Cross-Border Insolvency

Considering the huge number of non-performing loans and mounting insolvency issues in corporate, individuals and partnership firms, a unique law was introduced in India in 2016 with a name 'Insolvency and Bankruptcy Code' (IBC). It is clear that the primary motive of this code is to establish a consolidated framework for insolvency resolution of corporations, partnership firms and individuals in a time bound manner.

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INTRODUCTION

Large corporate houses or industries or firms getting bankrupt due to many reasons or becoming insolvent to repay their dues has always been a biggest threat to any economy. Such companies not only make a huge harm to themselves but they cause drawing of many Banks, Financial Institutions, small industries, workmen, employees, customers, creditors and ultimately many families and the economy as a whole along with them. Thus, considering the huge number of non-performing loans and mounting insolvency issues in corporate, individuals and partnership firms, a unique law was in introduced in India in 2016 with a name **'Insolvency and Bankruptcy Code' (IBC).**

It is clear that the primary motive of this code is to establish a consolidated framework for insolvency resolution of corporations, partnership firms and individuals in a time bound manner. This code provides for two way insolvency mechanism which on one hand, tries to provide support and education to the debtors to ensure sound business decision making and prevention of business failures; and on second hand, provides for rehabilitation of the financially ailing corporate entities to brought them back on their feet.

However, currently the IBC largely caters with only the domestic laws, and handles insolvent entities based in India. But due to the rapid growth of trade and technology, the world has become very small. The corporate world has rising number of multinational entities creating cross-border business relationships among countries. Having a business presence in various countries results in having creditors and debtors situated in various countries which causes overlapping of various laws and proceedings. Due to this, the insolvency resolution process becomes very complicated making the subject of 'cross-border insolvency' most crucial and important.

MEANING OF 'CROSS-BORDER INSOLVENCY' AND LAW TO REGULATE AND CONTROL THE SAME

When an insolvent debtor has credit and/or debtors in more than one jurisdiction i.e. in many different countries, that situation can be referred to as **'cross border insolvency'** or **'international insolvency'**.

A 'cross-border insolvency law' should be a law which can –

- Help creditors and resolution professionals to recover assets kept overseas;
- Help to deal with cross border legal issues in more efficient way;
- Protect the interests of the domestic and foreign creditors to be at par;
- Safeguard the value of assets of debtor located in different jurisdictions;
- Maintain coordination and cooperation among the courts and other judicial authorities in various jurisdictions and the domestic laws applicable therein; and
- Bring uniformity in the insolvency law and practices of the different jurisdiction.

Even though IBC has made progress in the harmonization of the insolvency process in India, it does not stipulate sufficient procedure for the regulation of cross-border insolvency proceedings.

CROSS-BORDER INSOLVENCY AND IBC

IBC provides two provisions that assist in cross-border insolvency disputes i.e. **Section 234** and **Section 235.**

Section 234 of IBC says that –

(1) The Central Government may enter into an **agreement with the Government of any country outside India** for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

Section 235 of IBC says that –

(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, **may issue a letter of request to a court or an authority of such country competent to deal with such request**.

Thus, where section 234 empowers the Central Government to enter into a bilateral agreements with foreign jurisdiction in order to resolve the issue of cross-border insolvency, section 235 on the other hand empowers the Adjudicating Authority to issue letters of request on Courts of the country with which bilateral agreement has been entered into under section 234 with an aim to address the fate of assets of the corporate debtors which are located outside India.

These two provisions under IBC at least take cognizance of the issue of 'cross-border insolvency'. However it's has been clearly proven that these present provisions fail to provide a comprehensive framework to address cross-border insolvency issues. The major reasons for such failure can be highlighted as follows:

1. Bilateral agreements are a time-consuming, expensive and not conclusive source of reliance due to the multiple layers of negotiation involved.

2. Balancing competing clauses of different treaties entered into with separate jurisdictions due to the presence of assets of the corporate debtor's assets in multiple locations could be one of the most cumbersome issues to be addressed by the adjudicating authority.

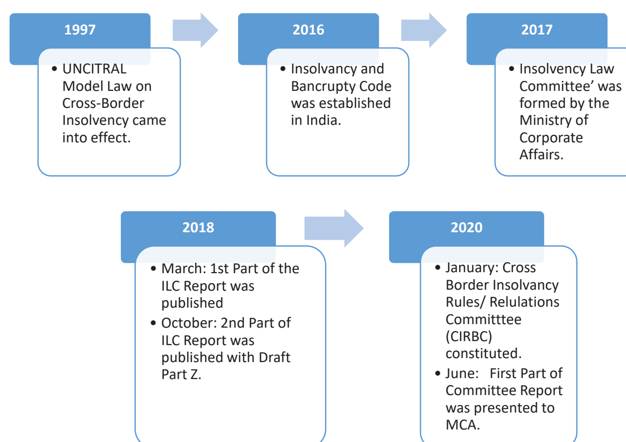
3. Such an ad-hoc procedure as provided under these sections of IBC would significantly delay the insolvency proceedings.

The Ministry of Corporate Affairs (MCA) constituted a **Insolvency Law Committee (ILC)** on 16th November, 2017 which submitted its first Report in March 2018 which recommended amendments to the Insolvency and Bankruptcy Code, 2016 based on the experience gained from implementation of the Code. The said committee decided to attempt to provide a comprehensive framework for the 'cross-border Insolvency' purpose based on the **UNCITRAL Model Law on Cross-Border Insolvency, 1997** which could be made a part of IBC by inserting a separate part for this purpose. Accordingly the second part of ILC Report was submitted in October, 2018 to make recommendations to the Government on adoption of the UNCITRAL Model Law and the modifications necessary in the Indian context.

REPORTS AND DISCUSSIONS IN INDIA

THE 'INSOLVENCY LAW COMMITTEE' (ILC)

The 'Insolvency Law Committee' was formed by the Ministry of Corporate Affairs on 16th November, 2017. In its first report which was submitted March 2018, it has recommended various amendments to the Insolvency and Bankruptcy Code, 2016. However, with respect to 'Cross Border Insolvency', the committee decided to submit its recommendations separately considering the complexity of subject matter and the requirement of in-depth research to adopt the UNICITRAL Model Law for India. Accordingly, the second part of the ILC Report was submitted to MCA on 16th October, 2018.



UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, 1997[1]

The United Nations Commission on International Trade Law is the core legal body of the United Nations system in the field of international trade law established by the United Nations General Assembly in 1966. It plays a key role in developing and maintaining a robust cross-border legal framework for the facilitation of international trade and investment in pursuit of its mandate to further the progressive harmonization and modernization of the law of international trade. UNCITRAL does this by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include conventions, model laws and rules which are acceptable worldwide, legal and legislative guides and recommendations of great practical value, updated information on case law and enactments of uniform commercial law, technical assistance in law reform projects, regional and national seminars on uniform commercial law.

The UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI) is designed to assist States in developing a modern, harmonized and fair insolvency framework to more effectively address instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. Well known nations such as the United Kingdom, United States, Singapore, Australia, South Africa, Korea, Canada and Japan have adopted and incorporated the Model Law into their local insolvency legislations.

The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

DRAFT 'PART Z'

Once the need for adopting the Model law for cross border insolvency was felt, blending the provisions of the legislation with the Indian framework began and resulted into the preparation of Draft Part Z subordinate legislation of which was recommended by the Cross-border Insolvency Rules/ Regulation Committee (**CBIRC**).

Draft Part Z (Draft Chapter) is a set of draft guidelines containing a specific chapter with an aim to address the limitations of the prevailing cross-border insolvency mechanism, or the lack thereof. The Model Law (i.e. MLCBI) is the basis of said draft. The Draft guidelines were recommended by ILC vide its Report submitted on 16.10.2018.

Further, the Draft Chapter recommended certain amendments to the IBC with an intention to streamline the inclusion of Draft Chapter in the IBC. For example:

1. Sections 234 and 235 may be amended to exclude corporate debtors and only apply to individuals and partnership firms since the content relevant to corporate debtors from these provisions has been proposed to be incorporated in the draft Part Z;
2. Section 60 may be amended to allow transfer of domestic proceedings to the Adjudicating Authority notified under the Draft Part Z in relevant instances;
3. The inspection and investigation powers of The Insolvency And Bankruptcy Board Of India ("IBBI") may need to be amended to include a suitable mechanism for investigation and adjudication of penalties against foreign representatives;
4. Section 196 may be amended to include regulation of foreign representatives within the functions of the IBBI;
5. Additional rule and regulation making power will need to be incorporated in Sections 239 and 240, respectively;
6. The 11th schedule may be amended based on the decision to amend section 375(3)(b) of the Companies Act ("2013 act");
7. Preamble to the Code may be amended to reflect inclusion of cross-border insolvency under the code.

GENERAL PROVISIONS WITH RESPECT TO DRAFT CHAPTER –

Applicability:

The scope of applicability of Draft Chapter is currently extended only to the corporate debtors only as at the time when the said report was submitted, Part III of the IBS which deals with individuals and partnership firms was not been notified (which has been notified later on in November 2019. However, it has been proposed expressly in the report that for the purposes of Part Z, the definition of "corporate debtor" should include foreign companies. This will ensure that creditors and insolvency professionals of companies registered outside India can approach the Adjudicating Authority for cooperation or recognition of foreign proceedings to avail relief in India.

Excluded Entities:

The Committee recommended that certain entities may be excluded from applicability of the proposed cross-border insolvency provisions under draft Part Z and Central Government be empowered to notify the entities that may be excluded from applicability of draft Part Z.

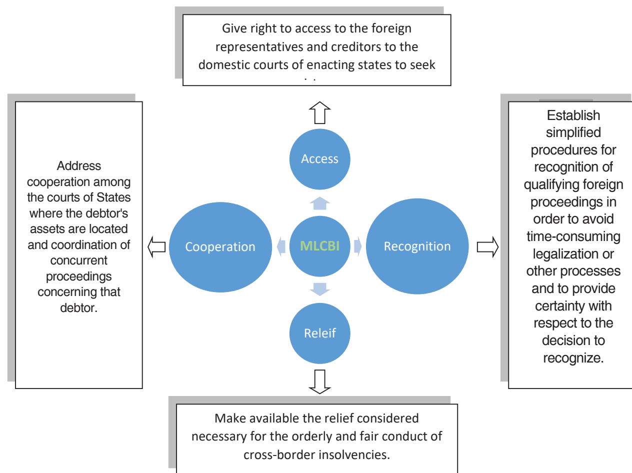
Reciprocity:

Considering the comments made in the MLCBI with respect to reciprocity given the stage of development of the Indian insolvency infrastructure, along with our overall economic development and our position globally, the Committee recommended that initially the Model Law may be adopted on a reciprocity basis. Eventually, the reciprocity requirement may be diluted based on the experience in implementation of

the Model Law and development of adequate infrastructure in the Indian insolvency system.

The Model law is based the four core pillars of the Cross border Insolvency which were identified by the ILC in their Report and subsequently reiterated by the Ministry of Finance –

- Access
- Recognition
- Cooperation
- Coordination



The above four elements have been adopted by the ILC Report on Cross-Border Insolvency in following manner –[2]

ACCESS TO FOREIGN REPRESENTATIVES

Clauses 5 to 9 of the ILC Report on Cross-Border Insolvency deals with the provisions with respect to 'Access to Foreign Representatives' to the Court in the enacting country. The key provisions with this respect can be stated as follows –

- Clause 5.4 of the said report suggests that it may be desirable to adopt a conservative approach in providing **access to foreign representatives to the domestic courts** till the development of infrastructure regarding cross-border insolvency in India. The Clause further states that a possible option may be to allow foreign representatives access to courts, and exercise of their powers under the draft Part Z, through domestic insolvency representatives. However, the Committee deemed it appropriate for the Central Government to provide the extent of the right to access, in this regard, through subordinate legislation.

- Clause 6.3 states that **foreign representatives may be subject to a code of conduct** .which may be specified by the IBBI and to a penalty provision, similar to that applicable to domestic insolvency professionals under Code, which may be inserted in draft Part Z.

- Clause 6.4 states that foreign representatives may be made to register with the IBBI though no conclusion was reached in this regard. This may be contemplated by the Central Government, in consultation with the IBBI.

- Clause 8.1 states that subject to the exclusions provided in this article, foreign creditors who apply to commence insolvency proceedings in the enacting country or file claims in such a proceeding, should not be treated worse than domestic creditors.

- Clause 9.2 of the said report states that **known foreign creditors may be given notice individually whenever notice is to be given to creditors of the debtor.** However, in order to ensure that costs of providing notice are not too high, the Committee decided that the IBBI may specify the mode of providing notice to a foreign creditor. **Electronic notice and uploading notices on the website of the corporate debtor or the IBBI may also be considered.** It was also noted, in this regard, that the intention of adopting this provision is not to give any special treatment to foreign creditors but to merely ensure that notices are served in a manner that is accessible to foreign creditors as well.

RECOGNITION OF A FOREIGN PROCEEDING

Clauses 10 to 13 of the ILC Report on Cross-Border Insolvency provides for the provisions with respect to 'Recognition of Foreign Proceedings and Relief'. The Key provisions in this respect can be stated as below –

The Model Law empowers **foreign representatives to seek recognition of a foreign proceeding from a court in the domestic country,** in order to avail appropriate relief in relation to the foreign proceeding. It further provides the documents required to be submitted by the foreign representative when making an application for recognition. This includes proof of the existence of the foreign proceeding and of the appointment of the foreign representative in such proceeding, along with details of any pending foreign proceedings against the debtor. The court to which the application for recognition is made may also require these documents to be translated, if necessary.

Clause 10.5 of the ILC Report it is suggested that the abovementioned provisions of Model Law may be adopted in the present draft Part Z with similar mandate for submission of translations of documents in English. Along with this, the foreign representative may be mandated to specify pending foreign and domestic insolvency proceedings against the corporate debtor that are known to her. This is to ensure that the Adjudicating Authority has complete information about the foreign proceedings along with any proceedings under the Code pending against the corporate debtor.

DETERMINATION OF COMI (CENTRE OF MAIN INTEREST)

Clause 11 of the Report mentions a detailed discussion about the concept of COIM which can be considered as a most important concept under Cross border Insolvency. Article 2(b) of the Model Law read with Clause 14 of the Draft Part Z deals with determination of COMI of the Corporate Debtor.

In Clause 11.5 of the Report, given that the Code and its enforcement architecture in India is still evolving; it is

recommended that the two principles provided by the UNCITRAL Guide to Enactment indicating COMI in most cases that are-

(a) where the central administration of the debtor takes place; and

(b) which is readily ascertainable by creditors.

– should be included in the Code. The intent is to provide objective factors to assist the Adjudicating Authority in cases where the COMI does not coincide with the registered office. It further recommends that in case where the two principal factors alone may not provide a conclusive answer regarding the COMI, it would be advisable to provide a list of indicative factors in subordinate legislation that may be considered by Adjudicating Authorities while determining COMI.

Under Section 14 of the draft Part Z, guidance is provided for determination of COMI. It provides for a prima facie presumption that –

- The corporate debtor's registered office is its COMI, unless there is proof to the contrary.
- However, this presumption would be applicable provided that the registered office of the corporate debtor has not been moved to another State within three months prior to the commencement of insolvency proceedings in such State.
- It further provides that the Adjudicating Authority will conduct an assessment of where the corporate debtor's central administration takes place in order to determine the corporate debtor's COMI.
- Such assessment might also include factors as prescribed by the Central Government, and should be carried out in a manner that is ascertainable by third parties, including the creditors of the corporate debtor.

Decision of recognition of foreign proceedings

Model Law provides that as long as the requirements set out in this provision are met, the court shall recognize the foreign proceeding at the earliest time possible. Accordingly, Clause 12.3 of the Report expresses the view that the said provision may be adopted in Draft Part Z, However, a timeline of thirty days may be provided to the Adjudicating Authority to decide on the application for recognition. However, the report does not recommend that power to grant interim relief to be provided in draft Part Z.

RELIEF ON RECOGNITION

The Report provides for two types of relief –

(i) ***Mandatory relief*** on recognition as a foreign main proceeding, and

(ii) ***Discretionary relief*** on recognition as either foreign main proceeding or foreign non-main proceeding.

The 'Draft Part Z' provides for two types of foreign proceedings i.e. Foreign Main Proceedings and Foreign Non-main Proceedings.

Foreign main proceeding refers to a foreign proceeding taking place in the State where the corporate debtor has the centre of its main interests. Whereas, a **foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding, which takes place in a State where the corporate debtor has an establishment.

Provisions in respect of these reliefs are included in clause 14 of the Report.

COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Clause 16.2 of the Report recommends that in the initial stages of introduction of the Model Law, cooperation and communication between Adjudicating Authorities and foreign courts in cross-border insolvency matters must be based on a framework to be notified by the Central Government in consultation with the Adjudicating Authority in the interest of all stakeholders.

The Committee recommended that the Central Government may notify an appropriate authority to assist the Adjudicating Authority in facilitating transmission of notices and other communications between the Adjudicating Authority and foreign courts. The joint hearings in concurrent proceedings may be undertaken directly by Adjudicating Authorities and foreign courts. Moreover, Adjudicating Authorities may also be allowed to directly communicate and request assistance or information directly from foreign representatives.

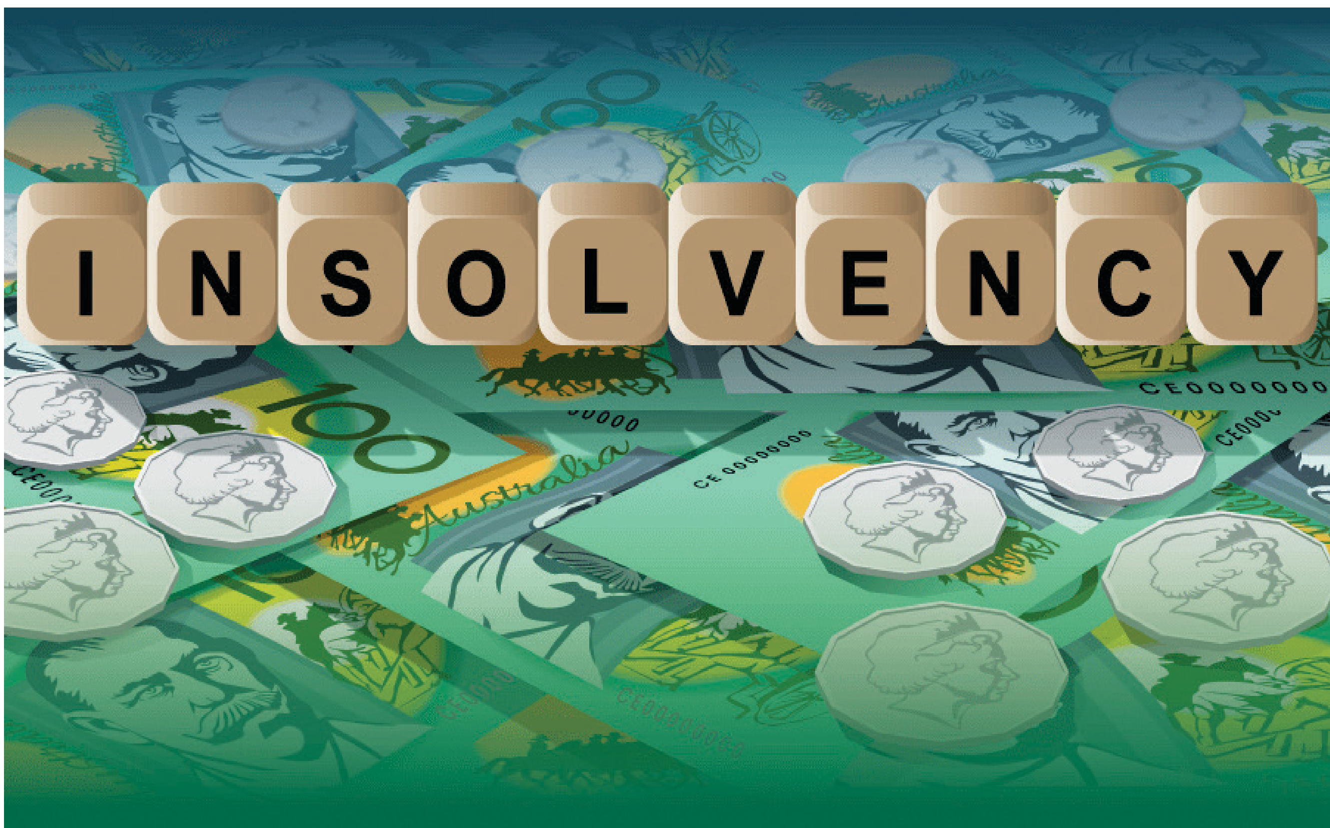
The report further recommends that Article 26 which provides for cooperation and communication between insolvency professionals with foreign courts and foreign representatives under supervision of the domestic courts and Article 27 which provides examples of various forms of cooperation between domestic and foreign courts and insolvency professionals; of the Model Law to be adopted without any substantial modifications.

CROSS-BORDER INSOLVENCY RULES/ REGULATIONS COMMITTEE (CBIRC)[3]

The Cross-Border Insolvency Rules/Regulation Committee (CBIRC) was constituted by Ministry of Corporate Affairs vide office order No. 30/27/2018-Insolvency Section dated 23rd January, 2020. The Committee was formed to provide a comprehensive rules and regulatory framework to enable implementation of the recommendations of the Insolvency Law Committee contained in its Report dated 16th October, 2018 based on the UNCITRAL Model Law on Cross-Border Insolvency.

The major recommendations of the CBIRC can be summarized as follows:

1. The Financial Service Providers (FSPs) and the companies engaged with critical finance, utility and infrastructure services should be excluded from Part Z.
2. The definition of 'foreign companies' along with clarification whether 'foreign companies' are 'unregistered companies' should be included under Part Z and Companies Act, 2013.



3. The CBIRC noted the anomalies that may arise from the non-applicability of the IBC to foreign companies and foreign LLPs. Therefore, the CBIRC recommends that:

I. The provisions of the IBC should be made applicable to entities:

   (a) incorporated with limited liability under the laws of a foreign country; and

   (b) having an establishment, as defined in Part Z, in India.

II. The MCA and the IBBI must consider evaluating the provisions of the IBC, the Companies Act 2013 and the LLP Act, 2008, which need to be amended, and the consequential delegated legislation, if any, which might need to be issued, for giving effect to the abovementioned recommendation.

4. Creation of an online mechanism maintained and governed by the IBBI. The said mechanism would allow foreign representatives to submit an application for authorization which must be done at the time of applying for authorization or cooperation to the NCLT under Part Z or immediately thereafter.

The Insolvency & Bankruptcy Board of India (IBBI) can reject such applications of foreign representatives in two cases:

- Misconduct in a previous proceedings conducted by the IBBI
- Existence of a pending disciplinary proceeding before the IBBI.

The need for the IBBI's authorization is not to be considered as a prerequisite to NCLT proceedings and if such applications are rejected, the IBBI notifies the relevant NCLT bench and fresh applications for a different foreign representative(s) can be filed with the NCLT proceedings occurring in parallel. To ensure smooth operations, the IBBI is time bound to reject applications within 10 days failing which such representatives would automatically be authorized.

5. CBIRC further recommended that all benches of NCLT should be equally eligible based on their territorial jurisdiction. For foreign proceedings, notified NCLT benches may be chosen.

The Report of the CBIRC sheds light on the nature of Cross Border Insolvency Regulations to be a 'principle-based light-touch code of conduct.'

Thus, it can be concluded that India is making various serious attempts to crystallize the legal framework for Cross-border Insolvency issues. The said framework is inspired from and in sync with the Model Laws adopted by many countries of the world. Proper adoption and legalization of these recommendations in the existing laws will help India to successfully handle its Cross-border relations.

JUDICIAL RECOGNITION OF CROSS-BORDER INSOLVENCY

The important international case laws with respect to determination of COMI for deciding the matters with respect to cross-border insolvency can be listed as follows–

Eurofood IFSC Ltd. Case, 2006[4]

Facts of the case and summery of proceedings –

- Eurofood, a wholly owned subsidiary of Parmalat, was incorporated in Ireland where it had its registered office. Eurofood had no offices in Italy. Eurofood's principal activity was the provision of financing facilities for other companies within the Parmalat group. Parmalat guaranteed many of the liabilities that it incurred. Eurofood had two Italian executive directors and two Irish nonexecutive directors, and all but one of its board meetings took place in Dublin.
- On 27 January 2004 one of Eurofood's creditors presented a petition to the High Court of Ireland for the winding up of Eurofood and applied for the appointment of a provisional liquidator, whom the Court appointed on the same day.
- On 24 December 2003, Parmalet had opened a proceeding in Italian Ministry for admission of Eurofood as group company to the extraordinary administration of Parmalat, which was admitted on 9 February, 2004.
- On 20 February 2004 the Italy court gave a judgment purporting to open main insolvency proceedings in relation to Eurofood. The Italy court made a determination, despite of the ongoing proceedings in Ireland, that Eurofood's COMI was in Italy, and appointed an extraordinary administrator over its assets.
- On 23 March 2004 the Irish court, refusing to recognize the Italian insolvency proceedings, held that Eurofood's COMI was located in Ireland, and that the appointment of the Irish provisional liquidator on 27 January 2004 had opened main insolvency proceedings. A winding-up order was granted.

Important points recognized under this case –

1. The normal presumption is that a company's COMI is situated in the State where it has its registered office. The Court thought that this presumption could be rebutted only if there were factors that were ascertainable by those dealing with the company that objectively established that its administration was conducted elsewhere. However, the burden of proof placed on those seeking to rebut the presumption.
2. The European Court said it was essential to the integrity of the system that a court checks that it has jurisdiction (i.e. COMI is within its territory) before opening main proceedings but if it does so the principle of mutual trust requires that the courts in other Member States recognize and accept the prior decision.

> When an insolvent debtor has credit and/or debtors in more than one jurisdiction i.e. in many different countries, that situation can be referred to as 'cross border insolvency' or 'international insolvency'.

3. Bearing in mind that a fair legal process is fundamental the Court thought that the Irish court would be justified in refusing recognition of the Italian proceedings where there had been a flagrant breach of the fundamental right of the liquidator which constitute a manifest breach of the rule of law in the Irish proceedings to be heard in the Italian proceedings.

Interedil Srl v Fallimento Interedil Srl [2011] ECR I-09915 (20th October 2011)[5]

Facts of the case and summery of proceedings –

- Interedil Srl was a company incorporated in Italy with its registered office in Monopoli. On 18 July 2001, it transferred its registered office to the United Kingdom and removed itself from the Italian register of companies.
- On 28 October 2003, Intesa (a financial institution) petitioned the Tribunale di Bari in Italy to open bankruptcy proceedings against Interedil. Interedil argued that the Italian court lacked jurisdiction as a result of the transfer of its registered office to the United Kingdom and that only the UK courts had jurisdiction to open insolvency proceedings. It requested a ruling on the preliminary issue of jurisdiction from the Italian Supreme Court of Cassation in December 2003.
- On 24 May 2004 and prior to the Italian Supreme Court making its decision, the Tribunale di Bari established that the undertaking in question was insolvent and ordered that *Interedil* be wound up, claiming that I*nteredil*'s contention that the Italian courts did not have jurisdiction was manifestly unfounded.
- Interedil then appealed the order to wind up before the Italian Supreme Court, which found that the Italian court of first instance (Bari) had jurisdiction on 20 May 2005.
- The court relied on the reasoning that the presumption of registered office could be rebutted in this case as a result of the immovable property located in Italy, the existence of a lease agreement, and a contract concluded with a banking institution, as well as the fact that the registrar of companies had not been notified of Interedil's transfer of registered office.

Important points recognized under this case –

1. COMI must be determined by attaching greater importance to the place of the company's central administration, established by objective factors that are ascertainable by third parties.

2. Where the company management/supervisory bodies and registered office are in the same place as where the management decisions of the company are taken (in a manner that is ascertainable by third parties), the 'registered office presumption' cannot be rebutted.

3. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in another Member State cannot be regarded as sufficient to rebut the 'registered office presumption' unless it is possible to establish that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.

4. Where the registered office is transferred before a request to open insolvency proceedings is lodged, the company's COMI is presumed to be the place of its new registered office.

CASE LAWS WITH RESPECT TO DETERMINATION OF COMI IN CASE OF GROUP CROSS-BORDER INSOLVENCY I.E. WHERE MORE THAN ONE COUNTRIES ARE INVOLVED IN INSOLVENCY

Daisytek-ISA Ltd. and others (2003)[6]

Facts of the case and summery of proceedings –

- Daisytek was a group composed of 16 European subsidiaries, reselling electronic office supplies in Europe.

- In early 2003, Daisytek was in default of secured loans owed to Bank of America, which precipitated a significant downturn in liquidity and eventually led to the filing of insolvency proceedings in the United States, England, France, and Germany.

- The parent company of the European companies was located in the UK (Bradford) and performed the head office functions of the Group, while there were also operating branches in France and Germany (having their registered offices in such countries). The parent company was in charge of the negotiation of supply contracts with some major suppliers of the whole group and had also given important guarantees to the suppliers of the French and German companies.

- The English proceedings were filed under the administration procedure (Insolvency Act 1986 section 8 and Schedule B1) with the aim of achieving a more advantageous realization of the assets than would be achieved in a liquidation.

- Proceedings were also filed in both France and Germany with an argument that the COMI for their individual subsidiaries should be in their jurisdictions' courts.

- In Germany, the business manager of the German subsidiaries filed under German insolvency law as a result of 'overindebtedness', but he failed to inform the court that main proceedings had already been filed in England. When this came to light later, the court issued an order finding that decisions of the Leeds court would have no effect.

- The English administrator then filed an extraordinary complaint in the German court on the basis that the correct application of Article 3 should mean that England had the jurisdiction in these circumstances. Further grounds were then taken to the District Court, which reversed the county courts' finding that denied relief to the English administrator and eventually found that the initial position rejecting the English main proceedings was incorrect.

- The French Court of Appeal of Versailles eventually also overturned the first instance judgment and approved of the insolvency proceedings opened in England, while withdrawing the filing of main proceedings in France. The final say followed the decision by the ECJ in Eurofood for which *the Cour de Cassation* waited before rendering its final decision on the matter.

- Given the intense financial activity and complex nexus of guarantees of the English parent company in favour of its subsidiaries, the court determined that the COMI and therefore the jurisdiction to open main proceedings was in England and Wales.

Important points recognized under this case –

1. In order to determine the COMI of the companies of the group, the judge had to apply the rules set by the EU Regulation and, therefore, identify the place in which the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties.

2. The court also had to take into consideration the presumption, set by the EU Regulation, Article 3(1), that the COMI is located at the place of the company's registered office.

Important Case laws in India with respect to cross-border insolvency:

Rajah of Vizianagaram v/s Official Receiver, Vizianagaram (1962)[7]

This case may be recognized as a first case on cross-border insolvency in an independent India.

Facts of the case and summery of proceedings –

- The company Vizianagaram Mining Co. Ltd. was incorporated in England. The company took certain land from Rajah of Vizianagaram, the appellant, on lease.

- The company was being wound up as an unregistered company on the request of the appellant. The Official Receiver of Vizagapatam was appointed Official Liquidator of the company.

- Certain foreign creditors of the company filed proofs of their claim before the official liquidator.
- The appellant opposed to their claims being entertained on the ground that these liquidation proceedings were only for the advantage of the Indian creditors, and that the foreign creditors were not authorized to prove their debts in these proceedings.
- The official liquidator rejected these objections and permitted the foreign creditors to prove their claims in the winding up of an unregistered company. Hence the appeal was dismissed.

Important points recognized under this case –

- The provisions of Companies Act which have a bearing on the winding up proceedings makes no distinction between Indian or foreign creditors or between debts with respect to the business carried on in India or with respect to the business of the company outside India.
- Therefore of opinion that both on account of the specific provisions of the Act and of the general principles, the view taken by the Court below, that the foreign creditors can prove their claims in the winding up of the unregistered company is correct.

Jet Airways (India) Limited vs State Bank Of India & Anr (2019)

Facts of the case and summery of proceedings –

- Jet Airways (India) Ltd.(the Corporate Debtor) is subject to parallel insolvency proceedings in India and in the Netherlands.
- In India, the Company has been admitted into a corporate insolvency resolution process under the IBC. Pursuant to the order of the NCLT and resolutions duly passed at the meeting of the committee of creditors of the Company ("CoC"), the Resolution Professional was appointed.
- In the Netherlands, the Company was declared bankrupt and the Dutch Trustee was appointed to manage the estate of the Company.
- On an application made by the Dutch Trustee, NCLAT directed the RP in consultation with the CoC, to consider the prospect of cooperating with the Dutch Trustee so as to have joint "corporate insolvency resolution process of the Company".
- Accordingly, an agreement / arrangement was entered into by the RP under the guidance of COC with the Dutch Trustee to extend such cooperation to each other.
- As per the terms of the said agreement it was made clear that the Dutch Trustee shall not be entitled to participate and vote in the CoC Meeting.
- Thus, it was made clear that the 'Committee of Creditors' have no role to play as the agreement reached between the 'Dutch Administrator' and the 'Resolution Professional' of India is on the basis of the direction of this Appellate Tribunal.

CONCLUSION OVER THE CURRENT POSITION OF INDIA IN HANDLING THE CROSS BORDER INSOLVENCY ISSUES AND RECOMMENDATIONS

Currently, India does not have any formal legal framework for resolution of cross-border insolvency proceedings. However, the country has felt a need formulating the said legal framework many years back and is in the sincere efforts to finalize the same. Various attempts in this regard has been made by formulating various committees of scholars. On the basis of reports of the said committees, the government is planning to add a chapter on cross-border insolvency in the Insolvency and Bankruptcy Code. The amendment in IBC made by Indian government is somehow a good step for the way ahead. The Code's primary goal is to revise and insolvency to maximize asset value in a time-linked way. Despite the ambiguities, the order is a welcome step in order not to misuse this in the current economic scenario.

Suggested Cross-Border Insolvency Framework will make it possible for the country to deal with issues arising for the Indian companies with foreign assets and vice-versa. However, issues like insolvency treatment of corporate groups will still be a challenge. The proposed framework is intended for individual companies and not business groups. The UNCITRAL and the other international bodies resume examining many cross-border insolvency issues and developing feasible international alternatives to tackle the same. Thus, it is crucial that the Indian Framework should also be in sync with the extant laws in the partner countries, which are covered under the scope of the Draft Regulations.

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