



Jet-Airways and Cross Border Insolvency - Interplay

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The Insolvency and Bankruptcy Code (“**the Code**”) through Section 234 introduces an enabling mechanism for enforcement of the provisions of the IB Code by providing for bilateral agreements (or even multilateral agreements) to be entered by the Central Government of India with other countries as a means to tackling issues related to cross border insolvency. Further, Section 235 provides for a mechanism that can be adopted by the Adjudicating Authority to seek assistance from foreign countries with which a reciprocal arrangement has been arrived at for enforcing the provisions of the IB Code. It is, however, cross-border insolvency regimes based on bilateral treaties tend to be time-consuming to be put in place. In a major breakthrough for India's insolvency mechanism which is still in its evolving stage, Jet Airways (India) Limited in India (“**Corporate Debtor**”) is the first Indian company to undergo insolvency proceedings under the Cross Border Insolvency Protocol along with the Insolvency and Bankruptcy Code (IBC) of India.

Corporate Debtor has properties in India and outside India as well. When CIRP against Jet Airways started under the Code in India where Registered Office of the ‘Corporate Debtor’ is situated and similar proceedings were already started at Netherland (North-Holland), where the Regional Hub of the ‘Corporate Debtor’ is situated. Two vendors of Jet Airways from the Netherlands had filed a petition in a local Dutch court seeking recovery of about ₹280 crores. Two parallel insolvency proceedings are being carried out in the case of Jet Airways (Corporate Debtor) in India, and in Netherland based on different territorial jurisdiction. In Netherland, Jet Airways was declared bankrupt in response to a complaint filed by two European creditors where a Dutch court administrator is appointed who approached its Indian counterpart for access to the financials as well as assets of the Corporate Debtor.

The National Company Law Appellate Tribunal (“**Appellate Authority**”) in the case of *Jet Airways (India) Limited v State Bank of India*¹, took cognizance of the simultaneous insolvency proceedings currently underway against the corporate debtor being the place of incorporation as well as in the Netherlands, being one of the places of its business. The Appellate Authority vide its orders, *inter alia*, directed the committee of creditors of the Corporate Debtor to consider the scope of cooperating with the Dutch bankruptcy trustee, who by virtue of an appeal filed before the Appellate Authority submitted to the jurisdiction of the Indian courts. The Appellate Authority had directed its interest in having a joint ‘corporate insolvency resolution process’ of the Corporate Debtor instead of two separate proceedings being conducted in two different jurisdictions. The National Company Law Tribunal in India had previously dismissed the prayer for the intervention of the Dutch bankruptcy trustee in the application for commencement of insolvency resolution process filed against Corporate Debtor in India, citing the lack of authority to recognize the order of bankruptcy of a foreign court, especially given that Sections 234 and 235 of the IB Code were not in force then,

¹ Company Appeal (At) (Insolvency) No. 707 of 2019

² In Re Nortel Networks Corporation, Ontario Superior Court of Justice, Toronto, Case No. 09-CL-7950 (14 January 2009), and the United States Bankruptcy Court for the District of Delaware, Case No. 09-10138 (15 January 2009).

thereby declaring the order passed by the Dutch court nullity ab initio. pursuant to the direction of the Appellate Authority, an insolvency co-operation protocol (Jet Protocol) was negotiated and entered into between the Dutch bankruptcy trustee and the Indian insolvency resolution professional which was approved by both the Indian Appellate Authority and the Dutch Bankruptcy Court.

The Jet Protocol, in line with the usual insolvency co-operation protocols previously entered into by countries experiencing concurrent insolvency proceedings against a common insolvent such as those in the cases of Nortel Networks Corporation², aims at having a joint and a unified insolvency proceeding with respect to the Corporate Debtor by

- (a) minimizing the costs and maximizing recoveries for all creditors of the Corporate Debtor;
- (b) promoting the sharing of relevant information among the parties;
- (c) international coordination of related activities such as preservation and maximization of the value of the Corporate Debtor's worldwide assets and claim reconciliation; while respecting;
- (d) the separate interests of creditors and other interested parties to each insolvency proceeding, which were subject to local laws of the jurisdiction applicable to each insolvency official; and
- (e) independence, sovereignty, and authority of the courts in each jurisdiction.

The Jet Protocol embodies principles of English legal concept 'modified universalism' wherein the parties to Dutch Bankruptcy and Indian Bankruptcy of Jet Airways while placing emphasis on the procedural, administrative and practical matters, left the issues arising out of differences in the application of the substantive laws of the two countries to be adjudicated by the courts of the respective jurisdiction. This is pursuant to the recognition of the substantive differences in the insolvency proceedings in both the jurisdictions, especially given that the focus and objective of the insolvency proceedings under respective laws are varied, viz. while the Indian insolvency proceedings are aimed at revival/resolution of insolvency of the Corporate Debtor and the maximization of the value of its assets for the benefit of all its stakeholders; the main objective of the Dutch proceedings is to deal with the liquidation of the assets of the Corporate Debtor located in the Netherlands and distribution of the proceeds therefrom among the creditors.

This shows there a need for adopting & implementing required provisions of UNCITRAL Model Law on Cross-Border Insolvency, 1997 by making require amendments in Section 234 & 235 of the Code inter-alia. Approval of the Jet Protocol comes as a progressive step to a traditional 'territorial' approach towards governing cross-border insolvency matters by Appellate Authority. Further, though neither of the countries has adopted the UNCITRAL Model Law, the Jet protocol still echoes the principles and methods of the UNCITRAL Model Law, to the extent it recognizes, inter alia, the Indian

² In Re Nortel Networks Corporation, Ontario Superior Court of Justice, Toronto, Case No. 09-CL-7950 (14 January 2009), and the United States Bankruptcy Court for the District of Delaware, Case No. 09-10138 (15 January 2009).

proceeding as the foreign main proceeding and that in Netherlands as the non-main one. The judicial approach demonstrated by the Appellate Authority in the Jet Airways case is a commendable step towards attempting to overcome variations inherent in the insolvency laws of the respective jurisdictions, without undermining their respective sovereign authority, through a mechanism, though ad hoc, that facilitates cooperation and communication keeping in pace with the economic realities of today's world. While India is on the cusp of adoption of the UNCITRAL Model Law, this case is a reminder and recognition by the Indian judiciary of the conflicts and complexities involved in cross-border insolvency proceedings.

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