

UNDERSTANDING CROSS BORDER INSOLVENCY: AN INDIAN OVERVIEW

Ramesh Kumar*

ABSTRACT

This paper is written in an attempt to help the reader to understand the concept of cross border insolvency and the prevalent international legal framework across nations. The understanding of cross border insolvency in international trade is important for its stakeholders like cross border enterprises, lawyers, academicians, and researchers who one way or the other are connected to international trade and uncertainty that surmounts. The evolution of UNCITRAL model laws and the UNICITRAL legislative Guide by the United Nations is a pointer of immense relevance to cross border insolvency, its worldwide political and economic implications and it provides an approach to the solution of such business crises. UNCITRAL legal framework helps to prevent and limit financial crises and facilitates rapid and orderly workouts from excessive indebtedness. Most importantly when the business goes unviable than it helps businesses, reallocate economic resources to upcoming options to preserve employment and reduce the recurring cost. An attempt has been made to examine the effect of the adoption of (UNCITRAL) Model Law on jurisdictions such as Canada, Europe, the United Kingdom, India and the United States of America, etc.

Business of corporations being conducted internationally through enterprise groups that are connected by various forms of ownership and control and when anyone or some of them being constituent become insolvent than lack of domestic legal framework and international framework fails to resolve insolvency proceedings often involving multiple jurisdictions. The paper examines how the complexity of cross border insolvencies in such cases can assist courts to take the help of the UNCITRAL Guide and Model Law to give effect to the purposes in helping cross border insolvency resolution. Inconsistencies in interpretation can be overcome by UNCITRAL model laws in harmonious combination with municipal laws and regulations e.g. Insolvency and bankruptcy Code 2016 and Insolvency Bankruptcy Board of India.

To understand the concept, theory, the legal framework of cross border insolvency various online and offline literature, books, journals, publications available as a secondary source of

*LLM, GALGOTIAS UNIVERSITY.

information have been used to make a lucid presentation of the subject of cross border insolvency. Few case laws of cross border insolvency have also been included in this paper to make the understanding and interpretation easy, of cross border insolvency in various jurisdictions. Doctrinal research & exploratory research method has been applied to write this paper and accordingly, a comparative study has been attempted to give a bird's eye view of the subject to the reader.

INTRODUCTION

What is Insolvency?¹ It is the state of not having enough money to pay debts. When an organization is unable to honour its financial obligation, it files for a bankruptcy petition². Petition filing in court helps the creditors to get outstanding dues thought in full but proportionately from the company on its liquidation.³ Insolvency proceedings can be filed by the firm or individual to get for bankruptcy protection, through a court order that oversees the liquidation of the company's assets.⁴ Insolvency is a state of financial distress, whereas bankruptcy is a legal proceeding.

The Indian IBC, 2016 The code does not define insolvency. 'Default' by the corporate debtor has been marked as a trigger for initiating the insolvency proceeding under section 6 of I & B Code, 2016. Default occurs due to financial failure, which is a persistent mismatch between payments by and receivables by the enterprise. Business failure happens due to a breakdown in the business model of the enterprise which in turn causes financial failure. "According to the IBC, the corporate debtor becomes insolvent if there is a 'failure to pay' irrespective of whether the corporate debtor is 'unable to pay or not. Section 4 of the Code provides that the minimum amount of default is INR one lakh which may be increased to INR one crore by notification by the central Government."

Who can initiate the process of insolvency "The process for initiating corporate insolvency resolution may be initiated by any one of them: (i) A financial creditor (ii) An operational creditor (iii) The corporate debtor itself."

¹ Available at <https://dictionary.cambridge.org/dictionary/english/insolvency>: visited on 8th March, 2021 at 16:30hrs.

² Available at <https://taxguru.in/corporate-law/difference-insolvency-bankruptcy.html> ;Visited on 8th March,2021 at 13:00 hrs

³ Available at <https://www.law.cornell.edu/wex/insolvency#> : visited on 14th March,2021 at 15:30hrs.

⁴ Available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/> visited on 8th March,2021 at 16:hrs.

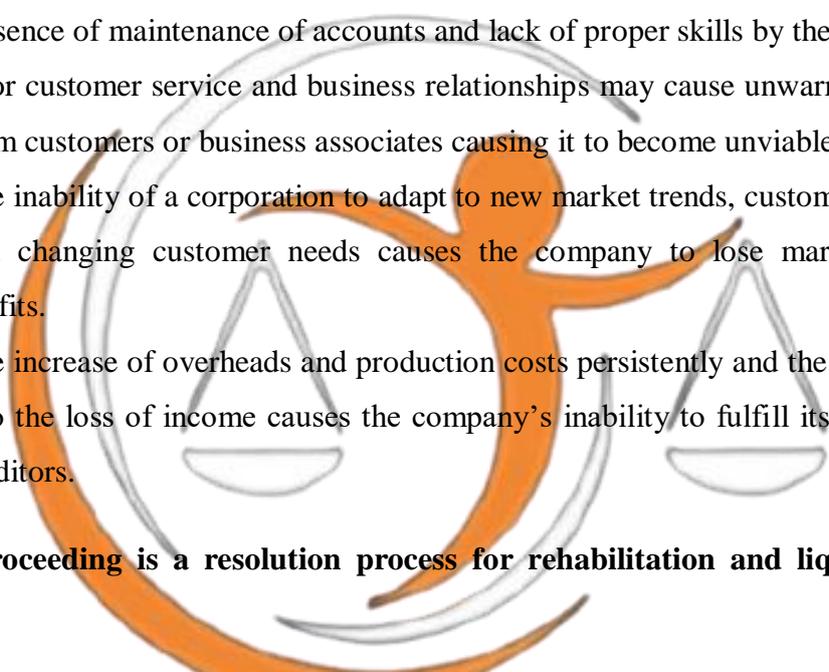
What are the kinds of Insolvency⁵

1. Cash-flow insolvency: In this case, the debtor may have considerable assets but there is a lack of cash in hand.

2. Balance-sheet insolvency

When Liabilities are shown in the balance sheet or more than the assets then it is called balance-sheet insolvency. It causes a higher probability of bankruptcy proceedings being filed against the corporate debtor.

FACTORS WHICH LEAD TO INSOLVENCY⁶

- 
- (i) Absence of maintenance of accounts and lack of proper skills by the manpower.
 - (ii) Poor customer service and business relationships may cause unwarranted lawsuits from customers or business associates causing it to become unviable.
 - (iii) The inability of a corporation to adapt to new market trends, customer preferences and changing customer needs causes the company to lose market share and profits.
 - (iv) The increase of overheads and production costs persistently and the failure to look into the loss of income causes the company's inability to fulfill its obligations to creditors.

Insolvency proceeding is a resolution process for rehabilitation and liquidation of a corporation⁷

The profit motive of a business attracts everyone but the success of a business is always uncertain due to uncertain market dynamics. Therefore, businesses need legal procedures which are efficient for an exit as well as for start-up. Insolvency legal framework, the world over help entrepreneurs close down unviable businesses and redirect the economic resources to preserve employment and profits

⁵ Available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/> visited on 8th March,2021 at 17:00 hrs.

⁶ Available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/> ;visited on 9th March,2021 at 12:00 hrs.

⁷ Available at <http://www.mca.gov.in/> visited on 9th March,2021 at 17:00hrs.

The Insolvency model laws have been designed to balance the possibility between rehabilitation and liquidation. The insolvency resolution process legal frame provides to help the genuine effort to explore restructuring/rehabilitation of potentially viable businesses if there is a consensus of various creditors. In case of failure of consensus to revive the alternative recourse of winding up is taken.

Corporate Insolvency Resolution Process(CIRP) under Indian Insolvency and Bankruptcy Code 2016

In India, “National Company Law Tribunal (NCLT) has the jurisdiction to initiate an insolvency resolution process (IRP) under the IBC, 2016. When a company defaults on making threshold payments to creditors, it triggers the default to file a petition for CIRP. CIRP may be initiated by a financial creditor under section 7, by an operational creditor under section 9, and by a corporate applicant of the corporate debtor under section 10 of the IBC Code,2016.”

CORPORATE INSOLVENCY PROCESS WITH TIMELINES AT A GLANCE⁸

- 1.Publication of the notice in a newspaper by Resolution Professional
- 2.Verification of the claims from the books of accounts of the Corporate debtor
- 3.Preparation of Information Memorandum and distribution of it amongst all financial Creditors.
- 4.Constitution of Committee of Creditors and meeting to ensure Information Memorandum has been correctly prepared
- 5.Calling for Resolution Plan
- 6.Acceptance or Rejection of Resolution Plan
- 7.Submission to NCLT for final approval or
- 8.Extension of 90 days if the Resolution Plan is not accepted within 180 days.
- 9.Liquidation if no resolution has been accepted at the end of 270 days.

⁸ Courtesy: Professor Risham Garg, National Law university of Delhi, LL.M (P) Course Material. (2019)



TIMELINE: CORPORATE INSOLVENCY RESOLUTION PROCESS⁹

1. Commencement of Corporate Insolvency Resolution Process and appointment of Insolvency

Resolution Professional. Let it is equal to time 'T'.

2. Publication of public notice will be by (T+3) days.

3. Submission of Claims by (T+14) days.

4. Verification of Claims by (T+21) days.

5. Application for appointment of Authorized Representative (AR) on behalf of financial creditors, if necessary, and filing of report certifying constitution of Committee of Creditors (CoC) by (T+23) days.

6. First meeting of CoC by (T+30) days.

7. Appointment of Resolution Professional by (T+33) days.

8. Appointment of two registered valuers by (T+47) days.

9. Submission of Information Memorandum to CoC by (T+54) days.

10. Publication of form G and invitation of EOI by (T+75) days.

*Submission of application for withdrawal of application, approval of the application by the CoC, and applying for withdrawal to Appellate authority shall be permissible only before the submission of EOI. i.e before the 75th day from the CIRP date (T).

11. Last date of submission of EOI by (T+90) days.

12. Provisional list of Resolution Applicants by (T+100)

13. Issue of request for Resolution Plan, including Evaluation Matrix and Information Memorandum to Resolution Applicants by (T+105) days.

⁹ <https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>; [Insolvency and Bankruptcy Code, 2016](#) (No.31 of 2016)

14.Determination of fraudulent and other transactions and Final List of Resolution Applicants by (T+115) days.

15.Submission of Resolution Plan by (T+135) days.

16.Submission of CoC-approved Resolution Plan to NCLT (T+165).

17.Approval of Resolution Plan by NCLT. End of CIRP timeline if not extended. (T+180)

18.Extension of CIRP process by 90 days. End of CIRP timelines at (T+270) days.

WHAT IS CROSS BORDER INSOLVENCY?¹⁰

When an insolvent debtor has assets in more than one country jurisdiction or where some of the creditors of the debtor are in the jurisdiction other than where the insolvency proceedings have been filed. According to Professor Ian Fletcher, “Cross-Border Insolvency” should be considered as a situation: in which insolvency circumstance in some way or the other transcend the confines of a single legal system, and where a single set of domestic insolvency law provisions cannot be exclusively applied without giving due regard to the issues raised by the foreign elements of the case.”¹¹ Multinational Corporations operating in more than one jurisdiction and going insolvent anywhere in one country make cross-border insolvencies common, and it is not an exceptional scenario.¹² Due to increasing international trade and globalization of business activities, it is common for businesses to encounter a wide array of legal systems. Therefore, when multinationals become insolvent, it comes as no surprise that such insolvencies have cross-border consequences and ramifications.

Cross border Insolvency and its adverse implications on the domestic legal framework

In one of the insolvency proceedings at the National Company Law Tribunal (India), in the case of Jet Airways (India) Pvt. Limited, the court expressly stated that while insolvency proceedings against the corporate debtor have already begun in “NOORD” – A Holland Court, “there is no provision or method provided in the Indian Insolvency and Bankruptcy Code 2016, at this moment, to recognize the judgment of Foreign Nation Court concerning

¹⁰ Available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/> visited on 9th March,2021 at 16:50hrs.

¹¹ Ibid

¹² Ibid

insolvency. Thus, even if the judgment of the Foreign Court was found to be true, still, without any relevant provision in the Code, this court is unable to bring that fact on record.¹³

What is the solution to Cross Border Insolvency:¹⁴

Harmonization of insolvency laws of multiple jurisdictions with multiple legal frameworks can be achieved by incorporating the international insolvency framework of UNCITRAL Model Law on Cross Border Insolvency, 1997, (Model Law), in the domestic legislation, and doing necessary amendments in the legislation if any required.

CROSS BORDER INSOLVENCY AND IBC 2016 (NO.31 OF 2016)¹⁵

Insolvency and Bankruptcy Code 2016, is an Act to combine and change laws identifying with revamping and indebtedness goal of corporate people, association firms and people in a period headed way for a boost of estimation of resources of such people to advance business, accessibility of credit and equilibrium the interests of all partners remembering modification for the request for the need of installment of the government contribution and to set up an Insolvency and chapter 11 leading group of India and for the issue associated therewith or accidental thereto. It provides for provisions of cross-border insolvency under Sections 234 and 235 as follows: -

Section 234: “Agreements with foreign countries; -

- (1) The Central Government may enter into an agreement with the government of any country outside India for enforcing the provisions of this Code.
- (2) The Central Government may, by notification in the Official Gazette, direct that the application of the provision of this Code concerning assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangement has been made, shall be subject to such conditions as may be specified.”

Section 235: Letter of request to a country outside India in certain cases: -

¹³ Available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf visited on 10th March,2021 at 19:00hrs

¹⁴ (ibid)

¹⁵ Available at; Cross-Border & Personal Insolvency in India: Roadmap for Implementation: CII, March (2019)

- (1) “Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of the insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, believes that assets of the corporate debtor or debtor, including a personal guarantor of the corporate debtor, are situated in a country outside India with which reciprocal arrangement has been made under section 234, he may make an application to the adjusting authority that evidence or action relating to such assets is required in such connection with such process or proceeding.
- (2) The Adjudicating Authority on receipt of an application under subsection (1) and on being satisfied that evidence or action relating to assets under subsection (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.”

ISSUES IN CROSS-BORDER INSOLVENCY

“The Insolvency Law Committee was constituted and set up Ministry of Corporate Affairs on 16th November 2017 to make a recommendation to the Government on the issues arising from the implementation of the Insolvency and Bankruptcy Code, 2016. The Committee presented its Report on 26th March 2018, which has stressed the need for a broader cross border insolvency framework. Committee deliberated on Cross Border Insolvency and noted that existing two provisions in the code (Section 234 & section 235) do not provide a comprehensive framework for cross border insolvency matters.” It has proposed a Draft, which is based on the UNCITRAL Model Law on Cross-border Insolvency and its provisions for adaptation in India. UNCITRAL Model Law has so far been adopted by 44 countries to help them resolve their issues of financial distress and insolvency about cross border trade the world over. The prime issue regarding Cross-border insolvency is the determination of the Centre of Main Interest (COMI). ILC Draft provides a rebuttable presumption wherein the place of incorporation / legal domicile of a corporate person may be considered as COMI. Various other jurisdictions across the world provide an indicative list of factors for determining COMI. Insolvency Law Committee (ILC) of India has proposed that India should also adopt a similar approach. ILC has proposed that India may enter into bilateral agreements with major trading players like the UK and the US to facilitate reciprocity with clear cut provisions to resolve cross border insolvencies with trading partner countries. ILC

also recommended that a timeline be mandated within which the adjudicating authority must determine the COMI, having an indicative list of factors will assist in such timely decision making by the adjudicating authority, consistent with the spirit of the Code being the speedy resolution of firms,

The Insolvency Committee deliberations on Cross Border Insolvency¹⁶

ILC noted that there is a “lack of clarity regarding the efficiency of the cross border insolvency system provided in Section- 234 & Section- 235”. Both the sections are insufficient to resolve cross border insolvency matters involving “assets, creditors or parallel proceedings in foreign jurisdictions”. Accordingly, it has attempted and proposed a comprehensive framework based on UNCITRAL model law on Cross Border Insolvency. ILC noted that treatment of group companies within insolvency laws is a complicated subject. “The current system of insolvency law is new, and it may be too soon to introduce a complex subject like the present issue”. It stated that the UNCITRAL legislative guide has mentioned treatment to group companies to be a complex subject concerning insolvency law and has multiple different approaches in different jurisdictions. ILC Stated that lifting of corporate veil in insolvency may also affect corporate debtor entities significantly, so this may be dealt with in the long term once the present system is well established. ILC has proposed that the draft proposed by it could be made a part of the I&B Code by inserting a separate chapter for this purpose.” Insolvency Law Committee's comment upon analysis and review of the clauses about Cross Border Insolvency is important. The Committee has also recommended the adoption of UNCITRAL Model Law with a few alterations and modifications to ensure that there is no inconsistency between the domestic insolvency framework and the proposed Cross Border Insolvency Framework.¹⁷

Impact of ILC Draft provisions on Legal Proceedings in India¹⁸ -The adoption of the ILC draft will help Commercial courts including NCLT to determine clearly ‘foreign main’ and ‘foreign non-main insolvency proceedings easily without any scope of ambiguity, against the corporate debtor, their initiation, continuation, and imposition of moratorium accordingly if mandatory, during litigation and arbitral proceedings in India or foreign countries. This will also help to cooperate with foreign courts and foreign jurisdictions through the letter of

¹⁶ (ibid)

¹⁷ <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1550197> ; visited on 12th March,2021 at 17:00hrs.

¹⁸ (ibid)

request. Concurrent proceedings too can be heard expeditiously by the courts with more clarity.

Procedural Predicaments in Cross Border Insolvency -To give a push to the ILC draft, it has proposed that certain amendments and subordinate legislation in conformity with UNCITRAL Model Laws would be necessary e.g to provide for concurrent hearings with other jurisdictions and to resolve other issues of cross-border insolvency with clarity and efficiency. As per the draft further, the detailing to subordinate legislation is to be done by Central Government and IBBI. The present Code prescribes strict timelines for the resolution of cases in India and the same have been determined as inviolable. The strict timelines in cross border insolvency process need to be prepared, clarified, and adhered too, to make international trade and investment favourable to India.

Requirement of Reciprocity in Cross Border Insolvency¹⁹ - India has ratified 1958, New York Convention²⁰-Total signatory as of date under this convention are 167. This convention provides for the recognition and enforcement of arbitral awards with a reciprocity reservation along with an Official Gazette notification in India. On the same lines, ILC has proposed that similar notification for reciprocity provision and ratification be done by incorporating suitable provisions of UNCITRAL Model Laws on Cross Border Insolvency and provisions UNCITRAL legislative guide on insolvency Laws to resolve Cross Border Insolvency issues expeditiously and without any ambiguity. As of date, 49 Countries²¹ have adopted UNCITRAL Model laws on cross-border insolvency the world over and India has not signed this convention so far as per the findings of the author of this paper. ILC has recommended that “efforts be undertaken under Section 234 of the code to enter into bilateral agreements with maximum trading partners including major trading partners in the beginning to facilitate reciprocity.”

Key features of UNCITRAL Model Law on Cross-border Insolvency²² - It is beyond doubt to say that globally, the UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues and legislation based on model has been adopted in 44 countries in total 46 jurisdictions. “The UNCITRAL Model

¹⁹(Ibid)

²⁰ Available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2; visited on 13th March,2021 at 16:00hrs.

²¹ (ibid)

²² Available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf; visited on 13th March,2021 at 17:00hrs.

Law ensures full recognition of a country's domestic insolvency law by giving precedence to domestic proceedings and allowing denial of relief under the Model law if such relief is against the public policy of the enacting country. It proposes four elements to facilitate the cross-border insolvency resolution process – Access to courts by foreign creditors & representatives without any obstacle, Recognition-simplified procedures for recognition of qualifying cross border foreign proceedings across nations, Relief (assistance)- providing cross border insolvency relief by courts expeditiously on mutual basis and cooperation – Coordination and communication between the various foreign courts and representatives to foster decisions and eliminate delays and ambiguity in the insolvency proceedings across various jurisdictions. The Model Law is divided into five chapters; General provisions; Access of foreign representatives and creditors to courts in a state; Recognition of foreign proceedings and relief; Cooperation with foreign courts and foreign representatives; and Procedure to deal with concurrent proceedings.”²³ Thus it is a comprehensive legal framework to resolve the cross border insolvency issues amicably and expeditiously.

According to Model Law, there are two kinds of proceedings i.e. ‘foreign main proceeding’ and ‘foreign non-main proceeding’.²⁴ A foreign main proceeding takes place in the State where the debtor has COMI²⁵. A foreign non-main proceeding is a foreign proceeding other than the foreign main proceeding, where the debtor has another establishment. The Model Law provides clarity for various terms like COMI, Public Policy, Foreign Main Proceeding, and Foreign non-Main Proceeding. States can adopt the Model Law into their domestic legal systems after making variations as suitable to their jurisdictions to eliminate ambiguity and vagueness of the term “public policy” to bring transparency and clarity before invoking the provision of public policy.

Objectives of UNCITRAL model law for cross border insolvency - The overall objective of UNCITRAL Model Law is to promote international trade and to remove all such obstacles and uncertainties which can bring embarrassment to the business through uncertain financial distress and causing it to be unviable.

²³ https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency visited on 13th March,2021 at 17:00hrs.

²⁴ Cross-Border & Personal Insolvency in India: Roadmap for Implementation, CII (2019); available at : <https://www.cii.in/>

²⁵ The jurisdiction with which a person or company is most closely associated for the purposes of cross-border insolvency proceedings. <https://uk.practicallaw.thomsonreuters.com/>

“Therefore, the main objective of the UNCITRAL: Model Law on Cross Border Insolvency is: -

a) Cross border cooperation of States at all levels between the courts and other competent authorities. (b) To provide legal certainty to cross border trade and investment (c) To provide an efficient and fair mechanism for cross-border insolvencies and to maximize wealth for all its stakeholders (d) To Protect and maximize the value of the debtor's assets (e) To Facilitate legal insolvency proceedings in case of financially distressed businesses (f) To reorganize, rehabilitate and restructure the business in case of insolvency to protect investment and preserve employment. UNCITRAL model law is based on the ideal principles of (a) Easy access to local courts for representatives of foreign insolvency proceedings and creditors and authorizations for representatives of local proceedings (b) Recognition of orders issued by foreign courts on insolvency matters (c) Simplified procedure and relief to assist foreign proceedings and (d) Cooperation among courts of different states where the debtor's assets are located and to simplify the coordination of concurrent proceedings.”

RECOMMENDATIONS OF ILC VIS-A-VIS COMPARATIVE ANALYSIS²⁶

1. Element of COMI - The ILC Draft proposes a rebuttable presumption legal domicile as COMI. Committee highlighted that there should be indicative factors in the absence of a presumption to provide further clarity on the issue of determining COMI.

COMI in the European Union (EU)²⁷ - “Cross Border insolvency in EU is regulated by European Insolvency Regulation (EIR 2000). Court of Justice of the EU (CJEU) has played an efficient role by clarifying ‘centre of main interests (COMI), ‘establishment’ and ‘related action. (EIR Recast), which has been brought in effect since 26 June 2017, presume that the debtor’s registered office coincides with its COMI. COMI is identified at the moment when an insolvency application has been filed.” EU contains a presumption similar to that mentioned in India. In the case of rebuttal of presumption, an applicant has to provide evidence to that effect. Courts will also follow the Indicative list in practice.

²⁶ Cross Border and Personal Insolvency in India; Road map for implementation, A publication by CII, (2019); available at <https://www.cii.in/>

²⁷ <https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law>

COMI in the U.S²⁸ - US Bankruptcy Code also contains Chapter 15 for the presumption of COMI as proposed by ILC and presume. That debtor's registered office coincides with its COMI. "U.S courts treat the presumption as merely indicative for 'speed and convenience. Simultaneous application of conflicting COMI tests opens the door to forum shopping and conflicts of jurisdiction in different states at the same time. US courts conclude that COMI should be determined at the time Chapter 15 petition is filed."

Analysis:²⁹ Confederation of Indian Industry (CII) has recommended that an indicative list of factors be provided in the code for determining COMI. CII has also recommended that a timeline be mandated within which the adjudicating authority must determine the COMI. It will assist in providing clarity and expeditious mechanism for adjudicating authority.

Public Policy Exception³⁰ - The ILC Draft following UNCITRAL Model law suggests that the adjudicating authority may refuse action if such action would be contrary to the public policy of India. Clarity needs to be provided to eliminate any ambiguity. However, in Section 48 of the Arbitration and Conciliation Act, 1996, while providing clarity on the issue, it states that the following would amount to conflicting with the public policy of India: If

(a) making of the award is induced by fraud or corruption or was in violation of section 75 and section 81 of the Act, or (b) It is in the contravention of the fundamental policy of Indian law or (c) it conflicts with the most basic notions of morality or justice.

Public Policy in EU³¹ - The EIR Recast, (European regulation) provides for the immediate recognition of judgments concerning the insolvency proceedings which fall within its scope. It too has the provision of the public provision under Article 33. "The European Court of Justice has confirmed in *Krombach v. Bamberski* that to apply public policy exception, a judgment must be at variance to an unacceptable degree with the legal order of the enforcing country in as much as it manifest breach of a rule of law regarded as essential in the legal order of the enforcing country. In the European insolvency framework, courts cannot second-guess the correctness of decisions and conclusions as to the debtor's COMI or establishment rendered by courts of other Member States. Importantly, opposition to the jurisdiction of the court is only admissible in the court where an insolvency proceeding has been opened.

²⁸ (ibid)

²⁹ (ibid)

³⁰ (ibid)

³¹ (ibid)

Public Policy in the U.S³² - An Application by a foreign representative has to be filed under Uniform Commercial Code and according to Chapter 15.U.S courts review the jurisdiction of the originating court to decide whether to recognize the foreign proceeding as a foreign main or a foreign non-main proceeding. Only a foreign main proceeding or a foreign non-main proceeding meeting the standards of the U.S Bankruptcy Code is entitled to recognition. If the application fails to satisfy the criteria under the US law it is denied and no recognition is granted to such proceeding.”

Analysis: To prevent litigation and corresponding delays in recognition of foreign insolvency proceedings, guidance on interpretation and application of the public policy exception must be provided clearly in IBC too. The word 'manifestly', incorporated in the exception, should ordinarily be resorted to only if another, more specific provision of the law does not govern the dispute.

3. Cross Border Corporate Group Insolvencies³³ - An enterprise group has been defined in Part III of the UNCITRAL Legislative guide on Insolvency as two or more group members as legal entities and linked together by some form of direct or indirect control including ownership. Interdependence including the financial interdependence of group members across jurisdictions attracts provisions of the cross border insolvency framework.

“The conduct of cross-border insolvency proceedings concerning enterprise groups will often require determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of and to what extent the responsibility for those assets can be shared among or allocated to different parties in different States. How information concerning the affairs of different debtors in different jurisdictions can be obtained and shared to ensure coordination and cooperation and the sequence in which proceedings should evolve.

Concerning the location of proceedings and coordination of such proceedings, UNCITRAL Legislative Guide on Insolvency Law suggests the identification of a ‘coordination centre’ for the group. The UNCITRAL has also set up a Working Group on cross border insolvency of enterprise groups. The Insolvency and Bankruptcy Board of India has also constituted a

³² (ibid)

³³ <https://law.emory.edu/ebdj/content/volume-29/issue-2/article/corporate-group-cross-border-insolvencies.html>

Working Group on Group Insolvency to submit a complete regulatory framework to facilitate insolvency resolution and liquidation of corporate debtors in a group.”

Group Insolvencies in EU³⁴ - Despite the best efforts by the author of this paper, it could not be found that EIR has any standard legal framework explicitly on group enterprise insolvencies, however, EIR grants its member states far more autonomy to apply local law. E.U. insolvencies do not explicitly address corporate groups as every member of the group itself is a legal entity and has a COMI. While a single, efficient group insolvency proceeding is possible under the EIR, it is not legally prescribed.

Group Insolvencies in the U.S³⁵ - despite the best efforts by the author of this paper, it could not be found that the U.S has any standard legal framework explicitly on group enterprise insolvencies. However, in the U.S. corporate groups can have, a single consolidated group insolvency proceeding. Chapter 15, Part II, III & IV of the U.S Bankruptcy Code defines corporate groups, their benefits, litigation costs, efficiency and cooperation, and challenges in cross border insolvency proceedings. Determining “COMI” frequently becomes the greatest challenge due to conflicting and flexible legal frameworks.

Analysis: The Corporate group insolvencies is still a complex issue though being resolved in the U.S and U.K. Working Group on Group Insolvency may consider the above-mentioned issues in evolving a better framework for group insolvency, simultaneously considering the draft legislation of the UNCITRAL Working Group as the basis for dealing with cross border insolvencies of group companies.

4. Principle of Reciprocity in Cross Border Insolvency - The Model Law provides for reciprocity provisions between jurisdictions. The ILC Draft has adopted the reciprocity principle in clause 1. The ILC Draft shall apply to countries who have adopted the UNCITRAL Model laws and with whom the Central Government has entered into reciprocity agreements and has notified such information in the official gazette as per the proposed schedule.

³⁴ (ibid)

³⁵ Available at <https://law.emory.edu/ebdj/content/volume-29/issue-2/article/corporate-group-cross-border-insolvencies.html> ; visited on 14th march,2021 at 17:00hrs.

Principle of Reciprocity in U.K and U.S - Jurisdictions such as U.K and U.S have specifically opposed reciprocity provisions and deal with the recognition of proceedings on a case-to-case basis.

Analysis: Adoption of the reciprocity principle with clear provisions & scope on reciprocity in the implementation of the cross border insolvency framework will facilitate expeditious adjudication. It will help in easy coordination of proceedings with jurisdictions that have adopted the UNCITRAL model law. Efforts are undertaken under Section 234 of the Code to enter into bilateral agreements with major trading players such as U.S and U.K to facilitate reciprocity as per the proposed schedule of the ILC draft.

5. Conflict due to Multiple Legislations About Insolvency - For example, section 2(94A) of the Companies Act, 2013 refers to provisions of the winding-up proceedings of insolvent firms, specifically unregistered companies which may conflict with IBC-2016.

Position in U.K and U.S: In the UK, there are no such multiple provisions for different types of enterprises. All enterprises are governed by one law.

Analysis: To circumvent the uncertainties due to multiple legislative bodies in charge of the insolvency procedures, the Government may undertake necessary reforms to limit the involvement of additional jurisdictional bodies and ensure that the IBC-2016 as amended up-to-date serves as the comprehensive legislation for all matters about insolvency including cross border insolvency.

EC Regulation (EIR Recast) on Insolvency Proceedings³⁶ - The European Commission's Cross Border Insolvency framework is regulated by EIR, 2000 Insolvency Regulation which came into force on May 31, 2002. "EC Regulation, which consists of 47 articles and 3 annexures, applies to all member states of the European Union, except Denmark. Recast Regulation applies to insolvency proceedings initiated after June 26, 2017. EU member states (except Denmark) are required to pass domestic laws to incorporate the provisions of the Recast Regulation on insolvency."

³⁶Available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf ;visited on 15th March,2021 at 17:45hrs.

Bankruptcy Code of United States of America - U.S Bankruptcy Code provides for cross-border insolvency. Chapter 15 was added by the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005. USA has adopted the UNCITRAL Model Law. The U.S.

CONCLUSION

Cross Border Insolvency and its legislation the world over is a highly complex issue. In international trade, cross border insolvency may arise as a consequence of financial trouble in the business and it is an integral part of it. Due to the Lack of an international common legal and enforcement framework, it is very difficult for the stakeholders to knock the right jurisdiction in a country to get relief. The issue becomes very difficult when a business has operations and assets in more than one country. Who will initiate and where it will be initiated and how after winding up, the assets will be distributed and how impartial, efficient, and effective resolution process will be administered keeping in mind when there is no uniform and consistent international law to enforce the process. Currently, except for UNCITRAL model law, there is no effective legal framework for resolving cross-border insolvency proceedings in India and the World Over. The Draft Provisions suggested by the Insolvency Law Committee in conformity with UNCITRAL Model Laws would necessarily require to be formulated as a Bill according to ILC and as a common understanding, which must be passed, to be inserted in the Code to bring consistency, uniformity, and harmonization in the insolvency laws world over for smooth flow of international trade. “Presently, in the Indian context, there is no clarity as to when such amendments will be effected. If the Draft Provisions are adopted, despite the existence of some procedural and legal challenges, the framework suggested by it could go a long way in ensuring expeditious coordination and communication between jurisdictions to successfully and efficiently provide relief, address the resolution of cross border insolvency cases to benefit various stakeholders.”

CASE LAWS³⁷

1. Kamsley V Barclay bank

Mr. Kemsley was an English businessman to whom Barclays made an unsecured loan for £5million.

³⁷ Available at <https://www.casemine.com/> visited on 15th March, 2021 at 17:45 hrs.

- In June 2009, he and his family moved to the US.
- A bankruptcy petition was issued against him by HMRC in the UK in November 2011. He then issued a debtor's petition for his bankruptcy in January 2012. He claimed he was in the UK on the date the petition was presented, he was domiciled in the UK and had a place of residence in the UK within the previous 3 years, as required by Section-265, Insolvency Act 1986.U.K.
- On 1 March 2012, Barclays issued proceedings in New York, in the USA.
- Kemsley was made bankrupt in the U.K on 26 March 2012 on his petition.
- Bankruptcy Trustees were appointed in the U.K, they applied for recognition of the U.K bankruptcy in the U.S under Chapter 15 of the U.S Bankruptcy Code (in August 2012).

Issues in Cross-Border Insolvency

- The US bankruptcy court ruled that Kemsley's COMI was in the U.S as of such date because "the Debtor's close relationship with his children serves as a useful proxy for the Debtor's subjective intent regarding his habitual place of residence."
- At the time of the filing of the U.K proceeding, he was living in the US with his family, therefore his COMI was then in the U.S.

2. The case of Rubin v. Euro finance:³⁸ It is about the question of, the foreign proceeding will be recognized and initiated in a domestic court given the fact that the debtor does not belong to the foreign jurisdiction. It also raises a fundamental issue in cross border insolvency if, enforcement of an order of a foreign court can be effected through the international assistance provision of the UNCITRAL Model Law.

Facts of the Case: Euro finance was an English Law trust.it simultaneously ran a sales promotion firm in the United States which ran into a legal battle with the U.S Courts based on consumer protection legislation. U.S Bankruptcy Court made orders for the recovery of fraudulent transfer of funds against the defendants, who were residents of England. The defendants did not take part in any of the U.S insolvency proceedings and subsequently defaulted. Summary judgements were entered against them.

³⁸ Available at <https://www.careyolsen.com/briefings/rubin-v-eurofinance-a-welcome-clarification-for-the-insolvency-world>; visited on 15th March,2021 at 17:55 hrs.

The U.S courts then submitted an application to the U.K court for recognition and admission of insolvency proceedings.

In a remarkable judgement, U.K Supreme Court held that “there was no reason to class avoidance judgments relating to insolvency proceedings any differently to any other type of foreign judgment and based the recognition to U.S Bankruptcy Court on the following basis that foreign officeholders will have to show that the judgment debtor:

- (a) Was present in the foreign jurisdiction at the time proceedings were instituted;
- (b) Was the claimant or the counter-claimant in the foreign proceedings
- (c) Had submitted to the foreign proceeding by agreement”

The decision of the U.K Supreme Court provides welcome relief to the foreign jurisdiction and reinforces the importance of territorial limits in respect of insolvency proceedings and clarifies the common law position on the enforceability of foreign judgments in case of cross border insolvencies too.

3. In the case of Maxwell Communication Corp. (MCC):³⁹ The U.S & U.K Courts, showed a remarkable degree of cooperation and reconciliation of the laws of both forums.

Facts of the Case:-

Maxwell Corporation Group due to scandals forced the international corporation into bankruptcy. MCC was an unusual business, with its true "seat" of administration and management of its financial affairs especially loans and the grant of security in London. Amazingly with its principal assets in the United States in the form of various large operating companies. The Company declared voluntary insolvency at the time when it was headquartered and managed in the U.K. It had incurred most of its debts in the U.K jurisdiction. 80% of Maxwell's assets were located in the United States, primarily in its two major subsidiaries. Upon bankruptcy, Maxwell filed a petition for reorganization under Chapter 11 of the U.S Bankruptcy Code and simultaneously petitioned the High Court of Justice in London for an administration order.

Concurrent proceedings in different countries, generally in multi-party cases like bankruptcies, can lead to unusual inconsistencies and conflicts.⁴⁰ In this case, both courts of

³⁹ (ibid)

the USA and the U.K independently raised with their respective counsel the concept that a protocol between the two administrations would be helpful to resolve an impasse and to facilitate better and expeditious exchanges of information. These parallel proceedings in the U.K and USA courts resulted in an extremely high level of international cooperation⁴¹ and provided a significant degree of harmonization of the laws of the two countries.



⁴⁰ (ibid)

⁴¹ (ibid)