The Cross-Border Insolvency through unchartered waters amidst COVID-19

The novel COVID-19 pandemic has yet again brought forth troubling aspects of globalisation. Just a few months into the lockdown, a significant number of businesses, including quite a few major retail and hospitality brands, have filed for insolvency protection. The effect this lockdown has had on the aviation industry is unequivocally unparalleled as well, with many believing significant failures to come out in the open soon. With disrupted supply chains, sharp decreases in consumer spending, and liquidity issues, the impact of this pandemic is being felt in every sector and is likely so that many companies will not be able to weather this unprecedented storm.

The resultant of this unprecedented situation is that complex cross border insolvency matters will skyrocket, in turn producing a need for handling such insolvency related issues in a cooperative and a consensual manner, probably on a scale and in a way never seen before.

In this context, it is imperative to resolve the legal quandary entailing the recognition of foreign jurisdiction's insolvency proceedings and thereby enabling the stakeholders to proactively engage and establish a cogent recovery and enforcement mechanism of their security interests.

One such international standard which provides a framework encouraging cooperation and coordination between jurisdictions is the UNCITRAL Model Law on Cross-Border Insolvency, 1997 ("Model Law"). The Model Law does not attempt to unify the insolvency laws of different jurisdictions instead it aims to build on the differences through rationalisation of the process and access to insolvency proceedings, without any fear of relinquishment of national sovereignty.

Though, the Model Law provides a well-thought-out framework, it is not the 'only way' to achieve a cross-border cooperation. The prime example is the case of Germany, which does not follow the Model Law per se however has succeeded in laying down autonomous rules for international recognition and cooperation of cross border insolvency which do not fall short of the standard set by the Model Law.

Now, taking the example of India:

The country has seen a complete overhaul and consolidation of the existing laws pertaining to insolvency through the enactment of the Insolvency and Bankruptcy Code, 2016 ("Insolvency Code"). However, it is unfortunate to witness that the cross-border insolvency provisions were not made part of the Insolvency Code. Consequently, and rightly so, it was expected that this (incomplete) Insolvency Code would lead to complications in resolutions concerning cross-border insolvency matters, even where, in the greater scheme of things, the cross-border element as such is rather minor.

Soon after the Insolvency Code became effective, draft provisions incorporating the Model Law were indeed recommended by the Insolvency Law Committee ("Committee") vide its report dated October 16, 2018. However, they are still yet to find relevance in the Insolvency Code and so far only remain floating proposals waiting to be incorporated.

An important aspect that was being deliberated by the Committee is whether the Model Law should be adopted based on a 'legislative reciprocity' approach. There is no requirement of such reciprocity in the Model Law when enacting a legislation based on it and only few countries have indeed included reciprocity provisions in relation to the recognition of insolvency proceedings in foreign jurisdictions. The legislative reciprocity indicates that a domestic court will recognize and enforce a foreign court's decisions only if the country in which the foreign court is located has adopted the same or similar legislation to that governing the domestic court.

While the government of India deliberates on the recommendations of the Committee, one can expect a significant attrition in value of the assets of ongoing cross-border insolvency of companies, such as, for instance, in the cases of Videocon Industries, Amtek Auto, Essar Steel- with all of them comprising a significant cross border element.

Still, the judiciary in India understood the necessity of having the Model Law structure read into the Insolvency Code framework and has pronounced an interesting judgement in the past year. In a case that sets the ball rolling for India's ever growing need to endorse and champion the Model Law into its own system is the recent case of Jet Airways (India) Limited ("Jet"). On 20 June 2019, Jet was admitted to corporate insolvency resolution proceedings by the National Company Law Tribunal ('NCLT') of India, with the lenders' consortium led by State Bank of India. Already a month earlier, however, a court in the Netherlands had appointed a

Netherlands based bankruptcy administrator, to take charge of Jet assets located in the Netherlands, Jet's regional hub for its European operations. The underlying petition had been filed by two European creditors the H Esser Finance Company and Wallenborn Transport, which asserted claims of unpaid dues worth INR 280 crore (approx. EUR 33 mil.), prompting the Dutch court to order the seizure of one of Jet's Boeing 777 aircrafts that was parked in the Schiphol airport in Amsterdam.

Following Jet's admission to corporate insolvency resolution proceedings in India, the administrator appointed by the Dutch court came before the Mumbai bench of NCLT seeking the recognition of the on-going proceedings in the Netherlands. The NCLT not only outrightly barred the administrator appointed by the Dutch court from participating in the insolvency proceedings in India but further declared the overseas bankruptcy proceedings as 'null and void'.

However, the Dutch court appointed administrator appealed the NCLT's order and in what would appear to have been driven by a spirit of 'sustainable insolvency resolution', the NCLAT, the competent appellate tribunal, then set aside that order and allowed the Dutch administrator to be the part of and attend the committee of creditors (CoC) meetings. The NCLAT went further to advice the parties on exploring a framework that would allow seamless cooperation between the resolution professional in India, the Dutch administrator and the CoC. This gave rise to a truly avant-garde cross border insolvency protocol, cohesively developed by the parties, which laid down a framework for international coordination and cooperation between all the stakeholders involved in the matter while respecting the sovereignty of each jurisdiction. This was possible only because the 'cross border insolvency protocol' was constructed on the principles of the Model Law, which recognised India as the 'centre of main interest' and the Dutch proceedings as the 'non-main proceedings'.

One of the important discussions that arose during the Jet's case was whether there will be a struggle between the two somewhat distinct doctrinal perspective of cross-border insolvency of India and that of Netherlands. Netherlands insolvency law prescribes no requirement of affording any cooperation with insolvency administrators in non-EU matters, which are beyond the scope of the EU Insolvency Regulation. Though, the Dutch Supreme Court has in the past allowed a foreign insolvency administrator to effectively exercise its powers in the Netherlands (see the Russian oil company Yukos case) but in essence the it still adheres to the principle of 'territoriality' of cross-border insolvency. The

territoriality approach entails that the insolvency measure will only have legal effect within the territorial limits of the state in which the insolvency proceedings have commenced. Therefore, the legal implications of insolvency proceedings will only remain within the border of such state and any assets abroad of such debtor would remain unaffected.

On the other hand India adheres to a sort of 'universalist approach' of cross-border insolvency, which stipulates the administration of the insolvency proceedings by one court in the jurisdiction where the entity is registered or domiciled by taking into account all the assets of such corporate debtor regardless of the location in the world.

The application of either of these two distinct approaches would have failed to strike a "balance between the relief granted to the foreign representative and the interests of those affected by such relief" which is essential to achieve the objectives of cross-border insolvency legislation as underpinned in the legislative guide of Model Law.

However, the NCLAT recognized the quintessence of the modified universalism of cross border insolvency as embodied in the Model Law – which is consistent and coordinated with varying objectives of the two distinct insolvency authorities, the Indian and the Dutch – and succeeded in setting out an encouraging precedent for all future cross border insolvency matters.

One should hope that this historical move by the NCLAT may set a precedent for future cross-border insolvency cases in India, till at least such time that the government enacts a legislation based on the Model Law. This also serve as demonstration of the point that Indian stakeholders on all sides are willing to be associated with more comprehensive insolvency regimes that enable a seamless value driven approach towards the realisation of dues.

Returning to the Insolvency Code, India's adoption of sort of 'universalist approach' emanates by way of sections 234 and 235 of the Insolvency Code, which provide for the possibility of a reciprocal arrangement that may be entered into between India and other countries for the administration of cross border insolvencies. Unfortunately, however, these provisions fail to lay-down any procedure which may comprehensively address complexities of cross-border insolvency proceedings. Till date, no use has subsequently been made of this possibility of a reciprocal arrangement.

Another case that warrants a mention here is the decision of the US Bankruptcy Court for the Delaware District on November 4, 2019, which recognized the case of State Bank of India v/s SEL Manufacturing Company Limited India pending before the National Company Law Tribunal, Chandigarh Bench, as the ‘foreign main proceeding'. This gives a much-needed impetus to the cross border recognition of the Insolvency Code by being recognized for the first time under the US Bankruptcy Code, which may as well lead to enhanced recovery in at-least a segment of future cross border insolvency cases.

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