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Duality of Regime to Handle Insolvency of Foreign Companies in India

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I. Introduction

Growth in international trade, also leads to incidental businesses risk to failure. One of the concerns in cross border trade is the cross border insolvency. The businesses traverse through nations but all these nations do not adhere to common set of insolvency rules across nations. World Bank recognises the fact that in such cross border insolvency instances the cooperation of courts and administrators in international insolvency proceedings. Implementation of the same by the administrators, policy makers and insolvency practitioners remain one of the common lacunas. Cross border insolvency proceedings can be prolonged and inefficient. Different languages are the least of the problems with different legal systems and traditions giving rise to the obvious conflicts. Implementation of the Orders in insolvency proceedings by courts (foreign courts) is easier said than done. In cross border context the complexities increase and often results in uncertainty, risk and increased costs to businesses. The extent to which the insolvency administrator may obtain access to assets in foreign country; priority of payments and recognition of claims of local creditors in a foreign administration; recognition and enforcement of local securities over local assets where a foreign administrator is appointed are some of the concerns. The two broad approaches that countries adopt in designing insolvency laws or to guide cross-border insolvency administrations are either the Universal approach or the territorial approach. The Universal approach assumes that one insolvency proceeding will be universally recognised by the jurisdictions in which the entity has assets or carries on business. All the assets of the insolvent company will be administered by the court or the administrator in and possibly also accordingly to the law of the place of incorporation. The territorial approach assumes that each country will have exclusive jurisdiction over the insolvent of a particular debtor and that the separate proceedings for each country under the countries' laws will be undertaken. No recognition is given to proceedings in course or completed in other jurisdictions.

This paper will discuss the existing cross border insolvency and bankruptcy in India which is governed primarily by the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016. Then the key features of the UNCITRAL Model Law of Insolvency, 1997 will be highlighted which can be easily incorporated in the Indian regime to allow the parity across nations and encourage foreign companies to invest more in the country. However, it is right to conclude how any incorporation of the model law or adaptation thereto would also stress the

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prerequisite assessment of the provisions in the Companies Act, 2013 to create an appropriate sync in the procedure to be followed by the country.

II. Cross Border Insolvency Regime In India

Cross border insolvency is a term often used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Businesses and forms cross their national boundaries to grow and adopt a larger multi-national perspective. India too has been preferred for such expansion of trade by many foreign companies. The globalisation wave has given India enough scope to deliberate on the domestic laws to deal with insolvency of such enterprises. Typically, domestic laws are looked up to for the procedures to identify and locate debtor's assets; '*calling in*' the assets and converting them in monetary form; identify and reverse any voidable or preference transactions ; identifying the creditors and the extent of their claims and the solution which suits all without disturbing the international trade and cooperation aspects of the Nation.

Cross Border Insolvency in India can be raised when the creditors of an Indian debtor intend to enforce their rights over such debtor's assets located overseas; when the creditors of a foreign debtor intend to enforce their rights over the assets of the foreign debtor in India and when the Indian creators to a foreign debtor intend to enforce their rights over the assets of the foreign debtor in a foreign jurisdiction. As per the Code, a foreign creditor can initiate insolvency proceedings against an Indian debtor in India. It is the interests of the creditors against the interests of the debtors and the Centre of Main interests around which majority of concerns in cross-insolvency proceedings revolve. The model law deals with four major principles of cross-border insolvency, namely direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor; recognition of foreign proceedings & provision of remedies; cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and coordination between two or more concurrent insolvency proceedings in different countries. The main proceeding is determined by the concept of centre of main interest ("COMI"). The necessity of having Cross Border Insolvency Framework under the Insolvency and Bankruptcy Code arises from the fact that many Indian companies have a global footprint and many foreign companies have presence in multiple countries including India. Although the proposed Framework for Cross Border Insolvency will enable us to deal with Indian companies having foreign assets and vice versa, it still does not provide for a framework for dealing with enterprise groups, which is still work in progress with UNCITRAL and other international bodies. The inclusion of the Cross Border Insolvency Chapter in the Insolvency and Bankruptcy Code of India, 2016, will be a major step forward and will bring Indian Insolvency Law on a par with that of matured jurisdictions.

In India, cross border insolvency has been recognised as untamed lion which needs diligent attention and delicate handling. The Eradi Committee Report[1] recommended that the Model Law be implemented in India vide an amendment in the then Part VII of Companies Act, 1956. It suggested in-bound and out-bound requests for recognition of foreign proceedings along with co-ordination of proceedings in two or more States and participation of foreign creditors in insolvency proceedings in the interests of justice. The N.L. Mitra Committee stated the obvious by mentioning as to how the Indian legislations were ill-equipped to deal with cross-border insolvency and in no comparison to international legal standards. In the event of international insolvency proceedings, the machinery in India will find it difficult to cope with the specific requirements and thus proposed a well drafted Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code, 2016 was thus a welcome addition to the country's growing demands to foreign companies management and growth.

The Insolvency and Bankruptcy Code stipulates two-pronged approach to the issues of cross-border insolvency. The Government can enter into individual agreements with other countries to enforce the insolvency and Bankruptcy Code and the National Company Law Tribunal can issue the authority to write a letter to the courts and authorities of these countries to seek information or request action in relation to the assets of the debtors situated outside India. The orders passed by these foreign courts will be implemented in India as decrees passed by foreign courts as per the relevant provisions in Code of Civil Procedure 1908. India has not yet adopted the Model Law on cross-border insolvency and would like to go down a difficult and lengthy process to negotiate agreements instead with specific countries. The relevant provisions in the code dealing with foreign companies and the cross-border insolvency are contained in Section 234 and Section 235 of the Act. Section 234 of the Code discusses the agreements with foreign countries. It recognises bilateral and reciprocal agreements. Bilateral agreements empower the Central government to enter into a bilateral agreement with a foreign government to enforce the provisions of the code and the reciprocal agreements would empower the Central government to direct such countries wherein agreements have been entered to direct the assets of the debtors (corporate debtor or personal debtor or debtor) as per the conditions stipulated in the agreement. Such agreements may also require reciprocity in insolvency laws of these countries with whom India enters into such agreements.

The Code provides for a letter of request to a country outside India in certain cases. Section 235 of the code states that a liquidator or bankruptcy trustee can

[1] Report of The High Level Committee on Law Relating to Insolvency and Winding up of Companies 2000, As available http://reports.mca.gov.in/Reports/24Eradi%20committee%20report%20of%20the%20high%20level %20committee%20on%20law%20relating %20to%20insolvency%20&%20winding%20up%20of%20Companies, %202000.pdf last accessed on 10.03.2019.

make an application to seek National Company Law Tribunal to issue a request letter to a foreign court/authority in country where in there is a pre-existing agreement to such cooperation requesting evidence in relation to an asset in relation to the proceedings against a corporate debtor in India[2]. According to the Code, foreign creditors are given equal access and rights as domestic creditors. Insolvency professionals are permitted to access and gain control over all of debtor's assets including the assets beyond the territorial borders of the country[3]. However at the same time, the insolvency proceedings being held in foreign territories are not accepted by the courts neither are the representatives or members of Foreign Insolvency Proceedings allowed access to the documents in India. The Code is expected to provide for a robust mechanism to deal with insolvency and bankruptcy proceedings while maintaining enough scope to lure in more foreign investors and make the economy globally friendly in terms of trade and investment. In last two years of its implementation, the code has successfully witnessed filing of applications and despite initial teething troubles; it has made its own mark to deal with the insolvency and bankruptcy proceedings of companies in the nation.

A report of Insolvency Law Committee on Cross Border Insolvency in October, 2018 by the Ministry of Corporate Affairs, Government of India dealt with the recommendations of the government on adoption of the UNCITRAL Model Law on Cross border Insolvency, 1997[4]. It was duly noted that the code vide Section 234 and 235 does not provide for a comprehensive framework for the cross-border insolvency matters. It was specifically suggested by the committee as to how the adoption of the Model Law would increase foreign investment with increased communication and cooperation between domestic and foreign courts. It will align Indian with the global practices to deal with cross border insolvency and signal to global investors, international organisation and creditors of the robustness of the nation's financial sector. In order to make the interaction more effective for the foreign companies and investors, the legislators suggest the incorporation and adoption of the model code on the basis of reciprocity. The Model Law must be adopted based on legislative reciprocity or without any reciprocity requirement. Broadly, "*legislative reciprocity*" indicates that a domestic court will recognize and enforce a foreign court's judgments or orders only if the country in which the foreign court is located has adopted the same or similar legislation to that governing the domestic court. Globally, countries such as South Africa, Mexico, Romania, etc. have incorporated a reciprocity requirement while

[2] Section 234 and Section 235 of The Insolvency and the Bankruptcy Code, 2016 as available at http://www.mca.gov.in/Ministry/pdf/The In solvency and Bankruptcy of India.pdf last accessed on 24.03.2019.

[3] Section 18(1)(f)(i) of The Insolvency and Bankruptcy Code, 2016

[4] The Committee was formed in the year 2017 and the report is available in its entirety at http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf last accessed on 15.03.2019.

adopting the Model Law in their domestic insolvency statutes. At this stage of development in the Indian insolvency infrastructure and its overall economic developments, the Committee in its latest report in October, 2018 recommended that initially the Model Law may be adopted on a reciprocity basis. Eventually, the reciprocity requirement may be diluted based on the experience in implementation of the Model Law and development of adequate infrastructure in the Indian insolvency system. The Committee clarified that provisions of the Code, other than draft Part Z, would not be affected by the reciprocity requirement. Therefore, foreign creditors will still be able to initiate, participate in and file claims in proceedings under the Code regardless of reciprocity.

III. Key Features Of UNICITRAL Model Law On Insolvency

Foreign Companies as defined under the Companies Act , 2013 mean any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent physically or through electronic mode and conducts any business activity in India in any other manner[5]. The Companies Act, 2013 contains the provisions to deal with insolvency of foreign companies. Section 375 of the Act[6] which deals with winding up of unregistered companies also covers the foreign companies within its ambit as per the literal interpretation of the statute[7]. An amendment of the Insolvency and the Bankruptcy Code will ensure duality of the regime unless clarified by the legislators in the process of application.

The recent recommendation of the committee in the month of October, 2018 to adopt the Model law on reciprocity basis which could be diluted subsequently though seems to be a dicey game of implementation, is the current proposition under consideration. Reciprocity indicates the recognition of the judgment of a foreign court if the foreign country has accepted the same legislation but does not specify what will be the procedural requirements for the such adoption of foreign judgment.If the clause of reciprocity does not work out as to create a parallel authority of the civil courts of the foreign countries. And if the reciprocity approach does not spread as effectively as anticipated, the process of dilution of the same would lead a gap in between the change of approach and the already implemented one i.e. a chaotic situation of understanding the overlapping provisions and facing duplicity of proceedings to expect the least. The model law allows foreign insolvency professions and foreign creditors' access to domestic courts and the same is ensured by the Code as per Section 235 but there is a need for an effective mechanism to streamline the process. The Centre of Main Interest as per the

[5] Section 2 Sub section 42 of the Companies Act, 2013.

[6] Section 375 deals with winding up of unregistered companies and section 376 deals with the power to wind up foreign companies although dissolved.

[7] This section was notified and effective from the 15th of December, 2016.

Model Law can be out rightly read as the territorial approach wherein the domestic courts determine whether the debtor has its Centre of Main Interest in a foreign country and if such foreign proceedings could be considered as main proceedings. The non-main proceedings can be at the discretion of the domestic court and thus there lays the rule making powers.

The UNCITRAL model was created by the United Nations in 1966 *'to further the progressive harmonisation and unification of the law of international trade'*. The model law reflects a universal approach to cross-border insolvency based on the principle that the domestic courts of each home country should endeavour to cooperate with the courts of other countries in cross-border insolvency cases. It does not impose substantive laws or rules for the choice of substantive laws. The model law is procedural in nature providing for judicial cooperation between states, rights of access for foreign insolvency administrators and recognition of foreign insolvency proceedings by participating states[8]. The preamble of the Model Law States:

'The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.'

The UNCITRAL Model Law in 1997 on cross-border insolvency provided for a certain direction. The states were expected to give the model law '*favourable consideration*' while outlining their cross-border insolvency regime. Access, recognition, relief, cooperation and coordination are the key principles of the Model Law.Article 1(2) of the Model Law[9] permits a State to exclude from the operation of the Model Law, any special entity, such as a bank or insurance company that may be subject to a "*special insolvency regime*". The reason for the exclusion of such entities is that their insolvency may require the protection of the interests of a large number of individuals. Article 3 preserves the right of a State to honour

[8] Cross Border Insolvency Promoting International Cooperation and Coordination, as available at https://www.iiiglobal.org/sites/default/files/6-_Australia_Report_on_Cross_Border_Insolvency.pdf last accessed on 12.03.2019

[9] S. Chandra Mohan, *Cross Border Insolvency Problems: Is the UNCITRAL Model Law the Answer*?, (2012) International Insolvency Review.21, (3), 199-223

its treaty or other agreement obligations should there be a conflict between the treaty and the Modern Law. It expresses the principle of the supremacy of international treaty obligations of a state. The model law encourages and promotes the domestic laws. It enables the domestic courts to adopt as much as possible in line with their own public policy. Such flexibility to protect the domestic interest is elaborated in Article 6 of the Model law which provides that a state court may refuse to "*take an action governed by this Law if the action would be manifestly contrary to the public policy*" of the State. The Article does not define "*public policy*" as "*the notion of public policy is grounded in national law and may differ from State to State*".

IV. **Conclusion**

Adoption of the UNCITRAL Model Law is the way forward to create a robust insolvency and bankruptcy procedure in India to deal with cross border insolvency and the requirements of globally growing international trade and investment in the country. The recommendations of the committee to adopt the UNCITRAL Model Law, if accepted, will strengthen the Insolvency and Bankruptcy Code in India to deal with cross border insolvency. It will also encourage the foreign investors and companies to increase interface in international trade. However, the incorporation requires a thorough assessment of the existing provisions in the Companies Act, 2013 to deal with insolvency of foreign companies to avoid a conflict or overlapping of statutes. Unless the Companies Act, 2013 is modified or reassessed through appropriate amendments, as per the international standards, the adoption of model law will have to be cross roads with the statute governing companies. The Insolvency and Bankruptcy Code, 2016 on adoption will create a duality in regime giving the scope to corporate or companies and investors to decide their preferred modus operandi while dealing with insolvency of foreign creditors, foreign companies or Indian debtors with assets in foreign companies. It will then create another kind of implementation hiccups and roadblocks on the hegemony of the judgments of few courts and procedural requirements thereto.