Should India adopt the UNCITRAL Model Law in Order to Solve Cross Border Insolvency Disputes in the Aviation Sector

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In different fields, India is one of the world's fastest-growing countries. India, has taken many steps in order to attain his position different fields. It is quite evident that India has been supported by many foreign countries by investing in India. The duty of the nation is not only to receive money through investment but as a nation it also holds upon a duty to protect foreign investors' investments. If a company is insolvent, steps must be taken to protect international investors in order to protect their rights. However, with regard to the aspect of cross-border insolvency, limited laws have been adopted. The present regime in regard to insolvency law in India is quite narrow and because of which it leaves question on those streamline issues which directly impacts the country's economic health.

Aviation industry is one of the most capital-intensive areas, where the increase in costs is solely due to higher taxes, turbine fuel charges and airport costs. The aircraft industry is one of the worst affected industries amid the Covid 19 pandemic and it is foresee that amid pandemic it would lead to less contribution i.e $3.2 billion in the country's GDP, where as the estimated contribution that aviation industry makes is almost $7.2 billion. Thereby, many airlines in the country are finding difficulties in surviving. It is therefore particularly important at this time to pay heed to the laws on airline insolvencies and their associated shortcomings so that stakeholders' rights do not become adversely affected. The leading examples of the two major airliners in India (Kingfisher and Jet airways) had previously caused huge losses for interested parties such as creditors, salary fees for employees, etc. In this post, the authors shall try to cover the universal regime (UNCITRAL model Law) that has been adopted by many developing and developed nations across the globe and will also try to establish the challenges and opportunities that are therein included in the present framework of Insolvency and Bankruptcy law, 2016 vis-à-vis aviation insolvency cases.

Cross Border Insolvency under IBC, 2016

Insolvency and Bankruptcy code, 2016(hereinafter refereed as IBC) has been enacted not as a debt recovery mechanism but a measure to rehabilitate or restructure the debt of the insolvent debtor. The code seems to be at a nascent stage. Issues concerning the insolvency of a private individual or a corporate entity are governed by the help of the aforesaid code. Cross-border insolvency is one area where the legislation has paid little attention. It is important to define the phrase "cross-border insolvency" before diving into the present framework for cross-border insolvency under the IBC. The term cross border refers to a situation where Insolvent debtors' assets are located in more than one nation, and concerned creditors (financial and operational) are located in more than one country across the globe.

The framework of cross border insolvency works under three main areas-

First– Securing the rights of those creditors of other countries who have their rights on the assets of

the concerned insolvent debtor, wherein the proceedings in relation to insolvency of the insolvent debtor takes place in one particular jurisdiction.

Second– When the debtor's assets are located in different competencies or jurisdictions and the concerned creditor wishes to include those assets in insolvency proceedings in those jurisdictions.

Third– where the proceedings related to insolvency are taking place in more than one jurisdiction.

The code does not lay down an exhaustive procedure in relation to cross border insolvency. Thereby, issues concerning cross border insolvency are regulated and governed under the purview of section 234 and section 235 of the IBC. In pursuant to section 234, the central government has the ability to enter into any arrangement with a foreign country in order to initiate insolvency proceeding against an insolvent debtor. Furthermore, according to Section 235 of the code, the letter of request can be delivered to the authorities of a foreign country with which reciprocal agreements have been reached under Section 234.

The term reciprocal agreement is the root of the issue, engaging into reciprocal agreements with different countries is a lengthy process, thus this strategy would take a long time and would fail to accomplish the code's goal of speedy debt recovery. Furthermore, reciprocal agreements would make the insolvency procedure much more cumbersome when the assets are located in separate countries. The procedure regarding reciprocity with other nations is too not defined which at the outset leaves the code incomplete. When certain nations join into reciprocal agreements and each country has its own process, it will not work out effectively since there will be a point of dispute. Reciprocal agreements lack the ability to coordinate insolvency procedures involving numerous jurisdictions, they are ineffective. As a result, a comprehensive insolvency procedure authorized by all international governments is required to provide a suitable framework and fairness to all investors from diverse countries.

UNCITRAL Model Law

The Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL) was enacted in 1997 to assist countries in developing their domestic law strategies in relation to cross border insolvency matters. The Model Law aspires to make the legal system more efficient, fair, and transparent by bringing a cost-effective method of dealing with international insolvency cases. As of 2021, the Model Law has been accepted by around 49 nations, including the Australia, Canada, United States, Japan, New Zealand, Singapore, and South Africa (UNCITRAL, 2019a).

The model law consists of 4 major elements that are therein divulged under different heads. Firstly, Access (stated under chapter II of the UNCITRAL Model Law) wherein, foreign creditors have a right of access to the enacting state's courts to seek help in insolvency proceedings. A foreign representative can apply directly to a local court, according to Article 9 of the Model Law (UNCITRAL Model Law, art. 9). According to UNCITRAL Model Law, Article 11, a foreign representative can initiate an insolvency proceeding under local jurisdiction if the conditions for initiating such a proceeding are met. When a foreign bankruptcy procedure is recognized, Article 12 of the Model Law allows a foreign representative to participate in a local insolvency proceeding of the debtor (UNCITRAL Model Law, art. 12). In contrast to local/domestic creditors, foreign creditors have the right of access under Article 13 of the Model Law. Foreign creditors shall, at the very least,

have the same treatment as ordinary unsecured creditors, unless they form a class of creditors to which domestic creditors would also be subordinated (UNCITRAL Model Law, art. 13.2).

Secondly, there is 'Recognition,' in which eligible foreign processes are recognized in order to save time and money. A qualifying foreign proceeding can be recognized as the main proceeding in the jurisdiction where the debtor has its centre of main interests (COMI) at the time the foreign process is commenced, or as a non-main proceeding in the jurisdiction where the debtor has an establishment (UNCITRAL Model Law, arts. 2. c & 2.f). The Foreign Representative shall, pursuant to Article 15 of the Model Law, apply to recognize the foreign proceeding by including a number of documents, such as the certified copy of the decision which is therefore an affirmation of the commencement of the foreign proceeding (UNCITRAL Model Law, Art.15). The requirements of Article 17 provide that, once they have been met, a foreign process shall, according to the criteria enshrined in the Model Law, be recognized as a foreign primary procedure or a foreign, non-main procedure (UNCITRAL Model Law, Art. 17).

Thirdly, one of the primary purposes of the Model Law is "Relief" for the assistance of foreign proceedings. Central elements of the available relief include an Interim Relief at the discretion of the Court, staying on the recognition of a foreign major procedure, and an Interim Relief at the discretion of the Court with regard to both the main and the non-main foreign procedures. Article 19 of the model law states that the Court may grant a temporary remedy upon the request of the Foreign Representative to protect the interest of the creditors or to protect the debtor's assets. Some of the interim reliefs include the staying of execution against the debtor's property and the entrustment to the foreign representative or a court-appointed person of the for the debtor's property (UNCITRAL Model Law, Article 19). Article 20 states that certain automatic relief provisions, such as staying the actions of individual creditors against the debtor, a suspension of the debtor's right to entrust property to the third person, all these relief may be recognized by taking advantage of upon acceptance of the foreign major procedure (UNCITRAL Model Law, art. 20).

Fourth, the model law enables the courts to directly communicate with foreign courts and coordinate concurrent proceedings. Articles 25 and 26 of the Model Law provide for the maximum possible cooperation between the local courts and foreign insolvency representatives (UNCITRAL Model Law, arts. 25 and 26).

Key Recommendations by Insolvency Law Committee vis-à-vis Cross Border Insolvency

The Insolvency law committee has come up with a draft proposal on October 16, 2018 in relation to cross border insolvency issue. The proposed draft incorporated certain areas that are therein incorporated in the UNCITRAL Model law. The draft contains the modifications and variations of the aforementioned Model law, as deemed necessary by the Insolvency law committee in light of Indian context. There is a need for this draft proposal because the present regime under IBC in regard to cross border insolvency is not suffice, as cases pertaining to cross border insolvency too holds a wider ambit-

A. The Ground for Applicability

- The draft proposal has clearly established that, at present, the draft would only apply to corporate debtors. For partnerships and other individuals, the same will be applied when

notified. The draft has not been discriminative and has recognized foreign creditors as part of the creditors. The Supreme Court decision in ***Macquarie Bank Limited v Shilpi Cable Technologies Ltd*** was a step forward in making foreign creditors more accessible in insolvency proceedings and in ensuring the code's non-discriminatory nature.

B. Recognition of the Foreign Main and Non-Main Proceedings

- The draft provision has included two major proceedings which are foreign main proceeding and foreign non main proceedings.

1. **Foreign main proceedings**– The principal external proceedings or the foreign main proceedings are those initiated in that jurisdiction in which the insolvent debtor has its main centre of interests ("COMI"). The COMI is the most important concepts arising from the Model Law which have been heavily debated. There are several guidelines that have been enumerated in the drafts proposal under section 14 which gives an understanding of the term COMI-
   i. There is a presumption unless there is evidence otherwise that the jurisdiction in which the registered office of the corporate debtor is located shall be its COMI.
   ii. This aforesaid presumption would apply only if, the corporate debtor's registered office had not been transferred to another country three months prior to the filing of the insolvency application.
   iii. The NCLT will try to ascertain that the location where COMI exists is readily ascertainable by the third parties.
   iv. And if after giving due consideration to above factors COMI does not determined then in such a case NCLT will apply rules stipulated by Central Government.
2. **Foreign Non-main Proceeding**– Foreign non-main proceeding may begin in jurisdictions where the corporate debtor holds its 'Establishment'. It is a proceeding other than a foreign main proceeding in a country in which the corporate debtor has a business. Like the model law, the Draft defines an establishment as a location where, through the use of human resources and assets or services, the corporate debtors conduct non-transitory economic activities. The jurisprudence in relation to Foreign Non-main Proceeding is still at the nascent stage and it will evolve gradually as other jurisdictions.

C. Relief that are mandatory and Non- Mandatory

- In cross-border insolvency, the initiation of a moratorium is especially important because the corporate debtor's assets are located in more than one jurisdiction. The present draft provides reliefs, based upon the need and the nature of foreign proceedings-

  Reliefs that are Mandatory– If the NCLT concludes that the foreign action or proceeding is a foreign main proceeding, it *SHALL* then offer the mandatory relief as outlined in section 14 of the Insolvency Bankruptcy Code, 2016 by declaring the moratorium.

  Reliefs that are Non–Mandatory– If the NCLT concludes that the foreign action or proceeding is a foreign main proceeding, it *MAY* then offer the mandatory relief as outlined in section 14 of the Insolvency Bankruptcy Code, 2016 by declaring the moratorium

D. Coopertaion and cordination

- The draft provisions provide for the cooperation and coordination between NCLT, foreign courts, foreign representatives, resolution professional and liquidator of foreign courts

E. Concurrent Proceedings

- Three situations of cross border insolvency proceedings are envisaged for the draft provisions which are:

A. Recognition of foreign main proceeding.
B. Simultaneous proceeding.
C. Coordination of more than one main proceeding

F. Public Policy

- The draft provisions at the very beginning provide for an extensive exception to public policy. This exception provides that if such actions are manifestly contrary to Indian public policy, the NCLT may refuse the actions otherwise authorized by the draft provisions.

Conclusion

The present framework of the IBC is in a developing stage. There are parts which have not got notification from the Ministry of Corporate affairs yet. After looking at such a scenario, it can be inferred that bringing new legislation with respect to cross border insolvency will not be a viable option. It is important that, rather than the enactment of more new laws, it is the implementation of existing laws that matter. Taking the USA, as an example, India can think of bringing comprehensive amendments to the IBC. Adopting the insights from the UNCITRAL model would be a fruitful option for India. No doubt, Model law lacks some of the key factors such as COMI, which has been the debatable presumption in many domestic laws who have adopted and followed the UNCITRAL regime, but those can be amended by simply bringing exhaustive guidelines that are in consonance with the frame work of Indian Laws.

The case of Jet Airways is just one example of how a company debtor needs a cross-border regime which addresses situations where creditors and assets of a corporate debtor are dispersed in different competences. The increasing size of economies has enabled companies to expand their businesses across national boundaries and organize their businesses. Because business activities are increasingly globalised, companies face a wide range of legal systems. Therefore, it is no surprise that such insolvencies have cross-border implications when multinationals become insolvent. Therefore, in order to avoid such a situation, the law framework pursuant to cross border insolvency issue has now become the need of the hour.

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