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"CROSS BORDER INSOLVENCY REGIME IN INDIA: A CRITICAL ANALYSIS."

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I. INTRODUCTION:

"The introduction of the Insolvency and bankruptcy code in the year 2016 was a paradigm shift from then existing deficient legislations to a new era of comprehensive and efficient legislation, which attempted to set out rules concerning insolvency regime in sufficient details to simplify the understanding of the framework of the Insolvency and Bankruptcy laws. Essentially, the code aims to offer a ***"time-bound mechanism for resolution of insolvency, wherever possible"***[1] *to protect the interest of the creditors.*

However, recent instances[2]*, specifically concerning the issue of cross border insolvency illustrates how the IBC as a mechanism for resolution of entities* ***"wherever possible"*** *has turned out to be a futile step when it comes to recognizing the rights of the creditors across international borders. This research paper aims at critically analysing the current legal regime that deals with adjudication of Cross-Border cases and at the same time, it makes an attempt to put forward possible solutions for the purpose of protecting the interest of creditors in international insolvency cases."*

[1] The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India Oct-Dec 2016, Insolvency and Bankruptcy Board of India. https://ibbi.gov.in/uploads/publication/IBBI_Newsletter_Web.pdf (last visited December 20, 2019).

[2] The NCLAT in the case of *Usha Holdings v. Francorp Advisors Pvt. Ltd [*Company Appeal (AT) (Insolvency) No. 44 of 2018] looked into the question of the Adjudicating Authority's power to look into the legality of a foreign judgement. In the recent case of Jet Airways(India) Ltd.(Offshore Regional Hub/office), Holland V. State Bank of India & Anr., the NCLAT ordered the Resolution Practitioner and the Dutch Trustee to enter into an agreement for the purpose collating the claim of offshore creditors and to gain the control over the assets of Jet Airways located in Dutch's jurisdiction.

II. CROSS BORDER INSOLVENCY AND THE ISSUES INVOLVED:

Cross-Border insolvency, or International Insolvency, as it is alternatively called, refers to an incident of insolvency involving a foreign element[3]. It is a class of insolvency 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 proceedings are taking place. To analyse the existing cross-border insolvency regime in the Country and across various nations, it is first necessary to put some light on the fundamental issues related to the subject.

The issues can be recognised in the following points:

1. Should the Resolution Professional or liquidator appointed in one country be allowed to take control over the assets of the debtor lying in another jurisdiction?
2. Should there be a single Resolution Professional or liquidator, or should there be one for each jurisdiction where the Debtor has his assets?
3. Should there be a single proceeding for the purpose of insolvency/bankruptcy or separate proceedings should be allowed to take place in multiple jurisdictions?
4. In instances where a branch of a Company located in a country becomes insolvent, while the Company as a whole is solvent, should the Creditors be allowed to start the insolvency proceedings?[4]

In order to achieve a sound legal system that governs cross-border insolvency, it is essential that all the above issues should be specifically answered because they form the very basis of every cross-border insolvency problem.

III. PRINCIPLES OF PRIVATE INTERNATIONAL LAW AND INSOLVENCY:

One of the key features of every insolvency proceedings is the imposition of a moratorium period and giving the Insolvency Resolution Practitioner, the control of Debtor's assets. However, this key feature becomes complex in case of Cross-border insolvency. While the Adjudicating Authority has jurisdiction over the assets of the Debtor in India, the issue arises when it comes to imposing moratorium period and transferring control concerning assets located in a foreign jurisdiction. As a result of this, disputes arise, leading to questions such

[3] HAMISH ANDERSON, THE FRAMEWORK OF CORPORATE INSOLVENCY LAW 272 (Oxford University Press, New York, 1st ed. 2017).
[4] NL Mitra Committee, Advisory Group on Bankruptcy Laws, 40 (May 9, 2001).

as Whether the Indian Courts have jurisdiction to impose a moratorium in a Foreign Country? Which system of law should be chosen?[5] All these disputes arise due to the existence of a foreign element[6] in the adjudication process. Conflict of law, also known as Private International law, is the branch of law that deals with the above-mentioned disputes and it tends to provide a solution to such disputes by application of 'Principles of Private International Law'[7]. This part of the paper deals with the application of various Principles of Private International Law in Cross-Border Insolvency. There exist two classical theories to deal with the subject of Cross Border insolvency in Conflict of Laws.

The First theory is Territorialism, which founded on the idea of 'state sovereignty'. It broadly sets out that each sovereign state shall apply its insolvency laws to administer the assets located in its jurisdiction. It excludes other jurisdictions, and there is no recognition of foreign proceedings. This theory sets out the rule that to access the assets in a foreign jurisdiction, a separate insolvency proceeding is required in each country where the insolvent debtor operates[8]. In a global economy, where assets of an Insolvent Debtor may be located in multiple jurisdictions, this approach is, prima facie, inefficient because it will delay the process. Furthermore, it is possible that even after liquidation of the Debtor's assets in a Sovereign State, the creditors could not recover debt money and the liquidation of assets in a foreign jurisdiction is necessary to fulfil their claims.

The fact that moratorium is declared only over the assets located in sovereign jurisdiction, allows the Debtor to sell the assets located in a foreign jurisdiction before creditors file a separate suit in that jurisdiction and thus debarring the Creditors to get access of the assets. Even if this is not the case, filing a new suit in a foreign jurisdiction to get access over the assets of the debtor, is in itself a lengthy and tiring procedure, which only delays the creditors right to recover their money. Thus, by restricting the application of law only to the assets

[5] ATUL M SETALVAD, CONFLICT OF LAWS 7 (Lexis Nexis Butters Worth, New Delhi, 1st ed. 2007).
[6] Foreign element in this context means a relevant fact to issues involved in the proceedings which have a geographical or other connection with a territory unit other than the territorial unit where the court is dealing with the proceedings.
[7] ATUL M SETALVAD, CONFLICT OF LAWS 3 (Lexis Nexis Butters Worth, New Delhi, 1st ed. 2007).
[8] A K Sikri, *Cross Border Insolvency: Court-to-Court Cooperation*, 51 Journal of the Indian Law Institute 467, 468 (2009).

located in its jurisdiction, this theory, suspends the Creditors' right to access the assets located in a foreign jurisdiction.

The second theory is Universalism, which is based on the idea that all the assets and liabilities of a Debtor should be governed by single insolvency proceedings across the globe. It tries to prevent competing proceedings that deal with a local pool of assets and operates by creating a notion that the assets and liabilities of a debtor in a foreign jurisdiction should only be governed by the law of Debtor's domicile jurisdiction[9]. Thus, while territorialism will deal with only local assets, universalism theory tries to deal with the debtor's assets and undertaking worldwide. The advantage of this theory is that it promotes the ascertainably of the law that will be applied in the insolvency proceedings since the jurisdiction is given to the court of the domicile of Debtor. At the same time, the disadvantage of the theory is that the debtor's domicile may not be the place, whose law governs the loan agreement, or the place where the assets are located, or the place where the business is being carried on[10].

The practical problem with the application of this theory can be best explained with an example. Let's assume that *A*, a company registered under the Indian Companies Act, having its operations in England borrows money from *B* under a contract governed by the English Laws. On account of poor performance over the years, *A* is not able to generate enough profits to pay back its liabilities and the total value of its liabilities is now more than its assets, as a result of which it files for bankruptcy. Now, to recover its money, *B* files a recovery suit in English Court, because the contract under which the money was given was governed by the laws of England.

However, going by the Universalism theory, the Courts in England cannot admit the case as it should be governed by Debtor's home jurisdiction, which happens to be in India. Furthermore, now the property of *A* will be distributed according to the laws of India and *B* never 'consented' to the jurisdiction of the Indian Court. In addition to these two theories, there exists a *pragmatic* theory, knows as *'Modified Universalism'* which is the

[9] A K Sikri, *Cross Border Insolvency: Court-to-Court Cooperation*, 51 Journal of the Indian Law Institute 467, 468 (2009).
[10] Paras Diwan and Peeyushi Diwan, Private International Law 452 (Deep and Deep Publications, New Delhi 4th edn.1998).

pursuit of the goals of Universalism, while giving regard to local laws and local interest[11]. It is based upon the idea that a single set of insolvency proceedings will deal with the assets and undertakings of the Debtor globally, and such a proceeding will cooperate with the Courts of other jurisdiction. It combines Universalism and Territorialism in a way that calls for a mechanism wherein 'Main Proceedings' will be held in one forum along with 'Secondary Proceedings' in other forums. The primary function of 'Ancillary proceedings' is to aid 'Main proceedings' by giving them access to the assets located in its jurisdiction, while keeping in mind the local interest of their creditors. Modified Universalism thus focuses on the protection of local interest which would be ignored if exposed to effects of foreign proceedings[12].

IV. THE INDIAN SCENARIO:

Insolvency proceedings with a foreign element may arise against an Indian entity in the following situations[13]:

1. When there exist Foreign Creditor(s) who want to become a part of Insolvency proceedings initiated in India, or who wish to initiate insolvency proceedings to ensure that their rights are protected.
2. When the Creditors located in India wants to get access to the assets of the Debtor that are located in the foreign jurisdiction
3. When the Insolvency proceedings are initiated in multiple jurisdictions against the same Debtor.

Concerning the Rights of the Foreign Creditors, The Insolvency and Bankruptcy Code keeps Indian Creditors and Foreign Creditors on the same pedestal and under the provisions of the Act, any of them can initiate insolvency proceedings against the Debtor or can be a part of the on-going proceedings. This is achieved by having a wide set of entities covered under the definition of the term '*person'*. The Code, under Section 3(23) includes '*person resident outside India*' in the interpretation of the term 'person'. Hence, allowing them to be either

[11] HAMISH ANDERSON, THE FRAMEWORK OF CORPORATE INSOLVENCY LAW 273 (Oxford University Press, New York, 1st ed. 2017).
[12] HAMISH ANDERSON, THE FRAMEWORK OF CORPORATE INSOLVENCY LAW 274 (Oxford University Press, New York, 1st ed. 2017).
[13] Aparna Ravi, *Filling in the Gaps in the Insolvency and Bankruptcy Code — Cross Border Insolvency*, IndiaCorpLaw (Dec.17, 2019), https://indiacorplaw.in/2016/05/filling-in-gaps-in-insol-vency-and.html.

financial creditor or operational creditor for the Code[14]. The National Company Law Tribunal, which is the adjudicating authority for insolvency proceedings in India, also follows the abovementioned reasoning. The Division Bench of NCLT (Chennai) in the matter of ***M/s. Stanbic Bank Ghana Limited v Rajkumar Impex Private Ltd***.[15], admitted the Petition of a creditor whose ordinary place of residence was Ghana, for initiation of Corporate Insolvency Resolution Process against an Indian Debtor. The Supreme Court of India, too, has allowed the initiation of insolvency proceedings by a Foreign Creditor. In the case of *Macquarie Bank Limited v Shilpi Cable Technologies*[16] observed that a foreign supplier can be an operational creditor and the same is *"established from a reading of the definition of "person" contained in Section 3(23), as including person's resident outside India, together with the definition of "operational creditor" contained in Section 5(20)"*.

As for the remaining two instances of cross border insolvency, a futile attempt has been made to deal with them in the code. Section 234 and Section 235 of the Insolvency and Bankruptcy code attempts to deal with the Cross Border transactions. At the very outset, there exists a problem because the provision is till date not notified by the Central Government. However, even if they were notified, they would not provide an effective solution, primarily because of the procedure established by the provisions. Section 234 gives power to the Central Government to enter into bilateral agreements with other countries to enforce the provisions of the Code.

Once a bilateral agreement is signed, the Adjudicating Authority under Section 235 may send a letter of request to a foreign court of such country to get access to the assets of the Debtor. The abovementioned provisions which were added after the recommendations of the Joint Parliamentary Committee in essence merely substitute the consideration of substantive provisions to an alternative system of Bilateral Agreements[17].

[14] Section 5(20) of the IBC defines the term operational creditor as a 'person' to whom operation debt is owned. This definition read with the definition of the term 'person' as given under section 3(23) would imply that all the entities that fall under the definition of 'person' under section 3(23) have the legal capacity to become Operational Creditor.
[15] CP/670/IB/2017.
[16] AIR 2018 SC 498.
[17] Aparna Ravi, *Filling in the Gaps in the Insolvency and Bankruptcy Code — Cross Border Insolvency*, IndiaCorpLaw (Dec.17, 2019), https://indiacorplaw.in/2016/05/filling-in-gaps-in-insol-vency-and.html.

While bilateral agreements have been used in the past[18] as a means of cooperation between Courts for some Cross-Border Insolvency proceedings, basing a Country's entire International insolvency Regime on them remains a doubtful step. This is because bilateral agreements take time to negotiate and having to negotiate such an agreement with every country is not a practical solution to the problem.

Furthermore, it cannot be denied that a 'Uniform' Bilateral Agreement having the same terms and conditions will be signed by India with every country. The fact that there will always be room for non-uniformity between such agreements signed with other nations implies that it would just increase the burden of the Adjudicating Authority by having them to look into the nuances of each such agreement.

IV.I RECOGNITION OF FOREIGN JUDGEMENT IN INDIA:

An alternate mechanism for adjudication of cross border insolvency cases lies in the Civil Procedure Code (CPC). The Civil Procedure Code aids in the recognition of foreign judgements in Indian Territory and hence helps in protecting the interest of foreign creditors. The Indian Courts under Section 13, 14 and 44A of the CPC are empowered to enforce a foreign judgement of a reciprocating country. A Foreign Creditor, during the pendency of proceedings in his country, may produce a certified copy of the order passed by a Court of his land to initiate moratorium period over the assets of a Debtor in India, or he may use such an order to initiate CIRP (Corporate Insolvency Resolution Process). The only requirement for enforcement of such judgement is that the Court enforcing it should be satisfied that the judgement is conclusive. However, this requirement is blatantly overlooked when it comes to enforcement of Foreign Judgements by Adjudicating Authority in insolvency or bankruptcy matters.

The NCLAT, in the matter of ***Usha Holdings v. Francorp Advisors Pvt. Ltd.***[19], looked into the question of Adjudicating Authority's power to examine the legality of a Foreign Judgement. It was held that the Adjudicating Authority not being a court or a tribunal,

[18] In Re Maxwell Communication Corp. Plc, 186 B.R. 807 (S.D.N.Y. 1995), the English Courts and the American Courts in the year 1991developed a protocol to deal with the issues involved in the cross-border insolvency of Maxwell Communications.
[19] Company Appeal (AT) (Insolvency) No. 44 of 2018.

has *"no jurisdiction to decide the question of legality or propriety of a foreign judgement"* and any exercise of such powers by it will be a nullity in the eyes of law.

This, in turn, implies that only a civil court or a High Court can look into the legality of a foreign judgement to hold it out as a conclusive judgement. Furthermore, it is pertinent to note that until such a judgement is not declared as conclusive by a Civil Court or a High Court, the question of a legally payable debt does not arise and since the debt is not payable is law until the Court the declares is as conclusive, the CIRP cannot be initiated by the person enforcing such foreign judgement[20]. Hence, even though the creditors have a choice to enforce foreign judgements through Code of Civil Procedure, the remedy is not efficacious as it is very time consuming and in cases where the person is seeking declaration 'instant moratorium' over the assets of Debtor in India, the provisions are a shortcoming. In addition to this, it must be noted that a foreign judgement of every foreign Court will not be enforced in India. Section 44A lists out the Reciprocating Countries whose judgement can be enforced in India. Thus, the relief under CPC is restricted to only a few countries which are notified by the Central Government in the Official Gazette.

Also, yet another problem seems to exist with the enforcement of foreign judgements. There is a divide amongst the Adjudicating Authority itself with respect to the question of enforcement of Foreign Judgements and there seems to the absence of a commonly followed precedence. In certain cases they have enforced Foreign Judgements while in others, they have declared them as *nullity ab-initio*[21] thus making this whole application of CPC even dicier.

IV.II NEED FOR LEGISLATIVE REFORMS- LESSON LEARNT FROM JET AIRWAYS INSOLVENCY CASE:

The recent bankruptcy proceedings of Jet Airways Ltd.[22] gives yet another reason why is it a high time to appraise our International Insolvency laws. The proceedings were nothing less than a legal conundrum revolving around the rights of foreign creditors, the jurisdiction of courts and the question of the multiplicity of suits, all being the primary issues related to cross border insolvency. During insolvency proceedings, the NCLT was informed that

[20] Peter Johnson John (Employee) Vs. M/s KEC International Limited [CA (AT) (Ins) No. 188/2019].
[21] State Bank of India & Ors. v. Jet Airways (India) limited CP 2205 (IB)/MB/2019.
[22] State Bank of India & Ors. v. Jet Airways (India) Ltd. [CP 2205 (IB)/MB/2019].

parallel proceedings have already been initiated in Noord-Holland District Court[23] and that the Foreign Court wide judgement dated 21.05.2019 had passed an order of Bankruptcy against Jet Airways ltd. The Administrator which was appointed by the Foreign Court filed a written statement in the capacity of an intervener and sought that the NCLT should recognize the proceedings of the Noord-Holland District Court and the Orders passed by it. However, the Adjudicating authority adhered to the principle of *territorialism* and gave preference to state sovereignty over the rights of Foreign Creditors. The Adjudicating Authority held that the order of the Foreign Court *"is a nullity in the eyes of the law and such order cannot be given effect"*[24]. While doing so, the NCLT also looked into Section 234 and 235 of the Code and stated that in the absence of notification of the sections, *"the Adjudicating Authority is not empowered to entertain the orders passed by the foreign jurisdiction"*[25].

While the order of the NCLT left us pondering over the question of enforcement of rights of foreign creditors in a Global Economy, the NCLAT order took an unprecedented stance. The NCLAT, in the appeal[26]against the decision of the Adjudicating Authority took a pragmatic approach and while coming up with a mechanism for coordination between the Administrator and Resolution Professional, in a way followed the principle of cooperation between jurisdictions (which are one of the key principles of UNCITRAL's Model Law on Cross Border Insolvency).

To create cooperation, the Appellate Tribunal wide its order dated September 26, 2019, directed the Resolution Practitioner of India and the Administrator appointed by the Dutch Court to come into an Agreement to collate the claim of offshore creditors and to gain the control over the assets of Jet Airways located in Dutch's jurisdiction. The Agreement was a *pseudo law* that governed the Cross-Border Insolvency of Jet Airways. It recognised Indian

[23] Petition Number: C/15/288017/ FT RK 19/540R.
[24] In the combined matter of- State Bank of India *v/s.* Jet Airways (India) Ltd.[CP 2205 (IB)/MB/2019], Gaggar Enterprise Pvt. Ltd. *v/s* .Jet Airways(India)Ltd.[CP 1968(IB)/MB/2019] and Shaman Wheels Pvt. Ltd. *v/s.* Jet Airways (India) Ltd. [CP 1938(IB)/MB/2019] Para 28.
[25] In the combined matter of- State Bank of India *v/s*. Jet Airways (India) Ltd.[CP 2205 (IB)/MB/2019], Gaggar Enterprise Pvt. Ltd. *v/s* .Jet Airways(India)Ltd.[CP 1968(IB)/MB/2019] and Shaman Wheels Pvt. Ltd. *v/s.* Jet Airways (India) Ltd. [CP 1938(IB)/MB/2019] Para 27.
[26] Jet Airways(India) Ltd.(Offshore Regional Hub/office), Holland V. State Bank of India & Anr. Company Appeal (AT) (Insolvency)No. 707 of 2019.

proceedings as main proceedings and Dutch's proceedings as non-main insolvency proceedings. While recognising that the Administrator and the Resolution Practitioner will cooperate to administer the assets of the Debtor, the agreement, at the same time maintained 'independent' jurisdiction of both the Indian Adjudicating Authority and the Dutch's Bankruptcy Court. While the protocol also allowed the Dutch Trustee to be a part of the Committee of Creditors, it restricted him to the capacity of a mere observer and didn't give any voting rights to him.

While the move of NCLAT is indeed a welcome move to adjudicate Cross Border insolvency cases in the current legal regime, it cannot be ignored that the Current provisions fall short to govern International Insolvency cases. Furthermore, instead of formulating such an agreement in every case involving the issue of multiple jurisdictions, bringing in reforms to the current legal regime seems to be a much more viable option.

If one performs an in detail analysis of the agreement that was formulated between the parties, he will realise that the Agreement was primarily based upon the structure and principles of UNCITRAL's Model Law on Cross Border Insolvency. Thus, in a way, the NCLAT, the Resolution Practitioner and the Dutch Trustee opted for the principles of Model law over the currently existing options, which indeed is the way forward to solve India's Cross Border Insolvency issues.

V. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY:

As stated earlier, the Jet Airways insolvency proceedings witnessed the application of the principles of the model law in achieving a common consensus between the Resolution Practitioner and the Dutch Trustee. This part of the research paper specifically deals with the UNCITRAL Model law and highlights how its principles provide for a framework that promotes hassle-free information exchange and access to assets that are located in other jurisdictions. The UNCITRAL Model Law on Cross-border insolvency (hereinafter referred as Model Law) is model legislation that was adopted in the year 1997 and till date, it has been

adopted by 44 Nations across the globe[27]. Unlike a treaty or a convention, it is a model form of legislation which means that the countries may adopt it in their domestic legislations after making relevant changes to it. It aims to assist states in achieving a modern, harmonised and fair framework for the purpose of effectively addressing the various instances that arise during the proceeding of international insolvency matters. It recognises the difference between the procedural laws of various jurisdictions and attempts at not to bring about a substantive amalgamation of the global laws[28].

At the same time, it gives importance to national interest and public policy[29] of the enacting country, and contains provisions to prioritise the same over the adjudication of Cross-Border insolvency case, hence making itself more '*country friendly'*. The main purpose of the Model law is to promote cooperation between courts, fair and effective administration of international insolvency matters and to maximise the value of assets[30].

V.I SCOPE OF APPLICATION:

Article 1 deals with the scope of application of the Model Law. It is stated that the law applied where:

a. Assistance is sought in enacting state by a foreign court or by the representative appointed by such court.

b. Assistance is sought by the enacting state in a foreign country.

c. In instances where simultaneous proceedings are taking place against the same Debtor in enacting state and the foreign state.

[27] Previously the Eradi Committee report which was published in the year 2000 came up with the suggestion to bring reforms in the country's cross border insolvency regime. Later, another committee report which was published in the year 2001 under the Chairmanship of NL Mitra also suggested reforms in India's Cross Border insolvency regime. Both the committee reports suggested adoption of UNCITRAL Model Law on Cross Border Insolvency as a step towards achieving a sound International Insolvency regime in India. However, the reforms were never brought out by the legislature.

[28] UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION 19 (United Nations Publications, 2014).

[29] Article 6 of the UNCITRAL Model law on Cross Border Insolvency gives the Court the power to refuse the exercise of power by it, if such exercise of power is manifestly against the Public policy of Enacting State. However, a narrow meaning is given to actions that would be vocative of a country's public policy. The UNCITRAL Guide to Enactment on page number 52, Paragraph 103 observes that only in cases of actions that are *'manifestly'* against public policy, the Court should exercise the power under Article 6. This is solely done in order to ensure that international cooperation is not affected in the safeguarding the country's public policy.

[30] UNCITRAL Model Law on Cross Border Insolvency, Preamble.

d. Where the foreign creditors want to commence proceedings against the Debtor of enacting state, or want to participate in on-going proceedings against the Debtor of such state.

V.II IMPLICATIONS OF ADOPTING MODEL LAW:

The Model Law has four main components which help in providing a regime that deals with the nuances of cross-border insolvencies. This part of the research paper deals with an in-depth look into these components and how they provide for a framework that aims at offering the best possible solution.

V.II.I ACCESS:

The Foreign Representative under Article 9 of the Model Law has direct access to the court and is allowed to seek remedies in relation to foreign proceedings. Hence, the requirement that Foreign Representatives should bring diplomatic instruments or any other such sort of document to get direct access to the Court is expressly done with by the Model Law[31]. Furthermore, he has the power to initiate domestic proceedings against the debtor[32] and at the same time, he has been allowed to participate in on-going Domestic proceedings against the Debtor[33]. At the same time, even the Creditors under Article 13, are given the right regarding the commencement of proceedings and to participate in on-going proceedings before the Adjudicating Authority. While the Model law promotes the equal treatment of Foreign Creditors and domestic creditors, it tends to give autonomy to the Country adopting the Model law to decide upon the question of the ranking of claims; provided that the Domestic court will give them a minimum level of treatment[34].

V.II.II RECOGNISING FOREIGN PROCEEDINGS:

Article 15 of the Model Law deals with the recognition of foreign proceedings and allows a foreign representative to apply for recognition either by submitting a certified copy of the decision that commenced the foreign proceedings and appointed the foreign representative, or alternatively, by submitting a certificate from the foreign court that affirms the existence of proceedings. It must be noted that the Model Law doesn't require the court to look into the

[31] Jonathan L. Howell, *International Insolvency Law*, 42 INT'L LAW. 113, 126 (2008).
[32] UNCITRAL Model Law on Cross Border Insolvency, Article 11.
[33] UNCITRAL Model Law on Cross Border Insolvency, Article 12.
[34] Jonathan L. Howell, *International Insolvency Law*, 42 INT'L LAW. 113, 127 (2008).

legality of such documents and it entitles them to presume that such documents are authentic in nature[35]. Once all the requirements for recognition of application are fulfilled, the Court shall, under Article 17 declare whether foreign proceedings are main proceedings or non-main proceedings[36].

V.II.III COOPERATION WITH FOREIGN COURT(s):

Cooperation is a key element of Model Law on Cross-Border insolvency and it aims at enabling Courts to directly communicate, request information and seek assistance from foreign courts or representatives in order to maximise the value of assets of the debtor[37]. It is pertinent to note that cooperation may take place even at a point prior to recognition of foreign proceedings, even before an application for recognition is made to the Court[38]. The Model Law, under Article 25 puts a mandate upon the Court to *'cooperate to the maximum extent'* with the foreign court and foreign representatives. This is primarily done to get over with the issue of National Legislations not providing a basis for cooperation by their Courts with foreign Courts in instances of Cross Border Insolvency[39].

V.II.IV COORDINATION BETWEEN CONCURRENT PROCEEDINGS:

The Model law provides for the commencement of concurrent proceedings in enforcing state once the court recognises foreign proceedings as "Foreign Main Proceedings". However, such proceedings can be commenced only when there exist some assets of the Debtor in the territory of enforcing state[40]. At the same time, Article 29 of the Model law provides that the foreign Court and the Court enforcing the Model law shall coordinate with each other for the purpose promoting better access to the assets of the Debtor. The abovementioned principles of Model Law thus help in creating a mechanism wherein the Courts by way of cooperation and coordination are able to achieve the better realisation of Debtor's assets. At the same time, this procedure is less time consuming because the courts are not wasting time in

[35] UNCITRAL Model Law on Cross Border Insolvency, Article 16.
[36] The question of Main or Non-Main foreign proceedings is determined by the Centre of Main Interest of the Debtor. According to UNCITRAL Guide to Enactment, there are two principal factors that determine the Centre of Main interest; the place of central administration of the Debtor and which is readily accessible by the creditors.
[37] UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION 97 (United Nations Publications, 2014).
[38] UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION 96 (United Nations Publications, 2014).
[39] Jonathan L. Howell, *International Insolvency Law*, 42 INT'L LAW. 113, 127 (2008).
[40] UNCITRAL Model Law on Cross Border Insolvency, Article 28

formulating a bilateral agreement for the purpose of governing the Cross-Border Insolvency. By facilitating a better exchange of information between the Courts, the Model Law also helps in reducing the transaction cost of the insolvency proceedings.

VI. CONCLUSION:

After doing a critical analysis of the existing legal framework with regard to Cross-Border Insolvency regime in India, it can be rightly said that the current legal system is highly ineffective and that it fails to protect the interest of both domestic, as well foreign creditors in instances of cross border insolvency. While the introduction of Insolvency and Bankruptcy Code in the year 2016 was seen as one of the most significant reforms in the legal history of Indian Banking sector, the enactment miserably failed to address the fundamental issues related to Cross-Border insolvency in a holistic manner. The mechanism of signing bilateral agreements and issuing letters of request to other courts as provided under Section 234 and Section 235 of the IBC is not an efficient solution to solve cross-border insolvency issues because, bilateral agreements take time to negotiate and having to negotiate such an agreement with every country is not a practical solution to the problem.

The fact that there will always be room for non-uniformity between such agreements signed with other nations implies that it would just increase the burden of the Adjudicating Authority by having them to look into the nuances of each such agreement. The alternative mechanism under the Code of Civil Procedure allows for the enforcement of foreign judgements. However, this alternate remedy is time-consuming since the Courts need to be satisfied before its enforcement that the foreign judgement is a collusive judgement and since Adjudicating Authority cannot look into the question of the legality of the judgement, a separate suit needs to be filed at a Civil Court or a High Court.

Hence, it basically delays the right of the creditors recovers their money in a short period of time. Furthermore, a foreign judgement of only those countries can be enforced which are already mentioned under Section 44A or which are notified by the government in the official gazette. Thus, if the foreign judgment that a person is seeking to enforce is not from the country falling in the above category, a person cannot enforce the same.

As stated in the last part of the research paper, Model Law on Corporate Insolvency is the best alternative that is available to India at the moment. The law without trying to bring out any substantive changes to the Indian Legal system tends to come up with a mechanism by which Cross-Border Insolvency matters can be adjudicated. Most importantly, it recognises the interest of the enforcing country and provides for alteration of judgement if the same is against the sovereign interest of the enforcing country.

Thus, it provides for a mechanism wherein creditor's interest is protected without compromising of enforcing the country's public policy and national interest. Taking all this into consideration, it highly suggested that India should proceed with adopting the Model Law for the purpose of adjudicating its cross-border insolvency cases.