

Introduction to Cross-Border Insolvency

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1. Glossary of Terms

Abbreviations and terms used in this document shall have the meaning set forth below for each such term. Certain other terms shall have the meaning set forth elsewhere in this document.

NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
EU	European Union
EC	European Commission
EC REGULATION	Council Regulation (EC) No. 1346/2000
IBBI	Insolvency and Bankruptcy Board of India
INSOLVENCY PROFESSIONAL	As per Code, an Insolvency Professional is a person: a. enrolled with an insolvency professional agency as its member and, b. registered with Insolvency and Bankruptcy Board of India as an insolvency professional.
MODEL LAW	UNCITRAL Model Law on Cross Border Insolvency, 1997
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
COMI	Centre Of Main Interests
RECAST REGULATION	Regulation (EU) No. 2015/848
CODE	The Insolvency and Bankruptcy Code, 2016
COMMITTEE	The Insolvency Law Committee
REPORT	The Insolvency Law Committee report submitted on October 16, 2018
DRAFT PROVISIONS	Provisions pertaining to cross border insolvency suggested by the Insolvency Law Committee through its report dated October 16, 2018 for incorporation into the Code.

2. Introduction to Cross-Border Insolvency

Recently, in the insolvency proceedings of Jet Airways (India) Private Limited,¹ the National Company Law Tribunal (“NCLT”) in Mumbai expressly stated that while insolvency proceedings against the corporate debtor have already been initiated before the NOORD – Holland District Court, “*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.*” Earlier in the year, a Jet Airways flight had been grounded in Amsterdam over non-payment of dues to a European Cargo firm. The Jet group has been facing insolvency proceedings in the Netherlands and in India at the same time. The Dutch court-appointed administrator in charge of the proceedings in Netherlands moved the NCLT (Mumbai) to have the NCLT recognize the Dutch proceedings. Upon the NCLT rejecting its plea, the Dutch administrator approached the National Company Law Appellate Tribunal (“NCLAT”) to recognize Jet Airways’ insolvency proceedings in the Netherlands.

On August 21, 2019, the NCLAT asked the creditors of Jet Airways to file an affidavit on whether they are willing to cooperate with the Dutch Administrator, pay his fees and accord foreign lenders the same status as the Indian creditors, who otherwise are also eligible to file their claims before the resolution professional coordinating the insolvency proceedings.²

Pursuant to the NCLAT’s directions, the Dutch Court Administrator and the Resolution Professional agreed upon a ‘Cross Border Insolvency Protocol’ wherein India was

recognized as the ‘centre of main interests’ and the Dutch proceedings were recognized as the ‘non-main insolvency proceedings’.³ Through this Protocol, the Resolution Professional and the Dutch Court Administrator have agreed on terms and conditions on which they will cooperate in the ongoing insolvency process, except the involvement of the Dutch Administrator in Committee of Creditors meetings. The NCLAT, in response, allowed the Administrator the right to attend Committee of Creditors meetings but to only observe, in order to prevent an overlap of powers.⁴

In the same order, the NCLAT also set aside the order of the Mumbai-bench of NCLT, which had said that the Dutch court administrator had no jurisdiction in India and therefore would not be able to take part in Jet Airways’ CoC meetings or raise claims on the airlines’ assets in India.

The *Jet Airways* case is only one of many such cases that exemplify the need for a regime that deals with situations where a corporate debtor may have creditors and assets dispersed across various jurisdictions. Similarly, in the *Videocon Industries* insolvency saga, news reports had indicated that Videocon has requested the NCLT to include its overseas assets in the ongoing corporate insolvency resolution process.⁵ The NCLT, in a recent order, has permitted the inclusion of Videocon’s foreign businesses in the corporate insolvency resolution process in India.⁶ However, for situations such as these, the tribunals are proceeding on a case-by-case basis as there is no clear cross-border insolvency framework in India yet.

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1. 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.
 2. Jet Airways (India) Ltd v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 August 2019; NCLAT seeks Jet lenders’ response on Dutch insolvency administrator’s plea, Business Standard, available at: https://www.business-standard.com/article/companies/nclat-seeks-jet-lenders-response-on-dutch-insolvency-administrator-s-plea-119082101584_1.html.

3. Jet Airways (India) Ltd. (Offshore Regional Hub/Offices) v. State Bank of India Company Appeal (AT) (Insolvency) No. 707 of 2019, Order dated 26 September 2019.

4. *Id.*

5. Videocon requests NCLT to include overseas oil assets in insolvency process, Economic Times, available at: //economictimes.indiatimes.com/articleshow/70779728.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cpst.

6. Order dated February 12, 2020, in the matter of Videocon Industries Limited and Ors. [MA 2385-2019 in C.P.(IB)-02-MB-2018].

Cross-border insolvency denotes a situation where the insolvent debtor has assets in more than one jurisdiction or where some of the creditors of the debtor are not from the jurisdiction where the insolvency proceedings have been filed.⁷ Professor Ian Fletcher, a renowned scholar on aspects of commercial insolvency, proposes that 'cross-border insolvency' should be considered as a situation '*...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case.*'⁸ A majority of significant corporate failures in recent times highlight the involvement of more than one jurisdiction making international insolvencies common, and not an exceptional scenario.⁹

With a spurt in commercial technology, cross-border trade has no longer remained the preserve only of large multi-national corporations. The growing size of economies have lured companies to stretch their business beyond their home jurisdictions, organizing their activities across national boundaries. Due to increasing globalization of business activities, businesses encounter a wide array of legal systems. Therefore, when multinationals become insolvent, it comes as no surprise that such insolvencies have cross-border consequences.¹⁰ The collapse

of Lehman Brothers in September 2008, a firm that conducted business in over forty countries through instrumentality of about 650 legal entities outside the United States, is the best illustration of the scale, complexity, and financial significance of cross-border insolvency. The consequence of such a situation results in clashes between competing national laws on questions including, *inter alia*, the recognition of security interests, processes related to the disbursal of assets, and different policy preferences underlying the protection of different kinds of creditors. This may result in various uncoordinated legal proceedings in separate jurisdictions which are connected to the affairs of such a multinational enterprise.¹¹

In the absence of a framework for cross-border insolvency resolution, several questions remain unanswered and unclear, the recent *Jet Airways* and *Videocon* cases being a primary examples. For instance, if insolvency proceedings have commenced in India for a particular debtor who has assets abroad, what are the measures to ensure that such assets will not be the subject matter of a parallel proceeding in that foreign jurisdiction? What if there exist concurrent insolvency proceedings in several jurisdictions in relation to the debtor and its assets? A possible solution to confront these problems is a certain degree of harmonization of insolvency laws of multiple jurisdictions. Since there exist several pervasive differences between the legal systems of countries, the goal of harmonisation of such statutes must be pursued.¹²

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- 7. Halliday, T.C. and Carruthers, B.G., 2007. The recursivity of law: Global norm making and national lawmaking in the globalization of corporate insolvency regimes. *American Journal of Sociology*, 112(4), pp.1135-1202.
 - 8. Bogdan, M., 2000. Ian F. Fletcher, Insolvency in Private International Law: National and International Approaches. *Nordic Journal of International Law*, 69(4), pp.527-528.
 - 9. Masoud, B.S., 2014. The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa. *International Insolvency Review*, 23(3), pp.181-200.
 - 10. Fletcher, I.F., 2005. *Insolvency in Private International Law: National and International Approaches* (Oxford Private International Law Series). Oxford University Press. ("Many different factors are capable, either singly or in combination, of imparting a cross-border dimension to a case of insolvency. The debtor may have had dealings with one or more parties from other countries, or may own or have interests in property not all of which is exclusively within the jurisdiction of a single state. Liabilities may be owed to parties whose forensic connections are predominantly with a different country to that with which the debtor is associated; or the relevant obligations may be governed by foreign law, may have been incurred outside the debtor's home country, or may be due to be performed abroad.")

11. Buxbaum, H.L., 2000. Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory. *Stan. J. Int'l L.*, 36, p.23.

12. McKenzie, D., 1996. International Solutions to International Insolvency: An Insoluble Problem. *U. Balt. L. Rev.*, 26, p.15.

3. The Uncitral Model Law on Cross Border Insolvency

In order to devise an effective method to handle cases involving cross-border insolvency, the United Nations Commission on International Trade Law proposed the UNCITRAL Model Law on Cross Border Insolvency, 1997 (“**Model Law**”). The Model Law was adopted on May 30, 1997 by the UNCITRAL at its thirteenth session of UNCITRAL held in Vienna. States can implement the Model Law into their domestic regimes to assist in the coordination and resolution of complicated cross-border insolvency issues. Unlike a United Nations convention, the Model Law does not require a State to notify the United Nations or any other States of its decision to implement it.¹³ As of today, 44 States have adopted the Model Law in varying degrees into their domestic legal systems.¹⁴

Interestingly, the Model Law does not prescribe the mandatory unification of the substantive domestic laws of the various States implementing it. Rather, it proposes four elements to facilitate the cross-border insolvency resolution process - access, recognition, relief (assistance) and cooperation.¹⁵ The Model law is divided into five chapters which cover general provisions; access of foreign representatives and creditors to courts in a state; recognition of foreign proceedings and relief; cooperation with foreign courts and foreign representatives; and lastly procedure to deal with concurrent proceedings.

The Model Law recognizes two kinds of proceedings *i.e.* foreign main proceeding and foreign non-main proceeding. These concepts are dealt with in further detail in this paper. Briefly, a foreign main proceeding takes place in the State where the debtor has the ‘centre of its main interests’.¹⁶ A foreign non-main proceeding is a foreign proceeding other than the foreign main proceeding, where the debtor has an ‘establishment’.¹⁷ The Model Law provides guidance as to how the ‘centre of main interests’ can be identified. For the purpose of recognizing a foreign non-main proceeding, the Model Law also defines ‘establishment’ as a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.¹⁸ Further, the Model Law contains a public policy exception which holds that courts in a State may refuse to take an action governed by the Model Law, if such action would be ‘manifestly contrary to the public policy’ of that State.

States have adopted the Model Law into their domestic legal systems after making variations they determine as suitable to their jurisdictions. For instance, the word ‘manifestly’ in the public policy exception discussed above is absent from the domestic legislation in countries such as Singapore,¹⁹ whereas countries such as the United States of America²⁰ and the United Kingdom²¹ have chosen to include it.

¹³. UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, available at: <https://www.uncitral.org/pdf/english/texts/insolvency/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

¹⁴. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

¹⁵. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

¹⁶. Article 2(b), UNCITRAL Model Law.

¹⁷. Article 2(c), UNCITRAL Model Law.

¹⁸. Article 2(f), UNCITRAL Model Law.

¹⁹. Article 6, Tenth Schedule, Companies Act, 2006

²⁰. Section 1506, Chapter 15, Title 11, US Code

²¹. Article 6, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

4. EC Regulation on Insolvency Proceedings

The European Commission (“EC”) has formulated regulations on cross-border insolvency, creating a framework for the member States of the European Union (“EU”). On May 29, 2000, the EC passed Council Regulation (EC) No. 1346/2000 (“**EC Regulation**”) on insolvency proceedings, which came into force on May 31, 2002.²² The EC Regulation, consisting of 47 articles and 3 annexures, is applicable to all member States of the EU, except Denmark.

The EC Regulation does not attempt to harmonize the domestic insolvency regime of EU members. Rather, it facilitates the member States in determining the jurisdiction and applicable law for cross-border insolvency proceedings. Further, it provides for automatic recognition of insolvency proceedings across the member states of the EU. The scope of the EC Regulation is limited to “*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.*”²³

The EC Regulation recognizes three kinds of insolvency proceedings that may take place:

- i. main proceedings, where the debtor has its centre of main interest within the EU;

When insolvency proceedings may take place in over one jurisdiction, the EC Regulations recognizes main insolvency proceedings in one jurisdiction and secondary proceedings in another. The main proceedings have universal scope and aim at encompassing all the debtor’s assets.²⁴ For a proceeding to be recognized as ‘main proceedings’, the debtor must have its ‘centre of main interests’ in the jurisdiction of that Member State. Centre of main interests corresponds to the place wherein the debtor conducts the

administration of his interests regularly and can be ascertained by third parties.²⁵

- ii. secondary proceedings, where the debtor has an establishment;

As per the EC Regulation, secondary proceedings may be opened in a Member State where the debtor has an ‘establishment’.²⁶ Establishment has been defined to mean any place of operation wherein the debtor undertakes non-transitory economic activity with human means and goods²⁷ run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State.

- iii. territorial proceedings, where the debtor has an establishment, but main proceedings have not yet commenced elsewhere.²⁸

In order to provide further clarity to the EC Regulation, Regulation (EU) No. 2015/848 (“**Recast Regulation**”) on insolvency proceedings was approved by the European Parliament on May 20, 2015 to replace the EC Regulation. Barring a few provisions, the Recast Regulation applies to insolvency proceedings initiated after June 26, 2017,²⁹ while the EC Regulation continues to apply to insolvency proceedings initiated prior to this date. Similar to the EC Regulation, the Recast Regulation also does not attempt to directly harmonize the substantive domestic insolvency laws of the member States of the EU. Thus, EU member States (except Denmark) are required to pass domestic laws to incorporate the provisions of the Recast Regulation.

25. *Id.*

26. *Id.*

27. Regulation 2(h), EC Regulation

28. Article 3, EC Regulation

29. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>

22. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=en>.

23. Article 1(1), EC Regulation

24. Preamble, paragraph 12, EC Regulation

The Recast Regulation provides clarity by further defining the concept of centre of main interests. There is now a rebuttable presumption that the centre of main interest is at the place of the registered office, the individual's principal place of business or habitual residence. This presumption may be rebutted based on several factors, for instance, where the company's central administration is re-located in another Member State or the registered office or business to another Member State within 3 months prior to requesting the opening of insolvency proceedings. The Regulation also includes provisions for; creating a central database

effecting a change in process of communication between liquidators and courts and the introducing of a novel concept of voluntary 'group coordination proceedings', amongst other changes.³⁰ The concept of 'group coordination proceedings' aims to coordinate multiple insolvency proceedings in Member State concerning the same group of companies through cooperation and coordination between Member States. In this regard, Member States may coordinate to appoint the same insolvency practitioners for the group of companies and allow for a coordinated restructuring of the group of companies.

30. <https://www.lexisnexis.com/uk/lexispsl/restructuringandinsolvency/document/393781/55KG-Po41-F18C-C101-00000-00/EC%20Regulation%20on%20Insolvency%201346/2000%E2%80%94overview#>

5. Singapore Model Law and Guidelines

Singapore has adopted the UNCITRAL Model Law. To this tune, amendments were made to the Companies Act³¹ which became operative on May 23, 2017. By virtue of introduction of Section 354B and Xth Schedule to the Companies Act, first-hand legislative tools to enhance cross-border insolvency were introduced. The amendments, *inter alia*, now permit the recognition of foreign insolvency proceedings and insolvency representatives in Singapore. Further, provisions have been made for imposing and respecting moratorium in line with the UNCITRAL Model Law.

Further, Model Law protects the power of the Singapore Courts to intervene when the public policy of Singapore would be affected. Singapore Model Law by virtue of Article 7 therein, signifies that the common law will continue to play a role in interpreting the sections of the Singapore Model Law as well as for the alternative relief options.

Recently, in the case of *Re. Zetta*,³² the Singapore High Court recognized proceedings of Zetta entities pending in the United States as foreign main proceedings. In doing so, the Court was grappled with the question of determining a centre of material interest, in light of presence of Zetta entities in Singapore. This was resolved by the courts by adopting the US position by prioritizing the date at which application for recognition is made.

In October 2016, the Supreme Court announced establishment of a network of insolvency judges from several jurisdictions to encourage communication and cooperation among national courts. The network, known as the Judicial Insolvency Network (“JIN”), comprises judges from various jurisdictions including United States of America, Australia, etc.³³ The JIN issued a set of guidelines titled the “Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters” (“Guidelines”). In Singapore, these Guidelines supplement all legislation, rules and procedure concerning insolvency. These guidelines are to be considered in any case involving cross-border proceedings relating to the insolvency or adjustment of debt commenced in more than one jurisdiction.³⁴ These Guidelines were also recently invoked last year by the Singapore High Court and the US Bankruptcy Court (Southern District of New York) to jointly manage the insolvency of Ezra Holdings Ltd, a leading global offshore services provider.³⁵

31. <https://sso.agc.gov.sg/Act/CoA1967?ProvsIDs=Sc10>

32. *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53

33. <http://www.jin-global.org/about-us.html>

34. <https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-1-2017--issuance-of-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters.pdf>

35. *Id.*

6. United States of America

Chapter 15 of the Bankruptcy Code of the United States of America provides for cross-border related provisions. This chapter was added by the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005. It replaced Section 304 of the Bankruptcy Code to make way for USA's adoption of UNCITRAL Model Law. As a result, the U.S. interpretation must be coordinated with the interpretation given by other countries that have adopted it as internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases. This

is executed by the statute's five tiered objectives. *First*, to promote cooperation between the US Courts and parties of interest and other courts and competent authorities of foreign countries involved in cross-border insolvency cases. *Second*, to establish greater legal certainty. *Third*, to inculcate fairness and efficiency in cross border insolvencies to protect interests of all stakeholders. *Fourth*, to afford protection and maximization of the value of the debtor's assets and *Fifth*, to facilitate the rescue of financially troubled businesses.³⁶

^{36.} 11 U.S.C. § 1501

7. Status of Cross Border Insolvency in India

India has experienced a complete overhaul of its insolvency regime in recent times. The Insolvency and Bankruptcy Code, 2016³⁷ (“Code”) came into force on December 15, 2016, consolidating several laws relating to insolvency resolution of companies, partnerships and individuals. The Code currently extends its applicability to corporate persons, and the provisions relating to partnerships and individuals are yet to be notified. Although the Code is recent, it has been evolving immensely through amendments, regulations and judicial interpretation. For a more detailed analyses and latest updates on the Code regime in India, you may refer to our paper A Primer on the Insolvency and Bankruptcy Code, 2016.³⁸

Currently, the Code contains two provisions to assist with cross-border insolvency disputes:

- *Agreements with foreign countries*

The Central Government may enter into an agreement with the Government of another country for enforcing the provisions of the Code pursuant to Section 234 of the Code. Further, the Central Government may direct the application of the provisions of the Code in relation to assets or property of a corporate debtor or an individual, including a personal guarantor of a corporate debtor, situated outside India through a reciprocal arrangement.

- *Letter of request*

When evidence or action relating to assets of a corporate debtor situated outside India is required in relation to an insolvency resolution process, the resolution professional, liquidator or bankruptcy trustee, can make an application to the NCLT pursuant to Section 235 of the Code. If the NCLT deems it fit, it may issue a letter of

request to a court or an authority of a country with whom a reciprocal arrangement has been established pursuant to Section 234 of the Code.

Although the inclusion of Sections 234 and 235 in the code was to facilitate resolution of cross border insolvencies, it was observed that no steps had been taken to effectively implement the inter government agreements. As of today, an order of the NCLT in a cross-border insolvency matter would not directly be recognized or enforced in any foreign country. Further, even if notified, these provisions do not adequately address the complicated issues arising out of cross-border insolvency cases.

Considering this, the Insolvency Law Committee (“Committee”) submitted a report on October 16, 2018 (“Report”) suggesting the incorporation of the Model Law (“Draft Provisions”) into the Code.³⁹ The Draft Provisions contain certain modifications and variations of the Model Law as deemed necessary by the Committee in the Indian context. The key features of the Draft Provisions are discussed below.

I. Recommendations of the Insolvency Law Committee Report

A. Applicability

i. Who does the Draft Provisions apply to?

The Code has been notified only with respect to corporate persons as corporate debtors. The Draft Provisions would thereby apply only to corporate debtors. For partnerships and individuals, Section 234 and 235 of the Code would to apply, as and when notified.

37. The Insolvency and Bankruptcy Code, 2016, available at: [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jun/Insolvency%20and%20Bankruptcy%20Code,%202016%20\(31%20of%202016\)_2018-06-08%202018-06-32.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jun/Insolvency%20and%20Bankruptcy%20Code,%202016%20(31%20of%202016)_2018-06-08%202018-06-32.pdf).

38. A Primer on the Insolvency and Bankruptcy Code, 2016, available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf.

39. https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Oct/Report%20on%20Cross%20Border%20Insolvency_2018-10-22%2018-55-11.pdf

ii. When can it be applied?

Proceedings under the Code may be commenced only if the corporate debtor has assets in India. It must be noted that under the Code as it stands today, foreign creditors are already included as creditors, and can thereby initiate and participate in an insolvency resolution process commenced in India. The Supreme Court's judgment in *Macquarie Bank Limited v Shilpi Cable Technologies Ltd.*⁴⁰ was a step forward in clarifying the accessibility of foreign creditors to the insolvency resolution process and the non-discriminatory nature of the Code.⁴¹

For proceedings commenced outside India, the Draft Provisions imbibe a reciprocity requirement to be applicable foreign countries. Therefore, their applicability would extend to foreign countries that have adopted the Model Law into their domestic regimes. Additionally, the Central Government may notify any other country to which the Draft Provisions would apply. This reciprocity requirement is further analyzed in the 'Practical Implications' section below.

iii. How is access granted when proceedings are commenced outside India?

Once reciprocity is established, a 'foreign representative' can apply to the NCLT for the recognition of a foreign proceeding. Upon recognition of the foreign proceeding by the NCLT, the foreign representative can participate in the insolvency resolution process as prescribed under the Draft Provisions.

The Draft Provisions provide a wide definition to the term 'foreign representative', as a person or body who has been authorized in a foreign proceeding to manage the insolvency resolution process; or to act as a representative of the foreign proceeding, including those appointed on an interim basis. Therefore, if the Draft Provisions are implemented, foreign creditors

with claims on foreign companies which have assets in India can, through a foreign representative under the Code, have access to the foreign companies' assets in India.

The Draft Provisions also provide the Central Government the power to prescribe a code of conduct to apply to foreign representatives. Further, if the foreign representative violates the Draft Provisions or any rules or regulations made under it, the Insolvency and Bankruptcy Board of India ("IBBI") may impose a penalty for the contravention; or pass any other direction that the IBBI is authorized to grant against an insolvency professional ("Insolvency Professional") under the Code.

Similarly, if the reciprocity requirement is met, a resolution professional or liquidator recognized and authorized under the Code may be authorized to act on behalf of a proceeding under the Code in a foreign country, as permitted by the applicable foreign law. Thus, subject to the requirements under Indian law and the applicable foreign law being met, creditors in India (through the resolution professional or liquidator) may also have access to the assets of a corporate debtor in a foreign country.

B. Recognition of Foreign Proceedings

Foreign proceeding is a judicial or administrative proceeding in a foreign country pursuant to a law relating to insolvency. In a foreign proceeding, the assets and affairs of the corporate debtor are under the control or supervision of a foreign court for reorganization or liquidation.

The Draft Provisions highlight two types of foreign proceedings – foreign main proceedings and foreign non-main proceedings. Such a distinction is created to determine the level of control that jurisdiction has over the insolvency resolution process, and the type and extent of relief that the NCLT can grant in relation to the foreign proceedings. Further, as discussed in detail below, the NCLT can grant mandatory relief in case of a foreign main proceeding and non-mandatory relief in case of a foreign non-main proceeding.

40. Civil Appeal No.15135 OF 2017

41. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/4417/html/1.html?no_cache=1.

i. Foreign Main Proceeding

Foreign main proceedings are those which commence in the jurisdiction where the corporate debtor has its centre of main interests (“COMI”). The COMI is one of the most heavily debated concepts arising out of the Model Law. The Draft Provisions provide guidance for the determination of the COMI⁴²:

- a. Unless there is proof to the contrary, there is a presumption that the jurisdiction where the corporate debtor’s registered office is located is its COMI.
- b. This presumption would apply only if the registered office of the corporate debtor has not moved to another country three months prior to the filing of an application for initiation of insolvency proceedings in that country.
- c. The NCLT will conduct an assessment to determine where the corporate debtor’s central administration takes place and whether such location is readily ascertainable by third parties, including the creditors of the corporate debtor.
- d. If the COMI is not determined by the above factors, the NCLT may conduct an assessment using factors prescribed by the Central Government.

A rebuttable presumption regarding the COMI at the registered office of the corporate debtor was inserted to simplify the resolution of straight-forward cross-border insolvency matters. However, the Model Law does not prescribe a three month look back period regarding the registered office for application of the rebuttable presumption. However, the Recast Regulation contains a provision providing for a three month look back period in order to prevent forum shopping by parties involved in the insolvency resolution process.⁴³

Acknowledging that the Code is still evolving, the Committee determined that inclusion of a look-back period relating to the registered office was necessary in the Indian context.

Further, the Central Government has been given the power to prescribe additional factors for the determination of COMI through subordinate legislation. Upon consideration of the factors above, the COMI of a corporate debtor is determined by the NCLT. This results in the classification of the proceeding at that identified jurisdiction as the foreign main proceeding.

ii. Foreign Non-Main Proceeding

‘Foreign non-main proceedings’ may commence in jurisdictions where the corporate debtor has an ‘establishment’. It is a proceeding, other than a foreign main proceeding which takes place in a country where the corporate debtor has an establishment. Like the Model Law, the Draft Provisions define an establishment as a place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services. Lately, there is a surge in business activity which does not necessarily involve human means, such as e-commerce companies and companies primarily operating over the Internet. Therefore, some jurisdictions such as the US have specifically excluded the requirement of ‘human means’ from the definition of establishment.⁴⁴ However, the Committee has retained the same in the Draft Provisions as there is insufficient conclusive jurisprudence on the consequences of altering the definition of establishment.

C. Mandatory and Non-Mandatory Relief

A moratorium ensures that the corporate debtor’s assets are protected during the course of the insolvency proceedings. Establishing a moratorium is especially of importance in cross-border insolvency matters as the assets of the corporate debtor may be situated in more

42. Section 14, Draft Part Z, Insolvency Law Committee Report, available at: http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf

43. Regulation 31, EC Recast Regulation, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848>.

44. Section 1502(2), Chapter 15, Title 11, US Code.

than one legal jurisdiction. The Draft Provisions provide for mandatory and non-mandatory reliefs, based on the nature of the foreign proceeding.

Mandatory Relief: If the NCLT determines that the foreign proceeding is a foreign main proceeding, it *shall* grant mandatory relief by declaring a moratorium on the following:

- a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. transferring, encumbering, alienating or disposing of, by the corporate debtor, any of its assets or any legal right or beneficial interest therein;
- c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

A moratorium ensures that the corporate debtor is prohibited from engaging in the abovementioned activities. In the case of recognition of a foreign main proceeding, such moratorium is automatic. The Draft Provisions clarify that the moratorium imposed will be similar to the moratorium under Section 14 of the Code.

Non-Mandatory Relief: If the NCLT determines that there exists a foreign non-main proceeding it *may* declare a moratorium on the aspects highlighted in points (a) to (d) above, as it deems fit.

Further, upon recognition of a foreign proceeding (main or non-main), the NCLT may entrust the distribution of the corporate debtor's assets located in India to the foreign representative upon his request; or another person designated by the NCLT. However, in order to pass such an order, the NCLT must be

satisfied that the interests of creditors in India are adequately protected.

D. Cooperation and coordination between countries

The Draft Provisions provide a framework for cooperation and coordination between foreign courts and foreign representatives in the following forms:

- a. Cooperation and communication between the NCLT and foreign courts or foreign representatives
- b. Cooperation and direct communication between the resolution professional and liquidators of foreign courts or foreign representatives.

The Central Government has been given the power to issue guidelines to ensure such cooperation and coordination between the NCLT and foreign courts and representatives. Apart from ensuring direct communication channels across countries, foreign proceedings may involve joint hearings in when occurring concurrently.

E. Concurrent Proceedings

The Draft Provisions envisage three situations of concurrent cross-border insolvency proceedings:

- i. **Recognition of foreign main proceeding** – If a proceeding is recognized as a foreign main proceeding, any proceeding may be commenced under the Code if the corporate debtor has assets in India. This proceeding will be limited to the assets of the corporate debtor located in India. The framework for cooperation and coordination of proceedings would apply to such a proceeding.
- ii. **Simultaneous proceedings** – If an application for recognition of foreign proceeding is received *after* a proceeding has commenced under the Code, any non-mandatory relief granted by the NCLT with respect to such foreign proceeding must be

consistent with the proceedings under the Code. Further, if such foreign proceeding is identified as a foreign main proceeding, the automatic mandatory relief prescribed under the Draft Provisions are excluded from application.

If proceedings under the Code commence after the recognition of a foreign proceeding, any mandatory or non-mandatory relief granted by the NCLT with respect to the foreign proceeding shall be modified or terminated if inconsistent with the provisions of the Code.

- iii. **Coordination of more than one proceeding** – If the corporate debtor has more than one foreign proceeding, the NCLT is expected to seek cooperation and coordination with the other jurisdictions as prescribed under the Draft Provisions. Further, the Draft Provisions further provide that the NCLT has the power to modify a non-mandatory relief granted under the Draft Provisions to be consistent with the foreign main proceedings. If more than one foreign non-main proceeding is recognized, the NCLT has the power to grant, modify or terminate any relief to ensure the coordination of such foreign proceedings.

F. Public Policy

At the very outset, the Draft Provisions provide a wide public policy exception. This exception states that the NCLT may refuse to take an action otherwise authorized by the Draft Provisions if such action is manifestly contrary to the public policy of India. Further, the Central Government has also been given the power to apply to the NCLT if an action authorized by the Draft Provisions is considered manifestly contrary to the public policy of India.

As discussed previously, the Model Law prescribes this public policy exception, which has been adopted in varying degrees by countries. For instance, the word ‘manifestly’ in the public policy exception discussed above is absent from the domestic legislation

in countries such as Singapore,⁴⁵ whereas countries such as the United States of America⁴⁶ and the United Kingdom⁴⁷ have chosen to include it. In the US, courts have recognized that the public policy exception must be used sparingly and applied only in the rarest of rare cases.⁴⁸ In Singapore, the High Court recently held that the omission of the word ‘manifestly’ during its adoption of the Model Law subjects Singapore to a lower threshold of determination of when an action is against the public policy of the country.⁴⁹

The Draft Provisions have not attempted to define what constitutes public policy. It remains to be seen how the public policy exception will be interpreted by courts in the Indian context and should be in for varying juridical interpretations given the history of jurisprudence of ‘public policy’ in the arbitration law context. An analysis of the public policy exemption can be found in the section below.

II. Practical Implications

A. Impact on Legal Proceedings in India

If the Draft Provisions are implemented, and the NCLT determines that a foreign proceeding is a foreign main proceeding, arbitration and litigation proceedings in India against the corporate debtor (including their initiation or continuation) would be mandatorily subject to a moratorium. If the NCLT determines that a foreign proceeding is a foreign non-main proceeding, the NCLT has the discretion to impose a moratorium on litigation and arbitration proceedings against the corporate debtor in India.

45. Article 6, Tenth Schedule, Companies Act, 2006

46. Section 1506, Chapter 15, Title 11, US Code

47. Article 6, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

48. *In re Dr. Jürgen Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011).

49. *Re: Zetta Jet Pte Ltd and others* [2018] SGHC 16.

Until the Draft Provisions are implemented, any litigation or arbitration proceedings in India may continue even if insolvency proceedings have been initiated against the corporate debtor in foreign countries. However, if insolvency proceedings have been initiated against the corporate debtor in India, upon admission of the insolvency application, a moratorium would be imposed on initiating or continuing legal proceedings against the corporate debtor.

B. Primacy of Local Law

the Draft Provisions, like the Model Law, do not mandatorily unify domestic insolvency regimes of countries. As can be seen above, the Draft Provisions provide supremacy to proceedings commenced under the Code. Thus, if insolvency proceedings under the Code are initiated, any foreign proceeding that may be recognized by the NCLT under the Draft Provisions must not be inconsistent with the proceedings under the Code. The NCLT has been given the power to modify or terminate reliefs to ensure coordination and consistency with the provisions of the Code. It remains to be seen how effective the recognition of foreign proceedings will actually be in coordination of concurrent insolvency proceedings in light of the wide powers provided to the NCLT.

C. Public Policy Exemption

The NCLT may refuse to take any action under the Draft Provisions if it is considered manifestly contrary to the public policy of India. Public policy, however, has not been defined under the Draft Provisions.

Countries that have adopted the Model Law previously have evolved their definition of public policy through judicial precedents. Singapore has not used the term “manifestly” in its public policy exemption. Thereby, in its first judgment of interpreting public policy under its insolvency legislation, the Singapore High Court in *Zetta Jet Pte Ltd*⁵⁰ held that the standard for interpreting public policy grounds is much

lower than in jurisdictions that have adopted the word “manifestly” in their public policy exemptions. The United States cross-border insolvency legislation contains an exemption if an action is manifestly contrary to its public policy. In the case of *In Re Qimonda AG*,⁵¹ the United States Bankruptcy Court reiterated that the public policy exemption is limited to the most fundamental policies and purposes of the United States.

It is unpredictable how Indian courts will interpret the public policy exemption. For instance, in the arbitration context, India saw varied and diverse interpretations of public policy, often to the detriment of Indian arbitration landscape. Subsequently, judicial precedents and statutory amendments were effected to reverse such diverse interpretations, and narrow down the scope of public policy. In this regard, perhaps the Committee could have taken a leaf out of the lessons learnt in the arbitration context and defined the public policy exemption more exactly, stressing upon a narrow scope of its applicability through legislation itself.

D. Procedural Predicaments

In order to provide effect to the Draft Provisions, a slew of amendments and sub-ordinate legislations would be necessary. For instance, currently the legislations in India do not provide for concurrent hearings with other jurisdictions. Further, the Draft Provisions have left a lot of detailing to subordinate legislation from the Central Government and IBI. Such amendments and promulgations of rules and regulations must coincide with the vision of the Model Law and be effected in a timely manner to avoid a muddle in the resolution of cross-border insolvency cases.

The Code as it stands today prescribes strict timelines for resolution of cases, which have been time and again determined as inviolable. It is unclear if these strict timelines will be applicable to cross-border insolvency cases, and

⁵⁰. *Zetta Jet Pte Ltd*, [2018] SGHC 16

⁵¹. *In Re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

if so, how they would be effectively adhered to in the presence of multiple insolvency proceedings.

The requirement of reciprocity for the applicability of the Draft Provisions is an ambitious one, which may not bear fruit in the short run given India's past experience with reciprocity requirements. In a separate example, India has ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) for the enforcement of arbitral awards with a reciprocity reservation along with an Official Gazette notification. Till date, India has officially notified 50 countries as reciprocating countries,⁵² which

is less than one-third of the countries which have ratified the New York Convention. Considering the general hesitation in implementing reciprocity provisions, it remains to be seen how the reciprocity requirement under the Draft Provisions will be implemented.

Further, there are several pervasive challenges that countries adopting the Model Law are facing, such as the manner of defining the COMI and harmonizing the diverse domestic insolvency legislations of various countries. It remains to be seen how Indian courts will overcome such challenges and provide consistent interpretations.

52. Enforcement of Arbitral Awards and Decrees in India, Nishith Desai Associates (January 2019).

8. Road Ahead

Currently, there is no effective legal framework for resolving cross-border insolvency proceedings in India. The Draft Provisions suggested by the Committee would necessarily require to be formulated as a Bill, which must be passed, in order to be inserted in the Code as it stands today. Presently, there is no clarity as to when such amendments will be effected, although newspaper reports claim that the Government is contemplating adding a chapter on cross-border insolvency to the Code soon.⁵³

If the Draft Provisions are adopted, despite the existence of some procedural and legal challenges, the framework suggested by it could go a long way in ensuring coordination and communication between jurisdictions to successfully address the resolution of cross-border insolvency cases.

53. Govt likely to tweak IBC for cross-border cases, Bill after elections, Business Standard, 5 March 2019, available at: <https://economictimes.indiatimes.com/news/economy/policy/work-is-on-to-amend-ibc-to-address-cross-border-insolvency-m-s-sahoo/articleshow/72308982.cms?from=mdr>

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