ISSUE OF CROSS-BORDER INSOLVENCY : IS INSOLVENCY PROTOCOL A SUCCESS STORY IN INDIA?

Sandhya Sharma[*]
Versha Vahini[**]

I. INTRODUCTION[1]

Over the last twenty years, global economies have experienced an increased interconnectivity, leading to the growth of multinational corporations that possess assets and creditors in multiple jurisdictions.[2] The increasing inevitability of cross-border insolvencies[3] necessitates an examination of how these insolvencies will be efficiently and effectively managed.

The insolvency Protocols have emerged as a response to this issue, with judges establishing protocols that encourage coordination, cooperation, and communication between the courts, between the courts and the parties, and between the parties themselves.[4] Guidelines and model laws[5] came into being as a result of the growing popularity of these insolvency protocols.[6] These guidelines and laws were intended to serve as guidance on how to draft these protocols.

Nevertheless, it is imperative to acknowledge that these protocols, inherently tailored to individual cases, are subject to continuous evolution.[7] Their primary purpose is to cater to the unique circumstances of each case, thereby augmenting the repertoire of resources that future cases can draw upon when implementing similar protocols.

II. CROSS-BORDER INSOLVENCY ISSUE IN INDIA

The present regulatory framework pertaining to cross-border insolvency assistance in India is plagued with a notable degree of ambiguity and unpredictability.[8] The existing

[*] Assistant Professor, Christ University, Pune, Lavasa.
[**] Professor of Law, School of Law, Bennett University, Uttar Pradesh, India.
[1] This paper is an updated version of manuscript presented at the National Conference on "*The Interplay of Law and Economics in the Society and Policy Making*" organised by The National Law School University, Bhopal. The authors are extremely thankful to the Chairperson of the Technical Session for providing his valuable suggestion.
[2] Paul H. Zumbro, "Cross-Border Insolvencies and International Protocols-An Imperfect but Effective Tool" 11(2) *Business Law International* 157 (2010).
[3] In this paper, the terms Cross-Border Insolvency, International Insolvency, and Trans-national Insolvencies are used Interchangeably.
[4] Oriana Casasola and Stephan Madaus, "Mean of Implementation of Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast" 33 *European Business Law Review* (2022), *available at*: https://doi.org/10.54648/eulr2022036 (last visited on Mar. 17, 2024).
[5] UNCITRAL Model Law on Cross-Border Insolvency (New York; 1997).
[6] Akshaya Kamalnath, "Cross-Border Insolvency Protocol: A Success Story?" 2 *International Journal of Legal Studies and Research* 172 (2013).
[7] *Ibid*.
[8] Priya Misra, "Cross-Border corporate insolvency law in India: Dealing with Insolvency in Multinational Group Companies-Determining Jurisdiction for Group Companies" 45(2) *Vikalpa: The Journal for Decision Makers* 93 (2020).

literature highlights a notable dearth of certainty pertaining to the acknowledgment and execution of judgements and orders associated with foreign insolvency matters.[9] The Code of Civil Procedure of 1908 establishes a procedural framework for the acknowledgment and implementation of foreign judgements. Decisions rendered by courts of foreign jurisdictions are typically regarded as binding and final, with certain limited exceptions provided under section 13[10] of the Code of Civil Procedure 1906. Further, section 44A[11] of the Code of Civil Procedure delineates the provisions pertaining to the execution of a foreign court judgement within the territorial limits of India. This statutory provision mandates the fulfilment of specific conditions, including the requirement that the judgement in question emanates from a superior court and originates from a jurisdiction that maintains a reciprocal arrangement with India.[12]

The aforementioned judgements will have comparable outcomes to those that are delivered by a local District Court. In India, the recognition of judgements and orders from foreign courts has traditionally been governed by the principle of comity of courts[13], operating outside the purview of the Code of Civil Procedure. The Delhi High Court recently entertained a lawsuit brought forth by a Japanese Bankruptcy Trustee, who sought injunctive relief in accordance with the judgement issued by the Japanese Bankruptcy Court.[14]

India is currently in the final phases of revising the Insolvency and Bankruptcy Code (IBC, 2016) in order to incorporate the adopted version of UNCITRAL Model Law on Cross-Border Insolvency 1997 (referred to as the 'Model Law'). The implementation of the *Part-Z*[15] will facilitate the acknowledgment in India of international insolvency orders that authorise the inclusion of a corporate debtor in bankruptcy proceedings. This will result in providing the protective measures that aimed at safeguarding the assets of the corporate debtor in India. As previously mentioned, the CPC alone permits the acknowledgment and execution of foreign judgements. The implementation of insolvency-related orders issued by foreign courts continues to be a subject of debate and disagreement. Moreover, within the context of foreign insolvency procedures, the insolvency representatives possess the authority to render decisions

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[9] *Ibid.*

[10] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except
(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in [India].

[11] Execution of decrees passed by Courts in reciprocating territory. (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

[12] Naresh Thakkar and Rhia Marshall, "Litigation: Enforcement of Foreign Judgment in India", *available at*: https://www.lexology.com/library/detail.aspx?g=681612a7-f920-4ad5-8fbb-c37912bb8644 (last visited on May 17, 2024).

[13] *Alcon Electronics Private Limited* v. *Celem SA of FAO 34320 Roujan, France and Another* (2017) 2 SCC 253. Also *see*, Arjan Kumar Sikri, "Cross Border Insolvency: Court-To-Court Cooperation" 51(4) *Journal of the Indian Law Institute* 482 (2009).

[14] *Toshiaki Aiba* v. *Vipan Kumar Sharma & Anr*, Delhi High Court CS (COMM) 1136/2018 and I.A. No. 7598/2020 ('Toshiaki Aiba').

[15] The Insolvency Law Committee, in its reports on the Cross-Border Insolvency titled as *Draft Part-Z*, which is the proposed Chapter on Cross-Border Insolvency, to be included in the Insolvency and Bankruptcy Code, 2016.

in situations that lack recognition from any provision outlined in the Code of Civil Procedure, 1906.

The inclusion of cross-border insolvency framework hold great importance in the globalised world today and inclusion of cross-border insolvency law will enable foreign representatives to immediately approach Indian courts for the acknowledgment and support of cross-border insolvency procedures.[16] Consequently, it will be not necessary for a foreign representative to delay the recognition of insolvency proceedings in India until the completion of foreign insolvency proceedings and the issuance of a foreign judgement or order.[17]

III. WHAT ARE INSOLVENCY PROTOCOLS?

United Nations Commission on International Trade Law, in its publication on *Practice Guide on Cross-Border Insolvency* defined Insolvency protocol as an "agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest."[18]

The adoption and approval of protocols typically occur within the purview of the courts, in accordance with the prevailing local laws and practices specific to each jurisdiction.[19] Notwithstanding as mentioned above, the advantageous characteristic of an insolvency protocol is that, in contrast to a binding treaty or convention, protocols have the capacity to be customised and tailored in accordance with the unique requirements of each individual case.[20] Therefore, protocols exhibit a degree of specificity depending on the particular case, while also aiming to tackle fundamental challenges commonly seen in cross-border insolvency situations.[21] Typically, insolvency protocols indicate their objective, which may involve helping the re-organisation of the firm, safeguarding the integrity of the administrative process, or establishing effective and prompt processes for resolving disputes related to claims.[22]

Additionally, they commit to establishing a structure that enables courts to coordinate their efforts, ensuring that any legal action can be resolved by a single court.[23] The issue of court communication, particularly the organisation of joint hearings, is also discussed.[24] The equitable treatment of all parties across jurisdictions is vital component that is addressed through the implementation of specific processes. Ensuring that all relevant stakeholders have

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[16] Ishita Das, "The Need for Implementing a Cross-border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016" 45 *Vikalpa: The Journal of decision Makers* (2020), *available at*: https://doi.org/10.1177/0256090920946519 (last visited on May 08, 2024).

[17] *Ibid*.

[18] United Nations, *UNICTRAL Practical Guide on Cross-Border Insolvency Cooperation* (United Nations Publications, New York, 2010).

[19] Evan D. Flaschen and Ronald J Silverman, "Cross-Border Insolvency Cooperation Protocols" 33 *Texas International Law Journal* 587 (1998).

[20] *Ibid*.

[21] *Ibid*.

[22] *Supra* note 4.

[23] Akshaya Kamalnath, "Cross-Border Insolvency Protocol: A Success Story?" 2 *International Journal of Legal Studies and Research* 172 (2013).

[24] *Ibid*.

the opportunity to express their views is equally significant.[25] And lastly the matter of retaining and compensating professionals is another important issue that is dealt under this.

A. Development of Insolvency Protocols: From Maxwell to Lehman and Madoff

Significant endeavors have been undertaken both at the international and national levels to formulate comprehensive frameworks, guidelines, and principles for insolvency protocols. These principles were not arbitrarily established but rather emerged as a result of practical necessity in response to complex problems that arose in specific instances.[26] The utilisation of protocols in cross-border bankruptcy proceedings by courts and practitioners did not originate solely from the implementation of the Model Law and the E.U. Regulation. In fact, the initial protocols of the contemporary age were developed in the United States during the early 1990s, at a time when there was no provision similar to the current versions of article 27(d) of the Model Law [as implemented by section 1527(4) of the U.S. Bankruptcy Code].

(i) In re Maxwell Communication

In re Maxwell Communication[27] was famous for being the first major case where an insolvency protocol was negotiated.[28] The Protocol aims to optimise the value of the estate and promote efficiency in the procedures, with the goal of reducing wastage, expenses, and conflicts related to jurisdiction.[29] The framework established under the Maxwell protocol facilitated the management of corporate governance of the Maxwell estate by U.K. administrators. However, significant decisions pertaining to borrowings and asset realisations necessitated the assent of the U.S. examiner or approval from the U.S. court. There were few issues which remain unaddressed under this framework for instance the matter about the method in which creditors would be distributed and the final conclusion of the lawsuit. These were the issues which ultimately resolved through the implementation of separate plans of reorganisation and schemes of arrangement by the involved parties. The plan of reorganization and scheme of arrangement was reached within 16 months which as Justice Tina Brozman later said, "helped save hundreds of well-known companies that Maxwell had owned"[30].

(ii) Nakash – The First Protocol with a Civil Law Country

It is the most recent protocol which added another significant dimension to the cooperation facilitated by the protocol. The case of *In re Joseph Nakash*[31] emphasised on organised actions of parties as well as on improved coordination of court procedures and

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[25] *Ibid*.

[26] The history of protocol was started at various points in history, for instance at the international insolvency case of Ammanati Bank in 1302. Or at the first treaties between Verona and Trento in 1204 or Verona and Venice in 1306 or perhaps the treaty regarding mutual recognition of Bankruptcy declarations between the States of Holland and the State of Utrecht in 1689.

[27] 93 F.3d 1036 (1996).

[28] Evan D. Flaschen and Bingham McCutchen, "How the Maxwell Sausage was Made", *available at*: http://evanflaschen.net/Maxwell%20Sausage.pdf (last visited on Nov. 12, 2023).

[29] *Ibid*.

[30] Testimony of Justice Tina L. Brozman, Chief Bankruptcy Judge for the Southern District of New York, before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, on H.R. 1596, The Bankruptcy Judgeship Act of 1997, June 19, 1997. *Available at*: http://judiciary.house.gov/legacy/590.htm (last visited on Nov. 14, 2023).

[31] 190 B.R. 763 (1996).

collaboration among judiciaries. Apart from this, it is the first protocol between a civil law nation Israel and a common law country. This fact is significant because the civil law (in the instant case Israel) mandates strict adherence to the statutory law. So, under the civil legal system, an Israeli court could not merely mandate and sign a cooperation agreement with a foreign court under the framework of its "general equitable or inherent" mandate. Instead, the Israeli court was asked to find an explicit legislative authorization for entering into the Nakash Protocol, which it duly accomplished.[32] In addition, a civil court also assumes the responsibility of fact-finding, necessitating a higher level of court participation. The Nakash Protocol prioritised the synchronisation of court proceedings and judicial actions in both jurisdictions, in addition to coordinating the parties involved.[33]

The aim of the Nakash protocol was to standardise and synchronise the two different legal proceedings and thereby upholding the credibility of the two courts. Moreover, the protocol additionally ensures the protection and enhancement of the debtor's assets on an international level, and finally, streamlines operations and facilitates the sharing of information to reduce costs and avoid duplication.

(iii) Olympia and York

Olympia and York[34] was the first case of cross-border insolvency between the United States and Canada, with Maxwell case serving as a prior legal precedent. The debtor in question was a real estate company which was based in Toronto, Canada and had assets which were located in multiple location in Canada, the UK and the US. So, to safeguard and protect the assets which were located in multiple locations. This resulted in significant ambiguity as the creditors who had previously held security interests in the subsidiary and were considered as secured creditors became the unsecured creditors of the parent company. This protocol addressed the payment of professionals' issue by adopting a more territorial approach. It allowed professional of both countries to receive payments as per the payment regulation for professionals its respective states. In addition to this, the protocol primarily emphasised the corporate governance of the entity.[35]

(iv) Livent

In *Livent*, the protocol involved utilising a multicast satellite television feed after obtaining court approval for the sale of Livent's theatre assets in both countries. Following a two-day hearing, both courts issued complementary orders that permitted the sale of theatre assets in both cases to a single buyer.

(v) The Lehman Protocol

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[32] The Nakash Protocol is also unusual in that, not only did the debtor not sign the Protocol (which was also the case in Maxwell), but also the debtor actively opposed the approval of the Protocol and has appealed such approval in both the U.S. and Israel. The parties to the Nakash Protocol are the U.S. Examiner and the Official Receiver of the State of Israel.

[33] *Supra* note 19 at 588.

[34] Sean Dargan, "The Emergence of Mechanisms for cross-border insolvencies in Canadian Law" 17 *Connecticut Journal of International Law* 121 (2001).

[35] Edward T. Canuel, "United States – Canadian Insolvencies: Reviewing Conflicting Legal Mechanisms, Challenges and Opportunities for Cross-Border Cooperation" 4(1) *Journal of International Business and Law* 15 (2005).

The bankruptcy filing of *Lehman Brothers*[36] is the most extensive and intricate international bankruptcy case in history. The event not only led to twenty-two more Lehman affiliates filing for Chapter 11 petitions in New York but also resulted in seventy-five separate legal proceedings worldwide.[37]

The protocol outlined its objectives as the reduction of expenses and the optimisation of recoveries for all stakeholders, while efficiently handling each individual case with uniform outcomes.[38] The objective was to accomplish this by means of international coordination and synchronisation of proceedings, communication among all authorised representatives and committees, among committees themselves, among tribunals and between courts, sharing of information and data, preservation of assets, an efficient and transparent claims process, maximisation of recoveries, and fostering comity.

IV. THE JET-AIRWAYS CROSS-BORDER INSOLVENCY PROTOCOL: A SUCCESS STORY

Jet Airways, once of the India's renowned and popular airline, started experiencing significant difficulties and turbulence since 2018. The company started facing financial crunches and faced challenges in meeting its financial obligations, including employee's salaries and aircraft lease expenses. Despite making multiple efforts to secure funding and in the midst of investigations into financial misconduct within the company, the company was compelled to cease flying operations on April 17, 2019.[39] Subsequently, an application for insolvency was submitted against the company to the Mumbai Bench of the National Company Law Tribunal (herein after referred as 'NCLT'), which then commenced the insolvency resolution process through its order dated June 20, 2019.[40]

Prior to the initiation of insolvency proceedings in India, Jet Airways was declared bankrupt in the Netherlands on May 21, 2019. Shortly after that Jet Airways was admitted to CIRP (Corporate Insolvency Resolution Process) in India, the administrator appointed by the Dutch Court approached NCLT, Mumbai Bench, requesting recognition of the insolvency proceedings in the Netherlands. The administrator also requested that the CIRP proceedings in India be put on hold, as bankruptcy proceedings were already underway against the airline in the competent court in the Netherlands, claiming jurisdiction under article 2(4) of the Dutch Bankruptcy Act.[41] The administrator argued that having two parallel proceedings in different jurisdictions would undermine the restructuring process and negatively impact the creditors.

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[36] *In re Lehman Bros. Holdings Inc*., No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

[37] Michael J. Fleming and Asani Sarkar, "The Failure Resolution of Lehman Brothers", *available at*: https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412flem.pdf (last visited on May 20, 2024).

[38] Rosalind Z. Wiggins, Thomas Piontek and Andrew Metrick, "Lehman Brother Bankruptcy: An Overview", *available at*: https://ypfsresourcelibrary.blob.core.windows.net/fcic/YPFS/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf (last visited on May 20, 2024).

[39] Ambrish Pandey, "Cross-Border Insolvency in India & the Case of Jet Airways", *available at*: https://www.taxmann.com/research/ibc/top-story/105010000000016987/cross-border-insolvency-in-india-the-case-of-jet-airways-experts-opinion (last visited on May 21, 2024).

[40] *State Bank of India* v. *Jet Airways (India) Limited*, *available at*: https://ibbi.gov.in/webadmin/pdf/order/2019/Jun/20th%20Jun%202019%20in%20the%20matter%20of%20Jet%20Airways%20(India)%20Limited%20CP%201938,1968%20&%202205%20(MB)-MB-2019_2019-06-21%2016:52:41.pdf (last visited on May 23, 2024).

[41] Gausia Shaikh, "The Airways Cross-Border Insolvency Protocol: A Success Story", *available at*: https://ccla.smu.edu.sg/sgri/blog/2021/01/26/jet-airways-cross-border-insolvency-protocol-success-story (last visited on May 23, 2024).

An appeal was submitted to the National Company Law Appellate Tribunal resulted in an unprecedented ruling issued by the tribunal. The appellate authority requested a consensus between the Indian resolution professionals and the trustees appointed by the Netherlands court to ensure collaboration and synchronisation of the two parallel proceedings in order to maximise the worth of the insolvent estate while the proceedings ran simultaneously. As a result, a protocol for handling insolvency cases across borders was established between the two court-appointed officials. This protocol was later accepted by the NCLAT on September 26, 2019.[42]

A. Jet Protocol

Although there is no single standardised format for the cross-border insolvency protocols, but the paper from the International Insolvency Institute explains that these protocols are typically employed to address gaps in legislation and promote consistency in procedural matters, rather than substantive issues, that arise from simultaneous insolvency proceedings in different jurisdictions.[43] The protocol is defined as a means of expressing the intentions of the two officials with the objective of minimising expenses and optimising the value of the company, as well as enhancing the recoveries of creditors. This will be achieved through the exchange of information and the execution of associated tasks by the officials.

The Cross-Border Insolvency Protocol, which was entered between Dutch trustees and Indian Resolution Professionals is known as the Jet Protocol.

Key features of the Protocols:

1. The protocol designates India as the Centre of Main Interest (COMI), which refers to the jurisdiction where the primary proceedings take place.[44] This determination is typically made by bankruptcy courts based on the location of the company's registered office. In the case of Jet Airways, being an Indian company, India is identified as its COMI. After receiving the approval from the Dutch Court and NCLAT, for the jet protocol, added another degree of certainty and judicial scrutiny for the classification between the main and non-main proceedings.
2. Guidelines for the officials appointed by the Noord Holland. Among the other things, the following are other requirements of this protocol:
    i. The Dutch trustee is required to refrain from making decisions that would harm the company’s value maximisation and must inform the Indian resolution professional if compelled to make such decisions.
    ii. The Dutch trustee is also urged to assist in submitting a reorganisation plan that aligns with a bid approved in the IBC proceedings.
    iii. Additionally, the Dutch trustees were expected to look into the progress of the Indian proceedings before making any significant decisions in the Dutch proceedings.

    An analysis of the protocol shows that the language employed in provisions pertaining to guidelines for the Dutch trustee has a non-binding tone. The Dutch Trustee is not

[42] *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder)* v. *State Bank of India & Anr.*, Company Appeal (AT) (Insolvency) No. 707 of 2019, *available at*: https://ibbi.gov.in/uploads/order/b7bbd5ba93be73bb4602dfe25f25cdd4.pdf (last visited on May 24, 2024).
[43] *Supra* note 41.
[44] *Supra* note 39.

obligated by any enforceable requirements, but instead, the success of the two proceedings depends on a shared understanding and agreement regarding the importance of cooperation and coordination.

3. Preserving companies Assets – The protocol explicitly includes the company's assets situated in the Netherlands and requires their preservation to the best of the company's abilities.[45] Additionally, it documents that in the event that the trustee decides to sell off any of these assets, in that case the resulting funds would be placed in a separate bankruptcy account and the allocation of these sale proceeds would be carried out only after the consultation and advise of the Indian resolution professional.
4. Right to appear in and present in the proceedings – The jet protocol has given officials of both countries to attend the proceedings in person in both the jurisdictions without being legally bound by the laws of any jurisdiction apart from their own.[46]

V. CONCLUSION

The use of cross-border insolvency protocols is expected to rise due to the growing volume of cross-border commerce and corporate transactions, which frequently include organisations possessing assets and incurring liabilities in many jurisdictions.

As evident from the discussion in this paper that, insolvency protocols have emerged out of necessity and will persist in that manner. The protocol in Maxwell served as an innovative mechanism to resolve the dispute between the legal procedures of the United States and the United Kingdom. The protocol that was implemented in Lehman and Madoff case provided the streamlined communication, synchronisation, and exchange of information. Therefore, each protocol caters to the requirements of a particular scenario, rendering it highly attractive tool in cross-border insolvency cases.

If courts and judges enthusiastically advocate insolvency protocols, they may become the standard norm and allow parties to pre-arrange with creditors regarding protocol terms. This would reduce uncertainty in insolvency proceedings, easing concerns among creditors of huge multi-nation corporations. Still, there is no clarity whether courts would be upholding such pre-existing commercial agreements, as while doing so it will restrict the ability to customise the protocols as per the need and requirement of each case.

[45] *Supra* note 42.
[46] *Supra* note 39.