CROSS BORDER INSOLVENCY: COURT-TO-COURT COOPERATION

*A K Sikri**

SINCE THE opening up of her economic boundaries in the year 1991, India has emerged as one of the key economy of the world and as on today it has become world's 4th largest economy on PPP basis.[1] This economic metamorphosis has been a two way process. Not only India has emerged as one of the most preferred investment destination but at the same time Indian companies are also going global at an unprecedented pace. Howsoever splendid be the scenario, the 2008 global financial crises have shown the world that no business setup, howsoever large, is free from the risks inherently involved in the business world and even the big multinational companies can go insolvent.

Insolvency refers to a situation of financial crunch wherein any person, whether natural or juristic, is unable to pay its debts. Black's Law dictionary defines insolvency as "an inability to pay debts as they fall due or in the usual course of business". This insolvency can be tested either on the "equity basis" or the "balance sheet basis". The situation of insolvency gives rise to complicated legal issues and to deal with these issues every modern state has either put an efficient and effective legal regime in place or is moving towards this direction. The underlying rationale behind such a regime is to achieve manifold objectives in order to facilitate and boost the confidence among the investors on the one hand and by securing their claims and among the entrepreneurs on the other hand by giving them an opportunity to close down an unviable business entity and to start a fresh one.

A very interesting situation from legal point of view arises in a case where a business enterprise having its assets and creditors in multi jurisdictional sphere finds itself trapped into a situation of insolvency. Such insolvency has been termed as "Cross Border Insolvency". Some of the issues which may arise in case of cross border insolvency have been identified by the Mitra committee (2001) in its Report of The Advisory

* Judge, Delhi High Court, India.

1. World Bank data. *Available at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf

Group on Bankruptcy Laws:[2]

(a) If a branch of an enterprise located in one country becomes insolvent, should creditors in that country be allowed to initiate insolvency proceedings while the enterprise as a whole is still solvent?

(b) If the enterprise as a whole is insolvent, should there be separate proceedings in the various countries where its branches are located?

(c) Alternatively, should there be a single procedure, based in the country where the head office or place of incorporation is situated?

(d) Should there be a single liquidator or administrator, or one for each country where the enterprise has a place of business or assets?

(e) Should the liquidator or administrator appointed in one country be able to recapture assets fraudulently transferred by the debtor to another country?

Broadly speaking there are three ways to deal with these issues:

Territorialism: Founded upon the idea of state sovereignty, the *territorial* approach involves each country employing its own insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country's laws. Under the strict territorial approach, there is no recognition of foreign proceedings and a separate insolvency administration is required in each country in which the insolvent entity operates.

Universalism: In the area of international insolvencies, there has been a long-standing consensus that the correct policy outcome only can be achieved under "universalism," i.e., an enterprise approach. The theory of universalism conceives of a scheme where all components of an international insolvency are administered by a single court and a single applicable law. Universalism implies to send property owned by the foreign debtor in any part of the world back to the debtor's home jurisdiction in order for the property to be distributed to the debtor's creditors in conformity with the local jurisdiction's distribution scheme.

Modified Universalism: Modified universalism incorporates the philosophy of universalism but accepts that a country may only unilaterally

2. The Advisory Group on Bankruptcy Laws was constituted w.e.f. February 8, 2002 by RBI under the chairmanship of L N Mitra.

control its own territory and laws. Under a modified universal regime, a country does not try to coordinate its legislation with another country but rather creates a system that is open to cooperation while seeking the broadest impact possible for its own laws. Modified universalism combines the theories of universality and territoriality such that one forum hosts a primary insolvency proceeding to which other jurisdictions supplement with ancillary or secondary proceedings. Ancillary proceedings, therefore, merely aid the main proceeding.

If one looks into the worldwide general practice one will find that the insolvency has been among the most provincial of legal fields with each country grabbing and distributing the assets within its grab with little attention to the foreign laws and their municipal courts. However, keeping in mind the rapid growth of the international trade it is increasingly being realized by the states all over the globe that there must be some sort of harmonization and coordination among the insolvency laws and the concerned authorities of the states, which are party to any cross border insolvency.

Legal response to the challenges underlying cross border insolvencies has come up in the form of various models. A few important one are:

1. UNCITRAL model law on cross border insolvency.[3]
2. Guidelines applicable to court-to-court communication in cross border cases - Principles of cooperation among NAFTA countries as prescribed by the American Law Institute and adopted by the International Insolvency Institute.[4]
3. European Union Regulation on Insolvency Proceedings, which became effective for the member states of European Union in 2002.

Among these three options the UNCITRAL model law has been regarded as most widely recognized model in the circles of international insolvency professionals.

UNCITRAL Model Law

A broad framework for dealing with cross border insolvency issues has been established by the United Nations Commission on International

3. Adopted by UNCITRAL on May 30, 1997. The model law is designed to assist states to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency.

4. American Law Institute prepared these guidelines during its Transnational Insolvency Project. *Available at* http://www.ali.org/doc/Guidelines.pdf

Trade Law (UNCITRAL) in its model law on cross border insolvency (the model law), adopted by consensus on May 30, 1997 at the thirtieth session of UNCITRAL. In December 1997, the General Assembly of the United Nations adopted resolution 52/159, in which it expressed its appreciation to UNCITRAL for completing and adopting the model law. One of UNCITRAL's functions is to seek to further the harmonization and unification of world trade law.

Because the text is a model law rather than a treaty, it is meant to be adopted as part of the law of each enacting state. The guide to enactment as prepared by the UN Secretariat states that the model law is designed to assist the states to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross border insolvency. The guide says that the model law reflects practices in cross border insolvency matters that are characteristic of modern, efficient insolvency systems. The model law is essentially procedural in other respects and the differences among national substantive insolvency laws are unaltered. The model law does not attempt a substantive unification of insolvency law.[5]

The solutions it offers include:

- Providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting state, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting state to determine what co-ordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
- Determining when a foreign insolvency proceeding should be accorded "recognition", and what the consequences of recognition may be;
- Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting state;
- Permitting courts in the enacting state to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

5. Refer to the Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency. *Available at* http://www.uncitral.org/.

- Authorizing courts in the enacting state and persons administering insolvency proceedings in the enacting state to seek assistance abroad;
- Providing for court jurisdiction and establishing rules for co-ordination where an insolvency proceeding in the enacting state is taking place concurrently with an insolvency proceeding in a foreign state;
- Establishing rules for co-ordination of relief granted in the enacting state in favour of two or more insolvency proceedings that may take place in foreign states regarding the same debtor;
- Providing speedy access to foreign insolvency practitioners to the courts of enacting states to aid the prevention of the dissipation and transfer of assets out of the jurisdiction.

Scope

The model law applies in a number of cross border insolvency situations. It applies where:

(a) Assistance is sought in India by a foreign court or a foreign representative in connection with a foreign proceeding;[6]

(b) Assistance is sought in a foreign State in connection with a proceeding under Indian law;[7]

(c) A foreign proceeding and a proceeding under Indian law in respect of the same debtor are taking place concurrently;[8]

(d) Creditors in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under Indian law.[9]

Access

The model law gives a foreign representative the right to appear in local courts. A direct application for assistance can be made and proceedings can be commenced under the enacting state's laws. In addition, the foreign representative may participate in a proceeding regarding the debtor in the enacting state provided the foreign proceedings are first

6. UNCITRAL Model Law on Cross Border Insolvency. Art. 1 (1)(a)
7. *Ibid*., Art. 1 (1) (b).
8. *Ibid*., Art. 1 (1) (c).
9. *Ibid*., Art. 1 (1) (d).

recognized.[10] The guide states that an important objective of the model law is to provide expedited and direct access for foreign representatives to the courts of the enacting state. The law avoids the need to rely on cumbersome and time consuming letters rogatory or other forms of diplomatic or consular communications, which might otherwise have to be used.

Recognition of foreign proceedings

Model law establishes the criteria for determining whether a foreign proceeding is to be recognized.[11] The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognized as the "main" or instead as the "non-main" foreign insolvency proceeding. A foreign proceeding is deemed to be the "main" proceeding if it has been commenced in the state where "the debtor has the centre of its main interests" (COMI). The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative. Key elements of the relief accorded on recognition of the representative of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor and a suspension of the debtor's right to transfer or encumber its assets.[12] It authorizes the court to grant discretionary relief for the benefit of any foreign proceeding, whether "main" or not.[13]

Treatment of foreign creditors

Model law gives foreign creditors the same rights regarding the commencement of, and participation in, a proceeding under the laws of the enacting state as creditors in that state.[14] However, it does permit the enacting state to grant or deny equivalent treatment for foreign creditors as to priorities, but provides a general floor of treatment as a general, unsecured creditor.

Cross border co-operation

As the guide puts it, a widespread limitation on co-operation and co-

10. *Id*., Art. 9, 11 and 12.
11. *Id*., Art. 15-17.
12. *Id*., Art. 20.
13. *Id*., Art. 21.
14. *Id*., Art. 13.

ordination between judges from different jurisdictions in cases of cross border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing co-operation with foreign courts. The model law obliges and empowers local courts to co-operate to the maximum extent possible with foreign courts or foreign representatives and examples of forms of co-operation are contained therein.[15]

Co-ordination of concurrent proceedings

Recognizing the reality of the politics of international co-operation, the model law does not significantly limit the jurisdiction of the local courts to commence or continue insolvency proceedings. Under it, even after recognition of a foreign "main" proceeding, jurisdiction remains with the local courts to institute an insolvency proceeding if the debtor has assets in the enacting state and the effects of that proceeding are to be substantially restricted to the assets of the debtor that are located in that state.[16]

The model law deals with co-ordination between a local proceeding and a foreign proceeding concerning the same debtor[17] and facilitates co-ordination between two or more foreign proceedings concerning the same debtor.[18] The guide states that the objective of the provisions is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor's assets or the most advantageous restructuring of the enterprise).

When the court is faced with more than one foreign proceeding, the model law calls for tailoring relief in such a way that will facilitate co-ordination of the foreign proceedings.[19] If one of the foreign proceedings is a "main" proceeding, any relief must be consistent with that "main" proceeding.

Provisions of the model law are designed to enhance co-ordination of concurrent proceedings by adjusting payments to creditors. It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.[20]

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15. *Id*., Arts. 25 to 27.
16. *Id*., Art. 28.
17. *Id*., Art. 29.
18. *Id*., Art. 30.
19. *Ibid*.
20. *Id*., Art. 32.

At present, only the United States of America (2005), Australia (2008), British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), have enacted the model law.[21]

Indian scenario

Indian law does not have any provision of cross-border corporate insolvency issues. Rather the same is dealt under provisions dealing with winding up of unregistered company under the Companies Act, 1956. [22] For the purposes of winding up, a foreign company is included within the meaning of 'unregistered company'.[23] An unregistered company will wind up:

a. If, the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs;

b. If the company is unable to pay its debt;

c. If the court is of opinion that it is just and equitable to wind up its affair.

So, the test of insolvency under this provision, if, at all, for insolvency of foreign company is 'unable to pay its debt'.[24] Insolvency agencies are

21. Updated status as found on the website of the UNCITRAL. *Available at* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

22. Part X, The Companies Act, 1956

23. *Ibid.,* s. 582.

24. *Ibid.,* s. 583 (5). - An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts-

(a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the [Tribunal] may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) If any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due from the company, or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some

the same for execution of insolvency process as it is provided for the companies incorporated in India.

Since Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognize the jurisdiction of foreign courts in respect of the branches of foreign companies operating in India, therefore, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is filed before an insolvency court for the winding-up of its branches in India. For example, when BCCI was taken into liquidation and liquidators were appointed by British courts, the Reserve Bank moved the high court in India to wind up Indian branches of that Bank. The overseas liquidator had filed his claim in respect of BCCI branches in India. As regards questions of choice of law, Indian courts apply the concept of *lex fori*, using the law of the forum where the proceeding has been initiated. This in itself is outdated, as the modern day insolvency laws provide for a regime based on *lex situs*, or the law of the forum where the property is situated.

Over the years, the higher courts of this country have dealt with the matter of cross boundary corporate insolvency very carefully. The following observations made by the Supreme Court of India, in the case of *Raja of Vizianagaram* v. *Official Receiver,*[25] clearly bring out the legal position of international insolvencies in India:[26]

> The Courts of a country dealing with the winding-up of a company can ordinarily deal with the assets within their jurisdiction. It is, therefore, necessary that if a company carries on business in countries other than the country in which it is incorporated, the courts of those countries too should be able to conduct winding-

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director, manager or principal officer of the company or by otherwise serving the same in such manner as the [Tribunal] may approve or direct, the company has not, within ten days after service of the notice,-

(i) Paid, secured or compounded for the debt, or demand; or

(ii) Procured the suit or other legal proceeding to be stayed; or

(iii) Indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) If execution or other process issued on a decree or [order of any Court or Tribunal] in favour of a creditor against the company, or any member thereof as such, or any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part;

(d) If it is otherwise proved to the [satisfaction of the Tribunal] that the company is unable to pay its debts.

25. AIR 1962 SC 500.

26. *Id.*, paras 15, 16 & 17.

> up proceedings of its business in their respective countries. Such winding-up of the business in a country other than the country in which the company was incorporated is really an ancillary winding-up of the main company whose winding-up may have already been taken up in that country or may be taken up at the proper time.... ordinarily the winding-up of the company will be proceeded simultaneously in the various countries where it carried on business whenever the business of the company has ceased to be profitable and the company is reduced to a position in which it is not expected to make good its liabilities. It is the company incorporated outside India which is really wound up as an unregistered company in this country. In fact, there is no separate unregistered company which is being wound up here. All the creditors and contributories are really creditors and contributories of the company incorporated outside India and therefore, all of them on principle, should be able to do what creditors and contributories resident in India can do in the winding up proceedings.

The court further observed that though the decision of foreign court should not be mechanically applied, but, there is no reason why a foreign decision should not be followed unless it is opposed to Indian ethics, traditions, jurisprudence or is otherwise unsuitable.

The question before the Supreme Court of India was whether in a winding-up proceeding initiated in India in respect of the business of a foreign company in India, the foreign creditors of that company could prove their claim. The Indian Supreme Court, after examining various precedents under English Law, held that under the provisions of the Indian Companies Act and the general principles, foreign creditors can prove their claims in the winding-up of unregistered companies in India.

The globalization and opening-up of the economy has added impetus in India to the need to formulate comprehensive corporate insolvency legal policy taking care of both domestic as well as cross border insolvencies. For this purpose, in the year 1999, the Government of India set up a high level committee[27] headed by V.B. Balakrishna Eradi, J., for remodeling the existing laws relating to insolvency and winding up of companies and bringing them in time with the international practices in this field. The Eradi Committee Report, taking into account the fact that

27. The High Level Committee on Law Relating to Insolvency of Companies was constituted by Government of India on October 22, 1999 to examine the issues relating to insolvency (Popularly known as Justice Eradi Committee Report).

globalization of trade and opening up of the economy has taken place and with these sweeping changes, the issues relating to cross border insolvency have become increasingly important, recommended that the model law be implemented in India. However, when the amendments in the existing Companies Act, 1956 were brought about on the lines of the suggestions made by the *Eradi Committee* in the year 2002, the Parliament did not deem it necessary to include provisions of cross border insolvency. The reason was that by that time there were hardly any countries which had any legislation/statute on the lines of UNCITRAL model law.

In the year 2001 the Reserve Bank of India appointed a advisory Group on "Bankruptcy Laws"[28] under the Chairmanship of N. L. Mitra, to give its recommendations covering each and every aspect of the insolvency legal regime in India. This expert committee again reiterated the need to adopt the UNCITRAL model law in India. Meanwhile the amendments carried out by the Amendment Act of 2002 were also felt inadequate and in the year 2004 the government of India constituted another expert committee on company law[29] under the chairmanship of J.J. Irani.

Insofar as the issues of cross border insolvency are concerned, the Irani Committee recommended that insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, co-operation and assistance among courts in different countries and choice of law. However, the Bill which was introduced in the Parliament in the year 2008 for enacting new Companies Act had not included the chapter on cross border insolvency. Same is the position with the Companies Bill 2009 which is presently pending before the Parliament.

The challenge

For want of specific statutory provisions on cross border insolvency, how the courts in India would deal with such issues is the question. Actually incidents of cross border insolvencies have not been witnessed by the country so far. However, cross border issues relating to conflict of jurisdictions have arisen in other fields of law. Principles applied in resolving those issues can safely be applied for resolving cross border insolvency issues as well. Those principles are discussed hereafter:

28. *Supra* note 2.

29. This committee was constituted on December 2, 2004 under the chairmanship of J. J. Irani with the task of advising the government on the proposed revision of the Companies Act, 1956.

Doctrine of comity of jurisdiction

As a legal term "comity"[30] is very elastic with wide amplitude. Its best definition, in the light of derivation of the word, is "courtesy". The common law doctrine of the comity of nations can reflect in the courtesy shown by the municipal courts towards foreign laws by way of their application to those matters before them which touches the jurisdictional boundaries of the foreign country. This courtesy can also be shown by municipal courts by enforcing foreign judgments within the territorial limits of the domestic country.

The US Supreme Court outlined the concept of international comity in *Hilton* v. *Guyot*,[31] in the following words:[32]

> Comity in legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition a nation allows within its territory to the legislative, executive or judicial acts of another nation, having regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.

As a general rule, municipal laws of a country do not extend beyond its territorial limits; however the doctrine of comity is an exception. Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their laws or inflict an injury on some one of their own citizens. Thus "comity" reconciles jurisdictional conflict by encouraging deference to the judgment of a foreign court under the appropriate circumstances. This comity is granted out of respect, deference, or friendship.

The concept of comity has also been applied exclusively within the domestic domain of a federal legal system and in this context comity is usually an issue that involves the federal courts' willingness (or unwillingness) to rule on a state law in the absence of decision by a state court on the same issue. This line of judicial thinking has led to the modern doctrine of abstention, which stems from the notion that the state and federal courts are equally obligated to enforce the United States Constitution. Sandra Day O'Connor J noted in *Brockett* v. *Spokane*

30. The Black's Law Dictionary, (7th ed.) defines judicial comity as "[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions."

31. 159 U.S. 113 (1895).

32. *Id.* at 164

Arcades, Inc.[33] that:[34]

> This Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law…. Where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain from reaching a decision on federal issues until a state court has addressed the state questions.

Similarly, on grounds of comity and pursuant to federal law, the Supreme Court has generally refused to allow federal courts to intervene in pending cases in state courts in the absence of showing of bad faith harassment. As was noted in *Younger* v. *Harris*[35] comity means:

> A proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps, for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism', and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism'.

This principle of comity of jurisdiction has been statutorily recognized insofar as domestic courts are concerned. If the matter is pending in one competent court of law, other court, where same issue between the same parties is filed later in point of time, shall stay its hands off till the decision given by the first court. It is contained in section 10 of the Code of Civil Procedure, 1908 (CPC), which reads as under:

> **10. Stay of suit. –** No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before

33. 472 U.S. 491 (1985)
34. *Id*. at 508.
35. 401 U.S. 37 (1971)

the Supreme Court.

Explanation – The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

This common law principle is recognized, *de hors* section 10 of the CPC as well. In that sense the court can adopt this principle even when matters are pending in courts of different jurisdictions. In *Tamil Nadu Mercantile Bank Share Holders Welfare Association* v. *S.C. Sekhar,*[36] the Supreme Court held that doctrine of amity or comity requires that different courts exercising separate jurisdiction pass similar orders. The court quoted with approval from *Law of Injunctions* authored by Lewis & Spelling in the following passage:[37]

Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction.

In *National Mineral Development Corporation* v. *Government of India,*[38] the Delhi High Court referred to various judgments of the US courts as well as its own earlier judgments while accepting the doctrine of comity of jurisdiction. Relevant observations contained in the said judgment runs as under:

19. In *Narendra Kumar Maheshwari* v. *Union of India and Ors.* 1990 (Suppl) SCC the Supreme Court dealt with comity of courts in a federal structure. The court held that:

Before we conclude, we must note that good deal of argument was adduced that these applications in different High Courts in civil suits were not genuine and properly motivated, but were mala fide. Even though these might not have been to feed fat an innocent object, it was apparent that it was to feed fat a grudge in respect of a competitive project by a competitor. Anyway, in the view we have taken, it is not necessary to decide the bona fides or mala fides of the applicants. *Shri Nariman, when he moved the application initially, had suggested that we should lay down certain norms as to how the courts in different parts of the country should grant injunction or entertain applications affecting an all-India issue or having ramifications all over the country.*

36. (2009) 2 SCC 784.
37. *Id.*, para 48.
38. MANU/DE/0288/2008.

Except that before the courts grant any injunction, they should have regard to the principles of comity of courts in a federal structure and have regard to self-restraint and circumspection, we do not at this stage lay down any more definite norms. We may also perhaps add that it may be impossible to lay down hard and fast rules of general application because of the diverse situations which give rise to problems of this nature. Each case has its own special facts and complications and it will be a disadvantage, rather than an advantage, to attempt and apply any stereotyped formula to all cases. *Perhaps in this sphere, the High Courts themselves might be able to introduce a certain amount of discipline having regard to the principles of comity of courts administering the same general laws applicable all over the country in respect of granting interim orders which will have repercussion or effect beyond the jurisdiction of the particular courts. Such an exercise will be useful contribution in evolving good conventions in the federal judicial system.*

20. In *Hartford Fire Ins. Co.* v. *Cal*. 509 U.S. 764, it was observed that the comity of courts refers to a situation where judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere. In *Parsi* v. *Davidson* 405 U.S. 34, it was observed that under accepted principles of comity, a court should stay its hand only if the relief the petitioner seeks would also be available to him with reasonable promptness and certainty through the alternative machinery. This court would have to undoubtedly keep these principles in mind in the present case. The issue therefore is whether it can be said that this Court should decline to exercise jurisdiction in respect of the subject matter of this petition because it can be more appropriately be adjudicated at Raipur. The order of the Central Government impugned in this Petition no doubt confirms the recommendation of the State Government, yet, the scope and discretion of the Central Government under provisions of the MMDR Act are equally circumscribed by other provisions of law. Moreover, it does not act invariably as a confirming authority; the Union Government has to independently assess the proposal of the State and issue orders. Thus, its order dated 14.2.2007 was to be seen on its merits. In the overall conspectus of the facts, and attendant circumstances, this Court is of opinion that since the issues involved and urged concern the legality and jurisdiction of statutory authorities under the Forest Act and also since the order dated 14-2-2007 was made by the Central

> Government, the pendancy of proceedings before Chhatisgarh cannot be construed as a bar and principles of comity do not inhibit this Court from hearing and deciding the present petition.

The courts in India have also referred to the English judgments. The case known as the *Abidin Daver*[39] and specifically the following observations of Lord Diplock in the said judgment has been referred to in several cases:

> Since the District Court of Sprayer would be recognized by the English High Court as a Court of competent jurisdiction, any judgment given by it against the Cuban owners would be enforceable in England by action; so an unseemly race to be the first to obtain judgment in the jurisdictions in which the Turkish owners and the Cuban owners respectively are plaintiffs might well ensue; and novel problems relating to estoppels per rem judicator and issue estoppels, which have not hitherto been examined by any English Court, might also arise. Comity demands that such a situation should not be permitted to occur as between Courts of two civilized and friendly states. It is a recipe for confusion and injustice.

What follows from the above is that if the insolvency proceedings are initiated in a foreign court and are pending, in the later proceedings instituted in the Indian Courts, if the issue involved is identical and the judgment of the foreign court will have bearing on the proceedings in the Indian court, the Indian court can apply the principle of comity of Jurisdiction. This, of course, would be subject to the condition that the view ultimately rendered by the foreign court would be recognized in India, which aspect will be dealt with separately at the appropriate stage hereafter.

Forum non-conveniens

Forum non conveniens[40] (FNC) is a discretionary power of mostly common law courts to refuse to hear a case that has been brought before

39. (1984) 1 Lloyd's Rep. 339 (House of Lords).

40. *Forum non-conveniens* is a Latin phrase that translates to mean a forum or jurisdiction that is "inconvenient" or "inappropriate forum". The Black`s Law Dictionary (7th ed.) defines it as "the doctrine that an appropriate forum – even though competent under the law- may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought."

it. The courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties.

The legal concept of FNC is not exclusive to common law nations. The maritime courts of the Republic of Panama, although not a common law jurisdiction, also have similar power. The doctrine is used both internationally and domestically. Countries with overlapping, parallel or exclusive courts such as the United States and Canada also use the doctrine to decide when a judgment from a neighboring court should be recognized and enforced. It is an important organizing principle in the field of conflict of laws. The underlying principles, such as basing respect given to foreign courts on reciprocal respect or comity, also apply in civil law systems (*lis alibi pendens*).[41]

Historical origin

Scholars and jurists seem to find a Scottish origin[42] prior to the first American use of the concept. Some writers see the doctrine of FNC as having developed from an earlier doctrine of forum non competens (non-competent forum). The doctrine of FNC originated in the United States in *Willendson* v. *Forsoket*,[43] where a federal district court in Pennsylvania declined to exercise jurisdiction over a Danish sea captain who was being sued for back wages by a Danish seaman, stating that "if any differences should hereafter arise, it must be settled by a Danish tribunal". In Scotland, the concept is first recorded in *MacMaster* v. *MacMaster.*[44]

In the United States the defendant may move to dismiss an action on the ground of FNC. Invoking this doctrine usually means that the plaintiff properly invoked the jurisdiction of the court, but it is inconvenient for the court and the defendant to have a trial in the original jurisdiction. The court must balance convenience against the plaintiff's choice of forum. In other words, if the plaintiff's choice of forum was reasonable, the defendant must show a compelling reason to change jurisdiction. If a transfer would simply shift the inconvenience from one party to the other, the plaintiff's choice of forum should not be disturbed.

In deciding whether to grant the motion, the court considers the following aspects:

1. The location of potential witnesses.
2. The location of relevant evidence and records.

41. The Black's Law Dictionary (7th ed.) defines it as "lawsuit pending elsewhere".
42. See. *Vernor* v. *Elvies,* 6 Dict. of Dec. 4788 (1610).
43. 29 Fed. Cas. 1283 (DC Pa 1801) (No. 17,682).
44. Sess. Scot 11 Sess Cas, First Series 685, judgment dated June 7, 1833.

3. Possible undue hardship for the defendant.
4. Availability of adequate alternative forums for the plaintiff.
5. The expeditious use of judicial resources.
6. The choice of law applicable to the dispute.
7. Questions of public policy.
8. The location where the cause of action arose.
9. The identities of the parties. Who is suing whom?

Position in India

This principle of *forum non conveniens* is recognized by the Indian courts as well. This term is applied to mean a general power to stay actions and not entertain litigation on the ground that some other court or forum having jurisdiction is the appropriate forum for trial of the action. It is applied in the interest of both parties and when the ends of justice require that the cause should be tried in a different forum. The said principle is generally applied in cases of private international law. It requires two stages enquiry. In the first stage, one is concerned whether there is an alternative competent forum, which is more appropriate and second stage requires answer to the question, whether it is in the interest of justice and equity to relegate the parties to the said forum. This principle has been adopted, as explained by Chesire and North in their book *Private International Law*.[45] The said principle was referred to in *Kusum Ingots and Alloys* v. *Union of India,*[46] wherein the question of territorial jurisdiction of a high court to maintain a writ petition was examined. The Supreme Court has observed that a high court may refuse to exercise discretionary jurisdiction by invoking the principle or doctrine of 'forum non-convenience' even if a small part or fraction of part of cause of action has arisen within the jurisdiction of the high court.

Again in the case of *Mayar (H.K.) Ltd.* v. *Owners and Parties, Vessel M.V. Fortune Express,*[47] the Supreme Court took note of the concept of *forum non conveniens* as explained by the English court, as is clear from the following passage contained in this judgment of the Supreme Court:

> 28. In *Smith Kline & French Laboratories Ltd. and Ors.* v. *Bloch* (1983) 2 All ER 72, the first plaintiffs (the English Company)

45. Chesire and North, *Private International Law* 336 (13th edn.).
46. AIR 2004 SC 2321.
47. (2006) 3 SCC 100.

were pharmaceutical company in England and were a wholly owned subsidiary of the second plaintiffs (the U.S. Company) The defendant was a research worker working in England. The defendant brought an action for damages in Pennysylvania against both the English and the U.S. Companies. The English Company (plaintiff) sought an injunction in the English Court to restrain the defendant from further proceedings with his claim in Pennysylvania or from making any further claims outside the jurisdiction of English Court and further sought declarations that the proper law of agreement was that of England and that the English Company were not liable for the breaches complained of. The judge granted the injunction sought. The defendant appealed and it was held while dismissing the appeal that "the Court had jurisdiction to grant an injunction restraining a litigant from continuing proceedings in a foreign court where the parties were amenable to the English jurisdiction and where it is satisfied (a) that justice could be done between the parties in the English forum at substantially less inconvenience and expense; and (b) that the stay of proceedings did not deprive the litigant in the foreign proceedings of any legitimate personal or juridical advantage which would otherwise have been available to him. The jurisdiction was nevertheless to be exercised with great caution.

29. In *Spiliada Maritime Corporation* v. *Cansulex Ltd.* (1986) 3 All ER 843, the House of Lords explained the ambit of the principle of *forum non conveniens* for issuing the order of stay and held:

(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case would be tried more suitably for the interests of all the parties and for the ends of justice

(2) In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and

> substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction…

Thus, when it is found that the proceedings are pending in a foreign court, which is a more appropriate forum, even if courts in India have territorial jurisdiction to deal with the same subject matter, it can refuse to entertain the proceedings in India till the conclusion of the proceedings in a foreign court which is found to be the more appropriate forum. This principle, therefore, is almost akin to the principle of comity of jurisdiction. Appropriateness of a forum presupposes the existence of multiple forums having concurrent jurisdictions. However, if all these forums adjudicate upon the same issue, involving same parties, there is all likelihood of conflicting judgments and an unseemly race between the parties to be the first to obtain the judgment and further to subsequent problems of estoppels. The court, thus, would consider by applying the principle of effectiveness as to the court of which country is in a position to give most effective judgment and that court would be treated as a court of preferential jurisdiction.

Anti-suit injunction[48]

Principle of comity of jurisdiction may give rise to another incidental issue. No doubt, comity is a rule for cooperation, but it can also be a tool for exclusion. There can be a situation where a party, which has filed legal proceedings in an Indian court, can contend that more convenient and effective forum is the Indian court and not a foreign court where also the proceedings are pending. In such a situation, a party before the Indian court can seek stay of proceedings pending in a foreign court. This is known as anti-suit injunction.

48. In the area of conflict of laws, anti-suit injunction is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. If the opposing party contravenes such an order issued by a court, a contempt of court order may be issued by the domestic court against that party.

The principle governing *anti-suit injunctions* are based on common law principles. In *Modi Entertainment Network* v. *W.S.G. Cricket PTE. Ltd.*,[49] the Supreme Court of India scanned through the law prevailing on this subject in various countries, including UK, and adopted those principles in the following manner:

> 9. The Courts in India like the Courts in England are courts on both law and equity. The principles governing grant of injunction - an equitable relief - by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in personam. However, having regarding to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court."

A reading of this judgment would indicate that following aspects are to be specified before the court exercises its discretion to grant an anti-suit injunction:

> (1) (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court; (b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and (c) the principle of comity — respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind;
>
> (2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a *forum non-conveniens*;
>
> (3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of

49. AIR 2003 SC 1177.

the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major* or force majeure and the like;

(5) Where parties have agreed, under a non- exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti- suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot *per se* be treated as vexatious or oppressive nor can the court be said to be *forum non-conveniens*; and

(7) The burden of establishing that the forum of the choice is a forum non- conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

It is, thus, clear that the principle on which an anti-suit injunction is invoked is just the reverse of the principle on which the doctrine of *forum*

non-conveniens is employed.[50] To that extent, if such a suit is filed, it may create difficulties in dealing with the problems of cross border insolvencies and the solution would be to recognize the need for having uniform practice by adopting UNCITRAL model law.

Recognition of foreign judgments

Indian law gives recognition to the foreign judgments, which are passed by the courts of reciprocal countries. Thus, judgments pronounced by such foreign courts are enforceable in India. However, the courts in India may refuse to enforce such a judgment if any circumstances stated in section 13 of the CPC exist. Section 13 of the CPC reads as under:

> **13. When foreign judgments not conclusive: –** A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:
>
> a. Where it has not been pronounced by a Court of competent jurisdiction;
>
> b. Where it has not been given on the merits of the case;
>
> c. Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
>
> d. Where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> e. Where it has been obtained by fraud;
>
> f. Where it sustains a claim founded on a breach of any law in force in India.

Section 14[51] of the Code of Civil Procedure relates to the presumption about foreign judgment as pronounced by a court of competent jurisdiction on production of certified copy of the said judgment.

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50. See. *M/s Moser Baer India Ltd.* v. *Koninklijke Philips Electronics*, 151 (2008) DLT 180.

51. **S. 14. Presumption as to foreign judgments:** The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Section 13, thus, embodies the principle of private international law that court will not enforce a foreign judgment if that judgment is not of a competent court. Otherwise, foreign judgment is final and conclusive upon the courts and courts in India will refuse to accept such a judgment only if condition specified in any of the clauses (a) to (f) of section 13 are satisfied.

The perusal of section 13 of the Civil Procedure Code, 1908 signifies that a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a court that it must be obtained after due observance of the judicial process, i.e. the court rendering the judgment must observe the minimum requirements of natural justice – it must be composed of impartial persons, acting fairly, without bias, and in good faith, it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured: correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the municipal court. Neither the foreign substantive law, nor even the procedural law of the trial be the same or similar as in the municipal court. As observed by Charwell, J., in *Robinson* v. *Fenner*:[52]

> In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough: Godard v. Gray, (1870) 6 QB 139 and whatever the expression "contrary to natural justice", which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does.

A judgment will not be conclusive, however, if the proceeding in which it was obtained is opposed to natural justice. The words of the statute make it clear that to exclude a judgment under clause (d) from the rule of conclusiveness the procedure must be opposed to natural justice. A judgment which is the result of bias or want of impartiality on the part of a judge will be regarded as a nullity and the "trial coram non judice"[53]

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52. (1913) 3 K B 835 at. 842.

53. See *Vassiliades* v. *Vassiliades*, AIR 1945 PC 38 and *Manak Lal* v. *Dr. Prem Chand*, 1957 SCR 575.

It was way back in the year 1963, the Supreme Court in the case of *R. Vishwanathan* v. *R. Gajambal Ammal,*[54] made following pertinent observations relating to enforcement of foreign judgments in India:

> 40. Before we deal with the contentions it may be necessary to dispose of the contention advanced by the executors that it is not open in this suit to the plaintiffs to raise a contention about bias, prejudice, vindictiveness or interest of the Judges constituting the Bench. They submitted that according to recent trends in the development of Private International law a plea that a foreign judgment is contrary to natural justice is admissible only if the party setting up the plea is not duly served, or has not been given an opportunity of being heard. In support of that contention counsel for the executors relied upon the statement made by the Editors of Dicey's "Conflict of Laws", 7th Edition Rule 186 at pp. 1010-1011 and submitted that a foreign judgment is open to challenge only on the ground of want of competence and not on the ground that it is vitiated because the proceeding culminating in the judgment was conducted in a manner opposed to natural justice. The following statement made in "Private International Law" by Cheshire, 6th Edition pp. 675 to 677 was relied upon:
>
> "The expression 'contrary to natural justice' has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact scope. The only statement that can be made with any approach to accuracy is that in the present context the expression is confined to something glaringly defective in the procedural rules of the foreign law. As Denman, C.J. said in an earlier case: "That injustice has been done is never presumed, unless we see in the clearest light that the foreign laws, or at least some part of the proceedings of the foreign court, are repugnant to natural justice: and this has often been made the subject of inquiry in our Courts." In other words, what the Courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case. The wholesome maxim audi alteram partem is deemed to be of universal, not merely of domestic application. The problem, in fact, has been narrowed down to two cases.
>
> The first is that of assumed jurisdiction over absent defendants…. Secondly, it is a violation of natural justice if a litigant, though

54. AIR 1963 SC 1.

present at the proceedings, was unfairly prejudiced in the presentation of his case to the Court.

The private international law is a branch of the municipal law of the state in which the court which is called upon to give effect to a foreign judgment functions.

Though, normally, there is a tendency to recognize a foreign judgment and enforce it, in given situation it cannot be said with certainty as to whether courts in India would recognize a particular judgment. This, coupled with the issues of anti-suit injunction, would justify the inclusion of provisions on the lines of model law on cross border insolvency in the domestic laws. Furthermore, insofar as access, i.e. court-to-court cooperation is concerned, that is an unknown concept. Normally, one judge would not even discuss the matter pending before him/her with another judge of the same court. Therefore, if communication and coordination among courts were to be followed, backing of legislative provisions would be necessary.

Some of the justifications given by the UNCITRAL for adopting model law are as under:[55]

> 16. Approaches based purely on the doctrine of comity or on *exequatur* do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, in a given legal system general legislation on reciprocal recognition of judgments, including *exequatur,* might be confined to enforcement of specific money judgments or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign "judgment", for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final.
>
> 17. To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possible liquidated without reference to other more advantageous solutions. As a result, not only is the

55. See M.A.L.M. Willems, *UNCITRAL Model Law on Cross Border Insolvencies* 49-50.

> ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. By contrast, mechanisms in national legislation for coordinated administration of cases of cross-border insolvency make it possible to adopt solutions that are sensible and in the best interest of the creditors and the debtor; the presence of such mechanisms in the law of a State is therefore perceived as advantageous for foreign investment and trade in that State.

Though courts in India have recognized the foreign judgments and are also liberally adopting the doctrine of comity of jurisdiction, degree of predictability and reliability would always remain an issue in the absence of specific statutory provisions.

Globalization of economy has thrown new challenges insofar as economic laws are concerned. Since the world is shrinking in economic terms and is described as one "village", laws governing the economic activities also need to be uniform. If absolute commonality cannot be achieved by having same laws in different countries, attempts are being made to have uniform standards as far as possible. Realizing this need, UNCITRAL has come out with model legislation on insolvency.

It is now to be seen as to whether the Parliament accepts the need and legislate on this UNCITRAL model law or not.