

# 2<sup>ND</sup> INSOLVENCY LAW ACADEMY ANNUAL CONFERENCE 2024

## RECIPROCITY AND ENFORCEMENT OF INSOLVENCY RELATED JUDGMENTS: USE AND IMPACT ASSESSMENT

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# RECIPROCITY IN INDIA: IN THREE STEPS

- *Step 1 – Recognition:* Code of Civil Procedure, 1908 offers jurisdiction recognition – limited and notified for enforcement and execution of foreign decrees in India (Section 44A). Decree recognised move to step 2; not recognized then relitigate, subject to period of limitation (Section 13). Indian position has been on bilateral arrangement and not through convention [1971, 2001, 2005 and today...]
- *Step 2 - decree and judgment ‘enforcement’ and ‘execution’* – age old debate on making a distinction but exists in the context of foreign decrees.
  - challenge to enforcement of a recognised jurisdiction on limited grounds.
  - In money decrees, frequent delays in execution on timelines, judicial overburdening.
- *Step 3 – execute the decree, though time spent is 3-10 years.*
  - *Absence of value of justice lead to the initial bilateral investment treaty claims with White Industries*

# RECIPROCAL AGREEMENTS, ABSENCE THEREOF: PRE 2016 (WINDING UP ERA)

- 2008-2011, enforcement of security interests and rights of foreign unsecured lenders: Kingfisher Airlines (Principal Borrower) and United Breweries (Corporate Guarantor), most foreign decree holders of recognized territories left remediless due to inactions by the promoters. Winding up moratorium period stayed execution of foreign decrees which courts did not execute for a period of 3-4 years.
- Limited civil protections against forum shopping or asset stripping through anti-suit injunctions in civil law. Anti-suit jurisprudence has been the strong point of commercial and civil litigation; however, contracts still offer an open option to litigation in India (one cannot contract out of litigation in India, section 28 – impacts the nature of event of default remedies including insolvency protections)
- Pre 2016 period also saw increase in large scale, winding up cases with cross border connotations.
- Exit measures required strengthening an insolvency regime that responded to issues of territoriality and universality, which also forms the basis of adoption of the Model Laws within IBC 2016.

# RECIPROCAL AGREEMENTS AND INTERNATIONAL CONVENTION: POST 2016 (IBC IMPACT)

- IBC 2016, early discussions included enforcement of MLCBI. Present day discussions of working groups geared towards enterprise group issues but does not delve into promoter-based litigation or asset-based litigation. Issues of treatment of antecedent transactions and asset tracing in international transactions in insolvent debtor litigation are practical considerations.
- 2019 onwards, Jet Airways resolution plan is an indicator of (i) civil court reluctance to adopt jurisdiction or enforce and recognized foreign court and foreign laws and (ii) staggered implementation concerns.
- Distinction relevant in terms of IBC 2016, since the law is procedural in nature and not substantive, therefore the overriding clause with respect to the law to address any conflict concerns of jurisdiction with exceptions – thus MLEJ serves the purpose akin to the New York Convention and relevant for the adoption of the MLCBI.

# ADOPTING THE MLEJ IN INDIA

- Not to confuse:
  - MLCBI measures of procedural coordination with MLEJ measures which have presently yet to be evaluated. Implementation requires literal interpretation and not purposive construction.
  - Reciprocal treatment in other civil matters and in any insolvency proceeding of an Indian corporate debtor, to be able to recognize foreign decrees within timeline is in tandem with the objective of the IBC.
- Based on precedent specific provision of automatic recognition necessary in insolvency proceedings for Indian corporate debtors, subject to *due process or public policy* exception.
  - One could argue on the principles of automatic moratorium.
- Treaty based execution not the most effective for India. Reduce litigation surrounding insolvent debtors to maintain value of the debtor and the meet the objective of the law.
- Priority necessary in terms of contract enforcement and creditor protection to limit breach of moratorium.



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