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THE ROLE OF SOFT LAW IN SHAPING GLOBAL JUDICIAL COOPERATION:AN ANALYSIS OF NON-BINDING STANDARDS IN CROSS BORDER INSOLVEN

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ABSTRACT

In the era of globalized trade, Multinational Enterprise Groups (MEGs) operate as complex and integrated economic units that span multiple countries, yet they remain legally subdivided across national boundaries. This dichotomy presents unique challenges, particularly when these entities face financial distress or failure. In such situations, the absence of a mandatory international treaty designed to govern cross-border insolvencies leads to a significant "legal vacuum." This legal void often results in national courts pursuing a "Territorialism" approach, which can inadvertently dismantle enterprise value and hinder the overall effectiveness of insolvency proceedings.

This paper delves into the essential role played by "Soft Law," which comprises non-binding texts that can guide judicial practices and promote cooperation among different legal systems. Examples of such soft law instruments include the UNCITRAL Model Law, which offers a framework for cross-border insolvency, The Judicial Perspective, which provides insights into judicial decision-making, and various Cross-Border Protocols that facilitate communication and coordination between jurisdictions. The analysis presented in this paper emphasizes the movement towards Modified Universalism, a concept that seeks to harmonize legal practices across borders while respecting the sovereignty of individual nations.

By examining the implications of soft law, the paper highlights how these non-binding standards enable judges to establish principles of "Comity" and "Equity." These principles foster a collaborative judicial environment that allows for more cohesive handling of cross-border insolvencies, even in the absence of formal international agreements. The discussion draws upon significant case law, including landmark decisions such as Jet Airways, HIH

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Insurance, and Rubin v. Eurofinance, to illustrate how soft law can provide the flexibility and adaptability needed for the contemporary global insolvency regime.

Ultimately, the paper argues that soft law, with its inherently "sovereignty-neutral" structure, stands out as the most effective mechanism for promoting judicial collaboration across jurisdictions. This is particularly relevant for countries like India, which are in the process of evolving their legal frameworks to better accommodate formal cross-border law. As these jurisdictions continue to develop, the integration of soft law principles could play a pivotal role in enhancing the efficiency and efficacy of cross-border insolvency processes, ultimately benefiting both creditors and debtors in the increasingly interconnected global economy. Through this exploration, the paper aims to contribute to the ongoing discourse on how best to navigate the complexities of international insolvency law and foster a more cooperative global legal landscape.

INTRODUCTION

The Paradox of the Contemporary MNC

The world’s largest companies like Apple, Google, the now-defunct Lehman Brothers do not live in one place. They are MEGs (Multinational Enterprise Groups).

Economic Reality: They are one "body." Money, management and strategy flow seamlessly across borders.

Legal Reality: They’re hundreds of separate "persons" (subsidiaries) registered in different countries. Each is its own person under Salomon v. Salomon. This paradox results in a crisis when an MEG fails. When every nation attempts to "grab" the assets in its borders to pay its own people first, the "going concern" value of the business is destroyed. This is the "Collective Action Problem" of cross-border insolvency.

Hard Law vs. Soft Law

The “Hard Law” referring to binding treaties applies in international relations. Hard Law has mostly failed in insolvency. Why? Because insolvency law is at the heart of a country’s deepest social values - who gets paid first? Workers? Taxes? Banks? Countries cannot agree on these priorities, so they refuse to sign a global treaty. Without a treaty, the world has resorted to “Soft

Law." Soft Law includes non-obligatory guidelines, model laws, manuals, or equivalent, the "Global Best Practices." They're the "Handshake" that lets judges work together even when their national statutes are silent.

RESEARCH QUESTION

1. In what ways might non-binding soft law instruments (such as the UNCITRAL Judicial Perspective) mediate between potentially disparate national insolvency regimes?
2. How can "Soft Law Protocols" offer a lasting environment for judicial cooperation in countries like India that lack official laws to govern cross-border relations?
3. How can 'Equity' in soft law distribution (The Hotchpot Rule) help to prevent "Territorialism"?

LITRATURE REVIEW

1. Modified Universalism: The Irit Mevorach thesis. Modified Universalism A time when Modified Universalism began. She argues that one court will not be enough if that is how we think of the world (Pure Universalism), but we can have at least one Court leading the group and others serving as intermediaries. Soft law is the "glue" (in other words, the glue that holds the whole thing together).[2]
2. In the case of in re HIH Insurance Lord Hoffmann described cooperation by judges as a "Golden Thread" in the law. Courts are naturally endowed with an obligation to aid foreign liquidators, he reasoned, in order to achieve a 'single, unified distribution of assets.' This "duty to assist" is a core feature of soft law.[3]
3. The UNCITRAL Judicial Perspective (2022). This is a "Bench Book" for judges. Provides standardized tests for determining the Centre of Main Interests (COMI). It instructs judges that COMI should be "ascertainable by third parties" thereby allowing creditors to see where the company is managed from.[4]

[2] Irit Mevorach, *The Future of Cross-Border Insolvency* (OUP 2018) 25. https://www.google.com/search?q=https://global.oup.com/academic/product/the-future-of-cross-border-insolvency-9780198782872

[3] *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21.

[4] UNCITRAL, *The Judicial Perspective* (Updated 2022) 18.

METHODOLOGY

This research is based around both a Doctrinal and Analytical Approach.

- Doctrinal: It analyses primary international texts, especially the UNCITRAL Model Law and the Judicial Perspective.
- Analytical: it deep-dives into major case laws (Jet Airways, Rubin, Lehman Brothers) to see how judges use non-binding principles to solve real disputes.
- Comparative: It compares the "Hard Law" gaps in the Indian IBC with the "Soft Law" successes of judicial innovation.

MAIN ANALYSIS

The Four Pillars of the UNCITRAL Soft Law Framework

The UNCITRAL Model Law is based on four principles on which soft law cooperation is grounded:

1. Access: Enabling a foreign Resolution Professional (RP) to enter a local court without a government permit.
2. Recognition: When a local court officially "labels" a foreign case as a "Main" proceeding (at the home base) or "non-Main" proceeding (at a branch).
3. Relief: A "Stay" (freeze) order on assets once the case is recognized, so that creditors can't snatch them up in a "race."
4. Cooperation: Encouraging judges to have one-on-one conversations with foreign judges by phone, email or video conference.[5]

The Judicial Perspective: How COMI Is Determined

The biggest issue is finding the COMI (Centre of Main Interests). The Judicial Perspective also instructs judges that the COMI means the company's management is "ascertainable" to the public. This helps avoid Forum Shopping, where a business relocates its office to a "tax haven"

[5] UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment* (2013) 21. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

for the sake of easier bankruptcy laws. It is centered on the "Head Office Functions" instead of place of registration.[6]

Open Access / Public Policy Exception (Article 6)

A judge does not have the right to aid a foreign court if doing so might do harm to their own "Public Policy." However, soft law standards state that this should only occur if the foreign law is "manifestly contrary" (clearly shocking) to the local system of justice. It is a 'Safety Valve' which is hardly appropriate.[7]

Case Law Analysis (Explanation)

- In re Lehman Brothers (2009): The largest ever bankruptcy in history. It showed once again that Territorialism has a hard time in a digital world. And because there was no international law, the courts had to create “Cross-Border Protocols”—private arrangements between judges to share information and provide mutual assistance.[8]
- Jet Airways (India) Ltd. (2019): This issue is critical for India. India currently lacks a formal cross-border law. However, it uses the “Inherent Powers” of the NCLAT to adopt a Protocol with a Dutch Court. It proved that the Indian judges are ready to adhere to Soft Law principles when our “Hard Law” itself is mute.[9]
- Rubin v Eurofinance (2012): UK case that highlighted a limit or ‘Gap’ in soft law. The court stated that although soft law may facilitate procedure (including freezing assets), it cannot always be employed in the form of implementing a “money judgment” (force someone to pay back money). To address this shortfall the new UNCITRAL Model Law on Judgments (MLJ) was developed to do so.[10]

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[6] UNCITRAL, *The Judicial Perspective* (Updated 2022) 22-25.
https://www.google.com/search?q=https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial_perspective_2022_e.pdf
[7] *ibid* at page 35.
[8] *In re Lehman Brothers Holdings Inc.* (2009) Case No. 08-13555.
[9] *Jet Airways (India) Ltd. v. State Bank of India* (2019) NCLAT.
https://www.google.com/search?q=https://indiankanoon.org/doc/184136279/
[10] *Rubin v Eurofinance SA* [2012] UKSC 46.
https://www.google.com/search?q=https://www.supremecourt.uk/cases/docs/uksc-2011-0019-judgment.pdf

- HIH Insurance (2008): Lord Hoffmann agreed to hand UK assets over to an Australian liquidator on the basis that judges should serve as “helpers” to one another in order to enable one transfer of money, across the globe.[11]

Fairness: 'Hotchpot Rule'. Soft law looks at Equity (Justice)

The Hotchpot Rule is classic in one aspect: If a creditor “grabs” their debt by clawing 10% out of a tiny France court, they’re “blocked” from the main pool in India until everyone else has got its 10%. It prevents anyone from "double dipping" and everyone from being treated fairly.[12]

FINDINGS

- Flexibility: The "soft" law is flexible enough to make judges generate custom-made solutions for certain businesses (such as the Jet Airways protocol).
- Sovereignty Neutrality: Soft law succeeds because it does not compel countries to surrender their sovereignty; it simply asks for cooperation.
- Filling the Gap: In places like India, soft law has become the “Actual Law” that judges apply when they are waiting for formal statutes.
- Limits of Enforcement: Because soft law is great in coordinating and freezing assets, but still has limitations in the final enforcement of foreign financial judgments against third parties.

CONCLUSION & SUGGESTION

Soft law has shifted cross-border insolvency from a "Survival of the Fastest" (Territorialism) to a "Collective Rescue" (Modified Universalism). It provides the "Invisible Handshake" between judges that hard law has failed to deliver. It is the only practical way to manage the failure of global MNCs in a world of divided national laws.

Suggestions for the Indian Regime

1. Formal Adoption of "Part Z": India must officially adopt the UNCITRAL Model Law into the IBC to move from "Emergency Protocols" to a structured system.

[11] *In re HIH Insurance* [2008] UKHL 21. https://www.google.com/search?q=https://www.bailii.org/uk/cases/UKHL/2008/21.html
[12] Ian Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2005) 102.

2. Judicial Training: NCLT judges should be specifically trained using the UNCITRAL Judicial Perspective manual.
3. Standardized Protocol Template: The IBBI should create a "National Template" for protocols to save time in future cases.
4. Narrow Interpretation of Public Policy: Indian courts should only use the "Public Policy" excuse in extreme cases, as suggested by soft law guides.