



Insolvency Professional Agency of Institute of Cost Accountants of India

WEBINAR

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“Cross Border Insolvency in India - Key Issues and Leading Cases”

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What is Cross-Border Insolvency?

- Cross-Border insolvency a necessity to deal with insolvent debtors with assets over several jurisdictions. It shall aid with the insolvency process for several Indian multinational with subsidiaries and assets in foreign jurisdictions and undergoing insolvency process.
- Essential to improved credit recovery rate, information exchange without delay, empowering insolvency representatives and remedy in foreign jurisdictions.

What is the need for a law on Cross-Border Insolvency?

- UNCITRAL Model Law on Cross-Border Insolvency has been issued by UNCITRAL to assist states in relation to the regulation of corporate insolvency and financial distress involving companies which have assets or or creditors in more than one state.
- The Model law has been widely recognised and adopted by more than 44 countries including USA, U.K. and Singapore.
- Ministry of Company Affairs, India has released Draft chapter on Cross border Insolvency based on the UNCITRAL Model Law- Salient aspects:
- Applicability to Corporate Debtor in relation to foreign insolvency proceedings, Indian insolvency proceedings, concurrent insolvency proceedings and foreign creditors having interest in commencement of Indian insolvency proceedings where assistance is sought in a state by foreign court
- ❖ Provision for creditors in a foreign state on equal footing with domestic creditors, recognized rights of foreign representatives, recognition of foreign proceedings in relation to corporate debtor, recognition of orders passed by the foreign court

Cross-Border Insolvency of Jet Airways

Jet Airways to become first Indian company to undergo Cross Border Insolvency proceedings 18 Oct 2019, IANS

<https://www.livemint.com/companies/news/jet-airways-to-become-first-indian-company-to-undergo-cross-border-insolvency-proceedings-11571371382030.html>

New Delhi: In a major breakthrough for India's insolvency mechanism which is still in its evolving stage, Jet Airways would be the first Indian company to undergo insolvency proceedings under the Cross Border Insolvency Protocol along with the Insolvency and Bankruptcy Code (IBC) of India.

(NCLAT) allowed the Dutch court administrator of Jet Airways to attend the meetings of the bankrupt airline's Committee of Creditors (CoC). Dutch Trustee (Administrator) will work in cooperation with the 'Resolution Professional of India' as per the **'Cross Border Insolvency Protocol'**.

NCLT orders inclusion of Videocon's overseas assets in insolvency: Videocon was in the first list of the 12 largest accounts that the Reserve Bank of India referred for bankruptcy in late 2016

February 15, 2020

https://www.business-standard.com/article/companies/nclt-orders-inclusion-of-videocon-s-overseas-assets-in-insolvency-120021500036_1.html

The National Company Law Tribunal (NCLT) has ordered the inclusion of **Videocon** Industries' overseas oil and gas business in the ongoing insolvency process being conducted in the country.

Videocon was in the first list of the 12 largest accounts that the Reserve Bank of India referred for bankruptcy in late 2016. The diversified group owes collectively over Rs 1 trillion to lenders.

“.....there is cross creation of the security interest by all lenders in other business assets of **Videocon** Group treating it as a single economic entity,” the **NCLT** has said.

“... we have concluded that foreign oil and gas assets of the group held through VOVL, VHHL, VEBL and VINI, are in fact, the assets and property of VIL.... Therefore, the assets held by them can be said to be ‘its’ assets, which is under the insolvency,” the order noted.

VIL's overseas oil and gas **companies** are VOVL, Videocon Hydrocarbon Holdings, Videocon Energy Brasil), Videocon Indonesia Nunukan Inc.

The tribunal also directed the resolution professional to include the assets, liabilities, claims of the above mentioned overseas assets, **companies** in the information memorandum of Videocon.

The two-member Bench comprising Suchitra Kanuparthi and Chandra Bhan Singh allowed a moratorium on the foreign petroleum assets of the group which will restrain its lenders from selling the conglomerate's overseas assets.

MCA panel's scope on cross-border insolvency gets bigger

March 08, 2020 <https://www.thehindubusinessline.com/companies/mca-panels-scope-on-cross-border-insolvency-gets-bigger/article31015843.ece>

Committee to study UCITRAL Model Law on 'Enterprise Group Insolvency'

The scope of work for the committee constituted to recommend rules and regulatory framework for the smooth implementation of cross-border insolvency provisions under the Insolvency Bankruptcy Code just got bigger.

The Ministry of Corporate Affairs (MCA) has now expanded the terms of reference of this panel headed by retired IAS officer KP Krishnan to cover aspects relating to enterprise group insolvency on a cross-border basis.

This committee, which was constituted in the third week of January this year, will now also study and analyse the Uncitral Model Law for 'enterprise group insolvency' and make recommendations in the context of the Insolvency and Bankruptcy Code 2016 (IBC), official sources said.

UNCITRAL
Model Law on
Cross-Border
Insolvency
(1997)

Date of adoption: 30 May 1997

Purpose: The Model Law is designed to assist States-

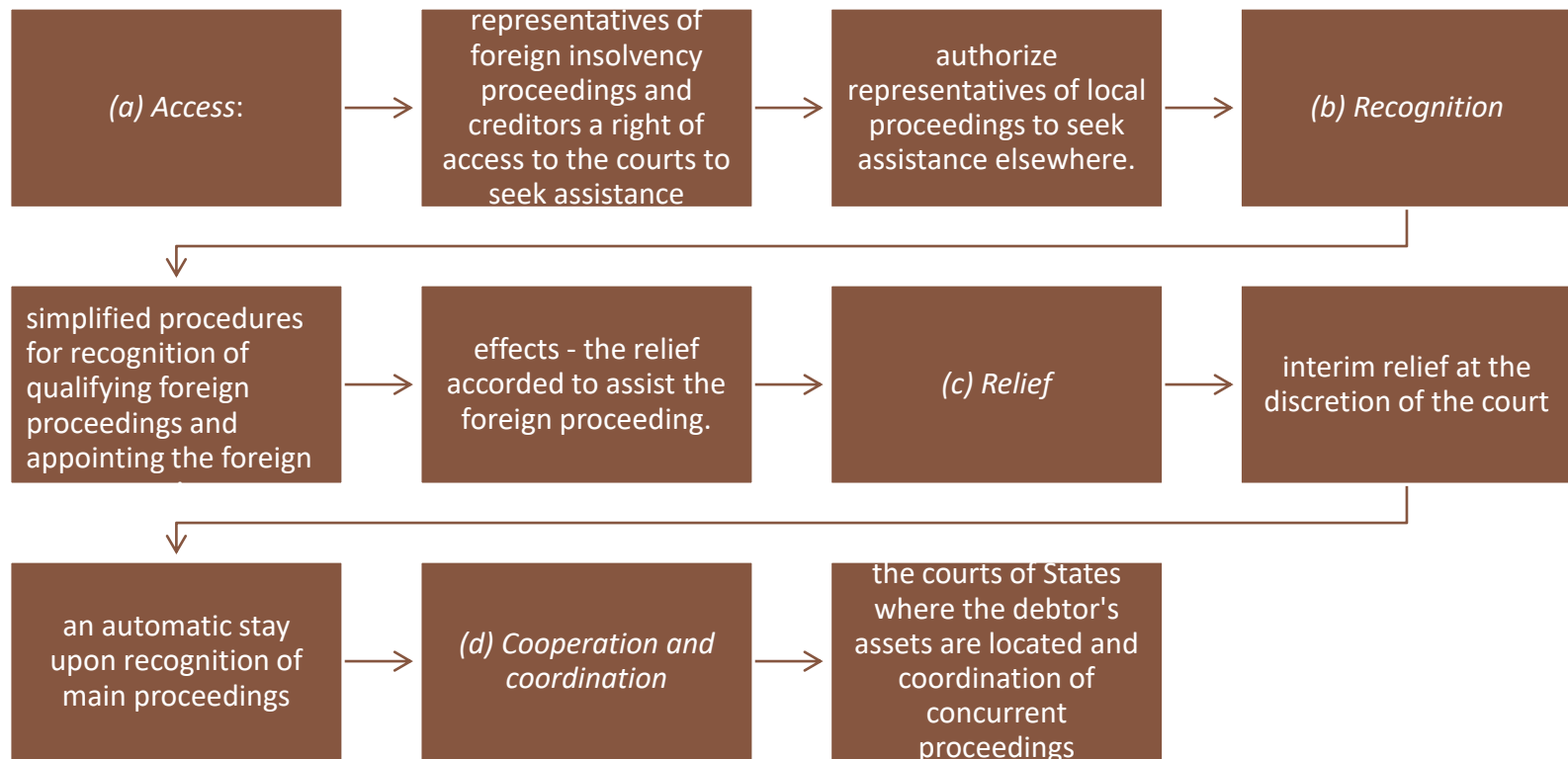
to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings

concerning debtors experiencing severe financial distress or insolvency.

It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.

“A cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place”

Key provisions



APPLICABILITY OF CROSS-BORDER REGIME

The Code provides the Adjudicating Authority with the power to refusal to take any action for implementation which in its opinion, ought to be manifestly contrary to the **public policy** of India.

A **foreign representative has to apply to the adjudicating authority**. The foreign representative shall be bound to follow the code of conduct as may be notified.

An application pursuant to this Part is made to the Adjudicating Authority by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the corporate debtor to the **jurisdiction of courts in India**, or the Adjudicating Authority, for any purpose other than the application.

Penalty provisions for the foreign representatives when any loss of amount or unlawful gain on behalf of the foreign representative takes place.

KEY CONCEPTS & DEFINITIONS

The “**foreign proceeding**” means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the corporate debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

The “**foreign representative**” means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the corporate debtor’s assets or affairs or to act as a representative of the foreign proceeding and includes any person or a body appointed on an interim basis.

The provisions shall apply only to the States who have adopted the UNCITRAL Model Law on cross-border insolvency or on any other State specified in Part B of the schedule with the Central Government shall notify.

Draft Part Z: THE CROSS-BORDER INSOLVENCY REGIME IN INDIA.

General Provisions, Public Policy (Clauses 1-6)

**Access of Foreign Representatives and Creditors to the
Adjudicating Authority (Clauses 7- 11)**

**Recognition of A Foreign Proceeding and Relief (Clauses
12- 20)**

**Cooperation with Foreign Courts and Foreign
Representatives (Clauses 21- 23)**

Concurrent Proceedings (Clauses 24- 28)

Miscellaneous (Clauses 29- 31)

EU Case
Study:
Eurofood IFSC
Ltd 2006 ECJ
(C-341/04)

Regulation (EC) No 1346/2000- Judicial cooperation in civil matters

Decision to open the Insolvency proceedings

Centre of the debtor's main interests (COMI)

On February 20, 2004, the Parma court at Italy opened a main insolvency proceeding for Eurofood.

It found that Eurofood's center of main interests 'COMI' was located in Italy, because its management and center of control came from its Parmalat parent that was located there.

The Irish liquidator appealed, but the Italian appellate court affirmed.

On March 23, 2004, the Dublin High Court found that Eurofood's COMI was located in Ireland, because its registered office was located there and it *'appeared to the third party creditors'* that its COMI was located in Ireland.

The court further held that an Irish main proceeding had opened on 27 January 2004, when it had appointed the temporary liquidator.

The Italian administrator appealed this decision to the Irish Supreme Court, which referred the matter to the ECJ.

Centre of Main Interests (COMI): Place of Registered Office

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect.

That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated.

‘Main insolvency proceedings’: The rule of priority

The main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

The rule of priority provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings.

The Irish Supreme Court referred questions on the interpretation of the Regulation to the ECJ:

What constituted the opening of insolvency proceedings within the meaning of the Regulation and which national court had jurisdiction to open main insolvency proceedings?

What are the governing factors for determining centre of main interests when the registered office of a parent company and its subsidiary are located in different member states?

Whether a member state had to give recognition to a decision of another member state purporting to open insolvency proceedings in respect of a debtor, when that debtor had not been given the right to fair procedures and a fair hearing

Questions for the ECJ

Facts and Analysis

The European Court of Justice (ECJ) gave opinion on referral by Supreme Court of Ireland of 5 questions of EU Insolvency Regulation

Whether to open a main insolvency proceeding for Eurofood IFSC Ltd in competition with a parallel main insolvency case for the same entity in Parma, Italy.

In re Eurofood IFSC Ltd., [2004] IESC 45 (Ir.).

The two parallel main proceedings arose because each court decided that Eurofood's center of main interests (CoMI) was located in its own country Case 341/04, Eurofood IFSC Ltd, 2006 E.C.R. _ . (*Eurofood-ECJ*).

According to the language used in the English version of the EU Regulation, a "proceeding" corresponds to a "case" under U.S. bankruptcy law. *See, e.g.*, 11 U.S.C. §§ 301-03 (providing for the filing of a "case" under the bankruptcy statute).

2 sets of factors necessary to determine the proper location of the CoMI of a subsidiary

The first set of factors is the location where a debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated.

The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary.

Where (as in the Eurofood proceedings), these factors point to different countries for the location of the CoMI, the court must determine the relative weight to give to each factor.

The criteria is required to be both objective and ascertainable by third parties, typically the debtor's major creditors.

As in the Eurofood proceeding, third parties may have undertaken considerable effort in exercising due diligence to assure themselves as to the location of the debtor's CoMI.

Presumption that CoMI is Located in Country of Registered Office

Rebuttal of Presumption

Under U.S. law, there are a variety of ways of treating a presumption and its possible rebuttal

ECJ Decision on Rebuttal Requirements

"letter-box" company that is not carrying on any business in the country where its registered office is located.

The presumption that Eurofood's CoMI was located in Ireland, because its registered office was located there, was supported by the evidence of the expectations of its major creditors.

Given this evidence, the location of its parent corporation Parmalat SpA in Italy was insufficient to rebut the presumption.

Re Daisytek- ISA Ltd and Others [2003] All ER (D) 312 The 'Head Office Function' Approach

In early 2003, Daisytek the parent company defaulted on financial covenants, and this default caused financial problems for the subsidiaries in Europe. Consequently, insolvency proceedings were filed in the US, England, Germany, and France.

In light of the case, the English court was satisfied that the COMI of each company in the group was situated in England, specifically in Bradford.

The English High Court argued that the head office in Bradford was the coordinator and the performer of the European group, which included, for example, the negotiation of supply contracts.

Cross-Border Insolvency of a Corporate Group

The Court provided a detailed analysis of the evidences and factors which affected its final decision to adopt the head office function approach.

The Court placed particular emphasis on the claim that the centre of the debtor's main interests was "ascertainable by third parties".

From the point of view of the English Court, the third parties are the creditors, so in the case of a trading company, these creditors are most likely to be its trade suppliers and its financiers.

The court found that most funding was provided through English financial institutions. Furthermore, the Court found that most of the factual evidence indicated that a head office in Bradford was managing and controlling all of the companies in the group.

Following the important decision in the Daisytek case, the same principle was applied in the case MG Rover, where the English court rebutted the presumption in Art 3(1) that COMI is where the registered office of the company is located, applying instead the head office function approach.

In general, two different approaches have been applied:

- the registered office approach and
- the head office function approach.

The registered office approach is more ascertainable for third parties, especially creditors, and this has been supported by the CJEU in the Eurofood and Interedil cases.

it is argued that the head office function approach might serve as an incentive for forum shopping when the group's management decides to move its place of control to a different location

**Sumikin Bussan International (Hong Kong) Ltd. Vs. King Shing Enterprises Ltd. MANU/MH/0880/2008, 2008(5)BomCR464
MANHARLAL TRIKAMDAS MODY VS SUMIKIN BUSSAN INTLHK. SLP(C)
No. 26680/2010, SLP(C) No. 30485/2010 dt. 05/04/2016 Supreme Court
Manharlal Trikandas Vs. Sumikin Bussan [2014]SGHC123 SINGAPORE HC**

Execution Application at the instance of plaintiffs, Sumikin Bussan Intl (Hong Kong), whereby the immovable property at Bombay, owned by Manharlal Trikandas Modi (Judgment Debtor, residents of Singapore) has been attached, by order dated 12th January, 2004. The plaintiffs, (Judgment Creditors) have initiated execution proceeding under Order 21, Rule 54 of CPC based on an order of High Court of Hong Kong

Contentions, that the Hong Kong Special Administrative Region is not a reciprocating territory within Section 44-A of the Code of Civil Procedure.

that the Court of First Instance of Hong Kong Special Administrative Region which passed the said decree is not a superior Court notified under Section 44-A of the C.P.C.

Key issues

In the present case, the question is whether the Singapore court has the jurisdiction to interfere with the Defendants execution against the Mumbai property in India.

Wrt principles laid down in *Galbraith v Grimshaw*, the answer to that depends on whether the attachment occurred *prior* to the granting of the bankruptcy order in Singapore. If the Mumbai property had already been attached prior to the bankruptcy order in Singapore, it is difficult to see how the subsequent bankruptcy of the Plaintiffs can affect the execution proceedings in India.

While the stay was initially granted by a single judge of the High Court of Bombay, this was reversed on appeal. In Appeal the Division Bench, after discussing relevant case law including *Galbriath v Grimshaw*, held that the attachment in India occurred prior to the adjudication of bankruptcy in Singapore. Accordingly, it was held that the bankruptcy orders granted in Singapore could not affect the right of the attaching creditor in India.

This case highlights the lack of framework for dealing with cross-border insolvency cases in India, as the current framework does not completely provide for a quick and fair adjudication of a complicated bankruptcy proceeding

The bankruptcy stay action was brought by King Shing Enterprises Ltd (KSE) and P1. KSE was a customer of Sumikin Bussan and MK Mody was the guarantor of the debts owed by KSE. It was in respect of a debt owed by KSE that a successful action was brought in the HKSAR against both KSE and Mody. This eventually gave rise to the HKSAR judgment debt, the enforcement of which forms the basis of the longstanding dispute between the Plaintiffs and the Defendant.

Held, Singapore is not, in any event, the *forum conveniens*, this is a good case for abuse of process.

INDIA
Recommendations by the
Justice Eradi
Committee
and
N.L. Mitra
Advisory
Group on
Bankruptcy
Laws.

The Eradi Committee Report:

Recommended that the Model Law be implemented in India; Amendment of Part VII of Companies Act, 1956

in-bound and our-bound requests for recognition of foreign proceedings,

co-ordination of proceedings in two or more States and

participation of foreign creditors in insolvency proceedings

The N. L. Mitra Committee:

Indian laws on cross border insolvency are outdated and are not comparable to international legal standards

in the event of an international insolvency proceeding involving an Indian company, Indian courts are unlikely to provide any aid or assistance to a foreign liquidator

Proposed a Comprehensive Bankruptcy Code

Indian Companies Act 1956/ 2013

Winding up proceedings under the Companies Act, 1956:-

companies registered in India under the Companies Act, 1956

- Indian courts have jurisdiction to hear and adjudicate upon proceedings irrespective of the fact that the main business of the company may be carried out elsewhere.
- In such proceedings, Indian as well as foreign creditors can prove their debts.

companies that are not registered in India

- winding up proceedings may be initiated u/s 584 of the Companies Act, 1956, if it had a place of business in India and in the following circumstances:
- if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs
- if the company is unable to pay its debts
- if the court is of the opinion that it is just and equitable that the company should be wound up

Ss 13 and 44A of the CPC provide for the treatment of foreign judgments in reciprocating countries as conclusive, barring certain exceptions, such as fraud, judgment not based on merits, not competent jurisdiction, etc.

Rajah of Vizianagaram v. Official Receiver AIR 1962 S.C. 500

Foreign creditors of a company which is incorporated in England and carried on business in India can prove their claims in the winding up proceedings of the company as an unregistered company in India.

The Courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction.

S. 271(3) says that the company incorporated outside India may be wound up as an unregistered company when it ceases to carry on business in India.

Cross-Border Insolvency in India

- The way ahead....

IBC 2016

**Agreements with
foreign countries
(Section 234)**

**Letter of request to
a country outside
India in certain
cases. (Section 235)**

**UNCITRAL Model
Law on Cross-
Border Insolvency
???**

**MCA Draft chapter
on Cross-Border
Insolvency**

The Insolvency & Bankruptcy Code 2016

Agreements with foreign countries.

234. (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

Letter of request to a country outside India in certain cases.

235. (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required ³⁵ in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request

UNCITRAL Model Law on Enterprise Group Insolvency

https://uncitral.un.org/sites/uncitral.un.org/files/draft_model_law_on_enterprise_group_insolvency_0.pdf

The new Model Law addresses the coordination of multiple insolvency proceedings, allows for ‘planning proceedings’ to develop a group insolvency solution and provides for relief that might be needed when managing and coordinating an enterprise group insolvency.

Thank You

Questions