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KEY ISSUES IN CROSS-BORDER INSOLVENCY

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Abstract In a world of globalization and rapidly increasing cross-border trade, this paper seeks to unpack the key issues in the bankruptcy of a company with asset linkages spread across the globe. Addressing these issues has become vital to the evolution of insolvency jurisprudence in India, on account of the recent notice issued by the Ministry of Corporate Affairs seeking comments on the draft chapter on cross-border insolvency sought to be introduced to the Code. In light of India's non-adoption of the UNCITRAL Model Law on Cross-Border Insolvency as of now, the Indian legal framework on this major issue has left much to be desired. This paper seeks to bridge the gap in clarity by addressing the basic principles of cross-border insolvency and mapping out what might happen when an insolvent entity has substantial assets overseas.

I. INTRODUCTION

Picture the scene: a major private Indian airline, *Woodpecker Airways* is struggling with its cash flow. Its creditors have lent it substantial amounts of money for fleet acquisition and increased competition in the aviation market has seen its market share drop substantially. Cash flows are dropping, but operational costs and financing costs for the recent fleet acquisition of brand-new Boeing 787 *Dreamliners* are rising.

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The staff haven't been paid in months and pilots are threatening to go on strike. Operational creditors have been asked to remain patient, with promises that their dues will be settled, but the catering and baggage handling costs remain unpaid, with default interest racking up on late payments.

Scheduled repayments of interest on debt haven't been paid and the creditors are demanding their dues. Woodpecker's besieged CEO is struggling to refinance the existing debt and secretly, he doesn't know how the airline will make it through the next month.

A meeting of Woodpecker's financial creditors looks ominous. With their loans *non-performing*, it's only a matter of time before *one* of them calls an *event of default*, triggering a *cross default* across all of its financing arrangements. Creditors anxiously assess whether they are *secured*; and if so, ponder *what* assets are secured and *where* they might be.

The sound of the ruffling of paper echoes around multiple financial districts as legal counsels in shiny glass plated offices assess whether their banks' loans are guaranteed and if so, by whom; and whether their last set of audited financials demonstrate that they will be good for the money.

And then, the *inevitable* happens. The airline goes bust. Flights are cancelled, planes are grounded; many at foreign airports and passengers are stranded.

It's not too difficult to see how this fictional set of circumstances can materialize for *any* business. How and *why* businesses fail in ever increasingly competitive markets, inevitably boils down to a squeezing of cash flow. Those rosy projections of revenue in the business model and the excel sheets just didn't work out as planned; and the operational and financing costs turned out to be more extensive than first thought.

Effective insolvency law is designed to deal with these types of events. While it might be catastrophic for the individual business, from a public policy perspective, the key thing is the efficient and timely *recycling* of capital, unlocking value for distribution amongst the businesses' creditors.

Historically, insolvency law was very much *intra-jurisdiction* focused, drafted at a time when most businesses and commercial transactions, operated within their own borders. *Globalisation* and increased cross-border trade has changed the fabric of business, with most business relationships having multiple links crossing borders and it is in this context that the implications of insolvency need to be put to the test, giving those affected, effective and timely legal recourse in a streamlined and logical process.

So how are cross-border insolvency issues dealt with in the context of Indian businesses? To understand the complexities involved, we first need to understand the role of the Indian entity in the unfolding insolvency. Is it the insolvent entity itself, with assets and creditors located in multiple jurisdictions? Or is it a *creditor* to a foreign business with assets located in multiple jurisdictions and potentially in India? If it is a creditor, is it a *financial creditor* or is it an *operational creditor*, owed money for goods or services provided? An understanding of the problem is critical in understanding the options available and the chance of recovering money's owed.

Until recently, cross border insolvency had no clear legal framework in India and the Ministry of Corporate Affairs, on June 20, 2018 issued a public notice ('the *Notification*') inviting comments and suggestions on the draft chapter on cross border insolvency it plans to introduce under the Insolvency & Bankruptcy Code, 2016 ('the *Code*'), based on the United Nations Commission on International Trade Law Model Law on Cross Border Insolvency ('the *UNCITRAL Model Law*').[1]

In the light of these new developments, this paper seeks to address the basic principles of cross-border insolvency and map out what might happen when an insolvent entity has substantial assets overseas.

II. CROSS-BORDER INSOLVENCY SCENARIOS

Insolvency is essentially the inability to pay financial debt owed. In case of a corporate entity having transnational operations, insolvency type scenarios might be triggered by a number of circumstances, and in particular, in the Indian context:

(a) where an Indian entity has domestic and foreign creditors, holding assets in India and overseas;

(b) where an Indian entity has foreign subsidiaries, and guarantees the financial debt of its overseas subsidiaries (and potentially has granted security over its shares to foreign creditors); and

(c) where a foreign entity has foreign creditors, holding assets across a number of jurisdictions, including India.

The issues stemming out of these scenarios are complex and in particular, where a parent company guarantees the debt of a number of overseas subsidiaries or other group companies, it creates contingent liabilities to discharge, in the

1 Insolvency Section File No. 30/27/2018, Public Notice, Ministry of Corporate Affairs, Government of India (June 20, 2018), http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf.

event that one of its subsidiaries or group companies cannot discharge their financial obligations.

If a number of its subsidiaries or group entities fail, then the call on the contingent liability created under the guarantees may be so large, that the parent guarantor can no longer meet its obligations.

In the context of our fictional scenario painted out in the introduction to this paper, in the event that *Woodpecker Airways* can no longer meet its financial obligations owed to creditors, then, an event of default called by a particular creditor under one loan agreement, will, more than likely, cross default other loan agreements with other lenders, and should any *financial creditor* (or an *operational creditor*) file for insolvency, then, if admissible, under the Code, it will essentially create a *moratorium* on all claims for debt against the insolvent entity (whether already existing or yet to be filed).[2]

Let's say, for example, that one of *Woodpecker Airways'* financial creditors files an application for insolvency against the airline. Under the Code, and during the *moratorium period*, the insolvency resolution professional will essentially have to figure our *what* the airlines' assets are and also, *where* they are; and those planes on the tarmac of foreign airports might pose a bit of a jurisdictional problem.

But will foreign courts acknowledge and assist insolvency proceedings brought under the Code and will that take precedence over contracts between foreign creditors and the Indian entity governed by foreign law? What will happen if, say, foreign lenders, providing financing for *Woodpecker's* aircraft under *English law* financing documents commence *parallel* proceedings to enforce their security over the aircraft before the English courts?

Intuition might suggest two things: *firstly*, that a foreign court should grant the insolvency resolution professional appointed under the Code, assistance in any application to prevent the sale of assets located in that foreign jurisdiction, belonging to the Indian entity; and *secondly*, stay proceedings brought by foreign creditors in their courts for amounts due under foreign law contracts, which should, theoretically, be subject to the *moratorium* period under the Code.

Before we examine whether our intuition is correct, we should point out that India has *not* adopted the UNCITRAL Model Law and Section 234 of the Code, simply grants the Indian government with the flexibility to enter into agreements with other countries (and presumably, multilateral treaties) in the context of applying the Code to assets located outside of India (and likewise, afford

2 The Code, § 14.

recognition and grant rights to foreign representatives managing foreign insolvency proceedings before the Indian courts).

III. THE THEORY

Cross border insolvency, in essence, can be distilled down to three key questions: *which* law should be applied; *who* has jurisdiction to administer the insolvency process; and *how* are judgments asserting control over assets enforced?

The treatment of financially distressed debtors, with assets across jurisdictions has two main theoretical approaches, and a third, more practical model. Firstly, there is the *territorial* approach, which broadly sets out that each jurisdiction applies its own laws over assets located in that jurisdiction, to the exclusion of other jurisdictions. Secondly, there is the *universalist* approach, with a single administrator applying a single global regime over assets, across borders. Thirdly, there is the *hybrid* approach, where jurisdictions try and work out the most relevant center for conducting the proceedings, with co-operation from other jurisdictions in relation to assets that may be located there.

Cross border insolvency has a long history before common law courts. In *Solomons* v. *Ross*,[3] a Dutch trading firm was declared bankrupt and an English creditor brought proceedings before the English court to attach certain sums owing to the Dutch firm. The court held that the bankruptcy proceedings had vested all the assets of the Dutch firm (including monies owed to it by English debtors) in the Dutch assignees and the English creditor had to surrender its attachment and prove it before the Dutch courts. Further, in *Galbraith* v. *Grimshaw*,[4] an English court held that there should be only *one* universal process for the distribution of a bankrupt's property, and where that process was pending elsewhere, the English courts should not let actions within its jurisdiction interfere with that process.

IV. THE UNCITRAL MODEL LAW

The UNCITRAL Model Law attempts to deal with the complexities outlined above through rationalising the *process* in dealing with cross-border insolvency, but it should not be mistaken for creating a *substantive*, unified insolvency law.

It does this by providing a framework for *access* to insolvency appointed professionals in the courts of other jurisdictions, permitting them to participate or commence proceedings in that particular jurisdiction, though in the Indian context, this may need to be modified, on the basis of *locus standi* in the Indian

3 (1764) 1 Hy Bl 131n: 126 ER 79.
4 1910 AC 508.

courts, requiring foreign insolvency professionals to appoint an Indian insolvency professional to represent them in Indian proceedings.

It also lays out principles for *where* insolvency proceedings should be initiated. The UNCTRAL Model Law sets out a principle for identifying the most appropriate jurisdiction for commencing insolvency proceedings ('the *main proceeding*') and ensures that the resolution professionals appointed in that jurisdiction are granted recognition and access in proceedings in *other* jurisdictions, where the insolvent entity may have assets ('the *non-main proceeding*').[5]

In essence, the UNCITRAL Model Law sets out the principle of *center of main interests*[6] (commonly referred to as 'COMI') in deciding *where* the *main proceeding* should be commenced. Interestingly, COMI is not given a definition in the UNCITRAL Model Law. It broadly implies that it is the seat of a corporate entity's major stakes, whether that is in terms of control or the location of its assets and its significant operations. COMI is determined by factors, both objective and ascertainable by third parties, especially creditors and potential creditors.[7]

Essentially, the *command* and *control* test is the commonly applied test to determine the COMI of an entity.[8] There is a presumption in favour of the place of its registered office, which normally corresponds to the head office of the company[9] and this presumption has worked well where there is no serious controversy.[10] In effect, the registered office, or the place of incorporation serves as proof of *existence* of a corporate entity.

The registered office, however, does not otherwise have special evidentiary value and does not shift the burden of proof away from the foreign representatives seeking recognition as a main proceeding.[11] Courts generally take into account other factors, such as the location of the debtor's *headquarters*; the location of those who actually *manage* the debtor (which could possibly be the headquarters of a holding company); the location of the debtor's *primary assets*; the location of the majority of the debtor's *creditors* or of a majority of the creditors

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5 The UNCITRAL Model Law, Ch. II.

6 The UNCITRAL Model Law, Art. 17(2)(a): "*The foreign proceeding shall be recognised:*
(*a*) *As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests*".

7 *Stanford International Bank Ltd., In re*, 2011 Ch 33 : (2010) 3 WLR 941 : 2010 Bus LR 1270 (at ¶56).

8 Ian F. Fletcher, Insolvency in Private International Law, 390 (2d. ed., 2005).

9 The UNCITRAL Model Law, Art. 16(3); Miguel Virgos & Etienne Schmit, Report on the Convention on Insolvency Proceedings, EU Council Document 6500/96 DRS 8 (CFC), (1996).

10 H.R. Rep. No. 31, 109th Congress, 1st Session, at ¶114.

11 Tri-Continental Exchange Ltd., In re, (2006) 349 BR 627, 635.

who would be affected by the case; and the jurisdiction whose law would apply to most disputes.[12]

In order to *rebut* the presumption of the COMI under Article 16 of the UNCITRAL Model Law, one would be required to prove the involvement of agents or servants acting for the company go beyond commercial activities, and the sorts of functions that one would expect the head office to discharge.[13]

In not so obvious cases, the courts have held that the COMI would be situated where inquiries and negotiations involving third parties were dealt with and upon where demands for payment and invoices from third parties would be addressed.[14]

In the Indian context, the initiation of proceedings against an Indian corporate entity when the COMI lies in India itself makes such proceedings the '*foreign main proceedings*'[15] (under the UNCITRAL Model Law) for a foreign creditor. This implies that the provisions of the Code would take immediate effect. Recognition of the proceedings as a *main proceeding* will result in automatic relief such as a *stay* or *moratorium* on domestic proceedings in relation to the debtor, and the Indian insolvency professional would, presumably be afforded rights as a foreign representative of a foreign main proceeding before the courts of contracting States to the UNCITRAL Model Law, in any application to stay parallel main proceedings, or otherwise, to commence secondary proceedings in relation to the Indian debtor's assets which may be located overseas.

As discussed, however, in the case of the COMI of an Indian debtor falling outside India, *foreign main proceedings* shall ensue in that jurisdiction, and the Code, having no extraterritorial effect as of now, shall cease to apply. In such circumstances, relief available to Indian creditors in that jurisdiction is subject to the laws of where the foreign main proceedings are initiated and the provision of the Code, shall be applicable, only in so far as it is consistent with or otherwise, at the discretion of the court in whose jurisdiction the foreign main proceedings are commenced.

It should be stressed that the UNCITRAL Model Law does not import the *substantive* law of the foreign system into the insolvency system of the enacting state, nor does it apply the relief that would be available under the enacting state in any foreign proceedings. It does, however, grant recognition and assistance to foreign representatives of an insolvency resolution process in applying for interim relief and automatic stays, where available in that particular jurisdiction where such relief is sought.

[12] SphinX, Ltd., In re, (2007) 371 BR 10 (SDNY 2007).

[13] Mackellar v. Griffin, 2014 EWHC 2644 (Ch).

[14] Northsea Base Investment Ltd., In re, 2015 EWHC 121 (Ch).

[15] The UNCITRAL Model Law, Art. 2(b).

V. THE CURRENT LEGAL FRAMEWORK IN INDIA

Sections 234 and 235 of the Code deal with cross border insolvency in a *cursory* manner, empowering the government to make treaties and further empowering the Adjudicating Authority under the Code, to issue a letter of request to a court in a country, with which an agreement has been entered into, to deal with the assets in a specified manner (presumably, in accordance with the provisions of the Code). Theoretically, this should also provide a framework for *foreign representatives* to apply to the Indian courts to deal with assets in India in a manner consistent with the insolvency laws of the jurisdiction where *foreign main proceedings* have been initiated, in relation to a debtor, with assets in India.

For foreign proceedings to be recognized in India, the process set out under the Civil Procedure Code, 1908, will be applicable, together with English common law principles, though it should be noted that it is not broad enough to cover some insolvency related proceedings. Likewise, for Indian proceedings to be recognized abroad, the procedural rules of that foreign jurisdiction will apply. Those countries that have adopted the UNCITRAL Model Law (which include most industrialized countries) are required to provide recognition, assistance, cooperation, and appropriate relief in relation to insolvency proceedings commenced in India, *except* where that country has otherwise required reciprocity.

As of June 2018, 44 states have adopted the UNCITRAL Model Law, including the United States, the United Kingdom, and Singapore. Note, however, that certain countries that have adopted it may have made reservations to it, and may require *reciprocity*.[16]

Clearly, while the Code permits the government to enter into treaties to implement the UNCITRAL Model Law, negotiating up to 200 separate bilateral treaties in a relatively short space of time is just not practical, and it would further complicate matters, with the Indian courts having to take into account the nuances of each treaty in any cross border insolvency matter. Surely, the simplest solution would be for India to simply sign and ratify the UNCITRAL Model Law and then incorporate that into the Code.

VI. WHAT HAPPENS WHERE AN INSOLVENT ENTITY HAS SUBSTANTIAL ASSETS OVERSEAS?

Insolvent entities (or those which are being restructured) might have substantial assets outside of its COMI, which may be directly held (for example, the entity itself might be the legal registered owner of *property*, or in the case of *Woodpecker Airways*, *aircraft* parked at the gates of foreign airports).

[16] Keith D. Yamauchi, *Should Reciprocity be a Part of the UNCITRAL Model Cross Border Insolvency Law?*, 16 International Insolvency Review 145-179 (2007).

It may also have *shares* in foreign subsidiaries or other group companies, and these *share certificates*, are essentially moveable property (though they are likely to be pledged to any lender of the subsidiary or the group company as security for any loan).

However, it needs to be underlined, that the *assets* of any *foreign subsidiary* or *group company* are *not* the assets of the insolvent parent company (*other* than the *shares* held by it in any such foreign subsidiary or group company). This is a cardinal principle of limited liability and the courts will only lift the veil on the ring fencing of liabilities in exceptional circumstances.

Broadly, there are *three* situations where an Indian company might be impacted in a cross-border insolvency scenario;[17]

(a) *firstly*, when a foreign creditor wishes to initiate or be a part of any insolvency proceedings against an Indian company, initiated under the Code, in India;

(b) *secondly*, where the creditors of an Indian company wish to enforce rights over the assets of the Indian company which are located overseas; and

(c) *thirdly*, when insolvency proceedings are initiated against a debtor in more than one jurisdiction (and that debtor has assets in India).

In the first circumstance, under the provisions of the Code, foreign creditors may already apply to the *Adjudicating Authority* for either the initiation of insolvency proceedings against the Indian entity *or* to be a part of the ongoing proceedings, in the same manner as domestic creditors, with the same rights. The Code, by virtue of including a "*person resident outside India*" in the definition of '*persons*',[18] rightly underlines the principle of *neutrality* towards the identity of the corporate debtor's creditors.

However, the Code had fallen short in addressing the other two situations, wherein there is neither a provision for *automatic attachment* over assets situated overseas *nor* for parallel simultaneous proceedings against the corporate debtor in more than one jurisdiction.

In non UNCITRAL Model Law contracting States, the principles of private international law essentially govern cross-border insolvency, and a formal application will need to be made to attach those assets in the court of the relevant foreign jurisdiction where the corporate debtor may have assets.

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[17] Aparna Ravi, *Filling in the Gaps in the Insolvency and Bankruptcy Code — Cross Border Insolvency*, IndiaCorpLaw (May 17, 2016), https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html.

[18] The Code, § 3(23)(g).

In UNCITRAL Model Law contracting States (and those contracting states that accept applications from insolvency professionals in non-contracting States), generally, co-operation, assistance and recognition of foreign law proceedings will be afforded.

It's perhaps pertinent to now turn to the question of how other jurisdictions approach the problem of *locus standi* in the context of foreign insolvency proceedings and orders from foreign courts or tribunals?

The United Kingdom, for example, although it does not recognize India as a '*relevant country*' under the provisions of Section 426 of the Insolvency Act of 1986,[19] it does, however, provide an *insolvency professional* the right to approach the English Courts to either request *recognition* of insolvency proceedings under which it has been appointed, so as to ensure that assets located in the UK become part of the Indian insolvency proceedings, or, otherwise, be a part of insolvency proceedings initiated by a creditor in the UK.

But what about contracts between an Indian insolvent entity and foreign creditors, which are governed by English law? Will those foreign creditors be subject to (and bound by) the Code in the event that an insolvency resolution process is triggered in India against an Indian debtor? Will those foreign creditors need to prove their debts through the process in India and does the *moratorium* under the Code apply to parallel proceedings by foreign creditors before foreign courts, seeking enforcement of any local security interests?

There is a long-standing principle of English law that a debt governed by English law cannot be discharged by a foreign insolvency proceeding, unless that creditor submits to those foreign proceedings, derived from the decision by the English Court of Appeal in *Antony Gibbs and Sons* v. *La Société Industrielle et Commerciale des Métaux.*[20]

The so-called *Gibbs Rule* was recently put to test by English courts in *Bakhshiyeva* v. *Sberbank of Russia & Ors.*[21] In this case, the court considered an application by a foreign representative to the English court on behalf of the International Bank of Azerbaijan ('the *Debtor*') for a permanent stay on a creditors' enforcement of claims in England under English law contracts, contrary to the foreign insolvency proceeding, to which the creditors of the Debtor were *purportedly* bound.

[19] The Insolvency Act, 1986, § 426 stipulates an obligation on part of the British Courts to assist the foreign representatives from relevant countries in the insolvency proceedings involving attachment of assets situated in their jurisdiction.

[20] (1890) 25 QBD 399.

[21] 2018 Bus LR 1270 : 2018 EWHC 59 (Ch) ('*Sberbank*').

In this case, the foreign insolvency proceedings had been initiated in Azerbaijan against the Debtor and a restructuring plan had been agreed by nearly all of its creditors ('the *Restructuring Plan*'), which had been approved by the Azeri courts ('the *Approving Order*') and the question arose as to whether they should be recognised in England under the Cross Border Insolvency Regulations, 2006 ('the *CBIR*'), which broadly, implements the UNCITRAL Model Law.

The judgment is quite an interesting one, because there are essentially three issues at stake: *firstly*, whether a moratorium can be extended *indefinitely* (when it appears that the *moratorium period* under local law seems to be on the brink of expiry); *secondly,* whether creditors with rights under foreign law documents, who did not participate or agree to the restructuring plan are bound by it; and *thirdly*, whether the *Gibbs Rule* is still good law.

Turning to the brief facts of the case, *Sberbank* had lent USD 20 million to the Debtor, pursuant to English law financing documents and another creditor, Frankin Templeton, was the beneficial owner of USD 500 million of notes, issued by the Debtor and also governed by English law (*Sberbank* and Frankin Templeton together, being 'the *Respondents*').

The Respondents did not participate in the Restructuring Plan and did not consent to it. At first instance, the English court granted the representative of the Debtor the relief sought, imposing a moratorium, preventing creditors in general, and the Respondents in particular, from commencing or continuing any action against the Debtor.

The Respondents appealed the decision, arguing that the foreign restructuring proceedings under Azeri law came to an end at the end of January 2018 and further, it did not bind them, relying on the *Gibbs Rule.*

It was cited in the judgment that many English law insolvency academics now consider the Gibbs Rule as an *anachronism*, with some going so far as to say that the "*Gibbs doctrine belongs to an age of Anglocentric reasoning which should be confined to history*".[22] It was also pointed out in the proceedings that in *Pacific Andes Resource Development Ltd., In re*,[23] the Singapore High Court chose not to be bound by the Gibbs Rule, finding that:

> "*In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business,*

[22] Sberbank, 49.
[23] 2016 SGHC 210 at 48.

> *it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law*".

The *Gibbs Rule* is not doubt problematic: on the one hand, it does not recognise foreign insolvency or restructuring proceedings taking precedence over an English law debt; yet on the other hand, the English courts generally expect a foreign court to recognise its *own* judgments in relation to a restructuring in England, over and above foreign creditor's rights under a foreign law loan agreement. This appears to be a *paradox*.

On the question whether the *Gibbs Rule* had been *eroded* by the adoption of the UNCITRAL Model Law (incorporated under the CBIR), some academics have pointed out that:

> *"In situations where a restructuring is on foot in the foreign jurisdiction, the foreign representative can seek recognition in England pursuant to Article 15 of the [Model Law]. (One is obviously dealing with a situation where the foreign representative does not wish to proceed with a parallel scheme of arrangement in England and creditors have not sought to invoke the English court's insolvency jurisdiction.) Provided the foreign representative was appointed in foreign main proceedings, i.e. where the debtor has the centre of its main interests, the mandatory consequences of recognition include, under Article 20(1), the staying of both creditor actions and executions against the debtor's assets ...*"

Furthermore, the effect of this for foreign creditors who do not agree to any restructuring plan initiated in the debtor's COMI should become obvious:

> *"Hence the foreign representative can stymie a hold-out creditor who might be minded to ignore the foreign restructuring and proceed instead to bring an action or to seek to execute in England, relying upon a debt that arose under an English contract. By applying for a stay the foreign representative may not have to deal, at least not immediately, with the substantive question of whether the English debt will ultimately be discharged by the foreign proceedings.*
>
> *However, the application of Article 20 in respect of a foreign restructuring is not wholly free from complexity. The reference in Article 20(2)(a) to 'as if' a winding-up order had been made*

> *raises some uncertainty. For there is, of course, no discharge in a winding up.*
>
> *Thus one may ask: what will happen in England in respect of the stay once the foreign restructuring plan has been approved, the corporation resumes trading outside bankruptcy protection and the foreign proceedings are formally closed by the foreign court?"*

Nevertheless, pursuant to the definitions of a *foreign proceeding*[24] and a *foreign representative*[25] under Article 17(1) of Schedule 1 to the CBIR, the court must recognise a foreign insolvency proceeding if:

(a) The foreign insolvency proceeding constitutes a "*foreign proceeding*" as defined by Article 2(i) of Schedule 1 to the CBIR;

(b) The applicant is a "*foreign representative*" within Article 2(j) of Schedule 1 to the CBIR; and

(c) The application satisfies the evidential requirements set out in Article 15 of Schedule 1 to the CBIR.

Where a foreign *liquidation* is recognised by the English court as a *foreign main proceeding*, under the CBIR, then the debtor benefits from an *automatic stay* in England.[26] However, the situation is slightly different in the context of a foreign *restructuring* where an *administration moratorium* is granted.

In considering a similar case, based on similar facts to the *Sberbank* case, the English court, in *BTA Bank JSC, In re*,[27] granted a stay order for two principle reasons:

> *"first, the relief is appropriate because it enables the English court to cooperate with the financial court in Almaty City in subjecting the bank's assets and claims to a single regime for the benefit of the general body of claimants. Secondly, I consider the relief appropriate because there plainly should not be*

[24] CBIR, Art. 2(i), Sch. 1 defines a *foreign proceeding* as:
"...a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."

[25] CBIR, Art. 2(j), Sch. 1 defines a *foreign representative* as:
"...a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[26] CBIR, Art. 21(1), Sch. 1.

[27] 2012 EWHC 4457 (Ch) ('*BTA Bank*').

> *an unseemly scramble for English assets by English claimants to the possible prejudice of the general body of claimants, but there should be an ordered approach to such English claims as might survive the Kazakh insolvency process*".[28]

Notwithstanding the decision in *Re BTA Bank JSC*, the court in the *Sberbank* case, held that the UNCITRAL Model Law and the CBIR does not empower an English court to vary, or discharge rights granted under English law, or otherwise, essentially conform the rights of creditors under English law, with the rights that they have under foreign law (and have otherwise, not consented to).

What appears to be a critical emphasis in the judgment is the distinction between *insolvency* (and the distribution of assets) and *restructuring* (and the variation or removal of rights). Although they are both *collective* proceedings (involving the debtor's creditors), the first process relates to the removal of assets from the grasp of a single (or class of) creditor in a particular jurisdiction (for the collective benefit of the creditors as a whole), while the second process relates to the denial of contractual rights, if that creditor has not consented to a restructuring plan.

The *Sberbank* judgment further seems to underline that the English courts will not apply foreign law, or apply English law in such a manner that replicates or achieves the intended relief that may be available under foreign law, if such a result could not be achieved under English law.

So, to what extent does the Code and the proposed incorporation of the UNCITRAL Model Law address the *lacuna* of the *Gibbs Rule* and what, in the context of the *Sberbank* judgment, might happen if an Indian debtor undergoing the corporate insolvency resolution process in India under the Code had foreign creditors pursuant to English law financing documents?

In these circumstances, would an English court admit the insolvency resolution professional's application as a *foreign representative* to stay any action by those creditors until the moratorium period had expired under the Code? Can it already do this by virtue of the CBIR incorporating the UNCITRAL Model Law, *without* further legislative action required in India, adopting the UNCITRAL Model Law as part of the Code?

In the absence of any *reservation* made by the United Kingdom in relation to *reciprocity* for its insolvency representatives in India, granting it rights under the UNCITRAL Model Law, it is reasonable to conclude that the answer to that question would be *yes*.

[28] BTA Bank, 13.

Secondly, would the English court reject any application for a *permanent* stay or moratorium made by the Indian *foreign representative* in connection with foreign creditor's rights under English law financing documents and the Indian debtor's assets located in the United Kingdom?

What we can take away from the *Sberbank* judgment is that an application for *permanent* relief that goes *beyond* the moratorium period of the restructuring process in India, will likely be struck out by an English court. But that's a different conclusion from *temporary* relief, preventing creditors from asserting their rights under English law documents against the Indian debtor in the UK during the *moratorium period* under the Code in India; and such temporary relief is likely to be granted by an English court.

The Code enables the Adjudicating Authority to send a *Letter of Request* to an appropriate Court of the country with which a bilateral treaty has been entered into under Section 234, for recognition of proceedings, though theoretically, such a request is still subject to the discretion of the English court and the application of the Gibbs Rule, notwithstanding the provisions of the UNCITRAL Model Law and the incorporation of it under English law through the CBIR.

It should be noted, in this context, that the Azeri law has been amended to extend the *moratorium* period, potentially, indefinitely, and this raises the question to what extent any temporary relief granted in the English courts is necessarily required to be extended, until the *moratorium* allowing the restructuring, comes to a close. It remains to be seen how that question will be dealt with, and no doubt, the foreign representative of the Azeri bank will appeal the decision in *Sberbank* on this particular ground, amongst, potentially others.

VII. THE WAY FORWARD

The Notification, setting out the draft chapter on cross-border insolvency "(essentially adopting the UNCITRAL Model Law)" is to be welcomed, though it is assumed that it paves the way for India's accession to the UNCITRAL Model Law, rather than the laborious alternative of having to enter into bilateral arrangements with other jurisdictions.

However, as the complexity of the foregoing discussion should highlight, simply *adopting* the cross-border insolvency regime should not be mistaken to mean that the provisions of the Code will be imported, or its *intent* applied in *foreign* jurisdictions. What should be clear, if anything, is that the *Gibbs Rule* remains good law and foreign creditors will retain their rights under English law financing agreements, notwithstanding an Indian restructuring, assuming of course, that they have not participated in the restructuring or consented to the restructuring plan. Further, it is highly unlikely that a *permanent* stay on proceedings before the English courts will be granted to a foreign representative of an Indian debtor in the context of a restructuring that has not been implemented within any time bound requirement.

VIII. CONCLUSION

This paper should highlight that cross border insolvency raises a number of complex issues, which essentially, can be simplified by asking two concrete and related questions. *Where* is the center of control, or main interest of the insolvent entity and *where* are its assets located? The answer to the first question should determine where *primary* insolvency proceedings are brought; and the answer to the second question relates to where *secondary foreign* proceedings are brought.

Matters of cross-border insolvency should be regulated purely from a *procedural* perspective and not on *substantive* matters. Although there may be broad consensus, it would be impractical to suggest a global definition of insolvency; and for that matter; a globally acceptable process in terms of its resolution and the distribution of value between creditors. Each jurisdiction will have its own nuances and therefore, it is surely logical to embrace the idea of a *center of main interest* in determining primary and secondary proceedings.

In relation to *secondary proceedings*, potentially across multiple jurisdictions, depending on where the insolvent entity may have assets, the admissibility test *should* depend upon the recognition afforded to the appointment of any insolvency professional pursuant to insolvency type legislation, acting in the interests of all of the creditors of the insolvent entity (and not just a narrow class of them).

We began this paper with a fictional analogy and perhaps we track full circle to reflect on what we've learned during this discussion, and illustrate the broader point that legal questions have very practical consequences.

Those Boeing 787 *Dreamliners* belonging to *Woodpecker Airways* on the tarmac at Heathrow Airport raised a conundrum. Will *Woodpecker* be restructured or will it be liquidated? Were those *Dreamliners* financed by foreign lenders, pursuant to English law financing documents and are they secured by English law security documents? Will those foreign creditors participate in any restructuring plan in India?

If not, will a foreign representative appointed pursuant to the Code, be likely to win a moratorium against the claims of foreign creditors before the English courts in relation to *Woodpecker's* planes on the tarmac at Heathrow? The answers, no doubt, will to a certain extent, depend on the appeal in the *Sberbank* case.

IX. DISCLAIMER

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