Navigating cross-border insolvency

The adoption of cross-border insolvency laws is vital to international trade. Integration of cross-border regimes into a nation's legal ecosystem is considered the hallmark of sound insolvency laws. Besides providing legal certainty, they also improve the health of trading entities with cross-border operations, thereby benefiting investments and international trade.

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Implementing the Model Law

The debate on implementing harmonised laws to deal with cross-border insolvency has, therefore, been active. Since the late 1990s, the UN Commission on International Trade Law (UNCITRAL) has endeavoured to implement its Model Law developed on four pillars (access, recognition, cooperation, and coordination) across nations. Its potential benefits have been recognised in several countries, including India, by the Bankruptcy Law Reform Committee while drafting the Insolvency and Bankruptcy Code (IBC), 2016, as well as the Indian government (Economic Survey, 2022).

However, progress on the adoption of the Model Law has been slow. As per UNCITRAL, only 60 countries have adopted it. Further, there have been variations in its implementation (given its non-binding nature), with nations tailoring the same to their requirements by including reciprocity/public policy exceptions clauses.

India is also yet to adopt the Model Law despite several committee recommendations on the subject. As per reports, a decision on the same has been likely deferred again. The Union Budget, while in support of improving the IBC's efficiency through technology platforms/augmenting judicial infrastructure, was also silent on this issue. At present, India relies on limited provisions, which allow bilateral agreements on a case-by-case basis for cross-border insolvencies. These have been seen as ad hoc and inadequate.

There is a need to integrate perspectives on the importance of insolvency laws with global trade in multilateral or bilateral routes

In parallel, in the last few years, India has been executing Free Trade Agreements (FTAs), Comprehensive Economic Corporation Agreements (CECAs), Comprehensive Economic Partnership Agreements (CEPAs) and their equivalents. As per the Commerce Ministry, India has signed such agreements with more than 54 countries. The Ministry describes FTAs as arrangements between countries to reduce or eliminate tariff /non-tariff barriers on substantial trade with the scope of covering areas such as intellectual property rights (IPRs) and investments. Similarly, CECAs/CEPAs are described as more integrated agreements on goods, services, and investments while including broader areas such as trade facilitation and cooperation. Therefore, examining how these agreements capture insolvency is relevant.

Insolvency provisions

However, despite growing FTAs/CEPAs and their importance to trade, they lack detailed cross-border insolvency provisions. While FTAs are relatively limited in scope, CEPAs /CECAs are said to be "more ambitious and look at deeper regulatory aspects of trade" (Commerce Ministry). However, in their present form, most contain only general disputes or trade remedy clauses. It can be argued that FTAs facilitate trade, which leads to calls for cross-border insolvency laws. However, such laws are a vital ingredient of international trade, and relevant clauses need integration in agreements, pending the adoption of any harmonised law.

As regards the Model Law, while well recognised, the ground-level verdict is not out on whether it is the optimum solution, easily implementable in countries with diverse economic/legal regimes. There have been alternate perspectives from some scholars, noting that international treaties, frameworks, and protocols can be tailor-made to address individual cases. These may be effective while complementing the existing system.

After signing four new FTAs (2021-2024), India is working on similar agreements with several nations (Economic Survey, 2024). Hence, pending adoption of Model Law, there is little reason why such FTAs cannot cover insolvency. There can be complementary integration of cross-border provisions in FTAs /equivalents. In their present form, these agreements capture disputes, IPRs, and even sustainability, but mostly ignore insolvency. If CECAs/CEPAs are conceptualised to capture deeper regulatory aspects, why can they not cover insolvency dimensions?

Interestingly, the vacuum is not found only in bilateral/regional agreements but even in some important World Trade Organization reports, which omit an explicit discussion of cross-border insolvency while discussing factors influencing the future of trade. Thus, there is a need to integrate perspectives on the importance of insolvency laws with global trade in multilateral or bilateral routes. Specifically, FTAs are incomplete without cross-border dimensions.

Therefore, there needs to be a more ingrained appreciation of the importance of sound insolvency laws for international trade. FTAs (and their equivalents) need to factor in appropriate mechanisms to weather the consequences of insolvency of trading entities. This would only strengthen the edifice of FTAs being signed by India. This may also form part of the government's agenda of framing SOPs for FTAs. While the practical feasibility of interlinking insolvency with FTAs is best assessed by the Commerce Ministry, the Insolvency and Bankruptcy Board, and legal experts, considering the reality of insolvency with cross-border ramifications, the sooner these issues are addressed, the greater the benefits to India's trade.