



CROSS BORDER INSOLVENCY FRAMEWORK IN INDIA

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Introduction

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.

Background: Cross Border Insolvency Framework in India

Currently, the cross border insolvency framework of India is as follows:

(i) **Under Insolvency & Bankruptcy Code, 2016¹**: Section 234 and 235 of the Code would deal with cross border insolvency in India. Section 234 empowers the Central Government to enter into bilateral agreements with other countries to resolve situations pertaining to cross border insolvency. Section 235 empowers the adjudicating authority under the Code to issue a letter of request to a court in a country in which an agreement under Section 234 has been entered into, to deal with assets situated in that country in a specified manner. (not yet notified)

(ii) **Recognition of foreign proceedings in India**: For foreign proceedings to be recognised in India, Civil Procedure Code, 1908 is applicable along with principles developed in English common Law.

Section 44A of the Code of Civil Procedure of 1908² allows Indian courts to enforce orders passed by non-Indian courts in “reciprocating territories”. A country would be considered a reciprocating territory if it was declared by the Government of India through publication in the Official Gazette.

The basic principle which is followed while enforcing a foreign judgment or decree in India is to ensure that the judgment or decree is a conclusive one, passed on the merits of the case and by a superior court having competent jurisdiction.



- (iii) **Recognition of Indian Proceedings in foreign jurisdictions:** For Indian proceedings to be recognised abroad, the law of that Country will apply.

The current legislative framework may not be sufficient to deal with situations for example parallel proceedings, coordination, cooperation etc, and different agreements will have to be made with different countries which will lead to complexity. Since, India is a developing Country, a model and common approach for all the Countries is required to have hassle free solutions.

As per the Interim Report of the Advisory Group on Bankruptcy Laws dated January 2001 led³ by Dr. N. L. Mitra, it was deliberated that

“In the changing situation of growing cross-border investment, trade and commerce, cross-border insolvency problems are bound to increase both for Indian Companies having cross-boundary entities or ventures as well as foreign entities having Indian subsidiaries and ventures. A comprehensive Bankruptcy code is bound to address such issues taking into consideration international practices.

At present, the Committee on Bankruptcy is considering the adoption of UNCITRAL Model Law on Cross-Border Insolvency to equip the Indian law with sufficient provisions to deal with international insolvency.”

Further, the Insolvency Law committee report on cross border insolvency dated October, 2018⁴ provided recommendations of the committee to the Government on adoption of the UNCITRAL Model law and the modifications necessary in the Indian context after consultation with public at large.

Overview: Unicitral Model Law on Cross Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency was a model law issued by the secretariat of UNCITRAL on 30 May 1997 to assist states in relation to the regulation of corporate insolvency and financial distress involving companies which have assets or creditors in more than one state.

Globally, the UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues and legislation based on the Model Law has been adopted in 44 countries in a total of 46 jurisdictions⁴. Thus, the States enacting the Model Law would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases.

The **UNCITRAL** model law⁵ is divided into 2 parts:

Part 1 is “UNCITRAL Model Law on Cross-Border Insolvency” which contains 5 chapters covering general provisions, Access of foreign representatives and creditors, Recognition of a foreign proceeding and relief, Cooperation with foreign courts and foreign representatives and Concurrent proceedings.

Part 2 is GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY which contains 6 chapters covering purpose and origin of the model law, main features, article by article remarks, assistance from UNCITRAL secretariat etc.

The Model Law will be applicable in following scenarios:

- (i) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;
- (ii) Assistance is sought in the foreign State in connection with domestic insolvency proceedings;
- (iii) A foreign proceeding and domestic proceedings are taking place concurrently, in respect of the same debtor;
- (iv) Creditors or other interested persons have an interest in requesting the commencement of, or participating in, domestic insolvency proceeding.

As per Model Law, the foreign representative will be appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made.

The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency.

The main principles on which UNCITRAL Model Law is built are:

- (1) **The “access” principle:** It allows foreign insolvency officials and foreign creditors to have direct access to domestic courts and so that they can participate and initiate domestic insolvency proceedings.
- (2) **The “recognition” principle:** It allows recognition of foreign proceedings and remedies by the domestic court based on such recognition. A foreign proceeding should be recognized as either a main proceeding or a non-main proceeding.
 - A main proceeding is one taking place where the debtor has its **centre of main interests (COMI)**. A main proceeding is expected to have principal responsibility for managing the insolvency of the debtor, subject to appropriate coordination.

Centre of main interests (COMI) is not defined under the model law, but is based on a presumption that it is the registered office or habitual residence of the debtor.
 - A non-main proceeding is one taking place where the debtor has an establishment. This is defined as “any place of operation where the

debtor carries out permanent economic activity with human means and goods or services”

(3) **The “relief” principle:** It specifies that relief is available in both the proceedings (main or non main). Further, reliefs will also be interim relief and specified form of relief. If the proceedings of foreign country is termed as main proceedings, there will be stay on the domestic proceedings and foreign representative will handle the estate in domestic proceedings and domestic proceedings will be termed as ancillary proceedings. For non main proceedings, such relief is at the discretion of the court.

(4) **The “cooperation” and “coordination” principle:**

Cooperation: The Model Law lays down the basic framework for cooperation between

- Domestic and foreign courts, and
- Domestic and foreign insolvency professionals.

Notably, cooperation may also be provided to foreign proceedings that have not been recognised as either main or non-main.

Coordination: It provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

Some other important elements of model Law is that it allows a particular country to refuse the recognition of foreign proceedings if it against its domestic public policy and it gives priority to domestic proceedings and domestic stakeholders.

Therefore, adopting UNICITRAL Model Law will help in improving the ranking for ease of doing business, priority to domestic proceeding, remedy in other jurisdictions for Indian creditors, mechanism of cooperation etc.

The Insolvency Law committee chaired by Shri Injeti Srinivas submitted report on cross border insolvency in the month of October, 2018 to Union Minister of Finance and Corporate Affairs regarding the recommendations on inclusion of Unicitral Model Law under Insolvency and Bankruptcy Code, 2016 with suitable modifications in Indian Context.

Impact of Cross Border Insolvency ON Jet Airway’s Insolvency

While admitting the application of Jet Airways insolvency it was appraised to NCLT, Mumbai Bench that insolvency proceeding has already been initiated in Holland district Court, Netherlands. However, it was then clarified by the NCLT that since Section 234 has not been notified by the Government and



running 2 parallel proceedings will complicate the whole process. The order of the foreign court is a nullity in the eye of law and such order cannot be given effect.

However, the administrator filed an appeal with NCLAT, appellate Tribunal against the order of NCLT and questions in consideration were

- Whether separate proceeding(s) in ‘Corporate Insolvency Resolution Process’ against common ‘Corporate Debtor’ can proceed in two different countries, one having no territorial jurisdiction over the other?
- whether by a Joint Agreement or understanding between the ‘Resolution Professional’ of ‘Corporate Debtor’ in India and Administrator in Holland (Netherlands), one proceeding in India can proceed for maximization of the asset of the ‘Corporate Debtor’ and balancing all the stake holders, including the Indian/Offshore Creditors/ Lenders.

After detailed deliberations, discussions and hearings, NCLAT directed that⁶:

- To Set aside the order of NCLT
- Administrator and Interim resolution professional with cooperate with each other.
- It will be open for the administrator to collate the claims of offshore creditors and forward the same to Interim resolution professional for the purpose of preparation of Information memorandum.
- Administrator will cooperate in the proceedings pending in India and will not sell, alienate, transfer, lease or create any third party interest on the offshore movable and immovable assets of the ‘Corporate Debtor’ which are or may be taken in his possession.
- IRP to have terms of settlement with administrator in consultation with Committee of Creditors.
- Directions to Committee of creditors to cooperate with administrator during meetings.
- Administrator shall be invited to participate in the meetings of the Committee of Creditors as an observer but shall not have a right to vote in such meetings

Accordingly, an agreement named “CROSS-BORDER INSOLVENCY PROTOCOL” was executed between Resolution professional and administrator and it was clarified that joint ‘Corporate Insolvency Resolution Process’ will continue in accordance with ‘Insolvency and Bankruptcy Code, 2016.

This implies that Appellate Tribunal applied the principle of justice and tried to protect the interest of all the stakeholders during the corporate insolvency resolution process.



Road ahead

It can be clearly seen that there is pressing need of standardising and formulising the framework of cross border insolvency in India to have consonance with rapidly increasing foreign trade. The Government of India is working towards the implementation of norms and will soon come up with detailed framework which will benefit the entire nation and will help in improving ease of doing business in India.

References:

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