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THE 'UNPOLISHED' CODE BARRICADING CROSS-BORDER INSOLVENCY IN INDIA

Prateek Khandelwal*
Poojal Agarwal**

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Abstract

Cross-border insolvency is not a nascent term and is used widely across the world. However, when it comes to its codification in various nations, what is new is that it has to be studied with different sentiments, ideas and thoughts. The concept of cross-border insolvency revolves around resolving insolvency disputes of the companies having assets in more than one nation. This paper analyses, in brief, the beginning of the cases which involved the concept of cross-border insolvency in India and across the world. It further put its weightage on how the current legislation on cross-border insolvency in India is insufficient and how it hurdled the judiciary in coming to a conclusion in various landmark cases on cross-border insolvency. For India, in the current scenario, it is extremely important to expand its economic horizon. It is required for India to have a decent ranking in ease of doing business to attract investment across the globe. Realising its desideratum, Indian drafters have framed a draft based on the Model Law while taking account of Indian socio-economic conditions and by analysing the cross-border insolvency laws adopted by other countries. This paper not only analyses the journey of Indian drafters from facing the obstacle to the framing of provisions on cross-border insolvency but also studies the various flaws that were made by other countries in adopting the Model Law and how Indian drafters have taken notice of it and have tried to incorporate such learnings in its report.

* Student, Chanakya National Law University, Patna.
** Student, Chanakya National Law University, Patna.

Introduction

With increasing globalization, there is an upsurge of debtors having assets and creditors in more than one country. As most of the countries around the world have an open economy and easy accessibility, investors around the world are now stretching their hands outside their home country for investment. So, in such a situation, there is a pressing need to have standard laws to protect the interest of various stakeholders, i.e., cross-border insolvency laws.

In this unprecedented time of COVID-19, the importance of cross-border insolvency has been jacked up, with many companies, who have their assets in more than one country, falling on the verge of insolvency. Having proper and established provisions on cross-border insolvency is not only the need of the hour but also a significant tool kit for maintaining healthy business relations between different countries. United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("The Model Law")[1] is one such landmark step towards the harmonization of insolvency laws across the different nations. The development of the Model Law was not a one-day process, the drafters of Model Law have codified it by gaining experience from the cases of insolvency between various countries and the hurdles faced by them. In India, the intense need to have sufficient cross-border insolvency laws had been realized through the occurrence of cases like *Amtek Auto Ltd.*[2], *Videocon Industries*[3] and *Jet Airways*[4], which posed many questions on the existing 'unpolished' provisions on cross-border insolvency and also identified the loopholes in it. From gaining knowledge and understanding the scope and merit of adopting the Model Laws from various countries like the United States, Singapore, etc., Indian drafters too have drafted a report on cross-border insolvency and have tried not to divert or amend it to a large extent, a factor which has been analyzed in later part of the paper. Before gaining in-depth knowledge about cross-border insolvency, one needs to analyze its origin and understand its aim and purpose.

Development of Cross-Border Insolvency

Background

Before delving into the saga of the Indian cross-border regime, it is pertinent to understand

1 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 1997.

2 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

3 State Bank of India vs Videocon Industries Ltd. & Ors., CP (IB)-02 (MB)/2018, (Jun. 6, 2018).

4 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, (Jun. 20, 2019).

that the construction of codified laws on cross-border insolvency was a long and incremental process. In the late 18th century, the onset of the industrial revolution led to multilateral businesses and transactions that forced countries to cooperate in order to boost the economy.[5]

The credit of origin of cross-border insolvency cannot be given to one country as it was developed in different forms in different countries.[6] Be it *Solomons vs Ross*[7], a landmark case in England's bankruptcy regime which played a pivotal role in the evolution of international bankruptcy law, or the *Maxwell* bankruptcy case[8] in which standard provisions were laid down relating to insolvency in the form of the Maxwell Protocol by the United States and the United Kingdom courts.[9] Similarly, many cases can be marked as the critical juncture in the journey of codification of cross-border insolvency laws like the *Lehman Brothers* case.[10] In addition to this, other efforts were made by countries worldwide to develop cross-border insolvency laws, such as Singapore's 'old territorial approach,'[11] United States' 'universalism,'[12] and Honk Kong's 'Modified Universalism.'[13]

Inception of the Model Law

After continuous efforts, finally, the Model Law was endorsed by the United Nations General Assembly in 1997.[14] The main aim of the Model Laws was the standardization of insolvency laws across the world.[15] As stated earlier, due to globalization and technological advancements, companies started to establish their empire in more than one country. Since there were no uniform laws related to insolvency, it created a great hassle during the

5 The Transformation of Economic Systems, Lumen Boundless Sociology, (last visited on Jun. 22, 2021), https://courses.lumenlearning.com/boundless-sociology/chapter/the-transformation-of-economic-systems/.

6 Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, Sage Journals (last visited on Jun. 19, 2021), https://journals.sagepub.com/doi/full/10.1177/0256090920946519.

7 Solomons vs Ross, (1764) 1 H.BI. 131n.

8 Maxwell vs Dow, 176 U.S. 581 (1900).

9 *Id.*

10 Lehman Brothers vs International (Europe), Re, (2011) EWHC 1233 (Ch).

11 Halimi, Ryan, *An Analysis of the Three Major Cross-Border Insolvency Regimes* (2017). University of Chicago Law School Chicago Unbound, http://chicagounbound.uchicago.edu/international_immersion_program_papers/47.

12 *Id.*

13 *Id.*

14 *UNCITRAL The Model Law on Cross-Border Insolvency (1997)*, United Nations Commission On International Trade Law, (last visited on Jun. 15, 2021), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

15 *Id.*

insolvency of a company. The Model Law does not compel or force any country to adopt its provisions, rather the countries, on their own initiative, with modification or amendments (according to their country's economic and social conditions), can adopt the Model Laws to bring regularity and to create predictability on insolvency proceedings.[16]

The Model Law defines cross-border insolvency as the situation where either the debtor has assets in two or more states or where the creditors belong from different states. The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases, i.e., access, recognition, relief (assistance), and cooperation.[17] Due to UNCITRAL's extensive efforts, many countries have realized the strength of the Model Law and have adopted the same with some amendments. For example, the United States, while adopting the Model Law, incorporated the foreign insurance companies but omitted banks and railways.[18] On the other hand, the United Kingdom while adopting the Model Law omitted credit institutions and insurance undertakings.[19]

By seeing so many developed countries adopting the Model Law, it becomes even more essential to analyse the basic economic objective it serves. During insolvency, every concerned party, i.e., management of the corporate entity, its creditors, its debtors etc., try to save themselves from the detrimental effects of insolvency. To this end, the Model Law endeavors to serve the interest of all the stakeholders. It ensures that creditors are not affected because of the liquidation by safeguarding the regular business activity, which helps in asset protection and higher valuation of the entity. Meanwhile, it also averts the liquidation when the continuation of the business is more fruitful for the stakeholders.

The Saga of Multilateral Insolvency in India

Insolvency and Bankruptcy Code, 2016,[20] ("Code") a legislative framework that has accelerated the insolvency regime in India. Though the Code emulates UK insolvency legislation yet, it is a comprehensive framework customized according to the requirement of the domestic market.[21] The Code, though, is a relatively new legislation, but the pace

16 *Id.*

17 *Id.*

18 Ishita, *supra* note 6.

19 *Id.*

20 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament,2016, (India)

21 Rakesh Nangia and Neha Malhotra, Tweaking IBC for cross-border cases, The Hindu Business Line, (last visited on Aug. 14, 2021) https://www.thehindubusinessline.com/business-laws/tweaking-ibc-for-cross-border-cases/article33545085.ece.

at which it has stabilised the insolvency and bankruptcy system in India is appreciable. However, India refrained from incorporating a comprehensive framework for cross-border insolvency in 2016 because the lawmakers were skeptical, moreover, India lacked an ecosystem to handle not only multilateral but even domestic insolvency. There were no dedicated tribunals for bankruptcy, no consolidated law on the subject and lack of Insolvency or Resolution Professional and Informational Utilities. Furthermore, even though a legislation on domestic insolvency was much needed, Indian lawmakers were ambitious in combining individual insolvency and corporate insolvency and after that were hesitant to rush into legislating a framework for multilateral insolvency.

In response to this, a twin-section provision, section 234 and 235, was incorporated in the Code as a stopgap measure to deal with insolvency, which involves companies with multi-national or cross-border trading and business across nations. The provision under section 234 confers upon the Central Government the right to enter into a bilateral agreement for application of the Code to assets or property lying outside India of the corporate debtor, including a personal guarantor of a corporate debtor, situated outside India through a reciprocal arrangement.[22] In addition, when there is dispute regarding assets situated out of India, then an application can be made to Adjudicating Authority to investigate the matter under section 235. If the Adjudicating Authority is satisfied, then it may issue a letter of request to a court or an authority of such country competent to deal with such request and with whom a reciprocal arrangement has been established pursuant to section 234 of the Code.[23]

22 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, § 234 (India).
"(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."

23 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, § 235 (India).
"(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 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."

The existing provisions in the Code, which are dealing with cross-border insolvency, offer certain logistical challenges. When we have different agreements with different countries, it will be difficult to know at any given point of time whether there is a bilateral agreement signed by the country in issue or not. It might happen that while dealing with a corporate debtor having assets in two different nations, the court might face a deadlock due to contrary provisions in two agreements which can cause an unnecessary delay that is not promoted by the Code. Since it is difficult to have treaties or agreements with all countries, therefore the process of getting the letter of request from the concerned adjudicating authority and the satisfaction of adjudicating authority and directing it to the court is also a burdensome process as the debtor's assets are located in a different jurisdiction.[24]

Furthermore, India's experience in matters of reciprocal agreements has not been encouraging because for recognition of foreign judgements and proceedings, India has section 13 and 44A of the Civil Procedure Code, 1908,[25] which deals with the execution of decrees passed by courts in the reciprocating territory. Reciprocating Territory means any country or territory outside India, which the Government of India has declared via official gazette to be a reciprocating territory.[26] If a certified copy of any decree of the reciprocating territory is filed in an Indian court, then the same be executed as a court in India had passed it. However, this does not work in India as every time, there is a delay which will create an immense problem when the issue revolves around insolvency. Time is the essence of this Code.[27]

Since the provisions related to bilateral treaties or agreements are not the best way to deal

24 *Id.*

25 The Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908, § 13 and § 44A (India).
"Section 13 - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except..."
*"Section 44A - Execution of decrees passed by Courts in reciprocating territory.-- (1) Where a certified copy of a decree of any of the superior Courts of [2] *** any reciprocating territory has been filed in a District Court, the decree may be executed in [3] [India] as if it had been passed by the District Court."*

26 The Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908, § 44A Explanation - 1 (India).
"Explanation 1.-- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and superior Courts, with reference to any such territory, means such Courts as may be specified in the said notification."

27 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, Preamble (India).
"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders..."

with cooperation between jurisdictions, therefore, there is a pertinent need for specific legislation. Moreover, the recent Indian insolvency cases signified why bilateral agreements are insufficient to handle the growing Indian market, where assets of companies are spread across various nations. Therefore, we need a comprehensive legal framework and rules to deal with cross-border issues, and a treaty cannot be a substitute for a multilateral instrument that allows cooperation between various sovereign states. The adoption of the Model Law will be a prelude to the future course of cooperation in insolvency cases and other types of cooperation that will happen. Foreign creditors will not be reluctant to invest in Indian entities as they will be assured of the return if things go the other way.[28]

Judicial Take to Safeguard the Interest of Indian Creditors

While it was expected that the Code would have a space for the law relating to the cross-border insolvency and thus its non-inclusion made the insolvency regime in India incomplete, the absence was majorly felt by the creditors who have their capital invested in companies that are confronted with cross-border insolvency issues because the current legislation requires a specific bilateral agreement[29] and non-existence of the same which gives the Judiciary discretion to render the judgement, causing delay and immense loss to such entities.

Recently, in the *Amtek Auto Limited* case,[30]an automobile part manufacturer company's assets were lying in Japan, Thailand, Singapore, the United Kingdom, and few other nations came under scrutiny. While in some of these countries, Amtek was either undergoing restructuration or receivers were appointed by the respective judicial authority. In India, however, creditors found themselves helpless because most of the value lay in these assets, which were part of various subsidiaries or group companies, and the creditors could not reach out to them. Besides, the foreign receivers and administrators were unwilling to cooperate as they were bound by their legislations and confidentiality agreement. The creditors were stranded as they could not incorporate any data in the Information memorandum due to a lack of a framework that deals with such clauses. Therefore, any information with regard

28 Ministry of Corporate Affairs, Report of the Insolvency Law Committee On Cross Border Insolvency, (2018).
"*Increasing foreign investment: Even though foreign creditors have a remedy under the Code presently, adoption of the Model Law will provide added avenues for recognition of foreign insolvency proceedings, foster cooperation and communication between domestic and foreign courts and insolvency professionals and so on...*"

29 *Supra* note 22.

30 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

to assets and their value was entirely hypothetical, which eventually caused immense loss to Indian lenders.[31]

Similarly, it is pertinent to note the case of *Videocon Industries*,[32] which involved investors and creditors of various sovereign nations, petroleum giants, and Indian Government Corporations.[33] Similar to *Amtek Auto,*[34] Indian creditors felt handicapped because of the absence of specific legislation dealing with cross-border insolvency.[35] Though, now the court has allowed the inclusion of Videocon's foreign diversified businesses in the Corporate Insolvency Resolution Process in India.[36] This again has triggered the debate of having standalone legislation else such absence of a framework to deal with multilateral insolvency will result in a significant loss in value of such companies.

It was with *Jet Airways (India) Private Limited*[37] that the judiciary had to step in to plug the gap caused due to the absence of a framework in cross-border insolvency. In India, when the company was not in operation and most of the aircraft were grounded, lenders decided to take over the management as they lost confidence in the erstwhile promoters of the company. In the meantime, in the Netherlands, where Jet Airways had its European hub, the company had defaulted to a number of its lenders.[38] An aircraft was grounded at the Schiphol Airport, Amsterdam, over non-payment of dues to a European Cargo firm, and a winding-up petition was filed in the Netherlands. NOORD – Holland District Court ordered an ex-parte winding-up order, and an administrator was appointed.[39] In the meantime, some trade creditors filed insolvency petition in India, and that is when the main lender –

31 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

32 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

33 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

34 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

35 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

36 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 12 February 2020.

37 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.

38 Introduction to Cross-Border Insolvency, Nishith Desai Associates, (last visited on Jun. 21, 2021) https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction -to-Cross-Border-Insolvency.pdf.

39 *Id.*

the State bank of India – also decided to file a petition.[40] In response to it, an intervention application was filed at the National Company Law Tribunal ("NCLT") on behalf of the Dutch Administrator to notify NCLT that there is already an order passed and to request NCLT to consider passing some suitable order for cooperation and dialogue between the Dutch Administrator and the Indian Resolution Professional ("RP"). However, NCLT observed that there was no provision and mechanism in the Code, at that moment, to recognise the judgment of an insolvency court of any Foreign Nation, especially when the company is registered in India. Thus, NCLT ordered that neither can they take this order on record nor the NOORD – Holland District Court have the appropriate jurisdiction, therefore the request for intervention was rejected by the NCLT. Further, the court directed the Indian RP to ignore and disregard the proceedings in the Netherlands and prohibit getting in touch or have any open cooperation or dialogue with the Dutch Administrator.[41]

An appeal was made in the National Company Law Appellate Tribunal ("NCLAT")[42]. The NCLAT understood the implications and not only stayed the order of prohibiting cooperation but also ordered Indian RP and the Dutch Administrator to coordinate and work out a mechanism for cooperation and an amicable settlement plan.[43] They worked in accordance with the Model Law to decide the way ahead along with the responsibilities of the stakeholders, where the main proceedings would be and also recognise the independence of each court. Everything was virtually operated in the shadow of the Model Law, and they came out with '*Cross-Border Insolvency Protocol*'[44] which all the party fairly agreed that the best solution would be to maintain the neutrality and sovereignty of the courts in India as well as the Netherlands, giving superiority to the domestic law, clearly agreeing that nothing will be done which is contrary to the public policy of both the nations and recognising the Indian proceedings as the 'centre of main interests' while the Dutch proceedings will be the 'non-main insolvency proceedings.' Moreover, it was also agreed that the costs arising in the Netherlands would be paid out of the corpus costs that are created in India, and that any asset sold out in the Netherlands would be accounted as a sale consideration and will not be utilised as a part of the overall distribution that would be done under Indian law. Not only

40 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.

41 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.

42 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 July 2019.

43 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 July 2019

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

that, even the fees of the Dutch Administrator was agreed to be paid out of this common corpus. In fact, to the extent, NCLAT set aside the judgement of NCLT through which it was dictated that the Dutch Administrator had no jurisdiction in India and consequently he was not permitted to take part in Jet Airways' Committee of Creditors meetings.[45]

Indian lawmakers were initially reluctant because they wanted the insolvency law to stand on its feet and proposed to incorporate the Model Law in the Code when they have the confidence that the Indian judges and the practitioners were prepared enough to be able to deal with cross-border insolvency, particularly those cases coming from advanced economies which already have cross-border insolvency legislation in place for many years. Though the concerns were legitimate, however as a growing economy Indian market is capable of coping with the Model Law as demonstrated by domestic insolvency legislation, where India has done exceptionally well. Further, these cases make out the perfect situation to accelerate the enactment of specific legislation.

The case of *Jet Airways*[46] showed that Indian stakeholders are sophisticated and mature enough to be able to play on the playground of cross-border insolvency. Now, it is not that India is not prepared, rather Indian professionals are at par with International professionals, Indian Lenders are exposed to the global market and conditions, Indian judges are capable, and with some capacity building in learnings of the international experience, India will thus be able to cope up with future challenges in the global market.

Though, courts have skimmed the provisions of the Model Law structure and have applied the same while deciding cross-border insolvency issues. However, *Jet Airways'* case neither as a protocol nor as a precedent came out as a substitute of the Model Law. India does need specific legislation because this as a precedent was successful in one case but may not work in another case.

India's Initiative to fill Global Model 'Holes'

The Law Commission has drafted a Report on Cross Border Insolvency in 2018 and put India on the road of success in cross-border insolvency regime,.[47] By adopting the Model Law, India will have various advantages, which will help India improve its economic condition

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

46 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.

47 Ministry of Corporate Affairs, Report of the Insolvency Law Committee On Cross Border Insolvency, (2018).

on the international level. To proceed with the same motivation, India has imbibed various learnings before adopting the Model Law. For India, adopting the Model Law should not just be a mere formality so as to improve its ranking in 'Ease of Doing Business'. However, its aim should be to sincerely solve disputes on insolvency and to fulfil the basic aim and purpose which the Model Law propagates. If we measure the success of the Model Law by measuring the number of countries adopting it, then we will miss the viewpoint of drafters to a great extent.

If we analyse the provisions of the countries who have adopted the Model Law, we can somewhere come to the conclusion that the countries have, to some extent, exploited the flexibility provided in the Model Law, which has defeated the harmonization and uniformity which was the objective of the Model Law.[48] To explain this contention, lets dive into the provisions of exclusions adopted by various countries. Countries like New Zealand, Romania, US etc, have excluded various financial institutions and insurance undertakings from their cross border insolvency laws.[49] By the exclusion of various financial institutions from the ambit of cross border insolvency laws, the matter or issues involving dispute regarding financial assets or disputes where these institutions can be party to it, would escape as these would not be covered under the ambit of model law. So, when we look down to the grassroot level, the very motive or reason of bringing countries at the same pedestrian to solve cross border insolvency issues is defeated.

But if we analyse 'Report of Insolvency Law Commission on Cross Border Insolvency', 2018, we see that India has recognised this problem and mentioned that exclusion and inclusion of entities will be done by Central Government based on its experience, thereby protecting its own interest and also keeping par with the aim and purpose of the Model Law.[50]

It is well understood that every country has its own laws to govern and maintain public peace and order. It has its own fundamental duty to protect the interest and rights of its citizen. In almost every country, the fundamental rights of the citizen are considered supreme and any law made in contravention of it is considered *void ab initio*. The drafters of the Model Law have also paid heed to it and in Article 6. The Model Law's public policy provision states that this should be invoked only if the foreign order in question was "*manifestly contrary to public policy*". The word 'manifestly' in general terms means that 'in a way that is clear

48 *Supra* note 14.

49 S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL The Model Law the Answer?*, Volume 12 Issue 3 Int. Ins. Rev., 199, 223 (2012).

50 *Supra* note 47.

or obvious to the mind'. But many countries have failed to recognise the importance of it and here comes the concept of exclusion of public policy, which is again detrimental to the aim and purpose of the Model Law. However, some countries like Japan have removed the word manifestly to increase the scope of the interpretation of word public policy.[51] These examples show how most of the countries though have adopted the Model Law but have somewhere down the line failed to live up to its expectation. Indian drafters of the Model Law have referred to this issue and has decided to keep 'manifestly' to uphold the idea of the Model Law. The list does not end here, there are other provisions also like the issue of foreign representatives and the power and access with the country in dispute, which various countries have restricted to safeguard their interest and thereby defeat model law purpose, but Indian drafters have taken into account these aspects and have worked on it to keep the basis of UNCITRAL model law.[52]

By analysing the deviation that various countries have made from the Model Law defeats the very object of it. According to Professor Fletcher, *"The proof of the Model Law is in the enactment. The crucial question is not the number of States which take a conscious decision to enact the law but the extent to which they do so, both individually and collectively"*[53]. Thus, according to him, what matters is not quantity but the quality of the Model Law adopted. Indian drafters, to some extent, have paid attention to keep the essence of the Model Law but have left the interpretation of certain provisions according to the experience that it will gain over a period of time.[54] For India, it is still a long road ahead. India should make sure that in the race of adopting the Model Law, instead of securing its rank in the competition, which would benefit it in the short run, it should focus on the quality in adopting the Model Law.

Conclusion

There is an imminent need for India to adopt the Model Law, particularly in light of various

51 *Id.* at 214.

52 *Supra* note 47.

53 Dr. Hamiisi Junior Nsubuga, *The call for harmonisation of cross-border insolvency laws to enable cross-border filing and litigation in the East African community*, Volume 30 Issue 12 Int. Co. & Comm. Law Rev. 659, 668 (2019).

54 *Supra* note 47.

cases like that of *Jet Airways*[55], *Amtek Auto Ltd.*[56], and *Videocon Industries*[57]. Adopting the Model Law would not only bring more certainty to the system but also generate trust in the foreign investors & creditors. This will foster the Indian economy and help India climb up in the 'Ease of Doing business'.

The concerns of lawmakers to enact provisions of the Model Law along with the Code were legitimate and proved to be propitious for India. However, if the nation is now not catered to with a comprehensive framework on cross-border insolvency, it can hinder the growing economy. Further, one should understand that the Law on cross-border insolvency would not change or intrude into the substantive Law of India, instead, it will only facilitate India with global recognition and boost its cooperation with other sovereigns.

For India, implementation of legislation on cross-border insolvency is not a thing of great difficulty and merely one that can be achieved through judicial cooperation between insolvency tribunals of India and foreign states. As judicial cooperation in such cases will entail virtual joint hearings, this will require the Indian Insolvency and Bankruptcy judicial system to build capacity to understand and work along with its foreign counterparts.

Besides, there ought to be a consensus between the lawmakers that the legislation on cross-border insolvency should remain a light touch regulation because such multilateral instruments should not intend to impose a large number of obligations on the foreign counterpart, rather, the foreign representatives should only be subject to their legislation and the rules governing a particular case. Beyond that, the jurisprudence should develop with the case laws as there will be a danger in over-regulating such legislation in the initial stage because the flexibility that the Model Law provides needs to be kept intact in the legislation adopted by India. To this end, the adoption of the Model Law should not be the yardstick for India to measure its success, because the real victory for India would only be the successful implementation of insolvency laws in solving the cross-border issues without any substantive condemnation.

55 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.

56 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

57 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.