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# CROSS-BORDER INSOLVENCY IN PRIVATE INTERNATIONAL LAW– EXAMINING THE UNICTRAL MODEL

**Ekjot Kaur**[1]

## I. ABSTRACT

*"A common challenge in insolvency law is working out a solution under general law and factoring in the implications of insolvency on one or several other parties. Problems with choice of law add a great deal of complexity to international bankruptcy procedures. All questions about insolvency that arise beyond national borders are within the purview of private international law and are addressed in line with either specific statutes or general principles. The intention is to evaluate the UNCITRAL Model Law on Cross-Border Insolvency in light of the most pressing problems often associated with such transactions between different states. In spite of all the accolades the Model Law has garnered, it has only been adopted by around 53 countries in some form. If the number of countries that have adopted the Model Law and the comparatively lukewarm reception of its provisions are any indication, why is it that its adoption has failed to generate a groundswell of support throughout the world?"*

## II. KEYWORDS

UNCITRAL Model, Private International Law, Insolvency

## III. INTRODUCTION

A debtor is deemed insolvent when he or she is unable to pay past or current debts[2]. This research focuses on the efforts of the United Nations to standardize worldwide bankruptcy rules. In 1997, the UNCITRAL[3] Model Law on Cross-Border Insolvency was offered to the United Nations general assembly. Since its adoption by the General Assembly, the Model Law has been hailed as a significant piece of legislation.

[1] Student, Narsee Monjee Institute of Management Studies, Bengaluru
[2] Fletcher, Ian F., "The Law of Insolvency", Sweet and Maxwell, 2002
[3] The United Nations Commission on International Trade Law, 1966

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However, before diving into the Model Law, several preliminary concerns in international bankruptcy law need to be addressed.

Wharton's Law Lexicon[4] defines insolvency as "the situation of one who lacks sufficient assets to discharge all of his commitments." If a person's assets are less than or equal to his or her obligations, that individual is considered insolvent.

As its meaning is so similar to that of bankruptcy, "insolvency" is often misconstrued. The term bankruptcy is often used to refer to the legal proceedings that legally classify a person as insolvent[5], while the term insolvency refers to a state of financial difficulty. In ordinary use, however, the two words are equivalent.

Cross-border insolvency is a scenario in which a bankrupt debtor has assets and/or creditors in more than one country. Many businesses have worldwide activities and interests. Increasing numbers of organizations are globalizing their operations and constructing multinational supply networks. Now that we have access to such sophisticated means of communication and information technology, multinational corporations are no longer the only entities capable of engaging in international trade. Currently, there is little chance for a reversal of this trend. In such a situation, the adjudication of the company's solvency and, if it is determined to be insolvent, the subsequent realisation of assets and distribution of the proceeds to the many creditors and contributors[6] may be problematic.

## IV. ISSUES AND CHALLENGES WHICH CROSS-BORDER INSOLVENCY POSES

In recent years, numerous possible cross-border insolvency concerns have been addressed in copious literature. Of equal relevance is the ability of national legal systems and bankruptcy administration to deal with these issues, and whether or not they are recognized internationally.

[4] Oppe, A.S. (ed.) "Wharton's Law Lexicon", 14th ed., Stevens and Sons, Sweet and Maxwell, 1938
[5] Aiyar, S. Krishnamurthi, "The Law of Bankruptcy", 5th ed., The University Book Agency, 1988
[6] Barrett, J. A. "Various legislative attempts with respect to bankruptcies involving more than one country: IV, UNCITRAL", Texas International Law Journal, 1998

Conflicting jurisdictional interests are the most significant issue with international insolvency proceedings[7]. It is fairly unusual for foreign bankruptcy procedures to be lengthy, costly, and insufficient. This is mostly due to the absence of standardization and consistency in bankruptcy legislation among countries, their legal systems, and cultural values. When bankruptcy procedures are governed by the statutes of multiple countries, significant conflicts of laws will inevitably arise, particularly with regard to the acknowledgment and recognition of foreign verdicts and standards, the implementation of international judicial procedures, the acknowledgment of foreign creditors' liens, and the differences in relevant legislation controlling the disposal of funds, securities and assets. Since the purpose of insolvency procedures is often to execute pecuniary court judgements, it is unreasonable to assume that the courts to be indulgent while implementing insolvency orders from a variety of nations with various laws and legal systems.

Another difficulty is that different bankruptcy administrators need the assistance of local courts and governments to achieve their main objectives, which are often to the benefit of foreign creditors. State sovereignty is intricately interwoven with territoriality or the pre-eminence of domestic law, a disputed topic. The advantages of various bankruptcy resolution solutions, including modified universalism, territorialism, etc., are still being debated.[8]

## V. HOW IS UNCITRAL MODEL HELPING WITH THE ISSUES AND CHALLENGES – AN ANALYSIS OF THE UNICTRAL MODEL

It can be agreed upon that with the implementation of the model, a lot of issues have been given an umbrella to work under. First, the Model Law's concept of "recognition" permits

[7] Ian F. Fletcher, "The Law of Insolvency", 4th edn., Sweet & Maxwell, 2009
[8] Kent Anderson, "The Cross-Border Insolvency Paradigm : A Defense of the Modified Universal Approach Considering the Japanese Experience", (2000) 21 U.Pa.J.Int'l Econ.L. 679, https://scholarship.law.upenn.edu/jil/vol21/iss4/1/; John A.E.Pottow, "Procedural Incrementalism : A Model for International Bankruptcy", 2005, 45, Virginia Journal of International Law, 935, https://repository.law.umich.edu/articles/619/; Bob Wessels, Bruce A Markell and Jason J. Kilborn, "International Cooperation in Bankruptcy and Insolvency Matters", Oxford University Press, 2009

the recognition of court proceedings in a foreign jurisdiction, so expediting the settlement of the issue and preventing unnecessary delays. It also supports concurrent and simultaneous sessions. Second, under the "principle of access," foreign creditors and debtors have the right to join in court proceedings occurring in a separate nation. Simply expressed, this approach promotes a more cooperative and efficient approach in cross-border disputes by allowing foreign representatives to attend and observe court proceedings in a separate jurisdiction. As a consequence, there will be far less conflicts over the Court's decisions. Thirdly, Sections 29 and 30 of the Model Law provide helpful guidance for maintaining an effective framework for "coordination and cooperation throughout the whole bankruptcy procedure." These articles of the Model Law address the necessity for continual cooperation in scenarios involving concurrent domestic and foreign litigation, as well as situations requiring a large number of concurrent hearings.

It is relevant to question if, particularly from the perspective of state authorities and lawmakers, the issues connected with cross-border insolvencies in recent years are much more visible and genuine. There are certain well-known examples of insolvencies with global concerns, but nations must be convinced that the quantity of instances and the complexity of the issues need rapid, long-term legal solutions, such as the Model Law.

As a consequence, some interesting concerns do come up regarding the assumptions made by works like the Model Law, which hold that a failing multinational corporation would inevitably lead to several bankruptcy lawsuits in various jurisdictions. The connection can be made to a globalist scenario in which companies are forced to dissolve because creditors scramble to seize their assets wherever they may be located. Given the dearth of instances of various proceedings, particularly among financially troubled multinational organizations, it can be argued that this assumption "rests uneasily with the reality of modern bankruptcy practice". The number of countries in which a company's financial difficulties will be handled is normally decided by the debtors and the company's principal creditors or lenders. Therefore, the "standard explanation of international insolvencies" can be challenged. It can very well be argued that the fear of a territorial grab of business assets situated in several nations explains why there aren't as many multiple procedures as would be expected to support a universalist approach. Countries that have

not implemented the Model Law may see transnational insolvencies as more of a PR problem than a real one.

Model Law further seem to have a lot more loopholes, like:

i. First, the function and powers assigned to a foreign representative under the Model Law may not be to the liking of lawmakers due to the lack of regulatory oversight. It doesn't provide adequate measures to prevent fraud in cross-border situations. The court must be "assured" before assigning the foreign representative with the responsibility of division of the assets of the debtor, that the interests of local creditors are "adequately preserved." (Article 21(2))[9].

ii. Second, it does not address the issue of conflict of laws in a cross-border bankruptcy case, which is left to the interpretation of private international law by the courts of the various nations. Although it doesn't deal with legal problems head-on, it does allow for international bankruptcy agreements, which have been used to great effect by the parties involved. Different jurisdictions cannot provide the same degree of protection for the advantages derived via Model Law.

It has been also called into question whether the goal of harmonization has been achieved due to the fact that courts in the United States and the United Kingdom have reached different conclusions regarding the meaning of key elements of the Model Law, despite both countries' early adoption of the Model Law. Disagreements in interpretation reduce the Model Law's appeal, and the case laws of the United States and the United Kingdom have had a significant influence on the UNCITRAL's legislative and practical advice. Financial instruments and multi-national industrial conglomerates with regulated international supply networks are at the centre of each economic epidemic. Unfortunately, the Model Law does not provide any definitive guidance on these matters.

[9] Model Law on Cross-Border Insolvency, 1997, ar. 21(2)

Furthermore, although the international insolvency framework will be strengthened by the adoption of the MLIJ[10] and MLEGI[11], the absence of uniform rules on choice of law remains a fundamental gap. Moreover, the absence of choice of law may have an impact on the actual use and use of MLIJ. It has been argued that the choice of law is crucial to the successful enforcement of judgements related to insolvency. If a domestic court is tasked with carrying out an order or judgment from a foreign court, it may find itself unwittingly obligated to comply with the requirements of foreign law.

If enforcement depends on factors unique to cross-border bankruptcy, such as the foreign process being the dominant procedure, rather than the more general domestic private international law requirements, deference may be difficult to obtain. The court in Rubin[12] did not even bother to consider the issue of choice of law. Due to the lack of agreement, it decided not to implement the avoidance judgment. If the foreign court had exercised jurisdiction, it is fair to conclude that the English court, under ordinary (English) private international law, would have enforced the foreign court's verdict. If the foreign court had used English (avoidance) law, the decision may have been enforceable.

However, if we look at the other side of the coin, in the context of India, the issues faced by Jet Airways for their insolvency proceedings could have been tackled smoothly if India had adopted the UNICETRAL Model for Cross-Border Insolvency. Jet Airways (India) Limited's corporate bankruptcy resolution procedure begun on June 20, 2019, when State Bank of India's application under section 7 of the Code was granted[13].

An Asset Preservation Team was formed by the resolution professional (RP). Later it was discovered that in the Netherlands, the company's European headquarters, bankruptcy procedures had been begun and a Bankruptcy Trustee appointed. Due to outstanding debts owed to them bringing total, 2 European creditors initiated the procedure, which resulted in the seizure of the company's aircraft parked at Schiphol Airport in Amsterdam and a loss of Rs. 280 cr. As requested by the Dutch administrator, the NCLAT recognized

[10] Model Law on Recognition and Enforcement of Insolvency-Related Judgments, 2019
[11] Model Law on Enterprise Group Insolvency, 2019
[12] Rubin & Anr v. Eurofinance SA & Ors, (2009) EWHC 2129 (Ch)
[13] State Bank of India v. Jet Airways (India) Private Ltd., (2019) CP(IB) 2205(MB)

the Netherlands method (earlier refused by the NCLT). A position on the committee of creditors (CoC) was granted to the administrator, who could attend CoC meetings but would be barred from voting.

The Appellate Court ordered the RP and CoC "*to consider the prospect of cooperating with the Dutch Trustee so as to have a joint corporate insolvency resolution process of the company*" and "*to reach an arrangement/agreement with the Dutch Trustee to extend such cooperation to each other, further permitting the CoC to assist the RP in preparing an agreement in reaching the terms of arrangement of cooperation with the Dutch Trustee in the best interest of the company.*"

The 'Cross Border Insolvency Protocol' was signed by the parties after they had agreed on its terms and conditions, including their mutual objectives. In accordance with the terms mentioned, the Dutch Trustee and the RP had compiled claims in their respective jurisdictions and have examined the other's verification procedure of claim admission / disputes using the sample received. Both domestic and foreign courts have acknowledged the validity of the claims submitted.

## VI. CONCLUSION

The Model Law seems to be an efficient method for dealing with multinational insolvencies. Insolvency, on the other hand, necessitates the administration of significantly more complex substantive issues across several sectors of law and policy in a variety of nations. As seen by the very limited number of nations that have accepted the Model Law and the vast range of ways and degrees in which they have done so, there seem to be inherent problems associated with the Model Law's adoption. This does not auger good for the likelihood that states would adopt it as their own convincing statutory language.

Considering several additional laws, conventions, agreements, suggestions, and the successful construction of ad hoc protocols, it seems that the Model Law will continue to serve as a crucial guideline for resolving cross-border insolvencies without becoming a legally binding instrument. To repeat, it would seem that the Model Law cannot give what states need, what they do not already possess, or what they cannot negotiate for themselves.