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Comparative Study of Cross-Border Insolvency in India and U.K.

SIMRAN SINGH[1]

ABSTRACT

India is one of the fastest developing nations and in the past few decades it has further developed in various fields. This development has also been due to the support of many foreign nations investing in India. This growth of international business has, therefore, also increased the number of the issues with respect to international insolvency. With the expansion of any such areas or fields there comes risks and problems attached to it, so to deal with the issue of lack in the scope of cross-border insolvency in India, the Government of India has formed a committee the report of which is highlighted in this paper. The UK had voted to the European Union (EU) in 2016 and with the model law being adopted in EU and UK's trade relations with India; this impact of "Brexit" has also been discussed in the paper as one of the research questions.

I. INTRODUCTION

India is one of the fastest developing nations and in the past few decades it has further developed in various fields. This development has also been due to the support of many foreign nations investing in India. This growth of international business has, therefore, also increased the number of issues with respect to international insolvency, which will be highlighted further in the paper through a few cases. The present laws related to cross-border insolvency are Sections 234 and 235 of IBC, 2016. India can ratify bilateral treaties in relation to insolvency proceedings with particular country with which reciprocal arrangements and further can make a letter of request for an insolvency proceeding[2]. India is at a stage of adopting UNCITRAL Model Law on cross border insolvency due to the flaws and defects present in the current laws with respect to the same. There are certain other regimes that enable the Indian courts to recognize the rights and claims of international creditors and enforce the judgments passed by the courts of foreign jurisdictions[3]. The same will further be discussed in the paper. In the UK there are four main sources of law regarding cross border insolvency, pursuant to which the

[1] Author is a Lawyer in India.
[2] *Id.* 3.
[3] *Id.* 5.

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English court may recognise and give assistance to a foreign insolvency proceeding[4]: 1. The EC Regulation on Insolvency Proceedings (No. 1346/2000) 2. The Cross Border Insolvency Regulations 2006 (implementing the Model Law adopted by the UNCITRAL) 3. Section 426 of Insolvency Act, 1986 and 4. The common law.

This research paper is divided into 8 chapters with chapter 1 being the literture review followed by chapter 2 as the introduction. Chapter 3 is a brief analysis and discussion of this comparative study. Chapter 4 deals with the objectives of this comparative study and the research questions. Chapter 5 briefly describes the significance and scope of the comparative study with chapter 6 talking about the research methodology used in the paper. Chapters 7 and 8 deal with the details on cross-border insolvency in India and the UK respectively. Finally, chapter 9 gives suggestions and conclusions.

(A) Analysis and Discussion of the Topic of Study

This comparative study try to give a picture of how the cross-border insolvency issues are dealt with, in an already well-recognized global state, UK and a developing nation, India, which is still being recognized on a global platform.

The laws/reports that deal with cross-border insolvency in India at present are –

1. Sections 234 and 235 of IBC, 2016

2. Section 44A of CPC, 1908

3. Recommendations made by the Insolvency Law Committee on adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 through its report dated 16th October 2018[5].

The below are the laws in UK that deal with cross-border insolvency[6] –

1. The EC Regulation on Insolvency Proceedings (No. 1346/2000) (the "EC Regulation")

2. The Cross Border Insolvency Regulations 2006 (implementing the Model Law adopted by the United Nations Commission on International Trade Law – UNCITRAL)

3. Section 426 of Insolvency Act, 1986 and

4. The common law.

This comparative study is solely between India and UK and all these various laws, regulations

[4] Overview of the English legal framework for cross border insolvency, Mayer Brown, (Apr. 18, 2020, 8:44 PM), https://www.mayerbrown.com/public_docs/Overview_English_Legal_Framework.pdf.
[5] Government of India, Ministry of Corporate Affairs, Report of insolvency law committee on cross-border insolvency, Oct. 16, 2018, https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
[6] *Id.* 8.

and reports mentioned above will be dealt with in detail under chapters 7 and 8.

(B) Objective of the Study and Research Questions

Objectives –

1. To understand the concept of cross-border insolvency.

2. To undertake the comparative analysis between concept of cross-border insolvency in India as well as UK.

3. To Evaluate the Similarities and dissimilarities of concept of cross-border insolvency between India (UNCITRAL model law in Indian context) and UK.

4. To highlight the effect 'Brexit' might have on India and UK.

Research questions –

1. How do India and UK compare with respect to cross-border insolvency?

2. Whether 'Brexit' has had any impact on India as well as UK?

(C) Significance and Scope of the Study

The study assumes its significance on discussing the ongoing issue with regard to cross-border insolvency especially with respect to India. It is hoped that the study would provide valuable and comprehensive information regarding meaning and interpretation of cross-border insolvency. The scope of this study is limited to cross-border insolvency only in India and UK and the comparison between the same, inclusive of impact of 'Brexit'.

(D) Research Methodology

Due to the vastness of the research topic, doctrinal and non-empirical legal research methodology has been adopted for this comparative research. To make an authenticated study of the research topic 'Comparative Study of Cross-Border Insolvency in India and UK enormous amounts of study material is required, therefore, the relevant information and data necessary for its completion has been gathered from both primary as well as secondary sources available in various books, journals, periodicals, research articles and proceedings of a few seminars, conferences, websites, etc.

Keeping in view the need of present research, various cases, which have dealt with the cross-border insolvency issues, therein have also been used as a source of information.

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II. CROSS-BORDER INSOLVENCY IN INDIA

Historical background

The result of the two hundred year British rule resulted in our country emerging as a common law country and such a system still has an effect on the daily routines of both, individuals as well as businesses[7]. The Indian economy closed its doors to foreign investment after the independence during which the foreign policy of India was based on practice of import substitution and British antecedents were still followed in Indian laws including the insolvency laws[8]. Finally Indian corporate statute was enacted – Companies Act, 1956 which provided for winding up of insolvent companies[9]. Then gradually the liberalized Indian economy began with the inflow of foreign direct investment where multinational companies started investing in India[10]. Insolvency and Bankruptcy Code came into existence vide gazette notification 31 of 2016 dated 28th May 2016 and replaced the previous Acts, The Presidency Towns Insolvency Act 1909 and The Provincial Insolvency Act, 1920 which were repealed vide Section 243 of the Code[11].

Existing legal scenario of cross-border insolvency

Insolvency is when an individual, an organization or body corporates unable to pay back its financial debts as and when they are due. There are certain procedures that an organization goes through when it is declared as an insolvent with the last procedure of liquidator acquiring all the assets of the organization and liquidating them in order to pay off all the debts. Cross-border insolvency as discussed previously, means the state of being in debt across international territorial borders, with the debtor being in one jurisdiction or more and the creditor in another jurisdiction or more.

At present, the legal framework governing corporate insolvency is silent on the position of a foreign creditors' right to approach National Company Law Tribunal (NCLT) to initiate corporate insolvency proceedings[12.]

Under the Code, the cross-border insolvency is dealt with under sections 234 and 235[13].

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[7] Shetye, supra
[8] *Ibid.*
[9] Companies Act, No. 1 of 1956, § 433 (using the term "winding up" as a step in the liquidation process of a company where the court appoints a receiver (trustee) to settle outstanding accounts and liquidate assets of the company).
[10] *Id.* 11.
[11] Insolvency and Bankruptcy Act, No. 31 of 2016, § 243.
[12] Anush Rajaan, India's proposal to recognise cross border insolvency, Lakshmikumaran & Sridharan attorneys, Apr. 19, 2020, 4:00 PM), https://www.lakshmisri.com/insights/articles/india-proposal-to-recognise-cross-border-insolvency/.
[13] .*Ibid* § 234 and § 235.

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Section 234 gives power to the Central Government to enter into bilateral agreements with any other country outside India to resolve issues with respect to cross-border insolvency and section 235 gives power to the adjudicating authority under the Code to issue a letter of request to a court in a country with which an agreement under section 234 has been entered into, to deal with assets situated in that country in a specific manner[14]. The agreements under these sections will apply both when proceedings in India would require recognition, assistance, etc. abroad and when foreign proceedings require the same in India but this has resulted in an ad-hoc framework that was susceptible to delay and uncertainty for creditors and debtors as well as for courts[15]. In 2017, the Honorable Supreme Court in *Macquarie Bank Limited* v. *Shilpi Cable Technologies Ltd*[16] set a precedent that foreign creditors shall have the same right as available to a domestic creditor to initiate and participate in corporate insolvency resolution process under IBC and it also expanded the definition of 'person' to include persons residing outside India[17].

Foreign proceedings are recognized in India under CPC, 1908 together with the English common law principles. Section 44A allows Indian courts to enforce orders passed by non-Indian courts in "Reciprocating Territories."[18] A country would be considered a reciprocating territory if it were declared one by the Government of India through publication in the Official Gazette[19]. This mechanism under CPC isn't broad enough to include all the insolvency orders like reorganization processes, interim orders, etc. resulting in many judgments and orders of such insolvency processes unenforceable in India[20].

In the similar manner for Indian proceedings to be recognized abroad, the rules of that jurisdiction will apply regarding the procedure for the same. If a country has adopted the Model law (UNCITRAL) they would recognize the proceedings without requiring India to have adopted the Model law as well[21]. Whereas countries that have not adopted the Model law or have adopted it with some changes may require reciprocity of India to have a cross-border insolvency law based on the Model law, which means that such other country would provide recognition, cooperation, etc. with respect to Indian insolvency proceedings only if certain

[14] [18] Government of India, Ministry of Corporate Affairs, Public notice on cross-border insolvency, June 20, 2018. http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf.
[15] *Ibid.*
[16] Civil Appeal No. 15135 of 2017.
[17] *Id. 16.*
[18] Code of Civil Procedure, No.5 of 1908, §44A.
[19] *Ibid.*
[20] *Id.* 9.
[21] *Id*. 17.

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requirements are met with by the domestic Indian law[22].

Impact on India on the adoption of Model Law

Keeping in mind the lacuna and the confusion of the current laws there was committee set up by the Government of India to give a much more broader legal framework by keeping in mind that business transactions take place in more than one jurisdiction with their assets also spread across many jurisdiction. The

UNCITRAL Model Law, 1997 was identified as the framework which was recognized and accepted globally. This Model Law has been adopted in 47 States in a total of 50 jurisdictions[23]. It will provide a mechanism to liquidate on recover from foreign assets of Indian Corporate Debtors, which are undergoing insolvency or vice versa and has also recommended that the application of cross-border insolvency provisions should be started with Corporate Debtors and with time, it could be extended to individual insolvency[24]. It is enclosed with an Annexure containing the draft Cross Border Insolvency legislation that will be enacted in IBC once the parliament passes it. The other impacts that this Model Law will have are – [25]

1. Access to courts of ratifying States;

2. Recognition of either foreign main proceeding or a foreign non-main proceeding; 3. Coordination between court in which concurrent proceedings are being carried out and courts where the debtor's assets are situated;

4. Relief that is to be given for the fair and logical conduct of the cross-border insolvency. The Model law provides for direct communication between the Foreign Courts and the Adjudicating Authority i.e the NCLT, the proposed amendment has also provided for joint hearing of the NCLT and the Foreign Court furthermore, the Insolvency Resolution Professional too will have the authority to communicate with the foreign courts and representatives to discharge his duties under IBC.

Scope of application of the Model Law and the future course of action for the Indian Insolvency Mechanism

According to the draft part on cross-border insolvency[26] the draft cross-border insolvency

[22] *Ibid.*
[23] Status: The UNCITRAL Model Law on Cross-Border Insolvency (1997), United Nations Commission on International Trade Law, (Apr. 19, 2020, 4:30 PM), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
[24] Himanshu Handa, Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India, IJLMH, 3 (2018).
[25] *Ibid.*
[26] *Id.* 18.

legislation will be applicable to all the corporate debtors where –

1. India seeks for assistance by a foreign court or a foreign representative with respect to any foreign proceeding; or
2. Foreign State seeks assistance with respect to proceedings under this Code; or
3. Proceedings under this Code or foreign proceeding taking place at the same time in respect of the same corporate debtor; or
4. If creditors of a foreign State have an interest in the commencement of or the participation in a proceeding under IBC.

This will also be applicable to the countries mentioned in Part A and Part B of the Schedule, i.e. those that have adopted the UNCITRAL Model and any other country that the Central Government notifies respectively.

This proposal of the Government of India on the adoption of the UNCITRAL Model Law on cross-border insolvency into the existing legislation IBC, would give the Adjudicating Authority access to CIRP that would be carried out in courts outside the jurisdiction of India and would also help in achieving the objective of IBC which is completion of the resolution process in a time-bound manner and maximization of the assets of the corporate debtor. The draft chapter does not provide for cross-border insolvencies in respect of individual debtors as of now but the report[27] states that with the experience gained in respect of the cross-border insolvency for corporate debtors, it could be extended to individual insolvency too in due course of time. A

similar approach has been followed in Singapore and a few other countries[28]. Reciprocity is not requires by the Model Law per se and India will not be restricted in safeguarding the current provisions which deal with cross border insolvencies if reciprocity is adopted[29].

Center of main interests (COMI)[30]

The Insolvency Law Report gives the definition of COMI under Section 14 of the draft part as under 1. In the absence of proof to the contrary, the corporate debtor's registered office is presumed to be the corporate debtor's centre of main interests for the purpose of this Part;

2. The presumption in sub-clause (1) shall only apply if the registered office of the corporate debtor has not been moved to another country within the three month period prior to the filing

[27] *Id.* 9.
[28] *Ibid.*
[29] *Id.* 28.
[30] *Id.* 9.

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of application for initiation of insolvency proceedings in such country.

3. While determining the corporate debtor's centre of main interests, the Adjudicating Authority shall conduct an assessment, of where the corporate debtor's central administration takes place, and which is readily ascertainable by third parties including creditors of the corporate debtor.

4. If the corporate debtor's centre of main interests is not determined by factors stated in sub-clause (3), the Adjudicating Authority may conduct an assessment of factors prescribed by the Central Government or this purpose.

Effect of Brexit

The United Kingdom had voted to leave the European Union in June 2016, (Brexit is a portmanteau of "British" and "Exit". The British government had formally announced the Country's withdrawal in March 2017 and it left the EU at 11 PM GMT on 31st January 2020. This will naturally have an impact on trade between India and UK considering the fact that there are many business relations, which India has with UK. On 23rd

January 2020 the Withdrawal Agreement Act was passed and this agreement provide for the transition period till 31st December 2020, during which UK is free to come up with any trade negotiations not only with EU but also with the entire world. It is worth noting that British Prime Minister Boris Johnson had pledged a "new and improved" trading relationship as part of a "truly special UK-India relationship" on the election campaign trail last year[31]. Therefore, as of now it difficult to say what exactly the impact of Brexit might be specifically on

matters related to cross-border insolvency relationship with India and only the path taken by UK in the coming days will tell us.

III. CROSS-BORDER INSOLVENCY IN UK

Historical background

On 30th May 1997, the United Nations Commission on International Trade Law had adopted a model law (UNCITRAL Model Law) which provides guidance in cross-border insolvency proceedings and which would be a foundational framework for nations choosing to implement it. Its adoption isn't mandatory and many States that have adopted it have either enacted only selected parts of the Model or have added their own limiting provisions. The drafters of this

[31] UK-EU divorce on Friday; India on target list for post-Brexit UK trade campaign, The Economic Times (Apr. 20, 2020, 8:00 PM), https://economictimes.indiatimes.com/news/economy/foreign-trade/uk-eu-divorce-on-friday-india-on-target-list-for-post-brexit-uk trade-campaign/articleshow/73776558.cms.

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Model Law had intended for it to provide a modern legal framework and encourage cooperation and coordination between adopting jurisdictions in executing cross-border insolvency proceedings[32]. Great Britain adopted its version of the UNCITRAL Model as the Cross Border Insolvency Regulations 2006 with the goal of adopting the Model Law, as written, to the fullest extent possible[33].

Existing legal scenario

Currently under the English legal framework there are four main sources of law that deal with cross-border insolvency. The first one being the **EU Council Regulation on Insolvency Proceedings, 2000** which was adopted by the council of the EU on 29th May 200 but came into effect only from 31st May 2002. This regulation is considered to be directly applicable throughout the EU, prevails over all their domestic laws (with the exception of Denmark) and it also does not require the member States for its implementation. This regulation applies to those insolvency proceedings that are collective in nature; i.e. compulsory liquidation, administration, creditors' voluntary winding up (where there is confirmation by the court), voluntary arrangements and personal bankruptcy[34]. It does not include receiverships and also does not apply to certain types of entities including credit institutions, insurance companies and investment[35]. This regulation specifies three kinds of proceedings which will be applicable to insolvency matters in different jurisdictions or member States. The first one is the main proceeding, which will take place in the Member State where the debtor has its "Centre of Main Interest". The center of main interests is "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[36] The second one is the secondary proceeding in which the debtor has its establishment or place of business in one Member State and its Centre of Main Interest in another Member State in such a case if this ancillary proceedings takes place after the main proceeding they're called as secondary proceedings but if the ancillary proceedings takes place before the main proceedings it is territorial proceedings which is the third type of proceeding (this can take place only in limited circumstances). This regulation also gives the liquidator a restricted right of overseeing the main proceeding even if he is in another Member State and he can also move assets from the foreign Member State to the State that has the main proceeding. This right of liquidator is restricted as he must not conflict with the laws of that

[32] *Id.* 4.
[33] *Ibid.*
[34] *Id.* 8.
[35] *Ibid.*
[36] *Ibid.*

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foreign Member State.

The second legal framework governing cross-border insolvency is the **Cross Border Insolvency Regulations 2006** and was enacted keeping in mind the Model Law. The CBIR are applicable without the need of reciprocity of it being adopted in another country as well. These regulations specify two kinds of proceedings that will be applicable to insolvency matters in different jurisdictions or Member States. The first one is the foreign main proceeding, which will be applicable where the debtor has its center of main interest and the second one is foreign non-main proceeding, which will be applicable where the debtor has its establishment and not center of main interest. These two terms foreign main proceeding and foreign non-main proceeding has a similar meaning to that of main proceeding and secondary proceeding under the EC Regulation. A notable difference between the EC Regulation and CBIR is that the latter are only applicable once foreign proceedings are recognized in the UK, whereas recognition is automatic under the former. This recognition of foreign main proceeding was also established under the case *In re Namirei-Showa Co. Ltd*[37]. in this case, the insolvency proceeding had commenced in Japan and the Japanese representatives applied for it to be recognized as a foreign main proceeding; they also had with themselves documents in support of their claim, hence, the UK High Court of Justice decided in their favor and recognized the proceeding as a foreign main proceeding.

The third legal framework is **Section 426 of the Insolvency Act, 1986**. Under this section the UK Courts must provide assistance to the courts of "relevant countries" which ask for assistance. The UK courts are able to provide this assistance by making orders allowing overseas office holders to make use of UK insolvency laws or by applying the local insolvency laws of the requesting court in the UK, though Section 426 is useful but is a very limited provision because it applies only to requests for assistance made by the insolvency courts of "relevant countries" and such countries consist mostly of Commonwealth countries or remaining U.K. colonies[38].

The fourth and the final legal framework is **The Common Law**. Under this the bankruptcy laws of other countries within the English jurisdiction has been recognized.

Centre Of Main Interest (COMI)

The definition of COMI has neither been given in the UNCITRAL Model nor in the EC

[37] In re Namirei-Showa Co. Ltd., UK High Court of Justice (2008).
[38] U.K. Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?, Jones Day (Apr. 20, 2020, 4:15 PM), https://www.jonesday.com/en/insights/2009/09/uk-perspective-recognition-of-overseas-insolvency-procedures-spoiled-for-choice.

Regulation. COMI is an imporitant aspect in determination of whether the proceeding will be a foreign main proceeding or a foreign non-main proceeding, but on reading both the Model law as well as the regulation it can be said that it indirectly tells us what center of main interest actually means, both allow for such a presumption. Definition of COMI has been given by Thomsan Reuters as "the jurisdiction with which a person or company is most closely associated for the purposes of cross-border insolvency proceedings."[39] The presumption under the model law can be that "in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[40] It is still blurry as to the level of proof necessary to rebut such a presumption. There is a presumption under the EC Regulation as well that the COMI is the region where the (debtor) company has its registered office but when there is evidence contrary to the same such a presumption becomes a rebuttable one; but yet again the EC Regulation has failed to provide what an appropriate evidence could be. Article 3 of the regulation states that "the center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."[41] When the question arises as to which Member State has the jurisdiction when there are multiple insolvency proceedings for the same debtor in different Member States is when the COMI aspect as under EC Regulations gains significance.

Effect of Brexit

The withdrawal agreement of the UK exiting the EU began a transition period which will end on 31st January 2020 during which EU and UK will negotiate their future relations. Till the transition period the UK is subject to EU customs union and single market but is no more a part of EU's political institutions. The current insolvency law in EU is not well structured and is subject to the domestic rules and regulations of the Member States and the EC Regulation. This regulation will now cease to be effective in UK and being a non-participant State, the UK will not have any further say in the development of the regulation. Since we are in the stage of the transition period the legal framework of UK with respect to insolvency proceedings will depend on the negotiations it has with EU and the other Member States but if such an agreement is not reached at then domestic laws of UK will be applied to the insolvency matters, which will be subject to the Insolvency Regulation but might end up being uncertain to the

[39] Center Of Main Interest, Practical Law (Apr. 20, 2020, 5:15 PM), https://uk.practicallaw.thomsonreuters.com/6-503- 3605?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.
[40] *Id.* 27.
[41] Regulation of the European Parliament and of the Council on Insolvency Proceedings Recast 2015/848, EUR-Lex (Apr. 20, 2020, 6:00 PM), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0848.

parties who would be involved[42]. The insolvency proceedings will cease to be automatically recognized in EU and any other similar recognition will operate only on the basis of common law.

IV. SUGGESTIONS AND CONCLUSION

With respect to India this issue of cross-border insolvency is still a developing one because recently the scope of work for the insolvency law committee expanded to cover aspects related to enterprise group insolvency on a cross-border basis and it will also study the UNCITRAL Model Law for the same[43]. Though the Code permits India to enter into treaties to implement the Model Law but this might further complicate the matter instead what can be done is ratify the Model law and the incorporation of that into the Code. The notification provides a general restriction on 'public policy' but does not clearly state as to what public policy includes and the courts might either give it a broad or a narrow meaning but it will finally result in uncertainty, confusion and chaos with respect to the rights of the foreign representatives in the courts in India.

The legal framework in UK had become quite simpler and mush more progressive as compared to the period before 2002, i.e before the EU Regulation but now with Brexit it might again be reverting back to the same old stage, there is also a risk if it losing all the benefits of the regulation and the directives but there is still a scope of it leading to better treaties and negotiations which only time will tell once the transition period comes to an end.

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[42] Brexit: what might change, Loyens Loeff, (Apr. 20, 2020, 8:45 PM), https://www.loyensloeff.com /media/476497/memo-brexit insolvency-restructuring.pdf.

[43] K.R. Srivastav, MCA panel's scope on cross-border insolvency gets bigger, The Hindu Business Line, (Apr. 20, 2020, 9:09 PM), https://www.thehindubusinessline.com/companies/mca-panels-scope-on-cross-border-insolvency-gets-bigger/article31015843.ece.

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