RECOGNITION OF CROSS-BORDER INSOLVENCY CASES IN INDIA: ANALYSIS OF THE PROPOSED DRAFT TEXT

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ABSTRACT

With the corporate world continuously expanding and becoming more globalised, there is an increase in the rise of multinational organizations that transcend national borders and establish a web of relationships between themselves in order to make it more seamless. Today, nearly all countries have business ties that surpass one or more borders, as a result of which corporations end up having debtors and creditors all across the globe. Hence, a company going insolvent has implications for people, assets, and businesses spread across various jurisdictions making it necessary for a protocol to deal with such cross-border cases. However, India till today lacks the existence of a proper system in place to effectively manage cross-border insolvency. The need for such a system was evident to lawmakers and the judiciary after cases like Jet Airways post which committees were instituted to make a report on the needs and suggestions for new cross-border laws along with ways to implement the same. The committee proposed a report containing Draft Z proposing the adoption of the UNCITRAL Model Law on cross-border insolvency with alterations to make it more personal and fitting to the Indian scenario. This proposed text may prove to be potentially relevant in a country like India, where the law is mostly silent regarding cross-border insolvency laws. Accordingly, this first part of the paper deals with the current provisions in the IBC for recognition of such proceedings and then analyses the cases handled by the Indian judiciary on foreign insolvency up until now. (I) The paper then examines Draft Z and its provisions, with the aim of breaking down the provisions and understanding its purpose. (II) Lastly, the paper moves on to explore the implications of implementing Draft Z in India and ends by identifying the problems and gaps in the Draft proposal. (III).

Introduction

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC), ever since its commencement six years back, has seen a paradigm shift in comparison to its dawning stages by a series of attempts made either by amendments or judicial precedents to address and solve the on-field challenges as and when faced. However, its provisions related to foreign insolvency and bankruptcy proceedings have remained unchanged- Sections 234 and 235 of the IBC.[1] These sections, to date, have not been notified and therefore have no real effect. Presently, any orders passed in India relating to an entity that owes assets and liabilities in more than one jurisdiction will have no value unless taken up by the Government of India with the foreign government on a case-to-case basis, therefore making the provisions ad-hoc in nature and susceptible to delay.[2] Essentially, while foreign creditors have provisions to make claims against a domestic company, automatic recognition of any Indian insolvency proceedings in other countries is not provided for in the IBC.[3] Accordingly, "recognition" means the ability of the court to identify and acknowledge the legal effect of a foreign judgement within its territorial jurisdiction.[4]

Background

With the corporate world continuously expanding and becoming more globalised, there is an increase in the rise of multinational organisations that transcend national borders and establish a web of relationships between themselves in order to make it more seamless. Today, nearly all countries have business ties that surpass one or more borders, as a result of which corporations end up having debtors and creditors all across the globe.[5] In this situation, if an MNC becomes bankrupt and has to undergo insolvency, the conflicting and overlapping legal provisions of such jurisdictions would render the entire procedure unfeasible.[6] Hence, cross-border

[1] Neha Malu and others, "Cross Border Insolvency in India: A Long Due Dream" (*Vinod Kothari Consultants*, 1 February 2022) <https://vinodkothari.com/2022/02/cross-border-insolvency-in-india-a-long-due-dream/> accessed 19 October 2022

[2] *R. Viswanathan vs Rukn-Ul-Mulk Syed Abdul Wajid* 1 1963 SCR (3) 22.

[3] Ministry of Finance, *Economic Survey 2021-22*, (Government of India 2022), ch Monetary Management and Financial Intermediation, para 4.66 to 4.68.

[4] Saloni Khanderia, 'The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgements: Should South Africa Endorse it?' 2019 Journal of African Law <doi:10.1017/S002185531900024X> accessed 19 November 2022.

[5] Ran Chakrabarti, 'Key Issues in Cross-Border Insolvency' (2018) 30(2) National Law School of India Review <https://www.jstor.org/stable/10.2307/26743940> accessed 19 November 2022.

[6] Chakrabarti (n 5).

insolvency law becomes essential in today's free business economy to provide for equitable allocation of an insolvent debtor's assets to its creditors.[7]

Cross-border insolvency refers to situations involving the bankrupt debtor having assets and creditors in several jurisdictions, or a situation wherein bankruptcy proceedings have been filed against them in multiple nations.[8] The primary issues that arise in cross-border insolvency are two-part; (i) where and how many proceedings should be institutionalized against the insolvent debtor, and (ii) which law should be applicable to such proceedings.[9] The predominant reason for such problems is every country's reluctance to give up the application of their domestic law, provided the matter has any connection, howsoever remote to their jurisdiction.[10] This also gives rise to their disinclination towards recognizing foreign judgements. Therefore, United Nations Commission on International Trade Law (UNCITRAL) introduced the Model Law on Cross Border Insolvency (hereinafter known as the "Model law") in 1997 in response to the appraised need to have a more uniform approach to cross-border insolvency difficulties, particularly post-the early 1990's recession.[11] The Model Law has been premised on four key elements: access, recognition, relief, and cooperation based on the principles of comity[12] and court intervention.[13]

Such shortcomings and the problems thus created have also been acknowledged by the Indian legislature and the judiciary, where the Finance Minister in the Union Budget 2022 announced that necessary amendments would be made to enable seamless cross-border insolvency resolution.[14] In one of the most famous Indian bankruptcy cases involving a foreign proceeding, the National Company Law Tribunal (NCLT), even after finding the foreign judgement true, could not take it on record due to the unavailability of a relevant provision in the Indian

[7] R. K. Bansal, 'IBC: The Journey So Far, Challenges Ahead and Way Forward' in *IBC: Idea, Impressions and Implementation* (Insolvency and Bankruptcy Board of India 2022).
[8] Chakrabarti (n 5).
[9] Sefa M. Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34(1) Oxford Journal of Legal Studies <https://www.jstor.org/stable/24562810> accessed 19 November 2022.
[10] Chakrabarti (n 5).
[11] Neil Hanna, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017) 4.
[12] Principle of comity refers to how courts of one jurisdiction or state accept the laws and rulings of other states or jurisdictions whether they be state, federal, or international not out of duty or obligation but out of reverence and respect for one another.
[13] Ian F. Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford Private International Law Series 2007) 453, [8.17].
[14]Nirmala Sitharaman, Minister of Finance of India, 'Budget 2022-2023' (Speech on 1 February 2022, Government of India) < Budget_Speech.pdf (indiabudget.gov.in)> accessed 19 October 2022.

statute.[15]

However, this is not a problem that has come to light recently. The problem was identified back in mid-2010, and several attempts were made to develop a standardised framework for Cross-Border Insolvency. An Insolvency Law Committee (hereinafter named ILC) was constituted in 2018 by The Ministry of Corporate Affairs (MCA) to analyse and evaluate the operation and execution of the IBC, hence identifying the gaps in the cross-border insolvency proceedings in India and finding viable solutions.[16] It suggested reviewing India's present insolvency laws since they did not meet global standards.[17] Later, it submitted a two-part report, wherein, in the second part, they formulated the Draft-Z proposing the adoption of the UNCITRAL Model Law on cross-border insolvency with alterations to make it more personal and fitting to the Indian scenario.[18] Succeeding the ILC report, the Ministry of Corporate Affairs (MCA) established the Cross Border Insolvency Rules/Regulations Committee ("CBIRC") to facilitate the seamless implementation of the cross-border insolvency provisions proposed in the ILC reports. The CBIRC had to provide suggestions on the rules and regulations required to operationalise the ILC proposal.[19]

The Draft Z proposed may prove to be potentially relevant in a country like India, where the law is mostly silent regarding cross-border insolvency laws, with whatever rules existing coming from precedents getting developed as and when the court is faced with such cases. Accordingly, the aim of the paper is to examine the plausible benefits that the Draft proposal could have on the development of India's law on cross-border insolvency if implemented. The paper discusses the recognition of cross-border IBC proceedings in India and is divided into three major parts. The first part of the paper deals with the current provisions in the IBC for recognition of such proceedings and then analyses the cases handled by the Indian judiciary on foreign insolvency up until now. (I) The paper then examines Draft Z and its provisions, with the aim of breaking down the provisions and understanding its purpose. (II) Lastly, the paper moves on to explore the implications of implementing Draft Z in India and ends by identifying the problems and gaps in the Draft proposal. (III)

[15] *State Bank of India v Jet Airways (India) Ltd.* [2019] CP 2205 (IB)/MB/2019, [2019] NCLT 22905
[16] Ministry of Corporate Affairs, *'Repost of Insolvency Law Committee on Cross Border Insolvency'* (Government of India Oct 2018) <CrossBorderInsolvencyReport_22102018.pdf> accessed 20 October 2022.
[17] n 16.
[18] n 16.
[19] Cross Border Insolvency Rules/Regulations Committee, *Report on the Rules and Regulations for Cross-Border Insolvency Resolution* (Ministry of Corporate Affairs, Government of India June 2020)

I. CURRENT PROVISIONS ON RECOGNITION OF FOREIGN IBC CASES IN INDIA

Currently, India has endorsed The Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, 1965 (HCCH 1965 Service Convention), as well as The Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters in 2007, which offers ways for international justice systems to be accessed cooperatively as provisions for recognition of a foreign proceeding.[20]

For civil matters, the Code of Civil Procedure, 1908 (CPC) provides for the recognition and enforcement of foreign judgements. Foreign judgements are principally considered conclusive/determinative for the parties, with certain exceptions provided in Section 13, CPC.[21] Section 44A, CPC identifies and provides for direct enforcement of decrees by foreign courts which are recognized in India if it satisfies the following conditions: (i) the foreign court which has given the judgment has the proper jurisdiction; (ii) the judgement should not be against the provisions of international law, or a refusal to recognize Indian law; (iv) the judgement should not be against India's public policy (v) it should not have been obtained by way of fraud (vi) the matter in issue of the judgement should not be in violation of Indian law itself.[22] Additionally, the decree shall be from a superior court and a "reciprocating territory."[23] Such decrees have the same value and effect as that of a decree from a local court in India. However, here what is to be noted is that only final orders or awards passed by those courts are recognized; insolvency orders, orders of recognition processes, administrative orders, and interim orders are not recognised for the reason of enforcement.[24]

Section 376, Companies Act 2013 provides for the liquidation of a foreign incorporated company in India provided it has an established in India if it ceases to carry on business in India, or it undergoes liquidation in the country where it is incorporated.[25]

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[20] Ministry of Law and Justice, *Annual Report 2016-17* (Government of India 2017) < DEPARTMENT OF LEGAL AFFAIRS(E).pdf (lawmin.gov.in)> accessed 19 October 2022.
[21] Sudhaker Shukla and Kokila Jayaram, 'Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL' (Insolvency and Bankruptcy Board of India) 312 <https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf> accessed 19 October 2022.
[22] Pranav Khatavkar, 'India's Rendezvous with Cross-Border Insolvency and its Suggested Marriage to the UNCITRAL Model Law on Cross Border Insolvency' (2021) 4(3) IJLMH 1209, 1212 <Indias-Rendezvous-with-Cross-Border-Insolvency-and-its-Suggested-Marriage-to-the-UNCITRAL-Model-Law-on-Cross-Border-Insolvency.pdf (ijlmh.com)> accessed 19 October 2022.
[23] *Sheik Ali vs Sheik Mohamed* [1966] 2 MLJ 346
[24] Lakshmikumaran & Sridharan attorneys 'India Proposal to Recognise Cross Border Insolvency' (2018) <https://www.lakshmisri.com/insights/articles/india-proposal-to-recognise-cross-border-insolvency/#> accessed 19 October 2022.
[25] Khatavkar (n 22) 1212.

CPC also provides for parallel execution at more than one place through Section 51, which provides for execution of decrees by delivery and or sale of property for repayment of the debt, the appointment of a receiver, and arrest and detention with a reasonable opportunity for judgement -debtor to present his side.[26]

With respect to IBC specifically, Sections 234 and 235 relate to cross-border insolvency disputes and are designed in a way to extract the maximum value possible from the assets of a corporate debtor. However, a foreign judgement does not automatically become enforceable but requires India to be in a "reciprocal bilateral agreement"[27] with the nation under the provisions of the code. Regarding the application of bilateral agreements, the prevalent tendency continues to be that bilateral agreements with India normally apply to both current and future investments pursuant to the day India joined the agreement.[28] Certain agreements with a small number of States, such as Egypt, Sweden, Romania, etc., have restricted scope and only apply to investments made after the treaty entered into effect.[29] The disputes that may have arisen prior to these agreements are excluded. Currently, a moratorium is automatically imposed upon NCLT's admission of an insolvency petition, preventing the institution or continuation of litigation or arbitration proceedings against the corporate entity and prohibiting the transfer or encumberment of the company's assets and enforcement of security interest against the company.[30] Nonetheless, the Indian creditors do not get access to the assets of the company situated abroad as the moratorium only applies to Indian assets.[31]

Enforcement of Indian Judgements Abroad

Section 45 of the CPC deals with the execution of Indian decrees outside India, provided the Central Government establishes the transferee court in the foreign country and the State Government notifies that the respective decree will apply to the foreign Court.[32]

[26] Sudhaker (n 21) 312.
[27] Bilateral Investment Treaties (BITs) or Bilateral Investment Agreements establish the terms and conditions for private investments made by individuals and business entities from one sovereign State into other sovereign states. Applicability, fair and equitable treatment and full protection & security, national treatment and most-favored-nation treatment, expropriation, and dispute settlement mechanisms, between States and between an investor and a State are some of the essential clauses covered under BITs.
[28] Prateek Bagaria and Vyapak Desai, 'Bilateral Investment Treaties and India' (*Nishith Desai Associates*) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf> accessed 19 October 2022.
[29] Bagaria (n 28).
[30] *P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd*. [2021] 6 SCC 258 at para 9
[31] Bagaria (n 28).
[32] Sudhakar (n 21) 312.

Further, for the Indian proceedings to be recognized beyond its borders, the law of that country would apply. In case the country has adopted the UNCITRAL Model Law, then the proceedings can be recognized without India adopting the Model law. In case the country has not adopted the UNCITRAL Model Law or has adopted the Model Law with modifications, then the recognization will be made only if India adopts the UNCITRAL Model Law in some way.

Cross-Border Insolvency Cases in Indian Courts

India was faced with its first cross-border insolvency case in 1908 in *P. MacFadyen & Co., In re*,[33] where the proceeding was concerned with the liquidation of an Anglo-Indian partnership after the death of one of the partners. An agreement was entered into relating to the admission of claims and distribution of surpluses between the liquidators in India and England. A challenge against the agreement was struck down by the English Court, holding it to be a "common sense business agreement manifestly for the benefit of all interested parties."[34]

In the more recent and relevant case, *Jet Airways (India) Limited*[35], State Bank of India, had initiated bankruptcy proceedings against Jet Airways (India) Limited by filing a Section 7 application. Later it came to light that a Dutch Court had also initiated proceedings earlier and appointed a Bankruptcy Trustee in the company's Europe hub- the Netherlands.[36] The claims were based on unpaid dues of substantial amounts by two European creditors, and one of the company's aircraft parked at Schiphol airport in Amsterdam was seized.[37] The NCLT initially adopted a territorial approach and refused to take "on record" orders of a foreign court in the absence of an enabling provision in the IBC, declaring the Dutch administrator's petition to recognise the Netherlands proceedings null and void in law.[38] The idea behind the territorialism model is that each state should handle the assets and lenders of the debtor in their jurisdiction itself.[39] The insolvency proceedings of one jurisdiction hence have no extraterritorial reach, with each jurisdiction applying its own laws.[40] Since this model only identifies assets and

[33] *In re P. Macfadyen & Co. Ex parte Vizianagaram Co. Ltd.,* [1908] 1 K.B. 67
[34] Khatavkar (n 22) 1212.
[35] *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v. State Bank of India & Anr.*, [2019] Company Appeal (AT) (Insolvency) No. 707 of 2019
[36] ibid.
[37] ibid.
[38] Malu (n 1).
[39] Neil (n 11) 3.
[40] Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell Law Review* 696, 750

creditors in their jurisdiction, it leads to an inequitable return to the lenders based in different jurisdictions, thereby making the entire model unfeasible given the size of global organisations and the extent of their operations.[41]

The National Company Law Appellate Tribunal (NCLAT), acknowledging the problems hence associated with the territorial approach, later allowed it, recognising India to be The Centre of Main Interest (COMI) for the company.[42] The Legislative Guide on Model Law recommends interpreting COMI as contained in the EU Regulation.[43] As per the EU regulation, COMI, in the case of incorporated debtors, 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is hence ascertainable by third parties.'[44] It is deemed to be the place of the registered office unless proved otherwise, as per Article 16. In respect of individuals, their habitual place of residence becomes their COMI.[45]

Per the NCLAT orders, the administrator was granted permission to be a part of the committee of creditors and attend the meetings but was not given any voting rights.[46] The Court here acknowledged and highlighted the need to cooperate with foreign courts to have a joint corporate insolvency resolution process and to reach an agreement as to the terms of arrangements by mutual cooperation in the company's and its stakeholders' best interests.[47]

Following the order, the parties entered into a 'Cross Border Insolvency Protocol' whereby the Indian Resolution Professional and the Dutch Administrator determined India as the 'center of main interests.' At the same time, the foreign proceedings were agreed to be 'non-main insolvency proceedings,'[48] ensuing in which they collated claims in their respective jurisdiction and reviewed each other's verification process of claim admission/disputes based on the sample received. The courts of both jurisdictions recognised claims made here.[49]

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[41] Neil (n 11) 3.
[42] n 35.
[43] United Nations Commission on International Trade Law, General Assembly, Legislative Guide on Insolvency Law, UN Publications Sales No E.05.V.10 (United Nations, 2005), 41 [13].
[44] European Council (EC) Regulation No. 1346/ 2000 of 29 May 2000 on insolvency proceedings, Recital 13.
[45] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency [1997], Art. 16(3); ibid Art. 3.
[46] Manisha Arora and Raushan Kumar, 'India's tryst with cross-border insolvency law: How series of judicial pronouncements pave the way?' (SCC Online Blog, 16 April 2021) <India's tryst with cross-border insolvency law: How series of judicial pronouncements pave the way? | SCC Blog (scconline.com)> accessed 20 October 2022.
[47] Gabriela Roca-Fernandez, 'Cross-Border Insolvency in India: A Resistance to Change' (2021) 29 Tul J Int'l & Comp L 99
[48] Foreign non-main proceedings are defined as such proceedings taking place in a state where the debtor has an establishment, other than a foreign main proceeding. Correspondingly, foreign main proceedings, under Article 2 of the Model Law are defined as a proceeding taking place in the State where the debtor has its center of main interests.
[49] Roca-Fernandez (n 47).

Here, what is of significance is how the identification of COMI and non-main proceedings were in line with the model laws. Even though the NCLT dismissed the petition based on the unavailability of a proper statute, the NCLAT took heed of the European principles, as exemplified in model laws, i.e., the concept of modified universalism and struck a balance between the relief granted to the foreign representatives and the interests of those affected by such reliefs.[50] 'Modified Universalism' is considered to be the golden thread of cross-border insolvency.[51] It provides for the centralised administration of the assets and liabilities but, at the same time, grants the local jurisdictions the power to constitute separate proceedings while analysing the impartiality of the main proceedings.[52] The substantive questions of law and facts of the case were left at the discretion of each court in each jurisdiction they represented.[53]
Inter-jurisdictional cooperation was once again achieved through an agreed protocol based on a "pure universalist" model. The model promotes the administration of domestic and foreign assets in accordance with one domestic legislation to make it more feasible and beneficial for domestic and international creditors.[54] This protocol has since been a victory paving the way for the progress of the process subsequently. This court decision is very much similar to the first transnational insolvency case of Maxwell Communications Corporation (MCC)[55], a UK & US dispute, where no existing law provided constructive procedures for resolving cross-border disputes. Justice Brozman highlighted the paramount importance of cooperation among involved jurisdictions with the help of a document called the protocol that developed a "remarkable sequence of events leading to perhaps the first worldwide plan of orderly liquidation ever achieved."[56]

The complexity that exists in the present case is the distinct doctrinal viewpoint on cross-border insolvency endorsed by both countries. Where India follows a "universalist approach," which

[50] Edward Adams and Jason Fincke, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism Universalism' (2009) 15 COLUM. J. EUR. L. 43 <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1839&context=faculty_articles> accessed 19 October 2022.
[51] *McGrath v Riddell* [2008] 3 All ER 869, 881[30], cited in *Ackers v Saad Investment Company Ltd (in liq)* (2010) 190 FCR 285, 295 [47]; See also Lord Collins comments in *Rubin v Eurofinance SA* [2012] 3 WLR 1019, 1030.
[52] Ian Fletcher, 'Le enfer, c'est les autres': Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency' (2011) 46 Texas International Law Journal 489, 498–501
[53] Khatavkar (n 22) 1215.
[54] Neil (n 11) 2.
[55] *Maxwell Communication Corp. ex rel. Homan v. Societe Generale (In re Maxwell Communication Corp.),* [1996] 93 F.3d 1036 (2d Cir. 1996)
[56] Jay Lawrence Westbrook, 'The Lessons of Maxwell Communication' [1996] 64(6) Article 3, Fordham Law Review 2531, 2535

provides for the institution and administration of proceedings in that jurisdiction where the corporate debtor's registered office is or where it is domiciled,[57] accounting for all its assets notwithstanding their locations, the Netherlands is in total contrast. It follows the "territoriality approach," which constrains the court's jurisdiction to property within state territory and prohibits the administrator appointed from dealing with property not within state territory.[58] Nonetheless, the Dutch Supreme Court in Yukos Finance v. Liquidator, OAO Yukos Oil Company[59] gave permission to a foreign administrator to effectively employ his powers without prejudice to the interests of creditors residing in the Netherlands only if his actions comply with the laws of the jurisdiction in which the bankruptcy proceedings were initiated. Although this ratio sets out important precedents and rules, it raises a plethora of unresolved questions, like whether it is flexible enough to allow multiple parties from other jurisdictions to join the process, how other countries will provide their cooperation, or the efficacy of such a protocol implemented.

Prior to this as well, the court's ratio has time and again aligned with the model law. In Macquarie Bank v Shilpi Cable[60], the court held that foreign creditors have the same right as domestic creditors to initiate and participate in the Corporate Insolvency Resolution Process (CIRP) under the code. It also included the definition of 'person' to cover persons residing outside India as well.[61] It was observed that preferential interpretation would be violative of the right to equality enshrined in the Constitution of India, which applies to all persons, including foreigners.[62]

In the first consolidation of group companies for insolvency proceedings case, i.e., Videocon Case[63], NCLT authorising 13 out of the 15 Videocon Group Companies to consolidate recognized the principle of "substantial consolidation." It was the first time such consolidation was given the go-ahead under IBC using the theory of maximizing the asset value of debtors, thereby setting the standard for group insolvency.[64] This doctrine of "substantial consolidation," being an enabling doctrine, allows the assets and liabilities to be merged so as to provide for a common insolvency resolution and restructuring process to aid with achieving a fair value for

[57] Neil (n 11) 3.
[58] Neil (n 11) 3.
[59] *Yukos Finance v. Liquidator, OAO Yukos Oil Company* No. 07/11447
[60] *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd*. [2018] 2 SCC 674
[61] ibid.
[62] ibid.
[63] *State Bank of India v Videocon Industries Ltd.* [2019] SCC OnLine NCLT 745
[64] Arora (n 46).

the stressed assets of group companies while paying regards to the interests of the creditors.[65] NCLT here also directed for the inclusion of the diversified group's overseas oil and gas business in the insolvency process, recognising the cross-creation of the security interest by all creditors in other business assets of the parent group regarding it as a single entity.[66]

II. THE PROPOSED DRAFT TEXT ON THE RECOGNITION OF FOREIGN INSOLVENCY JUDGEMENTS: AN OVERVIEW

Following the cases and the acknowledgment of the unavailability of a proper cross-border insolvency protocol, the Ministry of Finance, in its Economic Survey 2021-22, also pointed out the need for such a framework that would address specific reservations.[67] It aims to point out the extent to which bankruptcy practitioners can have access to assets in foreign jurisdictions. Questions on adopting the doctrine of secondary insolvency, i.e., giving preference to domestic lenders over their foreign equivalent and recognising the claims of domestic creditors in foreign jurisdictions, are also to be dealt with.[68] Other topics such as recognition, enforcement of domestic securities, and taxing provisions over local assets where a foreign administrator is designated also find a place.

The proposed amendment by the ILC, i.e., Draft Z, therefore, ought to have provisions addressing these issues and should be able to provide a coherent framework for transnational insolvency proceedings. A major milestone for India was how the drafters approached the problems posed by bankruptcy and insolvency insofar from a purely domestic standpoint and offered solutions based on it.[69]

At first glance, its key highlights are its limited applicability, legislative reciprocity, COMI, rights of foreign creditors, coordination, etc.

One of the striking provisions is its limited applicability, i.e., it applies only to corporate debtors. This was proposed by the ILC as, at the time of proposing the Draft, the code had not operationalized the personal insolvency provisions and had only notified the provisions with

[65] Ritika Sarda and Sahiti Annam, 'The Need For a Robust Legal Framework For Cross Border Insolvencies in India' (2022) 7 Commonwealth Law Review Journal <Ritika-Sahiti-CLRJ.pdf (thelawbrigade.com)> accessed 19 October 2022.
[66] Arora (n 46).
[67] Ministry of Finance (n 3).
[68] Malu (n 1).
[69] Ministry of Corporate Affairs, 'File No. 30/27/2018- Insolvency Section' (2021) Notification Dated 24 November 2021 (Ministry of Corporate Affairs) <Cross-Border Insolvency under IBC.pdf (prsindia.org)> Accessed 19 October 2022.

respect to corporate debtors.[70] The union government has now, by notification, extended Part III of the code to apply it to personal guarantors to corporate debtors.[71] Consequently, immediate application of the cross-border law is proposed to be to corporate debtors and personal guarantors to corporate debtors. The COMI for Part III debtors may be presumed to be the 'habitual place of residence of the debtor.[72] This shall be a rebuttable presumption for determining the COMI, as recommended in the Model Law.[73] Non-Banking Financial Companies (NBFCs), utility and infrastructure services companies, and other such entities and classes, as notified by the RBI, along with individuals and foreign partnership firms, are excluded as per clause 29[74] and government notifications[75]. Further, companies already undergoing the Pre-packaged Insolvency Resolution Process (PIRP)[76] are also exempted as the PIRP guidelines are recent and the "jurisprudence and practice under the pre-pack mechanism are at a nascent stage."[77]

The interpretation of 'Corporate Debtor' as per the Draft is a controversial topic.[78] Where sections 3(7) and 3(8) IBC limit it, the Draft proposes to include foreign companies within its ambit.[79] Furthermore, 'foreign company' itself is nowhere defined in the Act, but its meaning has to be incorporated from definitions of other laws, including the Companies Act. The problem that arises here is that the MCA has not yet clarified if foreign companies include unregistered companies. This would lead to the duality of proceedings where a foreign company having a place of business in India initiates the winding up of the said unregistered business under Section 375 of the Companies Act.[80] The only way around this presently is to register and incorporate a separate legal entity in India to bypass Section 375, which would then allow the subsidiary to become a distinct legal entity while subjecting the foreign company to continue being governed by the cross-border provisions.[81] The CBIRC, to avoid such

[70] Ministry of Corporate Affairs (n 16) 16 clause 1.1.
[71] Ministry of Corporate Affairs, '*The Gazette of India: Extraordinary'* REGD. NO. D. L.-33004/99, Notification No. 3704 dated 15 November 2019 F. NO. 30/21/2018(Government of India) II(3)(ii) <Microsoft Word - 5912gi (mca.gov.in)> accessed 20 October 2022.
[72] UNCITRAL (n 45) Art. 16.
[73] UNCITRAL (n 45).
[74] Ministry of Corporate Affairs (n 16) 67 Clause 29.
[75] ibid.
[76] The pre-pack process is a quicker and simpler resolution process for MSME corporate debtors. It is a voluntary process designed for smaller businesses to effectively resolve their financial distress.
[77] Public Trust of India, 'Govt. proposes framework for cross-border insolvency; seeks comments till December 15' *The Hindu* (New Delhi, 26 November 2021) <Govt. proposes framework for cross-border insolvency; seeks comments till December 15 - The Hindu> accessed 20 October 2022.
[78] *Lalit Kumar Jain v. Union of India*, [2021] 9 SCC 321
[79] Ministry of Corporate Affairs (n 16) 51 clause 1(2).
[80] The Companies Act 2013, s.375(3)(b).
[81] *Vodafone v. Union of India* [2012] 6 SCC 613.

situations, has proposed to define 'foreign company' under the IBC itself such that it includes within its ambit such corporations that are set up as a limited liability as per laws of a foreign country as initially intended in the proviso to clause 1(2), escaping the command of S.375, Companies Act.[82]

To eliminate inefficiencies, CBIRC also recommended having notified NCLT benches for taking up cross-border insolvency cases.[83] Essentially it provides for the designation of NCLT benches to be based on the location of the corporate debtors' office and notified benches in case of foreign companies. The CBIRC recommends that all the benches of the NCLT should be vested with the jurisdiction to deal with applications under Part Z.[84] Thus, cross-border proceedings arising in respect of corporate debtors that are Indian companies will be dealt with at the bench having jurisdiction over the location of the registered office of the corporate debtor.[85] However, insolvency proceedings pertaining to any person incorporated with limited liability outside India should be dealt with by the Principal Bench of the NCLT.[86]

No legislation specifically restricts foreign representatives from accessing domestic courts. In reality, the MCC and the Jet airways case, if anything, reiterates the need for foreign access as imperative, if not the fundamental base of cross-border CIRP. Here, the CBIRC, in complete contrast to the UK[87] and the US[88],[89] wanted a regulatory authority, i.e., the Insolvency and Bankruptcy Board of India (IBBI), to manage the foreign representative government procedure and formalities instead of the designated court or tribunal.[90] Additionally, it also provides for the creation of an e-platform to be maintained and administered by the IBBI, which would permit foreign representatives to submit an application for a grant of authority either at the time of applying for authorization or cooperation with the NCLT under Part Z or immediately after that.[91] This, however, is not a pre-requisite to NCLT proceedings, and on the rejection of the said application, the relevant bench is notified by the NCLT.[92] Following this, a new application

[82] CBIRC (n 19) 32 Clause 4.1.1.
[83] ibid 36 Clause 4.2; Part Z defines an "Adjudicating Authority" as "benches of the National Company Law Tribunal, as notified by the Central Government in the manner provided in Clause 29 of this Part, to perform functions relating to recognition of foreign proceedings and cooperation with foreign courts and foreign representatives under this Part."
[84] n 16.
[85] ibid.
[86] ibid Clause 2(a).
[87] The Cross-Border Insolvency Regulations, 2006 Art. 9, Schedule 1.
[88] US Code Section 10, Chapter 15, Title 11.
[89] CBIRC (n 19) 26 Clause 5.2.
[90] ibid.
[91] ibid 30 Clause 10.1.
[92] CBIRC (n 19).

for a different foreign representative can be filed while the NCLT proceedings continue in parallel.[93]

Another provision provided in Draft Z is in relation to granting domestic representatives access to foreign courts. Essentially, there are no limitations placed by foreign countries on the recognition of non-local representatives; and with respect to IBC and IP Regulations as well, no restrictions are applied on Indian IPs from applying for recognition in foreign jurisdictions. However, CBIRC proposes that such IPs wanting access to foreign insolvency systems must necessarily report such undertakings to IBBI in the format as may be prescribed.[94]

'Cooperation,' an element repeatedly identified by courts in different countries as the key to cross-border insolvency, has embodied itself in Clause 22 of the Draft. The CBIRC report provides that irrespective of whether an application for recognition of foreign proceedings has been made before the tribunal or not, the foreign representative can apply for the Tribunal's cooperation with the aim to merely assist and not deliver any kind of order with respect to the case.[95] Formerly unavailable, a grant to the Adjudicating Authority (AA) to issue reliefs and adjudicate upon matters under the application for recognition of foreign proceedings has also been provided now.[96]

Once the application for initiating cross-border insolvency is allowed and recognized in both jurisdictions, guidelines to provide for proper communication and cooperation have been recommended through clauses 21, 22, and 23 of the Draft. The ILC suggested that these guidelines are to be notified by the federal government in deliberation with the Adjudicating Authority. However, the CBIRC particularly provides for the adoption of the various pre-existing guidelines on communication and cooperation between courts in cross-border insolvency. While consenting to the ILC's suggestions, CBIRC still highlighted the Judicial Insolvency Network 2019 (JIN), especially its provision of a 'Facilitator.'[97] The JIN framework provides for the appointment of one facilitator each by both jurisdictions, as the current provisions and the proposed amendment all provide only for cases involving not more than two jurisdictions.[98] At the same time, the Draft proposes the creation of a specific council that is to

[93] ibid.
[94] CBIRC (n 19) 46 Clause 4.4.
[95] ibid 63 Clause 4.8.
[96] ibid 30 Clause 10.1.
[97] ibid 63 Clause 4.8.1.
[98] JIN Guidelines Modalities of Court-to-Court Communication (adopted by JIN in 2019).

act under the direction and control of the Adjudicating Authority, wherein if there is more than one facilitator appointed, the need for them to coordinate amongst themselves will arise before they could communicate any information to the judges of the concerned courts or tribunals.[99]

Lastly, one of the draft's most important and controversial provisions is the COMI- an EU concept being recognized and implemented in India.[100] The starting point in the identification of COMI would be the date on which the insolvency was initiated, i.e., either the date on which the application for the foreign insolvency was initiated[101] or from the date it is brought before the NCLT through an application[102]. ILC, following the Model Law, did not propose any clarification regarding the same and left it for the courts to interpret.[103] The CBIRC, however, took note of the same and pointed out the issues of contradictory judgements, time consumption, and wastage of funds without any plausible returns that would stem from this open-endedness.[104] It was of the view that the effective date for the purposes of COMI should be when the commencement of the foreign proceeding takes place. The CBIRC also took heed of Clause 14, wherein the ILC provisioned for the central place of the administrator to be superior to certain 'other factors' for the determination of COMI. The problem here was that such 'other factors' are generally construed to be on the same footing as the central place of administration in practice while at the same time being a major determinant of the central place of determination.[105] Another matter that comes to light here is the possibility of debtors engaging in forum shopping by shifting their Centers of Main Interest. Draft Z anyhow covers this concern and guards the creditors' interests by provisioning for two elements. First off, if the registered office of the debtor has not been changed during the three months prior to the start of insolvency proceedings, it is assumed that the registered office is the COMI.[106] The second element being that the Tribunals, i.e., NCLT and NCLAT's necessary duty to perform the assessment above in such a way that it allows creditors and other interested third parties to scrutinise the entire process openly.[107] Although the drafters assumed incorporations of these two factors would mitigate the loss and found it to be justified, they nonetheless gave NCLT

[99] CBIRC (n 19) 42 Clause 16.
[100] (n 16) Clause 2(b) read with Clause 14.
[101] UNCITRAL Guide to Enactment, para 159; Report of the 11th Multinational Judicial Colloquium, UNCITRAL-INSOL-World Bank (21-22 March 2015, San Francisco) para 10.
[102]UNCITRAL Judicial Perspective, Paras 130-133; See also, Look Chan Ho, 'A Commentary on the UNCITRAL Model Law', (2017).
[103] (n 16) 34 Clause 11.8.
[104] CBIRC (n 19) 51-52 Clause 4.6.
[105] ibid 53-54.
[106] (n 16) Clause 14(2).
[107] Ibid Clause 14(3).

the discretion to draw its own conclusion. Instances where a company is registered in one jurisdiction based on tax relaxation but, in actuality, carries on its business from some other jurisdictions are not covered under these provisions.

In conclusion, the Draft also contains provisions on reliefs available. It provides for two categories of reliefs- discretionary and interim. Discretionary reliefs are encoded in Clause 18, with an additional suggestion of the CBIRC in furtherance of clause 18(1) that grants the Adjudicating Authority the authority to permit foreign representatives to access books of accounts, audit reports, records, and other forms of documents of the Corporate Debtor. On the other hand, Interim was not even mentioned in the IBC prior to the IBC report. It is recommended to provide interim reliefs in domestic proceedings and incorporate the same standard to that effect in Part Z.

III. IMPLICATIONS OF IMPLEMENTING THE DRAFT PROPOSAL IN INDIA

We now proceed to analyse the implications if the recommendations and amendments suggested by the report are actually implemented in India, which are fourfold.

First and foremost, the legal proceedings in India will change. A foreign proceeding identified as a foreign main proceeding will subject all arbitration and litigation proceedings in India against the corporate debtor to an automatic moratorium, i.e., it will be at a standstill.[108] On the other hand, if it is identified as a foreign non-main proceeding, the NCLT will then hold the power to inflict a moratorium to put a standstill on all litigation and arbitration proceedings against the Corporate Debtor in India.[109] Currently, up until the proposals are adopted, all arbitration and litigation proceedings can go on parallelly, irrespective of insolvency proceedings being initiated against the Corporate Debtor in other countries as well. Nevertheless, if bankruptcy proceedings have been initiated against the Corporate Debtor in India on the admission of the insolvency application, a moratorium on initiating or continuing legal actions against the Corporate Debtor would be applied.

Secondly, the proposal, in essence, gives priority to the proceedings under IBC.[110] Essentially this means that if insolvency proceedings under IBC have been initiated, any foreign

[108] Ministry of Corporate Affairs, *'Report of The Insolvency Law Committee'*, (Government of India February 2020) 26 Clause 5
[109] ibid.
[110] n 1.

proceeding cannot be recognized by the NCLT if it is in conflict with the proceeding administered under the IBC. NCLT has been given the discretion and the authority to amend or abrogate the possible reliefs to guarantee that coordination and consistency are preserved in line with the IBC provisions. Here, what is of concern is the excessive discretion granted to the NCLT, which could hamper the successful recognition of foreign proceedings in coordinating parallel insolvency procedures.

Thirdly, it also provides for public policy exemption.[111] NCLT has again been bestowed with the discretionary power to refuse to comply with the procedures and act in accordance with the proposed cross-border insolvency guidelines if they consider it to be manifestly against the public policy of India. Once more, the drafters of the report failed to define the term and ambit of 'public policy.'[112] Most countries that have adopted the Model Law have founded their understanding of public policy by relying on court precedents. For instance, Singapore has omitted the word "manifestly" in its exception of public policy. Following this, when initially faced with a case under the insolvency code, i.e., Zetta Jet Pte Ltd[113] , the Singapore High Court observed that the threshold for interpreting public policy reasons is notably higher than other jurisdictions that have incorporated the phrase "manifestly" in their public policy exceptions.[114] The Indian courts' interpretation and understanding of public policy are uncertain at this point. What would have been ideal would be the explicit meaning of public policy clearly defined in the report with a reference to restrictions on the degree of its applicability through regulations.

Lastly, the report has created a procedural dilemma. In order to bring alive the proposed draft recommendations, ancillary aid in the form of amendments and secondary laws would be imperative.[115] For instance, Indian law restricts parallel proceedings with other jurisdictions.[116] In addition to this, the framework also provides for the delegation of a majority of the information to the subordinate laws from the Union government and the IBBI.[117] Hence, such rectification and rules and regulations will call for an urgent proclamation in order for it to be in line with the vision and purpose of the Model Law along with the Draft and help counteract confusion created in settlement of cross-border insolvency cases. The current IBC provides for

[111] n 108.
[112] ibid 37.
[113] In The High Court Of The Republic Of Singapore [2018] SGHC 16 Originating Summons No 1391 of 2017 <Singapore Judgments (uncitral.org)> accessed on 20 October 2022.
[114] ibid.
[115] n 1.
[116] ibid.
[117] Sudhaker (n 21).

strict timeframe regulations of insolvency proceedings, which time and again have been held to be inalienable.[118] It is also unclear if such tight timelines would also be applicable to cross-border insolvency proceedings and, if so, how they will be formally complied with in numerous bankruptcy proceedings.

Conclusion

The bigger question that arises here is the probability of success of the Draft and its provisions in India which to a large extent depends on the reciprocity obligation under the Model Law. Therefore, the acceptance and recognition of foreign proceedings by India would be a determinant of the validity of NCLT decisions and orders in foreign jurisdictions. India presently follows the concept of purpose-specific bilateral agreements. Today India has signed Mutual Legal Assistance Treaty[119] in civil and commercial matters with six countries[120], Memorandum of Understandings with seven[121], along with a bilateral investment treaty[122] with several countries, and has investment chapters incorporated in its free trade agreements. All these tools are on a purpose-specific and reciprocating basis. The drawback with the provision providing for this arrangement is the requirement of ongoing dialogues and taking years to get to an agreement, finding common ground on a topic as complicated and dynamic as cross-border bankruptcy may be more difficult and require constant evaluations. Designing a thorough document that is flexible and allows for customization to specific reciprocating jurisdictions would be difficult.

At the same time, any other substitute to the same, if considered through a cost-benefit outlook, would be counter-beneficial as it would entail expenses for drafting the law, legislative approval, distribution, etc., as well as advantages for stakeholders, such as flexibility in legislation, jurisdictional coverage, and simplicity of use.[123] This problem does not arise in the

[118] n 7.
[119] Ministry of External Affairs, '*Mutual Legal Assistance in Criminal Matters*' (Government of India 2020) <https://mea.gov.in/mutual-legal-assistance-incriminal-matters.html> accessed on 20 October 2022 and Ministry of External Affairs, '*Mutual Legal Assistance Treaty in civil and commercial matters*' (Government of India 2020) <MEA | MLAT- commercial> accessed on 20 October 2022.
[120] Bahrain, France, Russia, Azerbaijan, UAE, Mangolia.
[121] Turkey, China, Russia, Qatar, Morocco, UK, Uzbekistan.
[122] India scrapped more than 80 bilateral investment treaties in 2015 and new treaties are being signed afresh with a host of countries. Arrangements in Bangladesh, Belarus, Colombia, Taipei, Congo, Bulgaria, Romania, Czech Republic, Brazil, are in force. Negotiations are underway with Iran, Switzerland, Morocco, Kuwait, Ukraine, UAE, Hongkong, Israel among others. <https://dea.gov.in/bipa> accessed on 20 October 2022.
[123] Sudhaker (n 21) 312.

currently existing law, which only needs to be amended enough to include the flexibility required to entail cooperation as envisioned by the Draft.

Taking inspiration from other jurisdictions that have adopted the Model Law demonstrates that such changes tend to lessen the law's overall universalist approach as well as the influence of its adaptability over time. The Model Law has offered plenty of information and direction to courts, and other stakeholders in terms of technical and interpretative help, which cannot be claimed for any other option explored in the paper. The number of jurisdictions that are protected is restricted to 47 and is confined to such jurisdictions that have previously ratified the legislation.[124] Nations that are important to India due to their current and possible future connections are excluded from these 47 jurisdictions. Hence, such protocols have been successfully implemented internationally due to their seamless amendments to the domestic code and successful stakeholder education, which again boils down to proper cooperation from all parties involved- private, government, and judiciary.[125]

In light of Indian requirements, Model Law cannot be entirely accounted for due to its fewer adoptions in the jurisdictions relevant to India and, at the same time, cannot be entirely discounted owing to the fact that it combines the distilled knowledge of cases spanning over 50 years from numerous jurisdictions instilling diversified approaches to bankruptcy proceedings. Its glaring gaps already identified in the paper cannot be left to be amended as and when faced with it, as it will create structural and foundational problems, to begin with. Therefore, India urgently needs to implement a cross-border protocol, which can be achieved with certain amendments to the Draft report.

[124] ibid 307.
[125] ibid.