (defining a creditor as "any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;" thus creating five different categories of creditors).

20. *Id.* § 53 (prescribing a waterfall mechanism which lays out the priority for the distribution of realization of gains from liquidation).

21. *See id.*

22. *See Corporate Processes*, INSOLVENCY & BANKR. NEWS (Insolvency & Bankr. Bd. Of India, New Delhi, India), Jan.-Mar., 2022, at 19 (while the figures for the realization of contingent claimants have not explicitly been released, on successful resolution, the financial creditors recovered 34% of their claims compared to the 11% recovered by operational creditors. Similarly, in liquidation, secured financial creditors who have waved away their security interest received 11% of their claim and "other creditors" (under which contingent claimants would be classified) received 2% of their claims).

23. Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC ONLINE 1, 37 (India).

24. The Insolvency and Bankruptcy Code, 2016, §53 (India).

25. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (2001) (Thomas Jackson cautions scholars against "viewing bankruptcy law as somehow conflicting with and perhaps overriding some other urgent social or economic goal" and implores them to examine bankruptcy in the context of what it is. Jackson writing in the US context observes bankruptcy to be a "debt collection law, 2" which provides "a financial fresh start" to the debtors and provides a "compulsory and collective forum (for the creditors) to sort out their relative entitlements." While some of these conceptions also describe insolvency law in India, the IBC predominantly tries to rescue a failing firm and should be examined as a restructuring law).

In context of environmental pollution and environmental liability, the Public Liability Insurance Act, 1991 ('the PLI Act')<sup>26</sup> is a good example. In the aftermath of the Bhopal Gas tragedy,<sup>27</sup> the government introduced the PLI Act which mandated compulsory insurance for companies handling hazardous chemicals. In cases of environmental pollution emanating from the above hazardous industries,<sup>28</sup> the insurance scheme under the PLI Act provides those affected an alternative forum to seek compensation. There is scope for the insurer to refuse claims under the PLI Act if the insured polluting company is admitted under insolvency or has come out through a successful resolution (referred to as Fresh Start).<sup>29</sup> This interplay between insolvency and environmental claims, and its interaction with insurance regime under the PLI regime, is the focus of this paper.

The paper is structured into five sections. The first section conceptualizes the broad questions which arise from environmental law and insolvency law interacting with each other. The second section examines the classification of environmental claims and the existing forums available for environmental claimants. The third section covers grounds of refusing insolvency and contextualizing environmental claims. The fourth section analyses types of claimants and treatment of environmental claims and elaborates the treatment of decree holders and contingent claimants under the IBC. The fifth section deals with the principle of fresh start under insolvency and its effect on Public Liability Insurance Scheme. The paper also briefly compares how other jurisdictions treat the interplay between environment and insolvency law to better inform the Indian position.

## I. CONTEXTUALIZING ENVIRONMENTAL CLAIMS AND INSOLVENCY

To contextualize the problem faced with the intersection of insolvency and environmental law, let us revert to the scenario where an environmentally polluting company is filing for insolvency. IBC would classify creditors into different categories in such a scenario. Financial creditors are those who provided loans and other types of financing,<sup>30</sup> operational creditors (such as suppliers) have unpaid bills, among other types of claims,<sup>31</sup> and government fines and clean-up costs would classify as government dues. Under the "polluter pays" principle, which is statutorily enshrined, the polluter has to pay the clean-up costs.<sup>32</sup> Contingent claims by the individuals adversely affected by the pollution may also be present. These claims are contingent due to the moratorium.<sup>33</sup> Claims that cannot be filed in court due to the moratorium are contingent claims that must be filed directly with the Resolution Professional appointed to oversee the resolution process.<sup>34</sup> In

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26. See The Public Liability Insurance Act, 1991 (India); see also Vikram Raghavan, *Public Liability Insurance Act: Breaking New Ground for Indian Environmental Law*, 39 J. INDIAN L. INST. 96 (1997); V.K. Agarwal, *Environmental Laws in India: Challenges for Enforcement*, 15 BULL. NAT'L INST. ECOL. 227 (2005).

27. See *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273 (1989) (India).

28. The Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 (India).

29. See discussion *infra* Part V(B) (how fresh start under insolvency interacts with the insurer's liability is elaborated upon).

30. The Insolvency and Bankruptcy Code, 2016, §§ 5(7)–5(8) (India).

31. *Id.* §§ 5(20)–(21).

32. The National Green Tribunal Act, 2010, § 20 (India); see *id.* § 2. Other laws, such as the Environment Protection Act 1986, the Water (Prevention and Control of Pollution) Act 1974, and the Air (Prevention and Control of Pollution) Act 1981 define pollution and acts which may classify as pollution and are read together with § 20 of the National Green Tribunal Act in application.

33. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 7 (India).

34. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 7.

cases where litigation has been completed and a court order is obtained, the individuals are classified as decree holders.<sup>35</sup> Other types of claims are classified under the heading *other types of debts and dues*. The hierarchy under the waterfall mechanism is illustrated in *Table 1*.

Under the waterfall mechanism, financial creditors get priority over others, and environmental claimants and decree holders are unlikely to get anything<sup>36</sup> (as explained in detail in *Tables 1 and 2 which are present in sub-section 2.3*). After initiating the Corporate Insolvency Resolution Process (CIRP), a Committee of Creditors (CoC) is formed. Only financial creditors are allowed a place in the CoC, which is tasked with heading the CIRP. If the CoC receives no resolution plan or no resolution plan is approved under the CIRP, the Corporate Debtor (CD or the defaulting company) will be liquidated.<sup>37</sup> The liquidator is obligated to try and sell the CD as a going concern, failing which the CD is stripped and sold.<sup>38</sup> Any money recovered during liquidation is disbursed according to the waterfall mechanism.<sup>39</sup> According to the waterfall mechanism, secured creditors (primarily financial creditors) have first priority along with pending workmen dues after CIRP costs.<sup>40</sup> Secured creditors are creditors who have a collateral or security interest against the money or service they have disbursed. Secured Creditors who have relinquished their security interest are ranked above unsecured financial creditors.<sup>41</sup> Unsecured financial creditors are generally ranked above operational creditors unless the operational creditor is a secured creditor.<sup>42</sup> Government dues are prioritized over other kinds of debts, including contingent claimants, decree holders, and unsecured operational creditors.<sup>43</sup>

The resolution process also favors the financial creditors over the operational creditors, as the financial creditors are in charge of approving a resolution plan. While some safeguards are in place to protect other creditors' interests, as seen in *Table 2*, if an operational creditor is unlikely to get any amount in liquidation, a similar outcome is most likely in resolution as well.

If the CIRP leads to the successful resolution of the company, no previous liability will be carried forward, including any environmental claims.<sup>44</sup> This is known as the principle of fresh start. As is well known, the consequences of environmental pollution are not always immediately apparent, and they may take years to understand. In these scenarios, insolvency and economic policy supersede environmental policy, either inadvertently or by design.

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35. *Id.* Reg. 9A (reading along with Form F from Schedule 1).

36. The Insolvency and Bankruptcy Code, 2016, §53(f) (India) (covering “any remaining debts and dues;” which includes all dues not covered by the earlier mechanisms).

37. *Id.* § 33.

38. *Id.* § 35.

39. *Id.* § 53.

40. *Id.* §53(1)(b)–(d).

41. *Id.*

42. *Id.*

43. *Id.* § 53(1)(e)(i).

44. *Id.* §§ 31, 32A (bestowing upon the successful resolution applicant a clean slate and a fresh start, extinguishing all the previous liabilities other than those accounted for in the resolution plan); *see also* Ghanashyam Mishra & Sons Priv. Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657 (India) (referencing the waiver of liability).

This superseding of insolvency over other laws is facilitated by a non obstante clause,<sup>45</sup> which overrides laws in conflict with it.<sup>46</sup> In the past, the IBC has overridden taxation laws and laws under which the government has seized assets.<sup>47</sup> In the clash between taxation and insolvency policy,<sup>48</sup> the resultant outcome predominantly has an economic impact on the government. Insolvency overriding taxation laws is a policy decision on which law has a better holistic economic effect. Also, one economic law overriding the other does not necessarily have a direct human rights impact. It may also be argued that the IBC tries to minimize direct human costs by providing workmen dues with a high priority among creditors.<sup>49</sup> Similarly, the exclusion of pension funds, provident funds, and the gratuity fund from the liquidation estate was recommended by the Joint Committee on Insolvency and Bankruptcy Code, as these funds provided a “social safety net to the workmen and employees and hence need to be secured in the event of liquidation of a company or bankruptcy of partnership firm.”<sup>50</sup> Contrastingly, when insolvency law supersedes environmental law, the environmental claimants are either left without compensation or remedy. Such treatment of environmental claimants has a visible human rights implication directly on individual citizens. This interplay between insolvency law and environmental claimants is the subject of the paper. Towards understanding the interplay better, the next section discusses environmental claims and its forums within the Indian legal system.

## II. ENVIRONMENTAL CLAIMS AND FORUMS FOR REMEDIATION IN INDIA

In this part, the first sub-section examines environmental claims and environmental claimants. The second section analyses the forums for environmental claimants to seek an efficacious remedy and the third section scrutinizes how insolvency may impact the different forums available to environmental claimants.

### A. *Environmental claims and environmental claimants*

In *Hameedia Hardware Stores v. B. Mohan Lal Sowcar*,<sup>51</sup> the Supreme Court of India, when determining an eviction dispute involving a tenant, generally defined a claim as “a demand for something as due” or “to seek or ask for on the ground of right.” No statute provides a general definition of a claim, favoring a narrow definition as only applicable to that statute. This tendency is observed in the definition of a claim provided under the PLI Act scheme.

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45. The Insolvency and Bankruptcy Code, 2016, § 238.

46. See *Innoventive Indus. Ltd. v. ICICI Bank Ltd.*, (2017) SCC OnLine SC 1025 (India) (referring to § 238 as overriding other laws).

47. *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs*, (2022) SC 1101 (India).

48. Jasper Vikas, *Resolution of Debts and Insolvency and Bankruptcy Code, 2016: The Status of Government Dues and Taxes*, 8 J. NAT'L. LAW UNIV. DELHI 29 (2021).

49. See generally LOK SABHA SECRETARIAT, THE REPORT OF THE JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015 22–24 (Sixteenth Lok Sabha, 2016).

50. *Id.* at 21–22.

51. *Hameedia Hardware Stores v. B. Mohan Lal Sowcar*, (1988) 2 SCC 513, 525 (India).

To understand the definition of a claim under the PLI Act, we need to briefly understand how the PLI Act functions. The PLI Act mandates companies who “own[], or have control over handling”<sup>52</sup> of any hazardous substances to safeguard the public from the risk of an accident by buying “Public Liability Insurance[.]”<sup>53</sup> The PLI Act lays down a simplified process<sup>54</sup> for “claims for relief” for those affected by an accident involving hazardous substances.<sup>55</sup> The PLI Act does not define “claims.”<sup>56</sup> “Claims” is defined under the Environment Relief Fund Scheme, 2008 (“ERF Scheme”)<sup>57</sup> which is established under Section 7A of the PLI Act.<sup>58</sup> The ERF Scheme defines “claims” as “the claims for relief arising out of an accident covered under the scheme.”<sup>59</sup> This definition applies solely to the claims under the ERF Scheme and cannot be imputed as a larger definition of claims under environmental law.

Nonetheless, as explained below, the definition of a claimant under the ERF Scheme helps clarify the definition of a claim. The ERF Scheme defines a claimant as “persons, owners or agents as specified in sub-section (1) of Section 6 of the [PLI] Act[.]”<sup>60</sup> Under Section 6(1) of the PLI Act, an application of relief can be made by either “the person who has sustained the injury” and by “the owner of the property to which the damage has been caused” and “where the accident has caused death”, the legal representatives and agents of the deceased can file a claim.<sup>61</sup> Thus, claims under the PLI Act mean the right of the injured party to seek compensation or relief, and claimants are the party making a claim for relief, as seen under Section 6(1) of the PLI Act.

As this paper limits its scope to analyzing how environmental claims and insolvency interact, claims need to be contextualized as environmental claims. No statute has defined “environmental claims”. Many courts and tribunals have dealt with environmental claims in the past.<sup>62</sup> However, they were termed as claims arising out of environmental harm,<sup>63</sup> broadly covering pollution, contamination, loss of biodiversity, or merely termed “damage” by the courts and accordingly compensated for. The term “environmental claims” has never

52. The Public Liability Insurance Act, 1991, §2(g) (defines an owner as a “person who owns, or has control over handling, any hazardous substance at the time of accident and includes,— (i) in the case of firm, any of its partners; (ii) in the case of an association, any of its members; and (iii) in the case of a company, any of its directors, managers, secretaries or other officers who is directly in charge of, and is responsible to, the company for the conduct of the business of the company.”).

53. *Id.* §4(1) (mandating the owner to buy a Public Liability Insurance Scheme).

54. *Id.* §7 (allowing the victim to directly file a complaint with the collector who, after providing the other party a chance to be heard, rules on the basis of no-fault liability whether compensation should be provided).

55. *Id.* §6.

56. *See id.* §2.

57. Environment Relief Fund Scheme, 2008, Gazette of India, pt. II sec. 3(i) (Nov. 4, 2008).

58. The Public Liability Insurance Act, 1991, §7A (India).

59. Environment Relief Fund Scheme, 2008, Gazette of India, Rule 2(c) (Nov. 4, 2008).

60. *Id.* Rule 2(d).

61. The Public Liability Insurance Act, 1991, § 6(1) (India).

62. *See generally* Union Carbide Corp. v. Union of India, 1990 AIR 273 (India) (Bhopal gas leak); M. C. Mehta v. Union of India (1986) 1987 AIR 1086 (India) (Oleum Gas Leak case); M. C. Mehta v. Union of India (1988) 1988 AIR 1115 (India) (Tanneries case); K.K. Muhammed Iqbal v. Kerala State Pollution Control Board 2022 SCC OnLine NGT 2400 (India)(Eloor-Adyar Industrial belt case); Sidhgarbyang Kalyan Sewa Samiti v. State of Uttarakhand, 2020 SCC OnLine NGT 2592 (India) (referencing pollution in the Uttarakhand industrial area); Saloni Ailawadi v. Union of India, 2019 SCC OnLine NGT 559 (India) (Volkswagen emissions case).

63. *See* A.P. Pollution Control Board v. Prof. M. V. Nayudu, (1999) 2 SCC 718 (India) (involving multiple appeals from cases related to environmental harm. The courts have used many different phrases to describe environmental harm, such as “harm towards the environment”, “harm to the environment”).



been precisely defined by the courts. This may be a conscious approach to try and examine each case on its merits as definitions are often exhaustive and exclusionary. Nonetheless, a broad understanding elicited from literature review is that any claim caused due to environmental liability is an environmental claim.<sup>64</sup> For instance, if a company pollutes a river, the company is said to have caused environmental harm, which is an environmental liability. The environmental pollution of the river may damage the drinking water source, properties such as farmlands or cause injury to an individual, among others. Any claim arising from the company's environmental liability may be termed "environmental claims".

While government fines and clean-up costs may technically be termed environmental claims, government fines are punitive, which is why they cannot be termed an "environmental claim".<sup>65</sup> It is also possible to treat government fines as CIRP costs. CIRP costs are costs incurred in keeping the company operational or a going concern. CIRP costs are given absolute priority.<sup>66</sup> If a government body threatens to withdraw the operating licence given to a company in light of pollution and asks the insolvent company to pay the fine, the insolvent company to keep itself operational may pay the fine which would be accounted as CIRP costs.<sup>67</sup> The treatment of government fines and clean-up costs under the IBC is another interesting aspect of the interplay between environmental law and insolvency which unfortunately transgresses the scope of the paper.

A forum which often receives such environmental claims is the National Green Tribunal ("NGT"). The NGT was established to remedy breaches and assist in enforcing laws protecting the environment and deciding on cases relating to environmental protection.<sup>68</sup> Consequently, the claims NGT receives often arise from environmental liability, such as environmental pollution, as reflected in various NGT orders. While there are many NGT cases which deal with environmental harm, cases which are relevant and have some context to insolvency related issues are discussed below.

For instance, the NGT barred a company from moving or selling its assets as the company was alleged to have contaminated nearby farmlands.<sup>69</sup> The Tribunal directed the company to "*not remove plant and machineries from their industrial premises, before their environmental liability for Annx-A4 (the farmlands) remediation project is quantified and settled.*"<sup>70</sup> In another case, the NGT held that "*environmental liability is governed by strict liability principle and contribution to such damage by others with whom CETP [Common Effluent Treatment Plant] or SIDCUL [State Industrial Development Corporation of Uttarakhand Ltd.] had arrangement could not be defense to avoid liability to the victims or to the environment.*"<sup>71</sup> Here, the Tribunal rejected the arguments that the companies could not be held liable for the actions of their contractors who were third parties. In another

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64. Deborah E. Parker, *Environmental Claims in Bankruptcy: It's a Question Of Priorities*, 32 SAN DIEGO L. REV 221, 230 (1995).

65. As the IBC classifies government dues as a separate category, trying to understand if clean-up costs or any other unpaid fees under environmental legislations merit to be treated as environmental claims would have no practical significance and would be merely academic and is not carried out.

66. The Insolvency and Bankruptcy Code, 2016, §53(1)(a) (India).

67. It is also to be noted that the government body which regulates such pollution is the Pollution Control Board (PCB) which has the power to take a bank guarantee from the company, where the company is not in compliance with the PCB mandate, for the duration of the breach. As soon as the company rectify the breach, the bank guarantee can be revoked. Such bank guarantees if furnished may be used to reimburse the clean-up cost.

68. The National Green Tribunal Act, 2010, Preamble (India).

69. K.K. Muhammed Iqbal v. Kerala State Pollution Control Board, 2020 SCC OnLine NGT 2400 (India).

70. *Id.*

71. Sidharbyang Kalyan Sewa Samiti v. State of Uttarakhand, 2019 SCC OnLine NGT 2592 (India).

order, the Tribunal, quoting a report, observed, “[t]he assessment of environmental damage is linked with serious cases of pollution, contamination and loss to biodiversity and is often dealt with environmental liability regulations and through environmental compensation under the ambit of ‘polluter pays principle’.”<sup>72</sup>

As seen above, a wide range of claims emerge from environmental liability, which may be called environmental claims. There is also a future possibility of climate change-induced claims similar to loss and damage<sup>73</sup> coming into play as environmental claims, such as the insolvency of a fossil fuel firm.<sup>74</sup> Claims arising out of loss and damage are difficult to prove<sup>75</sup> and likely to be tougher to prove before a liquidator or a resolution professional.

In examining the interplay between such broad environmental claims and insolvency, it is essential to examine forums available for environmental claimants to seek compensation.

### B. Forums to seek an environmental claim

Several civil remedies exist to address an environmental claim. A widely available remedy against harm caused by environmental liability is a civil suit for compensation.<sup>76</sup> A civil claim may not be a preferred option, as litigating a civil claim often takes time and is costly,<sup>77</sup> and it is unlikely to result in any immediate compensation.

As seen before, another avenue is to approach the NGT. The NGT was established as a specialized forum to adjudicate cases arising from laws protecting the environment. As environmental claims arise after a breach of environmental laws and out of negligence, the NGT often has jurisdiction.<sup>78</sup> The NGT’s powers include granting injunctions, awarding compensation and ordering restitution.<sup>79</sup>

72. *SUO MOTU v. Union of India*, 2020 SCC OnLine NGT 3054 (India) (emphasis added).

73. See generally, ENVIRONMENTAL LOSS AND DAMAGE IN A COMPARATIVE LAW PERSPECTIVE, (Barbara Pozzo & Valentina Jacometti eds., 2021) (noting that there is no universal or accepted definition of loss and damage where the term has been used in climate change negotiations).

74. Gouzoules advocates for setting aside money in liquidations involving fossil fuel companies to remediate climate damage. While Gouzoules does not specifically use the term “loss and damage,” in spirit, what is advocated for in the paper is compensation to the public for the loss and damage caused to the climate by the fossil fuel company’s actions. See generally Alexander Gouzoules, *Going Concerns and Environmental Concerns: Mitigating Climate Change Through Bankruptcy Reform*, 62 B.C. L. REV. 2169, 2170 (2022).

75. See Christian Huggel et al., *Potential and Limitations of the Attribution of Climate Change Impacts for Informing Loss and Damage Discussions and Policies*, 133 CLIMATIC CHANGE 453 (2015); Meinhard Doelle & Sara Seck, *Loss & Damage from Climate Change: From Concept to Remedy?*, 20 CLIMATE POL’Y 669 (2020).

76. Code of Civil Procedure, 1908, Schedule I, Rules (India) (provide in detail the procedure to file claims, examine witnesses, seek a summary judgment, among others).

77. See Daksh, *Access to Justice Survey 2015-16*, at 14, available at <https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>. (finding in its survey that “Civil litigants spend Rs 497 per day on average for court hearings. They incur a loss of Rs 844 per day due to loss of pay.”); see also Gene Kassebaum, *Alternate Dispute Resolution in India: Lok Adalat as an Alternative to Court Litigation*, 2 NAT’L L. SCH. J. 23 (1990) (observing in the paper that in India, “[t]he full adversary model is notoriously expensive. Concerns over the costs of litigating torts have led to the exploration of alternative dispute resolution options within and outside of courts”).

78. See Nupur Chowdhury & Nidhi Srivastava, *The National Green Tribunal in India: Examining the Question of Jurisdiction*, 21 ASIA PAC. J. ENV’T LAW 190 (2018).

79. The National Green Tribunal Act, 2010, §15 (India).

While the High Courts (HCs) and the Supreme Court (SC) can also be approached through either writ petitions<sup>80</sup> or Public Interest Litigation,<sup>81</sup> the HCs and SC prefer cases first be litigated before the NGT and prefer to hear an appeal to the case.<sup>82</sup>

Under civil cases and cases before the NGT, the polluting company will be a party to the case. According to Indian environmental case law, it is generally understood that no defenses are available against absolute liability, and the company must compensate the affected environmental claimants.<sup>83</sup> In this scenario, if the polluting company declares insolvency, insolvency acts as a defense against absolute liability, although such contradiction has not been tested yet before an Indian court. Under IBC, environmental claimants do not enjoy priority in compensation.<sup>84</sup> Financial creditors would be paid before environmental claimants, which results in insolvency overriding absolute liability.<sup>85</sup> Under absolute liability, compensation should be prioritized for the affected person, whereas insolvency ignores the same and prioritizes the financial creditors.

Nonetheless, emerging from the principle of absolute liability, in cases where it can be proved that the directors and management of a polluting company had prior knowledge and did not act, the directors and management can be held vicariously liable for environmental damage.<sup>86</sup> This is further facilitated under the current environmental laws, which assign criminal liability to the directors and management of the polluting company.<sup>87</sup> However, a conscious shift is underway from assigning personal criminal responsibility to the company's management and the directors, as seen in the draft PLI Amendment Bill, 2022.<sup>88</sup>

Environmental claimants have another avenue if the company has insured itself under the PLI Act.<sup>89</sup> Section 3 of the PLI Act states that the owner is liable to provide compensation on the principle of no-fault liability in case of an accident.<sup>90</sup> The compensation the owner has to give is governed by the Schedule annexed to the PLI Act. However the Schedule, which has not been updated since 1991, is terribly outdated. For example, in case of a medical injury, compensation is capped at Rs. 12,500 (\$154) and Rs. 25,000 (\$ 308) in case of death. For permanent disablement, the compensation is capped at

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80. India Const. art. 32, cl. 2; India Const. art. 226.

81. See, e.g., *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 8 SCC 161 (India); *Indian Council for Enviro-Legal Action (ICELA) v. MoEF*, 2014 SCC OnLine NGT 2723 (India); *M. C. Mehta v. Union of India* (1994) 3 SCC 717 (India); *M.C. Mehta v. Union of India (Kanpur Tanneries case)*, (1992) 2 SCC 633 (India).

82. See *M.P. High Court Advoc. Bar Assn. v. Union of India*, 2022 SCC Online SC 639 (India); see also *Mun. Corp. of Greater Mumbai v. Ankita Sinha*, 2021 SCC Online SC 897 (India).

83. See *Union Carbide Corp. v. Union of India*, AIR 1988 SC 1531 (India) (commonly referred to as the "Bhopal Gas Tragedy"); see also *M. C. Mehta v. Union of India* (1986) 2 SCC 176 (India) (commonly referred to as the "Oleum Gas Leak case").

84. See *id.*

85. See *id.*

86. See *Uttar Pradesh Pollution Control Bd. v. Modi Distillery*, (1987) 3 SCC 684 (India).

87. See *The Public Liability Insurance Act, 1991*, § 16; see also *Vijay Kumar Singh, Criminal Liability of Corporations—An Environmental Perspective*, in *ENVIRONMENTAL CRIMES: CORPORATE LIABILITY* (2010).

88. Ministry of Environment, Forest and Climate Change, *Note for consultation on proposal to make amendments in the "Public Liability Insurance (PLI) Act, 1991"*, F. No. 12/96/2020-HSM (Section 16 of the PLI Act currently criminalizes the person in charge of the company. The proposal to amend Section 16 of the PLI Act decriminalizes the penal provisions affecting the management of the company and states that such decriminalization of penal provisions is to "comply with action plan forwarded by the Ministry to DPIIT for decriminalization of penal provisions of various Acts/Rules administered by the MOEFCC.").

89. *The Public Liability Insurance Act, 1991*, § 4 (India).

90. See *id.* § 3.

Rs. 25,000 (\$ 308) in addition to Rs. 12,500 (\$154) cap for medical expenses.<sup>91</sup> People with partial disability are to be paid Rs. 1,000 (\$ 12.33) per month for three months. In case of damaged property, compensation is capped at Rs. 6,000 (\$ 74).<sup>92</sup> While the PLI Act specifies these are not the final amounts and compensation can also be sought under other legislations,<sup>93</sup> the process to seek compensation under the PLI Act is comparatively straightforward.<sup>94</sup> In June 2022, the Ministry of Environment, Forest and Climate Change initiated efforts to amend the PLI Act and update the compensation provided under the Act.<sup>95</sup>

Unfortunately, many environmental claims arising from environmental liability are not covered under the PLI Act. The two main elements under the PLI Act are; 1) there should be an accident,<sup>96</sup> and 2) the accident should involve hazardous substances.<sup>97</sup> Assume a situation where tanneries are discharging untreated wastewater into a river, which pollutes the rivers and accrues environmental liability.<sup>98</sup> Such environmental liability will not be covered under the PLI Act as there has been no “accident” that has taken place. The environmental claims against the tanneries have to be made against the polluting companies directly. The insurer will not step in.

However, importantly, most insurance policies have various caveats and disclaimers. A brief examination of three different insurance policies available on the Insurance Regulatory and Development Authority of India (insurance regulator) website provided by Liberty Videocon General Insurance (now Liberty General Insurance),<sup>99</sup> SBI General Insurance<sup>100</sup> and L&T Insurance<sup>101</sup> show many caveats and disclaimers. These policies had wording to discount claims caused due to the company’s negligence and fault, non-compliance with statutory provisions and the company not acting to mitigate the accident or the damage.

SBI General Insurance excluded liability arising from “fines, penalties, punitive or exemplary damages or any other damages resulting from the multiplication of

91. See *CURRENCY CONVERTER*, <https://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=INR> (conversion rate is as of 12th January, 2023 amounts to \$1 = INR 81.1) (last visited Jan. 12, 2023).

92. The Public Liability Insurance Act, 1991, Sch. (India).

93. *Id.* § 8.

94. See generally The Public Liability Insurance Act, 1991, (India). The PLI Act does not require excessive paperwork or a lawyer to file claims for the injured party. Under the PLI Act, the claim must be filed before the Collector, who would examine the claim and decide on the same after giving both parties a chance to be heard. Comparatively, civil claims before a court require a lawyer and take much longer.

95. See Ministry of Environment, *supra* note 88 (introduces the amendments, proposing that the compensation provided would be prescribed in the Rules which can be decided by the Ministry and not be present in the Act itself. This would enable the Ministry to keep updating the Rules (through the Executive) as and when required, compared to amending the Act (through the Parliament) each time they would want to update the figures for compensation).

96. The Public Liability Insurance Act, 1991, § 2(a), (India).

97. *Id.* § 2(d).

98. *Cf. M.C. Mehta v. Union of India & Ors*, AIR 1988 SC 1115 (1988) (India) (holding that the tanneries were held guilty of polluting the river and their closure was ordered).

99. See *Public Liability (Act) Insurance Policy*, LIBERTY VIDEOCON GENERAL INSURANCE [https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/111.Public%20Liability%20\(Act\)%20-%20Policy%20Wording.pdf](https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/111.Public%20Liability%20(Act)%20-%20Policy%20Wording.pdf).

100. *Public Liability Act Insurance Policy*, SBI GENERAL INSURANCE, [https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/70\\_Public%20Liability%20Insurance%20Act%20Policy.pdf](https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/70_Public%20Liability%20Insurance%20Act%20Policy.pdf)

101. *Combined Public And Product Liability Insurance Policy*, L&T GENERAL INSURANCE COMPANY LIMITED, [https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/20\\_CPPL%20-%20Policy%20wordings.pdf](https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/20_CPPL%20-%20Policy%20wordings.pdf)

compensatory damages.”<sup>102</sup> Liberty Videocon General Insurance (now Liberty General Insurance) and L&T Insurance used similar language to limit their environmental liability by stating they would not reimburse claims not covered under the PLI Act. The policy wordings result in many instances of environmental liability fall outside its scope. In such a scenario, environmental liability not covered under the PLI Act would fall on the company rather than the insurer.

Assume a company consciously releases wastewater and pollutes the river. In such a case, the insurance under PLI Act would not cover the company’s actions. In the meantime, the company pays its shareholders and partners a handsome dividend and files for insolvency and liquidation. Environmental claimants in such a scenario will not get much, if anything. This strategy is similar to the strategy used by coal companies in the United States and the United Kingdom. The coal companies are generally registered as subsidiaries and after exploiting the mines, the subsidiary coal company pays out all its profit to the parent company and files for liquidation.<sup>103</sup> The pollution caused due to mining is not remedied by the subsidiary coal company while the parent company enjoys the profits. In such a scenario, the environmental claimants against the subsidiary coal company are in a lurch.

With this background of environmental claims, claimants and forums, assume, after incurring environmental liability, the company defaults and files for insolvency.<sup>104</sup> This intersection of the PLI Act, environmental law and insolvency law is scrutinized in the next section.

### *C. The interplay between insolvency and general remedies to environmental claims*

When a company enters the Corporate Insolvency Resolution Process (hereinafter CIRP), a moratorium or a halt on all cases against the company is imposed.<sup>105</sup> The claimants must file a claim with the Interim Resolution Professional (IRP) or the Resolution Professional (RP).<sup>106</sup> Under the IBC framework, any outstanding environmental liability claims must be filed before the RP, resulting in environmental claims falling under the purview of insolvency.

An environmental claim can be in many forms. It may be a court order directing compensation, an order by the Collector under the PLI Act directing compensation,<sup>107</sup> or an ongoing case which classifies as a claim. The courts may also punitively fine the company as a deterrent,<sup>108</sup> although, as has been discussed earlier, this would not classify as a claim.

The IBC defines ‘claim’ as

102. *Public Liability (Act) Insurance Policy*, *supra* note 99, Point 13.2.

103. *BTI 2014 LLC v. Sequana SA* [2022] UKSC 25 (Eng.) at 141; Macey and Salovaara, *supra* note 6 at 879.

104. Insolvency and Bankruptcy Code, 2016, § 10(1) (India) (allowing the company to file for insolvency on its own if the company has defaulted on its debts).

105. *Id.* § 14(1)(a).

106. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 7.

107. If a company does not have insurance under the PLI Act, the Collector will make the order out directly against the company, which the company would be directly liable for.

108. *See Saloni Ailawadi v. Union of India*, 2019 SCC OnLine NGT 559 (India). The NGT fined Volkswagen punitively for the emission scandal. However, the order has been temporarily stayed by the Supreme Court in *Volkswagen (India) (P) Ltd. v. Satvinderjeet Singh Sodhi*, (2021) 5 SCC 806 (India).

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;<sup>109</sup>

Environmental claims are likely to fall under “a right to payment” that may be disputed or a legal right that has not been fructified into a decree or judgment. Such claims which are not determined are termed “contingent claims”.<sup>110</sup> The process to file a contingent claim is provided in the Indian Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.<sup>111</sup> The Resolution Professional is mandated to estimate the value of contingent claims.<sup>112</sup> Another type of environmental claim is a court decree directing the company to compensate the claimant. Due to a moratorium, the courts cannot execute any decree. As a result, environmental claim decree holders must file a claim before the Resolution Professional. The Tripura High Court recently held that the decree holders are to be classified as *other types of creditors*.<sup>113</sup> The Supreme Court dismissed an appeal challenging this classification of the Tripura High Court.<sup>114</sup> A consequence of the judgment is that environmental claimants as decree holders will be classified as other types of creditors within CIRP. So far, no CIRP has received any environmental claims.<sup>115</sup>

Under IBC, the value maximization of a company is prioritized.<sup>116</sup> Efficient value maximization occurs if the company remains a going concern and is saved by a resolution applicant, who reimburses the creditors with a part of their debt, as obligated under the priority list of the waterfall mechanism. A resolution plan which rescues the company must pay the creditors at least the liquidation value; that is, if the company’s liquidation value was 100 units, the resolution plan has to pay the creditors a minimum of 100 units. Assume the company’s liquidation value is 100 units and the outstanding debt is 200 units. In this case, the resolution plan has to provide a minimum of 100 units to the creditors. A resolution plan may discount “other types of debts and dues” completely, only paying a percentage of the claims to the financial creditors and operational creditors (to comply with the minimum amount under Section 30 (2)). Alternatively, if the company is liquidated, Table 1 shows how the 100 units will be distributed under the waterfall mechanism during the liquidation processes.

Priority	Section	Costs and Claims	Hypothetical Distribution of
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109. Insolvency and Bankruptcy Code, 2016, § 3(6).

110. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Reg. 14 [hereinafter IBBI Regulations] (while contingent claims are not defined, calls for the liquidator to determine the best estimate for claims whose value is contingent on some event. Hence, such claims are termed contingent claims).

111. *See id.*

112. *Id.* Reg. 14.

113. Subhankar Bhowmik v. Union of India, 2022 SCC ONLINE TRI 208 (India).

114. Subhankar Bhowmik v. Union of India, 2022 SCC ONLINE SC 764 (India).

115. *See Nair and Shekhar, supra* note 10.

116. Insolvency and Bankruptcy Code, 2016, *supra* note 104, Preamble.

			100 units
1 <sup>st</sup>	53(1)(a)	Corporate Insolvency Resolution Process Costs	$100 - 5 = 95$
2 <sup>nd</sup>	53(1)(b)(i)	Workmen's dues for twenty four months preceding initiation of insolvency	$95 - 10 = 85$
	53(1)(b)(ii)	Debts owed to secured creditors who have relinquished their security interest	$85 - 50 = 35$
3 <sup>rd</sup>	53(1)(c)	Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding insolvency	$35 - 10 = 25$
4 <sup>th</sup>	53(1)(d)	Financial debts owed to unsecured creditors;	$25 - 40 = 0$ (15)
5 <sup>th</sup>	53(1)(e)(i)	Amount due to the government	0
	53(1)(e)(ii)	Unpaid debts to secured creditors who enforced their security interest	0
6 <sup>th</sup>	53(1)(f)	Any remaining debts and dues (includes operational creditors, decree holders, contingent claimants)	0
7 <sup>th</sup>	53(1)(g)	Preference shareholders, if any	0
8 <sup>th</sup>	53(1)(h)	Equity shareholders or partners	0

*Table 1*

As *Table 1* illustrates, government fines arising from environmental liability are not recovered and environmental claimants often get nothing.<sup>117</sup> The IBBI data till March 2022 shows, of all the claims received by the Resolution Professional in all CIRPs, 32.89% of the claims were claims received from financial creditors.<sup>118</sup> This 32.89% of financial claims were equivalent to 171.39% of the company's value.<sup>119</sup> Interpreting the data, it is unlikely, any creditor below the financial creditor in priority realizes any value or a fair value. IBBI data till June 2022 for successful resolution show that financial creditors recovered 34 cents on the dollar compared to the 11 cents on the dollar recovered by operational creditors.<sup>120</sup>

117. The amount would not always be zero. It would rather depend on the value of the company during liquidation.

118. *Insolvency and Bankruptcy News*, INSOLVENCY AND BANKRUPTCY BD. OF INDIA, Jan.–Mar. 2022, at 20.

119. For instance, if the company's value was 100, the claims were for 171.39.

120. INSOLVENCY AND BANKR. BD. OF INDIA, *Quarterly Newsletter for Apr-Jun 2022*, Table 4, <https://ibbi.gov.in/uploads/publication/5c78b14a5b27e00cc17d4a13cd3e7ad5.xlsx>.

“Any remaining debtors”, including operational creditors, environmental decree holders and contingent claimants, whose claims are often unrealized if the company is liquidated. The resolution plan in such a scenario does not need to fulfil their claims, often providing them with token amounts.<sup>121</sup> Section 30(2) details the minimum requirements for the distribution of claims in a resolution plan,<sup>122</sup> which is structured differently compared to distribution of claims under liquidation. The resolution plan provides much leeway and discretion concerning the distribution of claims, apart from meeting some distribution related requirements which are that the resolution plan has to:

- (i) pay the CIRP costs in full;
- (ii) pay operational creditors the higher value of either what they would have received in case of liquidation (*Table 1*) or the value they would have gotten if the total amount given to all creditors were to be distributed according to the waterfall mechanism;
- (iii) pay the dissenting financial creditor a minimum amount of what they would have received in case of liquidation.

Apart from these requirements, a resolution plan is not bound by a strict hierarchy in distribution of claims, as seen in *Table 2*. A hypothetical resolution plan where the liquidation value is 95 units and the outstanding debt is 210 units is illustrated in *Table 2*.

Costs and Claims	Admitted claims	Hypothetical Distribution	Percentage of claim being repaid
Corporate Insolvency Resolution Process Costs	5	5	100%
Secured Financial Creditor	160	85	53%
Consenting Unsecured Financial Creditor	15	4	26.6%
Dissenting Unsecured Financial Creditor	5	0	0%
Operational Creditors	10	1	10%
Government debts and dues	6	0	0%
Contingent claims	5	0	0%
Any remaining debts and dues (including decree holders)	4	0	0%
Total	210	95	45.2%

*Table 2*

121. See *Punjab National Bank v. Bhushan Power & Steel Limited*, 2019 SCC ONLINE NCLT 18702 (India) (contingent claimants were only provided by 10% of their claims capped cumulatively at 35 crores) [hereinafter *Punjab National Bank*].

122. Insolvency and Bankruptcy Code, 2016, § 30(2).



Alternatively, operational creditors can be given 0% of their claims. This is because, neither under liquidation nor under distribution of the resolution value under Section 53, would operational creditors get any amount. In *Table 2*, the 10% given to operational creditors is at the discretion of the resolution applicant. Significantly, government debts and dues, contingent claims and other types of debts and dues can also be extinguished. *Tables 1 and 2* show how either in resolution or liquidation, environmental claims will likely be unaddressed.

Therefore, it can be seen that the application of insolvency law can undermine or supersede environmental policy. A commercial law i.e., insolvency can be used as a defense against a human rights/fundamental rights law i.e., environmental law and absolute liability. We explore these questions and dilemmas in the following sections.

### III. GROUNDS OF REFUSING INSOLVENCY AND HANDLING ENVIRONMENTAL CLAIMS

In this section, the paper examines whether the courts and the Adjudicating Authorities under IBC can refuse to admit a defaulting company to insolvency. In examining this, it is contemplated how Indian courts may handle insolvency in light of environmental claims. Reference to how other jurisdictions handle environmental claims under insolvency is also made to better understand the Indian position.

#### A. *Can the courts refuse insolvency? The curious case of Vidarbha Industries*

If the Indian courts had the statutory right to refuse insolvency, it would nip the debate about the treatment of environmental claims under insolvency in the bud, since the usual recourse for environmental claimants would be to simply approach the courts. However, this is not the case. While such an approach prioritizes environmental policy, it is largely incompatible with insolvency policy. In addressing these questions, an analysis of the recent Supreme Court decision in *Vidarbha Industries* is instructive.

In the case of *Vidarbha Industries Power Limited v. Axis Bank Limited* (hereinafter *Vidarbha Industries*),<sup>123</sup> the Supreme Court determined that the courts and tribunals have discretion in admitting a Section 7 petition (Section 7 is used by financial creditors to file an application) for insolvency.

Vidarbha Industries Power Limited was a power generation company which defaulted on a loan amounting to 533 crore rupees provided by a consortium of banks.<sup>124</sup> At the same time, Vidarbha Industries was involved in litigation to recover money from the Maharashtra Electricity Regulatory Commission (MPERC) in which the MPERC was ordered to pay Vidarbha Industries compensation amounting to 1,730 crore rupees. MPERC filed an appeal before the Supreme Court. Because of this pending appeal, Vidarbha Industries claimed an external reason which triggered the default, and it would be solvent when it received the pending 1,730 crores. Nonetheless, the banks filed a Section 7 application against Vidarbha Industries before the National Company Law Tribunal (hereinafter NCLT).<sup>125</sup> The NCLT

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123. *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, (2022) 8 SCC 352 (India).

124. *See id.*

125. *See id.* paras. 1–16.

found the existence of debt and default, as is required under the twin tests established by the IBC. The legality of the twin tests was already upheld by the Supreme Court in *Swiss Ribbons v. Union of India*<sup>126</sup> and applied by NCLT in this case. Vidarbha Industries appealed to the National Company Law Appellate Tribunal (hereinafter the NCLAT) which dismissed the appeal, holding that the twin tests are dispositive to resolving the case.<sup>127</sup>

Vidarbha Industries appealed to the Supreme Court.<sup>128</sup> The Supreme Court overruled NCLAT's decision and held that Section 7(5) used the phrase "it may, by order, admit such application," which provided the court with discretion in accepting insolvency petitions.<sup>129</sup> It interpreted such discretion to mean that the court was not mandated by the law to admit the petition even though the twin requirements of debt and default were satisfied. The Court observed:

the Adjudicating Authority [which is the NCLT] might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.<sup>130</sup>

The decision in *Vidarbha Industries* was criticized, most notably because it reversed well settled principles regarding the IBC and overlooked the intent of the legislation.<sup>131</sup> In their report, the Bankruptcy Legislative Reforms Commission (BLRC) observed that the courts were not supposed to examine the viability of the business.<sup>132</sup> The Report of the Insolvency Law Committee in 2022 noted that it is the CoC's responsibility to assess "the viability of the corporate debtor," and to determine "the manner in which its distress is to be resolved."<sup>133</sup> While discussing admission of applications, the Committee notes how reliance should be placed on information utilities to determine debt and default to speed up the process and discusses how these criteria are sufficient to accept the application for insolvency.<sup>134</sup> The Supreme Court in *Vidarbha Industries* held precisely the opposite, noting that the overall "financial health and viability" of the defaulting company may be taken into account by the courts. In a subsequent review petition, the Supreme Court clarified that the Vidarbha judgment had to be put in the context of the facts and the case.<sup>135</sup> The judgment is an anomaly and is likely to be either legislatively bypassed or overruled by the Supreme

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126. *Swiss Ribbons*, para. 58 (holding that as soon as the existence of both debt and default were proved, an application under Section 7 is to be admitted).

127. *Vidharbha Industries Power*, 8 SCC, paras. 60–61.

128. *Id.* para. 1.

129. *Id.* para. 60.

130. *Id.* para. 77.

131. Misha and Abhilash Chaudhary, *India: Vidarbha Industries Power Limited v. Axis Bank Limited*, MONDAQ (Aug. 22, 2022), <https://www.mondaq.com/india/insolvencybankruptcy/1223596/vidarbha-industries-power-limited-v-axis-bank-limited->.

132. See BANKRUPTCY LAW REFORM COMMITTEE, *Volume 1: Rationale and Design*, 20-4 (Nov. 4, 2015) (India) (stating that the BLRC opine that assessing the viability of a business should be left to the creditors while default should be the standard to admit a petition).

133. Ministry of Corporate Affairs, Report of the Insolvency Law Committee, 41 (issued on May 20, 2022).

134. *Id.* at 19–32.

135. *Punjab National Bank*, *supra* note 121. The Supreme Court clarified that "judicial utterances and/or pronouncements are in the setting of the facts of a particular case," and that "to interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."

Court.<sup>136</sup> Nonetheless, the option of refusing admission to the insolvency framework may be available to the courts following the current precedent.

Apart from *Vidarbha Industries*, the NCLT has also refused to admit a petition in a few cases. In one case, the NCLT refused a petition because the creditor and the defaulting company were “colluding” and trying to abuse the process.<sup>137</sup> In another case, NCLT Mumbai rejected a petition as it found the CD viable and a going concern despite debt and default.<sup>138</sup> The courts are not supposed to examine factors other than debt and default, as the IBC intended to only limit the analysis to debt and default for admitting any application. As the courts have looked at external factors and refused insolvency in these cases, whether the courts refuse insolvency in the context of environmental claims is examined in the next section.

*B. Should courts refuse insolvency on account of outstanding environmental claims?*

As discussed above, courts in India have refused to admit companies under insolvency. Hence, it is possible that the courts may refuse insolvency against a solvent company that strategically defaults to evade environmental claims, regardless of the existence of default and debt.<sup>139</sup> A company which may have defaulted in the natural course of business will likely be admitted, unless the courts look at external factors apart from debt and default, wherein the courts may find accepting the company into insolvency to defeat environmental policy and reject the application for insolvency.

While there is a possibility of refusing insolvency in light of environmental claims, it is not an efficient solution for environmental claimants. Assume a company that has caused environmental harm is not accepted into insolvency as it faces many environmental claims. The creditors of the company would naturally seek other remedies, such as enforcing their security interests, among other actions, to secure their debt. This results in the company’s assets being stripped or possessed, making it difficult for the company to be a going concern. Even environmental claimants will have to be involved in litigation against financial creditors, who would have greater time and resources to expend on litigation compared to environmental claimants.

Another approach the insolvency courts could consider is directing the company for liquidation rather than reorganization, a suggestion made by a US-based scholar.<sup>140</sup> In India, directing the company to liquidate rather than reorganize will again run into the waterfall mechanism, where the gains from liquidation are distributed according to the waterfall mechanism as directed by the IBC. An examination of IBBI data through March 2022 reveals, in liquidations, “other types of creditors”—which include operational creditors, decree holders, and contingent claimants—have only received 2% of their claims or Rs 2

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136. Ministry of Corporate Affairs, Invitation of Comments from the Public on Changes Being Considered to the Insolvency and Bankruptcy Code, F.No. 30/38/2021-Insolvency (issued on January 18, 2023) (seeking to amend Section 7 to replace ‘may’ with ‘shall’ in order to ensure an insolvency application is admitted as soon as default is proved).

137. *Hytone Merch. Priv. Ltd. v. Satabadi Inv. Consultants Priv. Ltd.*, (2021) 258 NCLAT 598 (India).

138. *Canara Bank v. GTL Infrastructure Ltd.*, (2022) NCLT Mum C.P.(IB)-4541(MB)/2019 (India).

139. *See id.* para. 49 (concluding that despite default and debt, the NCLAT upheld that the petition was filed in collusion with the Corporate Debtor and rejected the Petition filed U/S 7 of the Code and the claim. In doing so, NCLAT examined the company’s finances, which is reminiscent of the pre-IBC era, where the test for insolvency was a balance sheet test. For more information, *see* Ram Mohan, *The Role of Insolvency Tests: Implications for Indian Insolvency Law*, 6 INDIAN L. REV. 387 (2022)).

140. Gouzoules, *supra* note 74, at 2170.

for every Rs 100 they have claimed. On the other hand, financial creditors who relinquish their security interest have received 11% of their claims, or Rs 11 for every Rs 100 they have claimed.<sup>141</sup> Thus, it can be interpreted that directing the company to liquidation rather than reorganization is not an efficient solution in trying to solve the woes of environmental claimants under the IBC.

In the unlikely event a solvent company is seeking to default in order to gain or misuse the protections under insolvency strategically,<sup>142</sup> past experiences show that the NCLT may not allow such applications to succeed.<sup>143</sup>

*C. Do courts refuse insolvency elsewhere?*

In other jurisdictions, courts have refused application of a few specific provisions of insolvency law if it clashes with environmental policy. For instance, many insolvency regimes allow the liquidator or administrator to abandon onerous property or contracts. When insolvency and environmental policy clash, in cases where liquidators have tried to abandon environmentally onerous properties, courts have often not allowed the power of disclaiming onerous property. The United States Supreme Court did not allow the abandonment of a property under bankruptcy law as it posed a public health or safety hazard, where the property which the liquidator tried to abandon was in breach of various environmental laws which required the company to clean up the property before disposing of it.<sup>144</sup> In the United Kingdom, the High Court did not allow disclaiming of a waste management license under insolvency law,<sup>145</sup> observing “the benefit to the public of maintaining a healthy environment should take priority over the interests of the good administration of business”. The Supreme Court of Canada held that an oil and gas company which went bankrupt had to “fulfill provincial environmental obligations before paying anyone it owes money to”.<sup>146</sup>

The treatment of insolvency in critical sectors is considered differently by courts when compared to normal cases. This has been recently termed “National Interest Insolvency” in the United Kingdom.<sup>147</sup> Similarly, in the United States, special rules govern railroad bankruptcies on the grounds of protecting public interest.<sup>148</sup> It is not uncommon to see special bankruptcy provisions to protect public interest. Companies which are protected

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141. INSOLVENCY AND BANKRUPTCY BD. OF INDIA, IBBI Quarterly Newsletter Data Jan – March 20, 2022, tbl. 10.

142. While it is theoretically possible, the courts may step in and prevent such a situation.

143. See *Hytone Merchants Ltd. v. Satabadi Investment Consultants Ltd.*, 2021 SCC OnLine NCLAT 598 (India).

144. See *Midlantic Nat'l Bank v. NJDEP*, 474 U.S. 494 (1986).

145. See *In Re Mineral Resources Ltd* [1999] 1 AER 746 (UK).

146. *Orphan Well Association v. Grant Thornton Ltd.* [2019] 1 S.C.R. 150 (Can.).

147. See *Counsel General for Wales & Ors v. Allen & Ors* [2022] EWCH (Ch) 647 (Eng.); see also Inga West and Giles Boothman, *Should Administration or Compulsory Liquidation Be the Process of Choice for National Interest Insolvencies?*, FORWARD THINKING CONF. (The Insolvency Serv., London), Nov. 19, 2021; see also “National Interest Insolvencies” – *Creditors vs the Public Interest?*, MURRAY'S LEGAL, <https://murrayslegal.com.au/blog/2022/05/14/national-interest-insolvencies-creditors-vs-the-public-interest/> (May 14, 2022).

148. See Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004).

from bankruptcy generally provide a public utility, such as electricity<sup>149</sup> or transport. Australia and Canada also consider public interest in cases of insolvency.

These examples show that on specific public interest grounds, insolvency courts have some scope to refuse insolvency. Be that as it may, currently, the application of IBC in India shows that environmental claimants may not have any real advantage if the company is refused insolvency, as they may have in other jurisdictions. Instead, it is essential to explore if there is any workable solution for the treatment of environmental claims in insolvency; the next section examines this treatment and possible solutions.

#### IV. TYPES OF CLAIMANTS AND TREATMENT OF ENVIRONMENTAL CLAIMS

This section scrutinizes the decree holders' and contingent claimants' scope of realization of their environmental claims under the IBC framework, and as an example, details how environmental claims are determined in the United States.

As discussed earlier, the IBC neither prioritizes environmental claims, nor provides exceptions to the treatment of environmental claims. Any environmental claim will have to be accommodated within the framework provided by IBC. There can be two types of environmental claimants: claimants having a favorable order or decree from the court (decree holders) and claimants without an order or decree in their favor as the moratorium results in the halt of litigation (contingent claimants).

##### A. Treatment of decree holders under the IBC

As explored in brief earlier, environmental claimants who are decree holders have a court order in their favor directing the company to provide them with compensation. These may be court orders from the NGT, an order from the Collector under the PLI Act,<sup>150</sup> or a civil court order. While these environmental claimants as decree holders have a legal claim under the IBC, decree holders neither fall under the category of financial creditors nor operational creditors. In order to file a claim, decree holders have to use Form F in the Schedule of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.<sup>151</sup> Form F is titled "Proof of Claim by Creditors (Other than Financial Creditors and Operational Creditors)."

A question regarding the classification of decree holders was raised before the Tripura High Court in *Subhankar Bhowmik v. Union of India*.<sup>152</sup> The petitioner, who was a decree holder, contended that either decree holders should be treated as financial creditors or the provisions relating to the discrimination of decree holders be struck down. Rejecting the petitioner's arguments, the Tripura High Court observed that IBC, by design, differentiated between financial creditors, operational creditors, secured creditors, unsecured creditors, and decree holders. The High Court concluded "(t)he inescapable conclusion from the

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149. See Counsel General for Wales & Ors v. Allen & Ors [2022] EWCH (Ch) 647 (Eng.).

150. If the company does not have insurance under the PLI Act, the Collector passes an order against the company to provide compensation.

151. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, Form F: Proof of Claim by Creditors (Other Than Financial Creditors and Operational Creditors).

152. *Subhankar Bhowmik v. Union of India*, 2022 SCC OnLine Tri 208 (India).

aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held.”<sup>153</sup>

In deciding, the High Court emphasized the cooperative process of CIRP wherein the goal of the IBC was to get the Corporate Debtor (CD) back on its feet. According to the High Court, a decree holder has gone through the adversarial process and “to put the steering wheel of a non-adversarial process to revive a corporate debtor, in the hands of an adversarial claimant would defeat the very purpose of the IBC.”<sup>154</sup> It concluded that decree holders would be treated as other types of creditors within the CIRP and governed by the priority in the waterfall mechanism.

### *B. Treatment of Contingent Claimants Under the IBC*

The second type of environmental claimants are those who could not get a court order or a decree due to the imposition of a moratorium on account of CIRP. They are referred to as “contingent claimants,” as their claims have not fructified and are contingent on the pending litigation.<sup>155</sup> Resolution professionals and liquidators often give contingent claims nominal values. In the landmark case of *Essar Steel*,<sup>156</sup> the Resolution Professional assigned a nominal value to all the contingent claims, which was upheld on appeal by the Supreme Court.

These contingent claims are no longer actionable after a successful resolution, where the Resolution Applicant is free of all the liabilities of the CD apart from liabilities agreed to by the Resolution Applicant in the resolution plan. This principle of “fresh start” extinguishes all the previous liabilities, including contingent claims. The Supreme Court in *Ghanashyam Mishra & Sons Private Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*<sup>157</sup> reiterated this principle in no uncertain terms. The only exception the Court gave was that if the contingent claim formed part of the resolution plan, it could be litigated upon to determine its exact value.<sup>158</sup>

An example of the above can be seen in *Punjab National Bank v. Bhushan Power & Steel Limited*,<sup>159</sup> where the Resolution Applicant, JSW Steel, set aside the amount of 35 crores for contingent claimants. The contingent claimants were “to be paid only 10% of its claim subject to a cap of Rs. 35 crores, if it crystalized within two years from the date of approval of the resolution plan by the CoC.”<sup>160</sup> Similarly, in *Shaji Purushothaman v. S. Rajendran*,<sup>161</sup> the Resolution Plan set aside seven crores as a contingent liability fund for contingent claims.<sup>162</sup> On the other hand, in *Karad Urban Co-operative Bank Ltd. v. Khandoba Prasanna Sakhar Karkhana Ltd.*,<sup>163</sup> the Resolution Applicant sought to

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153. *Id.* para. 10.

154. *Id.* para. 16.

155. *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*, (2020) 8 SCC 531 (India).

156. *Id.*

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

158. *See Punjab National Bank v. Bhushan Power & Steel Limited*, 2019 SCC OnLine NCLT 18702 (India) (allowing contingent claimants to proceed with their claims as a fund of Rs; 35 crores had been set aside for contingent claims).

159. *Id.*

160. *Id.* para. 106.

161. *Shaji Purushothaman v. S. Rahendran*, (2020) 551 NCLT 651 (India).

162. *Id.*

163. *Karad Urban Co-operative Bank Ltd. v. Khandoba Prasanna Sakhar Karkhana Ltd.*, (2019) 1509 NCLA

extinguish all the contingent liabilities.<sup>164</sup> Similarly, *Percula Shipping & Trading INC v. Dadi Impex Pvt. Ltd.*, waived away all the contingent liabilities in their resolution plan.<sup>165</sup>

Another problem contingent claims run into is valuation. Resolution Professionals generally assign a nominal value to all the contingent claims combined.<sup>166</sup> Regulation 14 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, instructs the Resolution Professional to “make the best estimate of the amount of the claim based on the information available with him.”<sup>167</sup> Form F, which environmental contingent claimants use to file their claims, mandates the contingent claimants to provide details as to how the claim originated, provide documents, and substantiate the claim.<sup>168</sup> This includes information which the Resolution Professionals can use to determine the value.

In trying to determine the value of contingent claims, Resolution Professionals must show caution as they are not allowed to adjudicate or determine the value of the contingent claim; they can only assign it a nominal value. Herein lays the problem for contingent environmental claimants. A moratorium bars contingent environmental claimants from filing a case before any court and they must file their case before the Resolution Professional.

The NCLT, the adjudicatory authority for any decision taken by the Resolution Professional, has on numerous occasions held that the Resolution Professional needs to collate claims and is not an adjudicatory forum.<sup>169</sup> Additionally, the cases which were contested could be decided only after the moratorium period was over.<sup>170</sup>

Apart from these issues, contingent claims face other challenges. As was held in *Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*,<sup>171</sup> if a contingent claim was not accounted for in the resolution plan, the claim and the underlying liability were extinguished according to the fresh start principle. In such a situation, contingent claimants do not have any remedy and will not be able to get any compensation. Further, the resolution plan is not obligated to recognize or provide compensation to contingent environmental claimants as seen in *Table 2*.

Even if the contingent environmental claimants are recognized by the resolution plan, the contingent fund created for them would likely be capped. The claimants would only be paid a percentage of their claims.<sup>172</sup> In the next section we discuss how other jurisdictions handle such valuation issues.

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748 (India).

164. *Id.* The Resolution Plan stated that “all contingent liabilities including statutory liabilities till the approval of resolution plan by the adjudicating authority shall stand extinguished.”

165. *Percula Shipping & Trading INC v. Dadi Impex Pvt. Ltd.*, 2019 NCLT 9558 (India).

166. *See* IBBI Regulations, *supra* note 110, Reg. 14.

167. *Id.* Reg. 14.

168. *Id.*

169. *See, e.g.*, *Sri Krishna Constructions v. Vasudevan*, (2019) 619 NCAT 213 (India).

170. *Roma Enterprises v. Martin S.K. Golla*, (2018) 232 NCAT 706 (India).

171. *See Ghanashyam Mishra & Sons Priv. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657 (India).

172. *See Punjab Nat'l Bank v. Bhushan Power & Steel Ltd.*, (2019) SCC Online NCLT 18702 (India).

C. *Determination of environmental liability or claims during Insolvency in the United States*

Similar to the Indian insolvency regime, other regimes also provide an automatic stay on suits and cases against the defaulting company. In the United States, there is an exception to the automatic stay provided if “a governmental unit [is] utilizing its police or regulatory power.”<sup>173</sup> The government unit cannot enforce a money suit, which is generally stayed by the courts.<sup>174</sup>

The development of this exception in the United States provides India with some guidance. In the case of *United States v. Nicolet, Inc.*,<sup>175</sup> the Environmental Protection Agency (hereinafter EPA) had cleaned up a site and filed a suit for recovery of the money against Nicolet under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA). Meanwhile, Nicolet filed for bankruptcy. The District Court allowed the EPA to move forward with its suit accepting the argument that the EPA was exercising its police powers. Nicolet appealed to the Third Circuit Court where the EPA argued it was seeking “a verdict for the agency” and “no execution in the judgment would be sought”. The Third Circuit allowed the “government’s claim to be reduced to a judgment”. Such an application meant the Court allowed the government’s claim to proceed and be valued by the Court but did not allow the government to enforce their court order.

As observed by Dalton and Kerrigan,<sup>176</sup> in some cases relating to environmental claims, courts have rejected the premise of protecting the debtor’s estate from the stresses of litigation. They observe that while the government cannot enforce any of its claims, they are allowed to “perfect their claims” for the bankruptcy proceedings.<sup>177</sup> Perfecting their claims means that the Court allows the government to proceed with the case which allows for the valuation of the government’s claim. After the valuation, the courts do not allow the government to enforce their claim but rather direct the government to file their claim which is now properly valued within the bankruptcy process.

A solution to the valuation of environmental contingent claims in India can be similar. The claims may be valued under the PLI Act where the Collector assesses the claims. Herein, only assessment of the claims would be allowed, and assessed claims would not be enforced. Further, under the PLI Act, the insurer often defends the claims, which also ensures that the estate of the corporate debtor is not overly burdened. Even if there is some burden, the justification to allow such stress and burden on the debtor’s estate would be considered public interest, similar to the position in the United States.<sup>178</sup> Such valuation of claims would provide contingent claimants with a clearer claim and all the stakeholders involved with a better understanding of the environmental liability.

The following section analyses the effect the principle of fresh start will have on environmental claims and does it correspondingly play any role in the compensation of claims under the PLI Act.

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173. 11 U.S.C. § 362(b)(4).

174. This is called the “exception to the exception rule.” See Laura M. Dalton & Dennis F. Kerrigan Jr, *Analysis of the Conflicts Between Environmental Law and Bankruptcy Law*, 15 WM. & MARY J ENV’T L 1 (1990).

175. See *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988).

176. See Dalton and Kerrigan Jr, *supra* note 173, at 11.

177. See *id.* at 22.

178. See Gouzoules, *supra* note 74; see also Lubben, *supra* note 147.



## V. THE PRINCIPLE OF FRESH START AND ITS EFFECT ON PUBLIC LIABILITY INSURANCE SCHEMES

The principle of fresh start is to reassure the successful resolution applicant that no new liabilities will emerge after the resolution of the CD. In exploring how the principle of fresh start and Public Liability Insurance schemes may interact, the following sections explore the effect of the principle of fresh start under the IBC and discuss possible ways for the environmental contingent claims to proceed.

### A. *The Principle of Fresh Start*

Section 31(1) of the IBC lays down the principle of fresh start. It states that the resolution plan is “binding on the corporate debtor and its employees, members, creditors, [including the Central Government, any State Government, or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors, and other stakeholders involved in the resolution plan.”<sup>179</sup> Section 32A of IBC provides immunity to the successful Resolution Applicant from all previous offences committed by the CD.

In *Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*,<sup>180</sup> the Supreme Court observed “(t)he legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority . . . is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he (referring to the successful Resolution Applicant) should start with fresh slate on the basis of the resolution plan approved.”<sup>181</sup> The Court further observed “if that (referring to fresh claims after resolution) is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.”<sup>182</sup>

### B. *The interplay between Public Liability Insurance Scheme and Fresh Start*

In the ordinary course, if a company has taken out a Public Liability Insurance Scheme under the PLI Act, even though the compensation amount is low,<sup>183</sup> contingent environmental claimants and environmental decree holders are eligible to claim compensation. The question then arises does the PLI scheme continue to operate within the fresh start principle when no previous liability is actionable?

To examine how PLI Schemes and insolvency interact, three PLI Schemes were reviewed. Of the three PLI Schemes reviewed,<sup>184</sup> all schemes may face practical difficulties if the insured company receives a fresh start. All three policies use language where the

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179. Insolvency and Bankruptcy Code, 2016, § 31(1) (India)..

180. *Ghanashyam Mishra & Sons Priv. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657 (India).

181. *Id.* para. 61.

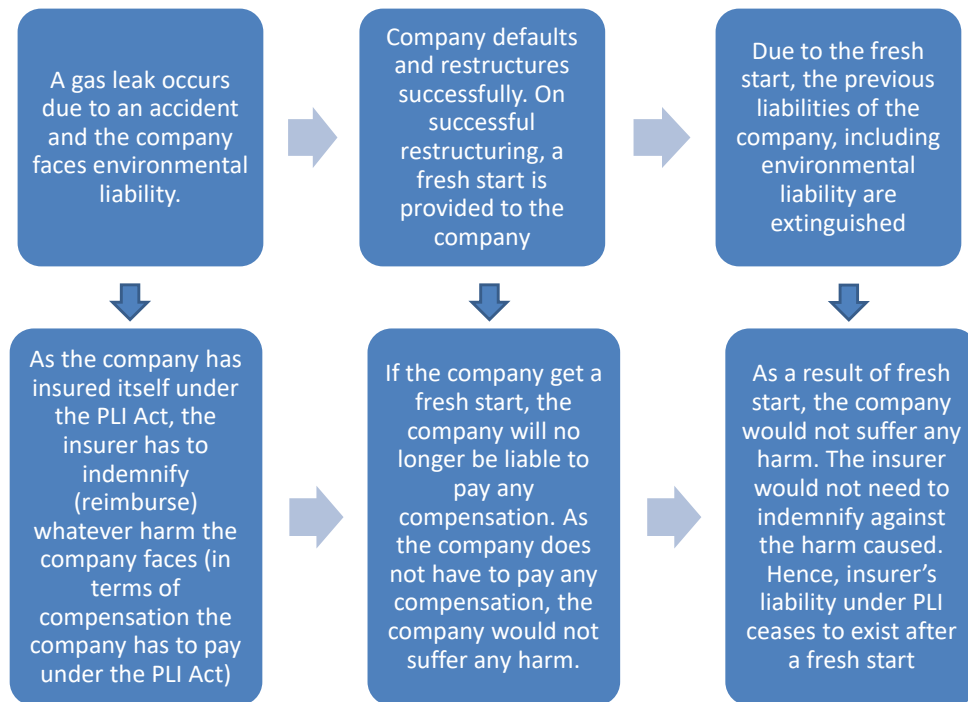
182. *Id.* para. 86.

183. There is currently a public consultation for the revision of the amount for compensation. *See supra* note 88.

184. *See Public Liability (Act) Insurance Policy*, LIBERTY VIDEOCON GENERAL INSURANCE *supra* note 99; *Public Liability Act Insurance Policy*, SBI GENERAL INSURANCE, *supra* note 100; *Combined Public And Product Liability Insurance Policy*, L&T GENERAL INSURANCE COMPANY, *supra* note 101.

insurer provides insurance to the company for any “loss” it suffers for its actions during the period of insurance. The settlement of claims happens between the insurer and the insured. Similarly, the insured has to forward “every letter, claim, writ, summons and process” it receives. Each policy uses language where the insurer reserves the right to defend any claim faced by the insured.

Such language may provide the insurer with an exit route or may be used to deny claims if the insured company has received a fresh start. As and when it receives a fresh start, the company is no longer liable for any claims arising out of previous environmental liability. Neither does the company have to defend any claim arising from its previous actions, nor will it suffer any “loss” due to its previous actions, as denoted in *Figure 1*. If environmental claimants directly sue to insurer, the insurer can raise privity of contract arguments.



*Figure 1*

An alternative is that, as the PLI Act is statutory, it may be interpreted so that claims can directly proceed against the insurer. In such an interpretation, the Collector, when passing an award under Section 7, can pass an award directly against the insurer. This arrangement maintains the sanctity of the principle of fresh start and also addresses the public interest issue to an extent.

Now assume the owner’s liability, as is set in Section 4 of the PLI Act, ceases to exist due to a fresh start. Due to statutory application, the Collector may still make an order directly against the insurer in such a case. While the answers to these questions are mere suppositions, the PLI Act and the insurance provided seem the best remedy available to

contingent environmental claimants and environmental decree holders. As they are the most promising and best forums for environmental claimants to seek compensation, it should not be left to legal interpretation and should be clarified. A legislative example of this can be found in New South Wales, Australia.

New South Wales in Australia passed the Civil Liability (Third Party Claims Against Insurers) Act in 2017.<sup>185</sup> This law, regardless of the insured party being insolvent, allows third parties who had a claim against the insured to sue the insurer directly.<sup>186</sup>

While the position under Indian law dealing with the principle of fresh start and insurance is not clear, legislation in this regard, similar to the Civil Liability (Third Party Claims Against Insurers) Act, 2017, helps clarify the law, which then provides environmental claimants with a clear path under the PLI Act despite the insured company facing insolvency. In the meantime, the court may also interpret the insurer under the PLI Act to be directly liable to smoothen the process, similar to the case under the New South Wales law. Such expansive interpretation may be possible under Section 6 of the PLI Act where the Collector may have the ability to pass an order against the insurer.

## CONCLUSION

Modern insolvency legislations aim to provide a failing company at one last chance for revival. In its current design, insolvency acts as a defense against much of environmental liability. This is because through a waterfall mechanism, insolvency prioritizes repayment of financial debt over environmental liability. In prioritizing financial debt over environmental claims, insolvency prioritizes economic policy over other social goals. However, it may be argued that insolvency also attempts to minimize observable direct human costs, as seen in the priority waterfall treatment of unpaid workmen dues in insolvency and exclusion of pension funds from the liquidation estate due to social security reasons. Giving high priority to environmental liability within insolvency, on the other hand, is not an efficient solution either. It may result in other types of debts seeking a higher priority, opening a floodgate of claims. Tampering with the core idea of the waterfall mechanism at this stage of evolution of IBC may not be a desirable approach.

Insolvency law can achieve a limited but focused objective, which is restructuring and rescuing failing firms. Addressing the social issues within insolvency may require creative harmony with objects of other law. For instance, insurance mechanisms, especially under the PLI Act, are a better way to protect against environmental liability and pay compensation to environmental claimants. A harmonious application of the PLI Act with IBC would maintain the sanctity of insolvency, allowing the successful resolution application with a fresh start and the claimants with some relief. Nonetheless, it is not the complete or perfect solution, which is almost impossible to find, and more efforts are needed to understand the interplay between insolvency, environmental policy, and insurance law.

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185. See Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (Austl.).

186. See *id.* § 4.