

Cross Border Mergers in India in the IBC Era: A Legal Inquiry

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Abstract

The Insolvency and Bankruptcy Code, 2016 (IBC), since its enactment, has been a subject matter of intense deliberation, both in the trade as well as the legal fraternity. Strong opinions are polarised between those who consider it a necessary step and those who classify it as a 'draconian legislation'. In 2018, certain provisions of the IBC were amended which introduced sweeping changes in both the substantive as well as the procedural aspects relating to the insolvency process. The Indian economy grew unprecedentedly while most economies were suffering from economic depression. This growth is attributed to the inflow of FDI into India by way of cross-border mergers & acquisitions. IBC is expected to play a significant role in establishing a solid legal platform where cross border mergers & acquisitions in India can flourish in mutual coexistence with all other laws leading to wholesome economic development.

Currently, the legal framework for cross border insolvency in India concerning foreign proceedings, the participation of foreign investors, recognition of foreign courts, and uniformity in relief provided etc. is unclear and at a nascent stage. This creates many legal hassles and confusion in the finalisation of cross border merger deals and makes the business climate uncertain. The authors attempt in earnest, to critically analyse the legal framework with respect to IBC and study the complexities of cross-border insolvency in the Indian context, and set out the broad principles of the UNCITRAL Model Law and determine the relevance of Gibbs rule in the insolvency resolution process to assess on a macroeconomic level, the impact of IBC on cross border mergers and acquisitions in India.

Keywords: *Cross-Border Mergers & Acquisitions, FDI, Cross Border Insolvency, UNCITRAL Model Law, Gibbs Rule, Insolvency and Bankruptcy Code, 2016 (IBC).*

I. Introduction

India is the third fastest growing economy in the world after the United States and China. India's economic transformation and momentous market potential is

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attracting substantial interest in the world economy.² India is among the top three global investment destinations and ranks 10th in FDI inflows in 2016, with trade volumes to the tune of USD 44 billion.³

The Indian economy has emerged as the world's fastest growing economy with an annual Gross Domestic Product (GDP) growth rate of 7.3% in the first quarter of 2018,⁴ owing to a strong capital market and market-friendly and competitive regulatory reforms. In 2018, India recorded her highest ever half yearly Mergers and Amalgamations (hereinafter M&A's) figure of USD75 billion from 638 transactions comprising of ten deals in the billion-dollar category, and 52 deals above USD100 million each, which together contributed 93% of total deal value.⁵ 2018 has witnessed 235 M&A transactions amounting USD65.5 billion, along with the highest cross-border M&A's deal value since 2011 at USD25 million, which is a monumental increase of 5.8 times the total value of the same in 2017.⁶

The Indian cross border merger and acquisition space, over the last couple of years, has witnessed a slew of policy-driven regulatory refinements driven aimed at ease of business as well as industry consolidation.⁷ This includes the much-hyped Insolvency & Bankruptcy Code, 2016⁸, which was aimed at facilitating cross border mergers and acquisitions in an organised and efficient manner by eliminating the threat of cross border insolvency which acts as a deterrent and major issue in all cross border mergers and acquisitions deals. Indian bankruptcy and insolvency laws were streamlined and consolidated with

²AfraAfsharipour, *Rising Multinationals: Law and the evolution of outbound acquisitions by Indian companies*, 44 UCCLR, 1029, 1030 (2011).

³WORLD INVESTMENT REPORT, 2017, UNCTAD, (May 9, 2017), http://unctad.org/en/Publications_Library/wir2017_en.pdf.

⁴Sridhar Ramasubramanian, *Expert speak on the overall economic outlook*, 16(4) GTILLP, 1, 25, (2018).

⁵*Id.* at 8.

⁶AnujChande, *2018 Setting new records for Indian M&A*, GTUKLLP, (Oct. 1, 2018, 11:15 AM), <https://www.grantthornton.co.uk/insights/2018-setting-new-records-for-indian-ma>.

⁷Sakshi Kapoor, *Mergers and acquisitions: Current scenario and emerging trends in India*, 1(6) IJAMSR, 69, 70-71, (2018).

⁸Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

the enactment of the Insolvency and Bankruptcy Code.⁹ The IBC has created a formal market for cross border M&A transaction involving distressed assets, and India has since seen a steady increase in transactions involving distressed assets.¹⁰ Legislative reforms including time-bound insolvency regime, replacing the primary company law, and the replacement of a redundant and complicated foreign investment regime with a new one, among others, have encouraged strategic cross border M&A activity in the country. The last fiscal witnessed deals over USD 80 billion, due to watershed activity in the telecommunication, financial services, technology and energy sectors – almost 30% more than the preceding year.¹¹

The MCA through a public notice¹² in June 2018 invited suggestions and comments on the proposed draft chapter relating to cross border insolvency which will make the provisions of IBC attuned to the Model Law.¹³

II. Cross-Border Insolvency Scenarios

In the Indian context cross border insolvency issues could arise in these circumstances: (a) where the creditors of an Indian debtor want to enforce their rights over the assets of an Indian debtor, located overseas; (b) where creditors

⁹Pratik Datta, *Value destruction and wealth transfer under the Insolvency and Bankruptcy Code, 2016*, NIPFP WORKING PAPER SERIES, 3, (Feb 2, 2019), https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf.

¹⁰*IBC triggers M&A deals for distressed assets*, M&ACRITIQUE, (Jan 21, 2019), <https://mnacritique.mergersindia.com/insolvency-bankruptcy-code-drives-mergers-acquisitions/>.

¹¹*Telecom, technology and BFSI push India M&A activity to over \$50 billion in 2017*, LIVEMINT, (Feb 1, 2019), <https://www.livemint.com/Companies/D2Z14GP2u0Dr1TeshGwLAO/Telecom-technology-and-BFSI-push-India-MA-activity-to-over.html>.

¹² Insolvency Section File No. 30/27/2018, *Public Notice Dated 20/06/2018, Ministry of Corporate Affairs*, (20 Mar. 2019)

http://www.mca.gov.in/Ministry/pdf/PublicNotice_CrossBorder_20062018.pdf

¹³Sarthak Jain & Anuska Sheth, *Cross-border Insolvency: Why India should adopt the UNCITRAL Model Law*, ILJ, 1-2, (Jan 4, 2019), <http://www.indialawjournal.org/cross-border-insolvency.php>; See also, *Overview of cross border Insolvency framework for Corporate debtors under the Insolvency and Bankruptcy Code, 2016*, GOVT. OF INDIA, MINISTRY OF CORPORATE AFFAIRS, (Jan 19, 2019), http://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf.

of a foreign debtor want to enforce their rights over the assets of the foreign debtor based in India; and (c) where the Indian creditors to a foreign debtor, want to enforce their rights over the assets of that foreign debtor based in a foreign jurisdiction.¹⁴

The issues arising out of these situations are intricate and cross border insolvency, inevitably creates panic amongst the creditors across jurisdictions over how their claims may be compromised by the initiation of insolvency against the debtor in its centre of main interests.¹⁵

Cross border insolvency, essentially, can be deconstructed based on three key questions: which law shall be applied; who has the jurisdiction to carry out the insolvency process; and how are judgments asserting control over assets enforced?¹⁶ The redressal of financially afflicted debtors, having assets across jurisdictions has two principal theoretical approaches, and a third, more practical real approach.¹⁷ Firstly, there is the territorial approach¹⁸, which broadly provides that each jurisdiction will apply its laws over assets located in its jurisdiction, to the exclusion of others.¹⁹ Secondly, there is the Universalist approach²⁰, which provides for a single administrator applying a single global regime over assets, across national boundaries. Thirdly, there is the hybrid approach²¹, where different jurisdictions try to harmonize and work out the most

¹⁴A foreign creditor is allowed to initiate insolvency proceedings against an Indian debtor, under the IBC in India.

¹⁵Mukesh Chand, *Cross border Insolvency "From territorialism to universalism to modified universalism,"* LIVELAW, (Feb 8, 2019), <https://www.livelaw.in/cross-border-insolvency-from-territorialism-to-universalism-to-modified-universalism/>.

¹⁶A. K. Sikri, *Cross-border Insolvency: Court-to-court cooperation*, 51(4) JILI, 466, 467, (2009).

¹⁷Sarah Paterson, *Rethinking corporate bankruptcy theory in the twenty-first century*, OJLS, 1, 3, (2015).

¹⁸Approaches to Cross-border Insolvency, Australian Government, The Treasury (20 Mar. 2019)

<http://archive.treasury.gov.au/documents/448/HTML/docshell.asp?URL=6Approaches.asp> at 1.

¹⁹Ryan Halimi, *An Analysis of the 3 major cross-border insolvency regimes*, II PROGRAM PAPERS, 2, (Jan 25, 2019), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1046&context=international_immersion_program_papers.

²⁰Approaches to Cross-border Insolvency, *Supra* Note 17

²¹*Id.* at 1

suitable centre for conducting the proceedings, by way of co-operation from other jurisdictions having the distressed assets.²²

III. The Legal Framework in India for Cross Border Insolvency

Sections 234 and 235 of the Code²³ deal with cross border insolvency perfunctorily, empowering the government to make treaties and empowering the Adjudicating Authority²⁴ under the IBC, to issue a letter of request to a court in a foreign country, which has signed an agreement, to deal with the assets in a specified manner.²⁵ Theoretically, this provides a mechanism to foreign creditors to apply to Indian courts with their issue to deal with assets in India in consonance with the insolvency laws of the jurisdiction where foreign main proceedings have been initiated, with respect to a debtor, having assets in India.²⁶

For the admission of the foreign proceedings in India, the process set out under the Code of Civil Procedure, 1908²⁷ will apply, along with English common law principles. Similarly, for Indian proceedings to be recognized abroad, the procedural rules of the foreign jurisdiction will apply. Countries who are signatories to the UNCITRAL Model Law are mandated to provide for the recognition, cooperation, assistance and appropriate relief in insolvency proceedings commenced in India, except in cases where the country has otherwise required reciprocity. As of June 2018, 44 nations have adopted the UNCITRAL Model Law, including the United States, the United Kingdom and

²² Michael Guihot, *Cross-border insolvency: A case for a transaction cost economics analysis*, 25(5) NJBLP, 1, 3-4, (2016).

²³ Insolvency and Bankruptcy Code, 2016, *Supra* Note 7

²⁴ NCLT is the adjudicatory authority in matters of Insolvency & Bankruptcy under the IBC, 2016.

²⁵ Roshni Menon, *Cross-border insolvency- An analysis of the draft chapter*, L&S ATTORNEYS, 1, (Jan 7, 2019), <https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/cross-border-insolvencyan-analysis-of-the-draft-chapter>.

²⁶ Ashish Pandey, *The Indian Insolvency and Bankruptcy Bill: Sixty years in the making*, 8(1) IMJ, 26, 28-29, (2016).

²⁷ The Code of Civil Procedure, 1908, Act No. 5, Acts of Parliament, India (1908).

Singapore. However, certain countries that have adopted it may have made reservations, and it calls for reciprocity.²⁸

While the IBC allows the government to enter into bilateral treaties to implement the UNCITRAL Model Law, it is not practical negotiating up to 200 separate bilateral treaties in such a short space of time as it will lead to further complications.²⁹ For India, the easiest solution would be sign and ratify the UNCITRAL Model Law and then incorporate the same into the IBC.³⁰ There is a common reservation that India will not give effect to the treaty provisions over public policy, but this reservation is very common amongst most contracting states and how the courts in India might interpret the principle³¹ and whether they will accord a narrow, or broad status, potentially frustrating the rights of foreign representatives in actions before the Indian courts is the key point here.³²

IV. India and the UNCITRAL Model Law

The UNCITRAL Model Law seeks to deal with the complexities in cases of cross border insolvency by rationalizing the process, but it should not be mistaken for creating a substantive, unified insolvency law.³³

The UNCITRAL Model Law provides for the principle of centre of main interests (COMI) in ascertaining the place where the main proceeding should be

²⁸ For the principle and implications of reciprocity, see Keith D. Yamauchi, *Should reciprocity be a part of the UNCITRAL Model cross-border insolvency law?* 16 IIR, 145, 147, (2007).

²⁹ Ran Chakraborti, *India's proposed cross border insolvency regime: Will it trump the Gibbs rule?* INDUSLAW, (Feb 10, 2019), <http://www.mondaq.com/india/x/721994/Insolvency+Bankruptcy/Indias+Proposed+CrossBorder+InsolvencyRegime+Will+It+Trump+The+Gibbs+Rule>.

³⁰ Morshed Mannan, *Are Bangladesh, India and Pakistan ready to adopt the UNCITRAL Model Law on cross-border insolvency?* UNCITRAL Model Law in South-Asia, 25(3) IIR, 1, 5, (2016).

³¹ Irit Mevorach, *Cross-border insolvency of enterprise groups: The choice of law challenge*, 9 BJCFC, 23, 26, (2014).

³² Sandeep Gopalan & Michael Guihot, *Recognition and enforcement in cross-border insolvency law*, 48 VJTL, 1225, 1226-27, (2015).

³³ Jenny Clift, *UNCITRAL Model Law on cross border insolvency-A legislative framework to facilitate coordination and cooperation in cross-border insolvency*, 12 TJICL, 307, 309, (2004).

initiated. Interestingly, COMI is not defined under the Model Law. It implies that the seat of a corporate entity's major stakes, either in terms of the location of its assets and its place of significant operations or control. COMI is determined by both objective and ascertainable factors by third parties, especially creditors and potential creditors.³⁴ The command and control test is the generally applied test to determine the COMI of an entity.³⁵ There is an obvious presumption in favour of the place of its registered office, which normally is the head office of the company³⁶ and this presumption has served well in the absence of any serious controversy.³⁷ The place of incorporation or the registered office serves as conclusive proof of the existence of a corporate entity.³⁸ The registered office, however, does not shift the burden of proof away from the foreign representatives seeking recognition in a main proceeding.³⁹ Courts generally, consider other factors, such as the location of the agency who manages the debtor, or the location of the debtor's headquarters⁴⁰, the location of majority of the debtor's creditors or the majority of creditors who would be affected by the case, the location of the debtor's primary assets and the jurisdiction whose law would apply to most disputes.⁴¹

In India, the initiation of proceedings against an Indian corporate entity itself makes such proceedings the "foreign main proceedings"⁴² then the COMI lies in India.

V. Implications of India Accession to the UNCITRAL Model Law

Cross border insolvency is resolved through a formal cross- border approach under the UNCITRAL Model Law on Cross-Border Insolvency⁴³ approved by

³⁴ In Re. *Stanford International Bank*, 2010 1270 Bus LR 1270 (2010).

³⁵ IAN F. FLETCHER, *INSOLVENCY IN PVT. INTERNATIONAL LAW*, 390-91, (2nd ed., 2005).

³⁶ Article 16(3) Model law; see also Virgos, Miguel, and Schmitt, Etienne. (1996) *The Report on the Convention on Insolvency Proceedings*, EU Council Document 6500/96 DRS8 (CFC)

³⁷ H.R. Report No. 31, 109th Congress, 1st Session, at para 114.

³⁸ ROY GOODE, *PRINCIPLES OF CORPORATE INSOLVENCY LAW*, 109, (4th ed., 2011).

³⁹ In Re. *Tri-Continental Ex. Ltd.*, 349 B.R. 627 (2006).

⁴⁰ H Jayesh et al., *A new look to the Indian corporate insolvency regime*, 10(1) IRI, 34, 36-37, (2016).

⁴¹ In Re. *Sphinx Ltd.*, 371 B.R. 10 (2007).

⁴² Article 2(b), UNCITRAL Model Insolvency Law (1997).

the UN General Assembly through a resolution in 1997.⁴⁴ The Model Law is a result of lengthy deliberations and was passed as a model law and not a convention to provide for greater flexibility for nations to adopt the same into their domestic laws.⁴⁵ This allows the nations to change, include or exclude certain provisions in addition to the existing model, giving states the option to adopt to the model law conveniently.⁴⁶

The present cross- border insolvency provisions under the Insolvency and Bankruptcy Code, 2016 (IBC), included on the recommendations of the High-Level Joint Committee on the Insolvency and Bankruptcy Code, 2015, requires India to enter into bilateral treaties with other nations to counter the issue of cross border insolvency.⁴⁷ This necessitates the application of the doctrine of reciprocity⁴⁸, where request letters may be issued by the NCLT or the authorized court to a tribunal or foreign court where the corporate debtor's assets are located.⁴⁹ Presently, India has not entered into any bilateral treaty with any other nation to further the development of the same.⁵⁰ The assumption that treaties with different states will have different provisions entailed leads to the uncertainty in the implementation and entering of the cross- border bilateral treaties.⁵¹ Reciprocal arrangements adopted uniformly will significantly minimise the burden on the judiciary.⁵²

⁴³ UNCITRAL Model Law on Cross-Border Insolvency (1997), (20 Mar. 2019), http://www.uncitral.org/UNCITRAL/en/UNCITRAL_texts/CrossBorderInsolvency/1997_ModelLaw.html at 1.

⁴⁴ Barry E. Adler, *A theory of corporate insolvency*, 72 NYULR, 343, 345, (1997).

⁴⁵ Wong Li Fern & Chelsia, *To better the insolvency regime: A question of assimilating the model law*, 23 SLR, 211, 217, (2003).

⁴⁶ *Id.* at 215.

⁴⁷ Vivek Tyagi & Manipadma Datta, *Regulatory framework of corporate insolvency in India: The road ahead*, 16(2) ABR, 5, 9, (2017).

⁴⁸ Keith D Yamauchi, *Should reciprocity be a part of the UNCITRAL Model Law*, 16 INSOLIR, 145, 147, (2007).

⁴⁹ Renuka Sane, *The way forward for personal insolvency in the Indian Insolvency and Bankruptcy Code*, NIPFP, 4, (Feb 23, 2019), https://www.nipfp.org.in/media/medialibrary/2019/02/WP_251_2019.pdf.

⁵⁰ Sreyan Chatterjee et al., *Watching India's insolvency reforms: A new dataset of insolvency cases*, Bloomberg quint, 3, 21, (2017)

⁵¹ William W Park & Alexander A. Yanos, *Treaty obligations and National law: Emerging conflicts in international arbitrations*, 58 HLR, 251, 252, (2006).

⁵² *Supra* Note 16.

In the past, the adoption of the Model Law in India was recommended in the past by the Eradi Committee⁵³ and the N.L. Mitra Committee⁵⁴ in 2000 and 2001 respectively, but the same was not considered by the legislators.⁵⁵ The Model Law lays down the most widely accepted practices in cross-border insolvencies and has been signed and ratified by 44 states till date⁵⁶.

The Model Law basically provides for the following (a) The recognition of foreign proceedings, as a foreign main proceeding or as a foreign non-main proceeding ; (b) To provide access to courts in an enacting state; (c) Increased co-ordination and co-operation between the courts where the debtor's assets are situated and the court where concurrent proceedings are being carried out; and (d) Ensuring uniform and consistent relief to be given for the fair and orderly resolution of cross-border insolvencies.⁵⁷

The Model Law lays down the circumstances when and where the foreign proceedings are to be recognized and how they shall be recognized.⁵⁸ The recognition granted is based upon where the debtor has its centre of main interests (COMI) which is dependent on its place of establishment.

The relief provided after recognizing foreign-main proceedings is generally the grant of a stay on local proceedings by creditors against the debtor undergoing the insolvency proceedings. This implies that a moratorium be levied on the

⁵³ Justice V. Balakrishna Eradi Committee Report 2000 on Law Relating to Insolvency & Winding up of Companies, (2000) MCA Reports, India, (20 Mar. 2019), <http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf>

⁵⁴ Dr. N.L. Mitra Committee Report, Report of The Advisory Group on Bankruptcy Laws - May 2001, RBI Reports, India, (20 Mar. 2019) <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁵⁵ Arjya Majumdar, *The UNCITRAL Model Law on cross border insolvency*, 2(1) ILJ, 1, 4, (2009).

⁵⁶ Status, *The UNCITRAL Model Law on Cross-Border Insolvency* (1997), (20 Mar. 2019) http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html at 1.

⁵⁷ UNCITRAL model law on cross border insolvency, Jan 2014, UNP E.14.V.2.

⁵⁸ Andre J Berends, *UNCITRAL model law on cross border insolvency: A comprehensive overview*, 6 TJICL, 309, 314, (1998).

assets of the debtor and the administration of his assets in that State to be entrusted to the foreign representative concerned. Article 21 of the Model Law is somewhat similar to the provisions of the IBC⁵⁹, which is based upon protection and not prejudicing the assets of the debtor, either in a foreign non-main proceeding or a foreign main proceeding.⁶⁰

The quantum of relief is determined on the principle of comity and assistance, although the Model Law is not very rigid on the demand for reciprocity. This implies that if India incorporates the Model Law, then Indian representatives cannot seek access to foreign insolvency proceedings of a nation that has not adopted the Model Law.⁶¹ However, a nation that has not adopted the Model Law may seek access to the insolvency proceedings in certain cases, of a State that has adopted it.⁶² The principle of reciprocity⁶³ that has currently been included in the IBC may however exist even if the Model Law is to be adopted.⁶⁴

VI. The Gibbs Rule and Its Relevance in Indian Context

The Gibbs Rule implies that a debt governed by English law cannot be discharged or upset by a foreign insolvency proceeding and the English Law shall take precedence unless that creditor has submitted to those foreign proceedings.⁶⁵

The longstanding Gibbs Rule was recently put to the test by English courts in the recent *Sberbank case*.⁶⁶ The judgment involves three pertinent issues: **firstly**, the extension of moratorium indefinitely where the moratorium period is at the brink of expiry under the local law; **secondly**, the status of creditors who

⁵⁹ Sec.14, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

⁶⁰ Ronald J Silverman, *Advances in cross-border insolvency cooperation: The UNCITRAL model law on cross border insolvency*, 6 ILSA JICL, 266, 266-67, (2000).

⁶¹ Matthew T. Cronin, *UNCITRAL model law on cross border insolvency: Procedural approach to a substantive problem*, JCL, 709, 711, (1999).

⁶² S. Chandra Mohan, *Cross-border insolvency problems: Is the UNCITRAL model law the answer?*, 21(3) IIR, 199, 220-21, (2012).

⁶³ For Principle of Reciprocity, See Keith D.Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?* 16(1) IIR, 145-179 (2007).

⁶⁴ *Id.*

⁶⁵ *Gibbs & Sons v. Societe Industrielle Des Metaux*, 2 QBD 399 (1890).

⁶⁶ *GunelBakhshiyeva v Sberbank of Russia &Ors.*, EWCA CIV 2802 (2018).

have rights under any foreign law document, and either who did not participate or agree to the restructuring proceedings; and **thirdly**, whether the Gibbs Rule is still a good law or not.⁶⁷

Many English academics in the judgement considered the Gibbs Rule as an anachronism, while some dubbed the "Gibbs doctrine to belong to an Anglo-centric age reasoning which should be confined to history."⁶⁸ Similarly in *Pacific Andes Resource Development Ltd*, the Singapore High Court⁶⁹ dismissed the Gibbs Rule, observing that: "In the case of a contractual obligation which is governed by English law, a further rule should be developed where, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law."

The Gibbs Rule is without doubt, problematic as it does not recognise foreign insolvency proceedings taking precedence over an English law debt; yet the English courts generally expect that a foreign court will recognise its own judgements in relation to a restructuring in England, under a foreign law loan agreement.⁷⁰ This leads to a dichotomous and paradoxical situation.

The *Sberbank* judgment⁷¹ further indicates that the English courts will not apply foreign law, or apply English law in a manner which replicates the intended relief that may be available under any foreign law if such an outcome cannot be achieved under the English law.⁷² Whether the IBC and subsequent incorporation of the Model Law will solve the issue with the Gibbs Rule and in

⁶⁷ *Anthony v Sexton, Current problems & trends in the administration of transnational insolvencies involving enterprise groups: The mixed record of protocols, the UNCITRAL Model insolvency law, and the EU insolvency regulation*, 12(2) CJIL, 812, 815, (2012).

⁶⁸ *Id.*, See Professor Ian Fletcher's quote in paragraph 49 of the judgment.

⁶⁹ *In Re. Pacific Andes Resource Development Ltd*, SGHC 210 (2016).

⁷⁰ Laura Carballo Pineiro, *Brexit and International Insolvency beyond the realm of mutual trust*, CPIL WORKING PAPER NO 2017, 2-3, (Jan 23, 2019), https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2017_1.pdf.

⁷¹ *Sberbank*, *Supra* Note 64

⁷² DONALD S. BERNSTEIN, *THE INSOLVENCY REVIEW*, 49-50, (6th ed., 2018).

the context of the Sberbank judgment⁷³, what might happen in case of an Indian debtor undergoing the corporate insolvency resolution process in India under the Code had foreign creditors under the English law financing documents needs further clarification⁷⁴

The question which warrants immediate answers are, will the English courts admit the application of an insolvency resolution professional's as a foreign representative under the Code?⁷⁵ Can it already do so only by incorporating the UNCITRAL Model Law, and without any further legislative action in India?

It is worth re-iterating that the IBC enables the Adjudicating Authority⁷⁶ to send a Request Letter to an appropriate Court of the country with which a bilateral treaty has been entered into, for recognition of proceedings⁷⁷, though such a request is still subject to the Gibbs Rule and the discretion of the English Court, notwithstanding the provisions of the Model Law and its incorporation.⁷⁸

VII. Insolvency and Bankruptcy Code (IBC), 2016 and Its Impact on Cross Border Mergers and Acquisitions in India

There is a significant increase in cross border M&A activity in India. The IBC 2016 creates a conducive environment for healthy companies to look for inorganic growth opportunities in entities undergoing insolvency resolution.⁷⁹ The acquisition of these entities with attractive concessions and exemptions from the tedious open-offer requirements by SEBI has made cross border M&A

⁷³ Sberbank, *Supra* Note 64

⁷⁴ Morrison and Foerster, *New UNCITRAL Model Law to facilitate cross-border restructuring and insolvency*, LEXOLOGY, (March 5, 2019), <https://www.lexology.com/library/detail.aspx?g=11c0fbc9-91f5-4302-b859-5caa03eabdc1>.

⁷⁵ DK Prahlada Rao, *Role and responsibility of insolvency professionals under the Code- An analysis*, ICSI, 21-22, (2017).

⁷⁶ The National Company Law Tribunal (NCLT)

⁷⁷ Sec. 234, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

⁷⁸ Manoj K Singh et al., *CIRP Regulation amendments: A step closer towards a smooth insolvency regime*, MANUPATRA, 13-14, (Jan 1, 2019) <https://www.manupatrafast.com/NewsletterArchives/listing/Insolvency%20Singh%20Associates/2018/Insolvency-Vol%20II%20Issue%20II.pdf>.

⁷⁹ DEEKSHA MALIK & AISHWARYA CHOUDHARY, *EMERGING CHALLENGES IN MERGERS & ACQUISITIONS*, 23-24, (1st ed., 2018).

s lucrative.⁸⁰ While steel and pharma sectors account for a significant portion of strategic mergers under resolution plans, the cement and allied sectors are also gaining prominence among the market players. Assocham predicts almost \$50 billion worth of deals on the back of stressed assets in 2018.⁸¹ According to Assocham 944 transactions including 664 domestic and 280 cross-border worth \$46.5 billion in which \$13.1 billion was for domestic and \$33.4 billion cross-border M&As, took place in 2017.⁸²

Under the erstwhile Companies Act, 1956⁸³ only inbound mergers were permitted. The Companies Act, 2013⁸⁴ allows outbound mergers as well, and its provisions were notified in 2017.⁸⁵ Towards that objective, the Reserve Bank of India (RBI) issued Foreign Exchange Management (Cross Border Merger) Regulations, 2018⁸⁶ in March 2018, providing an organised and liberalised framework for cross-border mergers.⁸⁷ The new regulations made way for a deemed-approval status from RBI upon fulfilling certain laid down conditions instead of an intensive and tedious in-principle approval on a case-to-case basis. While the regulations are expected to boost merger volumes, certain grey areas still need clarification. For example, demergers, have not been provided for. Tax-neutral treatment has not been given to outbound mergers yet.⁸⁸ Further, there is no provision for fast-track mergers, which are available for domestic

⁸⁰Rajesh Belur, *How bankruptcy law and reforms will spark M&As across sectors*, NEWS CORP, (March 13, 2019), <https://www.vccircle.com/how-bankruptcy-law-and-reforms-will-spark-m-as-across-sectors>.

⁸¹*Towards sustainable and lasting growth: Annual Report-2016-17*, GOVT. OF INDIA, MINISTRY OF COMMERCE & INDUSTRY & DEPT. OF COMMERCE, (March 4, 2019), http://commerce.gov.in/writereaddata/uploadedfile/moc_636281140249481285_annual_report_16_17_eng.pdf.

⁸²*Id.*

⁸³Companies Act, 1956, Act No. 1, Acts of Parliament, India, (1956).

⁸⁴Companies Act, 2013, Act No. 18, Acts of Parliament, India, (2013).

⁸⁵M Nirmla, *Corporate restructuring and Companies Act-2013-An impact analysis*, 1(5) IJMSRR, 26-27, (2014).

⁸⁶Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, Dated: March 20, 2018, (20 Mar. 2019), <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0> at 1.

⁸⁷Justin Bharucha, *Overview of M&A activity*, LAWREVIEWS, (March 7, 2019), <https://thelawreviews.co.uk/edition/the-mergers-acquisitions-review-edition-12/1174416/india>.

⁸⁸Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 UCD, 1029, 1031, (2011).

companies. However, as the regulations came recently and are still evolving, market dynamics and economic situation may prompt certain developments.⁸⁹

Almost all relevant corporate regulations in India have been restructured in the last few years, like the takeover rules, anti-monopoly laws, delisting and accounting guidelines, etc. Most recently, the FEMA (Transfer or Issue of Securities to Persons Resident Outside India) Regulations, 2000⁹⁰ – the principal law governing foreign investment in India – was replaced⁹¹ by a simpler and streamlined successor.⁹² The enactment of the Goods and Service Tax⁹³ is another significant step towards a simpler tax regime. On the policy level, many sectors like single-brand retail, manufacturing, and aviation have been brought under the automatic route over the last year.⁹⁴ There is also a growing overture for the simplification and unification of industrial and labour laws. The idea is to condense the 44 laws into four broad codes on wages, social security, safety regulations and trade unions. Another area on a similar path is the direct tax regime.

Cross border M&As are market-driven processes in a sense that, they are not only dependent upon the overall economy but also upon the external forces like market sentiment and regulatory developments.⁹⁵ Based on the atmosphere

⁸⁹*Id.*

⁹⁰Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2000, Notification No. FEMA 20 /2000-RB dated 3rd May 2000, (20 Mar. 2019),

https://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=174 at 1.

⁹¹The Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2017, Notification No. FEMA 20(R)/ 2017-RB, Dated 07 Nov. 2017, (20 Mar. 2019),

https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11161 at 1.

⁹²D'Souza-Monie et al., *India: Legal and tax issues in cross border M&As*, IFLR, 57, 59, (2001).

⁹³Introduced via 101st Amendment Act, Acts of Parliament, India, (2016).

⁹⁴Jatindar Singh, *Economic reforms and foreign direct investment in India: Policy, trends and patterns*, 8(4) IUP JFE, 59, 62, (2010).

⁹⁵Tony Edwards, Cross border mergers and acquisitions: the implications for labor, 5(3) ERLR, 320, 329, (1999).

created by the IBC and other regulatory reforms, cross border M&A are expected to increase.⁹⁶

Due diligence is advisable before making investments. Purchasing a distressed company calls for in-depth due diligence. Sector-wise, the technology, financial services and infrastructure should see the most activity.⁹⁷ Outbound investments will be led by the oil and gas sector, driven by India's pursuit to secure supplies of natural resources, and helped by the pro-trade measures taken by the government.⁹⁸ This trend can be termed as cautious optimism characterised by lower volume in trade, but a higher value in deals. Continued political stability, rapid economic reforms and macro-economic factors indicate that 2019 will be one of the most beneficial years for cross border M&A with transaction activity, with better returns than those achieved in 2018.⁹⁹

Even though the cross border M&A regulatory and policy framework in India is evolving, some challenges remain. One, such instance is SEBI's low threshold¹⁰⁰ listed companies for making open offers under the takeover regime. Acquirers are reluctant as significant costs, and expenses are involved. Further, the delisting a company from the stock exchanges after the merger is troublesome. Another issue is the varying stamp duty rates across different states, which have in the past made inter-state cross border M&As unattractive. Moreover, procedural bottlenecks like a long compliance list and multiple approvals from courts and sectoral regulators pose a problem.

VIII. Conclusion

The Notification on the draft chapter on cross-border insolvency by MCA, which aims at adopting the UNCITRAL Model Law, is a positive step, as it paves the way for India's accession to the UNCITRAL Model Law, rather than

⁹⁶ Arpita Agnihotri, *Determinants of acquisitions: an Indian perspective*, 36(9) MRR, 882, 883, (2013).

⁹⁷ KAMAL GHOSH RAY, *MERGERS AND ACQUISITIONS –STRATEGY, VALUATION AND INTEGRATION*, 557-58, (1st ed., 2010).

⁹⁸ Rabin Hattari & Ramkishen S. Rajan, *India as a source of outward foreign direct investment*, 38(4) ODS, 497, 501, (2010).

⁹⁹ Rajesh Begur, *How bankruptcy law and reforms will spark M&As across sectors*, <https://www.vccircle.com/walmart-gets-antitrust-approval-for-16-bn-flipkart-deal> (20 Mar. 2019)

¹⁰⁰ 25% threshold for making open offers.

entering into many bilateral arrangements with other jurisdictions. However, simply adopting the model law does not mean that the provisions of the IBC will be imported, or applied in foreign jurisdictions. It is clear that the Gibbs Rule is a good law and that the foreign creditors will retain their rights under the English law and financing agreements, notwithstanding an Indian restructuring, assuming that they did not participate in the restructuring process, or agreed to the restructuring plan.

In the context of a restructuring, it is implausible that a permanent stay is granted to a foreign creditor over an Indian debtor in proceedings before the English courts which are not implemented within any time-bound requirement.¹⁰¹ The suggested draft chapter fails to provide for the individual bankruptcy, which in turn minimises the scope of cross border insolvencies to corporates. The adoption of reciprocity, though not a requirement under the Model Law, will not restrict India from preserving the current provisions on cross border insolvencies.

In India, the application for the recognition of foreign proceedings is required to be made to the NCLT by the foreign representatives under the Model Law. To prevent any abuse of the powers broad parameters and guidelines for the use of discretionary powers of the tribunal while granting moratorium in case of foreign non-main proceedings need to be laid down. The adoption of the Model Law will help in the ease of doing business and significantly increase the inflow of FDI into India by way of cross border mergers and acquisitions. Finally, the Model Law should be adopted to achieve harmonization of insolvency laws, through international co-operation and co-ordination. All of this legal consolidation and harmonization will favourably impact the cross border mergers and acquisitions scenario in India.¹⁰²

¹⁰¹Chakrabarti, *Supra note 15*.

¹⁰²Aastha Kaushal & Saurav Gurjer, *Implications of India Adopting the UNCITRAL Model Law on Cross-Border Insolvency*, INDIACORPLAW, (March 9, 2019), <https://indiacorplaw.in/2018/09/implications-india-adopting-uncitral-model-law-cross-border-insolvency.html>.