EFFICACY OF I.B.C. IN LIGHT OF ABSENCE OF THE CROSS-BORDER INSOLVENCY REGIME: A CRITICAL COMPARISON OF THE UNITED STATES, THE UNITED KINGDOM AND SINGAPORE APPROACH TO THE MODEL LAW

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC" or the "Code") is the extant law dealing with insolvency in India. While it may seem that by not addressing the issue of cross-border insolvency the Code's efficacy may be questioned because it may not provide an immediate solution in cases of cross-border insolvency which involve the claims of the Indian corporations against the defaulting firms situated globally or the claims of financial persons situated globally having claims against the Indian firms. But, the stance that first, the domestic insolvency regime must prove effective to meet the challenges of time is also the other side which should not be ignored.

The present paper aims to delineate the important provisions of the UNCITRAL Model Law on Cross-Border Insolvency along with a study of a comparative approach of the United States, the United Kingdom, and Singapore which have adopted the Model Law in the year 2005, 2006, and 2017 respectively. The paper also critically analyses the Sections 234 and Section 235 of the IBC. Whether the adoption of the Model Law or

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ratifying an International Convention (yet to develop) is the road ahead for India or, altogether there can be the third approach is the cardinal focal point of the paper.

The central question of the paper is the solution that India may adhere to while addressing the need of incorporating provisions that deal with cross-border insolvency given the need of doing so in the near future due to increased foreign trade and investment and for the ease of doing business in India. The research paper does not focus on questioning the efficacy of the Code in the absence of the Cross-border insolvency, it rather suggests the recommendations that India can be mindful of while incorporating provisions dealing with the cross-border insolvency.

1. INTRODUCTION

The current legislation dealing with insolvency in India is a reflection of the effort of the Bankruptcy Law Reforms Committee which was constituted to study the legal framework of the corporate insolvency in India. The committee undertook the arduous task of not only examining the then existing legal framework for corporate insolvency and to suggest reforms but also to develop a unified legislative Code for both the individual and corporate insolvency in India. The Indian law derives its inspiration primarily from the UK Insolvency Act and from the precedents laid down by the Judges who have contributed to the field by developing and evolving the jurisprudence on questions not envisioned by the lawmakers. The increase in foreign investments in India, the rapid collapse

of the corporations, the need of an effective restructuring mechanism for viable entities along with challenges posed by the availability of various adjudicatory forums in India with none being effective enough acted like thrust factor for paving way for the much-needed legislation, in the form of a unified Code. IBC is an assimilated code unifying the different legal regimes dealing with insolvency in India. It covers within its sphere both personal as well as corporate insolvency.

Also, it is pertinent to note the difference between the terms 'Insolvency' and 'Bankruptcy' as the IBC does not define the term insolvency, so as to know what shall come within the scope of the term but it defines bankruptcy in Section 79(4) as the state of being bankrupt. In other words, being adjudged as an undischarged insolvent. Also, one may look at the literal definition of the two for layman understanding. While insolvency means the stage at which the liabilities of the debtors exceed his assets so as to render him unable to pay his debts, bankruptcy is the judicial determination of the fact of the insolvency of the debtor. In the U.S, insolvency by a corporation is described as bankruptcy while it is so for only individuals in the UK. The insolvency legal regime also differs in the sense that while U.S Bankruptcy Code 1978 is more debtor-oriented as it focuses on effective reorganisation so as to help the viable entity remain as a going concern, the UK Insolvency Act 1986 is more creditor-oriented in the sense that it encourages untimely early liquidation of the

corporation so as to satisfy the claims of the creditors.[1] However, the modern approach in the UK insolvency is also one which has developed the rescue-culture for the viable entities. Also, the term 'insolvent' has not been defined in the Code. IBC is an act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of the value of assets of such persons.[2] Insolvency law is remedial in nature and is intended to be interpreted in a widest possible manner and it needs to be construed liberally. On one hand, it deals strictly with the debtor in prohibiting him from disposing his property and assets and even goes to the extent of imposing heavy penalties, on the other hand, in case of fraud or non-compliance of the provisions enshrined in the Act it also saves him from disconcertment and his assets from being dismembered for otherwise than in the best interest of the creditors and for the business reorganization.[3]

The IBC also does not address one major issue that is of the 'Cross-Border Insolvency', which primarily involves the claims of the Indian firms in respect to the defaulting firms or corporations which are situated globally or financial persons situated globally having claims against the Indian defaulting companies.

[1] Julian Franks & Walter Torous, *Lessons From a Comparison of US And UK Insolvency Codes*, 8 OXFORD REV. OF ECON. POL'Y 70 (1992).
[2] *See* Insolvency & Bankruptcy Code, 2016, preamble.
[3] VINOD KOTHARI & SHIKHA BANSAL, LAW RELATING TO INSOLVENCY AND BANKRUPTCY CODE (2016).

2. CROSS-BORDER INSOLVENCY: AN INDIAN PERSPECTIVE

In the BLRC Interim Report, the committee said that while it realizes the importance of addressing the issue of cross-border insolvency given the increase in foreign investments in India, the adoption of UNCITRAL Model Law on Cross-Border Insolvency should ideally take place only after the adoption of the Insolvency Code. The reason forwarded for this was the belief of the committee in the fact that the effectiveness of a cross-border insolvency regime is heavily grounded on the potency of the domestic insolvency regime. It has also mentioned addressing the issue in the final report of the BLRC ("Final Report"). In the Final Report, it was mentioned that the first milepost to be achieved by India is the comprehensive solution to the domestic insolvency issues and to treat the cross-border insolvency to be achieved as the next frontier.

'Cross-border insolvency' includes addressing the claims of the Indian corporations in respect to the defaulting firms or corporations which are situated globally or financial persons situated globally having claims against the Indian defaulting corporations.[4] Although the Final Report dealt with the facet of insolvency in respect to foreign holders of corporate bonds issued in India or borrowing abroad by an Indian firm, it did not address other issues like Indian investors lending to persons situated overseas and the committee proposed to take up the issue in its next deliberation.

[4] B.L.R.C. FINAL REPORT (2015) [hereinafter Final Report].

In 1999, the Eradi Committee recommended the inclusion or incorporation of the UNCITRAL Model Law as a schedule to the Companies Act, 1956, however, this did not lead to any development on the cross-border insolvency front. Therefore, the present status is that, if a foreign firm is undergoing insolvency resolution outside India, its Indian business will be treated as distinct and separate, and will not be affected automatically unless an application is filed before the Adjudicating authority for winding up its branches in India, and hence there would be a need for coordination and cooperation between the courts situated in different jurisdictions to curb this issue of distinct treatment and to provide effective remedy. The adoption of the Model Law without modifications may prove to be a boon for India as it will help India to promote and facilitate international trade, increase in foreign investments, and better access to foreign courts for redressal of cross-border insolvency issues and to meet the challenges posed to the economy due to globalization. Nevertheless, this requires a lot of analysis. A blind and hasty approach at this stage is not appreciated. So far 43 States in a total of 45 jurisdictions have framed their legislations based on the Model Law dealing with the issue. Although there is recognition given to foreign judgments and foreign decrees of some reciprocating jurisdictions, such as the UK and Singapore as enshrined in Section 13 and 44A of the Code of Civil Procedure, 1908, there is none given to foreign insolvency proceedings.

The two pertinent sections of the IBC that show a tinge of the Cross-border insolvency essence are, Sections. 234 and 235. Section 234 talks

about the power of the Central Government to enter into agreements with the government of other jurisdictions (with which there are reciprocal arrangements) and also to specify conditions to be applicable in the administration of assets or property of the debtor situated outside India. Section 235 emphasizes on the role of the Adjudicating Authority (*i.e.* the NCLT) in issuing a letter of request to a foreign court or competent authority (situated in a country with which reciprocal arrangements are existing) for proof that the assets of a debtor/corporate debtor are situated outside, if required for any evidence or action relating to such assets in the insolvency resolution, liquidation or bankruptcy proceedings by the insolvency professional, the liquidator and the bankruptcy trustee.

3. CROSS-BORDER INSOLVENCY AND THE UNCITRAL MODEL LAW

3.1. MEANING OF THE TERM 'CROSS-BORDER INSOLVENCY'

According to the Model Law, a 'cross-border insolvency' is one where the insolvent debtor has assets in more than one states or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. The Model Law is designed to foster the enacting States to endow their insolvency regime with a modern legal framework to more effectually deal with the cross-border insolvency proceedings involving debtors undergoing severe financial tribulation or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification

or harmonization of various state-specific, substantive insolvency law respecting the procedural differences therein.

3.2. THE OBJECTIVES OF THE UNCITRAL MODEL LAW[5]

The objectives of the Model Law, as enumerated in the Preamble are as follows-

- Cooperation between the courts and other competent authorities and foreign States involved in cases of cross-border insolvency,
- Greater legal certainty for trade and investment,
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor,
- Protection and maximization of the value of the debtor's assets and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

3.3. THE MAIN FEATURES OF THE UNCITRAL MODEL LAW

The main features of the Model Law are[6]:

- **Access**: Representatives of foreign insolvency proceedings and creditors have a right of access to the courts to seek assistance and to authorize representatives of local proceedings to seek assistance elsewhere.

[5] U.N. Comm'n on Int'l Trade Law (UNCITRAL), *Model Law*.
[6] *Id.*

- **Recognition:** Simplified procedures for recognition of qualifying foreign proceedings and appointing the foreign representative. A qualifying foreign proceeding is either the main proceeding, taking place where the debtor had its centre of main interests- "COMI", or a non-main proceeding, taking place where the debtor has an establishment. This has an effect on the relief accorded to assist the foreign proceeding.
- **Relief**: Includes an interim relief at the discretion of the court; which may be in the form of an automatic stay upon recognition of main proceedings.
- **Cooperation and coordination**: Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor.

3.4. SOME HIGHLIGHTS OF THE UNCITRAL MODEL LAW[7]:

A foreign proceeding should be recognized as either the main proceeding or a non-main proceeding (article 17, paragraph 2). The main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding. In principle, the main proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre

[7] *Id.*

of main interests is not defined in the Model Law but is based on a presumption that, it is the registered office or habitual residence of the debtor (article 16, paragraph 3).

A non-main proceeding is one taking place where the debtor has an establishment. This is defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services" (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as the presence of assets without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme.

If foreign insolvency proceedings are recognised (in an enacting State) as main proceedings, Article 20 of the Model Law automatically affords the following relief:

- A stay over commencement or continuation of individual proceedings concerning the debtor's assets, rights, obligations or liabilities in the enacting State in which the foreign insolvency proceedings have been recognised;
- A stay over any type of execution against the debtor's assets in the enacting State in which the foreign insolvency proceedings have been recognised; and
- A suspension of the debtor's rights to transfer, encumber or otherwise dispose of any assets.

4. A COMPARATIVE PERSPECTIVE- THE U.K., U.S. AND SINGAPORE

4.1. UNITED KINGDOM:

In Great Britain, the Model Law was adopted in the year 2006. The regulatory framework in the English law comprises of:

- The EC Regulation on Insolvency Proceedings;
- The Cross-Border Insolvency Regulations, 2006; and
- Section 426, Insolvency Act, 1986.

Under Section 426 of the UK Insolvency Act, 1986 the designated countries like Australia etc. can ask the courts in U.K. to seek help in insolvency proceedings through a letter of request. Though the power is discretionary, it has to be applied rationally by the courts and unless there is a strong ground for a departure the Courts, as a general rule must provide the aid requested for.[8] Main proceedings in U.K. are intended to mean a proceeding that has a universal scope and encompasses all of the debtor's assets, wherever situated. If the debtor has an "establishment" in one Member State but its centre of main interests in a different Member State, ancillary insolvency proceedings can be opened in the Member State where the debtor has an establishment. If they are opened after the main proceedings, they are called "secondary proceedings", and if they are opened before the main proceedings, they are called "territorial proceedings".

[8] England v Smith, Ch. 419 (2001); *In Re*, HIH Casualty & Gen. Insurance Ltd., 1 W.L.R. 852 (2008).

4.2. UNITED STATES

The Model Law has been incorporated in Chapter 15 of the U.S. Bankruptcy Code.

The US bankruptcy court had to determine whether a particular foreign proceeding was main or non-main. The court noted the fact that Chapter 15 did not define COMI, the court examined the definition in light of the EU regulations (originator of the COMI concept). The US court stated the proceeding in the country where the debtor had its principal or registered office and primary concentration of its employees was the COMI of the debtor.[9] Similarly, in another case,[10] the US bankruptcy court accepted the finding and judgment of the Irish Supreme Court[11]on COMI and held that the presumption that a debtor's COMI is in the location of its registered office is a rebuttable presumption. A company may not be carrying on business in the jurisdiction in which its registered office is located, for example, as in the case of a 'letterbox' company.

4.3. SINGAPORE

Singapore adopted the model law recently in the year 2017. The Singapore law treats recognition as a mere formality and if the foreign-representative makes an application in the proper format, foreign insolvency proceedings will be mandatorily recognized. Under the Model Law, a foreign representative can apply to the Singapore High Court for

[9] *In re*, Tri-Continental Exchange Ltd., 349 B.R. 627.
[10] *In re*, SPhinX Ltd., 351 B.R. 103.
[11] *In* re, Eurofood IFSC Ltd., 2006 E.C.J. (C-341/04).

recognition of foreign insolvency proceedings. The application must be accompanied by (a) a certified copy of the decision commencing the foreign insolvency proceedings and appointing the foreign representative, and (b) a statement identifying all insolvency proceedings in respect of the debtor that are known to the foreign representative.

The Model Law has been adopted in Singapore with a notion to make Singapore the COMI for the businesses so as to lead to an increase in foreign investments in the country, and because Singapore seeks to become a hub for the insolvency administration and restructuring; thereby intending to reduce the cost incurred in the administration of insolvency proceedings and to increase asset recovery for creditors.

5. SOLUTION FOR INDIA: CROSS-BORDER INSOLVENCY

Now we have the Insolvency and Bankruptcy Code 2016 that is dealing with corporate insolvency resolution process since December 2016, is developing the needed jurisprudence through the recently dealt cases and would continue to do so.[12] It is almost going to be a year to the legislation and it is evident that the Courts have a significant role to play in giving the right interpretation to the provisions of the Code whenever

[12] ICICI v. Innoventive Indus., 82 taxmann.com 190/142 S.C.L. 119 (2017); Nikhil Mehta (HUF) v. AMR Infra. Ltd., C.P. No. (ISB)-03(PB)/2017; Vinod Awasthy v. AMR Infra. Ltd., C.P. No. (IB)-10(PB)/2017; Mukesh Kumar v. AMR Infra. Ltd., C.P. No. (IB)-30(PB)/2017; Sajive Kanwar v. AMR Infra. Ltd., C.P. No. 06/2017; Pawan Dubey v. J.B.K. Developers, C.P. No. (IB)-19(PB)/2017; Satish Mittal v. Ozone Builders & Developers, C.P No. (IB)-66(PB)/2017; Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd., Company Appeal (AT) (Ins) No. 6 of 2017; JK Jute Mills v. Surendra Trading Co., Company Appeals (AT) (Ins) No. 9 of 2017.

there is a scope for the judicial interpretation. The Code is a commendable effort to develop the right jurisprudence for dealing with the insolvency in India or the domestic issues and would take some time to achieve the landmarks the Code has attempted to achieve.

Nevertheless, when legislators further take a step to incorporate a cross-border insolvency they would need to be mindful of the fact that even the countries that have adopted the Model Law with or without modifications have faced issues of cooperation and coordination and it has not been a been a very serene zone to operate in for the States because of the differences in the regional and national insolvency regimes and that the States have adopted the Model Law only in rudimentary way and not completely.

The question is, whether the solution lies in the form of adopting the Model Law completely or that India should wait for an International Convention to be developed on Insolvency. While mostly Model Laws aimed at the unification of the laws at the national level a convention may provide the necessary mechanism needed for ensuring international judicial and administrative cooperation in cases of cross-border insolvency. Since the Model law does not address concerns about the corporate groups- an international convention seems to be the solution to resolve the issue since in the cases of insolvency many contracting states may be involved. Model Law aims at incorporating a particular law with or without modifications in the domestic insolvency regimes and serves as guidance for the States. An international convention would bridge the

difference in the national legal landscape thereby ensuring cooperation and coordination in cross-border judicial and administrative setup.

An international convention may receive polar views due to its non-flexibility, one that favors it because of the binding nature and other that stands against it as many States would be reluctant to adopt the same due to its rigidity, as a convention cannot be adopted with suitable modifications though there may be reservations. On the contrary, the Model Law allows the scope for the same. So, it may seem that a convention may help but it cannot be said with certainty until there is reciprocity element in the Convention and that the States agree to such a move; otherwise it would be nothing more than an effort on paper and the problem of cooperation and coordination would continue to persist.

Also, while it is difficult to incorporate many provisions of the Model Law into the domestic legal systems, owing to cardinal differences between the two, a convention takes care of this issue by leaving very less scope for the States to deviate from the provisions, howsoever distinct it may be from their national insolvency legal regime; except in very exceptional circumstances. Thus, the binding nature of the convention helps in solving many prospective disputes on issues of enforceability and cooperation between nations. The convention may be helpful in determining certain protocols regarding the choice of law, dispute resolution mechanism, and determination of jurisdictional competencies in context to main and non-main insolvency proceedings. A convention may, apart from aiding better access to foreign courts and providing recognition

to foreign proceedings, may also help to overcome the trust issues that there shall be any kind of discrimination by the foreign courts in treating different nations.

6. RECOMMENDATIONS

The opinion and views on what is good for India- adoption of the Model Law or to wait for an International Convention on Insolvency Law; is a subjective one. The author believes that it is better to wait for experiences of the nations to be gathered and more jurisprudence to develop on the domestic front for India, given the fact that the legislation (IBC) is a new and developing one. It still needs substantial time for enough jurisprudence to evolve in the area so as to interpret the Code in the right way. An integrated Code striving to achieve insolvency resolution in a time-bound manner is itself a big challenge for the Adjudicating authorities, and for everything to fall in place and function in order time is a crucial factor.

Recently, India witnessed an improvement in its rank from 130thto 100th out of a survey of 190 countries with respect to "Report on Ease of Doing Business by World Bank Group". One of the notable steps which led to this significant achievement was the introduction of the 'IBC, 2016', which ensures time-bound insolvency resolution while ensuring the maximum return to creditors and easy exit, reorganization, revival, and liquidation for the defaulting business. The Act suggests better recourse to banks as financial creditors and to deal with the Non-Performing Assets

(NPAs) more efficiently. Hence, the Code's efficacy is of paramount importance in respect to "Ease of Doing Business in India" so that there is more security to investors who intend to invest in India or have already invested. Recently the IBBI Chief M.S Sahoo announced that India is now heading towards developing a framework for Cross-Border Insolvency so as to make India an appealable terminus for the foreign creditors. Not only this, but a more predictable cross-border insolvency regime would help the banks as financial creditors to access overseas assets of a corporate undergoing resolution process. As per the Draft Chapter on Cross-Border Insolvency, on which comments and opinions were invited, it has made an endeavor to resolve two main pertinent issues. Firstly, since moratorium does not stop the foreign creditors from filing suits in foreign courts and because the foreign court would not recognize the restructuring plan approved by NCLT i.e. the Adjudicating Authority, there is an urgent need to have a legal regime dealing with such situations where the Central Government can have agreements with other foreign jurisdictions, so as to bring overseas assets of a domestic corporate debtor for IRP in India. Secondly, because even the NCLT in India might face procedural and other issues in implementing or recognizing order or decree of a foreign court, hence the cooperation between the jurisdictions for implementing the law on Cross-Border Insolvency becomes inevitable amongst jurisdictions. The Draft Chapter shall also ensure cooperation with foreign creditors to initiate IRP (Insolvency Resolution Process) against local corporate debtors. This move will instill more confidence in foreign

investors hence will ensure enhanced investment and further better ranking in "Ease of Doing Business"; especially if India is aiming to be in top 50 by the next year. This will also ensure more economic growth in the country given its capabilities to enhance boost in trade with India by making it more rhythmic and placid.

Hasty legislation is not needed for India. Hence, it is good that IBC as of now does not deal with the cross-border insolvency and would wait for the domestic front to be strong and effective first. This will also provide sufficient time to the legislators to discuss and deliberate keeping in mind the issues faced by countries adopting the Model Law so that whatever be the next step of India whether adoption of the Model Law or ratifying an International Convention, it is going to be a well thought of step and not a brisk approach. Even if India adopts the Model Law it can adapt it with such modifications which may help India to curb the issues faced by other countries and in a manner so as to best suit its adaptability. So far, India not adopting the Model Law blindly, is, in the author's opinion, the right step for the time being. India is not lagging behind because it has not adopted the Model Law so far but it may have a better vision, a foresightedness to adopt the same or have altogether a new approach depending upon the needs of the country. It will also help to take care of the global panorama more effectively through the international and the domestic jurisprudence evolved over time, addressing in more effectuate manner the issues that other nations have faced in respect to cross-border

insolvency. A hasty legislation or a less deliberated approach to deal with an issue is more open to criticism than the good it does.