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CROSS-BORDER GROUP INSOLVENCY, A STUDY OF NORTEL CASE

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Abstract:

Introduction. *This Article is a detailed analysis of one of the most complex and landmark judgments in the area of cross border group insolvency. It traces the timeline of the insolvency of Nortel Plc. and the simultaneous proceedings in multiple jurisdictions. Introduction followed by Literature Review.*

Research methods *are exploratory in nature, since the study has to explore a case of the simultaneous proceedings in multiple jurisdictions.*

Results and discussions. *The Article discusses that there are two major methods for dealing with corporate groups undergoing insolvency, which are: Procedural Coordination and Substantive Consolidation. Under such mechanisms which little to no precedence in any jurisdiction, this case carved out its own path to arrive at the outcome of Pro-Rata Allocation. The case is significant for being heard at the same time in two courtrooms, one in Delaware and one in Ontario, that were linked in order to receive live evidence together. This Article discusses the importance and significance of having a cross border group insolvency regime in place. In the era of Globalisation, the integration of national economies into a global economic system has been one of the most important developments of the last century. Globalisation has resulted in improving international trade drastically. It has resulted in higher inter connection and awareness of opportunities and now investors can access new business opportunities across the Globe. Investors invest in corporate debtors of different jurisdictions which lead to so many risks. Foreign investors take into consideration various factors while investing in a country and strong insolvency laws is one of the factors. Every foreign investor would like to protect his rights when the company becomes insolvent and at that point the cross border insolvency law will come into picture. Cross Border Insolvency laws deals with insolvency of companies which operates in more than one jurisdiction.*

Conclusions. *This case is a significant milestone in cross-border group insolvency that set the precedence for finding innovative solutions without disturbing the sanctity of the legislations in place, for the benefit of the stakeholders involved, that resulted in maximum returns for the claimants of the Group.*

Keywords: *procedural coordination, substantive consolidation, pro-rata allocation, cross border insolvency, group insolvency*

Introduction. In the current economic scenario, with the expansion and liberalisation in international trade, multi-national organisations are growing at a rapid speed. The speed for the development of an efficient global insolvency regime for group companies is far gradual. This area of cross border and group insolvency and the interplay between them seems amenable to development as a result of case laws. One such case is that of Nortel group based in the US, Canada and England, Europe and Middle East which set the precedence in the cross-border insolvency of group companies.

In the global scenario for group insolvency, there are two major methods for dealing with corporate groups undergoing insolvency, which are: *Procedural Coordination and Substantive Consolidation.* Under such mechanisms which little to no precedence in any jurisdiction, this case carved out its own path to arrive at the outcome of ***Pro-Rata Allocation***. The case is significant for being heard at the same time in two courtrooms, one in Delaware and one in Ontario, that were linked in order to receive live evidence together. The concurrent trials raise concerns about the enforceability and finality of the two independent court decisions and the financial implications of conducting separate proceedings. It has produced one judgment of the US court and one of the Canadian Court which arrive at the same outcome.

Through this Article, we seek to understand the process of arriving at the conclusion of Pro Rata Allocation as well as the consequences and reasons for such an outcome.

Literature Review. Claessens, S. (2004), this research paper highlights the importance of corporate restructuring as a means to recovery of the large-scale corporate sector distress. In the past decade several countries experienced a financial crisis. The corporate sector restructuring and reform was then considered necessary to the economic recovery, the viability of corporations in the long run and in lowering the risk of subsequent financial crisis. The paper has surveyed the policy approaches and legal and regulatory changes that were adopted as a solution to the corporate failure in eight countries (Czech Republic, Brazil, Indonesia, Malaysia, Republic of Korea, Turkey, Thailand and Mexico) [1].

Davydenko, S. A., Franks, J. R. (2006), the study after using a large sample of small to medium sized firms in France which defaulted on their bank debts, finds that there are large differences in the rights of the creditors across the lead banks of the country for adjusting their lending and reorganization practice. There were creditor unfriendly bankruptcy laws. The French banks required more collaterals than the lenders elsewhere. The bank recovery rates in default were different across the three countries and reflected different levels of protection to creditors [2].

Gamboa-Cavazos, M., Schneider, F. (2007), in this paper has assessed bankruptcy as a legal process empirically. The authors have examined the corporate bankruptcy law of Mexico, which has streamlined the legal procedures and put limits on litigation. Then the ways in which bankruptcy law framework affects a series of

variables are outlined. The speed of the procedures, the recovery rate of the creditors' claims, etc are tracked and compared in the litigation of the bankruptcy process [3].

Peng, Mike W., Yasuhiro Yamakawa and Seung-Hyun Lee (2010), this study has used bankruptcy laws as formal institutions to show the effect of bankruptcy laws on the development of entrepreneurship. The data of South Korea, Thailand, United States, Canada, Chile, Finland, Hong Kong, Australia, Singapore, Peru, Norway, Japan and other countries is used and covers developed and emerging economies [4].

Klapper, Leora (2011), this study presents the empirical literature on the impact of the insolvency reforms on the economic and financial activities of a nation. The 2008 global financial crisis consequently led to the rise in corporate insolvencies and this clearly highlighted the need for the efficient bankruptcy systems for liquidating the unviable businesses and reorganizing the viable ones in such a way that the maximum proceeds are recovered by the creditors, employees, shareholders and other stakeholders [5].

Lee, Seung-Hyun, Yasuhiro Yamakawa, Mike W. Peng and Jay B. Barney (2011), the research study has collected the database from 29 countries for the period of 19 years from 1990-2008 and showed that the bankruptcy laws affect entrepreneurial development around the world. It found that lenient and entrepreneur friendly bankruptcy laws are correlated with the rate of entrepreneurship development [6].

Menezes, Preciosa, A. (2014), this study focuses on the effective insolvency regimes as a saviour of the struggling firms which are viable and reallocation of assets of failing firms more productively. It says that the investors and banks are more willing to lend when they know that they will be able to recover some part of their investment and also studies that the entrepreneurs are willing to enter the market when they do not have to put their whole fortunes at risk [7].

McGowan, M.A., Andrews, D. (2016), this paper has developed an analytical framework for identifying the policies which are relevant for the exit of firms and the channels through which the aggregate productivity growth is shaped. It has identified the relevant policies such as insolvency regimes, regulations affecting labour, product, financial markets, macroeconomic policies, taxation, subsidies and environment regulations. Since, there are market imperfections hence obstacles are generated in the orderly exit of failing firms [8].

Garrido, J. (2016), this working paper of the International Monetary Fund (IMF) explores the recent insolvency and enforcement reforms and the remaining challenges in Italy. The insolvency reform was needed in Italy because the Italian banks were burdened with rates of non-performing loans and to clean them is the most important part of the insolvency and enforcement processes [9].

Valecha, J., Xalxo, A. A. (2017), in this paper the researchers have presented an overview of the Insolvency and Bankruptcy Code, 2016. They have discussed the need of the passage of the IBC, the slew of legislations applicable to insolvency cases in India prior to the Code and the summary of the committees which led to its constitution [10].

Goel, S. (2017), this research article throws light on some of the problems faced by and challenges before the Insolvency and Bankruptcy Code, 2016. This gives a lot

of scope to analyze the Act deeply. A careful study and investigation is needed to look into each and every facet of the IBC. The article evaluates that the IBC has brought a wind of change in India by improving the ranking of India on the World Bank's indexes: ease of doing business and resolving insolvency [11].

Dr. Sahoo, M. S. (2018), the Chairperson of IBBI Dr. M.S. Sahoo, advocated that the focus of the IBC should be on the resolution and not liquidation, so that the value of the assets of the corporate debtor in maximized. According to him, the soul of the code is to keep the firm alive by balancing the interests of all the stakeholders for which a successful resolution is needed [12].

Martinez, A. (2018), this research study recognizes the importance of efficient insolvency law and creditors' rights systems for the financial stability of the nation. According to the study the more developed insolvency systems help to increase the recovery rate for the creditors, reduce the Non-performing loans, improve the rate of investment, preserve the jobs and permit the business as going concern, if its application is possible [13].

PWC (2018), the research report has highlighted the perspectives of different stakeholders on the progress made by the IBC and the challenges faced on the implementation of the IBC. The impediments merit the further attention of various authorities. It is also backed by a detailed survey of the key stakeholders and they have shared their experiences under the Code so far [14].

Anup Roy (Business Standard Report, 2018), this write-up published in the Business Standard reports that the recovery of the Indian banks improved after the enactment and implementation of the IBC and the amendment of the SARFAESI Act, according to the Trends and Progress Report released by Reserve Bank of India. It says that the data of the RBI has shown huge recoveries under IBC and much more than other modes of recovery [15].

Tandon, D., Tandon, D. (2019), the researchers opined that the Indian Banking Industry is plagued with the issue of asset quality deterioration which has resulted in potential losses owing to improper and insufficient provisions for Non performing assets (NPAs). The immediate consequence of which has been that the existence of the banking industry became difficult. The researchers noted that over years, NPAs and bad loans have piled up in the Indian economy. They further concluded that the major reason of a number of bank frauds has been the lapses on part of the banking operations, primarily being non-adherence to procedures. The study concluded that despite the fact of the preventive measures taken by the RBI for the treatment of stressed assets and also prompt corrective actions to improve asset quality, still the progress has been appearing at a very slow pace and results are not very promising ones. They further opined that strength and sustainability of the credit growth is the need of the hour for improving conditions of Indian banking system in the times to come [16].

Renuka Sane (2019), the researcher was of the view that on the passage of the IBC the government had only notified corporate insolvency part and not the personal insolvency in 2016. The study mentions that the scenario of the credit market of India calls for the need for the personal insolvency law. The study makes suggestions on the questions of policy which are to be addressed prior to the meaningful

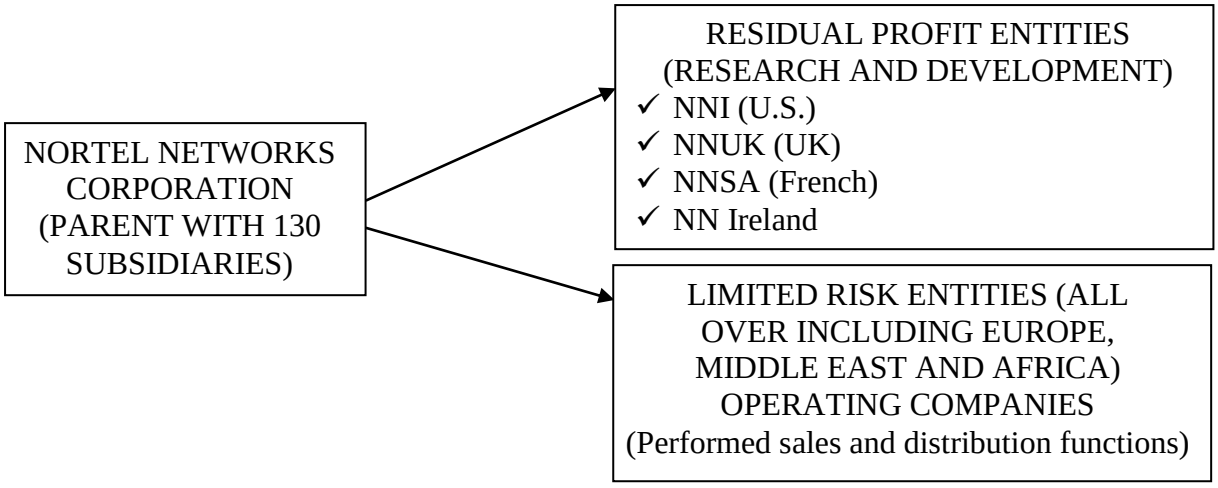
implementation of Law so that the proper design of the subordinate legislation as well as the evolution of the institutional infrastructure is designed. The researcher is of the opinion that debt to GDP ratio in India is much smaller as compared to other developed or emerging economies. As per the study even though the NPAs on personal loans from the banking sector are comparatively smaller in comparison with the industrial loans still they are rising continuously and nature calls for address of personal insolvency issues too. The researcher raised serious concerns over agricultural lending. The lenders other than institutional credit have no recourse to legal channel of recovery. The researcher in this paper has provided a brief overview of the legal provisions. The prime motivation as per the author in drafting of the law was its potential impact on the Indian credit market in India. A brief discussion on the distinctive procedures that deal with the loan defaults has been carried out which includes the "Fresh Start" process, providing debt-waiver to debtors meeting certain eligibility conditions as far as income, assets and debts are concerned, The "Debt Recovery Tribunals" (DRTs): the adjudicating authority for corporate insolvency. The researcher suggested that the success of the IBC hinges on the design of the subordinate legislation as well as the evolution of the institutional infrastructure [17].

Research Methodology. The research on the present study is a Doctrinal Research involving review of the earlier insolvency and bankruptcy laws that existed before the advent of IBC and the present insolvency and bankruptcy legislation in India and its impact on the economic development of India. The present study is Empirical and an Economic Policy Research. The research design is exploratory design is chosen for this study. Since, the study has to explore the impact of IBC on Indian Economy, therefore, it is exploratory in nature.

Results and Discussions. Facts and Timeline

Nortel Networks Corporation (NNC) was a Canada-based technology corporation. The Nortel Group comprised companies across the globe engaged in the business of telecommunications and networking solutions. Its principal driver of value was research and development. NNC, together with its 130 subsidiary corporations, formed the "*Nortel Group*", which operated in sixty sovereign jurisdictions. In order to maximize efficiency, the Nortel Group did not restrict its operations by jurisdiction. Rather, the Group "*operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world*." It functioned "*without regard for its different legal entities*".

Basic structure of Nortel



Due to the Nortel Group's multinational scope, transfer pricing was a significant concern. In order to allocate profits and losses on a tax efficient basis, the Nortel Group developed a "Master Research and Development Agreement" (MRDA). Pursuant to the MRDA, a Canadian operating company was designated as the legal owner of all intellectual property. The subsidiaries within the Nortel Group could then be granted a license to make and sell the Nortel Group's products using NNC's intellectual property.

Commencing of the proceedings. The insolvency proceedings were initiated in multiple courts in the US, UK, Italy et cetera. In all the proceedings, it was argued that the insolvency proceedings would be smoother if cross border court-to-court protocol would be adopted. In an order given by the U.S. Court, the reasons for adopting elements of procedural co-ordination were discussed. The parties identified the "*mutually desirable goals and objectives in the Insolvency Proceedings*" as follows:

(a) harmonize and coordinate activities in the Insolvency Proceedings before the Courts;

(b) promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

(c) honour the independence and integrity of the Courts and other courts and tribunals of the United States and Canada, respectively;

(d) promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors Committee, the Estate Representatives (as such terms are defined in the Protocol) and other creditors and interested parties in the Insolvency Proceedings;

(e) facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors' creditors and other interested parties, where located; and

(f) implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

The court referring to Nortel case stated that, "*The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of determining whether consistent rulings can be made by both Courts, coordinating the terms upon of the Courts' respective rulings, and addressing any other procedural or administrative matters*"

As to the question of why only procedural co-ordination and not substantive consolidation, the courts also relied on the case of *In Re Owens Corning* wherein the U.S. Court held that this remedy of substantive consolidation in group insolvencies should only be applied in "*extraordinary circumstances"* where no other option than that of a merger of these separate legal entities is available. Nortel's operations did not satisfy the legal and factual requirements for substantive consolidation. While Nortel operated as a highly integrated enterprise, the evidence on record established that the Nortel affiliates respected corporate formalities and did not mingle their distinct assets or liabilities. Since Nortel respected and maintained corporate separateness among its distinct legal entities both before and during its insolvency, substantive consolidation could not be applied. It is for these reasons that a solution that was not resulting in substantive consolidation but would result in maximum returns for all the stakeholders of various countries that pro-rata allocation was introduced.

14.1.2009	• Nortel filed for insolvency (EMEA, Canada, US estates filed for insolvency in coordination). Nortel Network UK defined benefit scheme had an estimated deficit of £ 2.1 bn.
-	• Interim funding and settlement agreement (IFSA) was agreed between Nortel estates which freed up cash around the Group to enable all the companies to continue trade.
January 2010	• UK Pensions Regulator issued a warning notice to almost all other EMEA entities, the US and Canada ('Target Companies'), to put in place financial support.
June 2010	• Determination Panel gave notice that it was reasonable to issue Financial Service Directions (FSDs) against Target Companies. If the FSDs were not complied with and contribution notices were issued against the EMEA entities, the rank of the claims in the administration would be unclear.
November 2010	• Joint Administrators applied to the High Court in England for direction on how these claims should rank in the administration. • HC view- Regulators claims would rank as expenses- ahead of unsecured creditor claims.
April 2011	• U.S. Debtors along with NNL and NNC sold Nortel's patent portfolio and related assets for 900 million dollars. The sale of IP Assets resulted in a price of 4.6 billion dollars.
October 2011	• High Court decision appealed by Joint Administrators. Court of Appeal upheld HC order but gave permission to appeal in SC(Supreme Court).
May 2013	• Appeal in SC
July 2013	• Verdict of SC. (overturned HC and earlier orders- Regulators claims would rank as provable debts alongside other unsecured creditors)
2014	• US and Canada had had 4 mediations to resolve Purchase Price Allocation (PPA) consensually between parties. Mediations were unsuccessful and would be resolved through courts.
May 2015	• Both courts handed down virtually identical rulings, to calculate each entity's sale proceeds known as modified pro-rata approach.
-	• French and US estates filed appeal against modified pro rata approach and appointed a conflicts administrator. • One final round of mediation was done and was successful.
October 2016	• Global Settlement was reached. Contained 4 documents- Allocation of PPA Proceeds, settlement between Regulator and EMEA estate, settlement in France, Deed of release.
May 2017	• Successful approvals from US, Canada and Europe Courts taken and PPA proceeds released.
June 2017	• Joint administrators had to file an application in the English High Court where they called for anyone who had post appointment claims. The court asked for the post appointment claims to be submitted by 27 October 2017.

Pro-rata Allocation

Owing to the fact that neither only procedural co-ordination nor substantive consolidation could fully conjure up a solution to satisfy all the claimants, the courts came up with a concept of pro-rata allocation which allocates the sale proceeds according to the percentage of Nortel's allowed claims that each estate (US, Canada, EMEA, UK) held. The courts also emphasised on the fact that they were not adopting pro-rata distribution which would be cash in each estate would not be reallocated, nor would inter-company claims be ignored. There was no aim that each creditor should receive a common dividend.

The courts were able to find that they had a broad discretion to make any allocation order that was appropriate to the insolvency proceedings before them. The immediate issue for the courts was the allocation of sale proceeds, and the courts were therefore concerned with ownership and responsibility for the value of Nortel's intellectual property.

For the purpose of carrying out this allocation, an agreement titled "Master Research and Development Agreement" (MRDA).The MRDA, however, did not control allocation. In the absence of an agreement governing allocation for entitlement to assets and the value of those assets, the Court's task was to arrive at a fair and equitable mechanism to allocate the billions of dollars of Sales Proceeds to numerous international entities for the benefit of their creditors. Adopting a modified pro rata allocation model recognized both the integrated approach while maintaining the corporate integrity of the Nortel Entities. This methodology does not constitute global substantive consolidation.

The U.S. Court has the authority to adopt a pro rata allocation. The U.S. Bankruptcy Code permits courts to "*issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code.*The Court is not directing a central insolvency administrator in one jurisdiction, that all of the Nortel Entities be treated as one, that all claims be determined within one proceeding under the supervision of one insolvency administrator, that there be one plan of reorganization for all Nortel Entities or that creditors receive a common dividend on a pro rata, *pari passu* basis. The Court is not adopting a pro rata distribution, but an allocation to separate interests. The Court's pro rata model recognizes that separate Estates exist, will continue to exist, and will ultimately be utilized to make distributions to creditors through whatever means is determined by the Courts following the Allocation Dispute. Moreover, the Court recognizes the separate and distinct integrity of each of the Debtors by recognizing cash-on-hand intercompany claims and settlements.

The calculation for pro-rata allocation was done on the basis of Pro Rata Share which meant that as at any Distribution Date, with respect to the holder of an Allowed Claim in any Class against a Debtor, the product of (A/B)*C where:

A= the amount of the particular Allowed Claim;

B= the aggregate amount of all Allowed Claims in the Class; and

C= the total amount of available Creditor Proceeds to be distributed to holders of Allowed Claims in such Class on the particular Distribution Date.

The pro-rata allocation was done in a four part process wherein,

First, Fund Allocation was done. This step was most ostensibly like substantive consolidation. Each entity in the Nortel Group was entitled to a pro rata share of the asset realization based on the percentage of claims against that entity relative to the total claims against the Nortel Group. Once the funds were allocated, each entity independently administered its own claims process.

Second, all inter-corporate claims were to remain outstanding. This step was to make sure that the end result of this allocation would not be that of a merger as would be in the case if substantive consolidation was done.

Third, each corporate entity was to retain all their cash in hand and apply it towards the entity's creditors. This helped maintain the separate legal entity principle to all the companies under the Nortel Group.

Fourth, creditors with guarantees were entitled to make a claim for the full value of the guarantee.

The result for all creditors was a 71 percent return on their claims against the Nortel Group. This allocation was of immense consequence to the UK Pension Claimants, who received a significantly higher proportion of the assets than if a pro rata allocation had not been adopted.

Conclusions and Recommendation. Scholars of the subject have argued that the process of pro rata allocation is comparable to that of substantive consolidation. The point of similarity being that the distribution of assets is done with no regard to the source of the asset. The difference however lies in the fact that pro-rata allocation does not involve transfer of wealth whereas in a substantive consolidation process the result is that of a merger. Consolidation in principle should only be used for insolvency of corporate groups in exceptional situations such as that of sham companies, fraud or inseparable mingled assets and liabilities.

This approach is considered perfect to maintain distinct legal identities while also distributing assets to all the creditors of the group regardless of which jurisdiction they fall in. In the case of Nortel the group maintained distinct corporate personalities, their own creditors, own cash proceeds and inter-corporate loans and agreements.

This case is a significant milestone in cross-border group insolvency for the reason that even though the jurisdictions and the applicable insolvency laws to various Nortel corporations were so distinct, the Courts, Creditors as well as the Insolvency Coordinators went beyond the text of the statutes to set a precedence for working together applying the principles of both procedural co-ordination and substantive consolidation that resulted in maximum returns for the claimants of the Group. This was a case that set the precedence for finding innovative solutions without disturbing the sanctity of the legislations in place, for the benefit of the stakeholders involved.

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