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Cross Border Insolvency: An oversight by the IBC

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Abstract

The **Indian Bankruptcy Code**, also known as the "IBC," was introduced in 2016. At the time, it was considered quite a progressive step by the Indian government towards improving the insolvency resolution process in India. IBC was truly a revolutionary code. It not only made the insolvency process smoother and more efficient but also consolidated all the old insolvency laws such as the Companies Act,1957 and the SICKA Act,1985.

Insolvency laws in India have developed in a very irregular manner. Before IBC, separate insolvency acts governed different entities, as a result, overlapping among acts, made the system inefficient. The IBC consolidated all the laws and brought all the entities like companies, individuals and partnerships, under one umbrella or code.

Despite the advantages that the IBC brought, it was found to be lacking in a few areas. The most glaring and surprising **oversight** was lack of regulations for **cross-border insolvency**. This oversight on the part of the IBC has held India back from becoming a participant in the 21st-century global insolvency system. It has caused great loss and inconvenience to both domestic and foreign companies and creditors.

However, even if the legislature or government has not been as active in this regard as they should be, the judiciary has definitely made some strides. In cases like Jet Airways and many others, the Indian courts have recognized cross-border insolvency and made landmark judgments that have saved foreign creditors and corporate debtors alike from being victims of blatant injustice. These case laws are discussed in detail in this article.

UNCITRAL Model On Cross Border Insolvency was established on 30th May 1997. It currently has been adopted in more than 50 countries. Its primary goal is to help countries in having a standard model legal framework to more effectively address cross-border insolvency proceedings. Accepting this model in India, like it has been in EU and the US, can make India a much more attractive place for foreign creditors and solve the problems of recognition and **multiplicity of proceedings**.

Keywords: **Indian Bankruptcy Code,** cross-**border insolvency, oversight, UNCITRAL model, multiplicity of proceedings.**

Introduction – Improvements brought by the IBC

The Insolvency and Bankruptcy Code of 2016 (IBC) serves as the overarching legislation in India for handling insolvency cases involving both businesses and individuals. The provisions related to corporate insolvency and liquidation became effective on December 1, 2016.

The IBC was created as a crucial element in India's journey toward becoming a more mature market economy. It addresses the increasing need for a comprehensive law that can efficiently resolve debtor insolvency, optimize the assets available to creditors, and facilitate the closure of nonviable businesses. The primary goal of the Code is effective and efficient resolution, followed by maximizing the value of a corporate debtor's assets, and promoting entrepreneurship, access to credit, and a balance of interests as its secondary and tertiary objectives. Following are the main benefits of IBC:

- It introduced a dual-stage process, with the first stage being the insolvency stage and the second stage being the liquidation stage. The first stage focuses on helping the company remain a going concern and finding a feasible resolution applicant to infuse cash and improve the company's financial state. The second stage begins if the insolvency proceedings fail.
- It made both the stages time-bound and mandated that Corporate Insolvency Resolution Process ('CIRP') and liquidation must conclude within a specified period. For instance, under section 12 of the IBC, the insolvency process can take a maximum of 180 days, with an additional 90 days allowed.
- It made the process of submitting claims by creditors less chaotic and provided a specific time period within which claims could be submitted and processed accordingly.
- A moratorium period, which continues for the duration of the insolvency process was introduced. It ensures the much-needed stability and financial protection that a company needs during insolvency.
- A more efficient, compliance-friendly, and time-bound mechanism for insolvency improved the ease of doing business in India and helped attract more multinational corporations.
- It focused on maximizing asset value, protecting the interests of stakeholders and creditors, and promoting good entrepreneurial skills. These goals were inspired by the UNCITRAL model.

What is cross-border Insolvency?

Cross-border insolvency is similar to any other insolvency. It occurs when a company's assets and cash flow are insufficient to pay back its loans or liabilities. According to Section 4 of IBC, there must be a default of over Rs 1 crore for creditors or the corporate debtor to initiate CIRP. However, there are three additional requirements to make this insolvency into a cross-border insolvency:

- If the assets of a corporate debtor are present or situated in different jurisdictions (in multiple countries).
- If the corporate debtor has creditors who are from different jurisdictions (different countries). And
- Last but not least, if there are multiple insolvency proceedings ongoing in different jurisdictions (in different countries).

It is not mandatory for all three above conditions to be true to make it a cross-border insolvency even fulfilling one or two of the aforementioned conditions are enough. However, IBC does not address cross-border insolvency extensively and does not cover all aspects of it. (Except for Sections 234 and 235 of the IBC). Therefore, it is important to point out and discuss what an ideal insolvency law should contain to adequately realize what is missing in IBC.

- Recognition of foreign creditors: This is an essential requirement for any insolvency law. Foreign creditors must be recognized under domestic law and treated at the same level as domestic creditors. This not only aids in providing justice and a platform for foreign creditors to make their claims but also restores confidence in a country's insolvency system as they are assured they can raise a claim if a company undergoes insolvency.

  Recognizing foreign creditors involves allowing them to raise claims, ensuring equal and fair treatment when distributing the proceeds of liquidation, and enabling their participation in the Committee of Creditors (COC), among other aspects. In India, the IBC does not have any specific provisions that allow for the recognition of foreign creditors, but the Indian government has the option to enter into agreements or treaties with other nations to make this possible.

  Additionally, there have been cross-border insolvency cases where the National Company Law Appellate Tribunal (NCLAT) has granted leave to foreign creditors to be a part of the COC, as seen in the case of Jet Airways (India) Ltd in 2019. So, there has been some progress on this front. However, it remains to be seen if IBC witness any change in response to the surge in cross border insolvencies in India.

- Reduction of multiple proceedings: A good insolvency law should focus on reducing the multiplicity of insolvency proceedings in different nations. This can only be achieved when the domestic insolvency system of a country works in collaboration with other countries.

  Furthermore, recognizing the assets of a corporate debtor situated in foreign lands and allowing foreign creditors or other creditors to recover these assets are also steps towards achieving this goal. The presence of assets in multiple countries holds significant importance, and the recovery of these assets depends largely on collaboration and recognition. In India, the IBC, once again, does not directly address this issue, but as mentioned earlier, the Indian government has the authority to sign treaties with other nations in this regard.

- Assistance to foreign courts: An ideal insolvency law must make provisions to enable and encourage a country's domestic courts (in India's case, the NCLT and NCLAT) to share documents, evidence, reports, or any other data with foreign insolvency courts if requested.

  This can facilitate quicker justice, smoother insolvency proceedings in other jurisdictions, and foster trust among foreign creditors. This provision is crucial when insolvency proceedings are unfolding in a foreign jurisdiction.

Additionally, regardless of cross-border or normal insolvency, below are other aspects that must be taken care of:

- Providing maximum value for the corporate debtor's assets during liquidation, such as faster processing and finding the best buyer and price.
- Having a smooth, efficient, time-bound, and stakeholder-oriented corporate insolvency resolution mechanism that focuses on helping companies that are insolvent.
- Promoting entrepreneurship, which involves ensuring that the company remains a going concern during insolvency and transferring control from the board of directors to creditors. It also means finding the best resolution applicant to lift the company out of insolvency.
- Maintaining creditors' confidence in the recovery system is imperative for credit market. IBC tries to insure this by having a time-bound mechanism for insolvency proceedings and establishing a good claim settlement mechanism. However, the status of foreign creditors leaves a lot to be desired.
- Setting up agencies like the Insolvency and Bankruptcy Board of India (IBBI), Insolvency Resolution Agency, and Information Utility facilitates a more robust and evidence-based insolvency resolution experience that works for all stakeholders and not just for any one party. These agencies also play an important role in regulating and managing the insolvency process.

IBC's limited Provisions and shortcomings

When it comes to the provisions of the Insolvency and Bankruptcy Code (IBC), there are only two sections that solely focus on cross-border insolvency: Section 234 and Section 235 as mentioned before.

Section 234 allows the Indian government to enter into agreements with other countries to recognize each other's laws related to insolvency. Subsection 2 of Section 234 specifies the areas of insolvency that may be covered in the agreement, including assets, property of corporate debtors, personal guarantors of corporate debtors, and so on.

Section 235 is an extension of Section 234. This section allows a resolution professional or liquidator (through the National Company Law Tribunal - NCLT) to request the appropriate authority in another country to process or recover any assets or property of the corporate debtor situated in that other country. It is important to note that this section only deals with the property of the corporate debtor situated in another country that has a reciprocal agreement with India, as mentioned in Section 234.

The above two are the only provisions in IBC that specifically deal with cross-border insolvency. That said, the provision for bilateral agreements as provided in section 234 is time-consuming, expensive, and not a conclusive source of reliance due to the multiple layers of negotiation involved. The oversight on the part of IBC in this regard has resulted into the following issues and problems:

- Injustice to creditors as they are unable to be directly recognized under the eyes of domestic laws in India and hence are not be on par with domestic creditors.
- It leads to multiple insolvency proceedings in many countries, making the process for corporate debtors much more complicated with overlapping orders.
- Non-collaboration and cooperation between courts of different countries regarding the insolvency of the same corporate debt can lead to disorder, delays, and confusion among all stakeholders.
- In the absence of proper laws and mechanisms, it is challenging to recover and distribute assets located in different countries. This can and has impeded efficient resolution of insolvency cases and hindered the maximization of value for the benefit of creditors.
- Additionally, inadequate legal provisions for cross-border insolvency has discouraged foreign creditors and banks to openly lend money to Indian entities.

In an effort to improve this situation, the Indian government requested the Insolvency Law Committee to recommend regulations in this area in 2018. The committee started its work in the same year, with the main mission of examining issues related to insolvency laws in India and making recommendations.

Some of the highlights of the committee's recommendations are mentioned below:

- It cautioned that if any cross-border insolvency provision is introduced in the IBC, it may clash with the provisions of the Companies Act, 2013, implying that any laws related to cross border insolvency when introduced must use proper diligence.
- The committee recommended applying the UNCITRAL mode law on a reciprocity basis initially and making further decisions to expand it to other countries.
- The model law should allow foreign insolvency professionals and foreign creditors to directly access domestic courts to seek remedies.
- The model law should allow for the principle of Center for Main Interest (COMI) and should allow recognition of insolvency proceedings ongoing in any other country.
- The model law should establish the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals.
- It should recognize foreign insolvency proceedings and provide a mechanism for starting domestic insolvency proceedings even if a foreign insolvency proceedings have already begun.

According to the news website *Mint*, "A cross-border insolvency regime has several benefits, but it also needs several issues to be addressed, including the readiness of the overall bankruptcy ecosystem. Besides letting foreign creditors initiate or take part in bankruptcy actions in local tribunals, it would also enable creditors in India to pursue overseas assets of Indian debtors as part of the debt resolution process. Such a regime would also result in any moratorium granted by an overseas court on the recovery of dues applicable in India as well in certain scenarios."

However, the above recommendations are only suggestions, and it is not clear when these recommendations will be accepted or included in the IBC. According to some reports in 2023, the Indian government has ruled out any plans to introduce a cross-border insolvency system or follow the UN model of cross-border insolvency (UNCITRAL model) in the near future.

Therefore, India is still a quite far away from introducing any full-fledged cross-border insolvency process that can address all aspects of cross-border insolvency, as discussed, such as foreign assets, creditors, multiplicity of proceedings, principles of COMI, and so on.

Case Studies

Jet Airways Case

Corporate Resolution Insolvency Process (CIRP) of Jet Airways started when some of the creditors of the airline filed an application for the same before the National Company Law Tribunal (NCLT) Bench in Mumbai in 2019. Jet Airways owed a lot of money, and one of the creditors was a bank based in the Netherlands. NCLT learned that insolvency proceedings

had been started by the Netherlands district court in the Netherlands one month prior to the application brought before the NCLT.

NCLT decided to set aside the proceedings that started in the Netherlands, declared them null, and refused to recognize them. It gave two reasons. Firstly, India did not have a reciprocal treaty with the Netherlands, as allowed by sections 234 and 235 of the IBC. Therefore, simultaneous proceedings could have delayed the process and resulted in overlapping jurisdictions. Secondly, Jet Airways, was a company registered in India and most of its assets were located India.

This order of NCLT was challenged by the Dutch trustee before the National Company Law Appellate Tribunal (NCLAT), citing that it could cause grave injustice to creditors in the Netherlands, and they must be recognized. NCLAT accepted the plea and asked the resolution professional (RP) of Jet Airways to check if the proceedings could go on in both nations through a "proposed coordination model." The RP and the Dutch trustee accordingly reached an agreement and submitted it to the NCLAT, this agreement was accepted by the NCLAT on 26th November 2019.

This was the first time NCLAT recognized foreign creditors and foreign proceedings in India. The agreement ordered by the NCLAT to be formed between India and the Netherlands was historical. It allowed the Dutch trustee to participate in the meetings of the committee of creditors of Jet Airways. Later in the case, a resolution plan was accepted and approved by the NCLAT, marking the end of the landmark proceedings.

Videocon case

In another interesting and landmark case, the NCLT granted the exceptional authorization to incorporate Videocon's overseas assets, specifically its foreign oil and gas assets, including any claims or interests held through foreign subsidiaries, within the Indian proceedings. This crucial and groundbreaking decision of NCLT was aimed to optimize the overall value of Videocon's assets and secure superior returns for all stakeholders involved.

Through encompassing and recognizing the foreign assets of Videocon, the insolvency resolution process was successful to a great extent in maximizing the value of the assets of the corporate debtor and worked out in favour of both the creditors and corporate debtor. This decision by NCLT is indeed a significant milestone in the realm of insolvency proceedings.

UNCITRAL Model and Conclusion

UNCITRAL Model On Cross Border Insolvency was established on 30th May 1997. It currently has been adopted in more than 50 countries. Its primary goal is to help countries in having a standard model legal framework to more effectively address cross-border insolvency proceedings. Accepting this model in India, like it has been in EU and the US, can make India a much more attractive place for foreign creditors and solve the problems of recognition and multiplicity of proceedings.

The model law focuses on four elements identified as key to the conduct of this process:

- **Access:** The model provides for allowing foreign creditors to access the courts of every member country if they seek assistance or recognition.
- **Foreign proceedings:** Recognition of foreign proceedings taking place in a different country by a member country is crucial for certainty. These provisions accord recognition to orders issued by foreign courts starting insolvency proceedings or appointing any representative of those proceedings.
- **Relief:** Any relief required to ensure the fair and orderly conduct of cross-border insolvency should be available to assist foreign proceedings. It also establishes a framework for cooperation and coordination without the need to override the individual legal system of a country.
- **Cooperation and coordination:** The model law empowers courts to cooperate in areas governed by the model and law and have the option to communicate, request, and recognize directly any foreign counterparts. Even if multiple court proceedings are underway, they must be aimed at achieving the objectives of those proceedings through the coordination of proceedings.

The model does not aim to make the insolvency laws of all countries exactly the same; rather, it emphasizes the harmonization of laws and cooperation. Even the Insolvency Law Committee report of 2018, as discussed earlier, talks about many principles found in the UNCITRAL model and recommends adopting the model in India.

Firstly, Sections 29 and 30 of the model provide for maintaining coordination and cooperation throughout the entire insolvency process between two or more countries in cases of cross-border insolvency. Secondly, the "principle of access" allows foreign creditors and debtors to attend court proceedings taking place in a different jurisdiction.

All these principles and rules of UNCITRAL go a long way in ensuring that foreign creditors do not get left out, and at the same time, the corporate debtor's assets in other countries are safeguarded and derive maximum value. It has already been discussed that how a sluggish response by the government and inadequacy in law can cause grave injustice and delay in insolvency proceedings. Therefore, it has never been more important for India than now, to start making progress on this front.

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