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Cross Border Insolvency Mechanism in India: The Need to Adopt UNCITRAL Model Law

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ABSTRACT

Globalization has led to growth of multinational corporations with creditors and assets held across countries. Therefore, actions of a multinational corporation may have effects spread across the world with domestic boundaries of the countries virtually being non-existent. Therefore, there is a need to adopt globally accepted basic procedural standards involved in cross border insolvency situations to provide greater certainty in international trade. The Indian legal regime in its current form fails to provide a concrete mechanism to deal with such situations. The need to bring in a law along the lines of globally accepted UNCITRAL Model Law is highlighted much more now in the times of the Corona virus pandemic as many businesses are financially strained due to disrupted supply lines as a result of the 'Lockdown'. The Insolvency Law Committee has suggested the adoption of Model Law but no action has been taken yet to accept its report. This paper aims at explaining how minor amendments to the Model Law can build a full proof system of cross border insolvency mechanism to deal with the inadequacies of the current Indian legal regime.

I. INTRODUCTION

The development of the concept of globalization has integrated various national economies into a single international economic and financial market wherein national borders are now virtually non-existent.[2] Globalization has led to birth of multinational companies which own substantial resources and perform business activities across various countries. These multinational companies carry on business through a network of branches located all across the global market and such branches form their own business strategy depending on different market conditions of every national market.[3] With rapid globalization, the threat of a global economic crisis has also increased like the 2008 Lehman Brothers bankruptcy which involved

[1] Author is an Advocate in India.
[2] Ristovska Katerina & Ristovska Aneta, *The Impact of Globalization on the Business;* available at: https://core.ac.uk/download/pdf/33812244.pdf. (Last visited on November 5, 2020).
[3] *Ibid.*

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2985 legal entities spread across over 50 countries.[4] This therefore highlights the need of establishing a robust mechanism to deal with cross border insolvency situations guided by a set of universally accepted global standards such as the UNCITRAL Model Law on Cross Border Insolvency (hereinafter referred to as the Model Law.)

With the development of the notion of globalization, India has become a major global player in international investment and business but it lacks a legal regime to deal with cross border insolvency situations. The current Corona virus pandemic has posed a great challenge to the cross border insolvency mechanism as businesses across the world are financially strained and are struggling with disrupted supply chains, sharp decrease in consumer spending and liquidity issues and many businesses may consider filing for insolvency.[5] Therefore, it is high time that India institutionalizes a cross border insolvency regime because the Insolvency and Bankruptcy Code, 2018 (hereinafter referred to as the Code) is essentially silent on the issue.

The Code provides for establishing a framework for cross border insolvency under Section 234 of the Code wherein the Central Government is empowered to enter into reciprocating bilateral agreements with other countries. Subsequently, Section 235 of the Code provides that once a bilateral agreement is entered into with a country, upon an application, the NCLT which is the Adjudicating Authority under the Code may issue '*Letters of Request'* to the courts of such country requesting cooperation and coordination in the initiated cross border insolvency proceeding. But both the provisions have not yet been notified in the Official Gazette by the Central Government. Therefore, currently there is no legal regime in India which regulates cross border insolvency situations. The NCLAT recently allowed coordination and cooperation in a cross border insolvency petition but it has not laid a binding law on the same hence, it can be safe to state that there lies a lacuna in the Indian legal regime of insolvency. Though, the Insolvency Law Committee (hereinafter referred to as the Committee) has recommended the Model Law be adopted because Sections 234 and 235 provide an inadequate mechanism for regulating cross border insolvency situations, the Central Government is yet to take concrete steps in solving the problem.

II. CROSS BORDER INSOLVENCY: THE CONCEPT

Cross Border Insolvency mechanism can be essentially defined as the process of dealing with

[4] Wai Yee Wan & Gerard McCormack, *Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL,* Emory Bankruptcy Developments Journal, Vol. 36 (2020).

[5] Christian Lütkehaus & Dr. Susanne Lenz, *Covid-19: Indian precedent case for cross-border insolvencies is now gaining importance,* Pinsent Masons; available at: https://www.pinsentmasons.com/out-law/analysis/indian-precedent-case-for-cross-boder-insolvencies. (Last visited on November 20, 2020).

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financially strained corporate structures which either may have its assets or creditors situated in multiple (more than one) jurisdictions. Herein, law seeks to regulate the process of insolvency of such corporate enterprises which operate beyond their domestic boundaries.

The law relating to cross border insolvency achieves to fulfil *inter alia* the following objectives:[6]

i. Providing protection and recognition to foreign creditors at par with domestic creditors.

ii. Ensuring the maximization of the value of corporate debtor's assets situated in more than one country.

iii. Establishment of a platform ensuring coordination and cooperation between foreign courts and various stakeholders involved in cross border insolvency proceedings.

The concept of cross border insolvency raises three questions with regards to its applicability. The first question involves the ascertainment of the country which would have the jurisdiction to regulate the process of insolvency and to hear the matter considering that the process has its ramifications across various countries. The second question which then arises is that when the insolvency process is spread across various jurisdictions, which country's law would be then applicable to such proceedings? Thirdly, when insolvency process is completed and the stage of enforcement is initiated across various jurisdictions, which law would regulate the enforcement proceedings?

Essentially, the process of cross border insolvency can be triggered *inter alia* in the following scenarios:[7]

i. Where a company has both domestic and foreign creditors and holds assets situated in its domestic boundary and foreign jurisdictions.

ii. Where a company has foreign subsidiaries and it guarantees loans advanced to such subsidiaries; as observed in Bombay High Court judgment of *Intesa Sanpaulo S.P.A. v. Videocon Industries Limited.*[8]

Such scenarios highlight the complexity of problems involved in a cross border insolvency mechanism and therefore raise the need to solve the above-mentioned questions with the help of global cooperation and coordination.

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[6] Anchal Jindal, *Cross Border Insolvency in India : A Cherry on the Cake*, IBC Laws; https://ibclaw.in/cross-border-insolvency-in-india-a-cherry-on-the-cake-by-cs-anchal-jindal/.(Last visited on November 16, 2020).
[7] Ran Chakrabarti, *Key Issues in Cross-Border Insolvency,* 30 NLSIU REV (2018).
[8] [2014] 183 Comp. Cas. 395 (Bom).

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III. THE LEGAL REGIME REGULATING CROSS BORDER INSOLVENCY IN INDIA

A. *Indian Companies Act, 2013*

In India, before enactment of the Code, the process of insolvency of a corporate entity was governed under the provisions of Indian Companies Act, 2013 (Hereinafter, referred to as the Act.) Though the provisions of the Act did not provide any explicit relief to foreign creditors, the Supreme Court paved the way for such foreign creditors to enforce their rights under the Act. In *Rajah of Vizianagram v. Official Reciever*[9], the Supreme Court held that foreign creditors of a company not incorporated in India but carrying on business in the country can initiate its insolvency under the provisions of the Act. Further, the only element of cross border insolvency could be observed in Section 584 of the Act which provided for winding up of an international company. It provided that winding up of an international company i.e. one incorporated outside India but which carries business in India could be ordered by a competent High Court. The provisions of the Act are now not applicable to insolvency proceedings because the Code has now replaced its insolvency mechanism.

B. *Insolvency And Bankruptcy Code, 2016*

The enactment of the Code brought in revolutionary changes in the process of insolvency of a body corporate in India. In terms of cross border insolvency, the Code only deals with a scenario wherein an Indian company may have a number of foreign creditors. The Code under this condition does not discriminate between domestic and foreign creditors. The order of the Mumbai Bench of the National Company Law Tribunal in *Forever Global Trading Limited v. Global Powersource (India) Ltd*[10] is significant in this regards. The Tribunal rejected the contention that a foreign-based creditor company was inherently incompetent to file a petition under Section 9 and relying upon the Supreme Court's judgment in *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd*[11], held that such a foreign creditor is covered under Sections 3(23)(g) and 3(25) of the Code and therefore can initiate insolvency proceedings under the Code.[12]

The Code fails to comprehensively deal with other two possible scenarios of cross border insolvency. The first condition is one wherein a company may hold assets in another jurisdiction, which its creditors may apply to be attached in the insolvency proceedings. The

[9] AIR 1962 S.C. 500.
[10] C.P. (IB) No. 3735/NCLT/MB/2018.
[11] Civil Appeal No. 15481 of 2017.
[12] Naman Katyal, *The NCLT on the Institution of CIRP on a Petition Filed by a Foreign Entity,* IndiaCorpLaw; available at: https://indiacorplaw.in/2020/07/the-nclt-on-the-institution-of-cirp-on-a-petition-filed-by-a-foreign-entity.html. (Last visited on November 135, 2020).

second scenario which the Code fails to deal with is when insolvency proceedings with respect to the same debtor may be initiated in more than one country.[13]

The only attempt to deal with these two scenarios is contained in Section 234 and Section 235 of the Code which deal with cross border insolvency inadequately. The two provisions were not included in the report of the Banking Law Reforms Committee (2015) for the reason that India lacked the judicial infrastructure to deal with cross border insolvency. But the Joint Parliamentary Committee found it imperative to include provisions related to cross border insolvency and therefore both the provisions were added into the Code.[14]

Section 234 of the Code provides that the Central Government can enter into bilateral agreements with other countries to deal with cross border insolvency. Such agreements in form of reciprocating agreements would allow for coordination and cooperation in insolvency proceedings between Indian courts and the courts of such country. Section 235 of the Code provides that when there is a pre-existing reciprocating agreement, the Adjudicating Authority, upon request of Resolution Professional, Liquidator or Bankruptcy Trustee, as the case may be, can issue 'Letter of Request' to courts of such country seeking action against the Corporate Debtor as per the provisions of the agreement.

It is though pertinent to note that both the provisions have not yet been notified by the Central Government and therefore are not applicable. The non-applicability of both the provisions is not the only problem with cross border insolvency legal regime in India. There are multiple problems which plague the mechanism proposed under the two provisions. The process of entering into bilateral treaties with other countries to facilitate the mechanism of cross border insolvency is very time consuming which would involve lengthy rounds of negotiations with each country India proposes to deal with. Further, negotiation with the countries can be problematic because different countries have wide variations in their substantive law regimes. Another problem which would arise if both the provisions are notified is that the Code does not provide for any mechanism for countries with which such bilateral agreement is not entered into. Therefore, the Code gives recognition to the principle of reciprocity as the only method for cooperation and coordination in cross border insolvency proceedings. Thus, it can be safe to state that the current legal regime with respect to cross border insolvency under the Code is unsatisfactory and inadequate and therefore needs a complete overhaul for it to deal with the modern day complexities of cross border trade, investment and insolvency.

[13] Aparna Ravi, *Filling in the Gaps in the Insolvency and Bankruptcy Code- Cross Border Insolvency*, IndiaCorpLaw; https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html. (Last visited on Nov 17, 2020).
[14] Supra, Note 5.

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C. Judicial Decisions

The National Company Law Appellate Tribunal's order in *Jet Airways (India) Ltd. v. State Bank of India & Anr*[15] paved the way to allow for cooperation and coordination with a foreign court wherein parallel insolvency proceedings against the same Corporate Debtor were already being conducted even though the Code is silent on regulating such a scenario. In this instant case, NCLT, Mumbai, which had already initiated insolvency proceedings against the Corporate Debtor (Jet Airways), was informed that insolvency proceedings against the Corporate Debtor had already been initiated by Noord-Holland Court. The Dutch court appointed Administrator had filed an application before the NCLT to allow him as an intervenor in the insolvency process initiated in India. The NCLT rejected the application stating that the Code at the time being is silent on regulation of such parallel proceedings in different jurisdictions. It held that "*there is no provision and mechanism in the I&B Code, at this moment, to recognize the judgment of an insolvency court of any Foreign Nation. Thus, even if the judgment of Foreign Court is verified and found to be true, still, sans the relevant provision in the I&B Code, we cannot take this order on record.*[16]*"* It was further opined that parallel cross border insolvency proceedings can neither recognized nor dealt with by Indian Tribunals because Sections 234 and 235 of the Code had not been notified by the Government.[17]

However, the order of NCLT was overturned by the NCLAT wherein it took the initiative proposing a 'Cross-Border Insolvency Protocol'[18] to put into effect a *"joint corporate insolvency resolution process of the Company."*[19]In the Protocol entered into by the Dutch Court Administrator and the Resolution Professional, India was recognized as the place of 'foreign main proceedings' and Dutch proceedings were recognized as 'foreign non-main proceedings' as the Corporate Debtor's 'centre of main interests' were present in India.[20] The NCLAT therefore allowed the Dutch Court Administrator to take part in the meetings of the Committee of Creditors but only as an observer and was not given any voting rights.[21]

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[15] Company Appeal (AT) (Insolvency) No. 77 of 2019, Order dated 12 August 2019
[16] State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/ MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.
[17] Rongeet Poddar, *Cross-Border Insolvency in India: The National Company Law Appellate Tribunal Paves the Way,* IndiaCorpLaw; available at: https://indiacorplaw.in/2019/09/cross-border-insolvency-india-national-company-law-appellate-tribunal-paves-way.html. (Last visited on November 9, 2020).
[18] *Ibid.*
[19] *Supra Note 15.*
[20] *Introduction to Cross-Border Insolvency,* Nishith Desai Associates, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf. (Last visited on November 19, 2020).
[21] *Ibid.*

In another order of NCLT Mumbai Bench in the case of *State Bank of India v. Videocon Industries Limited & Others*[22], the inclusion of foreign assets of Videocon in the corporate insolvency resolution process in India has been ordered. This order of the NCLT is significant and landmark because the foreign assets ordered to be attached are owned by the Corporate Debtor's foreign subsidiaries. Such attachment of assets of foreign subsidiaries under domestic insolvency proceedings has happened for the first time. But it is now reported that the creditors of the Corporate Debtor are planning to appeal against the order of the NCLT as they believe that it would be in every stakeholder's commercial interest to not attach foreign assets.[23] The inadequacy of the Code in regulating such cross border insolvency proceedings has therefore forced the Tribunals to proceed on a case-by-case basis with no binding precedent as a guideline to follow thereby creating a lot of uncertainty.

IV. THE UNCITRAL MODEL LAW: THE GLOBAL STANDARD ON REGULATION

The Model Law seeks to *"assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency."*[24]The Model law aims at promoting cooperation and coordination between countries by laying down a guiding set of rules of procedure which could be followed uniformly during cross border insolvency proceedings. Further, Model Law has been laid down to achieve *"greater legal certainty for trade and investment"* across borders.[25] It is pertinent to note that the Model Law only aims at streamlining the procedure involved during cross border insolvency proceedings and in no case does it propose to establish a substantive insolvency law.[26] Model Law only provides a guiding set of rules of procedure which any country can adopt and amend to suit its local needs and aspirations.

The Model Law seeks to achieve the above-mentioned objectives through four important principles which must guide every individual country while it adopts and localizes Model Law to suit its domestic needs. The four principles are as follows:[27]

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[22] MA 2385/2019 in C.P. (IB)-02/MB/2018.

[23] Creditors to Videocon Group likely to appeal against insolvency tribunal's order, Mint; https://www.livemint.com/companies/news/creditors-to-videocon-group-likely-to-appeal-against-insolvency-tribunal-s-order-11581878165983.html. (Last visited on November 15, 2020).

[24] *UNCITRAL Model Law on Cross-Border Insolvency (1997),* United Nations Commission on International Trade Law; https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency. (Last visited on November 16, 2020).

[25] Nidhi Shetye, *International Insolvency: An Indian Perspective on Cross-Border Treatment of Cases*, Fordham International Law Journal, Vol. 39 Issue 4 (2016).

[26] Supra, Note 6.

[27] Supra, Note 24.

i. ***"Access"* Principle:** It provides foreign creditors and foreign insolvency officials direct access to domestic courts of the receiving country for filing insolvency proceedings or taking part in insolvency proceedings already initiated in such state, as the case may be. Model Law provides the basis the 'access' principle under Articles 9, 11, 12 and 13.

Article 9 of the Model Law provides that a foreign representative has the right of direct access to the local court of the receiving state. Further, Article 11 entitles such a foreign representative to directly apply to the local court for initiating insolvency proceedings subject to the conditions of the local laws of the receiving state regarding insolvency.[28] It is pertinent to mention that the Indian law of insolvency as laid down in *Forever Global Trading Limited v. Global Powersource (India) Ltd*[29] confirms to both Article 9 and Article 11 wherein the Tribunal held that a foreign creditor can directly initiate insolvency proceedings by directly applying the competent Indian Tribunal.[30] The decision of the Tribunal is landmark because it was held that foreign creditors have the same rights regarding the commencement of, and participation in, an insolvency proceeding of an Indian entity before Indian Tribunals under the code thereby affirming to the principles laid down under Article 13 of the Model Law.

However, the Indian law does not recognize Article 12 of the Model Law which entitles a foreign representative to participate in an insolvency proceeding in the receiving state *"upon recognition of a foreign proceeding".*[31]Article 12 provides for the right of participation in insolvency proceedings by a foreign representative if such proceeding have been recognized either as a foreign main or non-main proceeding. However, the Code does not provide for recognition of any cross border insolvency proceeding as either main or non-main proceeding.

ii. ***"Recognition"* Principle:** It imparts the domestic court of the receiving state with the authority to pass an order recognizing foreign insolvency proceedings as either foreign *"main"* or *"non-main"* proceeding. This principle essentially deals with the scenario of parallel proceedings against the same corporate debtor being conducted in two or more different jurisdictions.

Article 15 of the Model Law provides that a foreign representative can apply to the domestic court of the receiving state for recognition of foreign proceedings already being conducted in

[28] Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016,* Vikalpa, Vol. 45 Issue 2 (2020).
[29] Supra, Note 9.
[30] Naman Katyal, *The NCLT on the Institution of CIRP on a Petition Filed by a Foreign Entity,* IndiaCorpLaw; avaibale at: https://indiacorplaw.in/2020/07/the-nclt-on-the-institution-of-cirp-on-a-petition-filed-by-a-foreign-entity.html. (Last visited on November 21, 2020).
[31] Article 12 of The UNCITRAL Model Law on Cross-Border Insolvency.

his/her country by submitting a certified copy and other documents from the court of his/her country affirming the existence of the same. Thereafter, Article 17 provides that upon fulfilment of the conditions under Article 15, the receiving court shall recognize the proceedings before it as either foreign main or non-main proceeding. [32] The ascertainment of a proceeding as main or non-main proceeding is important because the nature of proceedings decide the nature of relief which a court can grant. It also determines the level of control that each jurisdiction commands over the insolvency process.[33]

Further, Article 17(2) lays down the principle of *'centre of main interests'* (hereinafter referred to as COMI) which guides the determination of the nature of insolvency proceedings. The Model Law does not provide a definition of COMI but it is generally considered to be the place from where company's major activities are controlled.[34] The courts generally apply the 'command and control' test to ascertain the COMI of a corporate structure.[35] Article 16(3) gives a little understanding of the concept of COMI by laying down a rebuttable presumption that it shall be the place where the company's registered office is situated. But there are also certain other factors which help determine the COMI of a company. These factors *inter alia* include location of headquarters of the company, the location of such persons who *de facto* manage the company (which could possibly be the headquarters of a holding company), the place where the primary assets of the company are situated, the location of the majority of company's creditors etc.[36]

A foreign non-main proceeding is carried on in a jurisdiction where the corporate debtor has an 'establishment.' The term 'establishment' has been defined as a place which is not COMI and where the corporate debtor carries out a non-transitory economic activity with human means and assets or services.[37]Therefore, the Model Law lays down guiding principles to ascertain the most appropriate jurisdiction for commencing cross border insolvency proceedings.

However, Indian law fails to deal with such condition of parallel proceedings in different jurisdictions because neither Sections 234 nor 235 of the Code have been notified nor is there

[32] Dr. Binoy J. Kattadiyil & CS Nitika Manchanda, *Cross Border Insolvency Framework in India*, International Journal of Multidisciplinary Educational Research, Vol. 9, Issue 4(7) (2020).
[33] Supra, Note 19.
[34] Supra, Note 6.
[35] Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between The United States & European Union: Legal & Economic Developments,* Emory Bankruptcy Developments Journal, Vol. 29 (2013).
[36] The UNCITRAL Model Law, Art. 16(3); Miguel Virgos & Etienne Schmit, Report on the Convention on Insolvency Proceedings, EU Council Document 6500/96 DRS **8** (CFC), (1996). (Last visited on November 17, 2020).
[37] Supra, Note 19.

any judicial precedent which provides an exhaustive list of conditions to determine the nature of cross border insolvency proceedings. In *Jet Airways case*[38], India was considered to be place of foreign main proceeding only because a Protocol was established between the Resolution Professional and Dutch court appointed administrator upon the Tribunal's directions. The Tribunal did not specifically provide grounds for determining either the nature of proceedings or the COMI of the corporate debtor but it were the parties to the insolvency proceedings which decided to declare Indian proceedings as foreign main proceedings. Further, with respect to determination of COMI of a company, both the Code and judicial decisions are silent thereby adding to the uncertainty of cross border insolvency mechanism in India. Therefore, it is safe to state that in absence of provisions in the Code and judicial precedents, neither does India confirm with Model Law nor does it provide a mechanism to deal with the concept of parallel cross border insolvency proceedings.

iii. ***"Relief"* Principle:** It provides a court the authority to grant either interim or automatic or discretionary relief depending upon the type of proceedings which have been recognized before it. The nature of insolvency proceedings determine the level of control over the proceedings and the subsequent relief which the court can grant.

Article 19 provides that a court can grant *interim relief* upon application by the foreign representative to either protect the interests of the creditors or secure the assets of the corporate debtor from any misadventure.[39] It provides that the court can grant interim relief such as stay of execution of corporate debtor's assets or transfer of administration of corporate debtor's assets to either the foreign representative or any other person or suspending the right of transfer, encumber, or transfer of corporate debtor's assets. Article 19(3) provides that the interim relief would terminate unless extended once application for recognition of proceedings is disposed of.

Article 20 provides for grant of *automatic relief* which would mandatorily be ordered by the court once the proceedings have been recognised as foreign main proceedings.[40] This relief includes grant of a moratorium *inter alia* on institution of suits or continuation of pending suits against the corporate debtor, transferring, encumbering, alienating or disposing of any property of the corporate debtor.

Article 21 allows the court to grant *discretionary relief* in case of a foreign non-main proceeding wherein the court *may* declare a moratorium on grounds mentioned under Article

[38] Supra, Note 14.
[39] Supra, Note 24.
[40] Ibid.

20 if the court deems fit. The court may even in such a case entrust the distribution of assets of the corporate debtor to the foreign representative upon his/her request.[41] Such principle of grant of relief is absent in Indian law because the Code does not deal with cross border insolvency proceedings.

iv. ***"Cooperation and Coordination"*** **Principle:** It seeks to achieve total cooperation and coordination between the courts of the countries involved and all the stakeholders of the insolvency proceedings to ensure proper disposal of the dispute.

Article 25 and Article 26 provide that the domestic courts of the receiving state and insolvency representatives should cooperate to the maximum extent possible with foreign courts or foreign representatives. Further, Article 27 provides the mechanism through which cooperation and coordination as provided under Articles 25 and 26 can be achieved. [42]

Further, Article 29 provides that when concurrent foreign and local insolvency proceedings take place, the courts must cooperate and coordinate in accordance to Articles 25, 26 and 27.[43]

The Model Law also provides for certain exceptions to its applicability to suit the local needs and aspirations of the enacting countries. The exceptions provided are as follows:

i. *Excluded Entities:* Article 1 Para 2 provides that an exception can be provided by the enacting countries to certain entities such as banking institutions and insurance companies.

ii. *Public Policy Exception:* Article 6 provides that the court of the enacting state shall have the power to refuse an action if such action would be *'manifestly contrary'* to the public policy of such state. The term public policy has not been defined in the Model Law because notion of public policy derives existence from domestic law and it may differ from state to state.[44]Further, the UNCITRAL Guide to Enactment has also recommended that the interpretation of the notion of public policy must not be wide and limits should be imposed upon the court's discretion to invoke the exception.[45] This exclusion includes denial of recognition

[41] Supra, Note 19
[42] Supra, Note 24.
[43] Ibid.
[44] Aditi Mozika, *The Limits of Comity: Refusal to Recognise Foreign Insolvency Proceedings*, IndiaCorpLaw; available at: https://indiacorplaw.in/2020/01/limits-comity-refusal-recognise-foreign-insolvency-proceedings.html. (Last visited on November 22, 2020).
[45] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997) U.N. Sales No. E.99.V.3 [30]. (Last visited on November 13, 2020).

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or relief, if such action would be manifestly contrary to the public policy of the country that receives the application for recognition.[46]

V. APPLICATION OF THE MODEL LAW INTO THE INDIAN REGIME

The demand for adoption of the Model Law into Indian law of insolvency has been made since 2000 when Justice Eradi Committee in its report on *'Law relating to the Insolvency and Winding Up of Companies'* suggested inclusion of cross border insolvency law into the Companies Act, 1956 based upon the Model Law. Thereafter, in 2001, '*The Advisory Group on Bankruptcy Laws'*, under the chairmanship of Dr N. L. Mitra also advised adopting Model Law to deal with cross border insolvency. The latest recommendation to adopt Model Law into the Code has been suggested by the Insolvency Law Committee.[47]

The Committee noted that the existing mechanism for dealing with cross border insolvency under Sections 234 and 235 of the Code is inadequate and insufficient.[48] The Committee opined that if the mechanism under the two provisions is applied, it would lead to delay and uncertainty for the parties involved in the insolvency proceedings and also for the courts. It further noted that the existing provisions under the Code of Civil Procedure, 1908 which deal with the execution of foreign judgments is incapable of executing all insolvency orders.[49] Therefore, the Committee recommended that the Model Law be adopted into the Code. The recommendations of the Committee are as follows:

A. Applicability

i. The law relating to cross border insolvency to be applied only to corporate debtors because the Code as of now is not applicable to partnerships and individuals. Further, only a foreign creditor shall have standing in a foreign proceeding being conducted in the country thereby excluding *"other excluded persons"* as provided in the Model Law.[50]

ii. Insolvency proceedings should only be initiated if the corporate debtor has assets in India.[51]

iii. *Principle of Reciprocity:* Cooperation and coordination should only be extended to such countries where reciprocity with respect to the Model Law is applicable. Reciprocity

[46] *Ibid.*
[47] Supra, Note 24.
[48] Insolvency Law Committee, *Report of Insolvency Law Committee*, Ministry of Corporate Affairs; available at: https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Oct/Report%20on%20Cross%20Border%20Insolvency_2018-10-22%2018:55:11.pdf.
[49] *Ibid.*
[50] *Ibid.*
[51] Supra, Note 19.

means that applicability of the provisions of the Code would be extended to those countries which have adopted Model Law into their local insolvency law. The issue of reciprocity is problematic because Model Law has been adopted by only 48 states till date which limits the scope of applicability of the cross border insolvency regime.[52] Thus, the condition of applicability of Code with only reciprocating states drives the mechanism back to Sections 234 and 235 which provide for entering into bilateral treaties.[53] The Committee does provide for dilution of the rule of reciprocity in the future without a time line. Nonetheless, the scope of applicability of cross border insolvency process is restricted to a great deal by proposing the rule of reciprocity.

iv. *Foreign Representative:* The Committee has recommended that a foreign representative duly authorized in a foreign proceeding must adhere to the provisions of the Code otherwise a penalty for contravention could be levied upon him/her.[54] Further, it has suggested that the Central Government must be given the power to prescribe a code of conduct which would be applicable to such foreign representatives.

B. Recognition Of Foreign Proceedings

The Committee has applied the principle of *recognition* into its recommendations for the cross border insolvency mechanism and has recognized the following kinds of proceedings:

i. *Foreign Main Proceeding:* Such proceedings shall take place where the COMI of the corporate debtor is present. The general rule of the Model Law by implication provides that the NCLT shall not be compelled to recognize a proceeding unless COMI has been proved.[55] The Committee lays down the following guidelines which shall help in the ascertainment of COMI of a corporate debtor which are:[56]

a. There shall be a presumption that the registered office of the corporate debtor would be the COMI unless the contrary is proved. A time limit of three months has been provided for such presumption to hold good. The registered office shall be considered to be the COMI of the corporate debtor if the same

[52] Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), United Nations Commission On International Trade Law; https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status. (Last visited on November 7, 2020).
[53] Soham Chakraborty, *Reciprocity Requirements in India's Adoption of the UNCITRAL Model Law on Cross Border Insolvency*, IndiaCorpLaw; https://indiacorplaw.in/2020/02/reciprocity-requirements-in-indias-adoption-of-the-uncitral-model-law-on-cross-border-insolvency.html (Last visited on November 15, 2020).
[54] Supra, Note 19.
[55] *Aastha Kaushal & Saurav Gurjer, Implications of India Adopting the UNCITRAL Model Law on Cross-Border Insolvency*, IndiaCorpLaw; https://indiacorplaw.in/2018/09/implications-india-adopting-uncitral-model-law-cross-border-insolvency.html. (Last visited on November 16, 2020).
[56] Supra, Note 19.

has not been moved to another country three months prior to the initiation of the insolvency proceedings.

b. The Committee gives the power to the NCLT to ascertain the COMI of the corporate debtor. It recommends that the NCLT shall determine the COMI of the corporate debtor in every insolvency proceeding and it must ensure that such a location is readily ascertainable by third parties.

c. If the NCLT is still not able to ascertain the COMI of the corporate debtor through the above guidelines, it must conduct an assessment using factors prescribed by the Central Government.

ii. *Foreign Non-Main Proceeding:* The Committee provides that such a proceeding shall be initiated and recognized in jurisdictions where the corporate debtor holds an *'establishment.'* Establishment has been defined as a place where the corporate debtor carries out a non-transitory economic activity with human means and assets or services.

C. Mandatory And Non-Mandatory Relief

The Committee proposes to give power to the NCLT to grant mandatory relief in a foreign main proceeding along the lines of Article 20 of the Model Law. It further states that the automatic moratorium ordered in a foreign main proceeding shall be similar to the moratorium granted under Section 14 of the Code.[57] Further, the concept of non-mandatory relief to be granted in case of a foreign non-main proceeding confirms with Article 21 of the Model Law.[58] However, the Committee also opined that while granting such non-mandatory relief, the NCLT must ensure that the interests of the creditors in India are sufficiently protected.[59]

D. Cooperation And Coordination

The Committee suggests that cooperation must be ensured at two levels. *Firstly*, cooperation and coordination between the NCLT and the foreign courts or foreign representatives. And *secondly*, cooperation and direct communication must be developed between the resolution professional and liquidator of foreign courts or foreign representatives, as the case may be.[60]

[57] Report Summary: Insolvency Law Committee on Cross-border Insolvency, PRS Legislative Research; https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/ILC%20Summary%20-%20Cross%20Border%20Insolvency.pdf. (Last visited on November 8, 2020).
[58] Ibid.
[59] Supra, Note 19.
[60] Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross Border Insolvency in India*, IBC Laws; https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-

The Committee also proposes conducting joint proceedings when foreign proceedings may take place concurrently. Further, it imposes a duty upon the Central Government to issue guidelines to achieve the above-mentioned objectives.[61]

E. Concurrent Proceedings

The Committee provides regulation of the following two situations of concurrent cross border insolvency proceedings:

i. *Recognition of foreign main proceedings:* Upon application when a proceeding is recognized as a foreign main proceeding, the Code shall be applicable to such proceedings only if the corporate debtor has assets in India.[62]

ii. *Simultaneous proceedings:* If an insolvency proceeding has already been initiated in a different jurisdiction and an application for the recognition of the same is filed after insolvency proceeding has also been initiated under the Code, the non-mandatory relief, if any, granted by NCLT must be necessarily consistent with the Code.[63] Simultaneously, if after recognition of a foreign proceeding, insolvency proceedings are initiated under the Code thereafter, the relief granted by NCLT either mandatory or non-mandatory with respect to such foreign proceeding should be consistent with the Code else it would be necessarily modified or terminated to such extent of inconsistency.[64]

F. Excluded Entities

Article 1 Para 2 of the Model Law allows the countries to lay down an exception for its applicability on certain entities. These entities include banking and insurance companies because such companies either represent vital interests of a large number of individuals which need extra protection or the nature of such entities demand quick and prompt action.[65] The Committee noted that the power to exclude entities from its application may be necessary because such entities may require a special insolvency regime.[66] It is pertinent to note that Section 3(7) of the Code already excludes its application to banking companies and other public financial institutions. Therefore, the Committee recommended the exclusion of banking institutions and insurance companies from applicability of the Model Law. It further

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makharia/. (Last visited on November 10, 2020).
[61] *Ibid.*
[62] Supra, Note 19.
[63] Supra, Note 57.
[64] *Ibid.*
[65] Supra, Note 45.
[66] *Ibid.*

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recommended that the Central Government must be given the power to notify any other entities from the application of Model Law, if it deems fit.

G. Public Policy Exception

The Committee has recommended the adoption of the public policy exception from Article 6 of the Model Law. The Model Law provided such an exception to ensure that each enacting country has the liberty to mould law to suit its local needs and aspirations.[67] Further, the Committee has also recommended that the term *'manifestly'* must be necessarily be adopted to ensure that the term 'public policy' is interpreted in a restrictive manner and be invoked only under exceptional circumstances.[68] The Committee has also suggested that when the NCLT is of the opinion that any action may be contrary to public policy, the Central Government must necessarily be given the opportunity to be heard. Further, it recommended that the Central Government must be given the power to *suo moto* apply to the NCLT in any matter wherein it is of the opinion that an action in such a matter would be contrary to the public policy of India.

VI. THE WAY FORWARD

The recommendations of the Insolvency Law Committee should be commended as by advocating the adoption of UNCITRAL Model Law into the Code, it has saved the Central Government from the laborious alternative of having to enter into bilateral arrangements with other jurisdictions. The adoption of Model Law into the Code would standardize the Indian regime regulating cross border insolvency mechanism in consonance with the widely accepted global standards. After the Code was enacted in the country in 2016, India witnessed a remarkable improvement in its *'Ease of Doing Business'* ranking because the Code was formulated keeping in mind the global standards thereby making insolvency much more accessible.[69] Therefore, with the adoption of Model Law into the Code, it can be safe to forecast that India would again step up in the *'Ease of Doing Business'* ranking. The adoption of Model Law would certainly provide much certainty into the cross border insolvency regime because in reality, the Code is ineffective to deal with cross border insolvency situations and there is no definite judicial precedent which could help solve such situations.

Though the adoption of Model Law into the code would definitely facilitate the access to insolvency proceedings that are being carried out in foreign jurisdictions and maximize the value of the assets of the corporate debtor, there still remain certain reservations. The

[67] Supra, Note 41.
[68] Ibid.
[69] Supra, Note 27.

following are few concerns which still need to be addressed if the Committee's recommendations are accepted:

i. Determination of "Centre of Main Interests": The Committee does not provide guidance on the factors that could help determine the COMI of a corporate debtor. It does provide a presumption that the registered office would be the COMI of a company but it is not necessary that effective management and control of the company would always be taking place out of its registered office. Further, determination of COMI may also be difficult in case of multinational corporations which hold assets and business operations in a number of jurisdictions.[70] Therefore, this highlights the need for the legislature to lay down a set of guidelines to determine COMI otherwise there would be uncertainty and the respective NCLT's would have to determine COMI on a case-to-case basis.

ii. 'Principle of Reciprocity': The Committee recommends the inclusion of *'Principle of Reciprocity'* into the Code with respect to cross border insolvency. This makes the situation problematic because at this point of time only 48 states have adopted Model Law thereby limiting access to the insolvency regime. Therefore, the Government must re-examine the application of reciprocity as it would defeat one of the most important objective of the Model Law which is fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the corporate debtor. Further, the Model Law in itself provides various checks and balances to ensure that the interests of the enacting state are given priority and importance e.g. the public policy exception under Article 6 and the power to derecognize a foreign proceeding under Article 17 if the court administering the foreign proceeding in the other state lacks proper jurisdiction.[71]

iii. Conflict of Laws: The Committee provides that if foreign proceedings are recognized by the NCLT and insolvency proceedings have already being conducted under the Code, such foreign proceeds must necessarily be consistent with the provisions of the Code. It is possible that there might be a conflict of the provisions of the Code with the insolvency regime of any other state. The Model Law fails to provide a mechanism to deal with such a conflict in law. Therefore, this is an issue which must be dealt with to limit any future conflict.

iv. Interaction with Other Statutes and Capital Requirements: The Committee suggests

[70] Sudhaker Shukla & Kokila Jayaram, *Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL*, Insolvency and Bankruptcy Board of India; https://www.ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf. (Last visited on November 5, 2020).

[71] Soham Chakraborty, *Reciprocity Requirements in India's Adoption of the UNCITRAL Model Law on Cross Border Insolvency*, IndiaCorpLaw; https://indiacorplaw.in/2020/02/reciprocity-requirements-in-indias-adoption-of-the-uncitral-model-law-on-cross-border-insolvency.html. (Last visited on November 19, 2020).

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that foreign creditors would enjoy a position at par with domestic creditors but the amount of money they receive depends on factors such as foreign exchange rate and other relevant laws such as Foreign Exchange Management Act, 1999 and other RBI capital control requirements.[72] This issue has not been dealt with by the Committee and requires deliberation to ensure parity between all the stakeholders of the insolvency mechanism.

Therefore, the adoption of Model Law into the Insolvency and Bankruptcy Code, 2016 is a welcome step in regulating cross border insolvency situations but certain adjustments must be made to make the mechanism provided under it much more efficient. Further, the recommendation to adopt Model Law into the Code was made by the Insolvency Law Committee back in October, 2018 but still no action has been taken to implement it and therefore, the Government must expeditiously look into it considering the continuously expanding international commercial regime.

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[72] Supra, Note 12.

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