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Cross Border Insolvency
A Case to Cross the Border Beyond the UNCITRAL

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Along with globalisation spreading its wing rapidly, inherent fears of possible economic contagion like the one that unfolded in the form of the 2008 financial crisis also gained currency. It became increasingly evident that resorting to national solutions alone in relation to multinational players may not be effective. In turn, need for having robust institutional arrangement to deal with cross border insolvency issues in an efficient and swift manner gained momentum. The UNCITRAL Model Law (Model Law) was heralded as harbinger of standards which can be emulated by all the countries with suitable modifications as they may deem fit. However, even after over two decades, the number of countries who declared their affiliation with the initiative has just reached 47. In this backdrop, this article explores evolution of the UNCITRAL framework and alternatives which can be pursued in moving forward. Though the ongoing pandemic is compelling countries to scramble through and roll out suitable cross border insolvency frameworks, the difference in terms of integration with global economy and the maturity of financial and legal systems amongst various jurisdictions appear to be compelling enough to press for a framework that thinks beyond the Model Law.

INTRODUCTION

Globalisation – in normal parlance is defined as the state of being globalised especially, in the context of the positive shifts in production possibility curves through development of an increasingly integrated global economy marked especially by free trade, free flow of capital, the tapping of cheaper foreign labour markets, and removal of information asymmetries. Amartya Sen, while pointing out the efficacy of integrated global system highlighted, that presenting globalisation as an economic phenomenon is based on partial analysis. He opined, *'Globalisation is a complex issue, partly because economic globalisation is only one part of it. Globalisation is greater global closeness, and that is cultural, social, political, as well as economic.'* [2] However, the decade leading to 2020 and the recent pandemic, in particular, is leading us to think otherwise. Thoughts like 'globalisation has peaked'[3] or 'globalisation is dead'[4] are being deliberated and debated.

The pandemic-induced lockdown has brought economic activities to a grinding halt. Global growth[5] in 2020 is projected at - 4.9 per cent and 2021 at 6½ percentage points lower than the pre-COVID-19 projections of January 2020. FDI flows[6] are forecast to decrease by up to 40 per cent in 2020, by further 5-10 per cent in 2021 with a slow rebound in 2022. Global trade flows[7] are projected to contract between 12.9 per cent (optimistic scenario) and 31.9 per cent (pessimistic scenario) in 2020 with gradual recovery in 2021. Looming uncertainty and bleak outlook have led to a new wave of pessimism, writing off globalisation. The impact of the pandemic is set to have long term scarring for businesses. As the pandemic continues to spread, market-led probabilities of default have increased[8] in G-20 and emerging market economies alike. Bankruptcies are to become more common as firms exhaust cash buffers. The failure of a large multinational company can have widespread ramifications in the industry of which it is an integral part; in countries in which its operations are largely based and even the entire global market chain.

Excepting the recent (starting 2019) slowdown in global growth and trade, this decade saw world merchandise trade reach a record USD 19.67 trillion in 2018[9]. India was 17th in the list leading traders of goods and services in 2008 and rose to 11th position in 2018[10]. Global Foreign Direct Investment (FDI) flow[11] was a record USD 1.41 trillion in 2018 and of which India received USD 42 billion and was the 8th largest host country for investments. The year 2018 saw cross border mergers and acquisitions valued at USD 816 billion and FDI greenfield projects of USD 999 billion announced across the world. There were an estimated 164 million[12] people who worked in other countries in 2017 and in mid-2019, 5.2 million[13] Indians were working abroad. By all measures India is today more integrated with the world than ever before and globalisation continues to be an irresistible force today as it was in 1991. Having an insolvency law that can deal effectively with cross border issues would provide necessary comfort, in a worst-case scenario where many multinational enterprises are forced into insolvency resolution proceedings

The ongoing pandemic has posed several challenging questions regarding robustness of insolvency laws dealing with cross border insolvencies and has necessitated a comprehensive response. The choice of framework however depends on the country's level of integration with global economy, maturity of insolvency system currently in place, maturity of legal systems in general etc., among other things. The Insolvency and Bankruptcy Code, 2016 (Code) sought to address cross border insolvency by enabling the Central Government to enter into agreements or reciprocal arrangements with other countries for enforcing provisions of the Code[14]. It has also provided that the Adjudicating Authority (AA) under the Code can issue letter of request to a Court or an authority competent to deal with request for evidence or action in connection with proceedings under the Code in these countries[15]. The Insolvency Law Committee[16] in its October 2018 report on cross border insolvency recommended to the Government adoption of the Model Law.

With this backdrop, this article explores regional efforts to address cross border insolvency. In this regard, it also discusses the UNCITRAL framework and then evaluates the alternatives for India in moving forward. Following this introductory section, the next section presents the evolution of cross border insolvency measures including the Model Law. Section III assesses whether India needs a cross border insolvency framework and section IV assesses the alternatives available. The assessment favours bilateral arrangements over an overarching framework and we suggest that such arrangements may look beyond the Model Law for doing so.

EVOLUTION OF CROSS BORDER INSOLVENCY REGIMES

Regional efforts since the 19th century

The earliest attempt to address international aspects of insolvency was made in Latin America in the South American Congress of Private International Law of 1888-1889. The Montevideo Treaty of 1889 provided rules for liquidation, the concept of unity of proceedings and vesting jurisdiction in the State of the debtor's commercial domicile. The Treaty, revised in 1940, defined 'commercial domicile' and provided guidance for compositions, suspension of payments and analogous proceedings (Majumdar, 2009)[17]. Even as the Treaty existed, the Havana Conference in 1928 gave the Bustamante Code adopted by 15 Latin American countries. It provided both the concept of unity and universality for some countries. These were initial attempts to provide any guidance on insolvency matters between countries that were integrated economically and had similar legal cultures. These had broad application but gave preference to local creditors (Cunningham & Werlen, 1996) [18].

In 1933, the Nordic States of Denmark, Finland, Iceland, Norway and Sweden concluded a convention regarding bankruptcy. This convention was later amended in 1977 and 1982. The convention provided for amalgamation of assets into one estate and distribution according to the rules of the State where proceedings were opened in the bankrupt's residence or registered office. It provided for recognition of bankruptcy proceedings in other states, judicial assistance, and recognition of judicial decisions.

In Europe work started in 1894 as part of the Hague Conference and in 1928 it was decided to transform the multilateral convention into a model bilateral treaty, which saw very little adoption. The Council of Europe concluded the European Convention on Certain International Aspects of Bankruptcy in 1990, which provided for 'main' and 'secondary' bankruptcy proceedings. In May, 2002 EU Regulation 1346 came into force repealed in May 2015 by the Regulation (EU) 2015/848 and issued a *'Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency.'* Regulation 1346 provided uniform rules for the settlement of cross border insolvencies and focussed on coordinating insolvency proceedings as they existed in member states rather than creating uniform rules, whereas Regulation 848 and the Recommendation 'signal the new approach.' The objective is to foster the creation of a homogenous legal framework for business restructurings across EU while also striving to promote a common and uniform legal, economic, and financial environment between the European Union and the United States (Manganelli, 2016) [19]. The latest EU Regulation also is short on cooperation with non-EU countries in insolvency matters.

UNCITRAL Model Law on Cross Border Insolvency

At the Congress on International Trade Law in May 1992 in New York countries proposed that the UNCITRAL[20] (Commission) to consider undertaking work on international aspects of bankruptcy. Work initiated in 1992 then led to the adoption of the Model Law on Cross-Border Insolvency on May 30, 1997[21]. Working Group on Insolvency Law of the Commission continues to work on issues cross border insolvencies of multinational enterprises.

The Model Law[22] is unlike other multilateral conventions merely offers legislative guidance for states. The objective of the law, as stated, is *'to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross border insolvency.'* It focusses on encouraging cooperation and coordination between countries, rather than attempting unification, and respects the differences among national laws. The Model Law is based on four main principles[23]: Access, Recognition, Cooperation and Coordination. It allows foreign professionals and creditors direct access to domestic courts and enables them to participate in and commence domestic insolvency proceedings against a debtor. It allows recognition of foreign proceedings and enables courts to determine relief accordingly. It provides a framework for cooperation between insolvency professionals and courts of countries and for coordination in the conduct of concurrent proceedings in different jurisdictions. It appears to be a comprehensive instrument as it builds upon the prevailing bilateral frameworks and extends the flexibility for deviations as per the requirement of any particular jurisdiction. The Model Law, at best, provides a broad framework leaving individual jurisdictions to decide about the operational nitty gritty and altogether refrain from suggesting any mechanism through which differences in approaches within the ambit of Model Laws, as adopted by the various countries, can be resolved.

It has been adopted in 47 States[24] in a total of 50 jurisdictions. An interesting mix of countries have adopted the Model Law. It includes advanced economies like UK, USA, Canada, Australia, New Zealand, Japan, Singapore and small developing economies like Chad, Chile, Congo, Togo, Myanmar, Uganda etc. The emerging market of BRIC economies (except or South Africa), whole of ASEAN (except Singapore and Malaysia) and whole of European Union except for UK are yet to adopt the Model Law. Several economically advanced jurisdictions have refrained from joining the multilateral solution offered by the UNCITRAL Model Laws and their absence undermines the utility of the Model Law.

CROSS BORDER INSOLVENCY LAW IN INDIA

Efforts towards a cross border regime

India saw its first cross border insolvency in 1908, the Macfadyen & Co. case[25]. The proceeding was the liquidation of an Anglo-Indian partnership, after the death of one of the partners. The London and Madras trustees came to an agreement, confirmed by Courts in both jurisdictions, on admitted claims and promised that surplus sums would be remitted to the other proceeding for a global distribution. When the agreement was challenged, the English Court stated that the agreement was *'clearly a proper and common-sense business arrangement'* and that it was *'manifestly for the benefit of all parties interested'* (Wessels *et al.,* 2008) [26].

In May, 2000, the Eradi Committee Report[27] took into account the fact that globalisation of trade and opening up of the economy has taken place and with these sweeping changes, that the issues relating to cross border insolvency have become increasingly important and recommended that the Model Law be implemented in India by amending Part VII of the Companies Act, 1956. In the following year, the Advisory Group on Bankruptcy Law[28] (Mitra Committee) stated that the Indian law, (as existed then) *'is not comparable to the standard set in international legal requirement and as such stands apart and alone and has not taken into consideration of any cross-border relation.'* Both committees recommended adoption of the Model Law as well as the revamping of the domestic insolvency and bankruptcy laws. Despite several reports acknowledging the need for a cross border insolvency law and recommending adoption of the Model Law for more than two decades it is yet to be accomplished. This warrant answering the question: Whether such a law is required?

Economic imperatives

India's economic interaction with the rest of the world has been increasing over the last three decades since the start of liberalisation[29] and more so with deepening of the financial markets.

The Reserve Bank of India's annual census on foreign liabilities and assets[30] reported that 20,732 companies had FDI/ODI in their balance sheet in March 2018 and the total flow of FDI (inwards and outwards) was Rs. 33,526 billion. Indian companies continue to expand and operate across borders. Around 70 per cent of these flows happened in six countries namely, Mauritius, USA, UK, Singapore, Netherlands, and Switzerland.

Today, financial markets are a vast network consisting of credit (borrowing-lending relationships, counterparty exposures and implicit relationships), derivative contracts, collateral obligations, market impact of overlapping asset portfolios and the network of crossholdings interact in several complex layers across countries. The extent and magnitude of inter-connectedness in financial markets and institutions across countries has led to transmission of systemic risk and ensuing contagion which has been a cause of concern especially after the financial crisis (IMF, 2011)[31]. An assessment of cross border inter-bank contagion risk analysis for Indian banking sector (Sharma, 2018)[32], has brought out that the United States, United Kingdom, France, Germany and Japan are among the most important players in the cross-border banking network pertaining to India.

The banking channel remains predominant for cross-border capital flows with India, though external commercial borrowings have increased in the recent years. Global cross-border bank claims continued to expand rapidly, growing at 9 per cent year on year reaching USD 31 trillion at end-September 2019[33]. Banks of Indian origin had an equity of USD 8.9 billion, which is 0.15 per cent of the total global bank equity. Total foreign claims of banks of Indian nationality stands at USD 212.8 billion (0.37 per cent of total foreign claims). Of this, non-bank private sector claims form the largest counter party at USD 33.5 billion. Other potential exposures include derivatives contracts of USD 58.9 billion, guarantees extended at USD 30.0 billion and credit commitments of USD 2 billion. Analysis by the Bank of International Settlement states that in India, the corporate sector has been the dominant recipient of debt flows, though bank flows increased considerably after 2010[34].

The share of India's merchandise exports in world exports has gone up from 0.5 per cent in 1990 to 1.7 per cent in 2018. Top ten trading partners supported half (49.6 per cent) of India's trade in goods, during the year 2018-19[35]. India has trade deficits with eight of these countries and has trade surplus with only two of its top ten trade partners, namely USA and UAE. India's services exports have grown rapidly over the past two decades. At USD 81.9 billion, net services exports financed 45 per cent of India's trade deficit in 2018-19. At the global level, up to 80 per cent of trade is supported by some form of credit, guarantee or insurance. As far as the role of bank-intermediated cross border trade credit accounts for about one-third of the global merchandise trade credit[36]. Importers in India meet their funding needs largely through buyers' trade credit which in turn may be influenced by both demand (e.g., size of imports) and supply-side factors (e.g., ability and willingness of banks to extend credit)[37]. A sizeable amount of cross-border trade credit raised by importers in India is intermediated by domestic banks though foreign banks hold a major share. Domestic banks generally cater to trade finance needs of importers from the MSME sector while large corporates are serviced by foreign banks with large international presence. Domestic banks with large overseas presence in the form of bank branches, overseas subsidiaries and representative offices have higher share in total trade credit approvals.

As all the above factors indicate, as India continues to grow, Indian businesses will expand operations across countries and with increasing financial market linkages, financing needs will also be met from resources across the world. With the growing international trade, domestic businesses will become embedded into global value chains hence exposing themselves to external influences. The Indian financial market continues to evolve and will see increasing connectedness with foreign markets and the Indian banks consolidating their position domestically will look to expand across boundaries. Cross border interactions, in the form of shareholder-management, creditor-debtor, supplier-buyer, value chain partners, distributors etc., would become the norm rather than the exception for businesses. Failures and insolvencies with cross border elements will be inevitable and India does need a regime that is internationally acceptable and is able to deal with the complexities these situations may present in the context with countries with which are economic interest of the country are of paramount importance.

ASSESSMENT OF AVAILABLE ALTERNATIVES

Existing means for cross border judicial / legal cooperation

India has acceded to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters and the Hague Convention on Taking of Evidence Abroad in

Civil and Commercial Matters, 2007[38]. They provide mechanisms for cooperation in accessing judicial systems across countries.

With respect to the civil matters, the Code of Civil Procedure (CPC) supports recognition and enforcement of foreign judgments. Judgments by foreign courts are considered generally conclusive for the parties with few exceptions identified in Section 13 of the CPC. Section 44A of the CPC provides that the decree of foreign courts may be executed in Indian territory, when conditions such as it being a decree from a superior court and from a 'reciprocating territory.' Such decrees will have the same effect as a decree of the local District Court in India. There are 11 countries recognised as such by the Central Government so far, the latest being the UAE[39]. Some of the other countries notified as reciprocating territories include United Kingdom[40], Republic of Singapore[41], Federation of Malaya[42], and Hong Kong[43]. A decree from a non-reciprocating country can be enforced through a new suit filed before the relevant Court in India, based on the judgment from the foreign Court or the original cause of action, or both.

Section 45 of the CPC provides for execution of decrees of an Indian Court outside the territory of India under conditions that the Central Government establish the transferee court in the foreign country and the State Government notify that the said decree will apply to the foreign court. The CPC also provides for simultaneous execution at more than one place. Section 51 provides for execution of decrees by delivery or/and sale of property for repayment of debt, appointment of a receiver, and arrest and detention with reasonable opportunity for judgement -debtor to present his side.

These sections are being used despite the wide differences in interpretation given by the Indian Courts in interpreting foreign judgments[44]. The use of these sections for cross border insolvency issues (in India for foreign creditors and vice versa) will be further constrained by lack of clear understanding about complex foreign laws and the need to engage legal support in one or more territories. This has implications for cost of insolvency proceedings and may be prohibitive. Furthermore, this option is restricted to enforcement of Court decrees but not cooperation in proceedings, cooperation between courts/insolvency professionals etc., which are required in a cross border insolvency situation. The use is also constrained by long drawn judicial processes and is limited to enforcement of orders from courts only. In insolvency proceedings the insolvency representatives are also empowered to make decisions which are not enforceable through these sections. Enforcement of decrees from non-reciprocating countries is more constrained since a new suit in the Indian Courts is bound to be plagued by delays and consequent costs. Indian businesses use similar provisions available in other countries, (most common law countries have them) to enforce decrees of Indian Courts and would face similar constraints abroad. A mix of instruments, multiple authorities and Courts mean additional costs and delays for enforcing foreign Court orders in India and could be a significant factor influencing countries thinking of reciprocation arrangements with India.

UNCITRAL Model Law

The Model Law comes with strong recommendation as the global solution for resolving cross border issues. The World Bank[45] noted that insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law. The IMF[46] encourages its adoption as it would provide an effective means of achieving cooperation and coordination among courts and administrators of different countries. Questions of legitimacy are minimum, as India has been a member of the Commission and part of the consultation and drafting of the Model Law. However, the legitimate concern is that till date global consensus on the framework is lacking. Firstly, major economies which are important from the point of view of economic interest for India, have not adopted the Model Law. These countries include European economies such as Germany, France and major economies like Brazil, Russia, and China. Secondly, even the countries which have adopted the Model Law have done so with tailor-made changes to foster their economic interests which may be difficult to comply at bi-lateral level.

The countries that have adopted the Model Law have done so for various reasons. USA adopted the Model Law and it is nearly verbatim in 2005 in Chapter 15 of its Bankruptcy Code. The introductory section details the rationale and benefits of adopting the Model Law and reflecting the reasons as cooperation, legal certainty, fairness, maximising value of debtor's assets, and rescuing financially troubled businesses. While adopting the law, Australia saw it as a policy to promote efficiency, reduce legal uncertainties and transaction costs and enhance international trading efficiency (Government of Australia, 2002)[47]. Malaysia, while considering the Model Law, has opined that the law represents perhaps the most important step taken thus far in trying to achieve a truly international framework for cooperation in insolvencies, in contrast to the limitations of uniquely domestic legislation as well as previous efforts on a regional scale, not all of which have met with success (Omar, 2000)[48]. Singapore adopted the Model Law in 2017 and indicated that it provided a clear and internationally recognised framework (Government of Singapore, 2016)[49]. ThLaw was considered a firmer and more predictable platform for cross border cooperation in insolvency matters, thereby lowering the risks and cost of international financing and reduced cost of litigation.[50]

Access and recognition of Indian proceedings will be easier in the jurisdictions that have already adopted theLaw. Of these jurisdictions, India has significant economic ties with six countries namely, USA, UK, UAE, Japan, Korea, Singapore, and Mauritius. It is stated that adoption of Model Law will serve as a strong signalling factor. It may be seen as a progressive and forward-looking market reform and will project a positive international image when its peers Brazil, Russia and China continue to have laws based on territorialism (Kargman, 2012)[51].

Russia's bankruptcy law is silent on recognition of foreign proceedings (Trunk, 2007)[52] and only recognises foreign judgments regarding insolvency where an international treaty exists with that country. Brazil has encountered from the growing number of mergers and acquisitions between local and foreign companies originating from Europe and the USA but so far has not moved for adoption of the Model Law even as it has regional agreements with other Latin American countries. As a general rule, Brazilian courts do not recognise foreign insolvency proceedings and do not coordinate and cooperate with courts and insolvency administrators from these states (Locatelli, 2008)[53]. China enacted the Enterprise Bankruptcy Law in 2007 and removed the distinction between domestic and foreign creditors. The law is considered as an acknowledgment of the global nature of Chinese business operations and the need to protect Chinese creditors. As of 2013, China also had civil and commercial judicial assistance treaties/ agreements with 32 countries, often including provisions for cross border insolvency (Gong, 2013)[54] despite which, cross border resolutions have not been smooth.

Advocacy in favour of adoption of the Model Law heavily rests on its flexibility and to accommodate our domestic laws (Code) with the necessary modifications. Nevertheless, the major issue is that it is more a procedural law than substantive, allowing for customisation. Such flexibility seems to militate against the objective of harmonisation across jurisdictions. The exceptions adopted by countries have been much wider than contemplated by the Model Law. The Model Law does not require reciprocity, there is no requirement that a foreign representative wishing to access facilities under it must have been appointed, or foreign proceedings commenced, under the law of a State which has adopted it. A lot of the countries adopt Model Law with the reciprocity requirement incorporated in their modified model such as South Africa, Mexico, Romania, and Mauritius. Such reciprocity requirement can exist in different forms too for e.g. in some countries the reciprocity requirement is automatically met when other country adopts Model Law whereas in some countries the reciprocating requirement is met when the government of the enacting country notifies specific foreign countries. There is a lack of standard approach for interpretation of 'public policy' is a major hindrance in the Model Law. Many countries have dropped the word 'manifestly' while adopting law which has created a mismatch in the standard of care that a court need to apply while interpreting the term public policy.

Other concerns regarding the Model Law

Firstly, the role and powers granted to a foreign representative under the Model Law may not be very pleasing to legislators as it gives wide powers without any regulatory check on them. It fails to provide appropriate measures to curb the instances of misfeasance in cross border cases. The only check provided is Article 21(2) which requires the court to be satisfied that the interests of local creditors are 'adequately protected' before the foreign representative is entrusted with the distribution of the debtor's assets within the State.

Secondly, in its present form, it fails to address the issue of conflict of laws in a cross-border insolvency proceeding and leaves the issue at the mercy of application of private international law by the Courts in respective jurisdictions. It does not expressly deal with conflict of laws; however, it does allow for cross border insolvency agreements which have been effectively used by parties to address the issue. Jurisdictions with different stages of maturity cannot protect the advantages emanating from Model Law uniformly.

Differing interpretations[55] offered to crucial provisions of the Model Law by courts in the US and the UK despite both having adopted the Model Law early on has led to the question of whether the objective of harmonisation has failed. Case laws in the US and UK have been informing the UNCITRAL legislative and practical guides heavily and such differences in interpretation weakens the attractiveness of the Model Law.

At the core of any economic contagion are financial instruments and multinational enterprise groups with cross country value chains managed through subsidiaries. The Model Law does not have any clear solution to offer for these aspects.

Use of the Model Law in adopting countries

The USA is not only an early adopter, but the Model Law was substantially influenced by the US Bankruptcy Code 1978 (section 304 and 305). Model Law was later adopted as Chapter 15 of the US Bankruptcy Code[56] and both offer cooperative territorial approach[57]. Adoption of the Model Law led to increased willingness of Courts to recognise foreign proceedings (Westbrook, 2013)[58] however has not led to adoption of all the principles in the right spirit. In order to obtain relief the foreign representative has to approach the US courts for recognition of foreign proceedings but the Courts are not required to adjudge the foreign proceeding as a main proceeding even if Courts in the other jurisdiction have done so. Sufficient protection of domestic creditors continues to be an important factor in the Court's decision to grant relief. Relief granted can be conditional, as found appropriate by the Courts including the giving of security or a bond. The Courts are not required to defer to foreign Court orders in terms of the distribution of assets to foreign proceedings. While the Model Law has been adopted almost verbatim but there is 'significant rewriting to comport with procedural terminology and concepts in

United States vernacular'. An empirical study (Leong, 2010) [59] finds that though Courts recognised foreign proceedings in almost every Chapter 15 case, assets were entrusted to foreign proceedings in only 45.5 per cent of cases. Even when entrusted, there were accompanying orders to protect US creditors by seeking that the distribution priority scheme be in accordance with US laws or assurances that they be paid in full or in priority. US Courts have also placed the requirement that an applicant seeking recognition of foreign proceedings should qualify as a debtor under the domestic Bankruptcy Code, which is not in line with the Model Law. Courts in the USA seem reluctant to relinquish control over assets to proceedings in other jurisdictions.

The Model Law was implemented in Great Britain through the Cross-Border Insolvency Regulations 2006[60] and added another law to deal with cross border insolvency framework provided by common law and section 426 of the Insolvency Act 1986. Though Courts have used the Model Law provisions to allow access to foreign representatives and relief to creditors in several cases there has been reluctance[61] to implementing reorganisation plans approved in foreign proceedings without a parallel domestic proceeding. There is an emerging view that the Model Law is enabling softer form of cooperation which may not be aligned to implementing the Model Law in its spirit.

Divergence in the implementation strategies of the Model Law in Australia, Singapore, Japan, and Korea, are attributed to legal origin and path dependence, compatibility with approach to insolvency in the existing domestic laws, commitment towards adopting global norms and the changing judicial attitudes (Wan & McCormack, 2020)[62] . Whatever the explanation for the divergence, it is irrefutable that divergence exist, and that harmonisation has been limited in letter and more so in spirit.

PROTOCOLS IN CROSS BORDER INSOLVENCY

Protocols are agreements or arrangements entered in insolvency cases and may cover a broad range of issues arising in cross border situations. It was first used in 1991 for insolvency proceedings of Maxwell Communication Corporation plc for coordination between proceedings in the UK and USA and was accompanied by the appointment of an Examiner to facilitate such coordination. Since then protocols have been used by US Courts in many cross-border insolvency situations. Protocols have been used in complex cross border insolvency cases such as Lehman Brothers[63] (2009), involving 2985 legal entities in over 50 countries. They have also been used successfully in complex cases such as Bernard Madoff, Nortel Networks, Singer International, and Owens Corning.

The Model Law in Article 27 (d) provides for 'Approval or implementation by courts of agreements concerning the coordination of proceedings;' as a form of cooperation between parties. This covers the use of protocols as well as.

Protocols offer a set of solutions designed to meet case specific needs and considers bankruptcy principally a private dispute between parties. They do not predetermine substantive legal issues but aim to harmonise management of the case even before conflict arises[64]. They generally create a framework for communication, data sharing, asset preservation, claims reconciliation, and dealing with inter-company claims[65]. Protocols provide necessary flexibility for amendments to accommodate the emerging needs as a proceeding may require. The use of protocol in the *Everfresh* case lead to an estimated aggregate value maximisation of 40 per cent[66].

Apprehension about effectiveness of protocols have been noted regarding cooperation between common law and civil law countries[67] where the approach to insolvency and powers of the Courts vary widely regarding the making and enforcement of such arrangements/protocols. It is also observed that larger the number of territories and many-layered corporate structure of large multinational enterprises may require protocols that are complicated. The compatibility of protocols with national insolvency laws has also been raised along with the considerable cost and effort required to conclude successful negotiations of them.

Protocols are hence, seen as an imperfect yet effective tool in encouraging cooperation in cross border insolvency proceedings. The EU has considered detailed Guidelines[68] for its member states on the framing and dealing of such protocols. These are case specific and are more complicated than bilateral arrangements. Given the complexities in cross border insolvency situations negotiating an agreement for every case could debilitate the process itself let alone the time required for such understanding.

THE JET AIRWAYS (INDIA) LIMITED CASE

The corporate insolvency resolution process of Jet Airways (India) Limited commenced on June 20, 2019 after application under section 7 of the Code filed by State Bank of India was admitted. The resolution professional (RP) set up an Asset Preservation Team.

It was later found that a Dutch Court had initiated insolvency proceedings earlier and appointed a Bankruptcy Trustee in Netherlands, the company's Europe hub. The process was initiated based on claims of unpaid dues worth Rs. 280 crore by two European creditors and seizure of the company's aircraft parked at Schiphol airport in Amsterdam was ordered. The Dutch administrator's petition for recognition of the Netherlands proceeding was allowed by the NCLAT (earlier refused by the NCLT). The administrator was allowed to be part of the committee of creditors (CoC) and attend its meetings but with no voting rights. The Appellate Court directed the RP and CoC *'to consider the prospect of co-operating with the Dutch Trustee so as to have a joint corporate insolvency resolution process of the company*[69]*'* and *'to reach an arrangement/agreement with the Dutch Trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch Trustee in the best interest of the Company and all its stakeholders*[70]*'*

The parties entered into the 'Cross Border Insolvency Protocol' with terms and conditions agreed upon; with a clear aim and purpose; communication and information; rights of the RP and Trustee to appear and attend in Courts of both jurisdictions; cooperation in preserving assets; collation and review of claims and costs; and COMITY (centre of main interest). Based on this Protocol, the Dutch Trustee and the RP collated claims in their respective jurisdiction and reviewed each other's verification process of claim admission / disputes based on the sample received. Claims received have been recognised by courts of both jurisdictions.

The Protocol seems to be working successfully as seen from the fact that the resolution process has progressed since then. However, it remains to be seen if the Protocol will be flexible enough to allow for parties from other jurisdictions to be part of the process, what kind of cooperation will be extended by the other countries as part of such a Protocol and the effectiveness of such a Protocol in achieving the purpose of resolution of the impaired airline.

Purpose-specific bilateral agreements

India has certain purpose specific bilateral/multilateral arrangements. India has signed Mutual Legal Assistance Treaty[71] in civil and commercial matters with six countries[72] and Memorandum of

Understandings with seven[73] others, for cooperation in the area of law and justice, exchange of information, legal assistance along with the Extradition treaties and arrangements. India has signed bilateral investment treaties[74] with several countries and has investment chapters[75] in its free trade agreements/partnerships which provide for protection of investments made in each other's territories. These instruments are specific to the purpose and are on a reciprocating basis.

The Code enables the Government to enter into bilateral arrangements. If this option is to be used India would have to negotiate such arrangement with at least 15[76] countries to begin with as required by the extent of flow of capitals, trade links and expansion of Indian businesses. The constraint with these arrangements is that they require extensive negotiations and take years before common ground is reached. In a field as complex and dynamic as cross border insolvency finding common ground may be harder and require regular reviews. It would be a challenge to design a comprehensive instrument with flexibility that allows for customisation to individual reciprocating jurisdictions.

Insolvency agreements are entered into for the purpose of facilitating cross border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor.

Evaluating the alternatives

The suitability of any of the alternatives discussed above for adoption in India is considered through a cost-benefit framework. Adoption of any alternative involves costs in terms of framing of legislation, parliamentary approval, dissemination etc., and benefits in terms of flexibility in legislation, coverage in terms of jurisdiction, ease of use for stakeholders etc.

The existing means for cross border judicial/legal cooperation under the CPC does not require any new legislations or approvals but lack the kind of flexibility required for facilitating cooperation in insolvency proceedings. It is accessible to representatives from all jurisdictions but is dependent on an already excessively burdened Indian judiciary and will be constrained by all existing limitations of the system. The judiciary will be forced to rely on international experience in dealing with such matters but be left without adequate domestic legal backing specific to the domain.

The Model Law would require amendments to the Code and Parliamentary approvals for all related regulations. These regulations would have to be framed afresh and educating the stakeholders on these will be important factors for its successful implementation. It offers the most comprehensive of provisions and required flexibility for modifications, but international experience shows that such modifications tend to reduce the impact of the law's adoption in the long run and reduces the universalist element of the law itself. There is also an undecided debate on the pros and cons of the deviations that countries have already used in their adoption of the Model Law. In terms of the technical and interpretative assistance for courts and other stakeholders the Model Law, provides ample material and guidance which cannot be said for any other alternative considered in this paper. In terms of jurisdictions covered the number is limited to 47 jurisdictions that have already adopted the law and these does not include countries that are significant for India in terms of its ties with them in the present and potential ties in the future.

Protocols in cross border insolvency have been successfully used internationally for resolving complex cross border insolvencies. Use of these as the instrument of choice would require amendments to the Code and framing of regulations accordingly. The need for education and dissemination of stakeholders also follow. The judiciary and stakeholders have flexibility to tailor make the terms and conditions but will have to rely on international experience. The success of a protocol is ultimately dependent on the willingness of parties - private, governments and judiciaries, to cooperate. The lack of cooperation from a single party can derail the entire proceedings and cost resolution of the debtor altogether. The time required for confirmations of these protocols can be prohibitive if early resolutions are the objective. The judiciary bears the entire burden with no statutory fall back that can help with case specific issues.

Insolvency-specific bilateral agreements as the instrument of cross border insolvency does not require any amendments to the Code. There will be considerable effort required to develop a model bilateral agreement that can be used with minimal modifications to suit the needs of the negotiating partner countries. India has experience with the model bilateral investment treaties that can be put to good use here. It will require establishment of basic principles in dealing with cross border insolvencies which can be based on the Code and the Model Law. In terms of coverage, prioritisation of countries that India has deep ties with becomes possible. There are limitations in terms of international experience in the use of this option but closer study of the regional agreements of Nordic countries and the EU Regulations will be of relevance.

CONCLUSION: GOING BEYOND THE ALTERNATIVES

Each of the alternatives considered have potential benefits and limitations. There is considerable advocacy for adoption of the Model Law but accounting for the fewer adoptions in the jurisdictions that are relevant for India is a dampener along with the evolving view that spirit of the Model Law is not reflected in the implementation of the Law in countries that have adopted it. It is difficult to discount the Model Law as it incorporates the distilled wisdom of cases over more than half a century and from a wide spectrum of countries with varying approaches to deal with insolvency but it still has glaring gaps in keeping out special types of entities such as banks. This gap is of grave concern as integration of the global economy is hastened by financial integration and leaving them out of cross border insolvency regime places it in a disadvantageous position. If India is looking for a regime that is more workable and extends the objectives laid down for domestic insolvency resolution to cross border situations, then the Model Law is clearly inadequate.

India will have to think beyond the Model Law. The Financial Stability Board (FSB), which works closely with the G20, in 2015 laid down a set of principles[77] that would make cross border resolution of banks/ financial entities practicable and effective. This set of principles draws from the Model Law but goes beyond it. It suggests that a statutory framework should provide for recognition of measures from foreign resolution actions that is supplemented with supportive measures and complemented with contractual arrangements. While prescribing a framework for an effective regime for India is beyond the scope of this paper it certainly finds that the Model Law is inadequate and crossing the border set by the Model Law in lines of framework proposed by FSB may be a good starting point for India. It will enable India to think beyond the Model Law yet incorporate the essential principles that the Model Law recommends. Keeping in view the economic interests of the country, adoption of country by country approach will be a bold move and shall be targeted and may become an example in the future world where globalisation in its current form is undergoing significant change owing to prevailing pandemic situation.

NOTES

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