Dubious Cross-Border Insolvency Framework in India: The Need of a new Paradigm?

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Introduction

In 2018, around 47 entities forming the part of corporate groups were reported to be in debt which reflects the necessity of having an effective cross-border legal framework. The flexibility in the framework of cross border insolvency helps in overcoming the hurdles encountered in cross border disputes. This framework essentially girdles around the principle of coordination and cooperation and in consonance with these principles the National Company Law Appellate Tribunal ["**NCLAT**"] in *Jet Airways* case has extended these principles by providing sufficient rights to Dutch trustee and observed that–

"*as per law, he (Dutch Trustee) has a right to attend the meeting of the Committee of Creditors*"

However, despite effective coordination and cooperation, the proceedings against one entity is questioned to be extended to others as *first*, the elemental issue concerned is that each entity is managed by its own interests and such extension may be prejudicial to the interest of other entities and *second*, the legal conundrum associated in determining the Centre of Main Interest ["**COMI**"] of an entity. With regards to the first question, it is imperative that extension of insolvency proceeding is not prejudicial to the interests of the other entities as it is only extended in case of existence of reasonable nexus between entities in terms of financial and commercial relationship which makes them interdependent on each other. The authors would elaborate

upon
the second question in the subsequent section.´

Deficient Regulatory Framework

Section 234 and
235 of the Insolvency and Bankruptcy Code, 2016 ["**IBC**"] governs the cross border disputes in India. Section 234 empowers the government to enter into bilateral agreements with another country and Section 235 provides that Adjudicating Authority
can issue a letter of request, to a country with which bilateral agreement has been entered into, to deal with assets situated thereto.

As is evident, the
impediments associated with this regulatory framework are: *first*, it does not provide for a legal framework for foreign
representatives to apply to the Indian courts and most importantly these sections are not notified yet and *second*,
the current legal framework under IBC provides for entering into bilateral treaties which is uncertain and in addition is a long term negotiation process. For instance, in Australia the regulatory framework therein was
not sufficient to deal with the complexities associated with cross-border insolvencies as bilateral treaties can provide some solution but they are not easy to negotiate and have intrinsic intricacies. Consequently, it passed the Cross Border Insolvency Act, 2008 which provides adoption and enactment of the United
Nations Commission on International Trade Law ["**Model law**"]. In light of same, India should also consider the
enactment of the Model law though with modifications, one of which is suggested and dealt in the next section.

Resolving the Complications

Complications in
the field of International Insolvency are never-ending primarily due to the lack of a comprehensive legal framework. The Model Law seeks to alleviate these complications by providing a pragmatic legal framework. As asserted earlier, *Jet Airways* case acknowledges and

applies the principles enshrined under the Model Law. The Model Law, unlike any treaty or convention, is a model form of legislation which is adopted by 46 nations till
date.

The Model Law sets
out the principle of Centre of Main Interest ["**COMI**"] for determining the jurisdiction of the proceedings.
Interestingly, it does not define the COMI and therefore, determining COMI possesses the greatest challenge. Also, the principal concern that remains is that the debtor can escape its liability by changing its COMI according to its favourable outcome. However, the Model law safeguards the rights of the creditor by providing that *first*, as
per Article 16 of the Model Law, COMI corresponds to
the place where debtor has its registered office and *second*, COMI is dependent on many other factors viz. seat of an
entity having major stake in terms of control over assets and its significant operations, which is basically dependent upon the transparent assessment by the third parties. Consequently, the debtor cannot escape its liability by changing COMI as determination of the same is dependent upon assessment by third parties. Hence, the Model Law addresses the prime issues which are present in the current regulatory framework.

In India, the Report of Insolvency Law Committee ["**ILC**"] was constituted to examine the
issues related to IBC, which recommended the impending need to adopt the Model
Law. However, the proposed draft disregards the objective of coordination and cooperation among all nations by mandating the requirement of *reciprocity*.
The authors subscribe to the view, that, until the Model Law has been adopted to a significant extent by other counties, the absolute requirement of reciprocity as postulated under the draft should be done away with and courts should be given the discretion on *case to case* basis. As such an absolute requirement of reciprocity i.e. entering into a treaty with other countries take us back to the present legal framework in India by limiting adjudicating authority's power to only 46 countries. For instance, in case the corporate debtor has COMI in country A, which has adopted the Model Law, whereas his

assets are located in country B, which has not adopted the Model Law. In such a situation, if the requirement of reciprocity is imposed then the administration of assets in country B would become difficult, as an entity in country B would always be reluctant to become a part of the insolvency proceedings relying on probable defences such as of lex situs and absence of bilateral agreements.

In essence, this whole process would be detrimental to the interest of the creditor as it would hamper the maximization of the value of assets. Moreover, in *Rubin v. Eurofinance*, the Supreme Court of U.K. has observed that the court is allowed to use the discretion provided to it by the system. Hence, by this approach courts are allowed to cooperate and coordinate with those countries that are acquiescent to return the favour. It is pertinent to clarify that by granting discretion to court, the authors do not concede to the practice of Gibb's principle. Rather the said principle is inherently flawed as it does not recognise the foreign insolvency process preceding over English law per contra courts generally expects other jurisdictions to accept their judgements.

Concluding Remarks

After a careful analysis of present cross border legal framework in India, it can be ascertained that current system is highly ineffective and in light of instances provided, the adoption of the Model Law with modifications seems to be a better alternative. The Model Law provides an orderly mechanism as it recognises the interest of the enforcing country by taking into account its public policy and national interest. The Appellate Tribunal in *Jet Airways* case has attempted to extend the principles of the Model Law into domestic case laws therefore it is optimal time that India adopts such legislation. Though with regards to the problem of reciprocity as pointed earlier, the absolute requirement or non-requirement of the reciprocity would not solve the problem and according to *Rubin's* case, discretion should be given to the courts which would widen the scope of the application of the law, thereby, being in consonance with the objectives of the principles i.e. of effective cooperation and coordination among all nations. Hence, the Model law contains

enough of the measures to prevent any misuse of the process and adopting it with modifications would resolve the problem associated.