

## THE INTERSECTION OF NATIONAL LAWS AND GLOBAL PROTOCOLS: INDIA'S PROPOSED CROSS BORDER INSOLVENCY FRAMEWORK

Vaibhav Tripathi\*

### ABSTRACT

*As the world progresses into an age where international trade and globalisation is not the exception but the norm of doing business, effective ways of handling these multi-country operations and instituting resolution practices to manage their various stakeholders are starting to become increasingly crucial. As is with any business, these companies also face the risk of eventually running into financial failure and being unable to honour their financial obligations, upon which the company will inevitably have to institute a “corporate insolvency resolution process”. The massive scale and distribution of numerous assets spanning across several borders hold various consequences and ramifications. The leading model legislation for the same continues to be the United Nations Commission on International Trade Law on Cross Border Insolvency’s “Model Law” which provides for a comprehensive and flexible outline to be followed by the countries. Despite of having 9 companies that were featured in the Fortune Global 500 for having the highest revenues in the world in 2024<sup>1</sup>, there still exists a harrowing lack of legislation to handle the cross-border insolvency process which may have led to India being ranked lower in the Ease of Doing Business Index<sup>2</sup> before its discontinuation in 2020. In this paper, the author dives into the existing Cross Border Insolvency framework in India and attempts to analyse the proposed “Draft Part Z” and its implementation, whilst discussing the history of the cases in India, and draws a comparative analysis with international development of adoption of the Model Law. Ultimately, the author suggests additions to be made, covering certain shortcomings that may arise from certain lacunas in the proposed draft.*

**Keywords:** Cross-Border Insolvency, UNCITRAL Model Law, Transnational

---

\* Vaibhav Tripathi is a Final Year Law Student, Symbiosis Law School, Pune.

<sup>1</sup> THE FULL FORTUNE GLOBAL 500 LIST, (2009)[https://fortune.com/ranking/global500/?fg500\\_country=India](https://fortune.com/ranking/global500/?fg500_country=India).

<sup>2</sup> DOING BUSINESS 2020,

[https://archive.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020\\_rankings.pdf](https://archive.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020_rankings.pdf) (last visited on April 7, 2025).

Insolvency Projects, IBC Proceedings.

## **TABLE OF CONTENTS**

|  |            |
|--|------------|
| <b>I. INTRODUCTION.....</b>  | <b>153</b> |
| <b>II. EXISTING FRAMEWORK IN INDIA.....</b>                        | <b>154</b> |
| <b>III. INTERJURISDICTIONAL ANALYSIS &amp; CASES IN INDIA.....</b> | <b>164</b> |
| <b>IV. CONCLUSION AND THE WAY FORWARD.....</b>                     | <b>169</b> |

### **I. INTRODUCTION**

As Prof. Ian Fletcher said, “Cross-Border Insolvency should be considered as a situation: in which insolvency circumstance in some way or the other transcend the confines of a single legal system, and where a single set of domestic insolvency law provisions cannot be exclusively applied without giving due regard to the issues raised by the foreign elements of the case”.<sup>3</sup> Therefore, the need for a robust and comprehensive cross border insolvency structure is mandatory for easing the concerns of the stakeholders and upping the confidence of foreign investors to step into Indian territory for expanding or setting up their businesses.

The current cross-border insolvency regime exists in the form of two sections<sup>4</sup> in the Insolvency and Bankruptcy Code of 2016<sup>5</sup> (hereinafter “the Code”), and several judicial pronouncements that paved the way cross border insolvency is handled in the country, which heavily rely on bilateral agreements. In October of 2018, the Ministry of Corporate Affairs of India published a report<sup>6</sup> suggesting

---

<sup>3</sup> IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 7 (Oxford University Press, 2<sup>nd</sup> ed. 2007).

<sup>4</sup> *Infra* note 11 at 4.

<sup>5</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016 (Ind.).

<sup>6</sup> MINISTRY OF CORP. AFFAIRS, GOV'T OF IND., *REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY*, (2018)

that there is a need to expand upon the Code to further append the sections pertaining to cross border insolvency by following the United Nations Commission on International Trade Law's model, which has already been adopted by over 40 countries<sup>7</sup>, and observing the outcome to see if it produces fair results for the country. In pursuance of this report, several committees were formed and reports were published which were aimed at understanding the global approach taken on the matter and shape into a format wherein it can be adopted in an Indian context. The Author attempts to provide a comprehensive, chronological and updated documentation of the same along with analysing the cases in India which have tackled the issue of navigating a cross-border insolvency without appropriate protocols or statutes for it and drawing international comparisons. Taking into account the experience of aforementioned foreign jurisdictions, the author additionally proposes the inclusion of a few provisions to the draft, in order for it to cover the existing lacunas in it.

## **II. EXISTING FRAMEWORK IN INDIA**

### **A. TYPES OF CROSS-BORDER INSOLVENCY REGIMES**

In a scenario where cross border insolvency is to be executed, the proceedings are generally governed by the local laws, and therefore if the creditors are spread across multiple jurisdictions, it makes it all the more confusing for them to navigate the process where they will in most instances, not be aware of the procedures and laws. There are three universal regimes of cross-border insolvency that are present: -

#### **1. Territorialism:**

In this method, the country where the proceedings have been initiated would use its own laws to resolve the insolvency process, thereby rejecting any foreign

---

[https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport\\_22102018.pdf](https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf).  
[hereinafter ILC, CROSS BORDER INSOLVENCY]

<sup>7</sup> S Shukla and K Jayaram, "Cross Border Insolvency - A Case to Cross the Border Beyond the UNCITRAL", 307,  
<https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf>.

influence on the same.<sup>8</sup> This made it so that the country's domestic creditors would ultimately have a favourable financial support than those laying claim from a foreign jurisdiction. A good example of the same is the old Companies Act of Singapore<sup>9</sup>. This ultimately favoured the country when it attained independent statehood, due to the system making it so that the local creditors would be the favoured majority. However, as the country became a centre of global commerce it started to receive increased investments from across its borders and to accommodate the foreign key stakeholders of its growth, it ultimately adopted the UNCITRAL Model Law (hereinafter "Model Law") in 2017, which favoured a more universal approach.

## **2. Universalism:**

This approach favours the insolvency resolution procedure being conducted in one country and its transferability into other jurisdictions, while retaining the place where proceedings are happening as "main". It lays the foundation for the concept of "Centre of Main Interest" (hereinafter "COMI") in the Model Law and was mainly developed in the United States of America. It allows the judge of the main proceedings to ensure that there is equity in the distribution of the assets to the concerned creditors since they are not limited by the assets present under their jurisdiction.<sup>10</sup> A good example of this regime can be seen in the case *in re: Avanti Communications Group PLC (Avanti)*<sup>11</sup>, wherein the courts in U.S.A. had recognised a third-party non-debtor guarantee release under the U.K. law.

## **3. Modified Universalism:**

---

<sup>8</sup> Ishita Das, The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 201645 VIKALPA 104 (2020).

<sup>9</sup> Ryan Halimi, An Analysis of the Three Major Cross-Border Insolvency Regimes (University of Chicago Law Sch. Chicago Unbound, Intl. Prog. Papers, Working Paper no. 47, 2017) [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1046&context=international\\_immersion\\_program\\_papers](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1046&context=international_immersion_program_papers).

<sup>10</sup> NEIL HANNAN, CROSS-BORDER INSOLVENCY - THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW 39 (2017).

<sup>11</sup> *In re Avanti Commc'ns. Grp. PLC*, 582 B.R. 603, 618 (2018).

Best described as a combination of both the first and second regimes<sup>12</sup>, it takes the concept of having a COMI and still allows for other jurisdictions where assets are situated to continue with ancillary proceedings in order to assist with the main proceedings. It also allows for the agents of the main proceedings to represent themselves at ancillary ones to allow for making requests for injunctions and other action required to be taken. The Model Law also adopts this method to be used by countries that chose to adopt it.

## **B. THE REGIME IN INDIA**

The current statutory framework on the topic is present in the form of sections 234 and 235 of the Code.<sup>13</sup> The former provides for India to have bilateral agreements with certain foreign countries thereby allowing for the application of the Code to the assets or property of a corporate debtor, including a personal guarantor of the corporate debtor situated in the said country outside India. The subsequent section allows for resolution professionals or liquidators (along with any other authorised entity) to submit an application to the Adjudicating Authority to take appropriate action with regards to the property or assets, which upon confirmation of need for action will further issue a letter of request, to the competent court of authority in the appropriate jurisdiction.

Therefore, we can understand that section 234<sup>14</sup> acts as an enabling provision for the Central Government to enter into bilateral agreements with foreign countries, and for the appropriate authorities to execute appropriate action when required by way of section 235.<sup>15</sup> However, there are a number of problems associated with this manner of working.

India is a country that follows English law, and its principles extend to the procedures of recognition of foreign proceedings, under the Civil Procedure Code of 1908.<sup>16</sup> These are reciprocally applied to India itself, whose proceedings

---

<sup>12</sup> A Walters, *Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, *Am. Bankr. L.J.* 47, 93 (2017).

<sup>13</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016, §234, §235 (Ind.).

<sup>14</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016, §234 (Ind.).

<sup>15</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016, §235 (Ind.).

<sup>16</sup> The Code of Civil Procedure, No. 05 of 1908, §13, (Ind.).

*The Intersection of National Laws and Global Protocols: India's Proposed Cross Border Insolvency Framework*

will have to undergo checks under foreign procedural law to be appropriately recognised. The thought process behind the bilateral agreements was to forgo the need for these lengthy procedures altogether. Yet, the actual process of arranging for and executing a bilateral agreement with other countries is a lengthy, costly and challenging affair, as it involves the executive's willingness and favourable political atmosphere, for the conditions to be right for an agreement to happen. This is clearly evident in the fact that up until the formulation of this paper, India had not executed a singular bilateral agreement with any foreign country under section 234 of the Code.<sup>17</sup> The issue of cross-border insolvency has been raised on a national level since a long time, notably in several committees, which were headed by Honourable Justices<sup>18</sup>, and in reports by domain experts<sup>19</sup>, all of which recommend the adoption of the Model Law in the early 2000s.

A possible explanation as to why there is a delay in the adoption of the Model Law can be traced to the Bankruptcy Law Reform Committee's report in 2015, wherein it recommended that the framework for cross-border insolvency should be formulated at a later date as the success of the same would be dependent on how successful the Code would be after it was approved and put in practice<sup>20</sup>. The Insolvency Law Committee's first report stated that the adoption of a framework akin to the Model Law would be a complex exercise, involving the analysis of

---

<sup>17</sup> Poorva Sharma, Crossing Borders in Bankruptcy: India's leap into Global Insolvency Law, CCL NLUO (June 7, 2024) (<https://ccl.nluo.ac.in/post/crossing-borders-in-bankruptcy-india-s-leap-into-global-insolvency-law>).

<sup>18</sup> MINISTRY OF CORP. AFFAIRS, HIGH COMMITTEE ON LAW RELATING TO INSOLVENCY & WINDING UP OF COMPANIES, COMMITTEE REPORT (2000) <https://ibbi.gov.in/uploads/resources/July%202000,%20Eradi%20Committee%20Report%20on%20Law%20relating%20to%20Insolvency%20and%20winding%20up%20of%20Companies.pdf>.

<sup>19</sup> RESERVE BANK OF INDIA, EXPORT COMMITTEE ON BANKRUPTCY, REPORT OF THE ADVISORY GROUP ON BANKRUPTCY LAWS, (2001) <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/20811.pdf>.

<sup>20</sup> DEPARTMENT OF ECONOMIC AFFAIRS, BANKRUPTCY LAW REFORMS COMMITTEE, INTERIM REPORT, (2015) [https://msme.gov.in/sites/default/files/Interim\\_Report\\_BLRC\\_3.pdf](https://msme.gov.in/sites/default/files/Interim_Report_BLRC_3.pdf). [hereinafter BLR, INTERIM REPORT]

international practice at an extensive level to be made first.<sup>21</sup> Thereafter in its second report it suggested that the cross-border insolvency system can be rolled out for corporate debtors with individual insolvency provision to follow suit afterwards.<sup>22</sup> This second report also contained a “Draft Part Z” aimed to fix the lack of a proper framework of cross-border insolvency in India. While the Insolvency Law Committee’s report was impressive, it was solely based on the Model Law, and failed to account for the inclusion of analysis of other documents<sup>23</sup> such as the American Law Institute’s NAFTA Transnational Insolvency Projects<sup>24</sup>, and the International Bar Association Cross-Border Insolvency Concordat<sup>25</sup> and the EC Regulation on Insolvency Proceedings<sup>26</sup> as was earlier suggested by the Bankruptcy Law Reform Committee’s Interim Report.<sup>27</sup> Furthermore, the issue of group insolvencies was also suggested to be added at a later stage, effectively being side-tracked.

### C. UNCITRAL MODEL AND INDIAN ADOPTION

The UNCITRAL Model Law on Cross-Border Insolvency<sup>28</sup>, or the “Model Law” was enacted in the year 1997 by the United Nations Commission on International Trade Law. It was done to assist the nations in formulating their own cross border insolvency laws, containing provisions to promote and ensure an efficient and fair system of managing transnational cases. Several countries such as the United States, United Kingdom, Singapore, New Zealand, and Canada have

---

<sup>21</sup> MINISTRY OF CORP. AFFAIRS, THE INSOLVENCY LAW COMMITTEE, REPORT, 5 (2018), [https://ibbi.gov.in/ILRReport2603\\_03042018.pdf](https://ibbi.gov.in/ILRReport2603_03042018.pdf).

<sup>22</sup> ILC, CROSS BORDER INSOLVENCY, *supra* note 5.

<sup>23</sup> *Supra* note 8.

<sup>24</sup> J L Westbrook, J S Ziegel, The American Law Institute NAFTA Insolvency Project, 23 BROOK. J. INT’L L. 7 (1997).

<sup>25</sup> INT’L BAR ASS’N, COMMITTEE J CROSS BORDER INSOLVENCY CONCORDAT, 1 (1995) <https://is.muni.cz/el/1422/podzim2007/MV733K/um/concordat.pdf>.

<sup>26</sup> Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EU).

<sup>27</sup> BLR, INTERIM REPORT, *supra* note 17.

<sup>28</sup> UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>. [hereinafter MODEL LAW]

*The Intersection of National Laws and Global Protocols: India's Proposed Cross Border Insolvency Framework*

adopted it.<sup>29</sup> Others have adopted it too but have also made changes to the base law to fit their own needs. However, the BRICS countries with the exception of South Africa and Brazil have yet to adopt the Model Law in their Insolvency Framework<sup>30</sup>. In India, the Draft Part Z was also introduced with the former as its basis, as part of the ILC's 2018 report<sup>31</sup>. It was recommended to be introduced as part of the Code, finally giving cross border insolvency a much-needed comprehensive statutory basis. It adopts from the Model Law its four important elements to maintain the effectiveness, and fairness of the insolvency proceedings when spanning across borders: -

- Access (to foreign representatives): Part II of the Model Law goes in depth with the requirement of access being provided to the foreign creditors, with respect to the proceedings, and thereby giving them the chance to seek assistance.<sup>32</sup> This plays in well with the Draft as the ILC's recommendations on the matter were to give them an equal standing as the local creditor<sup>33</sup>, as recommended by the Model Law<sup>34</sup>, and serve known individual creditors notice at the same time as the local creditors, albeit in a cost-effective manner such as through digital means.<sup>35</sup> Complying further with the Articles 9 and 12, the Report further suggests giving the foreign representatives access to local courts through domestic insolvency professionals<sup>36</sup>, or having them register with the IBBI<sup>37</sup>, however leaving the ultimate decision to the legislative.
- Recognition (of foreign proceedings): This has been explained in chapter III to save time and resources of all the parties involved. The Model Law

---

<sup>29</sup> UNITED NATIONS, STATUS: UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status).

<sup>30</sup> *Id.*

<sup>31</sup> ILC, CROSS BORDER INSOLVENCY, *supra* note 5.

<sup>32</sup> MODEL LAW *supra* note 24 art. 13.

<sup>33</sup> ILC, CROSS BORDER INSOLVENCY *supra* note 5 at 28.

<sup>34</sup> MODEL LAW *supra* note 24 art. 13(2).

<sup>35</sup> ILC, CROSS BORDER INSOLVENCY *supra* note 5 at 29.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> *Id.* at 27.

suggests that a COMI should be established where the debtor will have a habitual residence or registered office<sup>38</sup>, and therefore the proceedings in that particular jurisdiction should be recognised as the main proceedings, while the other foreign proceedings where the debtor has an establishment (where the corporate debtor carries out a “non-transitory economic activity with human means and goods or services”) can be considered as non-main proceedings.<sup>39</sup> This has been improved upon in the ILC’s report by including the recommendation of mandatory disclosure of other known proceedings, against the debtor, in order for the Adjudicating Authority to have all the necessary information at its disposal.<sup>40</sup>

- Relief (to assist the foreign proceedings): It is one of the most important elements of the Model Law, as it strongly recommends an automatic moratorium<sup>41</sup> upon the recognition of a foreign ‘main’ proceedings of the court and granting interim relief as part of Article 19.<sup>42</sup> The ILC’s Report lays down two different kinds of reliefs, them being mandatory and discretionary. The former would be executed upon the recognition of the foreign main proceedings, and the latter would be executed in the event of recognition as either foreign main proceeding, or non-main proceeding.<sup>43</sup> The mandatory reliefs are recommended to be lifted directly from the existing Code. This includes the automatic moratorium as provided under section 14<sup>44</sup>, and allowing for the right to commence with individual proceedings against the corporate debtor to the extent necessary to preserve claims against the corporate debtor<sup>45</sup> not being affected by the moratorium period. This is necessary as it would be challenging to enforce in a transnational setting with several different

---

<sup>38</sup> MODEL LAW *supra* note 24 art. 6(3).

<sup>39</sup> MODEL LAW *supra* note 24 art. 2(c), 2(f).

<sup>40</sup> ILC, CROSS BORDER INSOLVENCY *supra* note 5 at 31.

<sup>41</sup> MODEL LAW *supra* note 24 art. 20.

<sup>42</sup> MODEL LAW *supra* note 24 art. 19.

<sup>43</sup> ILC, CROSS BORDER INSOLVENCY *supra* note 5 at 36.

<sup>44</sup> Insolvency and Bankruptcy Code, No. 31 of 2016, §14 (Ind.).

<sup>45</sup> MODEL LAW *supra* note 24 art. 20(3).

limitation periods. For the discretionary reliefs it suggests that Articles 21(1)<sup>46</sup> and 21(2)<sup>47</sup> be adopted with necessary modifications, and the power to allow a foreign representative to distribute the assets of the debtor located in the enacting country, under the latter, be used sparingly so as to not interfere with the main-proceedings, and ultimately the administration of other proceedings.<sup>48</sup>

- Co-operation and co-ordination (with the foreign courts): The Model Law provides that the local Adjudicating Authorities and representatives co-operate with foreign courts, and representatives “to the maximum extent possible”<sup>49</sup>. It gives six different examples of such co-operation.<sup>50</sup> The ILC recommends that there be an appropriate authority as notified by the Central Government, to assist the Adjudicating Authority in India to facilitate better communication and joint proceedings. This authority shall also serve the function of establishing direct contact with the foreign representatives in order to procure information and seek assistance from them.<sup>51</sup>

A Cross Border Insolvency Rules/Regulations Committee was constituted by the Ministry of Corporate Affairs via an order no. 30/27/2018- Insolvency Section in January of 2020<sup>52</sup>. The aim of this was to provide the regulatory framework to make the Draft Part Z, and other recommendations provided by the ILC, a reality and implement them in an effective manner. In its 2020 report, it talks mainly about the issues to be faced by the implementation of the same, due to the existing laws and courts not being fully equipped with the right tools to handle cases of cross border insolvency<sup>53</sup>. It also gives recommendations on

---

<sup>46</sup> MODEL LAW *supra* note 24 art. 21(1).

<sup>47</sup> MODEL LAW *supra* note 24 art. 21(2).

<sup>48</sup> MODEL LAW *supra* note 24 art. 21(3).

<sup>49</sup> MODEL LAW *supra* note 24 art. 26(1).

<sup>50</sup> MODEL LAW *supra* note 24 art. 28.

<sup>51</sup> ILC, CROSS BORDER INSOLVENCY *supra* note 5 at 42

<sup>52</sup> MINISTRY OF CORP. AFFAIRS, INSOLVENCY SECTION ORDER NO. 30/27/2018 (2020) [http://14.140.191.94/Ministry/pdf/constitutionOrder\\_26022020.pdf](http://14.140.191.94/Ministry/pdf/constitutionOrder_26022020.pdf)

<sup>53</sup> MINISTRY OF CORPORATE AFFAIRS, CROSS BORDER INSOLVENCY RULES/ REGULATIONS COMMITTEE REPORT ON THE RULES AND REGULATIONS FOR CROSS BORDER INSOLVENCY

amending certain definitions in the Companies Act of 2013<sup>54</sup>, and LLP Act of 2008<sup>55</sup> to expand upon them, to help extend the Insolvency Code's applicability to foreign company and LLPs<sup>56</sup>. Furthermore, it takes a step towards the digitisation and ease of access by suggesting the introduction of an online mechanism and the maintenance of the same by the IBBI, to allow for foreign representatives to apply for co-operation from the NCLT in insolvency matters.<sup>57</sup> It also further made significant contributions to clear up the remaining shortcomings in the draft by giving clear tests to determine the COMI, on the basis of both date and factors to be considered, while laying down protocols to be followed when dealing with and granting relief to foreign representatives and courts, and most importantly creating "typologies" of various cross border insolvencies.

An updated report presented by the ILC in 2022<sup>58</sup> discussed the issues submitted by the stakeholders regarding important topics such as the setting of timeline for approval, or dismissal of resolution plans to 30 days of a timeline to avoid unnecessary delays, and recommending the IBBI to set guidelines for the standard of conduct to be observed by the Committee of Creditors.

#### **D. TYPOLOGIES & RECOMMENDATIONS**

Typologies are important for three crucial reasons. Firstly, identifying the case types that would be more likely to trigger a cross-border insolvency. Secondly, figuring out the four key elements incorporated under part Z which will apply to the respective cases, along with the manner of application. Lastly, the manner in which the sequencing of foreign and domestic insolvency proceedings would

---

RESOLUTION 72 (2020) <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf>(hereinafter "CBIRC REPORT")

<sup>54</sup> The Companies Act, No. 18 of 2013 (Ind.)

<sup>55</sup> Limited Liability Partnership Act, No. 6 of 2009 (Ind.).

<sup>56</sup> *Supra* note 8.

<sup>57</sup> *Supra* note 44.

<sup>58</sup> MINISTRY OF CORPORATE AFFAIRS, GOV'T OF INDIA, 5<sup>TH</sup> REPORT BY THE INSOLVENCY LAW COMMITTEE (June 15, 2022), <https://ibbi.gov.in/uploads/resources/f841a45902d901ef311fe6d76127d094.pdf>.

affect the rules and regulations to be enforced upon the same.<sup>59</sup> There are several recommendations given to be applied to the different case types.

**1. Indian companies<sup>60</sup>: -**

- IBC Proceedings (Domestic): In the case of an Indian company with both foreign assets and liabilities or only foreign assets, the report recommends that the proceedings under IBC should be recognised as the main proceedings by foreign courts. Additionally, access should be given to the Indian Insolvency Professional to the foreign courts. Finally, co-operation is to be established between the NCLT, Indian IPs and Foreign Courts to the maximum. In case there are only foreign liabilities existent, then the only recommendation to be made is that there should be co-operation between the foreign courts, the NCLT and Indian IPs.
- Only Foreign Proceedings: In the case of only a foreign proceeding being initiated, with either foreign assets or liabilities being existent or both, the NCLT would be required to recognise the foreign proceedings. Additionally, access to the Indian assets and properties would have to be granted to foreign representatives, along with the Indian creditors being given access to the foreign proceedings.
- Concurrent proceedings: In the event of foreign proceedings being simultaneously initiated with domestic proceedings, and foreign assets and/or liabilities existing, the main recommendations are the recognition from both the sides (Indian proceedings abroad and foreign proceedings by Indian Court) along with access being given to representatives on both the sides. Finally, the representatives and courts on both the sides have to co-operate with each other on all the regards, much like the example laid down in *Jet Airways v SBI*.<sup>61</sup>

---

<sup>59</sup> CBIRC REPORT *supra* note 49 at 18.

<sup>60</sup> CBIRC REPORT *supra* note 49 at 27.

<sup>61</sup> *Jet Airways v. SBI*, 2019 SCC OnLine NCLAT 1216.

## **2. Foreign Companies<sup>62</sup>: -**

- Domestic proceedings (in the home jurisdiction of a Foreign Company): In case of a foreign company having assets and liabilities (or only assets existent in India) there the NCLT would be required to give recognition to the foreign proceedings as the main proceedings. Access would also have to be given to foreign representatives to Indian courts and assets, as well as the Indian creditors being given access to the foreign courts. In the event of only Indian liabilities being existent, the Indian creditors will require access to the foreign court proceedings. As is with all cross-border insolvency cases, the co-operation of NCLT and the foreign representatives would be imminent.
- Foreign proceedings (not in the home jurisdiction of a Foreign Company): The requirements would be pretty much the same in the event of the foreign company's insolvency proceedings being initiated in a jurisdiction that is not its home jurisdiction. The recognition from NCLT would be directed towards wherever the proceedings are underway, and much like the previous example foreign representatives and Indian creditors would have to be given access and co-operation in Indian courts and foreign proceedings respectively.
- Concurrent proceedings: In the event of the foreign company having assets or liabilities in India, the recognition of foreign main proceedings would be important, along with the Authorities agreeing on the same in an amicable manner.

### **III. INTERJURISDICTIONAL ANALYSIS & CASES IN INDIA**

#### **A. HISTORY OF CASES AND DEVELOPMENTS IN OTHER JURISDICTIONS**

Despite the lack of a comprehensive statutory structure to support cross border insolvency cases in India, there have been several notable judgements in the concerned area, and attempts have been made to circumvent the lacunas to

---

<sup>62</sup> CBIRC REPORT *supra* note 49 at 28.

*The Intersection of National Laws and Global Protocols: India's Proposed Cross Border  
Insolvency Framework*

execute a cross border insolvency successfully.

The first notable instance of cross border insolvency in India can be attributed to the Macfadyen<sup>63</sup> case wherein one of the partners of an Anglo-Indian partnership, Patrick Macfadyen had died and subsequently the liquidation proceedings were started. The trustees and courts in London and Madras jurisdictions then had come to an agreement on the claims submitted, and upon the same being challenged, the English court had held that it was both “a proper and common sense arrangement”, adding that it was made in the greater interest of all the parties involved. This shows the development from one of the first recorded cross-border insolvency cases in English law: *Solomons v Ross* (1764)<sup>64</sup> which laid down the doctrine of ubiquity in insolvency cases, i.e., the bankruptcy declared at the domicile of the debtor must be recognised everywhere.

When compared to several other countries such as the United States, or even geographically closer jurisdictions within the continent such as Singapore, India lacks behind severely. If we look at more cases of insolvency within the country wherein the parties were located across several jurisdictions, the courts have relied upon some interesting sources to give consequential orders. In what can be called the first case of cross border insolvency in an independent India, *Rajah of Vizianagaram v/s Official Receiver, Vizianagaram* (1962),<sup>65</sup> a mining company incorporated in England was given land on lease by the then ruler of Vizianagaram (modern day Vishakhapatnam), and proceedings for winding up of the company were eventually started. When the foreign creditors of the company laid their claims during the assets' liquidation process, they were challenged on the basis that the instant liquidation proceedings were solely for the benefit of Indian creditors, which was rejected by the liquidator appointed in the case. This further laid the precedent that provisions of the relevant statute did not differentiate between creditors based in domestic and foreign jurisdictions. When compared to modern day England, certain designated countries under the Model Law can send a letter

---

<sup>63</sup> In re P. Macfadyen & Co. Ex parte Vizianagaram Co., Ltd. [1908] 1 K.B. 67.

<sup>64</sup> *Solomons v. Ross*, (1764) 1 HBI 131.

<sup>65</sup> *The Rajah of Vizianagaram vs Official Receiver*, AIR 1962 SC 500.

to the courts to seek assistance in insolvency proceedings and the court will, as a general rule, proceed with providing said assistance to the applicant.<sup>66</sup> However, possibly due to the lack of adoption of the Model Law or existence of a similar mechanism in India, it is not listed as one of the designated countries.<sup>67</sup> The UK adopted the Model Law in 2006 and it is majorly shaped by the pre-existing laws of the country<sup>68</sup> in favour of comity.

When looking at the United States of America, the Model Law was “adopted” in 2005 by way of introduction of Chapter 15 of the Bankruptcy Code of the United States.<sup>69</sup> It encourages comity between the local courts and interested stakeholders and their foreign counterparts in order to achieve a smoother experience for everyone involved. Following the financial giant Lehman Brothers filing for bankruptcy in September of 2008,<sup>70</sup> which had multiple subsidiaries and affiliates in several different countries, the United States have been instrumental in developing the “universalism” approach. Similarly in the case of Singapore which is a well-known centre for international arbitration within the continent, if not the most favoured one, recently adopted the UNCITRAL Model in 2017.<sup>71</sup> As mentioned earlier in this paper, their approach has evolved from strictly territorial to favouring universal comity. This can be traced back to the judgement in *Re:Opti-Medix Ltd*<sup>72</sup> wherein a Japanese bankruptcy trustee’s title was recognised in the proceedings for bankruptcy of a company, even when trustee was not appointed by the domestic court of the company’s place of incorporation. Which, in turn, gave recognition to the idea of a “COMI” even when the Model Law was not formally adopted by the country in its insolvency statutory structure.

---

<sup>66</sup> Insolvency Act 1986, 5 & 6 Vict. C. 116, §426 (Eng).

<sup>67</sup> UK PARLIAMENT, THE CO-OPERATION OF INSOLVENCY COURTS (DESIGNATION OF RELEVANT COUNTRIES) ORDER (1996) <https://www.legislation.gov.uk/ukxi/1996/253/made>.

<sup>68</sup> Adrian Walters, Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law, 69, *AM. BANKR. L.J.*, 53 (2017).

<sup>69</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §1532 (2005).

<sup>70</sup> *Lehman Brothers Holdings, Inc.*, In re 415 B.R. 77 (N.D.N.Y. 2009).

<sup>71</sup> Companies (Amendment) Act, No. 15 of 2017, §41 (Sing).

<sup>72</sup> *Re Opti-Medix Ltd* 2016 4 SLR 312.

## **B. TWO DISTINCT CONCURRENT CASES IN INDIA**

We can see that this pattern of a landmark judgement paving the way for adoption of the Model Law has been followed in multiple countries. In case of India, including the judgements mentioned in the beginning of this section of the paper, the judicial trend has been to be as co-operative with the foreign courts and representatives and ensure comity with foreign creditors, aiming to achieve the spirit of universalism. Despite of some cases in the past that have favoured a territorial approach in matters pertaining to moratorium on assets of foreign companies situated in India,<sup>73</sup> cases such as the *Stanbic Ghana* case<sup>74</sup> and the *Agrocorp International* case<sup>75</sup> have laid the precedents in taking cognizance of foreign decrees and international insolvency proceedings.

Another reason why the Code strictly needs an expansion to include Cross Border Insolvency in it, is the different takes that courts have on application of several existing statutes and their interpretation. A good example would be to observe the dichotomy of approach in handling cases involving cross border insolvencies by the Adjudicating Authorities in India. The case of *Videocon Industries Limited*<sup>76</sup> is one that is plagued with a multitude of opinions from different parties at multiple junctions. Videocon Industries, which had humble beginnings as a paper tube seller, had expanded into a number of industries by sourcing the capital by borrowing from several Indian banks. However, come 2017, the profits seemed to be dwindling for the once well-established household electronics manufacturer leading to it having ₹90,000 crores in debt at one point of time.<sup>77</sup> This led to ultimately filing for insolvency in the form of an application by one of its creditors- State Bank of India. Upon the NCLT approving the same, a resolution plan was produced before the NCLT by Twinstar Technologies

---

<sup>73</sup> *Sumkin Bussan International (Hong Kong) Ltd. v. King Shing Enterprises Ltd.*, 2005 SCC OnLine Bom 711.

<sup>74</sup> *Hemantraj v. Stanbic Bank Ghana Ltd & Anr*, 2018 SCC OnLine SC 3712.

<sup>75</sup> *Matter of Agrocorp International Private (PTE) Limited v. National Steel and Agro Industries Limited*, 2020 SCC OnLine NCLT 6054.

<sup>76</sup> *State Bank of India v. Videocon Industries Ltd.*, 2018 SCC OnLine NCLT 26067.

<sup>77</sup> Videocon Industries posts Rs 6,760 cr loss in FY19, *THE TIMES OF INDIA* (Nov. 27, 2019, 10:08 PM), <https://timesofindia.indiatimes.com/business/india-business/videocon-industries-posts-rs-6760-cr-loss-in-fy19/articleshow/72265529.cms>.

Limited which had surprisingly offered a repayment amount that was only scarcely higher than the actual liquidation value, along with an unprecedented 95% difference between the initial value and the market value on the sums (in other words, a “haircut”) owed to the financial creditors. Even more surprisingly, it was accepted by the Committee of Creditors initially in 2020- a move they ultimately reconsidered, and filed an appeal against it in NCLAT, which was challenged by Twinstar Technologies Limited in the Apex Court.

Even more issues plagued the case, as the creditor that moved the application for insolvency considered including the assets of four offshore subsidiaries of the company. In the Code, assets of a company’s offshore subsidiaries are not to be treated as assets of the company when drawing up repayment plans.<sup>78</sup> Despite of the previous section clearly laying this down, the Adjudicating Authority approved the request of the promoter to have the subsidiaries’ assets be included in Videocon Industries Limited’s repayment plan by terming it as an appropriate opportunity for lifting of the corporate veil, and the four subsidiaries, which were in reality SPVs (special purpose vehicles) created to shield particular assets from being sold off in the event of liquidation.<sup>79</sup> However, the NCLAT ordered a stay on these proceedings and ultimately the resolution plan was formulated without including the aforementioned subsidiaries. The matter is yet to be resolved. This case highlights the confusion created in interpreting the Code when faced with the challenges in Cross Border Insolvency, as the Code does allow the Interim Resolution Professional to include the shareholdings over foreign subsidiaries in its resolution plans, but prohibits the assets themselves from being included. This further creates issues when bringing into light the fact that the resolution professional can also liquidate the foreign subsidiaries in the appropriate setting with assistance from the domestic courts of the foreign company. However, this is also met with the same set of challenges that a lack of proper co-operative statutory structures presents; confusion over the protocol to be followed by the representatives and courts of the countries, and the recognition of creditors and their rights etc.

---

<sup>78</sup> Insolvency and Bankruptcy Code, No. 31 of 2016, §18 (Ind.).

<sup>79</sup> SBI v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745.

*The Intersection of National Laws and Global Protocols: India's Proposed Cross Border Insolvency Framework*

A better outcome was seen in the insolvency case of Jet Airways. The State Bank of India, a creditor to Jet Airways (India) Ltd., along with a consortium of other creditors, moved an application in the Adjudicating Authority for the initiation of insolvency proceedings against the latter<sup>80</sup>. Meanwhile, a bankruptcy application had already been filed in Netherlands where the company had been incorporated and a Dutch Administrator (hereinafter referred to as the “Representative”) was appointed for the same. Following this, the Representative approached the Adjudicating Authority’s Mumbai bench to gain recognition of the proceedings going on in the courts in Netherlands. However, after the Adjudicating Authority rejected his application and declared the foreign proceedings as null and void<sup>81</sup>, citing the lack of notification of the cross-border insolvency sections in the Code<sup>82</sup>, the Representative filed an appeal to the same which led to the foreign proceedings being recognised, and the execution of a Cross-Border Insolvency Protocol between the Representative and the Indian RP.<sup>83</sup> The aforementioned protocol along with the co-operation between the adjudicating authorities and the Representative were responsible for the successful resolution of Jet Airways.

This case presents a different outcome of a situation arising out of cross border insolvency proceedings in India. The involvement of a foreign representative and the show of co-operation from the appellate courts along with the involved parties resulted in the ideal outcome of a case, wherein even with the severe handicap of a lack of statutory backing a protocol was established on the basis of international norms and prompt action to resolve the issues of the creditors and the international representative was taken. The recognition of creditor rights, the establishment of India as COMI, and the ultimate swift resolution is proof that upon there being a conclusive structure to be followed, the courts and professionals in India are equipped to handle a case spanning multiple jurisdictions ultimately signalling the need for inclusion of draft part Z

---

<sup>80</sup> State Bank of India and Ors. v. Jet Airways (India) Ltd. (2019) SCC OnLine NCLT 23735.

<sup>81</sup> State Bank of India and Ors. v. Jet Airways (India) Ltd. (2019) SCC OnLine NCLT 23875.

<sup>82</sup> Insolvency and Bankruptcy Code, No. 31 of 2016, §234, §235 (Ind.).

<sup>83</sup> Jet Airways (India) Ltd. v. State Bank of India and Ors., (2019) SCC OnLine NCLAT 385.

into the Code.

#### **IV. CONCLUSION AND THE WAY FORWARD**

It can be observed that the cases of cross border insolvency within India have been approached in a multitude of ways. The introduction of Draft Part Z and furthermore the recommendations made by the Ministry of Corporate Affairs to the same are a good step towards implementation of the concept in India and providing a better option for restructuring and resolving of companies and large conglomerates that span across several borders. However, the inclusion of provisions pertaining to foreign assets belonging to personal guarantors of the corporate debtors would be a welcome addition to be made to the Draft, especially because the Code presently allows for the pursuance of action against personal debtors and their assets in case of an insolvency, yet the draft does not include their foreign assets. The inclusion of overseas assets of personal guarantors in jurisdictions that have given recognition to Indian insolvency proceedings can be favourable to creditors, and other stakeholders as it would be an assurance that the corporate debtor or their personal guarantor would not rely on special purpose vehicles, and evade the repayment by way of placing their assets strategically in jurisdictions that are out of reach. There would still be the option of placing the assets in jurisdictions that do not recognise India's insolvency proceedings, thereby making it nigh impossible to pursue them. Furthermore, taking into account the issues that may arise out of clashing laws between India and other countries, the need for a set of provisions laying down guidelines to be followed in the event of the same happening is a must to minimize the number of grievances emerging. Despite of the challenges involved in introducing and implementing this gargantuan task of making cross-border insolvency feasible and uniform, the involved parties have applied rationale behind, and researched extensively to the highest degree in constructing the layout of Draft Part Z. With the entire process of revising now nearing its end, the author hopes that the insolvency regime in India will greatly benefit from finally having a complete and feasible statutory structure to follow in what will surely be many cases of successful cross border insolvencies.