Short Paper Topic:

"Analyse the use of cross-border protocols in cross-border insolvency proceedings"

Title: **Cross-Border Insolvency Protocols**

Table of Contents

Chapters:……Page Number

1. **Introduction:**

No matter what, some businesses will always fail. There can be multiple reasons for the failures. Although if a company goes insolvent and it only operates in one territory/jurisdiction the resolution process or if the company is not viable winding up process would be easier as only one law or statute will rule. Although if the company is a multinational or has assets or creditors in other territories/jurisdictions as well (which is the case in most insolvencies), resolution of such companies or liquidating the assets of such companies entails multi fold problems and hence the solution also cannot be that simple. In the times of global organizations many companies are operational cross borders. And when these companies become insolvent there are a lot of cross border issues which are to be taken care of.

To deal with these multiple issues a system of “cross-border insolvency protocol” has been developing. The term "cross-border insolvency protocol" typically refers to an agreement or framework established between different jurisdictions to address the issues arising from insolvent entities that have operations or assets in multiple countries. These protocols aim to facilitate cooperation and coordination between courts, insolvency practitioners, and stakeholders involved in cross-border insolvency proceedings.

The purpose of a cross-border insolvency protocol is to establish guidelines and mechanisms for the recognition and coordination of insolvency proceedings across different jurisdictions. It helps address challenges such as conflicting laws, conflicting court decisions, and difficulties in asset recovery and distribution. These protocols often promote cooperation, information sharing, and coordination among relevant parties to achieve more efficient and effective outcomes in cross-border insolvency cases.

It's important to note that specific cross-border insolvency protocols can vary depending on the jurisdictions involved. Different countries may have their own frameworks or international agreements in place to address cross-border insolvency, such as the UNCITRAL Model Law on Cross-Border Insolvency or bilateral treaties. These protocols are designed to enhance legal certainty and facilitate the resolution of cross-border insolvency cases.

2. **Major issues in Cross Border Insolvencies:**

A. **Jurisdictional conflicts (COMI-Centre of Main Interest):** Determining the jurisdiction where the insolvency proceedings should take place can be complex when multiple countries are involved. Different jurisdictions may have their own laws, regulations, and court systems that need to be navigated, leading to potential conflicts and disputes.

B. **Recognition of foreign proceedings**: Ensuring the recognition of insolvency proceedings initiated in one jurisdiction by other jurisdictions is crucial. Without proper recognition, the effectiveness and enforcement of decisions and orders may be hindered, leading to delays and difficulties in the overall resolution of the case.

C. **Coordination & Cooperation among multiple stakeholders**: Cross-border insolvency cases involve numerous stakeholders, including debtors, creditors, courts, insolvency practitioners, and regulatory authorities. Coordinating their efforts and interests across different jurisdictions can be challenging, particularly when there are language barriers, conflicting laws, or differences in legal systems.

D. **Asset identification and recovery**: Identifying and recovering assets located in different countries can be complicated in cross-border insolvency cases. Different legal systems and conflicting priorities may affect the ability to locate and liquidate assets, resulting in delays and potential losses for creditors.

E. **Diverse legal frameworks**: Each jurisdiction has its own insolvency laws and procedures, which can vary significantly. Harmonizing and aligning these legal frameworks can be complex, especially when there is no specific cross-border insolvency protocol or agreement in place between the relevant jurisdictions.

F. **Treatment of Avoidance Transactions**: A protocol may identify which Court is competent to deal with transaction avoidance claims, which in turn may depend on relevant provisions of the applicable laws which may not be in sync with each other. The IBA Concordat specifies that transaction avoidance rules have 'no greater applicability than the laws of any other nation' and that they do not apply to transactions that 'have no significant relationship with the plenary forum.' Instead, the Global Principles for cooperation in international insolvency cases suggests that insolvency practitioners should reach a common position on this type of claims. The Livent protocol also covered transaction avoidance actions.

G. **Residual Administrative Issues:** Finally, protocols also address residual administrative issues such as the issue of expenses, fees, and costs. Generally, the agreement provides that fees, costs and expenses of insolvency practitioners and professionals would be paid from the respective insolvency estate. Parties may also stipulate the procedure for accounting or the procedure applicable to the exchange of information regarding the estate accounts.

Addressing these issues requires cooperation, communication, and coordination among the stakeholders involved, along with the application of international frameworks or protocols designed to facilitate cross-border insolvency cases.

3. Most Popular Guidelines for using Protocols:

There have been several cross-border insolvency Guiding principles to draw protocols and frameworks used in the past to address the complexities of international insolvency cases. Although before I dig deeper into these types of protocols we must understand the doctrinal perspective to these cross border insolvency cases.

Universalism: Universalism in cross-border insolvency refers to the idea that there should be a unified and coordinated approach to resolving insolvency cases that transcend national borders. It emphasizes the recognition and cooperation among different jurisdictions to achieve an efficient and equitable outcome for all stakeholders involved. Universalism advocates for the recognition and enforcement of foreign insolvency proceedings and the coordination of these proceedings to maximize the value of the insolvent debtor's assets.

Territorialism: Territorialism, on the other hand, recognizes the sovereignty of individual jurisdictions and their ability to apply their own laws and regulations to insolvency cases within

their territories. It prioritizes the protection of local interests, including local creditors and domestic insolvency laws.

Middle Path: Mixed universalism represents a middle ground that seeks to strike a balance between universalism and territorialism. It recognizes the importance of cooperation among jurisdictions while also respecting the legal autonomy of each jurisdiction in handling insolvency cases. Mixed universalism promotes the idea that certain aspects of the insolvency process, such as recognition of foreign proceedings, coordination of assets, and cooperation among stakeholders, can be universalized, while leaving other matters, such as distribution of assets, to the jurisdiction where the insolvency proceedings take place.

The interaction between these doctrines in cross-border insolvency cases can be complex and requires international frameworks. The prominent ones we will discuss below:

UNCITRAL Model Law on Cross-Border Insolvency: The United Nations Commission on International Trade Law (UNCITRAL) developed this model law to provide a framework for the recognition and cooperation of cross-border insolvency proceedings. Many countries have adopted or enacted legislation based on this model law, promoting consistency and cooperation in international insolvency cases.

As this is the most popular framework on which many cross border protocols are based on, I would like to explain Article wise summary to demonstrate that how it addresses most of the issues to be handled in a cross border insolvency scenario:

a. Article 1. This article talks about the 'scope of application' where assistance is sought by a foreign representative.
b. Article 2. This provides for the definitions used in the framework.
c. Article 3. This article restricts 'international obligations of this state'.
d. Article 4. Here 'competent court or authority' is discussed and agreed upon.
e. Article 5. 'Authorization of competent authority' once recognized and agreed upon by parties.
f. Article 6. This article protects if any action be contrary to public policy of this state.
g. Article 7. This provides for 'additional assistance under other laws' to the representative.
h. Article 8. This provides for the scope of 'interpretation' of the law.
i. Article 9. Under this a foreign representative gets 'right to direct access' to a court.
j. Article 10. This defines the 'limited jurisdiction' to the purpose of application.
k. Article 11. This empowers 'application by a foreign representative to commence a proceeding' if conditions are met.
l. Article 12. This ensures 'participation of a foreign representative in a proceeding under the state law'.
m. Article 13. This provides for 'access of foreign creditors to a proceeding under the state law.
n. Article 14. This provides for 'notification to foreign creditors of a proceeding'.
o. Article 15 to 24. These articles in Chapter III of the UNCITRAL Model Law on Cross-Border Insolvency deals with the issues related to 'Recognition of a foreign proceeding and reliefs' thereon.
p. Article 25 to 27. As part of the Model Law's Chapter IV these articles discusses about 'Cooperation with foreign courts and foreign representatives'.

q. Article 28 to 32. In the Chapter V of the Model law these articles provide guidance on how to deal with the 'Concurrent proceedings,. Issues like commencement of a proceeding in a foreign court, coordination of different courts and setting rules for payments to different creditors are addressed in this chapter.

European Union Insolvency Regulation (EIR): The EIR, formerly known as the European Insolvency Regulation, is applicable among the member states of the European Union. It establishes rules for determining jurisdiction, applicable law, and the recognition and enforcement of insolvency judgments within the EU member states.

The history and development of European Union (EU) insolvency regulations can be traced back to various initiatives aimed at harmonizing and improving the legal framework for cross-border insolvency cases within the EU. Here are some key milestones:

1. 1980s-1990s: The need for a unified approach to cross-border insolvency cases was recognized as the EU experienced increased economic integration. Several studies and reports highlighted the challenges and inconsistencies in dealing with insolvencies involving multiple jurisdictions.

2. 1995: The European Commission published a Green Paper on Insolvency Law, which provided an overview of the existing national insolvency laws within the EU and initiated discussions on the need for a harmonized approach.

3. 2000: The European Commission proposed the "European Insolvency Regulation" (EIR), which aimed to establish a comprehensive framework for resolving cross-border insolvency cases within the EU. The EIR's objective was to provide predictability, enhance cooperation between courts and insolvency practitioners, and promote the rescue and restructuring of financially distressed businesses.

4. 2002: The European Insolvency Regulation (Council Regulation (EC) No 1346/2000) came into force. It provided rules for determining the jurisdiction and applicable law, recognition of insolvency proceedings, and coordination of proceedings involving multiple jurisdictions within the EU. The EIR introduced the concept of "main proceedings" and "secondary proceedings" to facilitate efficient cross-border insolvency cooperation.

5. 2015: The EU adopted a recast version of the EIR, which aimed to address certain limitations and improve the effectiveness of the regulation. The Recast Insolvency Regulation (Regulation (EU) 2015/848) introduced several changes, including the expansion of its scope to cover a broader range of insolvency-related proceedings, the establishment of an electronic insolvency register, and the promotion of rescue proceedings and early restructuring.

6. 2019: The EU adopted the Directive on Restructuring and Insolvency (Directive (EU) 2019/1023). The directive aims to harmonize the preventive restructuring frameworks across EU member states, encouraging early intervention and promoting the survival of viable businesses. It also provides rules for facilitating the discharge of debt for over-indebted entrepreneurs.

These developments reflect the EU's commitment to fostering a more efficient and consistent framework for dealing with cross-border insolvency cases, promoting economic stability, and facilitating the rescue of viable businesses facing financial difficulties. The regulations and

directives provide a legal framework for cooperation, coordination, and the recognition of insolvency proceedings across EU member states.

The European Best Practices Recital 48 EIR encourages insolvency practitioners and courts to consider the best practices emerging at the international level in the field of cooperation and coordination. The Recital also mentions principles and guidelines developed based on the experiences by European organisations. This reference is understood to point at (i) the European Communication and Cooperation Guidelines for Cross-Border Insolvency developed by Professor Bob Wessels and Professor Miguel Virgós in 2007 (CoCo Guidelines), and (ii) the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines developed by Professor Bob Wessels, Professor Jan Adriaanse and Paul Omar (EU JudgeCo Principles and Guidelines, 2015). These European initiatives aim at adapting best practices in cross-border cooperation and communication developed in a mostly common law background to the civil law reality of most EU Member States.

Cross-Border Insolvency Regulations (CBIR): These regulations were enacted in several countries, including the United Kingdom, Singapore, and Australia. They are based on the UNCITRAL Model Law and provide a framework for dealing with cross-border insolvency cases in a coordinated and efficient manner.

Cross-Border Insolvency Protocol in North America: The United States and Canada have a protocol known as the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. It promotes cooperation, coordination, and information sharing between courts handling cross-border insolvency cases in the two countries.

These are just a few examples, and many other countries and regions have their own protocols and frameworks to address cross-border insolvency. The specific protocols used can vary depending on the jurisdictions involved and the nature of the case. The clarification of the phenomenon of protocols also allows for a contribution to the academic discussion of their legal nature. Most importantly, protocols concluded by insolvency practitioners should be differentiated from protocols issued by courts. Any publication of a protocol or guideline or principles for (court-to-court) communication issued by insolvency courts is a determination by a court in a specific case or a general resolution.

4. **Major cases where Protocols were used:**

Cross-border insolvency protocols and frameworks have been utilized in various legal cases to address complex insolvency matters involving multiple jurisdictions. Here are a few notable examples:

Nortel Networks Corporation: Nortel was a multinational telecommunications equipment company that filed for bankruptcy protection in Canada, the United States, and the United Kingdom in 2009. The case involved extensive cross-border assets and creditors. The courts in these jurisdictions used cross-border insolvency protocols to coordinate the proceedings and address the distribution of assets among the various creditor groups.

Lehman Brothers: The collapse of Lehman Brothers in 2008 was one of the largest bankruptcy cases in history, involving entities and assets across the globe. Courts in the United States and

various other countries worked together under cross-border insolvency protocols to deal with the insolvency proceedings and asset distribution.

Hanjin Shipping: In 2016, Hanjin Shipping, a major South Korean shipping company, filed for bankruptcy. The case involved ships, cargo, and creditors in different countries.

Jet airways: In June 2019, Indian court NCLAT (National Company Law Appellate Tribunal) passed an order effecting the protocol for Jet Airways (India) Limited which was signed by Indian resolution professional and Dutch Trustee for resolving the Corporate Debtor.

Generally, the protocols are signed by the insolvency practitioners, who have the capacity and authority to agree on behalf of the insolvency estate. Occasionally, the debtor in possession, major creditors or the creditors' committee may be involved as a party. In contrast, the courts are never parties to a protocol. However, they may have a role in encouraging the insolvency practitioners to seek an agreement with the relevant counterparties.

5. **Conclusion**:

A written down cross border insolvency protocol signed by all the concerned stakeholders (generally the insolvency practitioners/administrators and if so required by the creditors and resolution applicants) having enforceability, in case of default, is the most suitable framework for addressing the issues sprouting in a multistate insolvency and resolving the same in least time and most efficiently in terms of realising the value, taking care of all the stakeholders, minimising the conflict and cost. Which type of protocol will be most suitable, this can be decided Depending on the jurisdictions and common understanding. Protocols have been used in past and best practices are being developed around them. So, we can conclude that cross border insolvency protocols are successfully used and will be used in the future, at least until the world really becomes one territory.

6. **Bibliography:**

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Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

The Cross-Border Insolvency Protocol; what is it and what is in it? From a European Union Perspective - Master Thesis Fabian Andreas Van de Ven Leiden Law School July 31, 2015

Appendix A: Author Statement for Short Paper

The following statement must be appended to the cover of your Short Paper:

Author Statement

ANJU AGARWAL

Full name

DECLARATION OF HONOUR

I declare that the paper, titled " CROSS- BORDER INSOLVENCY PROTOCOL "

is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.

Signed

Date: 8th July '2023

Place: New Delhi