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CRITICAL ANALYSIS OF CROSS-BORDER INSOLVENCY PROVISIONS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

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ABSTRACT

This paper focuses on the current supervisory and regulatory provisions for cross-border insolvency provided under the Insolvency and Bankruptcy Code (IBC), 2016. Under the Insolvency and Bankruptcy Code, 2016 there is no provision which is elaborate enough and self-contained to address the various complexities associated with a cross-border insolvency proceeding. Indian insolvency laws fail to provide a robust mechanism to establish cooperation and coordination between courts and insolvency professionals in foreign jurisdictions as well as domestically which would facilitate effective and faster adjudication of concurrent proceedings. The present regulations with respect to domestic and cross-border insolvency of corporations provided under IBC lacks extra-territorial application as a result of which private players compete to safeguard their interests via a multitude of proceedings. Thus, the lack of a comprehensive framework on cross-border insolvency matters can prove to be a deterrent factor in the growth of India's financial industry. It is self-explanatory that as the global economy continues to grow, business failures with global implications will occur more often. In this sense, the real challenge before the authorities is to strike a balance between the two goals of creating a regime that ensures interaction between private players in the market as well as to ensure that this regime does not foil with the public policies of the sovereigns. Such failures might increasingly result in insolvency proceedings in multiple jurisdictions involving the same debtor. Consequently, both practical and legal conflicts will follow from such multiplicity of proceedings and these issues prevalent in international insolvency litigation is the focus of this study. This article aims to explore some of the major issues that surround the laws governing cross-border insolvency and the need to develop a comprehensive insolvency resolution system.

INTRODUCTION

Insolvency relates to the incapacity of any person to discharge all the debts as and when they become due. In simpler terms, it is the situation in which the total debts (liabilities) of an entity exceed the total assets held by them. In common parlance, the term 'cross-border insolvency' has often been used interchangeably with 'global insolvency', 'international insolvency' and 'transnational insolvency'. These terms haven't been defined under the UNCITRAL Model

Law[1] (hereinafter referred to as Model Law), as well as under the domestic legislation[2], but to refer to insolvency of corporations having assets and creditors across various jurisdictions, the term cross-border insolvency is most often used.

Prior to the introduction of the IBC, insolvency proceedings in India were governed by multiple laws, some of which include the Sick Industrial Companies (Special Provisions) Act (SICA), 1985, the Recovery of debts due to Banks and Financial Institutions Act (RDDB Act), 1993, Companies Act, 1956 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002. However, claims under these legislations dragged on in courts for a long time as a result of which resolution of disputes under these legislations failed to be carried on within a reasonable time period.

Thus, without a proper regulatory framework that is applied in a predictable manner, creditors were unable to collect on their claims which in turn affected the future availability of credit.[3] To this end, the Insolvency and Bankruptcy Code (IBC), 2016 was enacted to provide for quick disposal of assets and speedy resolution of matters relating to rehabilitation, revival and winding up of companies. The IBC had the twin objective of developing the corporate bond markets as well as improving the credit environment to attract more foreign investments. The Code was only enacted in the year 2016 and is still in the nascent stage. There exist various ambiguities within the framing of the law itself. No law is perfect from the inception stage and there may be some grey areas which could be ironed out with appropriate judicial intervention.

Since multinational entities operate in multiple jurisdictions, when one member of a corporate group becomes insolvent, the laws governing the cross-border interactions between corporate debtors and creditors are disturbed and the question that arises is whether the court in one jurisdiction will recognise and enforce the insolvency proceedings in another jurisdiction. The present regulations with respect to domestic and cross-border insolvency of corporations provided under IBC lacks extra-territorial application as a result of which private players competed to safeguard their interests via a multitude of proceedings. Accordingly, non-recognition of Indian laws in foreign jurisdictions and vice-versa created various challenges.

[1] UNCITRAL Model Law on Cross-Border Insolvency, 1997.
[2] Insolvency & Bankruptcy Code, 2016.
[3] UNCITRAL Working Group on Insolvency Law Twenty-second session Vienna, 6-17 December 1999, pg. 17,

Thus, a global framework for bankruptcy law becomes as necessary as domestic bankruptcy law.

Even though IBC, 2016 lays down laws relating to reorganisation and insolvency resolution of corporate persons, it is silent on the foreign creditors right to approach the National Company Law Tribunal (NCLT) to initiate corporate insolvency proceedings. The brunt of such a lack of regulation are several. At present, upon institution of an insolvency petition in the NCLT a moratorium would be imposed, which by default restricts the institution or commencement of proceedings against the rights, assets, obligations or liabilities of the corporate debtor, suspension of the right to transfer or dispose of any assets and a stay is imposed against the debtor's assets.[4] However, Indian creditors don't have access to the overseas assets of the company as this prohibition governs only those assets situated within India. This paper looks into identifying the gaps in IBC and to find a solution to the above mentioned issues.

HISTORICAL BACKGROUND

The first few legislations that governed insolvency issues of individuals were the Provincial Insolvency Act, 1920 and Presidency Insolvency Act, 1909. In 2016, the parliament of India enacted the highly anticipated IBC (IBC), 2016 with a view of bringing uniformity in India's scattered bankruptcy laws. The IBC, 2016 was enacted on the recommendation of T K Viswanathan Committee with the objective of amending the existing laws relating to insolvency and bankruptcy and bringing them under one umbrella legislation as India's insolvency laws were scattered under many legislations.

Before passing of the IBC, the SICA dealt with sickness and insolvency in industries, however, the procedure under the SICA was found to be not in line with the international standards which led to the passing of the new legislation. One of the few reasons that lead to introduction of IBC was that the applicability of SICA, 1985 was restricted only to an industrial company which has been registered for atleast five years and which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. Thus, the applicability of SICA was determined on the basis of sickness in industries, whereas IBC, 2016 on the other hand

[4] UNCITRAL Model Law on Cross-Border Insolvency, Article 20, (1997).

was applicable to all corporations whose minimum default amount is fixed at 1 lakh. The SICA, 1985 also imposed an obligation on the board of directors to report sickness in industries and barred creditors from filing an application for insolvency, whereas, the Code gave preferential rights to all types of creditors and permitted a corporate debtor to file an application in the tribunal on the event of any default, thereby providing for a more creditor-driven insolvency resolution process. Once an application has been filed under SICA, 1985, then the BIFR appoints a special director and directs the operating agency to look into the working of the company and make a report in this respect, whereas under the Code a moratorium is declared preventing any judicial proceedings for recovery, enforcement of security interest and sale or transfer of assets and an interim resolution professional is appointed for timely resolution of the proceedings.

Companies Act also administered certain issues relating to insolvency which were subsequently omitted, that includes section 253 to 269 (pertaining to revival and rehabilitation of sick companies), section 270 (modes of winding up to be amended), section 271 (Part-I) which dealt with winding up of companies in case of inability to pay debts, section 289 (power of tribunal on the application for stay of winding up for rehabilitation purposes) and provisions for winding up by creditors were omitted from the purview of the Companies Act and brought under the IBC, 2016.

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002 also sought to establish a mechanism which allows for quick resolution of disputes without reference to courts but this remedy was only available to scheduled banks and other notified NBFC's against an account which had already become a NPA. The Reserve Bank of India also established various voluntary resolution mechanisms like the CDR, JLF, SDR, ets., to effectively formulate debt restructuring plans. These laws failed to meet the objectives for which they were set up due to inefficient enforcement and court delays as a result of which the legislature passed the IBC, 2016 as a comprehensive framework of rules and laws pertaining to the subject of bankruptcy and insolvency in India. The Code repealed the Presidency Town Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and sought to amend various laws including the Companies Act and the RDDB Act amongst others.

Thus, the main reason why the legislature felt compelled to enact a more comprehensive law dealing with insolvency was because the process of winding up under the existing statutes were very tedious and dragged on in courts for a long time. To this end, the IBC (IBC), 2016 was enacted to provide for quick disposal of assets and speedy resolution of matters relating to rehabilitation, revival and winding up of companies. However, the reality is that the domestic insolvency laws couldn't keep up with the economic developments and other changes in the business environment of India. More often, these laws proved to be ill equipped and inadequate while dealing with cases of a cross-border nature. It was realised that cross-border cooperation and coordination of insolvency proceedings against a corporate debtor was essential to protect the interests of creditors, both domestic and foreign.

CURRENT LEGAL FRAMEWORK

Presently, section 234[5] and 235[6] of the IBC regulate cross-border insolvency of corporations. Section 234 of the Code empowers the central government to conclude any agreements with a foreign country to initiate insolvency proceedings. Insolvency proceedings could be initiated against those countries with whom India has entered into a reciprocal arrangement. Section 235 further provides that a letter of request could be made to the authority of a foreign nation with which reciprocal arrangements have been made as per section 234. This request is to be made to the competent authority that is an adjudicating body in that country to provide evidence pertaining to the assets of the corporate debtor in that particular jurisdiction. Only states with reciprocal arrangements can make such an application for insolvency. But entering into reciprocal arrangements with different states in itself is a very difficult process as this approach would cost a great deal of time failing the very purpose for which the Code was established i.e. timely recovery of debt. Furthermore, if the assets are situated in different jurisdictions resolution of insolvency proceedings through reciprocal agreements would make the procedure more complicated.

There is no doubt that the Code lays down a mechanism to deal with cross-border insolvency (section 234 and 235), but given the complexities in a cross-border insolvency litigation, a mere bilateral agreement cannot address and regulate such issues. Giving effect to a new piece of

[5] Insolvency and Bankruptcy Code 2016, Section 234.
[6] Insolvency and Bankruptcy Code 2016, Section 235.

legislation is only the start for an economy that is so large and complex as India's, the real challenge is ensuring that the law is implemented in its true spirit by periodically evaluating it on the basis of the experience gained from the working of the Code. For this purpose, Insolvency Law Committee was constituted by the MCA to carry out a detailed review of the IBC, 2016 and propose amendments to the Code to adopt the UNCITRAL Model Law on Cross-Border Insolvency, 1997 for better implementation of the Code. The researcher aims to constrain her research to the challenges before the Code with respect to cross-border insolvency and therefore, even though there are certain loopholes in the Act that needs to be addressed, the researcher only seeks to address those issues inherent in the cross-border insolvency of corporations.

RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS IN INDIA

Foreign insolvency proceedings are given recognition under Civil Procedure Code, 1908, along with other principles developed under English common law. Section 44A[7] of the Civil Procedure Code, 1908 recognises the principle of comity allowing Indian courts to enforce orders passed by foreign courts in reciprocating territories[8]. Certain limitations are imposed by way of section 13 which provides that a foreign decision cannot be enforced if:

[7] Execution of decrees passed by Courts in reciprocating territory: (1) Where a certified copy of a decree of any of the superior Courts of [***] any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.
(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.
(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.
[Explanation 1.--"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.
Explanation 2.--"Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment].
[8] Some of the countries which have been declared as reciprocating territories:
(a) On 3.1.56, Federation of Malaya (now Malaysia) and the High Court and the Courts of Appeal as the Superior Court
(b) On 18.1.56, Colony of Aden and Supreme Court of Aden as the superior Court

- The court issuing the decision doesn't have competent jurisdiction;
- The decision wasn't given on the merits of the case;
- On the face of the proceedings, it appears that the proceedings are founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- The decision of the court is opposed to public policy;
- The judgement was obtained by fraud;
- Where the decision of the court sustains a claim founded on a breach of any law in force in India.[9]

Though Indian courts allow for the recognition of foreign insolvency proceedings passed in reciprocating territories that is declared by Government of India as one, and published in the Official Gazette, this doesn't specifically relate to enforcement of decisions of courts concerning foreign cross-border insolvencies. If a decision from a non-reciprocating territory is to be recognised then a fresh suit[10] has to be brought by the creditor to enforce the decree in Indian courts. In both cases, the decree has to satisfy the conditions imposed under section 13[11] to be enforceable in India.

(c) On 15.10.1957, New Zealand and Cook Islands, Turst Territory of Western Samoa and the Supreme Court of New Zealand as the Superior Court
(d) On 21.1.1961, Sikkim and the High court of Sikkim or any other court whose jurisdiction is not limited to a pecuniary jurisdiction.
(e) On 15.7.1961, Burma all civil and revenue courts as Superior Courts.
(f) On 1.3.53, United Kingdom of Great Britain and Northern Ireland and the House of Lords, Court of Appeals, High Court of England, the Court of Sessions in Scotland, the High court in Northern Ireland, the Court of Chancery of the County Panlatine or Lancaster and the Court of Chancery of the county Palantine or Durham as the Superior Courts.
(g) On 22.3.54, Colony of Fiji and the Supreme Court of Fiji as the Superior Court
(h) On 23.11.68, Hong Kong and republic of Singapore
(i) On 1.9.66, Trinidad and Tobago
(j) On 26.9.70, Papua New Guinea and Supreme Court as the superior court
(k) On 6.3.76, Bangladesh and Supreme Court and Courts of District and subordinate judges as the Superior Court.
(l) Canada and the Supreme Court of Ontario, please see the decision in the case of *Gurdas Mann v. Mohinder Singh*, AIR 1993 P&H 92. Source is the AIR Manual 5th edition, volume 4.

[9] Code of Civil Procedure 1908, Section 13.

[10] Refer *Moloji Nar Singh Rao v. Shankar Saran*, AIR 1962 SC 1737 at p. 1748 para 14. Also see *I & G Investment Trust v. Raja of Khalikote*, AIR 1952 Cal. 508 at 523 para 38.

[11] S. 13 of [Act no. of1908] 'When foreign judgment not conclusive': A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except –

Similarly, for insolvency proceedings decided by Indian courts to be recognised in other foreign states, the law of that particular state will apply. Here is where the importance of Model Law comes up. Typically, states that have adopted the Model Law such as USA, UK, Singapore, etc., gives recognition to foreign insolvency proceedings without further requirements. However, when recognition is sought in a state that has not adopted the Model Law or has adopted the Model law after making certain modifications, there may be reciprocity requirements depending on the insolvency laws of such states. For example, Mexico, Romania, etc., are some of the states that require other states to have reciprocal arrangements for the purpose of recognition of insolvency proceedings.

NATURE OF CROSS-BORDER INSOLVENCY

Up until a few decades ago, the primary effect of a cross-insolvency only impacted the state in which the corporate debtor ran his business. The effect of insolvency proceedings majorly revolved around one state having limited effects in other states. However, the business environment has changed completely now and collapse of a multinational entity has its implications across borders. These problems prevalent in insolvency of a cross-border nature emphasised the need to harmonise the insolvency laws of different states. Generally, four approaches are followed by states to harmonise insolvency laws and that includes bilateral or multilateral treaties entered by states, facilitative provisions in the domestic laws, protocols or concordats that state the procedures to be followed by states while administering cross-border insolvencies and a framework legislation or Model Law. [12]

(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
(d) where the proceedings in which judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in India.

[12] Rajah of Vizianagaram v. Official Receiver, AIR. 1962 S.C. 500, at 100.

Privy Council in the case of *Cambridge Gas Corpn v. Official Committee of Unsecured Creditors of Navigator Holding Plc.*[13] considered the question of whether an order made by a court in New York, during the course of an insolvency proceeding, is a right in rem or a right in personam. Lord Hoffmann noted that:

> "*… their lordships consider that bankruptcy proceedings do not fall into either category. Judgements in rem and in personam are judicial determinants of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgement in rem or in personam is recognised by a foreign court, it is accepted as establishing the right to which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgement itself is treated as the source of the right.*"[14]

By giving this decision, courts clarified that an insolvency proceeding is neither a right in rem or a right in personam and that the nature of rights depends on the claims of the parties. The concept of cross-border insolvency is more of an overlap between insolvency laws on one hand and conflict of laws (private international laws) on the other.

The fundamental principle of an insolvency proceeding is a collective action by the creditors.[15] It is referred to as a collective action because no individual remedies are available under an order for winding up i.e., the interests of the general creditors of the company will precede over the individual actions of the creditors. Since, Multinational enterprises operate in multiple jurisdictions, the bankruptcy of a multinational enterprise generally sets off an array of diverse and uncoordinated legal proceedings relating to the affairs of the enterprise in the countries in which they have their place of business.

Even though today's world is characterised by the development of numerous conventions, statutes and treaties designed to regulate international businesses, the field of international bankruptcy remains unaffected by any reforms. The current national rules of most countries governing the failure of corporations are not in line with the few existing international rules and standards as a result of which there is a significant potential for conflicts. Although these

[13] Cambridge Gas Corpn v. Official Committee of Unsecured Creditors of Navigator Holding Plc., (2006) UKPC 26.

[14] *Supra* note 13, at 13-14.

[15] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation 2005, at 83, para 26.

rules were made with a view to bring about uniformity in application of insolvency laws, they primarily address judicial and regulatory cooperation and not the substance of the law governing the insolvency proceedings. This lack of coordination of legal proceedings and the lack of predictability of operation of laws imposes substantial costs on the bankruptcy proceedings, for instance, by multiplying administrative expenses and also on the international commerce and trade generally by preventing investors from predicting accurately the consequences of any insolvency proceedings.

If a cross-border insolvency proceeding has been initiated under the Code, then the insolvency professional will essentially have to figure out the assets of the corporate debtor and also where they are. The question that arises here is whether Indian courts will acknowledge and assist insolvency proceedings under the Code and if that will take precedence over contracts between foreign creditors, and also as to what will happen if a foreign creditor commences parallel proceedings to enforce their claims. Before we examine this situation, the point to be noted is that section 234 of the Code only grants the Indian government with the flexibility to enter into agreements with other countries (presumably, multilateral treaties) in the context of applying the Code to assets located outside of India (so as to afford recognition and grant rights to foreign representatives managing foreign insolvency proceedings before the Indian courts).

APPROACHES TO CROSS-BORDER INSOLVENCY

In essence, cross-border insolvency aims to address three key issues: which law is applicable; who has authority to administer insolvency proceedings; and how are decisions enforcing control over assets enforced? There are two prominent theories in the movement to reform international bankruptcy law which is universality and territoriality.

Traditionally, the way most states resolved the issues inherent in the insolvency of multinational corporations was through an approach known as territorialism which favoured simultaneous administration of multiple local bankruptcies. The reason why territorialism was regarded as the default system for almost all cross-border insolvency systems was because it mainly relied on in rem control over the assets.

As per this approach, individual creditors are required to institute a suit in each forum where the debtors assets are situated. This system is simple and predictable but it resulted in increased administrative costs and differential treatment of similar creditors who happened to be in different jurisdictions. Territorialism, at the most basic level, does not require a separate legislation nor does it deviate from the principles of sovereignty and jurisdiction. Although under a territorial rule, a court never has to deny the enforcement and recognition of a foreign case, it is seen as less efficient economically as concurrent proceedings increases the cost of insolvency, subject the creditors to conflicting decisions and lead to unequal treatment of similar creditors in different jurisdictions.

In response to these limitations, various scholars and commentators sought to create a system which was more fair and efficient and thereby devised a universalist approach to resolving cross-border insolvencies. Supporters of universality argue that cross-border insolvencies need to be administered under a single law regardless of the actual location of the parties, claims or assets so as to ensure equality of treatment of all creditors, maximisation of the value of the bankruptcy estate, efficient and expeditious administration of the estate and for predictability of outcome. In *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings Plc.*[16] the court explained the concept of universalism as:

> "*At common law ... the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.*"[17]

Although the universalist principles have been guiding the bankruptcy reform movement for the past few decades, its support has been weakening in the present years. There are many reasons that limited the use of the university model, firstly, it was difficult to obtain the requisite international agreements administering international insolvencies at the regional, bilateral domestic and international levels as in the case of United States and Canada that failed to ratify the American-Canada Bankruptcy Treaty (Oct 29, 1979), secondly, it was believed that

[16] *Supra* note 13.
[17] *Id* at 22.

administering domestic insolvencies under separate laws and regimes might confuse debtor-creditor relationships, and finally, it was felt that it could lead to practical problems in implementation because usually *lex fori* applies but conflicts may arise with how other laws such as the *lex situs* of various assets that resolve the same issues. Furthermore, there is no conclusive definition or general rules to determine which jurisdiction should act as the universal forum, thus allowing for manipulative filings and forum shopping.[18]

The problem that remained with both the theories was that universalism in its pure form was not feasible without an international convention or treaty because states are generally unwilling to refer to a foreign courts extraterritorial actions while territorialism resulted in multiplicity of proceedings and increased litigation expenses for the parties. In response to these issues, many nations started recognising a modified or hybrid system that integrated some of the benefits of the universalist approach while still identifying the practical effects of territorialism. This new regime was termed as modified universalism as it allowed for an approach that permitted for the application of extraterritorial statutes for the administration of local insolvencies.

The modified universal regime allows for an approach in which a state does not try to coordinate its domestic legislation with another state, but rather creates a system that is open to cooperation. This approach proposes a method with greater certainty and predictability by providing that the proceedings in the debtors home jurisdiction plays the lead role and non-main proceedings could be opened in other jurisdictions by representatives of that estate. Thus, there will be a single insolvency proceeding in a particular jurisdiction and ancillary proceedings around it in different jurisdictions. It requires that a state's insolvency laws must be drafted in a way that it provides for extra territorial application in all areas starting from the creation of assets to the recognition of claims.

The advantage of the modified universal model is that it seeks to reduce duplicative administrative expenses by allowing coordinated insolvency proceedings and reorganisation of assets while incorporating the discretion and flexibility in a territorial approach by giving the ancillary courts (local court in a modified universal regime) the right to exercise powers over those matters over which they have direct control. Furthermore, the modified model is also attractive because it allows for a system that is independent of international conventions and

[18] UNCITRAL Model Law, Art. 2(b) and Art. 16(3), (1997), Debtors "center of interests" or "principal place of business" does appear to be developing rule regarding determination of main forum in a multinational insolvency.

treaties which can be implemented through domestic legislation. But this approach also has certain problems, for instance, the modified system maybe be unpredictable as a creditor does not know for sure the court in which the debtor may initiate insolvency proceedings. There may also be uncertainty regarding whether the ancillary courts will deny or assist the courts and the transaction and administrative expenses saved by avoiding multiplicity of proceedings are offset by the costs associated with filing insolvency and petitioning for assistance from ancillary courts.

The concept of modified universalism was defined by the court in *Re HIH Casualty and General Insurance Ltd.*,[19] where Lord Hoffman said that:

> "*The primary rule of private international law which seems to me applicable to this case is the principle of modified universalism which has been the golden thread running through English cross-border insolvency since the 18th century. That principle requires that English courts should, so far is consistent with justice and UK public policy, cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal.*"[20]

The Model Law on Cross-Border Insolvency implemented by the United Commission on International Trade Law (UNCITRAL) encompasses this modified universalist theory as is evident from the objectives of the Model Law.[21] If a corporate debtor initiates an insolvency proceeding in jurisdiction A, then the courts in that jurisdiction can authorise a foreign representative to open secondary or ancillary proceedings in other jurisdictions where the corporate debtor's assets are situated. Thus, clearly there is one single jurisdiction administering the insolvency proceedings which could be extended to proceedings in other states as well. The justification for how an ancillary court can grant relief has two primary

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[19] Re HIH Casualty and General Insurance Ltd, (2008) UKHL 21.
[20] *Id* at para 12

[21] The Model Law's Preamble lists its objectives:
(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) Greater legal certainty for trade an investment;
(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) Protection and maximization of the value of the debtor's assets; and
(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

reasons, firstly, there are certain rights granted automatically to a foreign representative once certain statutory rules are triggered (automatic assistance), secondly, there is also certain discretionary relief that an ancillary court is empowered to extend to a foreign representative (discretionary assistance).

On the legislative front, the current regime in India under which cross border insolvency is administered is mainly regulated by the IBC, 2016. The IBC, 2016 while purporting to foster universality and ensuring that the domestic legislation meets the international needs only observes a partial commitment to the universality approach. Since India is not a signatory to the UNCITRAL Model law on Cross-Border Insolvency, it mainly allows for a territorial approach where it does not recognise and enforce the insolvency proceedings from another jurisdiction and requires parties to initiate separate proceedings in local jurisdictions. The main attribute of territoriality is that the country uses its own cross-border insolvency laws without referring to other countries laws by permitting local courts to control local assets pursuant to local laws. The territorialism regime lead way to many complexities in the insolvency proceedings and further alleviated the need for Indian courts to recognise and enforce foreign proceedings which would make disposition of claims easier. For a country like India with industrial growth constantly escalating, it becomes extremely beneficial in helping to identify and address many of the problems that a state needs to overcome in any cross-border insolvency system. Furthermore, unlike many theoretical debates, this one is of importance to India as it is currently in the process of revising its entire insolvency scheme.

ISSUES IN CROSS-BORDER INSOLVENCY

As noted earlier, when a multi-national entity undergoes insolvency, there are implications on all creditors (both domestic and foreign). For the reason that domestic insolvency laws of different states may be different, there could be a difference in the approach of courts as well. Although conformity with international standards may help in boosting investor confidence, it is not practically possible to harmonise the bankruptcy laws of different states. As the number of cross-border insolvencies went up, there was very little to no development in the national insolvency laws to keep up with the growing challenges. There was no efficient system established to ensure coordination of insolvency proceedings and the management of the overseas assets of the corporate debtor. It is possible to overcome a lot of these issues in cross-border insolvency by establishing a mechanism which is in line with the Model Law.

Besides the inadequacy of an effective legal framework at the national level, there was also lack of clarity as to how these laws were to be implemented without having any implications on the capital flow as well as the cross-border investments. The administration of insolvency proceedings in different jurisdictions varied widely such as with regard to treatment of different classes of creditors, understanding key concepts, acceptance of different types of proceedings, etc. Though non-equitable treatment of participants maybe discriminative, Model Law makes it clear that there shouldn't be any discrimination with respect to access and that the principle is not to have any implications on the ranking of claims in insolvency proceedings. Such issues might affect the recognition of foreign proceedings as the courts in one jurisdiction may not recognise the decision of another foreign court.

LACUNAS IN THE EXISTING INDIAN LEGAL REGIME

The Insolvency Law Committee on Cross-Border Insolvency was established by the MCA which noted that the cross-border insolvency provisions under the Code were not comprehensive enough to deal with the various challenges posed by the insolvency of a multinational corporation. This report was submitted to the government of India proposing recommendations to adopt the UNCITRAL Model Law on Cross-Border Insolvency, 1997 which would be made a part of the Code by inserting a separate part for this purpose.[22]

In a world which is becoming increasingly economically interdependent, it is of prime importance that there is an improved legal framework for the facilitation of international trade and investment. Although there has been a significant rise in the number of cross-border insolvency cases across the globe, very few attempts have been made by states to equip their laws to address such issues. As a result of this, there are frequent conflicts between national laws and international insolvency regimes leading to inadequate and uncoordinated approaches to cross-border insolvency that are not only time consuming but also unpredictable, thus, lacking transparency in the operation of laws. These problems hinder effective and prompt

[22] Report of the Insolvency Law Committee, MCA, Government of India, March 2018, pg. 5.

resolution of insolvency proceedings and impede the protection of value of assets as longer the proceedings go on in courts, more is the depreciation in the value of the assets.

One of the major shortcomings of the existing provisions concerning cross-border insolvency is that the Code lays down provisions only for individual companies and not for enterprise groups. In a scenario where nations are moving down the path of globalisation this framework may not be adequate and has a limited applicability. Therefore, a need arises to amend the existing laws to bring it in line with the current international standards and to efficiently address the new challenges and issues that may come up.

The Code permits the authorities to refuse to take any action if it is founded that the issue concerned is manifestly contrary to public policy, but what actions are contrary to public policy are not stated under the Code. This vagueness gives a lot of discretion to the authorities thus increasing the need to monitor these issues to ensure efficient administration of the insolvency proceedings.

Determination of the Centre Of Main Interests (COMI) is critical because insolvency proceedings opened in a state where the debtor's assets are situated is referred to as a foreign main proceeding. The concept of COMI is interpreted as the place where the debtor conducts administration of his assets on a regular basis. The issues in this regard may occur when companies that have multiple registered offices in different jurisdiction goes into liquidation and in such a scenario it becomes difficult to ascertain the COMI as the Code doesn't clarify the other factors to be taken into consideration in order to determine the same.

The Insolvency Law Committee which was constituted to recommend changes and amendments to existing insolvency law suggested for the adoption of the UNCITRAL Model Law on Cross-Border Insolvency on the basis of the principle of reciprocity. The current Indian legal regime allows for recognition of insolvency proceedings subject to any bilateral agreements entered into by the foreign states or other reciprocal arrangements made by the states for the purpose of recognition. India does not have a robust mechanism dealing with cross-border insolvency issues nor has it adopted the UNCITRAL Model Law. The basis of India's cross-border insolvency provisions is founded on bilateral agreements between countries or letters of request resulting in more delay and uncertainty. Therefore, there is a need to bring India's laws in line with international standards by adopting the Model Law.

One of the main attractive feature of the Model Law is the concept of legislative reciprocity of proceedings. Legislative reciprocity implies that the courts in another jurisdiction will recognise and execute the decision of a foreign court. The existing provisions concerning cross-border insolvency under the Code allows reciprocity of proceedings provided the state has entered into any bilateral agreements.

CONCLUSION

The Indian insolvency laws undoubtedly contain provisions concerning cross-border insolvency of corporations, however, when it comes to the implementation of these provisions, certain difficulties arise. India is not a signatory to any international convention or treaties concerning insolvency. Principles of cooperation adopted by India concerning cross-border insolvencies has its source in cross-border insolvency provisions provided under the IBC, 2016.

The foundation of the provisions governing cross-border insolvency provided under the Code is the principle of reciprocity. Reciprocity as defined under Oxford dictionary is ‘a situation in which two people, countries,… provide the same help or advantage to each other’.[23] In simpler words, the principle of reciprocity seeks to create a balance in the rights, duties and interests of individuals by creating an environment where states help and support each other. Even though the provisions under the Code provide for reciprocity by permitting bilateral agreements to be entered by states for the purposes of insolvency, when it comes to the implementation of these provisions, certain difficulties may come up. Firstly, Indian government requires bilateral agreements to be entered between states for the recognition of foreign proceedings but the process of drafting and negotiating such agreements maybe time consuming and therefore is not practically feasible. Secondly, there is also a possibility that individual states may draft the agreements according to their requirements which might lead to differential treatment and other issues. Finally, this could result in multiplicity of proceedings when the assets of the debtor are distributed across various states.

[23] Sally Wehmeier et al. (eds.), Oxford Advanced Learner’s Dictionary, 2006, p. 1215.

Furthermore, in reality, these reciprocal agreements does not always state the procedure which has to be followed for administering insolvency proceedings and this makes the law incomplete. The principles of transparency and natural justice mandates that the manner in which insolvency proceedings are conducted should be equivalent for all countries entering into such reciprocal agreements, but the Indian law does not establish any such procedure which further raises ambiguity and uncertainty in the way cross-border insolvency proceedings are administered under the Code. For instance, consider a situation where certain countries have entered into reciprocal arrangements for the resolution of insolvency proceedings with India, and if for every state there is a different approach to resolution of claims then this would raise a point of conflict as in most cross-border insolvencies either the creditors are from different jurisdictions or the assets are situated in different jurisdictions. The following are some of the reasons why the Code fails to provide for an efficient system of administering insolvency.

In light of these issues, the Insolvency Law Committee suggested that the best practice that could be adopted is to implement a Model insolvency agreement that is built on the lines of the Model Law which could be modified by countries according to their specific requirements. The UNCITRAL Model Law seeks to lay down a mechanism to provide cooperation and coordination between the courts and insolvency proceedings in various jurisdictions; and to further the objective of providing greater legal certainty and security for trade and investment. The need to have a comprehensive framework is more apparent than ever before as India is facing its first cross-border insolvency claim under the insolvency of Jet Airways. Another issue in this context is the liquidation proceedings against Nirav Modi which has already commenced in the US, making it difficult for Indian creditors to recover their claims with respect to assets held by him in the US. Therefore, in order to ensure that all investors are guaranteed justice, there should be a proper procedure established by law to govern the insolvency proceedings.

Adopting the Model Law will help India meet the international standards as well as its developmental goals. In this context, the goal of the government should be to establish a regime that enables cross-border cooperation at the same time liberalising the FDI regulations. It is a known fact that different states follow different approaches to administering insolvency proceedings. therefore, in this era of globalisation, it is necessary that India incorporates the necessary reforms to its existing insolvency legislation to enable speedy restructuring of assets and to further its developmental goals.