



CROSS BORDER INSOLVENCY: WHY INDIA SHOULD ADOPT UNCITRAL MODEL LAW WITH SPECIAL REFERENCE TO JET AIRWAYS CASE

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Overview

In this study, the cross-border insolvency from Indian context is analysed. How the IBC is lacking cross border insolvency provision and with new model BIT is in dormant state with only few nations signed and (more than 67 BITs are terminated and it rely upon sunset clause) with this scenario and without implementing Model law (UNCITRAL ML C-BI) how the Appellate tribunal set an insolvency protocol to handle Jet airways insolvency is analysed. How much the set-up protocol resembles the Model law has been also analysed. Jet airways is an Indian debtor and India's first private international airlines restructuring it get priority over liquidation at the same time treat Indian and foreign creditor fairly and equally also important. We should understand how Lehman brother bankruptcy affected one of the Indian creditors, ICICI bank severely in the year 2008¹⁶. Panicked Indian public stood in front of the ICICI ATM to withdraw money even well-known great personality Mr. Narayana Moorthy moved nearly ₹1000 crore from ICICI to SBI. One of the reasons for these was, there was no predictable, known and solid mechanism to make people understand how ICICI going to get its money (nearly \$ 80 million) from Lehman brother. The line of defence made by then officials was the amount of debt was only just 0.1 percent of asset of ICICI, not how it was going to recover the debt from Lehman. This was a bad experience to the law makers to understand how one bankruptcy could put its creditors beyond its borders in risky position in the market, without taking necessary step it could go on as chain reaction. In this globalised world, the economy of every country is interlinked beyond borders. It is the responsibility of every state to frame an acceptable protocol or adopt one already available, to follow fair business practices. The company may go out of business and may come back stronger even after bankrupt through reorganisation but fair, unbiased and responsible business practices must be followed.



Introduction

Indian foreign exchange reserves were at US\$ 600 million on June 1991, the opening up of the economy took place from July 1991 and the growth of India took place in the last thirty years steadily even during the 2008 financial meltdown. As of Jan 2021, foreign exchange reserves are around US\$ 600 billion in this three decades India has seen and withstood Asian economic meltdown around 2000 and global meltdown during 2008 and embargo and sanction during 1998 after its Pokhran 2 test and COVID-19 crisis. It is time to move forward and introduce new reform in the jurisdiction sector. In the way Indian software service sector flourished in these years, in the way Indian space agencies launching satellite of other countries, Indian judicial sector can work not only for India but for the world, opening up its judicial sector is essential and profitable. India could become the next arbitration hub, a CoMI for many insolvency proceedings in another ten years.

Cross border insolvency code is the need of this century, especially for the country like India which is developing in leap and bounds, where the situation for the start-up is favourable and where all the MNC want to capture market, invest and tap human potential, so whether it is manufacturing or Research and Development or Service sector India cannot look inwards and play a



protectionist, India should look outwards and play a global role. India’s ambition to become global arbitration hub (In the same way its space agency launches satellites of other countries) with its language and infrastructure advantage, the Make in India for the world scheme, need cross border insolvency provision in IBC (insolvency and Bankruptcy code)2016. The public perception on companies’ insolvency must be changed, insolvency is neither a bad thing nor it is an end of road, companies can make rebirth even after bankruptcy through reorganization.

Overview of the Cross-border Insolvency

Insolvency is the state of being unable to pay the debts, by a person or company (debtor), at maturity; those in a state of insolvency are said to be insolvent.

Cross border insolvency is applicable when the filing company has asset or creditors in more than one country. Right now, the Indian insolvency code lag the cross-border provision, it was very visible in the Jet airways insolvency proceedings. There are more difficulties associated with trying to deal with cross border insolvency and number of cross border insolvency cases increase and it will increase further because of the Covid19 crisis. There are great deal of commercial and legal uncertainty and unpredictability and lack of cooperation between different jurisdiction.

The asset of companies which goes through insolvency proceeding might come under different jurisdiction.

Cross border insolvency code requires some harmonization between different jurisdiction and treat all the asset of the insolvent company as single entity and treat all the creditors without any bias. By centralizing assets of the insolvent present in different countries the maximization of the value of the asset can be achieved. It is also essential to avoid any parallel proceeding in different jurisdictions.

IBC, Model BIT and Cross border Insolvency

The IBC section 234 and 235 provide not clear option to tackle cross border insolvency using BIT or Multilateral agreement. After the White industries Vs India case, the new Bilateral Investment Treaty (BIT) model was introduced and nearly all the BIT (67 BITs) was terminated unilaterally by India and the sun set clause is applicable for all the terminated BITs.

The clause that deals with insolvency in model BIT 2016 is

6.3 Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its law, including actions relating to:

- i. bankruptcy, insolvency or the protection of the rights of the creditors;**

After introduction of IBC 2016 India moved up in the ease of doing business ranking 64rd position and 52nd rank in resolving insolvency even china.^{az}India’s FDI for 2020 is 74 billion.

Location	Resolving Insolvency rank	Resolving Insolvency score	Strength of insolvency framework index (0-16)
China	51	62.1	13.5
India	52	62.0	7.5

^{az} World bank ranking ease of doing business <https://www.doingbusiness.org/en/rankings>

UNCITRAL Model Law

UNCITRAL models are referred to as soft law. There adoption to member’s own legislation is recommended but not mandatory. ML C-BI 1997 deals with cross border insolvency.

It provides a universal approach to insolvency instead of territorial approach and hybrid approach.

There are two types of proceeding main proceeding and non-main proceedings. The debtor has centre of main interest (CoMI), the proceeding going on at CoMI is the main proceeding and proceeding at any place where debtor has commercial establishment is non main proceeding. CoMI could be where the main creditors are located or where debtor’s headquarters located or debtor’s domicile registration or where debtor’s board meeting held or place set for dispute resolution. The insolvency tribunal can select CoMI for the proceedings.



ML C-BI used in 47 countries. But not all 47 countries included all the principles or all 32 articles of the model law, countries are free to choose certain article and leave certain articles of model law. The main principles of model law are state should not give preference to domestic creditors or foreign creditors. State should cooperate and assist insolvency official from other countries regarding main or non-main proceedings.

The key things in model law are

Access: Access to the local court proceedings for creditors and insolvency representatives.

Recognition: Recognizing the foreign proceeding and outcome of the proceeding whether liquidation or reorganising the debtor asset.

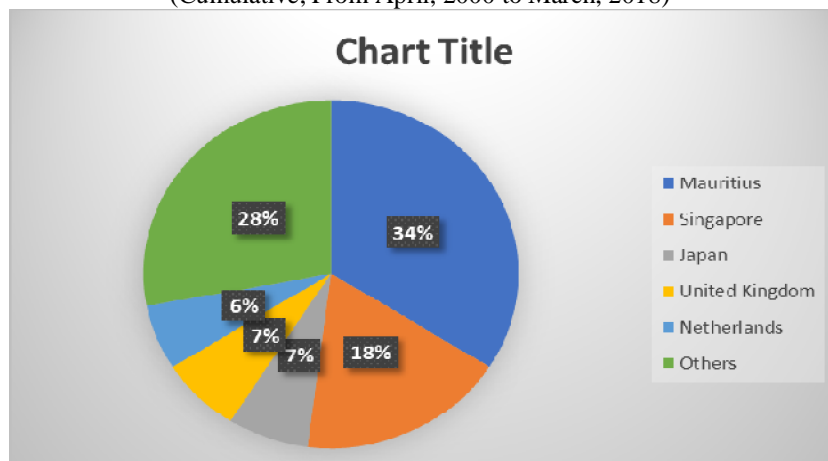
Relief: Assistance to the foreign proceeding

Cooperation and Coordination: Cooperation between the different jurisdiction to

Indian tribunals NCLT and NCALT used Model law in the cross-border insolvency case of Jet airways, so it would be easy for the insolvency professionals and judges to know the operational advantages and difficulties of the Model Law and apart from that Out of the top ten country FDI inflowwise in to India, six has adopted the Model law.

UNCITRAL Model law does not try to harmonize the different laws it gives substitution to the territorial approach or case by case approach. The jurisdiction can make choices which suits them the best. It is obvious that if India adopts its own version of Model law would go up in the ranking in ease of doing business and resolving insolvency ranking and increase the FDI inflow.

SHARE OF TOP COUNTRIES - FDI EQUITY INFLOWS¹¹
(Cumulative, From April, 2000 to March, 2018)



Model law is a balance approach between debtor's friendly and creditor friendly approach. It protects debtor's asset and offer room for reorganising of the company. During the proceeding the rights of creditors are protected and reorganization plan needs creditor's approval. This model law is unilateral law it doesn't require reciprocity from the states contradicting to the IBC sec 234. All creditors are bound by the approved reorganizing plan.

Jet airways insolvency

Jet airways is an Indian international airline, a Full-service carrier (FSC), based in Mumbai India founded in 1992 after India embraced liberalization and Globalization, the services of Jet is in comparable to that of Singapore airlines or Lufthansa airlines.

The Jet airways had 21.2% passenger market share as of Feb 2016. But due to losses incurred the Jet ceased operation on 17 April 2019. Jet airways faced insolvency proceeding in Netherlands and declared bankrupt. Jet had unpaid dept of 280 crores one of the aircraft of Jet Airways parked in Schiphol Airport Amsterdam was seized and SBI led consortium of creditors initiated new insolvency proceeding on Jet airways in India. The purpose of maximization of the value of the asset of insolvent could not be met under this situation (parallel proceeding) and seizing of aircraft was an assault on national pride.

With more than 15000 employees and 20% passenger share Jet insolvency is being a matter of national importance, liquidation gets second priority to reorganization.



Cross Border Insolvency protocol:¹⁴

The Aim of this protocol as stated by NCALT are a) Coordination b) Communication c) Information and Data sharing d) Preservation e) Claims' Reconciliation f) Maximize value of Assets/ recoveries g) Comity which are in sync with the aim of Model law. This insolvency case is the first cross border insolvency proceeding after formulating the IBC 2016. The insolvency proceeding against Jet airways initiated in Dutch Noord-Holland high court and declared Jet as bankrupt and ordered seizure of one of its Boeing 777 aircraft, and Dutch administrator approached NCLT. On hearings NCLT gave an order "The order passed by Noord Holland court for the company registered in India is nullity ab-initio"

The Dutch administrator applied against this in NCALT and Cross border insolvency protocol was framed and agreed by both the parties.

The objectionable clause in the protocol for the creditors was

"6.1.2.—The Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings. "

The Appellate court took Model law as blue print and framed the protocol, the Indian proceeding was identified and agreed as main proceeding (CoMI)^a and Dutch proceeding as NonCoMI nonmain proceeding. Upon assurance from Dutch administrator that Dutch court would not alienate or do anything to devalue the Jet off shore asset (even parking lot) allowed the administrator to be an observer without voting in all the Coc meetings and proceeding.

This action is again done based on Model law as blueprint, cooperation between different jurisdiction and allowing foreign representatives to allow in the CoMI proceeding and not doing anything to the off shore assets of the debtor before the judgement from CoMI hearings.

^a14485121915d8df2bae7814.pdf (nclat.nic.in)

Conclusion and Suggestion

India should consider to implement ML C-BI 1997 within 2022¹² i.e. before its UNCITRAL membership renewal, with its economy recovering after COVID-19 crisis and the presence of Indian conglomerates increased all over the world, it is responsibility of the state to adopt international standards in insolvency which serve the best interest of India. India should adopt the model law in the right manner for instance the model law is balanced between creditor and debtor in other words it is unbiased between liquidation and reorganization of debtor but adopting country can make their own bias, for India the code to be slightly biased on reorganization side is essential, even in the case of Jet airways liquidation was avoided considering the volume of business it has done and number of jobs it has created. India is going through series of introduction of new or updating many of its trade related law in the last decade starting from i) Company Act 2013, ii) Model Bilateral Investment Treaty 2016, iii) Insolvency and Bankruptcy Code 2016, iv) The Arbitration and Conciliation (Amendment) Act, 2019. All these act and amendment are need of the hour. To implement ML C-BI 1997 few things are essential like allowing tribunal NCLT under IBBI regulator to allow the foreign law firm and lawyers to practices law, more than the current 'fly in and fly out' rule, this would do good for the India's dream to become an arbitration hub or when it adopts ML C-BI with in its Insolvency and Bankruptcy Code, first allowing foreign lawyers in NCLT and after a decade apply the same in NCLAT. These bottom-up reforms are essential and do good for Indian companies and creditors.

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