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Adoption of the UNCITRAL Model Law on Cross Border Insolvency in the Asian Context: Emphasis on Singapore, Japan and India

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SUBMITTED

BY

SAURAV PANDA

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INTRODUCTION

With swift growth in transnational trade and commerce, the structures for undertaking international business have undergone massive evolution. From a simple domestic limited liability structure, corporates have taken the shape of global conglomerates operating in multiple jurisdictions, resulting in corporate entities having assets, liabilities, debtors and creditors across geographic borders. While globalisation has led to blurring of traditional geographic boundaries in business, the expansion into a different geographic region needs to factor in each region's unique political and legal divisions which is a significant factor in determining the risks associated with investment in such region.

Consequentially, when a multinational corporate entity fails, these legal divisions tend to lead to a race between the creditors (each of whom may initiate proceedings in different jurisdictions) in finding the best possible solution for themselves, usually leading to multiple recovery/insolvency proceedings which are initiated in several jurisdictions. When the debtor is subject to insolvency proceedings in multiple jurisdictions or where the debtor is subjected to applicability of multiple insolvency laws, it gives rise to various private international law issues such as those concerning recognition and enforcement of foreign court decisions, recognition of claims of foreign creditors, difference in priorities of creditor claims in different jurisdictions or issues surrounding the control and disposal of assets located in foreign jurisdictions.[1]

The most economically efficient outcome lies in a collective and coordinated proceeding conducted in a single jurisdiction with worldwide recognition and enforceability. The co-ordination of proceedings and co-operation between judicial and administrative agencies in different jurisdictions aids 'the goal of maximizing the value of debtor's worldwide assets, protecting the rights of the debtors and creditors and furthering of the just administration of the proceedings'.[2] With this thought and rationale, the United Nations Commission on

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[1] Ian F Fletcher, *The Law of Insolvency,* 4th edn, Sweet & Maxwell (2009).

[2] The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2016) <https://documents1.worldbank.org/curated/en/518861467086038847/pdf/106399-WP-REVISED-PUBLIC-ICR-Principle-Final-Hyperlinks-revised-Latest.pdf> last accessed 26 February 2024.

International Trade Law ("**UNCITRAL**") had issued the UNCITRAL Model Law on Cross-Border Insolvency ("**MLCBI**") on 30 May 1997.

The MLCBI seeks to equip national insolvency laws with a more modern, harmonized and fair framework to deal with insolvencies where the assets of the debtor lie in more than one state or where the creditors of the debtor belong to more than one state.[3] MLCBI was conceptualized as a framework which could supplement the national laws and foster the application of uniform and consistent principles in cases of cross-border insolvency. Rather than attempting an overhaul and unification of all substantive insolvency laws across the globe, the MLCBI respects the procedural differences in national laws and seeks to adopt a middle path, in which the national insolvency framework continues to prevail but in a fairer and more harmonized environment marked by the principles of: (i) co-operation and co-ordination - both judicial and administrative; (ii) access – to assets and foreign courts; (iii) recognition – of foreign proceedings, foreign representative and foreign creditors; and (iv) relief – in the nature of interim, mandatory and discretionary relief available at different instances.[4]

Through this paper, the author seeks to analyse how the MLCBI has been enacted/adopted in Asia, with specific focus on Japan and Singapore. Analysing the reasons for the adoption along with the reasons for divergence from MLCBI in these jurisdictions, the author extrapolates the findings of this research to India, his home jurisdiction, where a draft law[5] adopting/implementing the MLCBI is proposed and yet to be notified into the statute.

DIVERGENCE FROM MLCBI IN ASIAN JURISDICTIONS

As of January 2024, only 59 states have enacted legislations either based on or influenced by MLCBI.[6] Out of these 59 states, countries from Asia are few in number, 9 to be precise. Despite the common influence of MLCBI, there are divergences in manner of adoption of MLCBI by each state. Therefore, it is not just the act of adoption of MLCBI which would determine its success, but it is also contingent upon: (i) how states implement the principles of MLCBI in their domestic law; and (ii) how the courts of such state interpret and enforce these principles

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[3] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, New York, United Nations (2014), pg 19.

[4] *supra*, note 3, pg 27-32.

[5] Ministry of Corporate Affairs, Government of India, *Draft Part Z* (2018).

[6] United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> last accessed 26 February 2024.

contained in MLCBI.[7] In fact, in this context, Prof. Bob Wessels had opined that MLCBI's success was 'heavily dependent upon whether, and in what manner, countries choose to enact it'.[8]

In this section, the author analyses the manner of adoption of MLCBI and divergence from the core principles of MLCBI in two Asian jurisdictions, Japan and Singapore and then examines the divergence in the proposed adoption of MLCBI in India.

Japan

Japan was one of the first countries to adopt a legislation implementing the MLCBI. In the year 2000, Japan enacted the 'Act on Recognition of and Assistance for Foreign Insolvency Proceedings' ("**RAFIP**"), which bestowed upon the Tokyo District Court the power to recognize and provide assistance in respect of foreign insolvency proceedings in Japan. Prior to the enactment of RAFIP, Japan employed a pure territorialism approach in respect of its insolvency laws, which means that the insolvency law neither recognised the effect of Japanese proceedings to foreign countries nor recognized the effect of foreign proceedings in Japan.[9]

While RAFIP is modelled on MLCBI, Japan has incorporated several key differences and exceptions to the concepts in MLCBI, some of which are detailed below:

(i) **Definition of a 'foreign proceeding'**: The definition of 'foreign proceeding' adopted in RAFIP differs from the MLCBI as a foreign proceeding is defined in RAFIP as a proceeding filed in a foreign country which is equivalent to a Japanese bankruptcy/rehabilitation/ special liquidation proceeding, restricting the scope of proceedings which may be recognized in Japan. In this regard, domestic Japanese law provides for five types of proceedings: (a) bankruptcy (*hasan*) under the Bankruptcy Law (*hasan ho*); (b) special liquidation (*tokubetsu seisan*) under the Commercial Code (*sho ho*); (c) corporate reorganization (*kaisha kosei*) under the Corporate Reorganization Law (*kaisha kosei ho*); (d) civil rehabilitation (*minji*

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[7] Wai Y Wan & Gerard McCormack, *Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL*, 36 Emory Bankruptcy Development Journal 59 (2020).

[8] Bob Wessels, *Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will*, 3(4) International Corporate Rescue 200 (2006).

[9] Kazuhiko Yamamoto, *New Japanese Legislation on Cross-border Insolvency as Compared with the UNCITRAL the Model Law*, 11 International Insolvency Review 67, 95 (2002).

saisei) under the Civil Rehabilitation Law (*minji saisei ho*); and (e) corporate arrangement (*kaisha seiri*) under the Commercial Code – while (a) and (b) are liquidation proceedings, (c), (d), (e) are reorganization proceedings.[10] The determination whether the recognition proceedings correspond to one of the domestic Japanese insolvency proceedings also depends on the judge's discretion, considering that the domestic Japanese law lacks provisions defining these insolvency proceedings.[11]

(ii) **Public Policy exception**: Japan has diluted the public policy exception and recognition of a foreign proceeding can be refused if it is contrary to public policy of Japan, as opposed to the more stringent 'manifestly contrary to public policy' standard under MLCBI.

(iii) **Conditions for recognition**: RAFIP stipulates certain additional conditions for the denial of recognition, including the non-payment of expenses, the petition having been made for an 'unfair purpose', the foreign proceeding not having any effect on the debtor's assets in Japan, or if the recognition or assistance would be against public order or good public morals in Japan. These factors are mostly analogous to the factors for recognition of judgments in Japan under the ordinary civil procedure law.[12]

(iv) **Effects of recognition**: RAFIP does not provide for an 'automatic stay' upon recognition of a foreign proceeding, however, it stipulates that the court may, either on its own motion, or upon an application made by an interested party, grant discretionary relief to debtor or its assets in Japan, after the recognition of the foreign proceeding. The provisions for automatic relief were not adopted in Japan as it was thought that giving strong effects to recognition would make the judges too prudent to recognise the foreign proceedings, which would delay the recognition process, thereby defeating the purpose of MLCBI.[13]

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[10] Hideo Horikoshi, *Guide to Japanese Cross-Border Insolvency Law*, 9(5) Law and Business Review of the Americas 725 (2003).

[11] Sohsuke Takahashi, *The Reality of the Japanese Legal System for Cross-Border Insolvency ~Driven by Fear of Universalism~* (March 14, 2011) <https://www.iiiglobal.org/file.cfm/12/docs/2011_gold_prizepaper.pdf> last accessed 26 February 2024.

[12] ibid.

[13] ibid.

(v) **Concurrent Proceedings**: Like MLCBI, RAFIP allows the continuation/initiation of a local proceeding, even when a foreign proceeding has already been initiated. However, for coordination purposes, RAFIP takes a different approach and applies 'only one proceeding for one debtor' rule, which prioritizes the local proceeding over the foreign proceeding, unless it is a rare case where the following three conditions are satisfied: (a) foreign proceeding is the foreign main proceeding; (b) recognition of foreign proceeding would be generally in the best interest of creditors of the debtor; and (c) recognition of foreign proceeding would not unjustly violate or prejudice the interest of Japanese creditors.

Singapore

On March 30, 2017, Singapore passed the Companies (Amendment) Bill 2017, which adopted and implemented the MLCBI in Singapore. The objective of the law was to pave the way for Singapore in its bid to become the primary jurisdiction for commercial transactions in Asia and the world, and allow predictable outcomes and certainty in cases of cross-border insolvencies of Singaporean entities by reducing the desirability of forum shopping.[14] Subsequently, Singapore has promulgated the Insolvency, Restructuring and Dissolution Act 2018 making further improvements in the Singapore law on insolvency, which has been effective since July 30, 2020.

Quite contrary to Japan, Singapore's adoption of MLCBI appears to be much less deviant in both letter and spirit from the original construct of the MLCBI and the approach appears to be far more progressive. Some of the key differences from MLCBI as adopted by Singapore are as follows:

(i) **Public Policy exception**: Singapore has made a similar deviation as Japan and lowered the threshold for denial of recognition, by usage of 'contrary to public policy' instead of 'manifestly contrary to public policy'. However, in implementation, Singapore courts have resisted a wide interpretation of public policy.

[14] Speech by Senior Minister of State for Law, Indranee Rajah, at the Regional Insolvency Conference (2014), <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/speech-by-sms-at-regional-insolvency-conf-2014.html> last accessed 26 February 2024; Kannan Ramesh, *Cross-Border Insolvencies: A New Paradigm*, <http://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf> last accessed 26 February 2024.

(ii) **Relevant date for determination of centre of main interest ("COMI")**: While the MLCBI is silent on the relevant date for determination of COMI, by way of judicial orders, Singaporean courts have applied the US approach of determining COMI as on date of the recognition application (as opposed to the EU or UK approach where they consider the date of the application to open the foreign proceedings) while deciding the relevant date for determination of COMI.

No unfavourable outlook towards COMI shift: Singapore has taken a commercially prudent and economically sound outlook towards COMI shifts favourable to debtors. In *Zetta Jet 2*[15], the High Court of Singapore held that a shift or transfer of the COMI subsequent to the date of the foreign insolvency application may still be permissible in a jurisdiction where substantial connections exist even if the shifts occurred after the date of the foreign insolvency application. Courts in Singapore have preferred to take a neutral stance as to any purported changes in COMI so as to recognise the debtor's autonomy and to give effect to any preference exercised by the debtor, subject to any public policy concerns.

(iii) **Wider definition of Foreign Proceeding**: The definition of '*foreign proceeding*' in Article 2(h) of Third Schedule in Singapore's Insolvency, Restructuring and Dissolution Act 2018 is different from the parallel Article 2(a) of the MLCBI, in that while the MLCBI specifically links up the definition only to a proceeding pursuant to a 'law relating to insolvency', the Singapore law provides a wider ambit of 'law relating to insolvency or adjustment of debt', thereby presumably extending the definition of foreign proceeding to apply to even solvent liquidations.

It is pertinent to highlight that this broader interpretation has recently been settled by the Court of Appeal of Republic of Singapore in the judgment in *Re Ascentra Holdings, Inc*[16], in which the court held that there is no requirement under the Singapore Model Law for a company to be insolvent before a proceeding against it may be recognised as a foreign proceeding in Singapore. So long as the law or the relevant part of the law under which the relevant proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts,

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[15] *Re Zetta Jet Pte Limited*, (2019) 4 SLR 1343 (Singapore).

[16] (2023) SGCA 32 (Singapore).

such a proceeding shall be considered within the meaning of Art 2(h) as a foreign proceeding.

(iv) **Differential treatment to foreign tax and social security claims**: MLCBI affords a general protection to foreign creditors from discriminatory treatment as compared to domestic creditors of the enacting state, by providing that they shall, in no event, be treated inferior to the class of general non-preference claims in that jurisdiction, unless an equivalent local claim has a rank lower than the general non-preference claims.[17] However, Singapore, like the USA[18], has adopted a provision, which allows it to exclude foreign tax and social security claims from this protection and discriminate against them. Such exclusion is in fact, provided as an alternative provision to the original Article 13(2) in the MLCBI itself[19].

India

India presently lacks any comprehensive cross-border insolvency framework. The body of law on cross-border insolvency is contained in two measly sections (Section 234 and 235) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), which only extends to: (i) give effect to any bilateral arrangements between India and any other country in relation to cross-border insolvency; and (ii) allow the adjudicating authority to issue a letter of request to a court in the country with which India has such bilateral agreement.

On 20 June 2018, the Ministry of Corporate Affairs, Government of India, had proposed Draft Part Z ("**Part Z**"), modelled on MLCBI, for insertion as an independent chapter in IBC to govern cross-border insolvency framework in India. However, the same is yet to be notified. It is pertinent to highlight certain key features of the proposed Part Z which are in deviation to the MLCBI:

(i) **Reciprocity in application:** The provisions of Part Z are not universal in their application, unlike the MLCBI. Part Z is proposed to only apply on a reciprocal basis to countries that have either adopted the MLCBI or to any other state notified by the Central Government (for the countries which may have a bilateral /reciprocal

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[17] UNCITRAL Model Law on Cross-Border Insolvency 1997, Art 13.

[18] 11 USCA, Section 1513(2)(A)-(B) (United States of America).

[19] *supra*, note 3, pg 67.

arrangement with India in relation to cross-border insolvency proceedings).[20] As a result, recognition of a foreign proceeding may be denied in India if the foreign proceeding is in a state which does not provide a similar relief to the Indian proceeding. This would inevitably defeat the predictability, consistency and fairness, which MLCBI seeks to ensure.

(ii) **No direct access to foreign representative:** According direct access to the foreign representative is one of the grundnorms of the MLCBI.[21] However, highlighting the judgment of the Hon'ble Supreme Court in *Bar Council of India vs AK Balaji*[22], the framework proposed in Part Z deviates from MLCBI and disallows foreign representatives 'direct' access to the proceedings in India. Accordingly, Part Z omits the MLCBI provision allowing direct access to the foreign representative and instead provides that a foreign representative shall be entitled to apply to the adjudicating authority and exercise his powers and functions under the IBC, in the manner as may be prescribed.[23] However, no proposed subordinate legislation regulating the right to access of the foreign representative has been released yet. Additionally, Part Z omits Article 24 of the MLCBI and does not allow the foreign representative to intervene in any proceeding in which the debtor is a party.

(iii) **Look-back period of three (3) months for 'registered office' presumption:** Part Z incorporates a provision which disregards the presumption regarding the COMI of the debtor being at the registered office of the debtor, if the registered office of the debtor is moved to another state within the three-month period preceding the commencement of insolvency proceedings in such state.[24]

Such a provision has been incorporated with a view to prevent abusive COMI shifts or forum shopping by the debtors. This reflects the cautious outlook of Indian lawmakers with respect to insolvent debtors, similar to certain other unique features of the domestic insolvency law of India (such as Section 29A of the IBC) which is

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[20] *supra*, note 5, Section 1(3).

[21] *supra*, note 17, Preamble; *supra*, note 3, pg 27.

[22] AIR 2018 SC 1382 (India).

[23] *supra*, note 5, Section 7(1).

[24] *supra*, note 5, Section 14(2).

aimed at disqualifying the defaulting promoters from taking back control of the insolvent debtor with the benefits of insolvency resolution.

(iv) **No interim moratorium:** One of the basic principles of MLCBI is that relief, both interim and upon recognition, must be available to assist the foreign proceeding.[25] Part Z departs from the MLCBI in so far as it omits Article 19 of MLCBI, which provides for the discretionary grant of interim relief, i.e., grant of relief between the time of filing of an application for recognition until the application is decided upon.

While the domestic insolvency regime in India not providing for any interim reliefs being granted until the admission of insolvency proceedings and declaration of a moratorium as a consequence upon the commencement of insolvency resolution process is understandable, but in the context of cross-border insolvency where an insolvency proceeding is already admitted in another jurisdiction, the argument for interim moratorium in the recognition proceedings to prevent the debtor / creditors in the recognising jurisdiction from stymieing the foreign proceeding gains much greater relevance.

(v) **Public Policy exception**: Unlike Singapore and Japan, India has adopted the higher threshold of an action being 'manifestly contrary to public policy' for the adjudicating authority to decline recognition and reliefs under the MLCBI. This is in line with the MLCBI's objective of ensuring that the exception is applied exceptionally and sparingly and mere difference in insolvency regimes does not lead to a finding of violation of public policy of the recognizing state.[26]

The MLCBI does not provide any guidance on what may constitute public policy as the interpretation may differ from state to state. While Part Z provides for the central government to specify the factors which may be considered by the adjudicating authority in determining whether an action would be manifestly contrary to public policy, no such factors have been laid down by the central government yet. This may lead to uncertainty in judicial interpretation of the term 'manifestly contrary to public policy', which is already evident from the

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[25] *supra*, note 3, pg 29.

[26] *supra*, note 3, pg 28.

interpretation of the term 'public policy'[27] by the Indian courts in the context of international commercial arbitration in India.

(vi) Differential treatment to foreign tax and social security claims: Similar to the Singapore and US regime and for the reasons highlighted in the above section, Part Z also incorporates a provision which excludes foreign tax and social security claims from the general protection granted to foreign creditors against non-relegation below the class of general non-preference claims.

FACTORS AFFECTING THE ADOPTION/IMPLEMENTATION OF MLCBI IN ASIAN JURISDICTIONS

History of the Legal System

The origins of the legal system in a jurisdiction have a great bearing on the judicial powers of the courts in that jurisdiction. In fact, one of the most effective tools to ensure that a law can be made versatile enough to apply to a rapidly changing social, political, and economical milieu is through the discretionary powers granted to the judges.[28]

While common law jurisdictions are marked by general and discretionary judicial application of the principles of fairness and equity, civil law jurisdictions both structurally and historically discourage the exercise of judicial discretion. In a civil law jurisdiction, Professor AN Yiannopoulosin describes the process of 'judicial determination' as one involving 'always determination of issues in accordance with the requirements of formal logic', where 'rules of law furnish the major premise, fact situations form the minor premise, and the conclusion follows with logical necessity' and one where 'there is no room for discretion because formal logic is compelling'.[29]

In this context, it is pertinent to mention that MLCBI only lays down a broad set of principles for grant of reliefs by the courts of the enacting state. Naturally, such a broad set of principles pre-supposes the exercise of judicial discretion by the courts at the time of grant of the reliefs. Therefore, one likely reason for the divergence in approach between the approach in Singapore

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[27] Arbitration and Conciliation Act 1996, Section 48 (India).

[28] Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43(1) Louisiana Law Review 45 (1982).

[29] AN Yiannopoulos, *Civil Law System: Louisiana and Comparative Law*, 2nd edn, Claitor's Publishing Reference (1999).

and Japan is likely to be the different legal origins in both jurisdictions. While common law jurisdictions like Singapore and India may be more amenable to adopting and implementing the MLCBI without material deviations, jurisdictions such as Japan (which follow the civil law and inherently discourage exercise of judicial discretion) may have reservations on account of contradictions with the core principles of their legal system and jurisprudence.[30] Accordingly, where Japan lacks an explicit domestic law solution, they have preferred to avoid adoption of the uniformity and harmonization of MLCBI.

Economic conditions prevailing in the jurisdiction

The approach towards adopting international legal conventions and globally accepted principles, especially in the context of economic laws, is also a function of the openness of the national economy to the outside world. A conservative and closed domestic economy is much more unlikely to be incentivized by principles that benefit or promote transnational trade than an economy aiming to capitalise upon foreign direct investment.[31]

As an example, just before the enactment of RAFIP, Japan had to hurry in enacting the Civil Rehabilitation Law because of the burst of bubble economy and the boom of insolvency of small and middle sized companies.[32] These rising number of insolvent companies provided an impetus for recognition of cross-border insolvency since many such companies were operational in multiple jurisdictions and consequentially, the economic condition in Japan at the time, was one of the reasons behind enactment of RAFIP. On the other hand, Singapore's economy thrives on cross-border business interests since it is a global commercial hub and hence, its keenness to project itself as a jurisdiction with harmonised rules for cross-border insolvency reflects in the fulsome effect to recognition of foreign insolvency proceedings.

Existing Approach towards protection of National Interest – Exclusively territorialist or moderately territorialist

Most of the divergences from an international treaty or convention are sought to be justified by enacting states on the grounds of 'national interest'. In the context of cross border insolvency, Lord Peter Millet had observed that '*no branch of the law is moulded more by considerations*

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[30] *supra*, note 3, pg 95.

[31] Organisation for Economic Co-Operation and Development, *Foreign Direct Investment for Development: Maximising Benefits, Minimizing Costs* (2002) <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> last accessed 26 February 2024.

[32] *supra*, note 11.

of national economic policy and commercial philosophy'.[33] The need to protect the interests of the domestic economy, local revenue and sovereign interests may far outweigh the incentive to appease international community or adopt an approach for the common good of the world.

States which traditionally are exclusively territorialist (such as Japan) in their approach including under other prevailing laws, are more likely to seek carve-out from the MLCBI to protect the perceived sovereignty. While such jurisdictions do seek to recognize foreign insolvency proceedings, yet there is a resistance to committing to give full effect to such recognition. Given that the insolvency laws in Japan had traditionally been territorial in their operation, Japan adopted a conservative approach while enacting the MLCBI and diverged on a number of subjects, in its bid to simultaneously protect national interest.[34]

However, countries such as Singapore which have already been moving to a moderately territorialist approach under all legislations are more likely to give wholesome effect to the modified universalism approach under MLCBI. Even prior to the adoption of MLCBI by Singapore, courts in Singapore recognized administration order made by English courts and held that administrators of an English company would have same powers over the company's property as they had under English law.[35]

Thus, the prevailing approach towards national interest in a jurisdiction also has a material impact on the divergence sought from MLCBI in the jurisdiction.

CONCLUSION & LESSONS FOR INDIA

MLCBI is still at a nascent stage of adoption in Asia with only a handful of jurisdictions having adopted the same. With Asian countries increasingly becoming global manufacturing and service outsourcing hubs, there is exponential growth in Asia of cross-border business and lawmakers in several jurisdictions are exploring the approach for cross-border insolvency framework.

It is clear that there is no uniform or standard trend in the deviations adopted by the Asian jurisdictions from MLCBI. Several of the divergences are usually attributable to the unique

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[33] Sir Peter Millet, *Cross-Border Insolvency: The Judicial Approach*, 6 International Insolvency Review 99, 109 (1997).

[34] ibid.

[35] *Beluga Chartering GmbH (in liquidation) vs Beluga Projects (Singapore) Pte Ltd*, (2014) 2 SLR 815 [88] (Singapore).

context of each jurisdiction – legal origins, economic conditions and approach on territorialism and national interest.

Accordingly, the models of implementation of MLCBI vary across different jurisdictions in Asia; with Japan despite being the first Asian jurisdiction to implement MLCBI in its domestic law, having done very little to achieve the substantive goals sought to be achieved through the MLCBI, while Singapore having enacted MLCBI very recently, already being perceived as one of the advanced insolvency jurisdictions with its precedents paving way for other nascent jurisdictions.

India, a jurisdiction with a fairly young and dynamic domestic insolvency regime only in the seventh year of its implementation, which is still contemplating both the adoption and the manner of implementation of MLCBI, stands at an opportune crossroad. Being a common law jurisdiction which respects and implements the doctrine of comity, Indian legal system does not start from an exclusive territorialism approach like Japan. The Indian constitution explicitly recognizes the need for international co-operation in legal affairs and has provisions for the effective implementation of international treaties by incorporation in domestic legislations.[36]

With this background and drawing on the analysis of the implementation of MLCBI in other Asian jurisdictions, the author would like to suggest the early adoption and implementation of the proposed Part Z, with preferably the following amendments to ensure a robust cross border insolvency framework:

(i) **Removal of the concept of reciprocity**: The adoption of MLCBI was a result of lengthy negotiations and discussion and MLCBI itself contains adequate provisions to protect the national interest of the enacting state.[37] Accordingly, it is suggested that India should do away with the requirement of reciprocity under Part Z and provide for its universal application, as contemplated under the MLCBI.

(ii) **Direct access to foreign representative**: Provision of direct access to the courts of the enacting state is one of the fundamental objectives of the MLCBI. By regulating the process of such access and introducing domestic intermediaries, Part Z only complicates the process of access making it cumbersome and costly, and introduces

[36] The Constitution of India 1950, Articles 51(c), 253.

[37] *supra*, note 17, Art 1(2), 3, 6.

unnecessary stakeholders in the process. Therefore, it is suggested that the Part Z be amended to provide direct access to foreign representatives.

(iii) **Provide for the grant of interim relief on discretionary basis:** Despite the interim moratorium between the date of filing of recognition application and the decision on it being a concept alien to insolvency law, its introduction may be necessitated in certain situations. The fact that such interim moratorium has been incorporated as a discretionary relief in the MLCBI provides adequate opportunity to the adjudicating authority to consider if the grant of such relief would impair the interest of domestic creditors or other stakeholders. Therefore, it is recommended that the provisions for discretionary grant of interim relief may be incorporated in Part Z.

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