UNCITRAL MODEL OF CROSS INSOLVENCY LAW: RIGHT CHOICE TO USHER IN A NEW ERA

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INTRODUCTION

While business is becoming global in nature, laws applicable are mostly local. When a debtor is exposed to collective trans-national insolvency proceedings, pertinent aspect for the international business fraternity is how the interplay of the legal systems involved is affecting the trade prospects. Decisions affecting International trade and commerce in a particular jurisdiction are influenced by existing insolvency regime there as trading parties consider jurisdiction’s capacity to handle cross-border insolvency elements, a gauge of their risk assessment in doing business there.¹

With the increasing size of Indian economy, the creditors and corporate houses are doing cross-border transactions frequently. In wake of this, there’s need to have a globally recognized, effective cross-border insolvency regime, following which one country may provide assistance to the other in taking control of the assets and eventual disposition of such assets of the debtor company. Such objectives can be attained by the mutual acknowledgement of each country’s insolvency regime.

Eventually, Indian Government is eyeing on comprehensive changes in the Insolvency and Bankruptcy Code by bringing in UNCITRAL model law² (‘the Model Law’) to deal with the hurdles in getting access to the properties of defaulters in foreign jurisdictions. The Model law is most-widely recognized legal mechanism which is capable of effective resolution of insolvencies in which assets are spread across two or more Jurisdictions.

The **present framework** dealing with cross-border insolvency has been included under the following sections of the IBC\(^3\):

Section 234 empowers the Union Government to enter into bilateral agreement with foreign governments to enforce the provisions of the Code. Central Government has the power to direct that the assets of a corporate debtor or debtor or personal debtor, situated outside India be dealt with as per specified conditions. This may however require India to have reciprocity in its domestic law on insolvency, a provision in respect of which has been lacking in the Code.

Section 235 provides to the Resolution Professional/ liquidator/bankruptcy trustee as the case may be, the provision to make an application to NCLT seeking issuance of a request letter to a foreign court/ authority in a country with which there is an agreement, requesting evidence in relation to an asset, in relation to proceedings against a corporate debtor in India.

Hence, due to the absence of a specific legislative framework for handling of cross-border insolvency cases, various existing techniques are employed, such as doctrine of comity; enforcement of foreign insolvency orders using already existing legislation for enforcement of foreign judgments; and ‘letters rogatory’ requesting judicial assistance.

**LIMITATIONS OF EXISTING FRAMEWORK**

Approaches which are rooted exclusively on the doctrine of comity do not deliver efficacious reliability and predictability in relation to cooperation from judicial courts, access for foreign representatives to courts and recognition of foreign insolvency proceedings to the level as it can be ensured through specific legislation, such as the Model Law.

- The ILC in its report\(^4\) has mentioned that above said Sections are not sufficient to tackle situations of default wherein the assets are located in foreign jurisdiction. While Section 235 do provide for issuance of “letter of request” by NCLT, there is no provision for effective cooperation.

\(^3\) The Insolvency and Bankruptcy Code, 2016.

The Insolvency bankruptcy code permits application by foreign creditors before the Adjudicating Authority for initiating insolvency proceedings or being part of any ongoing proceedings against the Indian entity, with the same rights as Indian creditors. This has been made possible by expanding the definition of "persons" to include "person resident outside India" in order to introduce the principle of neutrality in identification of the corporate debtor's creditors.

However, the IBC is silent on situation wherein an Indian creditor seeks to enforce rights against debtor (Indian or foreign) having assets overseas. In such scenario, there is no provision for automatic attachment of assets or any parallel simultaneous legal proceedings against the Debtor.

- A bilateral agreement with different States separately, will be ineffective while dealing with cases where the Corporate Debtor holds assets in multiple jurisdictions. This makes the process very costly and time-taking.

- There are no specific provisions to deal with specific issues like recognition of proceeding, cooperation of courts, parallel proceedings and access to proceeding. Each bilateral agreement to be effective, will require inclusion of these provisions explicitly.

- It has also failed to consider the validity of orders passed in Indian proceedings in foreign country. To be effective in India, Orders passed by foreign courts should have a specific reference in respect of Indian laws. Though the mechanism for enforcement of such Foreign Orders has been provided under the Civil Procedure Code, 1908 but it is not effective in cases of insolvency proceedings.\(^6\)

**RECOMMENDATION BY VARIOUS COMMITTEES**

The Justice V. Balakrishna Eradi committee in 2000 suggested for the earliest adoption of the UNCITRAL law, either completely or in parts, in order to have an effectual regime for cross-border insolvency. Thereafter, the N.L. Mitra committee in the year 2001, noted that Indian Laws on Cross border Insolvency are obsolete and they are ineffective in comparison to International

\(^5\)Sec. 3(23)(g), Insolvency & Bankruptcy Code, 2016.
legal standards and needs. The recent insolvency law committee report also concluded that Sections 234 and 235 of the code don’t meet up the requirement of comprehensive framework needed.\(^7\)

**WHAT IS UNCITRAL MODEL LAW?**

*Introduction:*

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Cross-Border Insolvency in May 1997. The Model Law draft was prepared after having inputs from thirty-six member, forty observer states of UNCITRAL and thirteen international organizations\(^8\) with an aim to provide efficient mechanism having common acceptance across Nations for dealing with insolvencies spread across more than one jurisdiction in order to promote co-operation between authorities and courts which are situated cross borders and dealing with cross-border insolvency cases. It is a suggested template for domestic legislative reform, for states to adopt either wholesale or with minor modifications.\(^9\) The distinguishing reception of the model law can be termed as a success as (a) it has received equal support from delegates of Territorialist and Universalist states alike. Interestingly, (b) Model law is steadily becoming “a domestic hard law” in many countries across the globe: Mexico, Japan, South Africa, USA, United Kingdom, and New Zealand, along with many others, have paved the path for same. Though the Model Law has not been literally enacted in these countries and there has been certain reluctance and modifications, the orientation remains positive.

*Concept:*

Cross border insolvency can fundamentally be distilled down to three essential questions: (a) *which* law shall be applied; (b) *who* has jurisdiction for administration of insolvency proceeding; and (c) *how* the judgments to be enforced?

There are two main approaches as remedy to deal with financially perturbed debtors having set out that jurisdictions shall apply their domestic laws over assets situated in their territory, excluding


\(^8\)Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 16.

other jurisdictions. Second is the *universal* approach, which advocates for application of a single universal regime over assets situated across borders, by a single administrator. The UNCITRAL model law is the *hybrid* of both above-mentioned approaches, under which jurisdictions determine most relevant center for the proceedings, with assistance from other jurisdictions where assets might be located. However, it is pertinent to be mentioned here that the Model law doesn’t aim for creation of a *substantive, unified* insolvency law; instead it is a channel for harmonization of laws.

**Salient characteristics of the Model Law:**

The Model Law by means of studies and consultations, has identified four key issues, based on which an attempt to reach international consensus might be made.

- **Access to local Courts**-
  The Principle of access deals with incoming and outgoing facets of cross-border insolvency. Article 5 authorizes the ‘insolvency representative’ to act on behalf of local proceedings in a foreign State and under Article 9, a foreign representative through application, can have unmediated access of courts situated in the enacting State and may also apply for initiation of local proceeding in enacting State pursuant to terms mentioned under Article 11. Article 15 provides them with right to apply for recognition of the foreign proceedings.

  Importantly, Article 13 gives the foreign creditors same right just like the local creditors for commencing and participating in proceedings taking place in enacting state but Article 10 also categorically provides that foreign representative has mere right of making application to the court and by virtue of any such application any asset or debtor himself doesn’t become subject to the jurisdiction of enacting State.

  The Model Law is silent on the point of issuance of notice by the enacting state to interested parties/persons whose interests are closely associated to the said proceeding and states generally have their own rules in regard of this.
• Recognition of orders issued by foreign courts-

The Model Law aims at establishing a streamlined procedure for recognizing competent foreign proceedings. This would save lot of time which would otherwise be lost in the process of legalization and would bring in element of certainty. The Model Law advocates for according recognition to every foreign insolvency proceedings in accordance with Article 6, when the grounds mentioned in Article 2 regarding the nature of proceeding and foreign representative have been met and the evidence has been provided as per requirement of Article 15.

Article 6 of the model law provides for ground of refusal of recognition if such recognition is “manifestly contrary to the public policy” of the State where it is sought. However since public policy is subjective and varies from state to state and no particular definition of public policy has been provided under the model law, this exception is to be interpreted restrictively only in exceptional and limited circumstances and mere differences in insolvency laws leading to enforcement of one State’s laws must not be construed as violating of the public policy of another State.

• Relief to assist foreign proceedings-

Model Law also propounds for relief either on an interim basis or in the form of recognition to assist foreign proceedings. Article 19 provides that Interim relief can be availed at the discretion of the court while application for recognition is being processed while as per Article 20 certain specified reliefs can be availed post recognition of main proceedings. While enacting state may provide additional assistance under its’ other laws as per provision of the model law under Article 7. Post recognition of a foreign “main” proceeding, reliefs such as stay of enforcement proceedings or stay of actions of creditors or barring debtor from exercising his right to transfer its assets can also be provided for. This is done in order to provide the debtor with ‘breathing space’ until reorganization or liquidation while at the same time to prevent the debtor from moving his property beyond borders in today’s globalized financial system.

• Cooperation among the courts of States-

The Model Law explicitly authorizes courts to establish direct communication with the courts of foreign counter parts. This cooperation is independent of recognition and thus may be considered
at an early stage even prior to the actual application for recognition. In order to bring in uniformity and clarity, Article 27 ushers light on the meaning of cooperation which have been explained in further pellucid manner in the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*\(^\text{10}\).

Interesting observation here is that post recognition of foreign main proceeding, model law doesn’t advocate for halting the local proceedings being commenced in the enacting State (article 28). Instead, numerous provisions of the Model Law aim for coordination among concurrent proceedings in order to achieve the best objective of both proceedings. For e.g. Article 29 stresses on adjustment of the available relief if there is a concurrent proceeding. Article 32 ensures avoidance from situation wherein the same creditor might raise claims in multiple jurisdictions and get paid in multiple insolvency proceedings thereby resulting in prospective loss for other creditors and obtaining more favorable treatment for it.

**Advantages of enacting UNCITRAL model framework:**

- The Model law is flexible enough to respect the differences between insolvency laws of different countries. As per domestic needs, Countries may bring in modifications to suit their requirements. For e.g.US has restricted remedies to be availed only prior to recognition of foreign proceedings.
  
  Article 1(2) of the Model Law carefully scrutinizes the exclusion of proceedings anent certain entities which are subject to special insolvency regime in the State. Taking this into account, India may choose to exclude specific type of different entities. For e.g. New Zealand has excluded banks, while Romania has excluded all types of financial institutions that are into business of providing credit or investment services from the operation of the model law provisions.\(^\text{11}\)

- Under the Model law, the domestic interests of Nations have been given precedence. The Model law also allows Countries not to acknowledge such foreign proceedings which are opposed to their domestic public policy.\(^\text{12}\) This has also been included under Section 4 of the

\(^{10}\) The *Practice Guide* is available from: [http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html)

\(^{11}\) S. Chandra MOHAN, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*

recent rough draft released by the Ministry of Corporate Affairs, Government of India. Recognition of a foreign proceeding doesn’t stop the domestic proceedings under Model law and it also permits countries to retain their right of not providing assistance to foreign proceedings in certain cases, which bars any prospect of probable misuse by external creditors or debtors.

Again, Article 22 of model law focuses on the rights of domestic creditors suggesting that reliefs provided to foreign insolvency representative must be in consonance with the safeguards provided to Domestic creditors and other interested parties including the debtor.

- The proposed enactment allows foreign practitioners to access Indian proceedings and Indian insolvency practitioners to access foreign proceedings. Though Indian practitioners had such access earlier as well subject to the law of the foreign country but adequate guidance pertaining to powers of such representatives was absent from domestic law. Incorporating Article 6 of the model law would do away with this lacunae present in Indian law.

- The UNCITRAL model proposes for a mechanism of cooperation by means of direct coordination among the foreign as well as domestic courts and insolvency professionals. This will pave a path for realization of consistent law leading to an effective aid in cases of simultaneous proceedings across jurisdictions. The proposed framework has already been adopted by numerous countries (44 Countries). A uniform mechanism will result in procedural standardization and effective coordination between countries.

- The proposed Model law will do away with the need of deliberation on each provisions with each party separately, saving the time and cost of negotiations with each foreign government. The recovery rate of debt is calculated considering various factors such as cost incurred, time taken and outcome of proceedings for insolvency in each economy. The model law provides for certainty in the market to promote economic stability and growth through maximization of value of assets and ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information. All this enhances the Credit recovery efficiency which in turn improves ease of doing business.

- The enactment of the proposed framework will contain the shortcomings in Section 235 of IBC regarding reciprocity, by allowing cooperation with even those countries, which have adopted Model Law with special modifications relating to requirement of legislative reciprocity, like Mauritius, Virgin Islands, Mexico, etc. As per the laws of such countries, India needs to adopt
an effective Cross-border Insolvency laws in order to seek cooperation or recognition of Indian proceeding in those countries.

COMMENT

The decisions of Cross-border investments to a great extent depend on the insolvency laws currently in force in a Nation. Although the IBC has resulted in great improvement in our Country’s insolvency regime, there is still a lot that needs to be done and inclusion of the model law in the Code would be an effective step towards a comprehensive insolvency framework. The introduction of this globally celebrated and accepted framework, fine-tuned as per requirements of the aspirational Indian economy will encourage cross-border deals and help in making India an attractive FDI target by minimizing the risks analogous with insolvency.

The leveling of the playing field for Indian and Foreign Creditors is a significant move which would positively influence the global investor community and MNCs. Enactment of this Model law with enhanced predictability and certainty, is expected to provide a substantially improved mechanism of cooperation between India and other nations in the field of insolvency resolution which will boost the confidence of global investors to look for business opportunities in India.