Cross-border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies—Determining Jurisdiction for Group Insolvencies

Priya Misra

The Indian insolvency regime has undergone a sea change in the last three years resulting in a more conducive creditor-friendly environment in the context of distressed companies. The change in the regime has led to an increased presence of multinational companies (MNCs) in the country. Such MNCs have existence across borders, resulting in an array of creditors, both domestic and foreign. But when these companies are part of a business group (multinational enterprises [MNEs]), can the creditors satiate their unpaid debt from one company through the assets of another associate company? The answer to this question is complicated because on the one hand lies the doctrine of ‘separate legal personality’ which is the foundation of the entire structural regime of corporate law, while on other lies the exceptional circumstance wherein group companies may be considered to be a single entity. This problem is further complicated when the parent/associate company is situated outside India.

In this article, I will attempt to decipher the approach of common law application concerning jurisdiction, for a distressed company which has existence/asset outside India or where the entire group faces insolvency. To achieve this, I will look at the pertinent case law that have taken place in the UK and other common law jurisdictions while taking into account the international best practices. The endeavour through this article is to find a solution to such group company insolvency wherein the stakeholders of a company belong to different jurisdictions and have to approach a forum that can provide the most effective remedy to them.
The world is the oyster for the MNEs while they stretch their roots in different countries and are regulated by different local laws. They may choose these destinations for various reasons including for tax savings, ease of business, relaxed regulatory laws, etc., but they continue to work in a coordinated manner to earn huge profits. While the companies are subject to local laws when they commence and carry on their business, insolvency of companies poses a problem at a unique tangent. While companies are local, their assets and creditors may not be. The question arises about which law should govern the insolvency of these companies? It gets further complicated when such insolvencies are in the context of multinational groups wherein the web of inter-corporate transactions, control and management is a complex web.

Before we raise issues of insolvency resolution of MNEs, we must first find a suitable definition for our subject matter because Indian corporate law has none so far.

**DEFINITION OF A MULTINATIONAL ENTERPRISE**

Since there is no set format of multinational enterprise (MNE), we do not usually find any legal definition of MNE. As per the OECD Guidelines for Multinational Enterprises (2011), MNEs usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.

In other words, a multinational group is one whose constituent enterprises are set up in different jurisdictions but are related to one another in certain ways, these vital links being ‘control (actual, or capacity to control) or coordination between (or over) equity or contractually based entities, even when it is exerted over autonomous action centres...’ (Dunning, 1993).

Since a majority of countries do not have a specific law for these multinational groups, there exists no commonly accepted/agreed-upon definition. International organizations such as OECD also insist that the concept should remain undefined to broaden the dynamism of the laws applicable to them. For this article, any corporate group that consists of connected enterprises that are situated in more than a single jurisdiction will be the subject matter of discussion. Therefore, enterprises with a centrally operating structure and enterprises that have interdependence of finances, operations or management, will be subsumed under the definition for the article.

**STRUCTURES OF MULTINATIONAL ENTERPRISES PRESENT IN INDIA**

There are no set formats of MNE groups. They operate across the world with linked enterprises that may exist in different legal formats. In India, two frequently found structures of MNEs exist. The first one is that of an integrated group. Usually, whose ownership and control are in the form of a pyramid such as Tata Group. In such a group, the financial health of the company is often dependent on the financial health of the group as a whole because of the parent company’s ability to salvage its subsidiary in times of crises. At the same time, for the same reason, the financial health of a member enterprise affects the other group members too and can drag them to insolvency along with itself.

The second kind of structure is ‘contractual based’ wherein the MNEs are linked via contractual or operational arrangements such as through distribution of licenses to operate, franchise agreements, technology transfer agreements among others (Muchlinski, 2007; Teubner, 1993), for example, Lehman Brothers.

**GOALS OF INTERNATIONAL INSOLVENCY LAW CATERING TO AN MNE**

Having discussed the structures that India usually witnesses, we must venture into exploring what goals should insolvency of MNEs pursue? Of course, these goals are not specific to India and are hailed as ideals by countries across the world. While the efficiency of the law, predictability of the law and processes that follow as well as transparency throughout is an ideal that every insolvency law will seek to achieve, it becomes very pertinent in the case of multinational groups wherein there is more than one country involved. Various authors opine that such insolvencies of groups should be handled by a single jurisdiction.
under the tutelage of a single regime of law. Such application of a single set of laws brings about coordination in terms of collection and distribution of assets, facilitates quicker and smoother transition in case of reorganization and reduces costs while enhancing value generation. Another goal of international insolvency law is the creativity that the applicable law allows for providing appropriate remedies to satiate the different stakeholders involved while honouring the public policy and fairly dealing with all. Westbrook (2000) believes that a unified approach to international insolvency can generate predictable results and enhance the market transactions’ efficiency while bringing equality to all stakeholders.

While nations usually nod to the proposition that bankruptcy should be ‘unitary and universal’, not all of them are agreeable on the application of this principle in their territory when the insolvency of MNEs take place since it is seen as a compromise on the sovereignty to apply the law of another country.

However, we must realise that a global market requires a universal law to deal with insolvencies of enterprises that function globally (Westbrook, 2004). The UNCITRAL Model Law on Insolvency is the only widely accepted model set of principles (accepted in 44 countries including the USA and the UK). The Model lays down principles while leaving all details to the relevant countries and their courts to decide with cooperation. The OECD guidelines accepted by its member nations is the second most accepted model. However, since multinational companies (MNCs) target the developing countries to expand their wings for potential markets, these model laws fail since those countries may not have accepted the model law for themselves. In fact, some small regions do not have an insolvency law of their own at all. In such a scenario, how will a stakeholder get an appropriate remedy?

Countries have developed laws of their own that reflect their political, social and economic values. They give different protection to different stakeholders depending on their preferences developed over a period of time. For instance, India has a history of labour oppression under British rule. Consequently, emphasis on the protection of workers post-independence and even as late as 2016, was evident as the payment of statutory dues to workers was kept at par with secured creditors under the Insolvency & Bankruptcy Code. Since laws of different counties differ in their approaches, achieving a unified insolvency law (which itself is dependent of enforcement of various other local laws such as Contract Law, Property Law, relevant regulatory regime, etc.) is a herculean task. Since it is so challenging to concur on a single law of insolvency, the scholars believe that the next best alternative is to solicit cooperation among the relevant countries’ courts to apply and honour the orders of their peer courts in the other country on the matter.

According to Irit Mevorach (2008),

Clarity in terms of jurisdiction will also enhance efficiency, as it will reduce jurisdictional battles (litigation over the issue of jurisdiction resulting from vagueness in the rules). The ability to predict where the insolvency of the MEG will take place (and accordingly which laws will apply to the case) is also desirable considering ex ante efficiency that is, the facilitation of investment and lending.

The debate, therefore, intensifies as to what should be the jurisdiction for insolvency resolution of a MNE that exists in India but has assets or creditors outside or vice versa; or when its parent company which has sufficient assets is situated outside India while the accounts of creditors of the subsidiary company in India remain unsatisfied; or when the group is falling apart as a whole and salvaging a single enterprise will not solve any problem because the reorganization should be applicable across enterprises.

Therefore, the primary step to achieve the goals of international insolvency law is to determine the jurisdiction where the insolvency proceedings or the reorganization will take place and which will be made applicable to all sister entities of that group.

DETERMINING ‘JURISDICTION’ FOR A SINKING MULTINATIONAL ENTERPRISE

The first problem that one encounters when insolvency of an MNE takes place is the determination of which country’s insolvency law will apply Dunning & Lundan (2008). It is the most significant question because this decision will be the determinant of the extent of satisfaction and fairness that the stakeholders will receive. This level of satisfaction, in turn, will affect the future of the group (in case of reorganization at this stage) and the future of the commerce in that country.

So why should there be only one jurisdiction to deal with the insolvency process of a multinational group?
Well, first of all, a single location for insolvency resolution ensures a unified process and prevents confusion. Scholars believe that the ideal situs for insolvency resolution would be one, which has a strong connection with the different member enterprises so that ‘maximum’ satisfaction of creditors can be achieved. In other words, a jurisdiction governing the majority of transactions and contracts of most of the member enterprises and where most of the information about the functioning of the MNE can be obtained. It should be a place which satisfies most, if not all, of the stakeholders because not all stakeholders could have anticipated the situs of jurisdiction and which may not turn out to be in their favour. While determining the jurisdiction, the economic reality of the group should also be paid attention to, that is, if it is a closely knit group, the jurisdiction should not be at a place where a remote sister enterprise is situated. Instead, it should be a place that could have been easily predicted by creditors when the closely knit enterprise was functioning well and a situs that could not have been manipulated by the corporate debtor. In this context, three possible situs are being discussed below to determine the suitable jurisdiction for an MNE:

**Place of Incorporation**

This is the most conventional notion, which has existed since the inception of the corporate structure itself. The notion ideates that the court which should have jurisdiction is the place where the corporate debtor was incorporated2 (Singlaris Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36). However, such an alternative has exposed various fallacies in the context of a multinational group insolvency process. In the case of Hooley Ltd ([2016] CSOH 141, Scotland) the Scottish court decided to apply Scottish law to a group where three group companies did business and had assets in India though they were incorporated in Scotland. Consequently, the Scottish courts ran parallel proceedings applying modified universalism, despite the main creditors and assets stationed outside the Scottish lands. Over a period of time, the courts have had to resort to other alternatives since the incorporation sites did not reflect the true economic reality of MNCs.3

The reason why the place of incorporation is chosen as the jurisdiction for insolvency proceedings was that it would provide predictability ex ante and would avoid unnecessary jurisdictional disputes. However, the other side of the coin is that such place of incorporation may not have any assets, information, control or connection in the real sense. This may end up defeating the ‘ex-post efficiency’ of the insolvency proceedings (Perkins, 2000).

Certain legislations have accepted this lacuna and have adopted the ‘centre of main interest’ (COMI) as the situs for initiation of insolvency proceedings. For instance, EU Regulation provides that the place of the registered office will be presumed to be the COMI of a MNC. Similarly, UNCITRAL Model Law on Cross-border Insolvency (United Nations Commission on International Trade Law, 2005) presumes such a case too. But the law is flexible on the point in so far as these are presumption that can be rebutted by showing the functional corporeality of the corporate firm in question that may be elsewhere. For instance, in the case of Ci4net.com, incorporation was one of many factors that were considered, and not as a decisive factor in determining the COMI.

Such adoption of flexibility is desirable across jurisdictions to avoid making certain countries ‘bankruptcy havens’. The corporations incorporate themselves in bankruptcy havens while holding no significant business activity there, to get access to flexible insolvency law that is debtor-oriented, and which may lead to no remedy or protracted court battle for creditors (LoPucki, 2005).

Since the incorporation as a test for determination of jurisdiction may sometimes be flawed, as it focuses more on the form, rather than substance, it will be subject to manipulation in the context of MNEs whose roots are in different jurisdictions, it thwarts the achievement of one of the goals of international insolvency, which is single unified situs and process for resolution. If one chooses the situs of incorporation of the parent company as the relevant jurisdiction, while it may bring predictability to the scenario, it may be a flawed finding nevertheless, because there may not be a ‘real connection’ between the parent company and the other enterprises established under its aegis in different jurisdictions. Therefore, the test of incorporation may not be the ideal one for adoption on Indian soil.

**Asset-based/Activity-based Test**

This test is based on the place where the assets are located irrespective of the place of incorporation. This
usually is useful when a company is incorporated in one country but has major operations in another. For instance, a number of companies incorporate in Singapore, which is tax haven for India. They do not own any real assets in Singapore, but mostly on Indian soil. However, one must accept that a MNE may have assets spread across jurisdictions, with no major clusters at one place. Then this determination of jurisdiction on the basis of the location of assets becomes problematic. Since the assets of the company are not essentially perpetual nor are they always fixed at a place, the statistics will always keep changing, leaving the creditors with unpredictability and uncertainty of jurisdiction, thereby defeating a goal of international insolvency. However, unlike the incorporation test, the applicability of asset-based approach can be spread across the group, bringing more economic reality to the front. One must note, though, that this may not be true in the case of ‘contract-based’ groups where each entity in the group may have its own principal assets, administration and creditors, with no visible central locus of the group. Another setback for this test is the expenses and time involved. Counting the value of the assets/operation of the entire group requires more time and the quantification process is expensive. In a situation where there are already limited assets for creditors, the stakeholders of a group would look down upon undertaking of an expensive evaluation for jurisdiction exploration.

Centre of Main Interest Test

COMI is a notion related to the corporate debtor’s linkage, that is, to find out the corporate debtor’s locus of prime interests in terms of operations, assets and management. The courts may look at the place of incorporation or the location of assets to determine where the heart of the giant lies. Yet, unlike the previous tests, this test also involves looking at the location from where the company is managed. This concept is already in use in the USA and EU and is also promoted by UNCITRAL Model Law on Cross-border Insolvency (though not defined therein). While EU Regulation lays down that COMI should be the location from where the corporate debtor usually administers his business and which is ascertainable by the third parties dealing with it, UNCITRAL model law guide initially presumes that the COMI of a debtor is its registered office and then goes on to accept the EC Regulation’s approach (since the UNCITRAL Model Law is inspired from EC Regulation) wherein ‘the “COMIs” should correspond to the place where the debtor conducts the administration of his interests on a regular basis’ (EU Regulation 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings).

A modified interpretation of COMI that is now in vogue is the *headquarters criterion*, that is, the determination of the corporate group’s headquarters in the real sense (Westbrook, 1997). This test involves the identification of the location from where the control of the group is effectuated. Subsidiary companies act as the limbs of the group. The headquarters function as the brain of the body, that is, the headquarters reflect the ‘meeting point’ for the constituents of the group in terms of the decision-making. The determination of COMI as a factor for identifying jurisdiction becomes very relevant in the light of the past cases that the world has seen. For instance, in the famous case of BCCI, the parent company of the group was incorporated in Luxemburg, while the group’s assets were spread across the world. The group operated primarily from London, so the jurisdiction, in this case, should have been London. However, Luxemburg was identified for jurisdiction. These cases reflect on the need for an established test. Focus on parent company’s location, which may have no real control of operations in its hands, can result in wastage of time and efforts with no real remedy to the creditors. Therefore, concentrating on the parent entity as representing the nucleus of the group centre can, at times be counter-productive.

To determine the nucleus of the group, various factors may be useful, such as

‘location where executive meetings were taking place, and where the financial affairs were directed; whether this management had the authority to direct or coordinate the global business...’ or

whether the registered office or another head office is the address of principal executive offices or whether it is only a ‘post box’, and whether the majority of the administrative functions of the companies were conducted from this place; whether a commercial policy was decided at this location; whether key contracts were subjected to that jurisdiction’s laws, etc. (Mevorach, 2008)

The test of operational headquarters ensures reflection of the economic reality of the group and shows the actual connection among the group constituents. Once identified, it can avoid multiplicity of proceedings and will discourage forum shopping for bankruptcy havens by
facilitating the initiation of main proceedings at the brain site of the group. The adoption of this test in India will mean that it will take a global look at the enterprise and will bring parity with other developed legislation on insolvency. Creditors of the group, irrespective of their reach to a court or their knowledge, will be protected equally. This tenet subscribes to the goal of achieving fairness and predictability in internal insolvency resolution.

The ‘operational headquarters test’ is primarily based on situs of decision-making. Even if the board members are scattered across the world, the office from where these decisions are disseminated/formalised to inform other entities could be considered as the hot spot of that group. This consideration particularly holds significance in times of contagion such as COVID 19, which has caused a chaotic effect on the company’s conventional ways of functioning. With decisions being taken via video conferencing and other virtual modes, determining the locus of decision-making becomes difficult. Following the tenets established above discourse, the functional headquarters of the group enterprise would be the place where the decisions are birthed. This method of determination shall serve the following purposes: (a) it will continue to make the COMI predictable and ascertainable to the stakeholders of the corporate debtor (MNE); (b) it will help creditors get effective remedies; and (c) tracing subsidiaries, finances, assets, and creditors will become easier because of the availability of information from this situs.

The courts need to adopt a holistic approach to the issue, instead of racing to uphold their jurisdiction as the prime one. For instance, in the case of Eurofood C Ltd, which was a subsidiary company of Parmalat Group, the European Court of Justice held that since the subsidiary (Eurofood) was founded in Ireland, Ireland will have jurisdiction over the matter through the parent company and the operational headquarters of the group were located in Italy. Here, the court looked at the subsidiary and its location, ignoring the location of the group, which could have depicted the real economic situation of the company as well of the group. Similarly, in the case of BenQ, the Dutch court had to determine the jurisdiction of the group. The court went ahead with the place of incorporation of the parent company (Netherlands) as the criteria for determination despite the knowledge that the entire activities were managed from Munich.

However, few courts have been open to the idea of applying operational headquarters as the criteria, bringing more predictability and recognition to the test of COMI. For example, in Re Parmalat Hungary/Slovakia the issue before the court of Hungary was regarding a subsidiary company that was established in Slovakia, but its parent company was founded in Hungary. The court decided to adjudicate on the matter because it found that the decisions in the subsidiary company were managed and controlled by the Hungarian parent company.

It is clear from the above discussion that the goals of international insolvency can be achieved through the application of operational headquarters approach under the test of COMI through the courts have often found a reason to assume jurisdiction for themselves, either by applying the test or discarding it. However, in the larger interest of uniformity, I am of the opinion that the test should be adopted since it reflects the true global value that we have been striving for in commercial law.

However, this idea is not free from exceptions. Where a case involves a parent company that is situated in a country where it is functional, but all its subsidiaries are located in another country and operating along with their own creditors and assets, determination of headquarters would be different. Since in such a case, both jurisdictions have equal weightage, and a nucleus cannot be located. Courts of both jurisdictions should decide mutually through cooperation where the main and non-main proceedings should take place.

With the increasing cases of cross-border insolvency cases, the coordination among courts of different jurisdictions has also blossomed. Consequently, mutually agreed upon terms in the form of agreements between/among parties with the coordination/blessings of the courts in different jurisdictions have become increasingly common. Such agreements, called protocols, intend to pave a path for harmonized, smooth and coordinated proceedings in a jurisdiction that is mutually accepted by parties or in a combination of jurisdictions, as the case may be Flaschen & Silverman (1998).

While Lehman Brothers remains the biggest MNE insolvency in the history of the world with a debt of US$ 613 billion resulting in a protocol among sixteen countries (Leonard, 2009), it is Maxwell Communications which marks the success of protocol as a solution in the determination of jurisdiction in cross-border insolvency. Protocols, like agreements, have no set formats. They may contain provisions regarding jurisdictional determination/acknowledgement, data sharing, notices,
recognition of rights of creditors, to communication among courts and rights of representatives of other countries, among other clauses. The success of protocols depends on the relationship between countries. As was aptly pointed out by Hoffman J. in the case of Maxwell Communications—

The affected parties agreed to the plan and the scheme despite differences in the two nations’ bankruptcy laws. The distribution mechanism established by them—beyond addressing some of the most obvious substantive and procedural incongruities—allowed Maxwell’s assets to be pooled together and sold as going concerns, maximising the return to creditors. (Maxwell Communication Corp, 1996)

In the aforesaid case, while the parent company was incorporated in the UK, majority subsidiary companies of Maxwell Communication were situated and operated from the USA. The parent company governed the entire group, but assets of the group were handled by subsidiaries that were located in the USA. Consequently, both countries decided to run simultaneous proceedings with cooperation between the relevant courts.

In India, few cases have surfaced, exposing its lack of preparation in the area of cross-border insolvencies. Examples of such exposure are cases of Videocon Industries (State Bank of India v. Videocon Industries Ltd, 2019), and Jet Airways. Although these cases do not deal with MNEs, they do shed light in the path India may carve in the area of transnational insolvency cases. Jet Airways is an ideal case to take up. Jet Airways had its regional hub in Schiphol International Airport in the Netherlands. When the company faced financial distress, the creditors in the Netherlands moved to the Dutch court for initiating insolvency proceedings. A month later, State Bank of India also approached National Company Law Tribunal for initiating insolvency process against Jet Airways. On being apprised of the Dutch insolvency proceedings, the NCLT, instead of initiating cooperation, asked the Insolvency Professional to ignore the proceedings in the Netherlands. It is only through the intervention of the Appellate Tribunal (India) that the representative of the Committee of Creditors was advised to seek cooperation from the Dutch Court, which after intense deliberations, resulted in a Cross-border Insolvency Protocol. This protocol went in the right direction, recognizing India as the COMI since the company was Indian with main assets situated in India. The Dutch proceedings where the case was filed for liquidation (and not for rehabilitation) were non-main proceedings (Jet Airways (India) Ltd v. State Bank of India & others, 2019). While tribunal refused to recognize the rights of Dutch creditors, the appellate tribunal overruled its decision and gave sanctity to the protocol developed between the Dutch representatives and their Indian counterparts. This uncertainty between courts is the exact problem that creditors face because while ‘protocol plugs a huge gap, it is in no way a substitute for a comprehensive cross-border insolvency law’ (Batra, 2019). In the absence of any guidelines, one can never be sure if the courts will recognize foreign creditors’ rights or not.

PROBLEM OF THE CONTROL-COUNTRY

Certain countries are preferred over others as destinations for insolvency resolution or liquidation, as the case may be, due to factors like adequate protection to debtor rights or assets, creative remedies, timely disposal of cases, parity among stakeholders. These are called control-countries. The reason why they warrant discussion is because they tend to act an exception to the determination of jurisdiction and the tests elaborated above, and lead to forum shopping. Most of the time, the creditors or debtors may use countries that witness existence/operation of most of the financial institutions and MNCs as their choice of forum. These countries may assume jurisdiction because of the nexus of the international players on their soil, which can enable easy access to assets, stays and imposition of sanctions. So, even where the group has no real connection, the corporate debtor may initiate proceedings by justifying that all its creditors (or nearly all) have an office in that country. Three such identified control-countries are the USA, the UK and Singapore. These countries enjoy the presence of all standard MNCs, banking companies and other financial institutions, thereby a luring place for bankruptcy haven. These countries become insolvency havens for the following reasons:

1. global stay by courts on the assets/affairs of the MEG (Westbrook, 2018),
2. effective and immediate relief due to their ability to control the creditors and debtors alike (these countries are often tax havens too, and have offices of nearly all MEGs, through whom control is effectuated; Couwenberg & Lubben, 2015) and
3. Injunctions, seizures and other remedies can be implemented immediately, optimizing the value of the entire enterprise.
An example of the manipulation using such forums can be given through the case of *Pacific Andes Resources Development Limited.* PARDL had subsidiary companies in Peru that were undergoing insolvency proceedings there, while its parent company, which was listed on Singapore Exchange filed for insolvency in Singapore (also a potential COMI). Both Singapore and Peru courts were unable to impose an indirect global stay on proceedings and attachment of assets. While this chaos was ongoing, the group, as a whole, filed for bankruptcy in New York (USA) where the offices of key creditors were situated, resulting in an effective indirect global stay on parallel proceedings. One must note that there was no real/strong connection between the country and its group, as a whole or of its constituents. They had no assets in the USA apart from the retainer fee paid in advance for legal advice. This study reflects the potential abuse of forum that can ensue as a consequence of the assumption of jurisdiction by control-countries.

This problem has found no solution as of now and is likely to continue in the near future. India must ensure certain protection in this regard in its prospective amendments to prevent such abuse of position by the highhanded countries. Also, to an extent, the assumption of jurisdiction by control-countries goes against the model Law of UNCITRAL which lays down under Article 25 and 26, the mandate for the courts and insolvency representatives by saying that they ‘shall cooperate to the maximum extent possible’ (Westbrook, 2006). A control-country’s court, thus, assuming jurisdiction without taking note of other pre-existing proceedings and the COMI goes against the spirit of the Model Law itself.

Given that various reasons make a country an ‘insolvency-haven’, different stakeholders may choose differently (Franken, 2014). A country, such as the USA is considered to be a control-country because it provides better facilities to the corporate debtor. Where a company files for insolvency under Chapter 11 of the US Code, the management remains in control of the entity until a reorganization plan or liquidation decision is reached (Westbrook, 2009). That situation is favourable to the management which wishes to participate actively in the reorganization of the company, instead of being benched by the creditors, who are not that well-versed with the company’s daily affairs or by the resolution professionals who are equally unaware of the company’s functioning until the time they take over. Another factor for opting to surrender to the control-country’s jurisdiction is the availability of effective reorganization laws because many jurisdictions lack ‘restructuring of enterprises’ as an option in their insolvency laws. Yet another reason could be the automatic moratorium (American Law Institute & International Insolvency Institute, 2012) that is put on the actions of creditors against the corporate debtor until the court reaches a decision, such as in the case of *Patriot Coal Corporation.* Also, the restricting plan can be approved with lower threshold in these control-countries in comparison to their counterparts. Furthermore, the long look-back period for reverting transactions that were undervalued or fraudulent or unauthorized (Westbrook, 2018), also lures creditors to choose these control-countries as destinations for remedies.

All these factors described above may tempt corporate debtors and creditors to surrender their rights before a control-country’s jurisdiction to seek effective, efficient, time-saving and value-maximizing remedies. However, the path is fraught with various concerns.

One questions whether the stakeholders can be allowed to resort to a country’s jurisdiction just because they have better laws while there is no substantial nexus between the country and the group of the creditors? It could be a case where unanimously, all creditors and debtors agree to be guided by a particular jurisdiction, as happens in the cases of international arbitration. However, the difference between the two scenarios is that the latter one is agreed upon via a prior contract. Even if one accepts that if both creditors and debtors unanimously agree, jurisdiction can be given up by a court where COMI resides in favour of the one where the parties desire, what happens when key creditors agree to a particular jurisdiction which has better laws along with the corporate debtor, but minority creditors do not. These laws may be more suitable to a specific set of creditors than others, thereby finding favour with them. Should the rights of minority creditors (who are usually small domestic creditors) be subordinated in this case? The debate remains open. While Westbrook (2006–2007) agrees that the parties should be allowed to resort to jurisdictions with better laws, I respectfully disagree due to the absence of protection to minority creditors and possible local stakeholders. Courts should avoid resorting to the assumption of jurisdiction if the COMI is not situated in their jurisdiction, except when there are very pertinent reasons to accept them. Consider the case where MSMEs are involved.
India provides special protection to the medium and small enterprises, especially cottage industries. If they are creditors of an MNE, the international creditors may find it convenient to apply for bankruptcy in the USA or the UK where the laws give high preference to secured creditors but may not recognize MSMEs, a special category requiring attention and protection. Similarly, not all jurisdictions provide as much privilege to workers and employees as India does. Therefore handing over jurisdiction to control-country may provide expedited rehabilitation or liquidation, as the case may be, but in the absence of recognition of rights of minority creditors, the justice shall not be served to those who will be stripped of their special status, had the MNE’s situs been fairly determined.

Also, India has adopted the best practices of the USA, Singapore and the UK apart from the UNCITRAL principles of domestic insolvency. Therefore, the availability of automatic moratorium (Section 13 & 14 of the Insolvency & Bankruptcy Code, 2016), proceedings for reorganization of the company, look-back period extending up to two years (example, Section 46), easy consensus via 66% voting of financial creditors (Section 30(4)) of Insolvency & Bankruptcy Code, 2016, adequate measures for protection of stakeholders other than creditors (Misra, 2020), and a time-bound process for liquidation (Section 12), put India on the same pedestal as any other control-country. However, one must admit the lack of experience of the adjudicating authorities that may be a cause of concern for few stakeholders at present. That being said, India promises high at present in terms of insolvency resolution.

Even generally, the forum shopping in favour of the control-country which is not COMI, may undermine not only the UNCITRAL model law principles but also affect larger public interests that are usually associated with the web of laws that insolvency of an enterprise is governed by (Fox, 2013). The choice of control-country, though often convenient to the debtor and creditor, brings about uncertainty in jurisdiction despite COMI being settled, and leads to a more chaotic and disorderly global scenario, overturning all the efforts made in bringing certainty to insolvencies of MNEs.

CONCLUSION

It can be concluded from the aforesaid discussion that adoption of the concept of COMI, through the operational headquarters test, can lead to an efficient and optimal test for determination of a jurisdiction that can deliver effective remedies. It will lead to discouragement of an option by corporate groups to opt for forum shopping for bankruptcy haven. An added advantage in this process is the parity that can be ensured to the various stakeholders. A suggestion that can be added here is the mandatory disclosures about the nucleus of the group as part of healthy corporate governance practices, that is, determination of COMI by the corporate debtor itself. This will also ensure predictability of the jurisdiction by creditors and other stakeholders and bring more inflow of finances during the fine health of the company.

In an Indian context, globalization is a driving force in the market that needs not only ease of incorporation but the ease of dissolution as well. The creditors of a multinational group must enjoy the certainty of their rights and situs of their enforcement when they deal with a constituent of the group as a healthy company. When India adopts a determination process of jurisdiction that enjoys validity and recognition in other developed countries, it gains certainty and predictability (primary goals of international insolvency in the context of MNEs). It enjoys a coveted position in the arena of commercial law. Our courts have always cooperated with their fellow counterparts in other countries, but we need a robust legal regime to back it up. Our domestic law is updated, and we are about to incorporate an international insolvency law chapter. We must pave a path for more business and utilize this opportunity to carve a niche for India as an ideal destination for global trade and commerce.

DECLARATION OF CONFLICTING INTEREST

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

FUNDING

The author received no financial support for the research, authorship and/or publication of this article.

NOTES

1. In the case of HIH Casualty, McGrath & Others v. Riddell & Others [2008] UKHL 21, the House of Lords observed in Para 6 that “despite the absence of statutory provision,
som degree of international cooperation in corporate insolvency has been achieved by judicial practice. This was based upon what English Judges have … regarded as a general principle of private international law … that bankruptcy should be unitary and universal. There should be a unitary bankruptcy proceeding in the court … which received world-wide recognition and it should apply universally to all the bankrupt’s assets.”

2. The case related to a set of sister companies that were incorporated in Cayman Islands but recovery of certain assets/documents was invoked by the liquidators of the companies in Bermuda where the documents were located. The matter went up to UK Privy Council wherein it was concluded that only that court will have jurisdiction w.r.t. the insolvency of a company that was incorporated in that country, and not Bermuda, where the law does not allow liquidation of a company incorporated outside Bermuda.

3. In various cases such as In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) where court refused to recognize Cayman Islands proceedings despite Cayman Islands being the place of the corporate debtor’s incorporation or In re BRAC Rent-A-Car International Inc. (2003) EWHC (Ch) 128 [1], [4]–[5] where court concluded that English court will have jurisdiction to make an administration order over debtor company, which was incorporated in Delaware, USA, because debtor’s COMI was in England and it had no employees in the USA. Similarly in the case of MG Rover (2005) EWHC 874 (Ch) (Eng.), it was concluded that MC Rover (France)’s COMI was located in England despite the company’s registration in France. For further details, refer to Westbrook (2017).

4. Eurofood C Ltd (ECJ) (2006) BCC 397.

5. BenQ Mobile GmbH & Co OHG and BenQ Mobile Holding BV, Docket No 1503 IE 4371/05 Munich, 5 February 2007.

6. Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June 2004.

7. Refer also to Energotech SARL (2007) BCC 123 & Daisytek (Re Daisytek-ISA Ltd (2003)) BCC 562.

8. Maxwell Communication Corp 170 BR 800 (Bankr. S.D.N.Y. 1994) and Maxwell Communication Corp (1993) 1 WLR 1402 (Ch 1993).

9. In re Pac. Andes Res. Dev. Ltd (2016) SGHC 210-Singapore High Court.

10. In re China Fishery Grp. Ltd (Cayman), No. 16-11895 (JLG), 2016 WL 6875903, at 1–3 (Bankr. S.D.N.Y. 28 October 2016).

11. In re Patriot Coal Corp., 482 B.R. 718, 747 (Bankr. S.D.N.Y. 2012).

12. Refer also to In re Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 10–11 (Bankr. S.D.N.Y. 2003) where US bankruptcy law was preferred because applicable Colombian bankruptcy law was comparatively new and untested.

REFERENCES

American Law Institute & the International Insolvency Institute. (2012, March 30). ALI-III Global principles for cooperation in international insolvency cases 2012. https://www.iiiglobal.org/sites/default/files/ALI-III%20Global%20Principles%20booklet_0.pdf

Batra, S. (2019, November 1). Cross Border Insolvency Protocol fills a gap, but is not a comprehensive law. The Financial Express. https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/

Couwenberg, O., & Lubben, S. J. (2015). Corporate bankruptcy tourists. The Business Lawyer, 70(3), 719–750.

Dunning, J. H. (1993). Multinational Enterprises and the Global Economy. Edward Elgar, Cheltenham, p.3.

Flaschen, E. D., & Silverman, R. J. (1998). Cross-border insolvency cooperation protocols. Texas International Law Journal, 33, 587.

Fox, G. W. (2013). Patriot coal: Interest of justice Trumps convenience of the parties. American Bankruptcy Institute Journal, 32(1), 20, 70–71.

Franken, S. M. (2014). Cross-border insolvency law: A comparative institutional analysis. Oxford Journal of Legal Studies, 34(1), 97–131.

Jet Airways (India) Ltd v. State Bank of India & others. (2019) Company Appeal (AT) (Insolvency) No. 707 of 2019, order dated 26 September 2019 https://ibbi.gov.in/uploads/order/b7bd5ba93be73bb4602dcfe25f25lcd4.pdf

Leonard, B. (2009, June 29). Major advances in cross-border insolvency protocols: Lehman Bros. and Madoff Securities. https://www.lexology.com/library/detail.aspx?g=46c2564c-1f8-415b-ac5e-299b7180b100

LoPucki, L. M. (2005). Global and out of control. American Bankruptcy Law Journal, 79(1), 96–97.

Maxwell Communication Corp. ex rel. Homan v. Societe Generale (In re Maxwell Communication Corp.), 93 F. 3d 1036 (2d Cir. 1996).

Mevorach, I. (2008). The ‘home country’ of a multinational enterprise group facing insolvency. International & Comparative Law Quarterly, 57(2), 427–448.

Misra, P. (2020). Reviving insolvency law for achieving healthy corporate governance in India: Has the exercise been a success? Australian Journal of Corporate Law, 35, 77.

Muchlinski, P., & Dine, J. (2007). Multi-national Enterprises and the Law 2007–2008. The School of Oriental and African Studies and Centre for Commercial Law Studies, Queen Mary University of London. http://ccsi.columbia.edu/files/2014/01/DineandMuchlinski-MultinationalEnterprisesandtheLaw.pdf

Organisation for Economic Cooperation and Development. (2011). OECD Guidelines for Multinational Enterprises: 2011.
Perkins, L. A. (2000). Defense of Pure Universalism in Cross-border Corporate Insolvencies. *Journal of International Law and Politics*, 32, 789.

Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (recast). (2015). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=EN%1D%EF%BF%BD_z8o

State Bank of India v. Videocon Industries Ltd. (2019). MA 2385/2019 in C.P.(I.B.)-02/MB/2018, NCLT Mumbai, order dated 8 August 2019 and 2 February 2020. https://nclt.gov.in/sites/default/files/final-orders-pdf/VIDEOCON%20INDUSTRIES%20LTD.%20MA%201306%20OF%202018%20%20OF%202018%20NCLT%20ON%2008.08.2019%20FINAL.pdf

Teubner, G. (1993). The many-headed hydra: Networks as higher-order collective actors. In J. McCahery, S. Picciotto & C. Scott (Eds.), Corporate control and accountability. Oxford University Press.

Westbrook, J. L. (1997). Memorandum to the National Bankruptcy Review Commission. In *Bankruptcy, the Next Twenty Years: National Bankruptcy Review Commission Final Report*. The Commission.

Westbrook, J. L. (2000). A global solution to multinational default. *Michigan Law Review*, 98(7), 2276–2328.

Westbrook, J. L. (2004). The duty to seek cooperation in multinational insolvency cases. In Peter, H., Jeandin, N., & Kilborn, J. (2006). *The challenges of insolvency law reform in the 21st century*. Schulthess.

Westbrook, J. L. (2006–2007). Locating the eye of the financial storm. *Brooklyn Journal of International Law*, 32(3), 1019–1040.

Westbrook, J. L. (2009). Multinational insolvency: A first analysis of unilateral jurisdiction. *Norton Annual Review of International Insolvency*, 11–32.

Westbrook, J. L. (March 28, 2018). Global insolvency proceedings for a global market: The universalist system and the choice of a central court. U of Texas Law, Public Law Research Paper No. 691 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3151805

United Nations Commission on International Trade Law. (2005). *Legislative guide on insolvency law*. United Nations Publications.

---

**Priya Misra** teaches Corporate Law, Mergers & Acquisitions, Corporate Insolvency Law, Capital Market Regulation & Corporate Governance to undergraduate and post graduate students. She is also a visiting faculty at National Academy of Direct Taxes, Nagpur, National Academy of Customs, Indirect Taxes and Narcotics, Faridabad, and ICLS Academy, IICA, Manesar for the specialized areas of Business Laws. Her current areas of interest include Cross-border Corporate Insolvency Law and Corporate Social Responsibility.

email: priyamisra.nls@gmail.com