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CROSS-BORDER INSOLVENCY IN INDIA: NEED OF THE HOUR

- Suryansh Kumar Arora[1]

ABSTRACT

The Insolvency & Bankruptcy Code of 2016 came as a ray of hope to resolve the bad debt issue of the Indian Finance Sector. This Code changed the model from Debtor-in-Control to Creditor-in-Control. However, since the code lacks provision for Cross-Border Insolvency, many people consider it incomplete or half-done because the Indian market is expanding rapidly, and every Indian business is trying to get or is already on an International level by having assets and operations in different countries. The Insolvency Law Committee strongly suggestedadopting the UNCITRAL Model Law. Still, even after years of that suggestion and adjudication ofmattersrelated to Cross-Border Insolvency by the Courts, a provision has yet to be made. Other countries like USA and Singapore have also made provisions for Cross-Border Insolvency, and India, being a fast-growing economy, has to have a provision for the same. This paper focuses on the issue of cross-border insolvency as to what can be done by the Government to make the provision for the same,including the adoption of the Model Law, Bilateral Treaties, etc.,and how making a law for Cross-Border Insolvency is a need for the hour.

INTRODUCTION

In 2016, the Government of India enacted the Insolvency & Bankruptcy Code**("Code")** to consolidate the Insolvency Laws of the nation under one code and to repeal the old Laws, i.e.,The Provincial Insolvency Act, 1920[2] and The Presidency Towns Insolvency Act, 1909[3]. The Code aims to provide relief for and successful resolution of stressed businesses who cannotpay off their debts due to one or the other reason and encourage entrepreneurship. The Code provides for Creditors and the Debtor to initiate Insolvency Proceedings in case of

[1] Student, Amity Law School, Noida
[2]The Provincial Insolvency Act, 1920 (Act No 5 of 1920)
[3]The Presidency Towns Insolvency Act, 1909 (Act No 3 of 1909)

default. The Code is a result of the rapidly increasing non-performing assets in the country. The Code, since its enactment, has helped various Creditors, Financial & Operational, to initiate Insolvency against their debtors and recover their dues, however, time and again, the National Company Law Tribunal **("NCLT")**& National Company Law Appellate Tribunal **("NCLAT")**as well as the Hon'ble Supreme Court of India, has said that the purpose of the Code is not recovery but resolution of bad businesses which are in Debt.

The Code does not define Insolvency or Bankruptcy; however, Insolvency may be defined as a situation of financial distress, wherein the Corporate Debtor is unable to pay the dues to its creditors, and some may also describeit as a situation wherein the Debtor has more Liabilities than Assets.

CROSS-BORDER INSOLVENCY

Cross-Border Insolvency, as the name suggests, is a situation wherein the Corporate Debtor has assets in more than one country or has creditors in countries apart from the one wherein the Insolvency proceeding has been initiated. With rapidly growing technology and economy, companies worldwide are now looking towards expanding their businesses beyond their home country and having assets in different countries. This resulted in businesses going through several complex legal issues in different countries. If a Multinational Company fails to pay off its debt to its creditors, it will not only affect the industry its part of but willalso lead to Cross-Border Insolvency. Now, when a case of Cross-Border Insolvency initiates, several legal provisions of different countries clash, including, Centre of Main Interest, Disbursal of Assets, Recognition of foreign proceedings, security charge over assets, interest of creditors, etc. Eventually, this will cause too much chaos between the simultaneous Insolvency proceedings in different jurisdictions. Therefore, enacting the national or domestic laws straightaway will create more complex legal issues rather than resolving the situation and is not considered the best option. A solid international arrangement to handle such matters is needed to effectively deal with Debtors who have assets or creditors in more than one jurisdiction.

As described by Professor Fletcher, a renowned scholar on Insolvency, Cross-Border Insolvency means,

"a situation where an insolvency occurs in circumstances which in some way transcend the confines of a single legal system so that a single set of domestic insolvency law

provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case"[4]

CURRENT SITUATION IN INDIA

The Code does not explicitly have a provision for Cross-Border Insolvency matters; because of this, many people consider the Code as incomplete. However, under the code, Sections234 and 235 deals with the same in some way. These sections provide for bilateral agreements via letters from Indian Adjudicating Authorities requesting Foreign Courts for enforcement of provisions of the Code on assets of the Corporate Debtor located outside the Indian Territory. Now, if India enters into bilateral agreements for each country and the Adjudicating Authorities spend time in requesting the foreign courts, this will become a lengthy and complex process and would lead to differences and uncertainty in each case depending on the terms of the agreement with each country.The inclusion of sections 234 and 235 in the Code was aimed towards facilitating the resolution of cross-border insolvency matters, but concrete steps still needed to be taken by the Government to implement such inter-governmental agreements. As of today, any NCLT order on cross-border insolvency issues is not directly recognised or enforced in other countries. Furthermore, even when notified, these provisions need to adequately address the complex problems that arise from cross-border insolvencymatters.

UNCITRAL MODEL LAW

The United Nations Convention on International Trade Law **("UNCITRAL")**adopted the Model Law on Cross-Border Insolvency **("Model Law")** to provide a way to manage Cross-Border Insolvency matters, on 30th May 1997, in Vienna, by UNCITRAL at its thirteenth session.The Model Law was formed in such a way to help different countries with a harmonious, latest, and fair way to resolve cross-border insolvency matters involving Debtors who are distressed and unable to pay off their dues or are experiencing insolvency.Before adopting the said Model Law by UNCITRAL, recognising foreign proceedings relating to Insolvency was very difficult.

[4]"Insolvency in Private International Law: National and International Approaches" (2000) Bogdan, M. and Ian F. Fletcher.

The entire European Union, complete ASEAN (besides Singapore and Malaysia) and BRICS (excluding Australia) are yet to adopt and implement the Model Law and out of the total fifty states, forty-seven states have already adopted the Model Law.States can adopt and implement the Model Law as their Domestic Legislation to coordinate and resolve complex Cross-Border Insolvency matters.The states do not need to notify the United Nations if they implement the Model Law, unlike other Conventions of the United Nations. States have adopted the Model Law in their Domestic Laws after making specificappropriate and necessary changes per their jurisdiction and the law of the land.

Surprisingly, the Model Law does not impose any compulsory synthesis of substantive national laws of different states implementing it.This provides a framework for proper coordination in conducting simultaneous insolvency proceedings in other countries, between the Resolution Professionals and Courts of different states.

The Model Law is based on four principles or elements: Access, Recognition, Relief and Cooperation. To elaborate on the said principles, *Access*means accessibility to the domestic courts of the other country and for the Resolution Professional or Administrator to seek any assistance from such foreign court; *Recognition* refers to recognising the orders passed by a foreign court; *Relief* refers to assisting the foreign proceedings and *Cooperation* refers to cooperation among different states wherein the Corporate Debtor has assets and coordination of simultaneous proceedings in different courts.

The Model Law honours the different procedural laws of other countries and does not seek unification of the Insolvency Laws. Instead, it gives a framework for cooperation between governments and provides a helpful solution for promoting and facilitating a unified approach to cross-border insolvency. The states implementing the Model Law will be tasked with the following duty:

- To provide access to the Foreign Administration or Resolution Professional to the courts and authorities of the enacting state.
- To decide at what stage the state will recognize a foreign proceeding and what its consequences will be.
- To allow the courts of the enacting state to cooperate with the Foreign Court and Foreign Administrator, more effectively, involved in a Cross-Border Insolvency matter.
- To formulate rules regarding coordination between the reliefs granted in two or more insolvency proceedings in a foreign state wherein the Corporate Debtor is the same.

- To provide a fair rule for the foreign creditors, to have a right to initiate and participate in the foreign insolvency proceedings.
- To provide the courts with jurisdiction and authority to make rules for coordination when Insolvency proceedings have been initiated against the Corporate Debtor in the enacting state and simultaneously in a foreign state.

CROSS BORDER INSOLVENCY PROVISION IN OTHER COUNTRIES

1. UNITED STATES OF AMERICA:

In the United States of America **("USA")**, Chapter 15 of the Bankruptcy Code deals with Cross Border Insolvency matters. The law was enacted to replace Section 304 of the Bankruptcy Code, and Chapter 15 is an adoption of the Model Law for Cross Border Insolvency.Therefore, the US law must be in accordance with the interpretation taken by other countries about Cross-Border as a Domestic Lawto promote a unified and coordinated legal order in cross-border insolvency matters. The same is executed by the Law's five (5) objectives which are:

I. Promote the cooperation between the Courts and Interested Parties of the USA and other countries involved in a Cross-Border Insolvency matter.
II. Lay out more legal certainty.
III. Save and protect the interest of all parties in a Cross-Border Insolvency matter.
IV. Ensure value maximisation of the Corporate Debtor's assets.
V. Promote relief for financially distressed companies[5].

2. SINGAPORE:

Singapore has adopted the Model Law on Cross-Border Insolvency. Section 354B and the Xth Schedule of the Companies Act[6] introduced the legal instruments for Cross Border Insolvency. The said provisions allow recognition of insolvency proceedings and insolvency administrators of foreign countries in Singapore. There are provisions for Moratorium regarding the Model Law. Further, the Singapore Courts have the power to interfere when the Insolvency proceedings affectthe Public Policy of Singapore.

[5]11 U.S.C § 1501
[6]https://sso.agc.gov.sg/Acts-Supp/15-2017/Published/20170330?DocDate=20170330&ProvIds=pr41-#pr41-

In around October 2016, the Supreme Court of Singapore called for the establishment of a network of Insolvency Judges from several different nations tofacilitate cooperation and communication among different national courts; this network is called Judicial Insolvency Network **("JIN")**. This network is comprised judges from countries like the USA, Australia, etc. The JIN issued specific guidelines known as "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters"[7]. These guidelines, in Singapore, act as an accessory to the existing law, rules and procedure regarding Insolvency.The said guidelines should always be considered when dealing with cross-border insolvency or debt settlement proceedings initiated in multiple jurisdictions.

JET AIRWAYS CASE

The Jet Airways Insolvency case[8]was the first case related to Cross-Border Insolvency in India. In 2019, the NCLAT, by an order dated 26.09.2019,decided in the Jet Airways case, wherein it positively responded to such Cross-Border Insolvency matter.

FACTS: In 2017, the State Bank of India **("SBI")** initiated Insolvency Proceedings u/s 7 of the Code against the Corporate Debtor, Jet Airways. SBI submitted that it had granted around RS. 1090 Crores to Jet Airways on 08th August 2016, and the Corporate Debtor had also taken additional term loans from other Creditors.

On 20th June 2019, when Jet Airways defaulted, SBI approached the NCLT to get Jet Airways declared bankrupt.At the same time, Insolvency proceedings were initiated against Jet Airways in the Noord Holland District Court, Netherlands ("Netherlands Court"), wherein two European Creditors claimed their dues to RS. 270 Crores and asked the court to seize the Airline's Boeing 777 parked at the Amsterdam Schiphol Airport. The Netherlands Court appointed an Administrator to take up the charge of the Jet Airway's assets.

The NCLT learned about the Netherlands Court Insolvency proceedings and that a judgement has been passed. After that, the Administrator requested the NCLT to recognize the judgment by the Netherlands Court.

The NCLT refused the Administrator's plea becausethere is no provision in the Code to recognize the foreign proceedings and, further, the Government of India had no arrangement

[7]https://www.iiiglobal.org/sites/default/files/media/JIN%20Guidelines.pdf

[8]Jet Airways (India) Limited vs. State Bank of India, C.A. (AT) (Insolvency) No. 707 of 2019https://nclat.nic.in/Useradmin/upload/14485121915d8df2bae7814.pdf

with the Government of Netherlands and thus, the Foreign Judgement had no authority to pass an order under the Code where the Corporate Debtor's assets are in a different country.The Dutch Administratorappealed before the NCLAT against the said order.

ISSUES BEFORE THE NCLAT: The NCLAT, in this appeal, had to decide on some issues regarding Cross-Border Insolvency. These Issues were,Whetherthe NCLAT can enforce the foreign court's judgement and Whether an understanding or a jointarrangement/agreementbetween the Resolution Professional and the Foreign Administrator canresult in maximum recovery of the Corporate Debtor's Assets.

HELD: Once the NCLAT approved the Joint Arrangement / Agreement, the Resolution Professional and the Dutch Administrator agreed to the Cross-Border Insolvency Protocol. This led to the NCLT Order being set aside, and thus, the Resolution Professional and the Dutch Administrator accepted the terms of the Order; it was assumed that the Dutch Administrator had already taken the necessary approvals from the Appropriate Authorities in the Netherlands in order to agree to the terms decided by the NCLAT.The NCLAT allowed the Dutch Administratorto attend the meetings of the Committee of Creditors **("COC")**but was not given any voting rights and had an observatory role only.

Further, as per the Joint Arrangement, which was based on the Model law, India was recognized as the Centre of Main Interest **("COMI")**, a crucial element in Cross-Border Insolvency matters.

On 22nd June 2021,NCLT Mumbai approved and allowed the Resolution Plan for the Corporate Debtor, Jet Airways, allowing it to be owned by two (2) new companies. First, the UK-based, KarlockCaptial; second, UAE-based, Murari Lal Jalan Consortium. The said consortium offered to give RS. 1375 Crores, out of which RS. 900 Crores to be allocated for Capital Expenditure & Working Capital and the remaining RS. 475 Crores to pay off the Shareholders, which included the Financial Creditors too.

Likewise, during the Videocon Industries Bankruptcy Saga, Videocon requested the NCLT to include its foreign assets in the ongoing Insolvency Process. The NCLT, in an order dated 12th February 2020, allowed the inclusion of Videocon's Foreign assets in the Indian

Insolvency process[9]. Although there is no proper statutory framework for Cross-Border Insolvency in India, the tribunals will proceed on a case-to-case basis.

INSOLVENCY COMMITTEE - 2018 & 2021

1. The Insolvency Law Committee on Cross-Border Insolvency - 2018:

In 2018, the Government of India formed an Insolvency Law Committee headed byMr. Injeti Srinivas **("Injeti Committee 1")**. The committee noted that the current provisions under the Code, i.e., Section 234 & 235 are not sufficient enough to deal with matters relating to Cross-Border Insolvency, and thus it was decided to formulate a framework based on the Model Law on Cross-Border Insolvency which would then become a part of the Code by adding a new separate chapter. This led to the formation of The Insolvency Law Committee on Cross-Border Insolvency, 2018[10]**("Injeti Committee 2"),** which, too, was headed by Mr. Injeti Srinivas. The said committee framed a draft provision on Cross-Border Insolvency that was to be considered by the Government. It was noted that by adopting the Model Law, with specific carve-outs, there would be certain advantages,

1. A robust mechanism which will increase the coordination between courts and administrators/resolution professionals, both foreign and domestic. This will lead to more effective and efficient conduct of simultaneous proceedings.
2. A green signal to global investors, financial institutions, and companies that the Indian Financial Sector is solid and robust.
3. Precedence to Domestic proceedings regarding foreign insolvency proceedings.
4. Indispensable modifications in the Model Law so that the Domestic Insolvency Law is not affected while adopting the International framework.
5. Power to refuse to recognize foreign proceedings if they contradict the country's Public Policy.

2. The Standing Committee on Implementation of IBC -2021:

The Standing Committee of Finance **("Standing Committee")** submitted its report on the implementation of the IBC[11] wherein it noted that the Government of India had taken steps to introduce a chapter under the Code for Cross-Border Insolvency, taking into consideration

[9]Order dated February 12, 2020, in the matter of Videocon Industries Limited and Ors. [MA 2385-2019 in C.P.(IB)-02- MB-2018].
[10]https://www.ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf
[11]https://www.ibbi.gov.in/uploads/resources/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf

the case of Jet Airways and Videocon Industries and the fact that now many companies, in India, have operations and assets in more than just one country. These factors highlighted the need for a Cross-Border Insolvency provision under the Code.

The Injeti Committee 2 recommended implementing the Model Law under the Code with specific changes and modifications. The Standing Committee's report mentioned that the Model Law ensures complete recognition of the Domestic Insolvency proceedings and allows provision for not recognizing foreign proceedings or orders if they contradict the nation's public policy. The Model Law is the most effective and globally accepted legal framework for dealing with cross-border insolvency matters.

The Government also formed the Cross-Border Insolvency Rules / Regulation Committee 2021 **("CBIRC"),** which includes experts advising on an effortless and trouble-free implementation of the Model Law with certain variations.

Once these recommendations, as suggested by the Standing Committee, are adopted by the Government, it is believed that the Cross-Border Insolvency framework will greatly help ensure proper coordination and cooperation between courts and administrators of different countries to successfully resolve Cross-Border Insolvency matters. The committee also recommended rapid implementation of the Model Law under the Code.

RECOMMENDATIONS REGARDING IMPLEMENTATION OF CROSS-BORDER INSOLVENCY IN INDIA

The Model Law is not a treat or a convention that has to be adopted by the country; it is merely a recommended legal text, and any country has no compulsion of any sort to implement and embrace it. By adopting the Model Law, the Indian Courts will get sufficient precedent and guidance while deciding Cross-Border Insolvency matters. The Model Law supports modified universalism; it is a simple arrangement focused on improving and increasing cooperation and recognition by allowing simultaneous proceedings in addition to the "Main" proceedings. This implementation will enable common law jurisdictions, like India, to handle cross-border insolvency matters more effectively. Furthermore, the Indian Courts have already, in some way, accepted the Model Law in the Jet Airways Case, wherein the NCLAT showed a positive approach towards the Netherlands Proceedings and even allowed theForeign Dutch Administrator to attend the meetings conducted by the COC. This is because Indian courts emphasized the principle of comity, being an ordinary law jurisdiction, and having a cooperative approach. While implementing, the Government must

expressly provide Interim Reliefs during Cross-Border Insolvency so that the Corporate Debtor's assets are not disposed of and the Creditor's interests are protected.

In addition to adopting the Model Law, the government can also enter into bilateral agreements with different countries. The Model Law has proven advantageous and useful, although it has limitations. The countries implementing the Model Law have specific type of vagueness and inconsistencies in their legislative texts. For example, many countries have different factors to determine the COMI. In the USA, it is based on the registered office of the Corporate Debtor, whereas in Europe, it is based on where the Corporate Debtor has operations regularly.In these circumstances, bilateral insolvency agreements are important and decisive in facilitating cooperation in cross-border insolvency and recognition of foreign proceedings.

As mentioned above, there is JIN too, which can be implemented by the Government. The JIN Guidelines focus on increasing the efficiency of insolvency proceedings by decreasing the procedural costs involved in information asymmetry. The JIN Guidelines provide that all authorities and courts which deal with insolvency matters and such proceedings have been initiated should notify each other about all present and possible issues to save time and prevent unnecessary delays, of any sort, in coordinating the requests and queries. Furthermore, under the JIN Guidelines, there is a provision to appear before a foreign court, subject to approval from such a foreign court.

CONCLUSION

To date, no bill has been introduced in the Parliament about Cross-Border Insolvency; this shows that the Government is not ready to introduce this framework in India. It is high time that the Government of India makes a proper provision for Cross-Border Insolvency matters. Looking at the case of Jet Airways, it is not the only company in India with foreign assets and creditors, and in case any such company goes into Bankruptcy, there will be no framework to ensure proper and fast resolution of matters which will lead to unnecessary chaos.More than merely adopting the Model Law is required; however, it is one of the most effective tools for the Cross-Border Insolvency framework. There are JIN Guidelines and Bilateral Agreements that should be considered too. Many scholars believe the Code is incomplete since it lacks provisions about Cross-Border Insolvency and is not considerate of global implications and operations of Indian Companies. The Government of India, through the Ministry of

Corporate Affairs, invited suggestions from the public about Cross-Border Insolvency,but still, concrete action has yet to be taken for the same. It looks as if India will have a proper Cross-Border Insolvency regime sometime soon.