'CROSS BORDER INSOLVENCY': THE INDIAN LEGAL REGIME V REST OF THE WORLD

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Indian Laws for Cross-Border Insolvency

There are various reasons and instances that make a company insolvent at some point of time, that is, a stage where company becomes unable to pay off his debt and fulfil debt obligations. It is the legal framework which helps such companies to follow certain processes with the help of an appointed liquidator that helps them to dispose-off their remaining assets in such a strategic way that it reduces some financial burden of the insolvent company and even help the lenders-in-concern to get some part of their due money.

But the Insolvency and Bankruptcy Code (IBC)[1] in India- the existing law for insolvency- is incomplete in its nature since it covers aspects and the procedure of insolvency only at national or the domestic level (by the NCLT); it does not talk or discusses anything about the cross-border insolvency related laws. Even there is no provision in the IBC which deals with scenarios of insolvency procedure where the concerned company has its assets or liabilities in more than one country. The insolvency process for the companies; need to be fair, clear and transparent irrespective of the area of operations.

In the Jet Airways (India) Private Limited insolvency case[2]; the National Company Law Tribunal (NCLT) also held that the Indian IBC has no provision or mechanism which deals with valid and verified judgments of other nations of any said foreign insolvent judicial authority. In this company's similar but other case in the same year[3], the National Company Law Appellate Tribunal (NCLAT) set aside the NCLT Order, Mumbai Bench and stated that the administrator of the Dutch Court has no jurisdiction within the territory of India.

[1] Insolvency and Bankruptcy Code (IBC) 2016
[2] State Bank of India v Jet Airways (India) Ltd, CP 2205 (IB)/MB/ 2019, Order dated 10 June 2019
[3] Jet Airways (India) Ltd v State Bank of India, Company Appeal (AT) (Insolvency) No 707 of 2019, Order dated 12 August 2019

India owes a duty towards the investors or the creditors who are doing investments or providing financial help abroad, respectively. India should promote a secured platform, both for national and foreign debtors & creditors. The IBC just defines 'Person Resident Outside India[4]' (this Definition was upheld in the Shilpi Cable Case[5], giving foreign creditors same right as those of any domestic creditor at the time of the insolvency proceedings) and IBC in its provisions[6] just states that India has the option to ratify the treaties with other countries for the purpose of insolvency proceedings but nowhere it makes it mandatory.

To an extent, India can also request for some insolvency process in foreign land, that too in selected nations, but nothing beyond that. Section 44A of the CPC[7] allows the Indian Courts to enforce the orders passed by the foreign courts and it does include insolvency matters too.

We can refer to the Videocon case[8] for this. The Mumbai NCLT for the purpose of carrying out the insolvency resolution process, that the foreign subsidiaries of the company's corporate debtor should also be taken into account as its property including foreign oil and the foreign gas assets along with any interests or claims thereon.

It seems that it is easy for India to request for commencement of insolvency proceedings in some foreign territory but this is not so since it has various issues associated with it. Request for such issues requires some formal agreement between the concerned nations which is not that easy to be drafted, negotiated and executed. Such agreement making process is time consuming and involves a lot of technicalities. Also, there might exist few conflicts in such agreement-making since usually any two concerned countries have varied legal systems which might also mean differences while giving legal opinions.

Let us take example of the Nirav Modi / PNB Scam when it was before the US Court[9]. In this case, it explicitly highlighted the urgent necessity of bringing cross-border insolvency laws in India with its strict execution and implementation. Since such laws are absent in the country, India has failed many times and even date, it has not been able to get back its 'fugitive economic

[4] The Section 3 (25) of the IBC 2016
[5] Macquarie Bank Limited v Shilpi Cable Technologies Ltd, Civil Appeal No. 15135 of 2017
[6] Sections 234 and 235 of the IBC 2016
[7] Indian Civil Procedure Code (CPC) 1908
[8] State Bank of India v Videocon Industries Limited, Mumbai NCLT, MA 1306/2018 in CP No. 02 / 2018, Order dated 08 August 2019
[9] https://www.livelaw.in/pdf_upload/goi-v-nirav-modi-judgment-final-25022021-389755.pdf

offender', Mr Nirav Modi who in the year 2019, with Mehul Choksi, committed a huge fraud of Rs.14000 crores by doing scam with the Punjab National Bank in India.

After the declaration of Nirav Modi being insolvent; the authorized agencies in this matter have been able to seize his assets in India and freeze his bank accounts as well for the purposes of repayments but still, the Indian aggrieved creditors of the scam, have not been able to get the access of the assets which are in the jurisdiction of the United States of America (USA) due to the foreign companies of Nirav Modi there. This shows the lacuna in our Indian Legal Regime because there are no definite laws for dealing with such cross-border insolvency problems.

In the case of Usha Holdings Case[10]; the NCLAT, New Delhi, India held that in our country; the insolvency adjudicating authorities have no jurisdiction or powers to decide on the matters relating to questioning or checking for the validity of the insolvency foreign judgments / orders

So, for better understating of the reasons for requirement of cross-border insolvency laws in India; we can categorize it into three aspects- for protection of the interests of the foreign creditors who have given some loan to an insolvent company, for aiding those debtors whose assets are in various jurisdictions at time of insolvency and for helping such companies which wish to initiate the insolvency process but have business operations at various places.

Need for Cross-Border Insolvency Laws

There are even some theories which, if applied, can help to resolve the urgent need of bringing cross-border insolvency laws in our India. For example, the 'territorial theory' gives an approach where a debtor with some existing property, can exercise the concerned insolvency laws at domestic level which makes it all the related debtors and creditors to fall under that jurisdiction. This means that the home country is given preference in such cases.

On the other hand, let us take example of the 'universalist theory'. It slows for initiation of various cross-border insolvency processes under one specific insolvency law with the help of one single insolvency officer who helps in distribution of assets of the insolvent company; irrespective of the place of the said company's assets, creditors and debtors.

[10] Usha Holdings LLC v Francorp Advisors Pvt Ltd, Decided on 30 November 2018, Company Appeal (AT) (Insolvency) No. 44 of 2018

In the Cambridge Gas Transport Corporation case[11] also; there was a need felt for a common and a uniform set of insolvency proceedings especially in the Common Law setup.

There is a requirement of a uniform, transparent and clear system for cross-border insolvency related laws and not necessarily in India only but also for every nation that can adopt and practice the same. There are various reasons for this. It will simplify the complicated procedures between two countries for negotiating for the purpose of proceeding with such kind of insolvency proceedings. It will provide for uniformity and an effective way for cooperation among the courts which are located in different jurisdictions for carrying out insolvency process for the concerned insolvent company.

Even the insolvency professionals would have convenience while carrying out the insolvency lawsuit in the regard and will be able to exercise their right more which includes right like taking appropriate action for the foreign assets of the insolvent company or say, for finding of the evidences for the insolvent case.

Principles in Cross-Border Insolvency

Some principles that we can observe in the aspects of cross-border insolvency laws could be broadly divided into three sections. One part could be forming of such laws on the basis of the principles of jurisprudence, considering the possibility of affecting the sovereignty while carrying out same insolvency proceedings in other countries as well. Examples of such jurisprudential principles are principle of unity, principle of cooperation, principle of equality, principle of mutual trust, principle of universality, principle of communication and so on.

The other section with respect to principles of cross-border insolvency laws could be procedural principles, like the principle of efficiency, principle of transparency, principle of justice, principle of predictability, etc.

The last section of these cross-border insolvency comprises of the substantive principles which highlight the impact and result of the insolvency proceedings in-question on the grounds of the legal positions involved. These substantive principles include the principle of carrying out equal treatment with all the creditors of the insolvent company, principle of doing right treatment for the purpose of evaluating the value of assets of the debtor (s), principles related

[11] Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding PLC and Others) [2006] UKPC 26

to the protection of the company's debtors, principle of maintaining trust whether it be the secured creditors of the company or anyone bound by a legal contract and the principle of ensuring social protections for say, the staff and the employees of the insolvent company. Thus, we can say that it aims at overall protection of all the aggrieved ones who get affected after the declaration of the company being insolvent at the offshores level.

On the terms of the United Nations Commission on International Trade Law (UNCITRAL) Insolvency Model Law[12], which has been adopted by 50 countries but in total 54 jurisdictions across the globe[13]. India finally after years, in the current 2022 year, has proposed some amendments to the existing IBC 2016. India has recently proposed amendments in its IBC[14] to include resolutions related to the cross-border insolvency proceedings: a much -needed reform required in the Indian Legal Regime. This will even help the creditors to recover their amounts from those borrowers who wish to clear off dues by disposing off their foreign assets or even personal assets which are off-shore.

The UNICTRAL Model on Cross-Border Insolvency

The UNICTRAL Model Law on Cross-Border Insolvency (1997) helps the nations to bring changes in their respective legal systems so that they change with time and implement new laws and regulations as per the need of the hour in respect to cross-border insolvency aspects with an attempt to ease the insolvency process within different countries in such a way that peace and harmony are also maintained.

(Before UNICTRAL Insolvency Model came into existence; there was 'Model International Insolvency Cooperation Act' which never got adopted by any country of the world.)

Cross-Border Insolvency UNICTRAL Model Law[15] revolves around four major components.

Firstly, it is about 'access' which can be read under the Chapter II of this Model Law, which states the rights of the foreign creditors which includes getting access to the judicial courts or tribunals if they need any aid with respect to the concerned company's insolvency proceedings.

[12] UNICTRAL Model Law on Cross-Border Insolvency (1997)
[13] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status
[14] https://economictimes.indiatimes.com/news/economy/policy/budget-2022-proposes-a-faster-resolution-and-cross-border-insolvency/articleshow/89269106.cms
[15] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

- Article 9 permits the foreign representatives to directly approach local courts
- Article 11 allows the foreign representative to commence the insolvency proceedings as per the local laws if certain conditions are met in that State
- Article 12 authorizes the foreign representative to be part of the local insolvency proceedings related to the corporate debtor after it gets the recognition of the said foreign proceedings
- Article 13 gives right of access to foreign creditors in respect to the domestic ones

Secondly, it is regarding the 'recognition'. Here the foreign proceedings of the insolvency get recognized which helps to save both time and resources. This foreign proceeding can be 'main' or 'non-main' in nature, which is discussed later in this Paper. The Article 15 of the Model Law specifies about the application (given by the foreign representative in concern) which is for getting a foreign proceeding recognized while the Article 16 states presumptions for it. Thereafter comes the Article 17 where the judicial authorities take decision for recognition after taking into account the facts and circumstances along with the conditions laid down.

Thirdly, it mentions about the 'relief'. In simple terms, it is the interim relief given by the court-in-concern (within its scope and discretion powers) in form of a stay-order on the foreign proceedings which have got recognized, whether it be 'main' or 'non-main'. This is done after there is an application given by foreign representative which discusses about the scenarios where such stay-order is essential mainly when the matter is about protecting the interests of the company's creditors or the assets of the company's corporate debtor >> Article 19.

Fourthly, it is the 'cooperation and coordination'. The UNICTRAL Model Law gives the powers to the judicial authorities or the courts, as the case may be, to directly do communication with the concerned foreign court so as to coordinate for the simultaneous proceedings. The Articles 25 and 26 of this Model Law suggest for maximum cooperation that the local courts and the insolvency professionals should do with the foreign courts and foreign representatives whenever there is a matter related to the cross-border insolvency.

This will help in providing the appropriate relief to the aggrieved at the time of the company's insolvency, according to the Article 29. The Article 27 lists down the types of cooperation that can be undertaken here. The UNCITRAL Model Law under is Article 30 provides for coordination even in the cases where there is more than one foreign proceeding in the same matter.

Therefore, we can say that the 1997 UNICTRAL Model Law on Cross-Border Insolvency should ideally be adopted in cases / scenarios in which-

- A foreign insolvency professional or the foreign court in this regard, needs support of any one of the state countries in concern
- Both the foreign and the domestic insolvency proceedings are simultaneously taking place across the globe
- The insolvency proceedings need to commence in a particular area by the foreign creditors of the concerned company and other related parties
- Some help or assistance is required by the foreign country in the ongoing domestic insolvency proceedings of the said company

The UNICTRAL 1997 Model Law is helpful for the above-mentioned circumstances because it does have provisions which can enable-

- The creditors to get their right to access of assistance or support from the court and even this gets applicable for the foreign representatives of the insolvency proceedings
- For quicker recognition process of the foreign proceedings
- For better appointment procedure of the foreign representative(s)
- Providing for effective interim solutions or even stay orders, as the court decides but within the ambit of its discretionary powers
- Coordinating the proceedings and also, the cooperation between the courts in different jurisdictions, where the assets of the debtor are located

Hence, we observe some benefits of adopting this 1997 UNICTRAL Model Law, in general, if adopted by any nation, which are as follows-

- Making the country more appealing for the foreign investors
- Reducing time to exchange vital information between the two concerned countries
- Better efficient results while recovering the due credits
- More cooperation and support in the process of cross-border winding up
- More flexibility in implementing the foreign insolvency related laws
- Comparatively more recognition to the foreign proceedings in the home country
- More confidence in the foreign representatives and insolvency professionals to take up the insolvency proceedings both at national and international level

Overall, this 1997 Insolvency Law Model of UNICTRAL is complete and comprehensive in itself. It focusses on the bilateral frameworks of the two counties in matters related to the cross-

border insolvency in such a way that the whole procedure is not only simple to follow but also involves flexibility from time-to-time as the need arises. The clauses as given in this Model Law are not rigid, that is, not even restricted to particular jurisdictions in the world.

- It is essential for as many countries, as possible, to adopt this Model Law so as to bring consistency and uniformity in such kind of cross-border insolvency laws, in various parts of the word, for better execution purposes and to boost the trust level among various market players, in the financial markets, whether it be investors or creditors or the common public or financial institutions or banks or custodians, to be a part of this system, whether it be in any area across the globe.

Incorporation of the UNICTRAL Model Worldwide

The above-mentioned UNICTRAL Model Law has been incorporated by Australia (without amending the existing laws for domestic insolvency) by making this Model Law its Schedule I of the Australia Cross-Border Insolvency Act, 2008. The scope of this Act of 2008 is applicable to insolvencies related to both, the companies and persons.

Australia includes even the Comity Principle as covered under the Common Law- Australia has legal provisions for the recognition of the foreign representatives. There can be situations wherein the UNICTRAL Model Law might not be applicable at the time of a foreign court recognizing the said foreign representative so the Principle of Comity helps the foreign representative to gets its statutory rights related to the recognition, availed and accordingly, it is up to the discretion of the court to decide the further steps in relation to the foreign representative in concern.

Canada has taken the Provisions of the UNICTRAL Cross-Border Insolvency Model Law in its various Laws with an objective to primarily amend the 'Bankruptcy and Insolvency Act' and the Companies Creditors Arrangements Act.

Generally, the Bankruptcy and Insolvency Act does not restrict or prohibit for the application of the rules of equity and law in the foreign insolvency proceedings or orders, which commence through the application put forward by the foreign representative or any interested party to the matter. Also, this Act gives the courts the powers to rescind, review or do variations / changes to any insolvency proceedings which is valid under the said Act.

New Zealand though has adopted the UNICTRAL Model Law but it has not done much changes to its existing laws. It has amended the Schedule I of the Insolvency (Cross-Border) Act 2006 and has given more powers to the nation's High Courts for such matters so as to help the foreign courts wherever and whenever cooperation is required to deal a cross-border insolvency matter. Even under the Companies Act 1993 of New Zealand, there are legal provisions which gives powers to the country's High Courts to initiate liquidation proceedings of a foreign company, provided there is an application for the same and such application is not contingent to the fact that the corporate debtor has some or all its assets in New Zealand.

The United Kingdom (UK) in the year 2006, introduced the Cross-Border Insolvency Regulations on the basis of the UNCITRAL Model law, while it kept its main law for cross-border insolvency issues, as it is- the UK Insolvency Act 2000. UK gives the powers to the foreign representative to commence the insolvency proceedings after taking permission of the concerned / appropriate court, which has some concurrent cross-border insolvency proceedings going on with some British Court but with same Corporate Debtor of the same Company.

UK does not prohibit the foreign representatives in any aspect. After recognition of the foreign 'main' proceedings in the UK; such foreign representatives, while dealing with the assets of the insolvent company, are free and can easily go beyond the local jurisdiction of the UK, that is, the Great Britain.

In the case of Schmitt v Deichmann[16]; it has been held that the English Common Law has been enforced in such a manner that it has legal provisions for aiding the foreign courts and the foreign representatives for the insolvency proceedings, as per the Laws of the UK.

The United Arab Emirates (UAE) has not adopted the above-mentioned UNICTRAL Model Law but it has laws which recognize the foreign insolvency-proceedings in form of judgments or say, the legal precedents. UAE follows both the civil and common law systems. The UAE has the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) system which has already adopted the provisions of the UNICTRAL Model Law of Insolvency matters but with some changes / modifications, as per the existing legal regime.

Countries like Singapore are quick in adaptation. In the year 2013, it had set up a committee called as 'Insolvency Laws Review Committee' to review all its existing laws related to the

[16] Schmitt v Deichmann (2012) 2 All ER 1217, 1232-3 [62-65]

insolvency matters in the country.

The said Committee recommended to adopt the UNICTRAL Insolvency Model Law and the same was inserted and implemented within three years of giving of this suggestion. In today's time, a foreign representative can easily apply and approach a High Court of Singapore to recognize the foreign insolvency proceedings in concern but requires small formalities like attaching the copy of commencement of the said proceedings and a statement which mentions all the insolvency proceedings of the debtor in-question.

If we look at the scenario in Japan which did take into account many principles of the UNICTRAL 1997 Model Law of Cross-Border Insolvency; it had enacted and enforced its 'Law on Recognition of and Assistance for Foreign Insolvency Proceedings (The Recognition Law)' in the 2003 after tabling it before the Legislature in the 1990s, which later got amended in the year 2006. This was initiated primarily after the coming up of the recommendations by the Bankruptcy Law Committee in the year 1996. This was done to bring reforms in both the personal and corporate insolvency cases at the cross-border level, which focussed more on the rehabilitation aspects. Japan clearly makes a distinction between the laws for its own country and laws related to the foreign proceedings.

It seems that Japan was always ahead of time and was always ready to adapt to the changes but it is not the case. There are some significant provisions of the UNICTRAL 1997 Cross-Border Insolvency Law which has not yet been adopted by Japan like ways to proceed with automatic stay order, specific laws for recognizing the foreign proceedings, laws for permitting changes or modifications in the court related communications, etc.

On the other hand, South Korea's insolvency laws do recognize and provide for assistance in the foreign procedure and judgments and also, has legal provisions which allow for giving applications for the purpose of imposition of some automatic stay-order after the commencement of the insolvency proceedings (including foreign ones). Commencement of foreign insolvency proceedings is permitted after a simple application by the foreign representative in the court but sometimes it also requires with it, a written statement comprising of the translations too. The foreign court proceedings in South Korea fall under only the jurisdiction of the Seoul Bankruptcy Court, which has to, within one month, decide about the applicability of the application put forward by the foreign representative.

South Korea has altogether has enforced a new and unified bankruptcy act called as 'Debtor Rehabilitation and Bankruptcy Act (DRBA)' which became effective from 2006. It lists down the whole procedure to carry out a foreign / cross-border insolvency process, under the Article 629 while the Article 636 explains how the country can assist and cooperate in the foreign insolvency proceedings so as to protect the business of the debtor or the properties of the creditors, as the case may be in concern.

One of the advanced laws practiced in South Korea is removal of the concept of 'territorialism' in its laws which means that any proceeding, whether insolvency related or not, would remain applicable to the home country in such a way that its effect will spread even to the foreign countries as well and this the vice-vera situation here will be valid too. The legal provisions stating this principle of removal of territorialism, is mentioned under the Chapter V of the DRBA and it emphasizes on strict implementation, in very clear terms

Some countries are not that adaptative in nature, for example, South Africa. It initially had to break the obstacle of doing of the complicated work of negotiating with other countries to enforce treaties related to insolvency. It gradually bought amendments, in different years, to its Insolvency Act 1936 and Companies Act 1977 so as to update with time. Many times, there have been discussion in this country to adopt the UNICTRAL Insolvency Model Law, 1997 and it finally brought a separate Act called as 'Cross-Border Insolvency Act in the year 2000.

This new Act of 2000 had main objective to deal with the issues related to cross-border insolvency matters, like deciding the jurisdiction in other countries when such matters came to Africa's High Courts. This new Act helped the country to further strength the cooperation and coordination level between the South-African courts and the foreign courts in concern so which helped to decide, in a better way, how to administer the estate and assets of the insolvent company in-question to help mainly the creditors. The 2000 Act gives the foreign representatives the right to institute the insolvency proceedings.

This cross-border transparent and clear system in South Africa helps in creating a proper ranking setup for the claims of the creditors (foreign ones mainly) which fasten the process for the courts to decide for the insolvency matter by the authorized court. All this even enables to protect the related investments as well as preserve the employment, that is, considering issues, both before and after declaration of company being insolvent and its proceedings, as a whole.

It takes into consideration every-possible aspect related to the cross-border insolvency proceedings. Conflicts do arise till date in the country related to cross-border proceedings but overall, this legal system is better than many countries.

UNICTRAL Model Law in India

So, as far as India is concerned; if India adopts various provisions of this UNICTRAL Model then it will, to great extent, attract foreigners for investment purposes since the time to exchange information and transactions between the countries will get reduced and also, the system for credit recovery would be comparatively more effective. All this means more friendly relations of India with rest of the world and more growth for Indian economy along with more confidence among the market players to do business or be part of some company's business operations both at national and international level.

The economy of India will also get impacted in a way, keeping in mind the Foreign Direct Investment (FDI) and lack of cross-border insolvency laws in the country. This is because the bankruptcy procedures and resolutions do affect the long-term loans, the leverage ratios, bank recover rates, etc and the related values therein.

In France, there has been constant amendments in its legal regimes to protect the legal rights of the creditors even in dynamic era. The increased confidence of the creditors has led to sudden rise in the percentage of the FDI in in the country.

On the same grounds as that of France; even New Zealand has witnessed surge in its FDI level, like in the year 2007[17]. This country passed the Companies Amendment Act in 2006 which led to a more unified system of settling the debts with creditors in form of agreements, at the time of insolvency; for more transparency, clarity and efficiency.

Russia rewrote and passed a new legislation for insolvency issues in the year 2002 so as to meet up the latest modern international standards; which got later amended in 2009. All this led to increase in the FDI in country[18].

Hence, we can categorize all the benefits that India can get if it adopts the UNICTRAL 1997 Cross-Border Insolvency Law Model which are summarised below-

[17] World Bank FDI Report, SUPRA Note 3
[18] World Bank FDI Report, SUPRA Note 3

I. Economic Benefits- India will soon be an attractive destination for the foreign creditors who wish to invest in India.

II. Flexible Structure- If India gets UNICTRAL Model laws then it can have such legal system which balances and looks after both national and foreign insolvency procedures efficiently and in a less complicated manner along with judicial authorities will have choice to select which laws and precedents to be followed.

III. Intense Public Policy- India will be able to look after not only the creditors and corporate debtors who are in its jurisdiction but also abroad.

IV. More Reciprocity- If India adopts such Model Law, then it will mean more reciprocity of it with other nations of the world since involvement of two nations is essential to proceed with cross border insolvency aspects. More such reciprocity-based relations will mean better relations of Indi a with rest of the world, generally also and for dealing with global insolvency issues too.

V. Effectiveness and Efficiency- If India gets a unified yet simple cross border insolvency laws as per the UNICTRAL Model then the procedure to decide such matters will fasten as there will be more cooperation between the countries. This will result in more transparent, clear and appropriate judicial insolvency hearings.

India can make a try and add a new Chapter to its existing IBC 2016 which specifically deals with cross-border insolvency cases, like the United States of America (USA) has done. In the USA Bankruptcy Code, its Chapter XV has provisions only related to cross-border insolvency.

This Chapter XV was structured and enacted in a way such that during cross-border insolvency:

- It promotes cooperation between the USA and foreign courts in interests of the parties
- It provides for a good level of legal certainty
- There is more fairness, transparency and efficiency for all the stakeholders
- There shall be more protection and value maximization for debtor's assets
- Rescue process becomes easier for the financially weak company in concern

Let us refer to the case of Jaffé v Samsung Electronics Co. Ltd.[19] Here the Court, after considering the Chapter XV of the USA Bankruptcy Code, ordered directly to recognize the foreign proceedings in the question of the said matter.

[19] Jaffé v Samsung Electronics Co. Ltd., 737 F. 3d, 14, 17 (4th CIR 2013)

Also, in the Re Betcorp Ltd case[20], the Court permitted the USA Court to recognize the foreign Australian proceedings in question so as to protect the interests of the debtor in the USA.

The USA laws have provisions for providing recognition and assistance to the foreign representatives and foreign courts at the time of the insolvency. If sometimes laws are confusing or inconsistent then only the USA laws become applicable in the foreign insolvency cases / matters.

The USA Laws even allows the foreign representative (after recognition) to bring the ongoing or the pending insolvency proceedings under some other insolvency law provision but both the concerned laws have to be covered under the USA Bankruptcy Code.

However, in USA, once the domestic representative is appointed to carry out insolvency proceedings; it is not permitted to deal with foreign proceedings then and also, is not allowed to deal with insolvent company's assets which are not within the territory of the USA.

Insolvency is not same as bankruptcy. Insolvency is the situation where a person or company becomes unable to pay off its debts but on the other hand, bankruptcy is generally the legal process which helps to resolve the issue of the insolvency of a debtor in concern.

Few years back in India, in the year 2000, the Justice Eradi Committee[21] had recommended India to adopt the UNICTRAL Insolvency Model to deal effectively with issues related to cross-border insolvency, keeping in mind the need for adaptation in this globalization era.

Even in the year 2002 in India, the Committee of Professor Mitra[22] had emphasized on getting laws in India for the cross-border insolvency related aspects.

Then in the year 2015, Bankruptcy Law Reforms Committee[23] stated that it is true that India requires some legal provisions to deal with areas related to cross-border insolvency but it would be difficult to introduce the same since India still lacks the necessary institutional structure for it and still does not have sufficient number of insolvency practitioners and courts to execute it.

[20] Re Becorp Ltd., 400 BR 266 (Bankr D Nev 2009)
[21] http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf
[22] https://www.ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf
[23] https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

Later in year 2018, the Insolvency Law Committee Report in 2018[24] in India had also suggested and recommended for a unified system of cross-border insolvency in India. In the same year; Ministry of Corporate Affairs of India had even issued a public notice which allowed the banks to get access of the foreign assets of the company undergoing insolvency process[25].

This Insolvency Law Committee Report of 2018 also proposed and recognized the two types of foreign proceedings at the time of insolvency: main and non-main.

The 'Foreign Main Proceedings' are those judicial proceedings which commence at that jurisdiction where the corporate debtor has its COMI Generally, the UNICTRAL Insolvency Model Law of 1997 works on the principle of 'Centre Of Main Interest (COMI)' which in simple terms, mean that jurisdiction area where the insolvent company is mostly linked to or its debtors, for the purpose of carrying out insolvency proceedings. This Principle of COMI can also be seen in the European Commission (EC) Regulations[26] but not in India.

Some factors which can be taken into consideration to decide COMI Jurisdiction-

- Insolvent company's registered office area
- Financial books and accounts of the concerned company
- Location of main assets of the company
- Place of main business operations of the company
- Posting of the majority of company employees
- Legal local jurisdiction of the said company
- Location of the company's related third parties
- Area of management and supervision of the company

While the 'Foreign Non-Main Proceedings' take place where the concerned debtor has some kind of establishment, like for instance, an area where it carries some non-transitory economic activity with some assets or services.

** The EC Regulations on the Insolvency Proceedings 2000 provides the Members of the European Union (EU), a well-established legal structure for the aspects and the issues related to the cross-border insolvency. It provides for automatic routes for its EU Members to easily

[24] https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf
[25] https://indianexpress.com/article/business/banking-and-finance/draft-on-cross-border-insolvency-banks-to-get-access-to-overseas-assets-of-firms-undergoing-resolution-5227800/lite/
[26] EC Regulations on Insolvency Proceedings, 2000- For the Members in the European Union

recognize a foreign insolvency-based proceeding. These Regulations also has such legal provisions which allow for joint insolvency proceeding, involving only a limited number of corporate debtors in it along with an appointed liquidator as well.

The EC Regulations has categorized the cross-border or the regular insolvency proceedings into three types-

- Main Proceedings- Here the COMI of the debtor(s) lies within the EU area. The proceedings are held in a way that the main insolvency proceedings are in one jurisdiction (having universal reach in respect of all the concerned debtors) and the other insolvency proceedings fall in that jurisdiction which the EU recognizes.
- Secondary Proceedings- Here an establishment is created for the debtor, that is, an area or place where the business operations of the debtor had been taking place. Any Member of the EU can commence such 'Secondary Proceedings' but the consequences or results of such proceedings shall get restricted to that EU Member State only.
- Territorial Proceedings- Here the corporate debtor has its establishment built but there does not go on any 'main jurisdiction' in any other territory.

In the Euro-food IFSC Ltd Case[27]; the Honourable Court here held that in the cases where there is any conflict while deciding the COMI of the debtors by the creditors, then the views of that creditor will be considered, which hold the claim having value highest of all.

In the Niki Luftfahrt GMBH Matter[28]; the Court upheld the scenarios where there could be a possibility of rebutting or refuting the presumption of corporate debtor's being its registered office so the judicial authorities can allow for insolvency proceedings in other Member Nation State of the EU.

This 2018 Insolvency Law Committee Report of India even stated for some reliefs, whose application depends upon type of foreign insolvency proceedings. There are two kinds of reliefs mainly that is 'mandatory' and 'non-mandatory' for declaration of the moratorium period. (The moratorium period simply means a legal permission for the debtors to postpone a payment. So, in terms of insolvency, moratorium period in the IBC 2016,[29] refers to that period where no

[27] Re Euro-food IFSC Ltd Case, Case C-341/04, Decided by the Grand Chamber Court on 02 May 2006
[28] Niki Luftfahrt GMBH v European Commission, Chamber VIII of General Court, Decided on 13 May 2015
[29] The Section 14 of IBC 2016

judicial proceedings could be initiated or continued against the corporate debtor for any purpose; like for recovery of money, transfer of assets, termination of contracts, etc.)

'Mandatory Relief' by the NCLT takes place in a foreign main proceeding for declaring the moratorium period in cases like where the corporate debtor has to transfer any of its legal right or beneficial right or say in cases like wherein the corporate debtor has to get enforced some security interested created on its property according to the SARFAESI Act 2002[30] and so on.

On the contrary, 'Non-Mandatory Relief' in foreign non-main proceeding enables the option of the NCLT in some of the cases listed under grounds for mandatory relief, as the court deems fit, depending case to case.

The above-stated 2018 Insolvency Report also had provisions for 'concurrent proceedings' for the cross-border insolvency cases. Its first phase includes identifying the foreign main proceedings then comes the simultaneous proceedings and at end, it involves coordination of various / more than one proceeding.

In the year 2020 in the month of January, the Ministry of Corporate Affairs of India had even tried to set up a Special Committee to critically analyse the issues in the Indian insolvency laws so that a better insolvency law system could be introduced in the country which uniformly and in a well-planned manner, easily handles the cross-border insolvency problems in a better way.

All the Recommendations given by Such Committee[31] have not been implemented in India or taken into consideration yet.

If we observe the Economic Survey of the year 2021-22[32], given by Indian Ministry of Finance, we see that it had discussed about the rising need for cross-border insolvency laws system in the country and if gets into execution then it has to be specific and clear in its nature.

The Survey also stated that if such legal framework of cross-border insolvency comes into existence, then it's provisions should address some key issues which are listed below-

- Defining the extent of the powers of the company's administrator should be defined while it is accessing the assets which are in some foreign jurisdiction

[30] The Securitisation And Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act 2002
[31] https://www.mca.gov.in/Ministry/pdf/constitutionOrder_30012020.pdf
[32] https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf

- Enlisting the circumstances in which domestic creditors need to be given priority over the foreign creditors
- State scenarios when both national and foreign insolvency processes can be permitted
- Procedure for recognizing the claims of local creditors in foreign land
- Enforcement system of the company's securities, taxes, etc

The legal systems in countries like Switzerland, are a bit different. Switzerland country has 'Summarized Bankruptcy Proceedings' which have been established with an objective to provide for a quick liquidation / winding up process (both nationally and of foreign cases) in a manner that there is no requirement of any formal meeting of the creditors; this reduces both time and resources of the insolvency resolution process which leads to a quick and a more effective legal solution for the aggrieved.

The ideology behind the tracing of the assets after declaration of insolvency, can be cumbersome in nature. It is not necessary that the key managerial personnel or the directors or the promoters or any insider of the concerned company, will disclose every detail, once the company is 'insolvent'. This can lead to Company Resolution Professionals using information from varied sources or third-parties, to decide for further steps of the company's winding up / liquidation process; creating more difficulties in areas of 'tax havens', as seen globally.

The 'tax havens' hardly give any access over the authorized databases or digital records to the Insolvency Resolution Professionals due to the strict implementation of the 'confidentiality clause' and due to 'less recognition of the insolvency laws of the other countries', so this can result in more issues in identifying the actual status of the insolvent company's assets and liabilities in various jurisdictions globally. Hence, the whole procedure of insolvency resolution becomes complicated, especially if it is a cross-border one.

'Tax Havens' are mainly those economically stable nations in the world where taxes are imposed at very less rate, so as to attract the foreign investors. This is worrisome to some extent since it also attracts tax avoidance schemes for all its investors. Some examples of such 'tax havens' observed in cases of 'cross border insolvency' could be Cayman Islands, British Virgin Islands, Delaware in the USA, etc

The concept of tax havens can become a hurdle in the cross-border insolvency proceedings. Irrespective of the policies existing in the two concerned countries; development and creation of the bilateral understandings and conditions for executions, is always troublesome. No two

countries in the world can have same level of perception towards deciding a matter, primarily because their laws and ideologies cannot usually have same bases.

Our India can face comparatively more issues if cross-border insolvency proceedings include it and a tax-haven nation, since India till date, does not recognize the foreign insolvency proceedings only, in any of its laws or regulations irrespective of the jurisdiction.

So, we can observe and state some reasons behind a nation, like the USA or the United Kingdom (UK) or Singapore, being an 'insolvency-haven'-

- Some stay on the assets or acts of a Multinational Enterprise Group (MEG,) globally
- Immediate and operative remedy due to quick and good control over the debtors and creditors of the concerned company
- Imposition of court orders like some kind of injunction or seizure, which get executed immediately after the order, for accurate evaluation of the whole enterprise in concern

For better understanding of this concept, we can refer to the PARDL case[33]. Here, the Pacific Andes Resources Development Limited (PARDL) company had a few subsidiary companies in the Peru country, while the parent / home country was in Singapore and was duly listed on the Singapore exchange for the insolvency purposes as per the norms of the COMI. But both the courts of Singapore as well as of Peru, were unable to impose any global-level stay, neither on the concerned company's insolvency proceedings nor on their assets for attachment reasons.

Had it not this issue got resolved, another issue turned up, that is, the whole of the Enterprise Group in-question filed an application for bankruptcy in New York in the USA. New-York city was chosen here because the main creditors were located there. This New-York matter thus, resulted (indirectly) into a effective stay order on, any parallel proceedings across the globe related to the Enterprise.

We see that there was hardly any nexus between the country of the insolvency proceedings and the group of the enterprise, whether it be in part of or as a totality, this is primarily because the Enterprise did not have any of its assets there.

All this chaos created more confusion between the countries of different nations and this is why no court has found any legal solution for this problem of the Enterprise. Such legal issues can again rise in future easily in any jurisdiction so India should be prepared for this in-advance as

[33] In re Pac. Andes Res. Dev. Ltd (2016) SGHC 210-Singapore High Court.

it already does not have cross-border insolvency laws as such and it therefore, has any laws to prevent or protect from the dominance of positions in other nations. India needs to be vigilant and need to get more insolvency laws in such a way that it becomes able to tackle the new kind of menaces that can be interpreted from the matters of other countries.

Conclusion of the Research Paper with Some Suggestions

By concluding this Research Paper, we observe that our India is in a dire need to adopt the Cross-Border Insolvency Laws. It can adopt some or all the Provisions enlisted under the UNICTRAL Model Law on Cross-Border Insolvency (1997). This UNICTRAL Model Law is one of the most accepted Models across the globe (with some modifications depending upon the country's existing legal regime) because it is complete and comprehensive in its framework.

It almost covers all the aspects related to the cross-border insolvency proceedings as well as the problems, that could occur like for examples, this Model Law. It emphasizes more on the protection of the interests of all the stakeholders and the related parties of that company which has been declared insolvent.

If India adopts the above-mentioned UNICTRAL Model Law then first it has to bring some amendments to the Sections 234 and 235 of the IBC 2016. This will help primarily the debtors to recover the assets of the insolvent company, even outside India and this will help the central government from entering into various international negotiation treaties or bilateral agreements with other nations for the purpose of carrying out the cross-border insolvency proceedings.

This UNICTRAL Model Law will give more standards to the existing Indian insolvency laws with more definite legal provisions, even when the insolvency matter is of abroad. It will let India improve its rankings in terms of ease of doing business in it, at global level, since having laws for recognizing and doing foreign insolvency matters related, would boost the confidence of various national and international market players to be part of the Indian financial market.

This would even enhance the level and proportion of the foreign direct investments in India, which can turn out to be a booster for our Indian company. India can include more finance-related-entities during the cross-border insolvency proceedings, to provide more secured law system- example- Insurance companies. Such companies ensure more stability in the securities and financial markets which foster and enable further growth in the same industry.

Safe place for the companies to allow, which also have foreign collaborations, having laws to deal with legal issues at both in home country and abroad, lead to greater level of certainty for trading and investment purposes. This facilitates the rescue system for the company which is not yet insolvent but needs assistance to preserve the employment in the organization and its investors, whether domestic or foreign.

Adopting laws for cross-border insolvency matters in India would give more aid and access to those insolvency proceedings which are ongoing even outside the territory of India of that corporate entity which is related to India. This will help to achieve the maximum value of the assets of the corporate debtor in-question at the time evaluation during the insolvency proceedings, after taking into account all the necessary conditions and terms only.

Having specific and concrete laws for cross-border insolvency in India would not only bring, in future, more financial stability in the country but also will give means for better market integration at the national and international levels. This means more transparency, credibility, effectiveness, enter of new businesses, etc in India. This would help to eliminate some financial risks that might arise while doing business in India by a foreign company, resulting in the rise of the productivity and growth of our Indian economy.

If India adopts any Model Law for including and enacting the cross-border insolvency laws in the country then it is essential for such laws to give a proper, clear and legal definition for the concept of the COMI so that issues of deciding the jurisdiction in cases of cross-border insolvency, reduce to some extent. There can be even additional criteria or the conditions laid down to determine the COMI in the country.

The NCLTs in India should be given more powers in India, after incorporating the cross-border insolvency laws, as it is like the only adjudicating authority in the country to deal with the insolvency matters. Such powers should be enlisted and provided in a way that it gives the ease to the NCLTs to recognizes the foreign proceedings in the first place. These foreign proceedings to be of 'main' type, as discussed earlier in this Research Paper, which means commencement of the insolvency proceedings in that nation where the corporate debtor has some establishment. Once the NCLTs in India are given powers to initially recognize the foreign insolvency proceedings then it will immediately result and lead to the NCLTs getting more powers to function like the power to impose the moratorium period, which helps to protect and preserve the assets of the insolvent foreign company in India.