Cross Border Insolvency with Reference to India

The growth of multinationals, operating through several organs such as branches, agencies, franchises, subsidiaries and other forms of collaboration in more than one country, has given rise to the need to harmonise municipal laws of nations with regard to the consequences of insolvency for the operation of their branches, divisions, subsidiaries or agencies spread over the territories of several countries. The principles of Private International Law used to govern the conflict of law between countries. But the rapid growth of international trade, commerce, investment and industries setting the pace of globalisation and opening-up of the economies of nations added to the need of formulate specific legal measures for protecting Indian creditors as well. The question of choice of law arises in all cross-border transactions due to

- development of international trade in which inter-country debtor-creditor relations across the border develops;
- development of transnational and multinational institutions through building up transborder organisational structure through permanent establishment, branches or franchises;
- development of organisational relations through chain organisation structure of subsidiaries, and joint venture and finally
- development of complexities in modern business relations.

Naturally, in all trans-border insolvency situations there are claims of national creditor against foreign debtor or national debtor to settle dues to foreign creditors. The present Indian legal system does not contain any provision on any cross-border relations. In two regards Indian law on insolvency is out-dated. Firstly, Indian law is not comparable to the standard set in international legal requirements and as such stands apart and alone. Secondly, Indian law has not taken into consideration of any cross-border relation. The differences in national insolvency laws have important consequences in the case of enterprises with assets and liabilities in different countries. This diversity of approaches creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises. Resultantly, a number of initiatives have been undertaken to improve recognition of foreign proceedings and cooperation in this area. In November 1995 the text of the European Union Convention on Insolvency Procedures was adopted. This Convention sets forth rules for the treatment of insolvencies where the debtor has an establishment or assets in more than one state, including rules on choice of law, co-operation between courts, and the recognition of foreign judicial decisions and orders. The Convention has not been ratified by all members and its prospects for entry into force are still uncertain. In addition, the International Bar Association's Insolvency and Creditor's Rights Committee (J Committee) has developed the Cross- Border Insolvency Concordat, which is also designed to provide a framework for cooperation in multi-jurisdictional insolvencies. The year 1997 noted a significant development in this area.

The UNCITRAL came out with a Model Law on Cross-Border Insolvency negotiated among more that 40 countries representing a broad spectrum of differing legal systems. One of the distinguishing features of this model law is that it attempts to achieve limited but effective co-operation, compatible with all legal systems and, therefore, acceptable to all countries. Its goals are to ensure cooperation in crossborder insolvency cases through recognition of foreign decisions and access of foreign liquidators or administrators to local court proceedings. It is essential that affair and efficient administration of cross-border insolvencies is undertaken so that it protects the interest of all creditors and other interested persons, including the debtor. The UNCITRAL Model Law, which has as its objective the solving of the aforementioned issues, proclaims to provide effective mechanisms for dealing with cases of cross-border insolvency8. The law applies in the following situations where:

- assistance is sought in a state by a foreign court or a foreign representative in connection with a proceeding under the domestic law of a state;
- assistance is sought in a foreign state in connection with a proceeding under the domestic law of a state;
- a foreign proceeding and a proceeding under the domestic law of a state in respect of the same debtor are taking place concurrently; or
- Creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the domestic law of the state.

It is a difficult task to classify the provisions in the companies Act relating to Cross-border insolvency into a straitjacket. A company subject to liquidation in India is regarded as a single entity and not as a separate entity. It means that any liquidation or winding up proceedings conducted in India may have a theoretical application in relation to the company as a whole, which includes all its branches within and outside India. Liquidation in India is conducted in relation to the corporate entity as a whole enabling all the creditors, both national and international, to lodge proof of claim with the liquidator. There is no discriminative treatment of ‘foreign’ creditors in the sense that only the creditors of the Indian branch are able to lodge proof of claim. The claims are treated equally as per the provisions of the Companies Act, 1956, s. 530. The jurisdiction of the Indian court is ‘territorial’ as opposed to ‘universal’ in the sense that if the assets of the company are outside the jurisdiction of India, then the Indian courts and the liquidator will need to obtain the consent of the relevant courts in that jurisdiction for their actions to have effect. In the Indian context, the application of the theory of ‘universality’ does not mean that the courts will regard only the courts of the company’s place of incorporation or principal place of business as having jurisdiction to wind up the company, nor that the Indian courts will automatically defer to apply the insolvency laws of that state alone as being able to determine the making of claims against and the distribution of the assets of that company. The approach adopted by the Indian courts involves a mixture of both the concepts with a wide degree of flexibility taking into account the existence of foreign proceedings and the interest of creditors generally.