

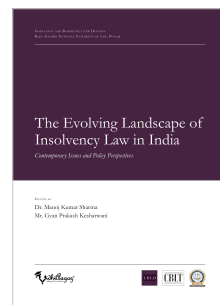
## CHAPTER 3

# Addressing the Unaddressed: An Analysis of the Confidentiality Void under Section 235 of the IBC in India's Cross-Border Insolvency Regime

Shekhar Pathak and Abhijeet Singh Choure

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## CHAPTER 3

# Addressing the Unaddressed: An Analysis of the Confidentiality Void under Section 235 of the IBC in India's Cross-Border Insolvency Regime

SHEKHAR PATHAK\* AND ABHIJEET SINGH CHOURE\*\*

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*India's Insolvency and Bankruptcy Code, 2016, has not yet incorporated the UNCITRAL Model Law on Cross-Border Insolvency, 1997. Meanwhile, Sections 234 and 235 are stopgap measures to allow international cooperation. Section 234 allows for reciprocal arrangements with foreign states to authorise Indian courts to issue letters of request for cross-border assistance with assets or evidence. No such arrangements have been established as yet. More importantly, Section 235, to make such requests operational, is devoid of crucial procedural protections, particularly for sensitive commercial and personal information being transferred transnationally. This is not simply a lacuna in practice; it is one of principle. Indian law has long recognised confidentiality as an equitable obligation. Courts in cases like John Richard Brady and Urmi Juvekar have protected technical and creative information even in the absence of express statutory backing. Globally, other jurisdictions have enacted such protection. For example, the UK in *In Re Farfetch Ltd.*, limited cross-border disclosure by way of confidentiality undertakings. The U.S., under §107(b) of the Bankruptcy Code, permits protective orders to prevent commercial harm. To bridge this gap, this paper proposes the enactment of a "Protective Protocol" pursuant to Section 235. It encompasses: first, clear statutory mandate for confidentiality orders; second, stepped disclosure standards ("good cause" and "compelling reasons"); third, mandatory confidentiality provisions with automatic sealing; fourth, procedural rules for sealing dispositive documents by affidavit and judicial balancing tests; and lastly, provisions to quash third-party subpoenas involving protected information.*

**Keywords:** Cross-Border Insolvency, Confidentiality Protective Protocol, Section 235, Insolvency and Bankruptcy Code, 2016

## 1 INTRODUCTION

Imagine that the firm named Xenon Auto Ltd., an automotive parts-maker with ₹4,200 crores worth of debt, finds its way into the Corporate Insolvency Resolution Process

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(“CIRP”) under the Insolvency and Bankruptcy Code, 2016 (“IBC”). The enterprise has two overseas subsidiaries, namely, Xenon GmbH in Germany and Xenon Thai Co. in Thailand, both of which face insolvency and court-supervised rehabilitation under the laws prevailing in each territory. Pursuant to an assumed reciprocal agreement, the Indian Resolution Professional (“RP”) resorts to Section 235 with the intention of coordinating with overseas courts. The RP, however, finds himself face-to-face with cross-conflicting confidentiality requirements. German jurisprudence mandates liberal disclosure in cross-border insolvency cases, including proprietary manufacturing information, aluminium alloy compositions, and sophisticated EV technology. In the meantime, the Thai legal regime prescribes comprehensive group-level financial disclosure, divulging cost structures, vendor arrangements, and confidential price terms.

In this hypothetical situation, the RP finds it difficult to ensure that such commercially confidential information, once divulged, will not be misused or made public, particularly by applicants with connections to rival foreign firms that stand to benefit competitively. The scenario presents several important questions. How should an RP determine whether the level of confidentiality in an overseas court is sufficient? Must Section 235 require procedural protections, like sealing orders or redaction procedures, prior to sending sensitive information abroad? How should the RP weigh the legal obligation to disclose against the obligation to maintain trade secrets and commercial privacy across borders? What accountability procedures should exist if sensitive information shared with court-to-court cooperation subsequently becomes leaked or misused?

Insolvency process, per se, as the Singapore Court of Appeal held in *Larsen Oil and Gas Pte Ltd. v. Petroprod Ltd.*, “is a collective statutory proceeding involving the public centralisation of disputes with the intention of achieving economic efficiency and optimum returns for creditors.”<sup>1</sup> Even as, in *SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O.*, the court noted that the world is getting smaller these days, with cross-border commercial activity increasingly becoming the order of the day.<sup>2</sup> The consequence was that each corporate insolvency matter proceeded under the glare of immediacy and uncertainty, where the existence of an entire enterprise, along with thousands of jobs, rested in the court’s hands. Moreover, with the point clear that foreign bankruptcy decrees had no direct effect upon Indian proceedings, as the Supreme Court held in *Y. Narasimha Rao v. Y. Venkata Lakshmi*,<sup>3</sup> India was yet to advance the cause of adopting the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (“Model Law”). However, the judgment in *Jet Airways (India) Ltd.*

<sup>1</sup> *Larsen Oil & Gas Pte Ltd. v. Petroprod Ltd.*, [2011] SGCA 21 (Sing.).

<sup>2</sup> *SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O.*, 2012 SCC OnLine Del 1714.

<sup>3</sup> *Y. Narasimha Rao v. Y. Venkata Lakshmi*, (1991) 3 SCC 451.

*v. State Bank of India & Anr.* marked a progressive step.<sup>4</sup> There, the Indian tribunal gave effect to a Dutch insolvency proceeding without the existence of an actual agreement, relying upon its sense of judicial comity. However, although Sections 234 and 235 of the IBC are in force, they have not yet been used, as no agreement under Section 234 has been made by the Central Government. Even if such agreements are concluded, it remains to be seen whether Section 235's enforcement will not encounter real difficulties, particularly with respect to ensuring confidentiality in cross-border cooperation.

As the process of insolvency unfolds, it necessarily brings into play an enormous treasure trove of private commercial information, board minutes safeguarding strategic choices regarding recapitalisations or disposals of assets;<sup>5</sup> private cash-flow and valuation studies estimating survival probabilities;<sup>6</sup> comprehensive customer and supply contracts with renewal and termination clauses; and technical schematics, patent templates, and source code essential to innovation in products.<sup>7</sup> Disclosure of such information without permission could mislead bidding procedures, permit aggressive behaviour among competitors, breach data-protection laws, and impair trust among stakeholders.<sup>8</sup> That, in turn, destroys the enterprise value that insolvency law seeks to maintain. The paper, therefore, confines itself to a question on the aspects of confidentiality under Section 235 of the Insolvency and Bankruptcy Code, and it starts by outlining the history of the evolution of the IBC and its approach towards cross-border insolvency, with particular reference to the limitations inherent in Section 235. Thereafter, it discusses the evolution of confidentiality provisions in insolvency cases. Against this, it provides a comparative analysis of relevant UK and US jurisprudence. In the end, the paper concludes by offering suggestions to strengthen confidentiality under Section 235.

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<sup>4</sup> *Jet Airways (India) Ltd. v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT 2019).

<sup>5</sup> Insolvency & Bankr. Bd. of India, *Discussion Paper on Measures to Enhance Integrity of CIRP*, TAXGURU (Aug. 7, 2025), <https://taxguru.in/corporate-law/ibbi-discussion-paper-measures-enhance-integrity-cirp.html>.

<sup>6</sup> TEJU Finance, *Reading: DCF for Startups – Modelling Survival Probability*, <https://vlp.teju-finance.com/courses/mod/book/view.php?id=137&chapterid=397> (last visited Aug. 7, 2025).

<sup>7</sup> Gartner, *Master TermsGuide: Structuring Contracts for Flexibility and Control*, <https://www.gartner.com/en/documents/3989112> (last visited Aug. 7, 2025); Wonder.Legal, *Supply Contract Template*, <https://www.wonder.legal/in/modele/supply-contract> (last visited Aug. 7, 2025).

<sup>8</sup> FAR 3.104-4, Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information, ACQUISITION.GOV, <https://www.acquisition.gov/far/3.104-4> (last visited Aug. 7, 2025); Nancy Sharma, *Judicial Scrutiny of Arbitrary Tender Rejections and Bidder Compliance in Public Contracts*, THE LAWGIST (Oct. 9, 2024), <https://thelawgist.org/judicial-scrutiny-of-arbitrary-tender-rejections-and-bidder-compliance-in-public-contracts/>; *Misleading Information in the Tender Offer and Designation of Goods*, PORTAL FOR COMPETITION LAW, <https://uclp.eu/misleading-information-in-the-tender-offer-and-designation-of-goods/> (last visited Aug. 7, 2025).

## 2 EVOLUTION OF INDIA'S CROSS-BORDER INSOLVENCY

The evolution of India's cross-border insolvency framework has been an incremental acceptance of the shortcomings inherent in exclusively territorial practices of dealing with multinational corporate failures.<sup>9</sup> The IBC, while groundbreaking in its national practice, initially resulted from a legislative process that insufficiently dealt with the nuances of cross-border insolvency.<sup>10</sup> Before the enactment of the IBC, India's insolvency regime was fragmented with multiple legal statutes, including the Companies Act, 1956; the Sick Industrial Companies (Special Provisions) Act, 1985; and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.<sup>11</sup> This diffused regulatory framework not only extended periods of time in dealing with debts and recovered less domestically for creditors, but also presented insurmountable challenges in successful cross-border cooperation. Even the process of drafting the IBC initially indicated a domestic-focused approach, based on the urgent need to overhaul India's disjointed and ineffective insolvency regime. This reform was led by the Bankruptcy Law Reforms Committee ("BLRC"), the Committee, which tabled its final report on 4 November 2015 and in its final report, it focused on developing an objective "default" test, rather than the subjective "inability to pay" criterion, but, in the initial stages, ignoring the international aspects of contemporary corporate frameworks. Noting that:<sup>12</sup>

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<sup>9</sup> Roshini Parameshwari S, *Cross-Border Insolvency in India: Evaluating the IBC's Framework in Light of the UNCITRAL Model Law*, 5 INDIAN J. LEGAL REV. 969 (2025), <https://ijlr.iledu.in/cross-border-insolvency-in-india-evaluating-the-ibcs-framework-in-light-of-the-uncitral-model-law/>; Sudhaker Shukla & Kokila Jayaram, *Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL*, INSOLVENCY & BANKRUPTCY BD. OF INDIA (2020), <https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf>; Mohd. Yasin & Ishita Singh, *Cross Border Insolvency: Initial Roots in India*, BURNISHED L.J. (2024), <http://burnishedlawjournal.in/wp-content/uploads/2024/02/CROSS-BORDER-INSOLVENCY-INITIAL-ROOTS-IN-INDIA-by-Mohd.-Yasin-Ishita-Singh.pdf>.

<sup>10</sup> Sidhi M. Jain, *Cross-Border Insolvency in India: Challenges and Opportunities for Reform*, INT'L J. FOR MULTIDISCIPLINARY RSCH., Mar.–Apr. 2025, at 1, <https://www.ijfmr.com/papers/2025/2/38582.pdf>; Rana Navneet Roy & Satyansh Gupta, *Cross Border Insolvency Under the Indian Insolvency and Bankruptcy Code, 2016*, ACAD. BUS. RES. J. (2024), <https://www.abacademies.org/articles/cross-border-insolvency-under-the-indian-insolvency-and-bankruptcy-code-2016.pdf>; Anurag Yadav, *Cross-Border Insolvency: A Domain to Be Strengthened by the Indian Legal System*, IBC LAWS BLOG (Mar. 15, 2025), <https://ibclaw.blog/cross-border-insolvency-a-domain-to-be-strengthened-by-the-indian-legal-system-abstract-by-anurag-yadav/>.

<sup>11</sup> Tejas Omkar Navandar, *A Comparative Analysis of Legal Frameworks of Insolvency Law in India, USA and the UK*, INT'L J. ADV. RES. SCI., COMMUN. & TECH., Paper No. 17042 (2022), <https://www.ijarsct.co.in/Paper17042.pdf>; Neha Mantri, *From SICA to IBC*, LAWYERSCLUBINDIA (Dec. 25, 2020), <https://www.lawyersclubindia.com/articles/from-sica-to-ibc-13455.asp>; Bhatt & Joshi Assocs., *Transition from SICA to IBC: A Legal Framework Evolution in Indian Corporate Insolvency Law*, BHATT & JOSHI ASSOCS. (June 17, 2021), <https://bhattandjoshiassociates.com/transition-from-sica-to-ibc-a-legal-framework-evolution-in-indian-corporate-insolvency-law/>.

<sup>12</sup> BANKRUPTCY LAW REFORMS COMM., MINISTRY OF FIN., GOV'T OF INDIA, REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE: VOLUME I – RATIONALE AND DESIGN (Nov. 4, 2015), <https://ifrogs.org/POLICY/blrc.html>.

“The Committee has taken up, and attempted to comprehensively solve, the question of bankruptcy and insolvency insofar as it is a purely domestic question. This is an important first milestone for India. The next frontier lies in addressing cross-border issues...”

This draft Bill, based on the recommendations of the BLRC, was then scrutinised by a Joint Parliamentary Committee (“JPC”) before enactment. In the course of its consideration, the JPC made some changes to the legislation proposed in order to make its ambit and terminology clearer.<sup>13</sup> In its April 2016 report, the Committee also took note of the glaring omission of provisions relating to cross-border insolvency. Imbuing the Code with a sense of reality with regard to the increasing interconnectedness of world trade, it noted that, considering that business and corporate transactions today involve an international and cross-border component in large numbers, the effects of cross-border insolvency cannot be overlooked too long if India is to possess a complete and enduring insolvency code, which the Code seeks to fulfil, and that failing to do so would result in an incomplete Code.

The territoriality is embedded in the IBC, as shown under Section 60(1), empowering the National Company Law Tribunal (“NCLT”) at the registered office of the corporate debtor as the adjudicating authority.<sup>14</sup> This strategy, while delivering clarity in local settings, inherently restricts jurisdictional reach to assets in India. It presumes that every state will initiate its own insolvency proceeding, impose its local laws on locally situated property, and distribute proceeds under its own rules of distribution.<sup>15</sup> Hence, this model necessitates the filing of multiple claims by creditors in each forum where proceedings are commenced, generating procedural and strategic drawbacks.

However, recognition of these shortcomings resulted in subsequent legislative responses. The March 2018 Report of the Insolvency Law Committee (“ILC”) was a foundation paper addressing the imperative need for cross-border insolvency solutions.<sup>16</sup> The report realised that unless there were proper international cooperation mechanisms, the

<sup>13</sup> LOK SABHA SECRETARIAT, REPORT OF THE JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015 (Apr. 2016), *quoted in* MINISTRY OF CORP. AFF., INVITATION OF COMMENTS FROM PUBLIC ON CROSS-BORDER INSOLVENCY UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 2–3 (Nov. 24, 2021), <https://prsindia.org/files/parliamentary-announcement/2021-12-15/Cross-Border%20Insolvency%20under%20IBC.pdf>.

<sup>14</sup> Adv. Partho Sarkar, *Deconstructing the Provision of Territorial Jurisdiction of Filing Application Under Insolvency and Bankruptcy Code*, IBC LAWS (Oct. 30, 2020), <https://ibclaw.in/deconstructing-the-provision-of-territorial-jurisdiction-of-filing-application-under-insolvency-and-bankruptcy-code-by-adv-partho-sarkar/>.

<sup>15</sup> Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross Border Insolvency in India*, IBC LAWS (July 24, 2020), <https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-makharia/>; Maheshwari & Co., *Cross-Border Insolvency: Legal Framework, Challenges & Solutions*, MAHESHWARI & CO. BLOG (Mar. 5, 2025), <https://www.maheshwariandco.com/blog/cross-border-insolvency-framework-consequences/>.

<sup>16</sup> INSOLVENCY LAW COMM., MINISTRY OF CORP. AFF., GOV’T OF INDIA, REPORT ON CROSS-BORDER INSOLVENCY (Oct. 16, 2018), [https://ibbi.gov.in/uploads/resources/Report\\_on\\_Cross%20Border%20Insolvency.pdf](https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border%20Insolvency.pdf); INSOLVENCY LAW COMM., MINISTRY OF CORP. AFF., GOV’T OF INDIA, REPORT OF THE INSOLVENCY LAW COMMITTEE (Mar. 26, 2018), [https://ibbi.gov.in/ILRReport2603\\_03042018.pdf](https://ibbi.gov.in/ILRReport2603_03042018.pdf).

domestic success of the IBC would be impossible. To make these suggestions operational, the ILC suggested the incorporation of *Part Z* in the IBC with detailed legal provisions and procedures for dealing with cross-border insolvency cases. In addition, the Ministry of Corporate Affairs formed the Cross Border Insolvency Rules Committee (“CBIRC”) in January 2020 which institutionalised commitment to putting these frameworks into operation.<sup>17</sup> The CBIRC’s June 2020 report, later opened to public consultation in November 2021, recommended the Insolvency and Bankruptcy (Cross-Border Insolvency) Rules, 2020, to put Draft *Part Z* into operation upon enactment. But this evolution leaves the interim status of the present cross-border provisions. The 2016 review of the JPC led to the introduction of Sections 234 and 235 as stopgap solutions, recognising the necessity of international cooperation while complete frameworks were still in the works. Although these provisions evidence legislative awareness of cross-border insolvency issues, they do not constitute a strong or harmonised framework. Specifically, Section 234’s dependence upon reciprocal treaties poses diplomatic and practical barriers, and Section 235, although providing for foreign court assistance, is deficient in necessary procedural protections, most notably regarding confidential commercial information.

## 2.1 Section 234: A Reciprocal Dilemma

Examination of Section 234 in text discloses both ambitious aims, as well as practical constraints. The conceivable roles encompass: *firstly*, allowing CIRP to secure extra-territorial effect through formal international treaties, which, nonetheless, is counterproductive with respect to the IBC, given it fails to provide specifically for dealing with assets situated outside India; *secondly*, devising structures for reciprocal recognition that would permit foreign insolvency proceedings to secure effect within Indian jurisdiction. As explained with clarity by Jurist *Bruno Simma*, underlining the value placed upon reciprocity, he indicated it, “[a]s a horizontal legal system, international law rests upon the logic of reciprocity in its entirety.”<sup>18</sup> In this manner, reciprocity stands not merely as a functional norm but as a structural column upon which international legal relations depend. It serves as a meta-principle or secondary law of international law, akin to the law of treaties and the law of state responsibility, inasmuch as it assists in sustaining cohesion within the decentralised international legal order.<sup>19</sup>

<sup>17</sup> MINISTRY OF CORP. AFF., GOV’T OF INDIA, CONSTITUTION ORDER FOR CROSS BORDER INSOLVENCY RULES COMMITTEE (Jan. 23, 2020), [https://www.mca.gov.in/Ministry/pdf/constitutionOrder\\_30012020.pdf](https://www.mca.gov.in/Ministry/pdf/constitutionOrder_30012020.pdf).

<sup>18</sup> Andreas Paulus, *Reciprocity Revisited*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 113, 113–37 (2011), <https://academic.oup.com/book/7421/chapter/152290672>.

<sup>19</sup> Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT’L L.J. 93 (2003), <https://scholarship.law.cornell.edu/cilj/vol36/iss1/4>; Christiane Ahlborn, *Reciprocity and International Organizations Law*, in RECIPROCITY IN INTERNATIONAL LAW 273, 273–99 (Marcin Kalduński ed., 2024), [https://link.springer.com/chapter/10.1007/978-3-031-66746-6\\_12](https://link.springer.com/chapter/10.1007/978-3-031-66746-6_12); Pierre-François Laval, *Reciprocity and Customary International Law*, in

Reciprocity, therefore, finds expression in several dimensions: *firstly*, legally, it assists in the mutual enforcement and recognition of obligations and entitlements across jurisdictions, as envisaged under Section 234;<sup>20</sup> *secondly*, sociologically, it creates normative expectations among the states, actors, conducive to compliance with the likelihood of reciprocal benefit, retaliation. The “tit-for-tat” or “quid pro quo” dynamic has, over the course of history, conditioned diplomatic and legal interactions among the states and continues to play an active part in negotiations over international cooperation agreements.<sup>21</sup>

## 2.2 Section 235: Disclosing Confidentiality

The provision states that, “if, in the opinion of the Adjudicating Authority,” such assistance is necessary, it may send a letter of request to a foreign court or authority. This wording leaves the NCLT with very broad discretionary powers. Such flexibility may well be beneficial, but it creates a significant lacuna in the absence of binding statutory parameters to guide the exercise of discretion. The provision does not prescribe specific criteria, e.g., the pecuniary value of the foreign asset in question, the urgency of enforcement, or the unavailability of domestic options. This statutory vagueness has the unintended consequence of allowing different NCLT benches to apply different criteria. Therefore, predictability and legal coherence suffer in high-stakes cross-border insolvency proceedings involving multi-national corporations.<sup>22</sup> In cross-border insolvency, tracing and preservation of assets are among the most sensitive and time-sensitive priorities.<sup>23</sup> This usually involves access to foreign bank records, shareholder registers, and holding company documents.<sup>24</sup> However, without statutory guidelines requiring proportionality or due process, such activities risk being branded as overbroad or intrusive.

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RECIPROCITY IN INTERNATIONAL LAW 55, 55–84 (Marcin Kaldunski ed., 2024), [https://link.springer.com/chapter/10.1007/978-3-031-66746-6\\_4](https://link.springer.com/chapter/10.1007/978-3-031-66746-6_4).

<sup>20</sup> JAN KLABBERS, INTERNATIONAL LAW 45 (2013); Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 412 (2002).

<sup>21</sup> ROBERT AXELROD, THE EVOLUTION OF COOPERATION 20–55 (1984).

<sup>22</sup> Irit Mevorach, *Certainty and Predictability in Insolvency Within Multinational Enterprise Groups*, in INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS 270–85 (2009), <https://academic.oup.com/book/1429/chapter/140805527>.

<sup>23</sup> Janis Sarra, Stephan Madaus & Irit Mevorach, *Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency*, 32 INT'L INSOLVENCY REV. 253 (2023), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1499>; Mobolaji Oriola & Izuchukwu Ibeanusi, *Cross-Border Asset Tracing and Recovery: Navigating International Legal Complexities*, ALLEN & BROOKS (June 19, 2024), <https://www.allenandbrooks.com/2024/06/19/cross-border-asset-tracing-and-recovery-navigating-international-legal-complexities/>; Surbhi Pareek & Monil Chheda, *Asset Tracing and Recovery: Is India Ready?* (Cyril Amarchand Mangaldas Tech. Paper Series No. 63, June 2024), <https://www.cyrilshroff.com/wp-content/uploads/2024/07/asset-tracing-and-recovery-is-india-ready.pdf>.

<sup>24</sup> IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 278 (2d ed. 2005); Look Chan Ho, *Cross-Border Insolvency and the Challenge of Asset Recovery*, 16 INT'L INSOLVENCY REV. 123, 130 (2007).

A request that invades deeply into a company's financial systems, without compelling necessity or confidentiality assurances, may be refused by foreign courts or simply ignored by counterparties. Further, Section 235 does not require threshold disclosures or proportionality tests, which are required to balance investigation objectives against the privacy protection imperatives required by regimes like the European Union's General Data Protection Regulation ("GDPR").<sup>25</sup> Beyond asset discovery, successful insolvency proceedings often depend on the ability to obtain evidence from foreign jurisdictions.<sup>26</sup> But Section 235 is silent as to any regime of confidentiality to which such disclosures must be sought and preserved.

This gap in protection of confidentiality is particularly ominous in view of the increasing significance of trade secrets to modern business. As of the early 2000s, more than 83% of the S&P 500's market value rested on intellectual property and other intangibles.<sup>27</sup> For technology companies like Microsoft and Yahoo!, it was over 98%. Among the most valuable of these intangible assets are trade secrets: unpatented confidential information essential to the firm's competitive edge. They are represented by anything from customer analyses and pricing algorithms to algorithms and raw data sets. Their value relies solely on secrecy; if disclosed, their exclusivity and commercial value are lost forever.<sup>28</sup>

This reality underscores the strategic trade-off firms must make when choosing between patent protection and protection by trade secrets.<sup>29</sup> Patents award a limited-duration legal monopoly in exchange for public disclosure. Trade secrets offer protection forever, but only if secrecy is absolutely guaranteed. If leaked, reverse-engineered, or independently discovered, trade secret protection is lost forever.<sup>30</sup> This tension is heightened in instances of insolvency, as court-ordered disclosures can unwittingly reveal confidential R&D details or strategic business plans, threatening a company's long-term survival.

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<sup>25</sup> Insolvency Act 1986, c. 45, § 235 (UK); Regulation (EU) 2016/679, 2016 O.J. (L 119) 1.

<sup>26</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004); *Re Stanford Int'l Bank Ltd.*, [2010] EWCA (Civ) 137, [2010] 3 W.L.R. 941 (Eng.).

<sup>27</sup> OCEAN TOMO, INTANGIBLE ASSET MARKET VALUE STUDY (2015), <https://leewardcapitalmgt.com/wp-content/uploads/2019/02/ocean-tomo-intangible-asset-study-2015.pdf>; *MSFT (Microsoft) Intangible Assets*, GURUFOCUS (2025), <https://www.gurufocus.com/term/intangibles/MSFT>.

<sup>28</sup> Uniform Trade Secrets Act § 1(4), 14 U.L.A. 538 (1985); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1094–96 (2012).

<sup>29</sup> Claimistry Team, *Navigating Conflicts Between Trade Secrets and Patent Rights in Intellectual Property Law*, CLAIMISTRY (Nov. 10, 2024), <https://claimistry.com/trade-secrets-and-patent-rights-conflicts/>; Lennie A. Bersh & Kristopher D. Reichen, *Patents and Trade Secrets: A Dual Strategy for Protecting Innovations*, N.J. L.J. (Apr. 17, 2023), [https://www.gtlaw.com/-/media/files/insights/published-articles/2023/04/bersh-and-reichen\\_njlj-april-article\\_patent-and-trade-secrets.pdf](https://www.gtlaw.com/-/media/files/insights/published-articles/2023/04/bersh-and-reichen_njlj-april-article_patent-and-trade-secrets.pdf).

<sup>30</sup> Uniform Trade Secrets Act § 1(4), 14 U.L.A. 538 (1985); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475–76 (1974).

### 3 HISTORICAL DEVELOPMENT OF CONFIDENTIALITY DOCTRINE

The English common law rule of confidentiality is adopted in Indian jurisprudence, and it evolved from the principles governing restrictive equitable remedies beyond statutory limitations.<sup>31</sup> This duty arose because it is sometimes incumbent upon a person, by reason of the inherent nature of the circumstances under which the information is given, to keep these rights secret in order that they may be made effective. That is a transition from simply thinking of a contract being constructed to an equitable framework for information sharing based on relationships.

The foundational principles that influenced Indian Law were established in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, where the plaintiffs disclosed their confidential designs for a set of manufacturing tools, which the defendants then took and used for themselves.<sup>32</sup> It reflected the essence of a well-known equitable principle that a person to whom information was given in confidence should not take undue advantage of performing the equity upon his conscience without respect to his having entered into any arrangement containing confidentiality obligations. The court held that where information is imparted under circumstances importing an obligation of confidence, a duty arises.

It was clarified in *Coco v. A.N. Clark (Engineers) Ltd.*, wherein the three-part test for breach of confidence was formulated by Justice Megarry.<sup>33</sup> It mandates that: *first*, the information must have the necessary quality of confidence; *secondly*, it should have been communicated in situations conveying an obligation of confidence; and *lastly*, there shall be an unauthorised use of such information prejudicial to the disclosing party. In *Coco*, the plaintiff released details of a moped engine in failed negotiations, and the defendant subsequently used similar designs himself. This test gave courts a formal approach for judging at what points confidentiality obligations arise and are broken. “Necessary quality of confidence” requires the information to be unique from material in the public domain and to possess potential value. A confidence obligation can arise from express terms or be implied from relationships such as employer-employee or doctor-patient. Although “detriment” originally applied, subsequent cases, such as *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, decided equity safeguards against unauthorised use to forestall unfair enrichment irrespective of pecuniary loss.<sup>34</sup> This development of English law acknowledged that confidentiality is in the interests of society at large, for instance, promoting innovation and commerce

<sup>31</sup> *Zee Telefilms Ltd. v. Sundial Commc'ns Pvt. Ltd.*, 2003 (5) Bom CR 404; B.N. Srikrishna, *Protection of Trade Secrets and Confidential Information: A Comparative Analysis*, 46 J. INDIAN L. INST. 1, 12–14 (2004).

<sup>32</sup> *Saltman Eng'g Co. v. Campbell Eng'g Co.*, (1948) 65 R.P.C. 203 (Eng.).

<sup>33</sup> *Coco v. A.N. Clark (Eng'rs) Ltd.*, [1969] R.P.C. 41, 47 (Ch.).

<sup>34</sup> *Att'y Gen. v. Guardian Newspapers Ltd. (No. 2)*, [1990] 1 A.C. 109 (H.L.); PAUL STANLEY, *THE LAW OF CONFIDENTIALITY: A RESTATEMENT* 145–48 (2008).

through enabling the safe communication of sensitive information. This equitable foundation provides for legal redress even in the absence of a formal contract, promoting teamwork in a professional setting. It is such equity-grounded jurisprudence which has significantly influenced the Indian law of confidentiality.

### 3.1 Indian Jurisprudential Position

These English common law rules were adopted by Indian courts, evolving an independent doctrine of confidentiality, emphasising it as an equitable obligation irrespective of contract, statute, or other enforceable interests.<sup>35</sup> The adoption signals both the received tradition in the law and the conditions of current commerce.

A landmark Indian judgment respecting confidentiality was the Delhi High Court's judgment in *John Richard Brady v. Chemical Process Equipments P. Ltd.*,<sup>36</sup> where the petitioner disclosed technical know-how for a fodder machine without a formal contract. Justice B.N. Kirpal affirmed that the law "depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it". The court established that a duty of confidence arises from the relationship and the information's character, binding the recipient's conscience when a reasonable expectation of confidentiality exists. This duty extends to any third party receiving the information with knowledge of its confidential nature. The judgment also affirmed the availability of equitable remedies like injunctions and an account of profits to prevent the "springboard" use of confidential information, where a recipient gains an unfair head start.<sup>37</sup>

The Karnataka High Court in *Inphase Power Technologies (India) Pvt. Ltd. v. Adishakti Loha and Ispat Pvt. Ltd.*<sup>38</sup> expanded this doctrine further, where it applied to preliminary commercial negotiation. The petitioner had made disclosure of technical designs in preliminary negotiations that failed to result in an ultimate agreement. It was held by Justice A.S. Bopanna that it is not compulsory that there should be a formal non-disclosure agreement (NDA) in order to enforce confidentiality where the circumstances suggest it. The judgment appreciated that such undertakings are permissible where it is an exploratory talk, because otherwise it will hamper the business and innovation. Verbal proprietary information made in confidence is protected where its confidential nature is clear. The court also mentioned that such undertakings could survive after termination of the business relationship, particularly where the information remains sensitive with respect to competition.

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<sup>35</sup> Akshay Maheshwari & Anjali Bhatt, *Protection of Confidential Information: The Reality*, ACADEMIKE (Dec. 7, 2014), <https://www.lawctopus.com/academike/protection-confidential-information-reality/>.

<sup>36</sup> *John Richard Brady v. Chem. Process Equipments (P) Ltd.*, AIR 1987 Del. 372.

<sup>37</sup> Rahil Raval, *Back to Basics: Springboard Doctrine as a Trade Secret Protection Policy*, THE IP PRESS (Oct. 18, 2020), <https://www.theippress.com/2020/10/18/back-to-basics-springboard-doctrine-as-a-trade-secret-protection-policy/>.

<sup>38</sup> *Inphase Power Techs. (India) Pvt. Ltd. v. Adishakti Loha & Ispat Pvt. Ltd.*, AIR 2017 Kar. 20.

The Bombay High Court's decision in *Urmi Juvekar Chiang v. Global Broadcast News Ltd.*,<sup>39</sup> extended confidentiality protection to creative and artistic materials. In this case, a filmmaker shared her documentary concept and script with a broadcaster, who then produced a strikingly similar program without a formal agreement. The court recognised that creative works have inherent value requiring protection. This decision highlighted how confidentiality can serve as a bridge, offering interim protection for creative ideas before they are developed enough for formal intellectual property rights like patents or copyrights. The court acknowledged that harm in creative contexts extends beyond financial loss to include reputational damage and loss of creative integrity, favouring equitable remedies like injunctions.<sup>40</sup>

Collectively, these Indian decisions provide an adaptive, proportionate body of law, sensitive to the interests of technology, business, and creative expression. Recognising that confidentiality undertakings could take place under circumstances without written contracts, Indian courts fashioned an information assets protection regime under dynamic conditions.<sup>41</sup>

## 4 COMPARATIVE ANALYSIS

### 4.1 United Kingdom

The United Kingdom's insolvency law framework is marked by the concurrent existence of two main legislative instruments: *first*, the Insolvency Act 1986 ("IA 1986"); and *second*, the Cross-Border Insolvency Regulations 2006 ("CBIR").<sup>42</sup> Where the IA 1986 forms the core of the UK's domestic insolvency system, the CBIR facilitates worldwide coordination and collaboration in cross-border insolvency procedures.<sup>43</sup> They complement each other in approval of the UK's desire for an efficient domestic insolvency system, as well as international harmonisation of insolvency procedures, especially in a post-Brexit legal environment where worldwide coordination is of greater importance.<sup>44</sup> The IA 1986 is the main act for

<sup>39</sup> *Urmi Juvekar Chiang v. Global Broadcast News Ltd.*, (2007) 6 AIR Bom. R. 240.

<sup>40</sup> Mitali Tikyani & Ajinkya Rajput, *Cross Border Insolvency in India*, 4 INDIAN J. LEGAL REV. 552 (2024), <https://ijlr.iledu.in/wp-content/uploads/2024/07/V4I260.pdf>.

<sup>41</sup> Argus Partners, *Protection of Confidential Information Without a Contract* (Sept. 28, 2020), <https://www.argus-p.com/papers-publications/thought-paper/protection-of-confidential-information-without-a-contract/>.

<sup>42</sup> Insolvency Act 1986, c. 45 (UK); Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK).

<sup>43</sup> Paul J. Omar, *Chapter 17: The Domestic Framework for Cross-Border Insolvency Cases*, in ENGLISH CORPORATE INSOLVENCY LAW 319, 319–37 (2022), <https://doi.org/10.4337/9781802204094.00028>.

<sup>44</sup> Chris Umfreville et al., *Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario*, INT'L INSOLVENCY REV. (2018), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.1325>; Norton Rose Fulbright, *Impact of Brexit on Insolvency* (2021), <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>.

regulating UK insolvency procedures. It regulates procedures for corporate insolvency, e.g., administration, liquidation, receivership, company voluntary arrangements (CVAs), and individual insolvency procedures such as bankruptcy and individual voluntary arrangements (IVAs).<sup>45</sup> Enacted in reaction to the deficiencies of earlier insolvency legislation, the IA 1986 attempts to strike a balance between debtors', creditors', and the general economy's interests.<sup>46</sup> The CBIR, enacted in the UK in 2006, however, simply transposes the Model Law. But one of the most significant differences between the two instruments lies in their purpose and scope. The IA 1986 is strictly domestic in application, dealing with insolvency proceedings occurring only in England, Wales, Scotland, and Northern Ireland, unless judicial cooperation expressly extends it. The CBIR, however, is applicable only in the international sphere. Its main purpose is to enable the recognition of foreign insolvency proceedings in the UK, relief for foreign office-holders, and cooperation between UK and foreign courts.

The Model Law, which the CBIR transposes into UK legislation, addresses principles of comity, mutual cooperation, and fair and efficient administration of cross-border insolvencies. Structurally, the IA 1986 is far more comprehensive and detailed, addressing a wide range of provisions dealing with both procedural and substantive aspects of insolvency. For example, Section 236 of the IA 1986 authorises the court to direct the attendance of persons likely to have information or documents relevant to an insolvency proceeding, and hence plays an important part in asset tracing and investigation.<sup>47</sup> The power extends to the production of books, records, and other papers, and allows for the examination of parties connected with the debtor company or person. The provision has proven especially useful in tracing fraud or misfeasance by directors or third parties. Nevertheless, it has been criticised when used to assist foreign officeholders, as English courts have been reluctant to permit its use for foreign benefit in the absence of an explicit statutory provision.<sup>48</sup> In an attempt to solve this issue, Section 246ZD was introduced into the IA 1986, expressly permitting courts to grant relief under Section 236 in certain circumstances to foreign representatives.<sup>49</sup> Section 246ZD, however, has restricted application and falls short of full adoption of the

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<sup>45</sup> Paul J. Omar, *Chapter 17: The Domestic Framework for Cross-Border Insolvency Cases*, in ENGLISH CORPORATE INSOLVENCY LAW 319, 319–37 (2022), <https://doi.org/10.4337/9781802204094.00028>.

<sup>46</sup> Insolvency Act 1986, c. 45 (UK); Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK); Mark Craggs, *The Model Law in Great Britain: Cross-Border Insolvency Regulations 2006*, NORTON ROSE FULBRIGHT (June 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/1d8e1fb5/the-model-law-in-great-britain-cross-border-insolvency-regulations-2006>.

<sup>47</sup> Insolvency Act 1986, c. 45, § 236 (UK).

<sup>48</sup> *Re MF Global UK Ltd.*, [2015] EWHC 2319 (Ch); *Re Omni Trustees Ltd.*, [2015] EWHC 2697 (Ch); *Re Tucker*, [1990] Ch 148; *Singularis Holdings Ltd. v. PricewaterhouseCoopers*, [2014] UKPC 36.

<sup>49</sup> Insolvency Act 1986, c. 45, § 246ZD (UK); *Cage Consultants Ltd. v. Iqbal (Re Totalbrand Ltd.)*, [2020] EWHC 2917 (Ch); Charles Russell Speechlys, *Assigning Your Rights Away – Changes to the Insolvency Act 1986*, LEXOLOGY (Apr. 8, 2015), <https://www.lexology.com/library/detail.aspx?g=4cf25320-822d-4d19-93c1-61c6bcfb4200>.

principles of the Model Law. Thus, the CBIR is the more appropriate scheme for wide-spread cross-border relief. The CBIR, unlike the IA 1986, contains no investigatory powers such as those in Section 236. Instead, it relies on discretionary judicial powers under Article 21, which allows the UK court to grant appropriate relief.

But the dialogue between domestic powers under the IA 1986 and international relief under the CBIR has raised sophisticated legal questions, notably on disclosure and privilege. In *Shlosberg v. Avonwick Holdings Ltd*, the Court of Appeal held that privilege in connection with documents of an individual in bankruptcy could not be excluded by reason of the mere appointment of a trustee in bankruptcy.<sup>50</sup>

The case emphasised the importance of preserving legal professional privilege even in insolvency situations and was a warning against office-holder overreach. Beyond that, in *Asertis Ltd v. Melhuish*, which was about the extraterritorial application of Section 236, the court clarified that domestic powers under Section 236 were not intended to support foreign insolvency proceedings, particularly when used as a substitute for recognition under the CBIR.<sup>51</sup>

The judgment emphasised the need to respect the boundaries of domestic and cross-border insolvency tools. Foreign office-holders seeking relief should take the route under the CBIR, which has an appropriate framework for recognition and judicial assistance. In the same vein, in *Phones 4u Ltd (in administration)*, the court refused to allow the application of Section 236 powers to require disclosure of documents from third parties for the benefit of a foreign proceeding.<sup>52</sup> The court reaffirmed that English courts should not be “clearing houses” for global litigation, save as specifically empowered under international insolvency cooperation schemes like the CBIR. This case again demonstrates the preference of courts to turn to CBIR in cross-border cases, instead of extending the IA 1986 beyond its intended limits.

## 4.2 United States

Cross-border insolvency is a feature of the globalised legal world. As companies grow abroad and corporate groups cross multiple borders, their insolvency tends to trigger legal proceedings in several jurisdictions. To address the complexity, the United States enacted Chapter 15 of its Bankruptcy Code in 2005, aligning itself with the Model Law.<sup>53</sup> Chapter 15 sought to facilitate cooperation between U.S. courts and foreign insolvency proceedings,

<sup>50</sup> *Shlosberg v. Avonwick Holdings Ltd.*, [2016] EWCA Civ 1138, [2017] Ch 210.

<sup>51</sup> *Asertis Ltd. v. Melhuish*, [2024] EWHC 2819 (Ch).

<sup>52</sup> *Phones 4U Ltd. (In Administration) v. EE Ltd.*, [2023] EWHC 2826 (Ch).

<sup>53</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23; Paul Keenan, Mark Bloom & James Leshaw, *Chapter 15: The U.S. Cross-Border Insolvency Law*, GREENBERG TRAURIG LLP, <http://leshawlaw.com/wp-content/uploads/2013/06/Cross-Border-Article.pdf>.

protect the interests of creditors and debtors, and ensure the fair and efficient resolution of international insolvencies. Cross-border insolvency proceedings, however, involve more than a touch of legal coordination; they present a fundamental trade-off between transparency and confidentiality.<sup>54</sup> On the one hand, U.S. law is skewed in favour of open court records, founded on the public's right to view court proceedings and monitor judicial decision-making.<sup>55</sup> On the other hand, foreign representatives, having been accustomed to different standards of confidentiality, tend to seek to seal court records or seek protective orders to protect sensitive commercial information, client information, or litigation strategy. So, when a foreign representative seeks recognition, they tend to seek further relief, such as staying suits or protecting assets in the United States. In many instances, such relief is sought in haste, and with it comes a request that particular filings or communications should be confidential. Why are foreign representatives so fixated on confidentiality? The reason lies in the nature of international business and the procedural risk of disclosure. For instance, disclosure of confidential business data, current negotiations, or transactions with creditors can damage a debtor's business operations, discredit current restructuring, or subject the foreign proceeding to undue public or competitor scrutiny.<sup>56</sup> In addition, what is protected under the foreign forum, e.g., privileged communications between insolvency professionals will not automatically be protected under U.S. law. To understand how U.S. courts decide whether or not to grant protection of confidentiality, one must look at the relevant statutory and procedural context. While U.S. courts otherwise operate under a presumption of openness, the Bankruptcy Code does introduce some exceptions. The most significant statutory provision is 11 U.S.C. § 107(b), under which protection can be afforded to information that

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<sup>54</sup> Vishvajeet Rastogi & Sumedha Singh, *Confidentiality in Insolvency Disputes: How ADR Protects Sensitive Information*, IBC LAWS (May 22, 2025), <https://ibclaw.in/confidentiality-in-insolvency-disputes-how-adr-protects-sensitive-information-by-vishvajeet-rastogi-sumedha-singh/>; Sidhi M. Jain, *Cross-Border Insolvency in India: Challenges and Opportunities for Reform*, INT'L J. FOR MULTIDISCIPLINARY RSCH., <https://www.ijfmr.com/papers/2025/2/38582.pdf>; UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Comm'n on Int'l Trade L., U.N. Sales No. E.14.V.2 (2014).

<sup>55</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Access to Court Proceedings*, U.S. COURTS, <https://www.uscourts.gov/court-records/access-court-proceedings>; *Open Court*, WEX | US LAW | LII / LEGAL INFO. INST., [https://www.law.cornell.edu/wex/open\\_court](https://www.law.cornell.edu/wex/open_court); *How to Access Public Access Court Records*, LEGALCLARITY, <https://legalclarity.org/how-to-access-public-access-court-records/>; *A. The Roots of Access Rights*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-court-sections/a-the-roots-of-access-rights/>.

<sup>56</sup> SEC, *CF Disclosure Guidance: Topic No. 8 – Intellectual Property and Technology Risks Associated with International Business Operations* (Dec. 19, 2019), <https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/risks-technology-intellectual-property>; IFRS Foundation, *AP2: Discussion on Disclosure of Sensitive Information* (June 2019), <https://www.ifrs.org/content/dam/ifrs/meetings/2019/june/gpf-and-cmac/ap2-disclosure-of-sensitive-information.pdf>; Crowell & Moring LLP, *When Talking Things Through Is the Problem, Not the Solution: The European Commission's Updated Guidance on Information Exchange*, <https://www.crowell.com/en/insights/client-alerts/when-talking-things-through-is-the-problem-not-the-solution-the-european-commissions-updated-guidance-on-information-exchange>.

is “trade secrets” or “confidential commercial information.”<sup>57</sup> Importantly, the wording of the statute is mandatory; if a court determines that a filing contains protected information under this provision, it must shield it from public access. This is in contrast to general civil litigation, where sealing orders are typically an exercise in balancing public and private interests. Rule 9018 of the Federal Rules of Bankruptcy Procedure is the vehicle to invoke such protection. Under this rule, parties, typically foreign representatives, may ask the court to enter protective orders, conduct in-camera reviews, or authorise sealed filings. These procedural protections are significant, especially in Chapter 15, where foreign confidentiality expectations are typically higher than those in the U.S.<sup>58</sup>

Although U.S. courts are governed by their own code and practices, cross-border insolvency necessarily entails a comparative approach. Foreign jurisdiction rulings, and in particular those of the United Kingdom, tend to determine what confidentiality is. In *Shlosberg v. Avonwick Holdings Ltd*, the English Court of Appeal held whether or not a trustee in bankruptcy could use confidential documents obtained by virtue of statutory powers (i.e., section 236 of the Insolvency Act 1986) for a purpose other than administration of the estate.<sup>59</sup> The Court held that documents produced under statutory examination powers should not be used to facilitate third-party litigation. The rationale was that the process of examination was intended to benefit the bankruptcy estate, not be a fishing expedition for uncorrelated commercial gain. Similarly, in *Aseris Ltd v. Melhuish*, the court was focused on confidentiality protections where documentation was requested by a liquidator from a former director for litigation funding and recovery of the estate.<sup>60</sup> The court imposed limitations on how such documentation was to be disclosed, observing that the director still had a residual interest in confidentiality, even after cessation of their cooperation with insolvency authorities.

#### 4.2.1 U.S. Practice: Protective Orders and Judicial Discretion

In the United States, courts exercise prudence when granting Chapter 15 requests for confidentiality, being mindful of the need to apply foreign law and protect legitimate commercial interests. Conversely, they are sensitive to constitutional and democratic ideals behind public access to court hearings.<sup>61</sup> Take, for example, the granting of protective orders in U.S. Chapter 15 proceedings. Whenever foreign representatives seek sealing of filings, they must articulate how the information falls within the definitions of the Bankruptcy Code,

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<sup>57</sup> 11 U.S.C. § 107(b) (2023); *Bankruptcy, Overview – Motion to Seal – 11 U.S.C. § 107(b)*, BLOOMBERG LAW, <https://www.bloomberglaw.com/external/document/X1SNKIE4000000/bankruptcy-overview-motion-to-seal-11-u-s-c-107-b-bankruptcy>.

<sup>58</sup> Fed. R. Bankr. P. 9018.

<sup>59</sup> *Avonwick Holdings Ltd. v. Shlosberg*, [2016] EWCA (Civ) 1138, [2017] B.P.I.R. 1, [2017] 2 W.L.R. 1075 (Eng.).

<sup>60</sup> *Aseris Ltd. v. Melhuish*, [2024] EWHC 2819 (Ch).

<sup>61</sup> *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 678–79 (S.D.N.Y. 2011).

trade secrets, sensitive commercial information, or potential competitive damage. The court may conduct an in-camera review in order to decide whether the material deserves protection. Once a determination is made under Section 107(b), the court must issue the order. But protective orders are not absolute.<sup>62</sup> U.S. courts demand specificity. General assertions of commercial sensitivity will not do. Parties must particularise a tangible risk of harm, typically with the assistance of declarations or expert assertions. Further, courts have limited protective orders to the narrowest conceivable scope necessary, redacting only the sensitive portion of a filing and not sealing the entire document. A recent example is the Chapter 15 proceeding of Brazilian telecommunication company Oi S.A. There, the court sealed some financial projections and business strategies filed by a foreign representative. The court concluded that this information, if disclosed, would inflict damage to the restructuring effort and competitive position of the company. The court limited the sealing order to only the exhibits that would inflict undue harm. Protective orders, therefore, must have a demonstrable purpose, such as abating harm, protecting privilege, or complying with foreign rules of confidentiality, and not just to avoid embarrassment or scrutiny.<sup>63</sup>

## 5 SUGGESTIONS

### 5.1 Standards for Issuing Confidentiality Orders

Creating a clear, unambiguous statutory foundation is the initial anchor in any effective confidentiality regime. According to the suggested amendments, Section 235's policy rules would clearly grant the NCLT and its Appellate Tribunal ("NCLAT") express powers to pass "orders of confidentiality" at any stage of the CIRP or liquidation. In contrast with the current reliance on tribunals' inherent powers, the new regulation would state: "To protect trade secrets, proprietary research and development information, internal financial estimates, commercial plans, privileged communications, and personal information of key stakeholders, the Tribunal may, *suo motu* or on application by any party, pass confidentiality orders limiting access, copying, retention, and public disclosure of specified documents or classes of information."

To preclude doubt, the rule would provide an illustrative, non-exhaustive definition of "confidential information," such as but not limited to: board resolutions, directors' meeting minutes, and strategic planning meetings; pending merger, acquisition, finance, or debt-

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<sup>62</sup> *In re Orion Pictures Corp.*, 21 F.3d 24, 27–28 (2d Cir. 1994).

<sup>63</sup> *In re Oi S.A.*, No. 1:23-bk-10193 (Bankr. S.D.N.Y. filed Feb. 8, 2023); see *Oi Seeks End to Ch15 in New York, Plans Parallel Ch11 Filing*, GLOBAL RESTRUCTURING REVIEW (July 22, 2025), <https://globalrestructuringreview.com/article/oi-seeks-end-ch15-in-new-york-plans-parallel-ch11-filing>; *Cross-Border Clash for the Brazilian Dutch Telco in the U.S. Courts*, JDSUPRA (2025), <https://www.jdsupra.com/legalnews/cross-border-clash-for-the-brazilian-59567/>.

restructuring proposals with indicative pricing; source code, algorithms, system architecture, and engineering schematics; long-term customer and supplier contracts specifying pricing mechanisms, volume rebates, and exclusivity provisions; detailed budgets, cash-flow models, and sensitivity analysis under different macroeconomic scenarios; audit workpapers and forensic reports tracing anomalies or related-party transactions; risk-assessment matrices outlining legal, regulatory, or operational vulnerabilities; and communications between the corporate debtor and external advisors, in-house counsel, or statutory auditors subject to privilege. By providing this statutory clarity, the IBBI would transmit a powerful message that confidentiality orders are neither outliers nor exceptions, but integral tools available from day one of the CIRP through closure or liquidation.

## 5.2 Disclosure Standards: Good Cause vs. Compelling Reasons

A blanket policy of confidentiality overlooks transparency as well as reasonable protection. In accordance with Federal Rule of Civil Procedure 26(c)(1)(G),<sup>64</sup> the rules set forth here adopt a measured, two-tiered standard: a “good cause” bar for non-dispositive or discovery-stage materials, and a more stringent “compelling reasons” test for documents central to adjudication. By invoking the “good cause” test, resolution professionals or debtor management teams could seek confidentiality over initial due diligence reports, internal compliance audits, draft cash-flow projections, and risk-assessment logs by showing that premature public disclosure would result in significant competitive harm, erode negotiating leverage, or drain the recoveries of the estate. For instance, a cash-flow model estimating break-even dates, if made public, would lead suppliers to insist on advance payment, throttling liquidity. A simple affidavit, summarising the particular nature of the harm and the nature of data at risk, would suffice to satisfy this standard.

For dispositive filings, resolution plans with debt-equity swap ratios, incentive management plans, and asset-sale plans; confirmation orders with binding conditions; final audited financial statements; and expert valuation reports, a stricter “compelling reasons” test would be used. Applicants would have to demonstrate that, *firstly*, public disclosure would result in serious, irreparable commercial damage or violate statutory protection of privacy (e.g., employee compensation data or whistleblower identities); *secondly*, a less restrictive alternative, partial redaction, executive summaries, or in-camera chambers review, was unavailable to protect the interest; and *lastly*, confidentiality is required to preserve market confidence, creditor participation, and overall viability of the resolution process. The tribunal, in return, would be required to provide written findings linking each factual assertion to the legal

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<sup>64</sup> Fed. R. Civ. P. 26(c)(1)(G).

standard, thereby ensuring consistent jurisprudence and leaving a clear map for appellate review.

### 5.3 Mandatory Confidentiality Clauses & Automatic Sealing

Administrative lapses and high-pressure docket arrears have a tendency to allow sealed exhibits, sometimes entire annexures, to fall into publicly accessible case portals, rendering confidentiality meaningless. To prevent such lapses, the regulations require that each filing pertaining to insolvency, be it a CIRP petition, information memorandum filing, application for interim relief, and resolution plan, shall be accompanied by a visibly placed Confidentiality Clause right after the cover page. This clause shall list, in detail, each document or exhibit to be kept confidential, e.g., “Exhibit C: Customer Price-List Database,” “Appendix II: Forensic Audit Report,” or “Tab A: Directors’ Meeting Minutes (Jan-Mar 2025).” When a filing with a valid Confidentiality Clause is received, registry staff shall initiate an automatic sealing action: the exhibits so listed shall be sealed in the master case file, kept securely in an access-control section; a simultaneous redacted version, where confidential portions are replaced with uniform placeholders (e.g., “[Confidential – Financial Forecast]”), shall be placed in the public domain; and two synchronized dockets, “Volume I: Public Filings” and “Volume II: Confidential Filings”, shall be kept, each with clear indexing, color-coded tabs, and metadata tags. The regulations shall stipulate specific redaction conventions, minimum thickness of black bars, legible placeholder text, uniform font size, exhibit numbering, and tagging, to enable registry staff to implement these processes with ease, even during peak case-load times, without fear of human error.

### 5.4 Sealing Orders for Dispositive Filings

The greatest interest is in sealing dispositive documents, i.e., the factual and legal basis of tribunal orders. Parties who wish to seal any portion of resolution plans, confirmation orders, expert valuation reports, or audited financial statements under the new rules will have to support their application with an Affidavit of Harm and Alternatives. The affidavit will: *firstly*, clearly define paragraphs, tables, schedules, or exhibits to be sealed; *secondly*, categorise the interest of confidentiality, trade secret, personal privacy, enforcement-sensitive information; *thirdly*, state in detail the competitive, financial, or regulatory damage disclosure would inflict; *fourthly*, explain why redaction, summary disclosure, or in-camera review is inadequate to protect the interest; and *lastly*, describe why confidentiality is essential to creditor confidence, market perception, and overall success of the CIRP. The court will then perform a meticulous balancing test considering, *firstly*, public interest in open adjudication; *secondly*, risk and seriousness of harm to the protected interest; *thirdly*, sufficiency of

alternatives; and *lastly*, impact of sealing on effectiveness, cost, and speed of the insolvency process. Only if “compelling reasons” demonstrably and clearly outweigh reasons against sealing will the court make an order, and only as narrowly as is appropriate. Orders should include sequential, factor-specific findings to facilitate future applications and ensure accountability.

### 5.5 Subpoena Quashment & Modification

Third-party subpoenas by investigative reporters in search of leaks, competitive bidders in search of strategic vulnerabilities, or regulatory authorities in search of compliance checks threaten secrecy directly unless expressly cut short. To counter this issue, the rules under Section 235 should take the procedure from Federal Rule 45(c)(3)(B)(i) and permit tribunals to quash or modify any subpoena or document-production order. A movant, the corporate debtor, a creditor, or the resolution professional, will make a motion supported by a non-privileged summary of the materials sought and a description of how disclosure would defeat strategic bargaining, competitive edge, or statutory goals. The requesting party will be required to respond with a showing of particularised need, demonstrating that the information cannot be obtained elsewhere, and a statement of a compelling public or legal interest, e.g., criminal investigation or systemic-risk determination, superior to confidentiality. Tribunals should decide such motions on an expedited schedule, within seven business days, with interim confidentiality maintained to avoid piecemeal disclosure until the final order.

## 6 CONCLUSION

In conclusion, a confidentiality regime under Section 235 of the IBC must be underpinned by robust enforcement mechanisms to ensure its efficacy. The proposed framework rightly empowers tribunals to impose meaningful contempt sanctions, including daily fines, custodial penalties, or both, against willful violators of confidentiality or sealing orders. Monetary penalties of up to INR 500,000 per breach, directed to the Insolvency Resolution Process Fund, serve as a proportionate deterrent calibrated to the gravity and frequency of violations. Moreover, for serious or repeated breaches, referral to professional bodies such as the Bar Council of India or the IBBI’s Disciplinary Committee can facilitate further disciplinary action, including censure, suspension, or disbarment.

However, enforcement alone is not sufficient. To keep pace with evolving commercial realities, jurisprudential developments, and emerging technological threats, Section 235 should mandate the formation of a Confidentiality Advisory Committee every two years. This multidisciplinary body, comprising insolvency adjudicators, leading professionals, cybersecurity experts, data privacy scholars, and creditor representatives, would play a critical

role in auditing implementation, inviting stakeholder feedback, and recommending reforms. By benchmarking against global best practices and following a transparent public comment process, the committee would ensure that the confidentiality framework remains both dynamic and resilient. Updates to the regulations should be finalised within six months of each review cycle, thereby institutionalising a culture of continuous oversight, accountability, and reform.

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