

## **VIRTUAL ROUND TABLE CONFERENCE ON CROSS-BORDER INSOLVENCY**

**18<sup>th</sup> December 2020**

The round table conference in cross-border insolvency, particularly in this time of pandemic where many business concerns be it large medium or small scale are reeling under the pressure of disrupted supply chains, sharp decrease in consumer spending and liquidity issue resulting in the issue of complex cross-border insolvency concerns. On 18 December 2020, Prof. (Dr.) Mamata Biswal, Professor of Law Dean, Faculty and Academic Affairs head, Centre for Corporate and Insolvency Law, GNLU along with GNLU team, UNCITRAL National Coordination Committee, India (UNCCI), and Indian Insolvency Board- IBBI, organised an online round table conference on Cross-border Insolvency.

The round table was chaired by Dr.TK Viswanathan, chairman, BLRC and Former Union Law Secretary, Indian Member, UNCCI, along with Prof. (Dr.) Mamata Biswal, who co-chaired the round table. The round table was diligently hosted by Ms. Adwaita Sharma, Practicing Advocate of Supreme Court of India, Secretary UNCCI and alumni member of GNLU Centre for Corporate and Insolvency Law, along with Ms. Ambica Batas, Research Associate at GNLU.

The Round table was graced by the presence of eminent speakers from all around the world.

### **Prof. (Dr.) Mamata Biswal**

- Introduced everyone to the idea behind the round table on cross-border insolvency.
- To know the impact of UNCITRAL Model law, cross-border insolvency in different jurisdictions, India being on the advanced stage of adopting the cross-border insolvency legislation.
- The major points to be covered in the round table were:
  1. Whether Model Law is adopted in the particular country of the representative or not?
  2. If adopted, is it having an effective impact and how effective is the same?
  3. Is the law being adopted as a domestic law or separate law?
  4. Those countries which have not yet adopted the Model law, how are they regulating the cross-border insolvency issues?

### **Dr. TK Viswanathan**

- Dr. TK Viswanathan commenced the round table with an introduction to the Background of the Insolvency and Bankruptcy Code, 2016, how the legislation was drafted and implemented. Also, the parliament introduced two provisions to the 2016 legislation based on the bilateral treaty related to cross-border insolvency issues.
- UNCITRAL Model law provides a platform for the countries to communicate and coordinate with other countries regarding the cross-border insolvency issue.
- Through this round table he wanted to know the experiences of the countries regarding the:

1. International Cooperation- A.25 and A.27, read with A.1 of the Model Law, which provides for cooperation between courts and foreign depreciation in cross-border insolvent matters. Cooperation between the Bankruptcy courts of different jurisdictions.
  2. Experience related to COMI- ‘Centre of Main Interest’ – COMI opens the door to forum shopping.
- He also, threw some light on the guidelines for Communication and Cooperation between Courts and Cross-border Insolvent matters, and the Judicial Insolvency Methods Conference held in 2016, which is adopted by Singapore, that has been the leading drone of the same, and India is trying to follow on the path laid down by Singapore. The objective of the guidelines is the joint hearing of courts of different jurisdictions.
  - The Aim of the guidelines is preservation of enterprise value and deduction of legal cause, and add other sources of judicial cooperation by providing a framework.
  - DR. Viswanathan also keen on experience of EU regarding the Court-to-Court Cooperation- adopted by the European Union, which has 27 member countries under its umbrella, and the cooperation of bankruptcy tribunals in European Union and Singapore.

#### **Prof. Wee Meng Seng, Republic of Singapore**

- Professor Wee Meng Seng, had prepared a presentation on The Cross-border Insolvency Laws in Singapore.
- He started his presentation by introducing and giving a brief background on the Doctrine of Model Law.
- In 2013, Singapore decided that it should adopt the Model law and abolish the ring fencing. Previously Singapore assets of a registered foreign company were ring fenced to pay debts incurred in Singapore (Singapore debts) before remittal to foreign liquidator. The ring fencing was abolished by distinguishing between ‘relevant company’ and other companies.
- In 2017 through an Amendment Act added provisions of Model Law to its Companies Act and Bankruptcy Act. Later on, in Insolvency, Restructuring and Dissolution Act, 2018, through S. 252, and 253, provided for the Model Law as set out in Third Schedule to have the force of law in Singapore. The Third Schedule only applies to the companies and not the individuals. The judicial attitude towards interpreting the third schedule has been innovative, pragmatic and internationalist, by taking into consideration the Interpretation of COMI and UNCITRAL guides to interpretation.
- He also, discussed certain case laws on COMI:
  1. *Jetta Jet and Rooftop*- in these cases the judges took an internationalist approach by referring to English Law, US law, EU law and Australian Law. The judges took references to international law regarding the relevant time for determining COMI.
- In interpreting the Third Schedule, the Travaux Preparatoires (the preparatory papers) and the 1997 UNCITRAL Guide to enactment of the Model Law are relevant documents.
- *In Zetta Jet*, court referred to Art.8 and the Preamble to the Third Schedule which emphasises cooperation and efficiency between the Courts of States involved in Cross-border Insolvency.

- He concluded his presentation by stating how the Supreme Court of Singapore has been actively promoting cooperation in cross-border insolvency. Also, Singapore is the pioneer member of the Judicial Insolvency Framework (JIN), a network of leading insolvency judges from around the world which aims at encouraging communication and cooperation amongst National Courts and exchange of ideas and experiences between the insolvency judges. The JIN has also developed guidelines for court-to-court communication and cooperation. This helps to give flesh to the broad principles on communication in the Model Law.

#### **Prof. Lafi Daradkeh, Hashemite Kingdom of Jordan**

- Prof. Lafi, gave an insight regarding the insolvency laws in Jordan. Jordan has been having legislations governing insolvency since 1966, they had rules governing insolvency as a part of commercial law but no particular law relating the foreign insolvency.
- In Jordan, the decision of insolvency by the courts is taken in three stages:
  1. Judgement regarding insolvency and bankruptcy, passed by the competent courts of law.
  2. Reconciliation issue- a chance to debtors and creditors to reconcile.
  3. Liquidation issue
- In 2018- New rules were implemented regarding cross-border insolvency, which was adapted from the UNCITRAL. Since, these are newly enacted regulations, there have not been any evident judicial proceedings by far.
- Prof. Lafi explained, however with all the benefits from the Model Law, Jordan has been facing certain challenges as well. One of the challenges is the complex proceedings, which are being conducted due to new rules. Earlier the procedure used to be very simple, as compared to now with the new insolvency laws.
- With the new insolvency laws, there are proceedings regarding the competency of the courts, regarding laws of debtors, creditors and their representatives, and different parts who can intervene in the proceedings of insolvency.
- Though there are challenges, but the new law has brought in a new way of approach to cross-border insolvency.
- In this pandemic of COVID 19, the government of Jordan has activated many defence laws, but no rules as such have come across the issue of cross-border insolvency yet.
- In conclusion, he hoped, that in near future the courts are able to cope up with the new rules and are able to amicably deal with the cross-border insolvency issues.

#### **Prof. Dr. Leon E Trakman and Dr. Robert Walters, Commonwealth of Australia**

- Dr. Robert Walters, on behalf of Dr. Leon E Trakman, presented on ‘Should the UNCITRAL Model Law on Cross-border Insolvency to be afforded Conventional Status?’
- The regionalisation and globalisation of trade and investment has resulted in companies no longer being confined to a single nation state. Also, the 2020 COVID 19 pandemic outbreak has posed a devastating threat to the global economy and a source of local,

regional and global business insolvencies. Hence, it will be argued that the United Nations Commission on International Trade Law should consider raising the UNCITRAL Model Law on cross-border insolvency to convention status.

- The UN General Assembly's endorsement of the Model Law for Cross-border Insolvency (CBI), on 15 December 1997, the CBI aims to facilitate the administration of international insolvency cases involving the same debtor. In particular, they aim to promote:
  - i. The orderly and effective, efficient, and timely administration of insolvency proceedings, and;
  - ii. The identification, preservation and maximisation of the value of the debtor's assets, including the debtor's business, on a global basis.
- In his presentation Dr. Robert Walters, explained the important parts of the UNCITRAL Model Law, which included important Articles from Chapter I, II, III, IV and V.
- In his argument for CBI to be a convention he stated that, there are a number of highly successful UNCITRAL models that can be replicated to strengthen the current governance framework in cross-border insolvency, like the Convention on International Sale of Goods and UNIDROIT Principles on International Commercial Contracts (ICC). Though not every state has signed the CISG, but it has been applauded for transcending boundaries between common and civil law, it has also provided uniform regime for the settlement of disputes, and has carefully balanced system of contractual remedies facilities interaction between buyer and seller and has also [+provided greater legal predictability and stability in times of constant geopolitical and economic upheaval. Thus a similar framework to UNCITRAL CISG and UNIDROIT Principles on ICC could be developed for Cross-border Insolvency.

#### Prof. Stephanie Rohlwing-Dijoux, French Republic

- Prof. Stephanie presented on the Cross-border Insolvency in France- in and outside the EU.
- France has not adopted the UNCITRAL Model Law, in EU only Greece, Poland, Romania have implemented the model law.
- Cross-border Insolvency between European Union Member States- if the debtor has the centre of his principal interest in one of the member states of the EU, the Regulation (EU) 2015/848 of 20 Mai 2015 which replaced the bilateral treaties, applies not only to classical procedures, but also to temporary or amicable procedures (currently in France, it covers the procedures of receivership, judicial liquidation and safeguard procedures). No over-indebtedness procedures for private individuals. The regulation organises a main insolvency procedure, which is recognised automatically in all member states. The *forum consensus* is split between main and secondary insolvency procedures (strictly territorial), with several openings of insolvency proceedings.
- In her presentation, Prof. Stephanie also distinguished between Principle of Universality and Principle of Territoriality.

- Governing Law- it follows jurisdiction. The *lex concursus* is the law of the State where the proceedings are initiated and the *lex rei sitae* remains applicable for real collaterals in property located in another country.
- She also mentioned about the international competency of French Courts for opening an insolvency procedure in France, under following circumstance:
  - i. If the debtor does not have the centre of its main interests in an EU member state, French law gives the French Courts jurisdiction to open insolvency proceedings in the court situated at the place of the debtor's registered office.
  - ii. If the debtor does not have a registered office in France, it is the place where it has its main interest in France. The effects of insolvency proceedings opened in France are universal. In order to implement this universality in the international legal order, an *exequatur* is usually required.
- Impact of COVID 19 Pandemic in France- The Government has taken measures to try to limit bankruptcies and job losses in the short term, The bye law 2020-341 of March 27, 2020 has put in place several adaptations of the rules relating to the difficulties of companies in the context of this health emergency, also they have fixed the date of cessation of payments, the assessment of which is still carried out with regard to the situation as of March 12, 2020. The measures are applicable up to and including December 31, 2020.

#### **Prof. Dr. Rajendra Prasad Gunputh, Republic of Mauritius**

- Prof. Rajendra, gave an insight to the Mauritius perspective by way of a questionnaire, which stated that Mauritius has adopted the UNCITRAL Model Law, and that the same has been incorporated in their domestic law, which efficacious/ successful to tackle the cross-border insolvency issues.
- Mauritius is a signatory of the New York Convention, signed on 19 June 1996 and acceded on 17 September 1996, and of the Washington Convention, signed on 2 June 1969 and acceded on 2 July 1969. These two conventions were transposed into domestic law, the first through The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act, 2001 and the second through The Investment Disputes (Enforcement of Awards Act of 1969).
- The Companies Act 2001 and the Insolvency Act 2009 are the principal laws governing the restructurings, reorganisations, liquidations, and insolvencies of companies generally in Mauritius. Part IV of the Insolvency Act 2009 is based principally on the 1997 UNCITRAL Model Law on Cross-border Insolvency, and regulated the cross-border insolvency proceedings. Apart from the arbitration agreement, there is also the *compromis* which is applicable both in domestic and public international law.
- The Republic of Mauritius has introduced COVID-19 (Miscellaneous Provisions) Act, 2019 and the Quarantine Act 2020 in order to deal with the lethal pandemic. The COVID-19 Act 2019 makes the small island state a 'Covid safe free' country and a strike a legal blow against the pandemic disease. The Quarantine Bill 2020 was passed to amend the

Quarantine Act 1954 to impose fine of Rs. 500,000 and imprisonment of 5 years for citizens who bypassed any rules and regulations which prevail during confinement, lockdown of all sectors without exception, and contaminated people were kept in quarantine.

#### **Mr. Methil Unnikrishnan, Republic of India**

- In 2016 India consolidated the Insolvency and Bankruptcy Code, but the code doesn't have any comprehensive cross-border insolvency provision. Though there are only two provisions of the code s. 234 and 235 which essentially rely on the Bilateral Treaty, where the Central Government of India has to enter into Bilateral agreement with the government of other countries, also s.13 and 44a of the Civil Procedure Code provides for enforcement of foreign judgements in India.
- Prof. Unnikrishnan, stated about certain drawbacks of the current legal framework, the challenges faced are as follow:
  - i. Long-term negotiations and lack of uniformity in bilateral agreements.
  - ii. Procedural complexities if the bilateral agreement exists with multiple countries.
  - iii. No guidance if there is no bilateral agreement with a country.
  - iv. Current mechanism under CPC is not broad enough to enforce all foreign orders and recognise proceedings.
  - v. Lack of clarity on procedure or predictability.
- The Insolvency Law Committee in its *First Report of the ILC [March 2018]* recommended that there is a need for comprehensive framework for the cross-border insolvency matters and decided to attempt the same based on the UNCITRAL Model Law on Cross-border Insolvency, which shall be made a part of the Code as a separate chapter for this purpose.
- The *Second Report of the ILC [October 2018]* recommended the adoption of UNCITRAL Model Law with certain modifications and also drafted Part Z to be inserted in the Code, only for corporate insolvency. Though the amendments have not been enacted yet.
- Assistance is sought in India by Foreign court or foreign insolvency professionals in connection with foreign proceedings and also regarding domestic insolvency proceedings.
- The Jet Airways case, is one of the important proceedings which threw light on the need for the cross-border insolvency legislation as there being conflicts between the Dutch protocols and the Indian protocols, and thus, has led the legal system of India to enact the legislation at earliest.

#### **Dr.Panayotis M. Protapsaltis, the United Kingdom of Great Britain and Northern Ireland**

- Cross-border insolvency involves patterns that have assets or creditors in more than one country and typically it refers to insurgency of a group of companies. It raises interesting issues regarding which country has jurisdiction to open insolvency proceedings.

- A number of German firms move their centre of main interest (COMI) to the United Kingdom in order to profit from the English insolvency law but they consider to be more helpful for purposes than Germany.
- In the early 1980s, the States replaced the Act of 1898 and began to amend the antiquated statutes of liquidation to favour the rehabilitation and reorganisation of companies. Though some of those regulations are notoriously favourable to groups of creditors.
- Regarding the question of Jurisdiction, whether to opt for Universalism or territorialism. Universalism implies that the assets of an insolvent company are administered by a single judicial authority irrespective of territorial effect. Territorialism by contrast posits that insolvency proceedings have a purely territorial force because this is the way to assure national interest of the state and its citizens.
- Cross-border Insolvency is an example of cooperative territorialism it does not establish international jurisdiction, it does not introduce automatic recognition, both rely on the concept of the center of main interest as the main jurisdictional test which makes different use of this test.
- The UNCITRAL Model Law distinguishes between foreign main and foreign non main domestic proceeding. Distinction between foreign main and foreign non main is the search for recognition of the foreign proceedings for relief purposes.

#### **Mr. Gabriel E Messina, Argentina Republic**

- Argentina has not adopted UNCITRAL Model law, but have made certain attempts regarding cross-border insolvency. In 2002, a reform bill to the Argentina Bankruptcy Law (ABL) was introduced, though these regulations may not have been added to the ABL but have remained as Special Law.
- There are no specific laws regarding the cross-border insolvencies, and there have not been much decided problems of the same matter by the Courts, which could serve as precedents.
- There are two different regimes for CBI in Argentina:
  - Deriving from International Resources- The Montevideo Treaties of 1889 and 1940
  - National Resources- contained in the ABL
- Any cross-border insolvencies are dealt in Argentina by the rules contained in ABL. There are 17 rules for CBI under ABL. ABL applies to legal entities and individuals, it excludes public entities as well as insurance companies, pension funds, financial institutions all of which are regulated by special regimes. There are three main insolvency proceedings:
  - Out of court agreements or workouts
  - Reorganisation procedures; or
  - Concur supplementing bankruptcy or liquidation proceedings
- The Argentina Court may declare the Bankruptcy but with limited effects- the effects of this bankruptcy remain within Argentina territory. The sole purpose of liquidation of assets

in Argentina is to distribute the proceeds among local creditors according to the rules of Argentina.

- According to ABL the differences between foreign and domestic grades lies in following criteria-
  - Rule of Reciprocity- For the acceptance of foreign creditors in Argentina insolvency proceedings make it essential to produce evidence.
- COVID 19 and reform to ABL in Argentina- Argentina government considered it necessary to happily adapt the situation especially as a consequence if the pandemic and mandatory isolation. At the moment there are 14 reform bills under debate in the arsenal in congress but one was approved last October, and the highlights of the October bill are as follow:
  - Suspension of deadlines in the bankruptcy proceedings in process.
  - Suspending all judicial and extrajudicial options including purchases, pledge of any origin.
  - The reform postponed many deadlines in order to help companies through the crisis.
- It was concluded that ABL has an old CBI regime more aimed at bankruptcy than the organisation and does not solve the main problems of transnational insolvency. One of the provisions of UNCITRAL Model law is contrary to the Argentina National Constitution. But adopting the Model Law in contrary will help in updating their obsolete rules of priority private international bankruptcy in line with the most modern trend and in the same time would give one country an important signal of brexitability and legal certainty to foreign investments.

#### **Prof. Jason Kilborn, United States of America**

- US adopted the Model Law in their new chapter 15 of the Bankruptcy Code in 2005. The insolvency proceedings have led the court-to-court cooperation of US courts with that of other countries.
- Challenges of the new Cross-border Insolvency Law, are disputes relating to intellectual property and discovery rules.
- Adoption of new model law does not means sacrificing local values in deference to foreign laws or interest.
- Prof. Kilborn discussed about certain cases where US courts had refused to cooperate with the judicial authorities of other countries in cross-border insolvency matters. Cooperation is mandated only if the interests of creditors and other interested parties including the debtors are sufficiently protected on the one hand and in particular the courts can refuse cooperation if that would be manifestly contrary to the public policy of whatever country is involved in mark.
- Through the cases, it seemed to the speaker that the US courts are surprisingly quick to abandon cooperation when the interests of US parties particularly to Intellectual Properties licenses are at issue.

- Also, when US discovery procedures are restricted, cooperation with a foreign representative becomes questionable.
- In another case, US Court refused to cooperate with the foreign representative, concluding that complying with the order of foreign representative would violate a variety of US privacy protection laws that apparently in the judge's view represented fundamental US Public Policy.
- Through these cases it can be understood that the Model Law does not necessarily force adopting States to abandon their local policies and their local preferences or to sacrifice protection of local interests. Though this was not what the drafter of the Model Law intended, but it is a reality.

## **CONCLUSION**

### **Dr.Viswanathan and Prof. (Dr.) Mamata Biswal- Concluding the Round Table**

Dr. Viswanathan concluded the round table by acknowledging the presence of all the speakers from around the world, who gave their precious time to mark their presence irrespective of their different time zones. He briefly summarised the whole round table conference by stating important points from what each speaker presented and by taking note all the reforms and challenges which were experienced by the countries who have adopted the UNCITRAL Model Law on Cross-border Insolvency and also, noting the steps taken by the countries regarding Cross-border Insolvency matters, who have not adopted the UNCITRAL Model Law.

Concluding the round table, Dr. Mamata Biswal expressed that the report regarding the rules and regulations on Cross-border Insolvency by the KP Krishnan Committee is much awaited. She also observed that certain common issues were persistent in both the countries which have adopted the Model law and which have not. Also, one of the concerns stated by her was regarding the jurisdiction between countries who have adopted Model Law and those who have not, and another concern was regarding territorial theory and Universal Theory, how to bring uniformity and harmony among countries where one follows territorial theory and other universal theory. She is looking forward to the implementation and application of the new law and initiative of Government of India to adopt the UNCITRAL Model Law on Cross-border Insolvency.

## **VOTE OF THANKS**

### **Mr. Rajesh Kumar Gupta, Chief General Manager, IBBI**

On behalf of IBBI, Mr Gupta thanked all the eminent speakers for their remarkable presence and for their edifying insightful addresses. He appreciated the views of all the speakers, and thanked Gujarat National Law University and Prof. (Dr.) Mamata Biswal for organising this International Conference, and is looking forward to many more such learning engagements in future.