A Strategic Report on

Cross-border Insolvency:

Present Framework, Model Law & Emerging Issues from Banking Perspective

Submitted to

Indian Institute of Banking & Finance

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May 2023

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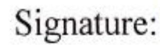
Signature: 

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ACKNOWLEDGMENTS

I would like to express my sincere gratitude to Indian Institute of Banking & Finance (IIBF) for providing me with this opportunity and the IIBF Research Advisory Committee, who helped me improve this research with their valuable inputs.

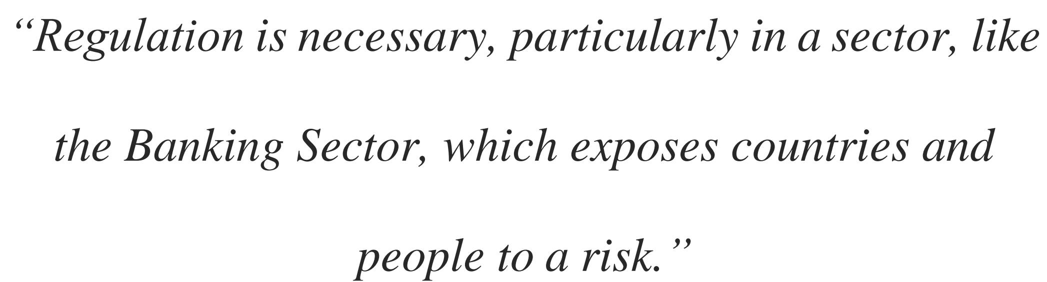
This journey would not have been so rewarding without the guidance, encouragement, and help extended by my mentor Shri Parashiva Murthy.

I would like to acknowledge my colleagues from IDBI Bank Ltd. for their support, expertise, and contribution in data collection for the report.

In addition, I would like to thank my family for their wise counsel and understanding.

LIST OF CONTENTS

Title	Page No.
Executive Summary	2-5
List of Abbreviations	6
Chapter 1: Introduction to Cross-border Insolvency & Model Law	7-21
Chapter 2: Present Framework & Insolvency and Bankruptcy Code, 2016 (IBC)	22-26
Chapter 3: Applicability of Cross-border Insolvency in the Indian banking system	27-33
Chapter 4: Emerging Issues	34-42
Chapter 5: Research Methodology	43-44
Chapter 6: Analysis through Case Studies	45-49
Chapter 7: Analysis of Responses By Lending Institutions	50-70
Chapter 8: Conclusion	71-75
Appendix I: Questionnaire for Lending Institutions	76-85
Appendix II: Questionnaire for Mid/Large Corporate	86-89
Bibliography	90



– Christine Lagarde

EXECUTIVE SUMMARY

- The rapidly growing and globalising corporate world has given birth to Multinational Entities (MNEs) that surpass national boundaries, creating a nearly borderless relation among several businesses.
- Almost every country has commercial relations that extend beyond one or more jurisdictions and thus economic entities consequently have debtors and creditors located at various such locations.
- Globalisation is multidimensional and includes international trade investments, bilateral tie-ups, technology transfer, and human and cultural exchange, and the world is becoming borderless. As time passes and technology develops with each passing second, globalisation evolves in its meaning.
- India is now among the core economies of the world with global business and diplomatic relations, both of which have seen an enormous jump over the last 2 decades.
- The Indian banking and financial market has also witnessed borrowing-lending relationships, counterparty exposures, derivative contracts, collateral obligations, etc. across countries.
- The importance of Cross-border Insolvency now takes center stage. Cross-border insolvency deals with circumstances where the insolvent debtor has assets and creditors in multiple countries or when insolvency proceedings have been initiated against the insolvent debtor in multiple countries.

- In India, to review and assess the functioning and implementation of the Insolvency and Bankruptcy Code, 2016 (IBC), the Insolvency Law Committee (ILC) was constituted by the Ministry of Corporate Affairs. The ILC, in its report, proposed to re-evaluate the current insolvency framework and to bring it at par with the Global Standards and adopt the United Nations Commission on International Trade Law (UNCITRAL Model Law, which is hereon referred to as the "Model Law") on Cross-Border Insolvency to resolve the concerns relating to cross-border insolvency in India.
- The existing Model Law on Cross-Border Insolvency (MLCBI), 1997, has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. The Model Law provides a legislative framework that can be adopted by countries with modifications to suit the domestic context of the enacting jurisdiction. It has been adopted by 49 States to date. This includes developed as well as developing countries, such as Singapore, the UK, the US, South Africa, the Republic of Korea, etc.
- The Government is working on assimilating the Model Law in the IBC. Enacting legislative provisions on cross-border insolvency is essential to address the emerging issues on cross-border insolvency.
- The Indian banking system has been dealing with a large number of such corporate debtors/promoters having assets/liabilities abroad and hence, the understanding and applicability of cross-border insolvency has become unavoidable for Indian Banks/FIs to enforce insolvency for corporate debtors/ guarantors with foreign assets. The Indian banking system needs to analyse the requirement of capacity building to deal with cross-border insolvency appropriately.

- The strategic paper aims to bring out the emerging issues for Indian banking system in cross-border insolvency for both the scenarios - Indian company with foreign assets & liabilities and foreign company with Indian assets & liabilities.
- The cross-border insolvency requirement arises when an Indian company has foreign liabilities, assets or operations or when a foreign company has Indian liabilities, assets or operations. The term "foreign assets" generally indicates the presence of assets and operations in a foreign jurisdiction, for example – cash holdings in a bank account in a foreign country, a production facility or an office in a foreign country and so on, including intangible forms, not always to be in the form physical presence or human interventions. Such intangible assets will include investments in foreign securities, licenses, supply agreements etc. The notion of foreign operations, too, may or may not be linked to physical presence. For instance, operations with physical presence may include branches or offices in foreign jurisdictions. However, even without their physical presence, companies may have customers or may have dues to be recovered or paid in foreign jurisdictions. A foreign liability may exist as long as the creditor is a foreign person or entity depending upon whether itis in foreign/local currency or contracted in the debtor's home jurisdiction or a foreign jurisdiction. A foreign liability can be financial as well as operational liabilities.

- The Indian banking system has been taking direct/indirect exposure by funding for foreign assets or wherein guarantors/corporate debtors have foreign assets or liabilities. Accordingly, with increase in Non-Performing Assets in the Indian banking system, it becomes all the more crucial to equip Indian Banks with the right protocols and prepare for enforcement under Cross-border Insolvency considering the increasing pace of globalisation in banking and lending.
- Likewise, the systematic development and learning under Insolvency and Bankruptcy Code (IBC) within the Indian banking system is prudent to gather a common understating of procedures, laws, rights, and challenges pertaining to Cross-border Insolvency.
- The understanding and applicability of Cross-border Insolvency has become unavoidable for Indian Banks/FIs to enforce insolvency for corporate debtors/guarantors with foreign assets. The Indian banking system needs to analyse the requirement of capacity building in Indian banking system to deal with Cross-border Insolvency;
- Indian Banks will require to keep records of companies' debts and defaults involving overseas insolvency and to consider challenges involved in enforcement of foreign assets along with the impact of foreign representative filings proceedings in the case of cross-border transactions and trade. It would be desirable to develop Standards of Procedures (SoPs) on how cross-border matters are to be handled under sole/multiple/consortium banking arrangements, the right policy to engage legal counsel, to bring understanding of its contents and costs involved in cross-border insolvency proceedings and to train staff in dealing with the wide range of issues & challenges.

LIST OF ABBREVIATIONS

IBC/Code	:	Insolvency and Bankruptcy Code, 2016
IBBI	:	Insolvency and Bankruptcy Board of India
UNCITRAL	:	United Nations Commission on International Trade Law
COMI	:	Centre of Main Interests
NCLT	:	National Company Law Tribunal
NCLAT	:	National Company Law Appellate Tribunal
SOP	:	Standard Operating Procedures
ROC	:	Registrar of Companies
CERSAI	:	Central Registry of Securitisation Asset Reconstruction and Security Interest of India
CRILC	:	Central Repository of Information on Large Credits
CPC	:	Code of Civil Procedure
MCA	:	Ministry of Corporate Affairs
ILC	:	Insolvency Law Committee
MNE	:	Multinational Entity
AA	:	Adjudicating Authority
IP	:	Insolvency Professional
RP	:	Resolution Professional
FDI	:	Foreign Direct Investment
ODI	:	Overseas Direct Investment
CIRP	:	Corporate Insolvency Resolution Process
MLAT	:	Mutual Legal Assistance Treaty
COC	:	Committee of Creditors
MLCBI	:	Model Law on Cross-Border Insolvency

Chapter 1

Introduction to Cross-border Insolvency & Model Law

The following are the aspects involved in cross-border insolvency:

- Equal Protection for interests of the domestic and foreign creditors;
- Value of the assets of a debtor located in different jurisdictions to be safeguarded;
- Uniformity in the insolvency law and practices of different jurisdictions;
- Coordination and cooperation amongst Courts and other Judicial Authorities in various jurisdictions and the domestic laws applicable therein.

The United Nations Commission on International Trade Law or UNCITRAL is the core legal body of the United Nations in the field of international trade law. A legal body with universal membership specialising in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernisation and harmonisation of rules on international business.

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 (Model Law/MLCBI) has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. The Model Law provides a legislative framework that can be adopted by countries with modifications to suit the domestic context of the enacting jurisdiction. It has been adopted by 53 States to date. This includes developed as well as developing countries, such as Singapore, UK, US, South Africa, the Republic of Korea, etc.

The following gives a brief outline of the procedure envisaged in the Model Law:

(i) **Access:** The Model Law allows foreign insolvency officials and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor.

(ii) **Recognition and Relief:** The Model Law allows recognition of foreign proceedings and relief by the domestic court based on such recognition. If domestic courts determine that the debtor has its Centre Of Main Interests ("COMI") in a foreign country, they will consider insolvency proceedings in such foreign country to be the main proceedings. Otherwise, they will be considered as non-main proceedings.

Recognition as the main proceeding will result in automatic relief, such as enforcing a moratorium on domestic proceedings regarding the debtor and providing greater powers to the foreign representative in handling the estate of the debtor. For non-main proceedings, such relief is at the discretion of the domestic court.

(iii) **Cooperation:** The Model Law lays down the basic framework for cooperation between domestic & foreign courts, and domestic & foreign insolvency professionals. It provides for direct cooperation between: (a)domestic courts and foreign insolvency professionals; (b) domestic courts and foreign courts; (c) foreign courts and domestic insolvency professionals; and (d) foreign insolvency professionals and domestic insolvency professionals.

(iv) **Coordination:** The Model Law also provides a framework for commencement of domestic insolvency proceedings when a foreign insolvency proceeding has already commenced or vice versa. It provides for coordination of two or more concurrent insolvency proceedings in different

States by encouraging cooperation amongst courts.

(v) **Public policy:** While the Model Law seeks to promote cooperation amongst countries, it also provides flexibility to courts to refuse any action that may be against the public policy of the enacting jurisdiction. Thus, a court in a country can refuse to take any action or provide any relief if it concludes that such action or relief would be manifestly contrary to the public policy of such a country. The determination of what constitutes "public policy" is left to enacting jurisdictions and is not detailed in the Model Law.

Benefit of UNCITRAL Model Law

i) Ease of doing business;

ii) Flexibility;

iii) Protection of the domestic investor;

iv) Priority to domestic proceedings;

v) Empowering Insolvency representatives;

vi) Mechanism for cooperation;

vii) Protection of Indian Creditors;

viii) Remedy in jurisdiction in remedy;

UNCITRAL Model Law notes, *"Approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, in a given legal system general legislation on reciprocal recognition of judgements, including exequatur, might be confined to enforcement of specific money judgements or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings".*

Adoption of Model Law:

At the crux of the Model Law is the need for conforming and harmonisation. The more countries adopt to this law while settling international insolvency, the more bullet proof it gets.

However, as we look around the globe, we find a lack of agreement. If each country adapted its own rules without a coherent international recognition and cooperation framework, it would lead to misbalance and conflicts. This is aptly described by UNCITRAL:

Inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximisation of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.

How the World Responded to the Model Law

Eritrea, was among the first few adopters of the Model Law, back in 1999. Prior to the Model Law, Eritrea didn't have a legal setup for insolvency proceedings, and so, the Model Law provided it the necessary framework it lacked in-house. However, it is also important to note that Eritrea isn't a huge economy even as we speak and has very little impact on the global scale of economic transactions, thus, its implementation of the law hasn't made very tangible and impactful real changes. The same is true for Montenegro.

Mexico and South Africa are much larger countries with a bigger populace and more powerful economies. Both of these medium-sized global and economic powerhouses

have domestic companies doing significant business abroad and foreign companies enjoying considerable local penetration. These are more probable to have a need for cross-border insolvency legalities. Since both of these countries are part of the Civil Law tradition, the legal comity that has voiced the most difficulty with the Model Law's innovations and enjoy significant leadership in their geographies, their usage of the Model Law makes a strong case. While these countries have adopted the MLCBI without much changes or revisions made to the proposed rule, their contribution to the global economy is not very huge. Moreover, these nations lack regional or historical synergy or cohesion within the group to produce a strong ripple of change and affect others.

Thus, while the Model Law has hopefully served its Legal Assistance purpose by filling a vacuum or providing a neutral or well-drafted law for these states, it has failed to achieve any of the harmonising benefits that are at the core of the unification movement.

Japan's rules are very much aligned with the MLCBI though, it's not modelled on the Model Law. Japan handles recognition for a foreign case and coordination among concurrent cases in a manner that disagrees with the universal Model Law. It is not clear how firm or lenient the Japanese proceedings are on recognising a foreign insolvency.

The Japanese law does provide an exception to this rule for foreign 'main' proceedings, but, even in this case, it requires that the court avoid a concurrent situation by dismissing the local proceeding. Slight linguistic barriers and interpretations with different contexts lead to defeat in harmonisation. This makes Japan a sceptic adopter and neutral.

Some of the biggest economies are closely working towards the Model Law's applicability in their domestic framework and considering it for their internal as well as external policy. For instance, Canada started working on cross-border insolvency even before the Model Law became a law. Much like Japan, the Canadian counterparts have also devised a structural protocol that is not so far from the MLCBI. Currently, Canada is examining the law and its applications in its domestic as well as cross-country law. Further, New Zealand and the UK have also time and again looked at the Model Law for inspiration and even used it to conduct fair trades.

Interestingly, the US currently has probably the most developed history of progressive and detailed provisions on cross-border insolvency in the world. America has now and again fallen back on the MLCBI guidelines to dictate its cross-border transactions. Thus, the United States might be seen as a model itself of how a state can maturely and sophisticatedly incorporate the Model Law, capturing its Harmonisation Benefits while preserving its own unique public policy concerns and significant experience.

With such major countries studying the headwinds that the Model Law can bring, it's a matter of time that the world find some strong advocates from this category. These developed nations could enforce reciprocity to handle insolvency proceedings, while also striking a balance with their domestic legislation. In the case of multiple nations involved, a willingness to adjust and find a common notion is a must.

South Africa, Mexico, and Mauritius have incorporated reciprocity requirements in their laws implementing the Model Law. Reciprocity in the Model Law states that a domestic court would consider a foreign court's verdict if a similar consideration has been granted by that foreign court in a similar setting.

The court and the Government have suo-motu powers, meaning they may refuse to comply with the Model Law if the action contradicts the public policy of the State. The opinion of the adjudicating authority is contingent on the government's submissions before any final determination. A term has been coined under the UNCITRAL - "Manifestly contrary to", which denotes contradiction to a country's own sovereign policies, and is followed by many countries including the likes of the US.

The European Insolvency Regulation (EIR) and the European Insolvency Regulation (Recast) (EIR Recast) have come close to the Model Law in the insolvency modules. However, each European State is deemed sovereign, self-regulatory, and unique, and the structural law provides each member country its own exceptions. Moreover, the rules that uphold alike in the EU as a whole do not extend beyond the European Union borders.

MLCBI, in the aftermath of the Brexit discourse, generally improved on its shortcomings and strengthened its "fallback" framework. It was the Model Law, which also helped the UK make a smooth exit from the Union. Following the same, Poland, Slovenia, Romania, and Greece too, moved from the EIR and the EIR Recast to the ML.

For those nations that have not adopted the MLCBI, there are in some cases bilateral treaties in place concerning recognition and cooperation that have been adopted instead. On the other hand, there are countries that have adopted the Model Law at large, which still allow for major concessional exceptions

In the Halifax matter, the Australian company was required to settle its insolvency matters with a New Zealand subsidiary. Australia and New Zealand have both adopted

the MLCBI, but their separate sovereign administration was also allowed to have a say as an exception. The Federal Court of Australia and the High Court of New Zealand in December 2020 appointed representatives, who were elected under the respective aid and auxiliary provisions in the relevant Australian and New Zealand legislation. Because both the countries coordinated and struck a middle ground, creditors benefitted with maximised recovery.

Australia’s proposal merely provides that Model Law article 7 will allow for any additional assistance allowed by law and the non-revocation of the old standard. This means confusion regarding the existence of the other standard, discourages use of the alternative standard, and renders the other standard more susceptible to amendment by displacement. Furthermore, the ambiguity raised by the indirect incorporation creates the possibility of following an unconsidered bandwagon rationale for adoption, that is, adoption for the sake of adoption rather than any considered substantive reasons. The Australian proposal to adopt the Model Law has not fully considered this unique position and simply advocates an uncritical wholesale adoption of the UNCITRAL rules.

The Model Law was a framework to enable and benefit those who didn’t have the experience. This is why, it has come as a surprise that smaller economies have been the slowest at adoption. Proposals such as the Model Law are supposed to be prime alternatives for countries like Indonesia and Thailand, as they neatly fill a vacuum with a neutrally and expertly drafted law while allowing a country to maintain its dignity by not simply receiving another state’s law.

The newly emerging economies in Eastern Europe have not adopted or even considered it at length, nor have those countries affected by the Asian Crisis. While

China and India have considered it, they already possess an excellent legal traditional system, which rules out the need for any such intervention. As India experiments with this policy, it can take a look at how the world has at large used it.

A pure universalist approach permits the conduct of only a single insolvency process in the debtor's home country which has a worldwide effect, without allowing the possibility of one or more ancillary proceedings where foreign creditors or property are located. Reciprocity requirements are seemingly gaining popularity.

Another approach is based on territorialism, wherein local authorities determine the creditor's rights, asset value, and the right course of action for each area, as per their own laws. However, this again doesn't bode well in the purpose of universalism, under which a main proceeding opened in the debtor's home country is mutually recognised in other jurisdictions where the debtor has assets and creditors unless doing so would be manifestly contrary to the local laws and policies of those other jurisdictions.

The European Union regulation on cross border insolvency:

The European Union (EU) also has provided a legal framework on the proceedings that should be adopted to solve the cases related to cross-border insolvency. It aims to ensure the efficient administration of insolvency proceedings involving an individual or business with business activities or financial interests in EU Member State other than the one in which they are usually based. The measures adopted on cross border insolvency by the European convention regulation are:

- It facilitated that the members should determine the jurisdiction and considerably apply laws and legislation for the cross-border insolvency proceedings.

- It provided for automatic recognition of insolvency proceedings related to cross-border insolvency.
- It stated that the cooperation between the member states should be maintained and sustained.
- It recognized and introduced three kinds of proceedings related to the matters of cross-border insolvency. They were:
    - Main proceedings- These are the proceedings that were determined to take place in one jurisdiction and the debtor was recognized as the centre of main interests i.e., the administration of the interests can be regularly ascertained.
    - Secondary proceedings- These are the proceedings that would take place in the nations where the debtor has an establishment.
    - Territorial proceedings- These are the proceedings that have not been commenced anywhere.

The Insolvency Regulation should also be seen in the context of the new Restructuring and Insolvency Directive – Directive (EU) 2019/1023. The Directive has three main elements; firstly, a 'preventive' restructuring framework; secondly, provisions on second chance/fresh start for 'entrepreneurs'; and, thirdly, more general provisions designed to enhance the efficiency of restructuring, insolvency and second chance procedures.

India's Truce with Cross-Border Insolvency

From time to time, various formulations and recommendations have been put forward by various committees to the Indian Government to manage disputes related to cross-border insolvency.

In 2000, the Justice Eradi Committee submitted a report to the Parliamentary

authorities in the matter of cross-border insolvency. The committee suggested that the laws should be amended to incorporate the UNCITRAL Model Law in the Companies Act, 1956, thus facilitating the quick disposal of cross-border insolvency cases and ensuring efficacy and transparency within the law.

In 2002, the N.L. Mitra Committee presented a report to the Parliamentary Committee, proposing the adoption of Model Laws in the Indian regime and the introduction of legislation related to cross border insolvency in order to resolve disputes concerning cross border insolvency cases.

In October 2018, the Insolvency Law Committee (ILC) submitted a report on cross-border insolvency to the Ministry of Corporate Affairs (MCA). It also submitted a draft law, referred to as "Part Z", which was to be incorporated as a separate Part of the IBC. Part Z is intended to be the cross-border framework of the IBC, which will govern all applications seeking recognition of foreign insolvency proceedings as well as applications seeking cooperation in such proceedings from the NCLT.

Foreign Assets, Liabilities, and Operations

The possibility of cross-border insolvency arises when an Indian company has foreign liabilities, assets or operations or when a foreign company has Indian liabilities, assets or operations. For assets, the term "foreign" generally indicates the presence of assets and operations in a foreign jurisdiction.

Foreign Exposure and Physical Presence

Foreign exposure of a firm through assets, liabilities, or operations may not always be through the physical presence of a debtor company in a foreign jurisdiction. The definition of "establishment" in clause 2(c) of Part Z is as follows:

"Establishment" means any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services."

This definition is used to determine whether a proceeding is to be recognised as "main" or "non-main". Jurisdictions where assets, liabilities or operations are not linked to physical presence may not always be able to meet this definition of establishment. Insolvency proceedings from such jurisdictions may not get recognition under the Part Z. The ILC deliberated on this issue with respect to some classes of debtor companies, such as internet based and e-commerce companies. It noted that:

"*Bearing in mind the divergent international precedents, after much deliberations, the Committee noted that at this juncture, it may be advisable to let jurisprudence develop further before recommending any such change to the definition of "establishment" provided in the Model Law*." (2.4, page 20, ILC Report)

The main factors to decide on the foreign proceedings are mainly a) foreign jurisdiction, b) liabilities in the jurisdiction, c) insolvency process costs in the jurisdiction, and d) realisable value of assets in the jurisdiction.

The lower the value of b) & c) and the higher the value realisation of d), the more preferable cross-border proceedings or insolvency are going to be.

Creditors are most likely to choose the jurisdiction which maximises their benefits while minimising their explicit costs and procedural frictions. This suggests that multi-jurisdictional insolvency actions are most likely in one or more circumstances where: (1) companies have foreign assets as well as foreign liabilities, (2) the jurisdictions where foreign assets and liabilities are located have insolvency laws that are reasonably efficient, in terms of time, costs and certainty of process and

outcome, and (3) there exist rules of priority that favour certain classes of creditors who are otherwise disadvantaged in domestic proceedings.

The nature of cross-border actions that are likely to arise for the various case types for Indian and foreign companies are:

- The recognition of Indian proceedings by foreign courts,
- The recognition of foreign proceedings by Adjudicating Authority (AA) in India,
- The AA in India, the NCLT, designating a proceeding as “main” or “non-main”,
- Grant of access to foreign representatives to act in respect of foreign proceedings and to participate in proceedings in India,
- Grant of access to Indian IPs to act in respect of Indian proceedings and to participate in proceedings in foreign jurisdictions.

Grant of access to Indian creditors with respect to foreign proceedings would be slightly different. While the IBC allows foreign creditors access to Indian insolvency proceedings, the same may not be automatically available to Indian creditors in foreign proceedings. The same would require cooperation between:

- Foreign court and NCLT,
- NCLT and foreign representative,
- Foreign court and Indian IPs,
- Indian IP and foreign representative, and
- Coordination between domestic and foreign proceedings for an Indian company.

Coordination between: (1) domestic (Company’s origin) and Indian proceedings, and (2) Indian proceeding and another foreign proceeding for a foreign company shall also

be required. For each of these actions, to provide clarity to participants, the following procedural details are required:

The modalities of initiating the actions, namely:

- Forum for initiation,
- Form and manner of initiation,
- Fees,
- Eligibility,
- Disclosure requirements,
- Documents required,
- Timelines, and
- Consequential actions.

Ongoing process:

- Actions,
- Disclosure requirements,
- Compliance requirements,
- Oversight,
- Investigations into frauds or misdemeanours,
- Enforcement actions, and
- Timelines.

Termination:

- Termination on completion,
- Early termination,
- Disclosure requirements for termination,
- Compliance requirements, and
- Timelines.

Chapter 2

Present Framework &

Insolvency and Bankruptcy Code, 2016 (IBC)

Insolvency and Bankruptcy Code, 2016 (IBC)

The Insolvency and Bankruptcy Code, 2016 is landmark legislation that has evolved over the last 7 years to align with the core objective that was to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and to balance the interests of all the stakeholders.

In today's world, the economic requirement for introducing a cross-border framework is must. Economic growth since the last three decades has been driven by liberalisation, modernisation, and globalisation, and has also turned into IT driven growth ensuring global involvement right from sourcing material, sharing of production technology, managing supply chain & logistics, to finding the end consumer. Increased interdependence of economies has resulted in high levels of cross-border investments, foreign borrowings, and movement of people across countries. Amidst all gains, lies the real risk of failure which also is no longer restricted to a single economy and is exposed to systemic risk having cascading impact on all economies of the world. Financial risks are transmitted through global markets and the absence of a comprehensive framework to deal with cross-border risks hampers prospective businesses and investments. Cross-border resolution issues are further complicated when an insolvent debtor has assets and/or creditors across more than one territorial jurisdiction which have conflicting domestic bankruptcy and insolvency regimes, governed by principles of territorialism. There is also the issue

of lack of cooperation amongst foreign courts and statutory agencies. It is important to have common legal principles to deal with such matters in a holistic and coordinated manner in today's globally connected world.

At present, cross-border insolvency is regulated by Section 234 and 235 of IBC. Section 234 of the code states that the Central Government can make any agreements with the foreign country to start with the insolvency proceedings.

Section 234 Agreements with foreign countries

(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. (2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any.

Section 235 Letter of request to a country outside India in certain cases

(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporatedebtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. (2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a

court or an authority of such country competent to deal with such request.

- In a nutshell, Section 234 of the IBC empowers the Central Government to enter into bilateral agreements with foreign jurisdiction in order to resolve the issues of cross-border insolvency.
- While Section 235, on the other hand, empowers the Adjudicating Authority to issue letters of request to the Courts of the country with which the bilateral agreement has been entered into, under Section 234, with an aim to address the fate of assets of the corporate debtors, which are located outside India.
- The Insolvency Law Committee (ILC) was constituted by the Ministry of Corporate Affairs (MCA) on 16 November, 2017, to take stock of the functioning and implementation of the Insolvency and Bankruptcy Code, 2016 (IBC) and identify issues that affect the efficiency of the corporate insolvency resolution and liquidation framework under the Code. In its last Report dated March 2018, the Committee discussed that there was a need to re-evaluate the current cross-border insolvency framework in India as it was fragmented, complicated and not at par with global standards. The Committee noted that even the Report of the Bankruptcy Law Reforms Committee, which laid down the foundation for the Code, had recommended that regulation of cross-border insolvency cases must be deliberated upon once the proposed legal regime for domestic insolvency matters was in place. The ILC opined that sections 234 and 235 of the Code, which envisage entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities under the Code resulted in an ad-hoc framework that was susceptible to delay and uncertainty for creditors and debtors as well as for courts.
- The Code of Civil Procedure (CPC) supports recognition and enforcement of foreign judgments.

Section 44 A of the Code of Civil Procedure of 1908:

- Allows Indian courts to enforce orders passed by non-Indian courts in "reciprocating territories". A country would be considered a reciprocating territory, if it were declared one by the Government of India through publication in the Official Gazette.
- ***Section 13*** imposes certain restrictions upon enforcement of foreign decrees.
- The principles of comity demand us to respect the order of the English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such orders, unless it falls under any of the exceptions penned under Section 13 of the CPC.
- "Comity of Courts" principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy.
- CPC provides no specific provisions to deal with specific issues, namely, recognition of proceeding, access to proceeding, cooperation of courts and parallel proceedings. Provisions of the CPC are used despite the wide differences in interpretation given by the Indian courts in dealing with foreign judgments. The use of these provisions involves going through already heavily backlogged Indian courts.

"The lack of such regimes has often resulted in inadequate and uncoordinated approaches to cross-border insolvency that are not only unpredictable and time-consuming in their application, but lack both transparency and the tools necessary to address the disparities and, in some cases, conflicts that may occur between national laws and insolvency regimes. These factors have impeded the protection of the value of the assets of financially troubled businesses and hampered their rescue."

[UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997)]

Chapter 3:
Applicability of Cross-border Insolvency in the Indian Banking System

The applicability of cross-border insolvency framework arises as the Indian banking system is increasingly taking risk from corporate debtors having foreign assets and liabilities. The cross-border insolvency provisions will make favorable business environment for the Indian lending institutions and thus, improving the ease of doing business and bringing clarity over the recoverability of the lending extended to the corporate debtors. The banking channel remains predominant for cross-border capital flows with India, though external commercial borrowings have increased in the recent years. Global cross-border bank claims continued to expand rapidly.

It is quite possible for a corporate debtor to possess foreign assets or foreign liability in the form of:

1. Foreign financial liabilities like secured/ unsecured loans, ECBs, Fructified guarantees provided by the debtor to foreign persons.
2. Foreign operational liabilities like trade payables, wages & salaries, statutory dues.

Foreign assets in the form of:

1. Tangible assets in foreign country like Capital assets, including plant and machinery, office space and related assets, and those that are work-in-progress, movable assets such as inventory.

2. Intangible assets in foreign country like licenses, Intellectual PropertyRights (IPRs), and long-term supply agreements.
3. Loans and advances to foreign debtors like loans given to third parties, employees, shareholders and directors, associates and subsidiaries.
4. Foreign investments in foreign financial assets in subsidiaries, associate companies, and Joint Ventures (JVs)
5. Receivables from foreign parties.
6. Cash held in bank accounts in foreign countries, and petty cash in foreign operations.

Present Scenario:

Overseas projects finance increased by 64% in developing economies during FY 2021, which was 853 projects compared to 520 during previous year (FY 2020) and 142% by value during FY 2021 i.e. USD 532 bn as against USD 220 bn during previous year. (Source: *World Investment Report 2022*).

The Reserve Bank of India’s annual census on foreign liabilities and assets dated September 22, 2022 reported that 29,718 companies had FDI/ODI in their balance sheet in March 2022 and the total flow of FDI (inwards and outwards) was USD 104.23 bn (Equity: USD 81.524 bn & Debt: USD 22.763 bn). Indian companies continue to expand and operate across borders (Source: *RBI Census*).

Total Inward and Outward Direct Investment:

Direct Investment	Inward				Outward			
	2021		2022		2021		2022	
	₹ crore	US$ mn	₹ crore	US$ mn	₹ crore	US$ mn	₹ crore	US$ mn
1	2	3	4	5	6	7	8	9
Equity	40,21,982	5,47,173	47,30,317	6,23,994	5,66,490	77,069	6,18,008	81,524
Debt	1,97,490	26,868	2,19,527	28,959	1,92,164	26,143	1,72,556	22,763
Total	42,19,472	5,74,041	49,49,844	6,52,953	7,58,654	1,03,212	7,90,564	1,04,287

Other Investment	Outstanding liabilities with unrelated party				Outstanding assets with unrelated party			
	2021		2022		2021		2022	
	₹ crore	US$ million	₹ crore	US$ million	₹ crore	US$ million	₹ crore	US$ million
1	2	3	4	5	6	7	8	9
Trade Credits	3,61,885	49,233	4,85,709	64,072	2,93,295	39,902	3,44,586	45,456
Loans	7,44,965	1,01,349	8,17,613	1,07,854	2,96,039	40,275	3,31,017	43,666
Currency & Deposits	5,20,881	70,864	5,50,166	72,574	1,29,760	17,653	1,26,626	16,704
Other receivable and payable accounts	2,37,963	32,374	2,86,533	37,798	1,61,615	21,987	1,43,626	18,946
Total	**18,65,694**	**2,53,820**	**21,40,021**	**2,82,298**	**8,80,709**	**1,19,817**	**9,45,855**	**1,24,772**

It is quite evident from the data that India's economic interaction with the rest of the world has been increasing over the last three decades since the start of liberalisation and more so with deepening of the financial markets. The financial markets are now a vast network consisting of credit (borrowing-lending relationships, counterparty exposures and implicit relationships), derivative contracts, collateral obligations,

market impact of overlapping asset portfolios, and the network of crossholdings interact in several complex layers across countries. The extent and magnitude of interdependence in financial markets and institutions across countries has led to transmission of systemic risk.

In present scenario, Domestic banks and foreign banks with large international presence generally cater to trade finance needs of importers/exporters from the MSME sector to large corporates. Domestic banks with large overseas presence in the form of bank branches, overseas subsidiaries, and representative offices have higher share in total trade credit approvals. As all the above factors indicate that as India continues to grow, Indian businesses will expand operations across countries and with increasing financial market linkages, financing needs will also be met from resources across the world. With the growing international trade, domestic businesses will become embedded into global value chains and hence, exposing themselves to external influences. The Indian financial market continues to evolve and will see increasing closeness to foreign markets and the Indian banks consolidating their position domestically will look to expand across boundaries. Cross-border interactions, in the form of shareholder-management, creditor-debtor, supplier-buyer, value chain partners, distributors etc., would become the norm rather than the exception for businesses. Bankruptcy and insolvencies with cross-border proceedings will be unavoidable and India will need a regime that is internationally acceptable and is able to deal with the complexities these situations may present in the context of countries with which our economic interests are of paramount importance.

Applicability of IBC for Foreign Creditor

- The IBC 2016 has not marked major differences between a foreign and an Indian creditor. The terms "operational creditor" and "financial creditor" have been defined as "persons" to whom a financial or operational debt is owed. Consequently, the definition of "persons" includes "person resident outside India".
- Under Section 9 of the IBC, a foreign creditor too, shall be able to access CIRP proceedings to make the cross-border insolvency truly creditor-friendly. The NCLT provisioned this in the wake of the Supreme Court's verdict in the Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd. case, wherein the Supreme Court of India held that a foreign creditor could not be barred from the purview of the IBC by virtue of its innate inability to abide by procedural requirements in the Code. The court allowed the foreign creditor's application by remarking that article 14 of the Indian Constitution is also applicable to foreigners.
- The code empowers the foreign creditors to initiate a corporate insolvency resolution process against financial creditors, which also includes a corporate guarantor.
- This decision also follows the rationale laid out in Stanbic Bank Ghana Ltd. v. Rajkumar Impex (P) Ltd. by the NCLT's Chennai Bench in which a Ghanese Bank was allowed to initiate CIRP against an Indian company registered under the Companies Act, 2013, owing to a guarantee made by the firm for its Ghanese subsidiary backed with its local assets.
- The realization of debt for foreign creditors in any insolvency process depends on a range of factors such as,

i. The nature of their claims,

ii. The position of their claims with respect to the priority order of other insolvency claims, and

iii. The extent of realisation that the insolvency process results.

It may be mentioned that allowing of access to Indian creditors to foreign proceedings is to be dealt with, while the IBC has already allowed foreign creditors with access to Indian insolvency proceedings, the same may not be automatically available to Indian creditors in foreign proceedings. Going ahead, as per the proposed cross-border insolvency law in line with Model law, the access to foreign representatives for Indian proceedings and access to IPs/domestic creditors for foreign proceedings will be strengthened.

Globalisation has made us more vulnerable. It creates a world without borders, and makes us painfully aware of the limitations of our present instruments, and of politics, to meet its challenges.

-Anna Lindh

Chapter 4:

Emerging Issues

In this section, we set out the issues and questions that may arise in all the different types of cross-border insolvency cases. This cross-border framework consists of four main elements:

(1) A foreign proceeding,

(2) A foreign representative,

(3) Recognition, and

(4) Relief.

A foreign proceeding is a "collective judicial or administrative proceeding in a foreign State, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation." Within that foreign proceeding, the foreign court can authorise a foreign representative to initiate an ancillary proceeding in another country. The representative would then file an ancillary proceeding, asking the ancillary court to recognise the foreign proceeding as either a foreign main proceeding or a foreign non-main proceeding. A foreign main proceeding is one where the foreign proceeding takes place in the State "where the debtor has the centre of its main interests" referred to as a debtor's COMI. If the ancillary court recognises the foreign proceeding as a main proceeding, then the debtor is entitled to certain relief, such as a stay against certain actions. A foreign non-main proceeding, on the other hand, is one where "a foreign proceeding, other than a foreign main proceeding, takes place in a State where the debtor has an establishment" If the ancillary court determines that the foreign proceeding is a non-main proceeding, then any relief is

discretionary and depends on the need "to protect the assets of the debtor or the interests of the creditors.”

[*Source:* UNCITRAL Model Law and Guide, supra note 8, at art. 2(a)]

In the domain of concurrent proceedings, it is highly likely that the issue of sequencing will arise. For instance, a foreign proceeding may commence before IBC Corporate Insolvency Resolution Process (CIRP) for an Indian company, or a foreign liquidation proceeding may commence just as the CIRP is nearing its completion.

The Part Z has already adopted the Model Law provisions that ensure that the existence of a domestic or a foreign proceeding does not: (1) affect the right to undertake individual actions or proceedings necessary to preserve claims against the corporate debtor, and (2) affect the right to commence domestic or foreign insolvency proceedings subsequently. Further, the use of cooperation and coordination mechanisms will ensure that many of the challenges that may arise due to sequencing get resolved, to the extent possible.

However, even with this, two sequencing related issues still remain to be addressed. The first is: which bench of the NCLT will hear cross-border matters for an Indian company, and for a foreign company? This is critical to ensure that the domestic and foreign insolvency proceedings of a debtor company are dealt with in a cohesive manner, and effective cooperation and coordination takes place.

The second is: the determination of COMI of the company and the recognition of COMI proceeding as “main”, and all other proceedings as “non-main”. This is

because, in Part Z, as in the Model Law, "main" proceedings are deemed as the primary insolvency proceeding of the debtor, while "non-main" proceedings have a limited scope.

Two questions are relevant for COMI determination:

- Which factors should the NCLT take into consideration in determining the COMI of the debtor company? and
- What should be the effective date for COMI determination and for designation of a proceeding as "main"? Should it be from the date the proceeding commences OR from the date of application for its recognition is made under Part Z?

The factors impacting identification of COMI will be:

- location of assets of the corporate debtor;
- location of book of accounts of the corporate debtor;
- location of directors and senior management of the corporate debtor;
- location of creditors of the corporate debtor;
- location of execution of contracts and applicable law to key contracts and disputes;
- location where financing was organised or authorised, or from where the cash management system was run;
- location of corporate debtor's primary bank account; and
- location from which purchasing and sales policy, staff, accounts payable and computer systems were managed.

Other Important Aspects:

Obstacles in commencing insolvency proceedings: Insolvency proceedings can be commenced, if a debtor is unable to pay debts as they become due. Many developing jurisdictions, especially those using civil law systems, do not provide for the commencement of insolvency proceedings on just and equitable grounds, as do some common law jurisdictions. Further, because of unclear legislation or lack of expertise, many developing countries do not have well-defined criteria for the commencement of insolvency cases.

Unregulated or Insufficiently Regulated Insolvency Representatives: It is presumed that a jurisdiction has an established concept of "insolvency representative." Some developing countries, however, provide little or no guidance or regulation for insolvency representatives. Some countries specify categories of professionals (such as lawyers and accountants) that can be appointed as insolvency representatives without necessarily requiring that the individuals appointed have any specialised knowledge of insolvency. Others have regulations for insolvency representatives but lack a regulatory body to monitor them or respond to complaints. Others have remuneration systems with potentially skewed incentives: for example, the longer a case takes, the more the representative is paid. In many jurisdictions, creditors do not have a say in the appointment of the insolvency representative, and courts maybe legally obligated to appoint, for example, a randomly selected individual; depending on the appointee's experience and knowledge, this approach might leave important features of a case unaddressed. In some jurisdictions, insolvency representatives have colluded with debtors, past management, or other parties.

Ineffective or Non-existent Anti-Avoidance System:

In leading practice jurisdictions, Proceedings for Fraudulent or Wrongful Trading and Preferences and Transactions at Undervalue, voidable transactions and the look- back period enable insolvency representatives to cancel transactions that are improper or prejudicial. In other jurisdictions, however, (1) there may be no legal provision allowing the insolvency representative to cancel transactions; (2) laws that permit avoidance are unclear or incomplete; (3) look-back periods are too short; and (4) laws have procedural or design problems, such as the failure to specify that creditors can pursue avoidance actions if the insolvency representative fails to do so. If a jurisdiction does not enable an insolvency representative to avoid improper transactions, or if the law is not sufficiently clear, fraudulent proceeds may be recoverable using the criminal law or other breach of duty regulations.

Slow, Unresponsive, or Inexperienced Judicial Systems and Lawyers: Insolvency proceedings used for the recovery of stolen assets benefit from proceeding quickly. The longer a proceeding takes, the greater the risk that assets will be transferred, documents will disappear, or witnesses will move out of reach. The World Bank's Doing Business Report 2019 (2018) indicates that, in Latin America and the Caribbean and in Sub-Saharan Africa, almost three years pass on an average, between a company's default and the payment of some or all of the money owed to a creditor. The process takes a little over half that time in countries in the Organisation for Economic Cooperation and Development. In some jurisdictions, recalcitrant debtors have many tactics at their disposal to delay proceedings. In jurisdictions where multiple appeals are often filed until an appeal has been heard, little or no action can take place. The appellate process can take years to complete. In many countries there is no limit on the number of extensions of time or adjournments that can be

granted. Many developing countries have general courts that handle a wide range of issues from criminal to family to corporate law, making it difficult for judges to master complex and technical areas of law such as insolvency. This can slow down proceedings or lead to incorrect decisions. Only 101 of the 190 countries measured by the World Bank's Doing Business Report 2019 (2018) have specialised commercial courts, and only 31 have bankruptcy courts for insolvency cases. Specialised commercial or insolvency jurisdiction can result in shorter resolution times (World Bank 2018). Training judges on insolvency is critical. In some jurisdictions, the ability to bring cases in dedicated commercial courts or before dedicated insolvency judges may enable claimants to avoid these delays.

Ineffective or Non-existent Collateral Registry Systems: A modern collateral registry system—centralised, notice-based, and accessible online, is another valuable component of the insolvency framework for asset recovery. Registries allow a lender to take a security interest in an asset without the requirement of physical custody. The debtor retains title and possession. Without registration of these transactions, there is no transparent guarantee for the lender and no assurance that the lender is the only one claiming an asset. When a debt is originated, collateral registries enable potential creditors or buyers to discover any existing liens on a property and allow them to register their own security interest, establishing priority over other creditors in case of the debtor's default. Collateral registries also enable insolvency representatives to quickly identify which assets are owned free and clear by the company and which have been used as collateral for lending. In asset recovery cases, the registry enables insolvency representatives to trace company assets and determine whether they are subject to liens. Insolvency representatives can also confirm which encumbered assets are subject to the collateral guarantee. Many developing countries, however, do not

have modern collateral registries. As of 2015, only 18 of 189 countries had a modern registry system. Only 25 countries had a notice-based registry, and 28 had an online registry (World Bank 2014). The lack of an established registry can make it difficult for insolvency representatives to identify assets for recovery.

Impediments to Enforcement: In asset recovery cases, insolvency representatives may need to conduct enforcement actions to recover assets from a company's debtors. These actions may be filed directly with the bankruptcy court or in other civil or commercial courts of the jurisdiction.

Effective debt enforcement requires that the legal, tax, and regulatory elements of the framework are mutually reinforcing and work together for a timely, efficient, and cost effective resolution. Moreover, effective debt enforcement depends on a strong institutional infrastructure, with an independent and competent judiciary that applies the law in a transparent, predictable, and consistent manner. Other institutional elements also play a significant role. In jurisdictions where bailiffs oversee enforcement, they must be adequately trained, supervised, and paid. If bailiffs are paid in advance, adequate incentives must ensure that they perform their function.

Transparency and Accountability of Legal Insolvency Frameworks: The bedrock of any legal process is transparency of decision making and accountability of all participants. Many developing countries do not publish lower court decisions, and in some jurisdictions, appellate court decisions are published only selectively or occasionally; both have consequences for the recovery of assets through the insolvency process. First, parties will have little recourse in the event of a questionable decision by a judge. Second, the inability to consult precedent makes it difficult for litigants to predict how a court might rule and deprives judges of the means of

developing consistent rulings on similar issues.

The level of accountability in the court system can be an issue in the developing countries. Inefficiencies and delays can result when judges are not accountable to a chief justice who can monitor progress on cases and set time standards. A lack of accountability also affects the functioning of judicial officers, such as registrars and bailiffs, who may play an important role in litigation in many developing jurisdictions.

Recognition and Use of Laws and Proceedings in Cross-Border Insolvency: Many large corporations and individuals have international operations or customers and suppliers throughout the world. Corruption and asset recovery cases often involve assets, individuals, or entities located in a jurisdiction different from the jurisdiction in which the insolvency litigation was begun.

The Conflict between State Confiscation of Criminal Assets and Insolvency Proceedings

Cross-border insolvency processes raise many complex issues. The pursuit of assets in a variety of jurisdictions requires careful strategic planning, especially when the laws of the different jurisdictions diverge. As a general rule, the location of assets will determine the applicable law. In some jurisdictions, assets held locally may be ring-fenced under local insolvency law giving creditors within that jurisdiction first priority.

In international corruption cases, assets may be the subject of a preservation order under the criminal law of a jurisdiction or under a mutual legal assistance treaty (MLAT) request from a foreign country. In such cases, assets may be held or “preserved” for years pending the conclusion of all criminal appeals abroad, removing the potential assets of an insolvent estate from the insolvency representative’s balance sheet. Insolvency practitioners and law enforcement should attempt to cooperate to

benefit both creditors and the victims of crime.

A criminal asset forfeiture order can have the effect of removing assets from the pool of value available to an insolvency estate that would otherwise be available for rateable distribution to creditors. Likewise, assets held by third parties that would otherwise be subject to claw-back provisions under bankruptcy law may also be unavailable. In some cases, a debtor who is also a criminal defendant in pending proceedings may voluntarily turn over assets in settlement of a restitution action, fine, or penalty that are then used to compensate victims in preference to creditors who would have had rights under a bankruptcy distribution scheme.

When a debtor faces criminal charges, state forfeiture provisions can interfere with assets that would otherwise be subject to the jurisdiction of the court in which the insolvency or bankruptcy proceedings are being administered. State forfeiture provisions can also interfere with distributions from the bankruptcy estate. In many jurisdictions, upon commencement of an insolvency or bankruptcy case, all civil actions against the debtor are automatically stayed. The stay does not necessarily apply, however, to asset forfeiture proceedings commenced by the state. In the United States, for example, because forfeiture is considered punishment for a crime, forfeiture proceedings are not automatically stayed by a U.S. Bankruptcy Court filing by or against a debtor.

[*Source:* Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases (2020) Brun, Jean-Pierre, Silver, Molly]

Chapter 5:
Research Methodology

I) Research Objective and Aim

The research aims at studying:

- How Indian banking system needs to prepare for enforcements under Cross-border Insolvency, considering the increasing pace of global banking and financial business;
- Analysing the requirement of capacity building in Indian banking system to deal with Cross-border Insolvency, and
- Understanding the emerging issues and challenges for Indian banking system under Cross-border Insolvency.

II) Research Questions

If the Indian banking system starts preparing for Cross-border Insolvency timely, then, Indian Banks/FIs will be capable of facing the issues/challenges under Cross-border Insolvency and realising and recovering more from the assets ofthe corporate debtor/guarantor having overseas assets or operations.

- **Who:** Indian Banks/ Financial Institutes.
- **What:** To prepare for Cross-border Insolvency.
- **How:** Enactment of guidelines policies through proposed research study.
- **When:** Now is the time as during the budget session of the parliament this year, Union Finance Minister Nirmala Sitharaman announced the introduction of a cross-border insolvency mechanism in the Insolvency and

Bankruptcy Code, 2016 (IBC). This is modelled on the UNCITRAL model law on Cross-Border Insolvency.

III) Research Design and Methodology

In qualitative research, a hypothesis is used in the form of a clear statement concerning the problem to be investigated. Qualitative research is defined asa market research method that focuses on obtaining data through open-ended and conversational communication. Qualitative research methods are designed to speculate and conclude on the behaviour and perception of the target audience with reference to a particular topic. The results of qualitative methods are more descriptive and the inferences can be naturally drawn from the data that isobtained. The study will be based on *Qualitative Research,* which will be more exploratory in nature that will comprise:

1. Case study methodology;
2. Circulating Open-ended Questionnaires to banking professionals; and
3. Examining past reports and Global Literature with the objective to further study impact, issues, and challenges.

Chapter 6:

Analysis through Case Studies

I) In re P.Macfadyen & Co. Ex Parte Vizianagaram Co. Ltd. (“Macfadyen”) The world’s first reported cross-border insolvency protocol was ideated in Macfadyen. In Macfadyen, the debtor company was an Anglo-Indian merchanting and banking partnership that was liquidated following the death of one of its partners. The liquidators in India and England entered into an agreement in relation to admission of the claims and distribution of the surpluses (“Agreement”). An English Court struck down a challenge to the Agreement, by reasoning that the Agreement was a “common sense business arrangement,” and that it was “manifestly for the benefit of all [interested] parties.”

II) Jet Airways started as an air taxi operator in 1993 and became a scheduled carrier in 1995. The famous tagline “The Joy of Flying” became synonymous with Jet Airways and its unrivalled product and service. The company was under insolvency after it shut operations in April 2019 under a heavy debt. Jet Airways is the first Indian carrier/airline to undergo insolvency proceedings under the Cross-border Insolvency Protocol along with the Insolvency and Bankruptcy Code (IBC) of India.

The Company is subject to parallel insolvency proceedings in India and in the Netherlands. In India, the Company has been admitted into a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (the "Indian

Proceedings"). Pursuant to the order of the NCLT and resolutions duly passed at the meeting of the committee of creditors of the Company ("CoC") dated 16th July, 2019, a Resolution Professional (RP) was appointed, resulting in the powers of the board of directors of the Company being vested with the RP.

In the Netherlands, the Company has been declared bankrupt and the Dutch Trustee has been appointed to manage the estate of the Company (the "Dutch Proceedings"). Parallel, the administrator in bankruptcy of the Company appointed by Noord-Holland District Court, Trade, Sub-district and Insolvency in the Netherlands ("Dutch Bankruptcy Court") by its order dated 21 May 2019 (the "Dutch Trustee"). The main objective of the Dutch Proceedings is to deal with the liquidation of the assets of the Company located in the Netherlands.

On an application made by the Dutch Trustee, appealing the 20th June, 2019 order of the NCLT before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT"), the NCLAT, by its orders dated 12th July, 2019 and 21st August, 2019 ("NCLAT Order"), inter alia, directed the RP, in consultation with the CoC, to consider the prospect of cooperating with the Dutch Trustee so as to have joint "corporate insolvency resolution process of the Company" and further vide its order dated 04th September, 2019 directed the RP under the Indian Proceedings to reach an arrangement/agreement with the Dutch Trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch Trustee in the best interest of the Company and all its stakeholders ("Proposed Cooperation").

The Parties acknowledge that while the Indian Proceedings focused on the revival/resolution of insolvency of the Company and the maximisation of the value of its assets for the benefit of all its stakeholders, the main objective of the Dutch Proceedings was to deal with the liquidation of the assets of the Company located in the Netherlands.

The RP and Dutch Trustee agreed to coordinate with each other and cooperate in good faith in all aspects of the Proceedings in terms of a common Protocol which aimed at:

- ***Coordination*** – To promote international cooperation and the coordination of activities in the Proceedings; and to provide for the orderly, effective, efficient, and timely administration of the proceedings in order to reduce their cost and maximise recovery for creditors.
- ***Communication*** – To promote communication among the Parties and the CoC; to provide, wherever possible, for direct communication among NCLT, NCLAT and Dutch Bankruptcy Court.
- ***Information and Data Sharing*** – To provide for the sharing of relevant information and data among the Parties in order to promote effective, efficient, and fair proceedings, and to avoid duplication of effort and activities by the parties.
- ***Preservation*** – To identify, preserve, and maximise the value of the Company's worldwide assets for the collective benefit of all creditors and other interested parties.
- ***Claims Reconciliation*** – To coordinate an efficient and transparent claims process.

- ***Maximise value of assets/recoveries*** – To cooperate in marshalling the assets of the Company in order to maximise value of assets/recovery for all of the Company's creditors.
- ***Comity*** – To maintain the independent jurisdiction, sovereignty, and authority of NCLT, NCLAT, and the Dutch Bankruptcy Court. The parties agreedthat each Court is an independent, sovereign Court, entitled to preserve its independent jurisdiction and authority with respect to matters before it and the conduct of the RP and the Dutch Trustee.

Conclusion:

- The protocol stated that "The Parties recognise that the Company being an Indian company with its Centre of main interest in India, the Indian Proceedings are the main insolvency proceedings, and the Dutch Proceedings are the non-main insolvency proceedings", due to which Indian laws are applicable to the foreign assets located in the Netherlands.
- Dutch authorities were permitted by NCLAT to participate in the creditors' committee, but, they did not have voting rights. The RP and the creditor's committee were instructed to cooperate with the Dutch trustees and to enter into such cooperation agreements to conduct the insolvency proceedings jointly. By order of the NCLAT, both sides had joined the "cross-border insolvency protocol." According to this protocol, both sides, the Insolvency Professional and Dutch Trustees could consolidate the claim under their jurisdiction and review other processes based on the information obtained.

- The cross-border insolvency procedure seems defective as there are no proper provisions governing the same. The Insolvency Law Committee has recommended a draft, but, for that to be implemented, a bill must be formulated or an amendment under the Code shall facilitate a favourable business environment for the creditors, further improving the ease of doing business.
- The Jet Airways case highlighted the requirement of cross-border insolvency mechanism in India, considering the challenges that were faced by regulators, courts, and tribunals. Jet Airways had assets and claims from outside India, the need for enacting a law, harmonious with the international best practices.

Chapter 7:

Analysis of Responses by Lending Institutions

This chapter analyses the responses collated through the questionnaire given at *Appendix I.*

Sample Size: The survey was conducted through an online questionnaire, which was sent to officers of Banks/FIs working in corporate lending, Legal Department & NPA Management Group handling Corporate Recovery across all levels. A total of 21 questionnaires were filled as part of survey though circulated to a large population. The questionnaire was filled by bank officers working in 6 different Indian Banks particularly State Bank of India (SBI), Axis Bank, Union Bank of India, Canara Bank, Karnataka Bank and IDBI Bank. It was a good mix of response considering 3 Public Sector Banks & 3 Private Sector Banks. The survey included questions related to Insolvency regulations in India, to take broader view of their understanding on Cross Border Insolvency and to seek suggestions on capacity building towards the same from Banking perspective and hence, the nature of data collected was objective as well as subjective in form of their opinion and suggestions.

It may be mentioned that another questionnaire for Mid/Large Corporates as given at Appendix II was also administered with the target audience of management level officers (Middle/ Top Management) handling Finance in a corporate entity. However, we were not able to get sufficient responses to suitably analyse and present the same.

1) Which one of the appended constitutions of borrower best fit the term "Corporate Debtor" ?

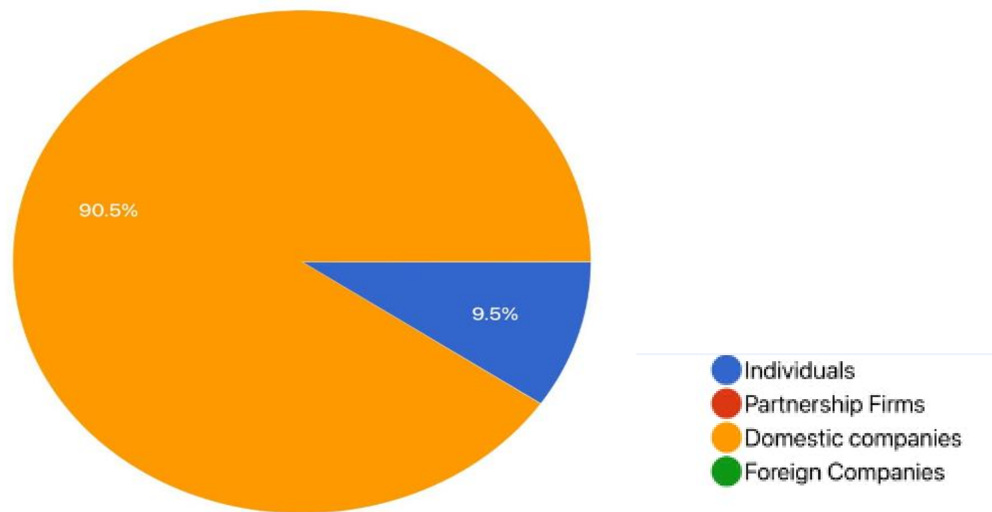


Fig.1

As recorded in *Fig.1,* 90.50% of respondents identified domestic companies as corporate debtors, while balance 9.50% respondents called individuals. A corporate debtor refers to a company, a limited liability partnership orany person who owes a debt to its creditors. Under the Insolvency and Bankruptcy code, a corporate debtor is liable to the financial and operational creditors for the payment of such debt.

2) Does your bank/institution give loans to "Corporate Debtors" having Foreign Assets, Liabilities or Operations?

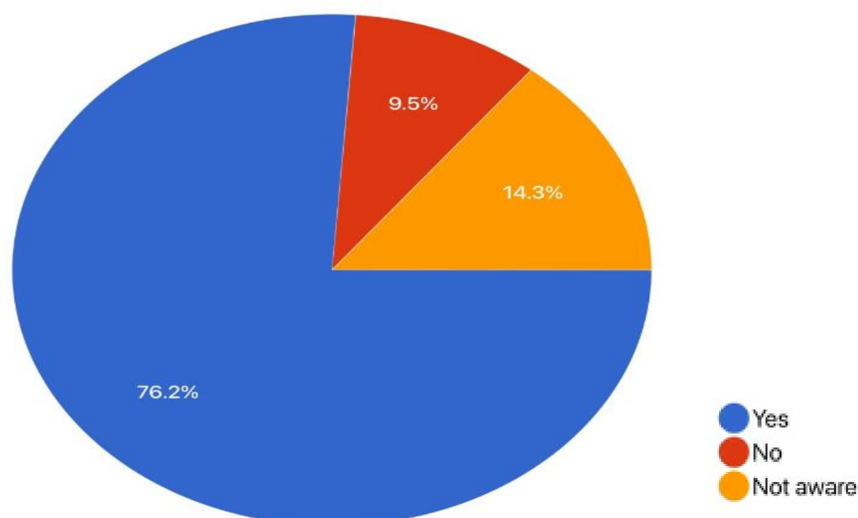


Fig.2

It was observed that 76.20% respondents affirmed that their respective bank/institute would have given loan to "Corporate Debtor" having Foreign Assets, Liabilities or Operations, while 9.50% respondent denied the same, and a wide 14.30% were not sure of the said proposition, as recorded in Fig 2.

3) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Tangible assets in foreign country like Capital assets, including plants and machinery, office space and related assets, and those that are work-in-progress, movable assets like inventory.

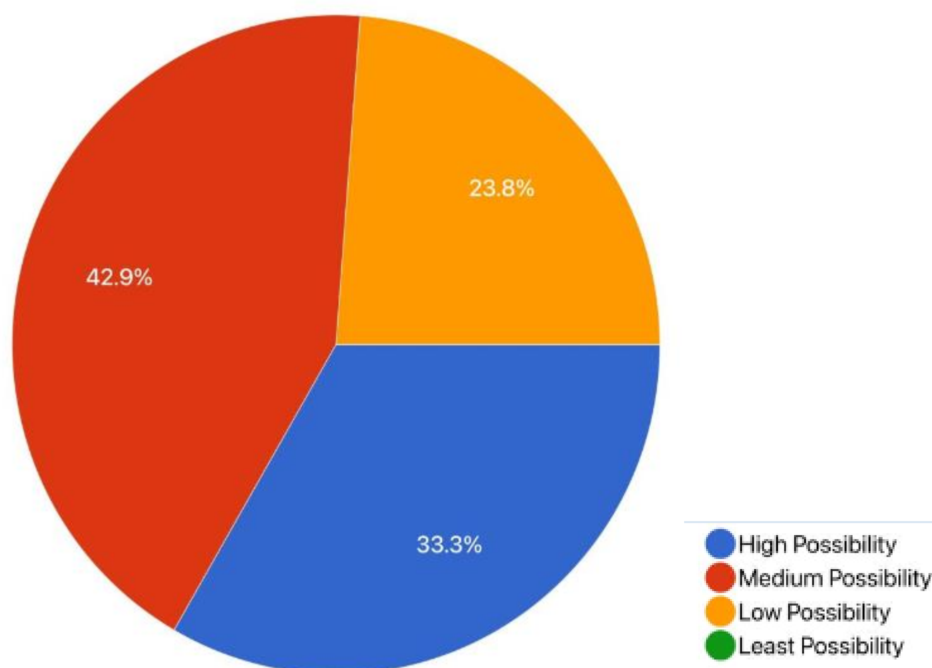


Fig.3

As recorded in Fig.3, over 33% of the surveyed recorded a High Possibility, 42.90% indicated there could be a Moderate Possibility, and 23.80% replied that there is a Low Possibility for the corporate debtor to have tangible assets in foreign country.

4) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Intangible assets in foreign country like Licenses, Intellectual Property Rights (IPRs) and long-term supply agreements.

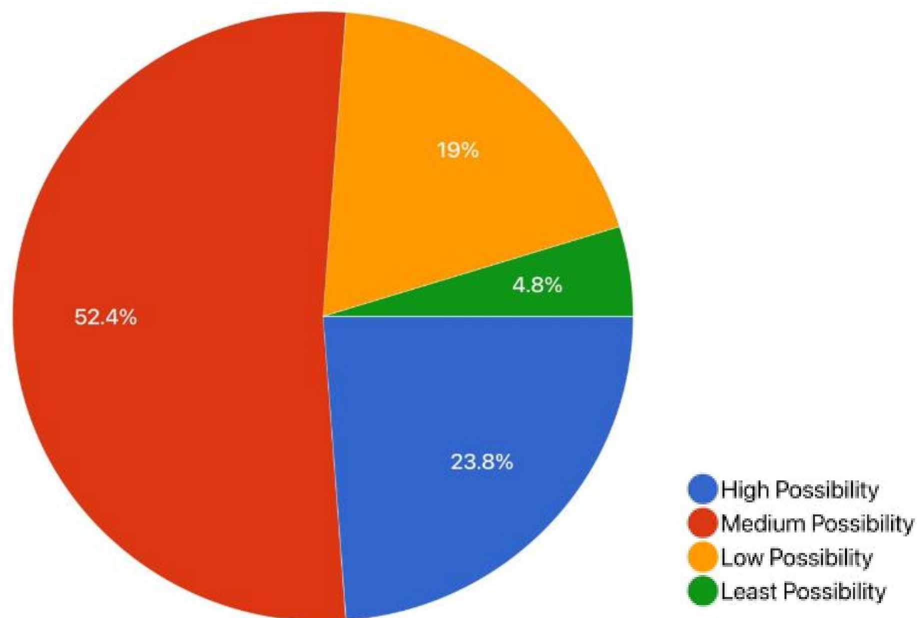


Fig.4

As recorded in Fig.4, 23.80% respondents have replied that there is High Possibility, 52.40% respondents have replied that there is Moderate Possibility and 19% & 4.80% respondents have replied that there is Low & Least Possibility respectively for a corporate debtor to have In-tangible assets in a foreign country.

5) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Loans and advances to foreign debtors like Loans given to third parties, to employees, to shareholders and directors, to associates and subsidiaries.

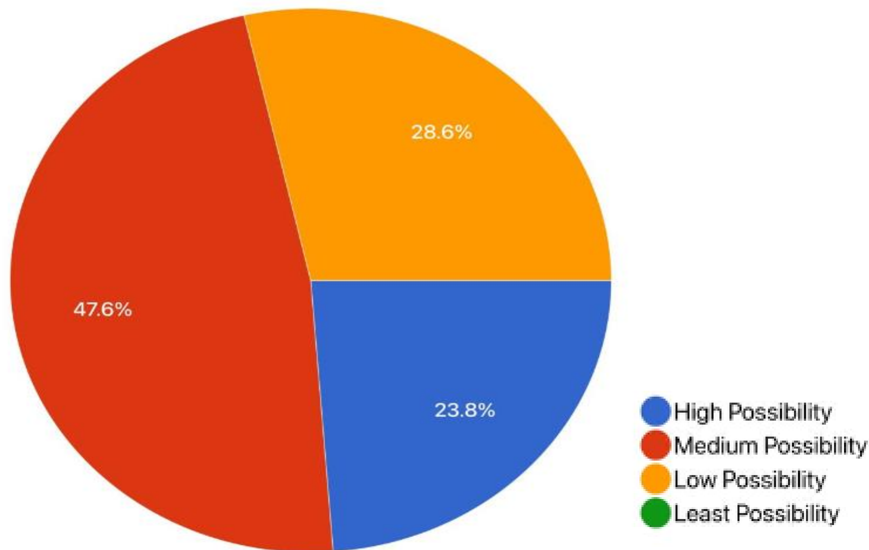


Fig.5

As recorded in Fig.5, 23.80% respondents have replied that there is High Possibility, 47.60% respondents have replied that there is Moderate Possibility and 28.60% respondents have replied that there is Low Possibility for a corporate debtor to have extended Loans and advances to foreign debtors like Loans given to third parties, to employees, to shareholders and directors, to associates and subsidiaries.

6) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Foreign investments in foreign financial assets like in subsidiaries, associatecompanies and Joint Ventures (JVs).

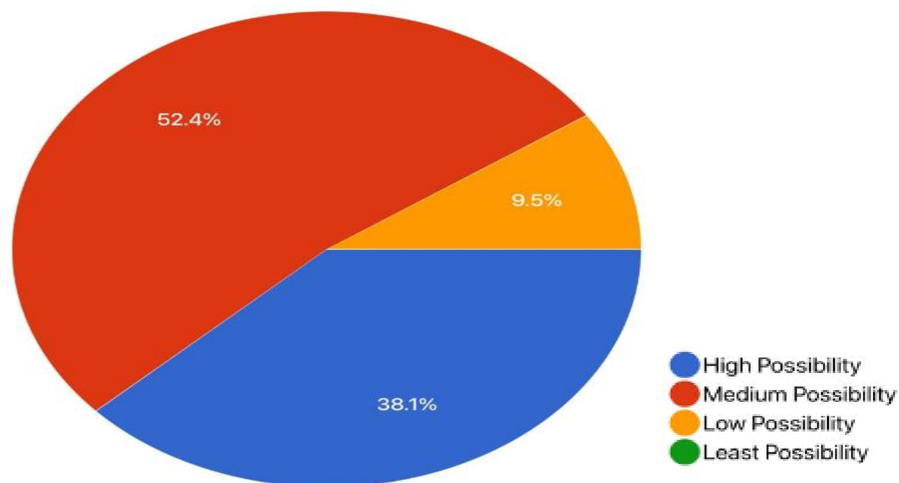


Fig.6

As recorded in Fig.6, 38.10% respondents have replied that there is High Possibility, 52.40% respondents have replied that there is Moderate Possibility and 9.50% respondents have replied that there is Low Possibility for a corporate debtor to have to have any of the foreign assets in form of Foreign investments in foreign financial assets like in subsidiaries, associate companies and Joint Ventures (JVs).

7) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Receivables from foreign parties and cash held in bank accounts in foreign countries, and petty cash in foreign operations.

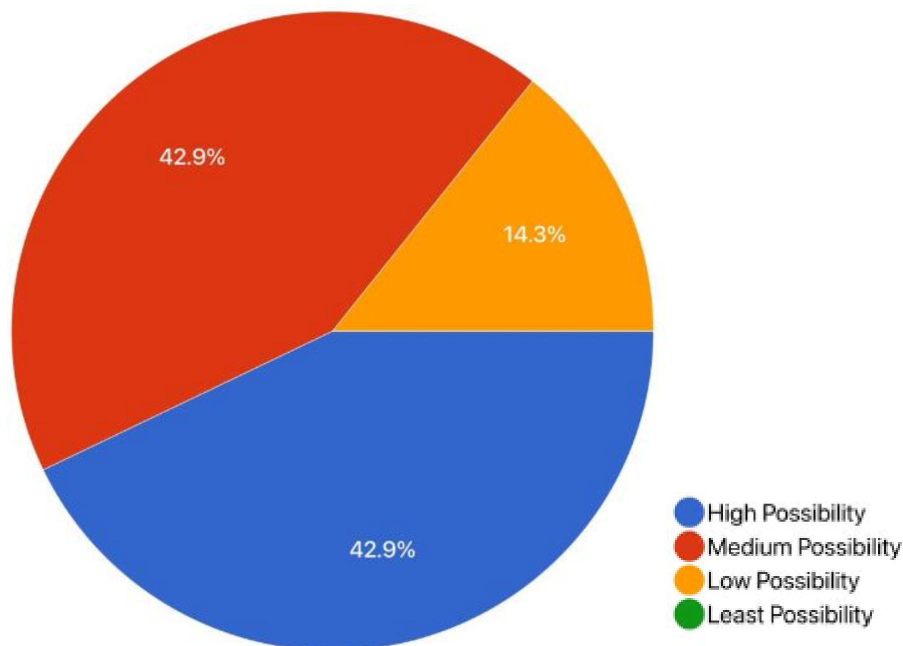


Fig.7

It was observed that 42.90% respondents replied that there is a High Possibility, 42.90% respondents replied that there is a Moderate Possibility and 14.30% respondents have replied that there is a Low Possibility for a corporate debtor to have any of the foreign assets in form of Receivables from foreign parties and Cash held in bank accounts in foreign countries, and petty cash in foreign operations, As recorded in Fig.7.

8) How high is the possibility for a corporate debtor to have any of thefollowing foreign liabilities?

- Foreign financial liabilities like secured/unsecured loans, External Commercial Borrowings (ECBs), fructified guarantees provided by the debtor to foreign persons.
- Foreign operational liabilities like trade payables, wages & salaries, statutory dues.

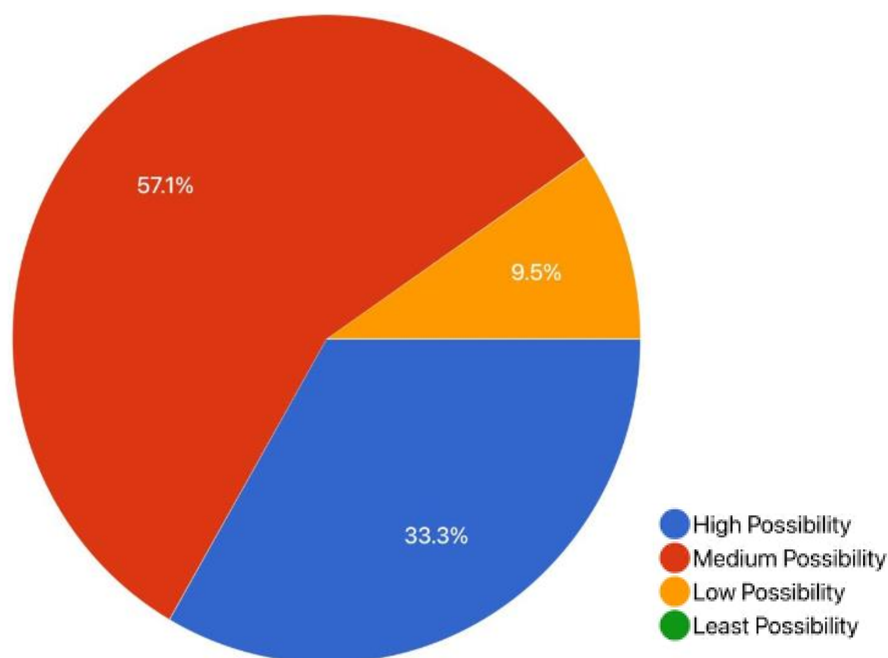


Fig.8

As recorded in Fig.8, around 57.10% respondents replied there is a High Possibility, 33.30% respondents replied that there is a Moderate Possibility, and 9.50% respondents replied that there is a Low Possibility for a corporate debtor to have to have any of the aforesaid foreign financial or operational liabilities.

9) While sanctioning loans to corporate debtors, is there any formal assessment of these foreign assets, liabilities and operations with a view of any expected concurrent proceedings in a foreign jurisdiction, its impact, and cost of participation in foreign proceedings?

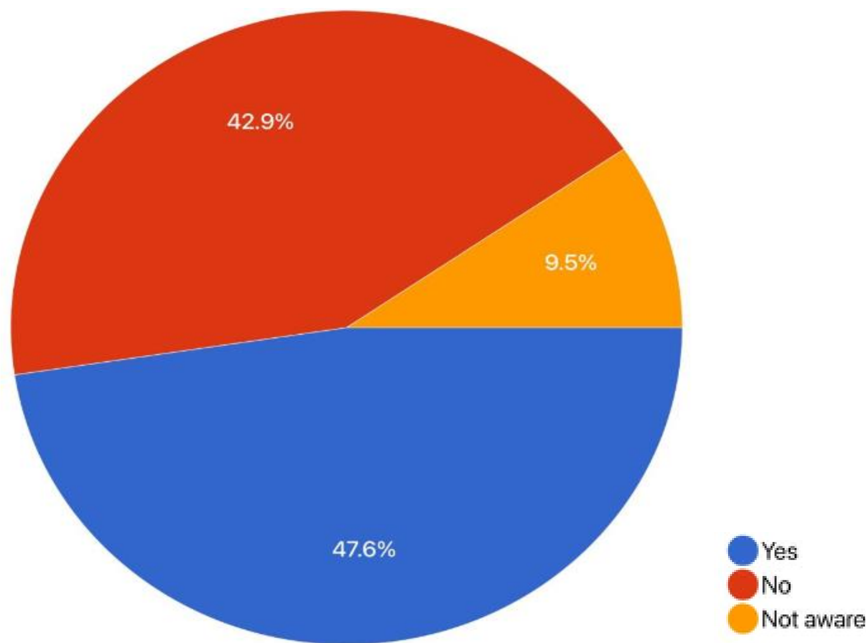


Fig.9

As recorded in Fig.9, 47.60% respondents affirmed that while sanctioning loans to corporate debtors, there is a formal assessment of foreign assets, liabilities and operations with a view of any expected concurrent proceedings in a foreign jurisdiction. 42.90% respondents disapproved use of any such assessment and 9.50% were not aware of the same. Few lenders suggested that there is a need for proper security creation in lender's favour, so that in case of any adverse scenario recovery from such security is possible. It was also suggested that presently no detailed assessment is done and only financial position as balance sheet item and related party transactions are only studied as part of due diligence.

10) Does your bank/institute have laid-down guidelines/Standard Operating Procedures (SoPs) for fructified guarantees provided by the debtor/guarantors to foreign persons?

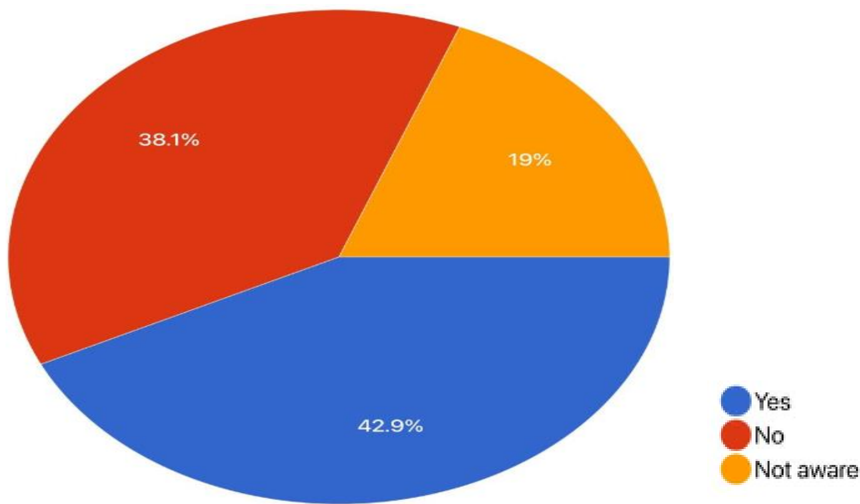


Fig.10

As recorded in Fig.10, 42.90% respondents confirmed that their bank has laid-down guidelines/Standard operating Procedures (SoP) for fructified guarantees provided by the debtor/guarantors to foreign person, while 38.10% respondents denied availability of such guidelines, and 19% respondents were not aware of the same. One of the lenders suggested that in such a scenario, the advise of a lender's legal counsel is sought and effect of such fructified guarantees on net worth is studied.

11) UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. Have you heard about UNCITRAL Model Law earlier and its expected adoption in domestic context as part of Insolvency Bankruptcy Code?

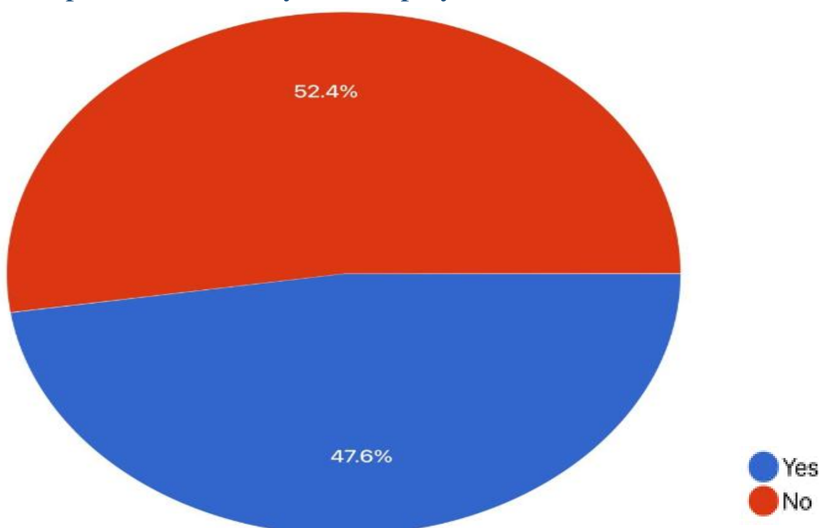


Fig.11

As recorded in Fig.11, about 47.60% respondents had heard of UNCITRAL Model Law and its expected adoption in domestic context as part of Insolvency Bankruptcy Code while remaining 52.40% respondents had never heard of the same.

12) Considering the increasing pace of global banking & financial business, do you acknowledge that it would be desirable to develop SoPs/guidelines on how cross-border matters/cases will be attended by Banks/Financial Institutions (FIs)?

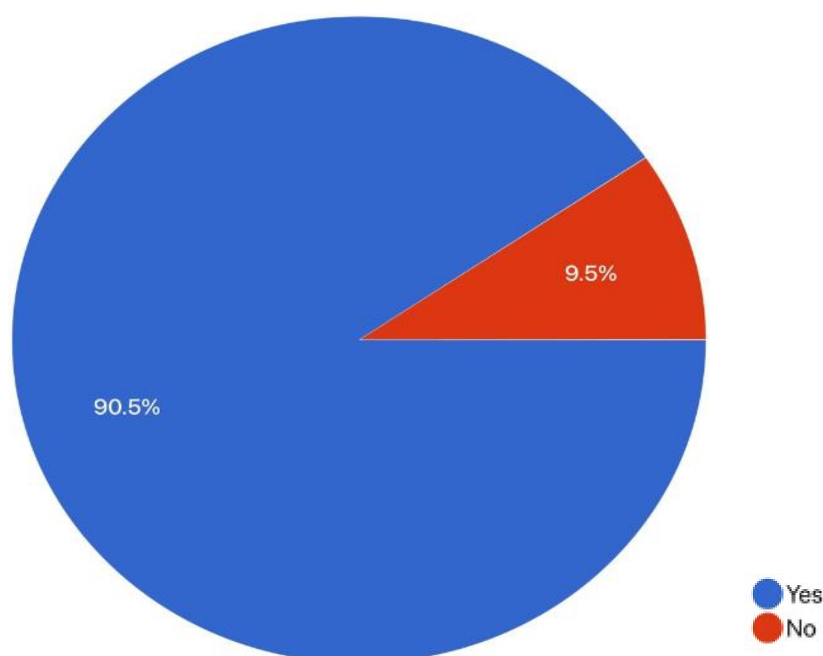


Fig.12

As recorded in Fig.12, about 90.50% respondents agreed on the need for developing SoPs/guidelines to deal with cross-border matters/cases, while the remaining 9.50% don't feel there is such a requirement at the moment. Suggestions/feedback as shared by the respondents are as follows:

a) Charge creation on foreign asset is a complex procedure;

b) Geo-political factors may be considered while framing such guidelines;

c) For cross-border insolvency lawyers listing/empanelment, guideline on jurisdiction of filing proceeding, relevant laws, brief legal procedures and

listing/empanelment of foreign enforcement agents, etc. may be covered.

d) WTO may come out with guidelines towards cross-border matters.

RBI should then take the initiative to develop SOPs/ guidelines for the same which will be applicable to Banks/FIs.

e) SOPs for officers working in Banks/FIs may be laid out as in the case of domestic insolvency under IBC was provided;

f) There are high chances that on account of impact on foreign subsidiaries or JV, Indian companies and banks have suffered. Hence, it is a must to have a cross-border law to capture the foreign liabilities/assets of Indian Corporates to be covered under NCLT with broad and guidelines.

g) Interested countries signing pacts and forming a common body to lay down procedures/SOPs on cross-border matters.

13) Do you feel the need to train the recovery & credit team for dealing with the wide range of issues and challenges that will arise with respect to cross-border matters?

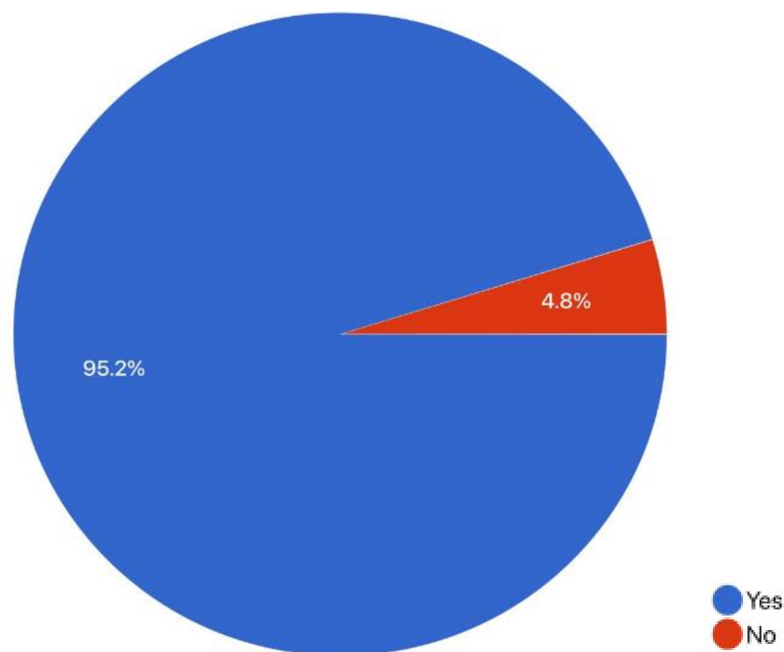


Fig.13

As recorded in Fig.13, about 95.20% respondents agreed for need to train the recovery & credit team for dealing with the wide range of issues and challenges that may arisein respect of cross-border matters, while only 4.80% respondent didn't feel there was an exclusive training requirement.

14) Is it easy to identify/locate the foreign assets of corporate debtors from enforcement perspective?

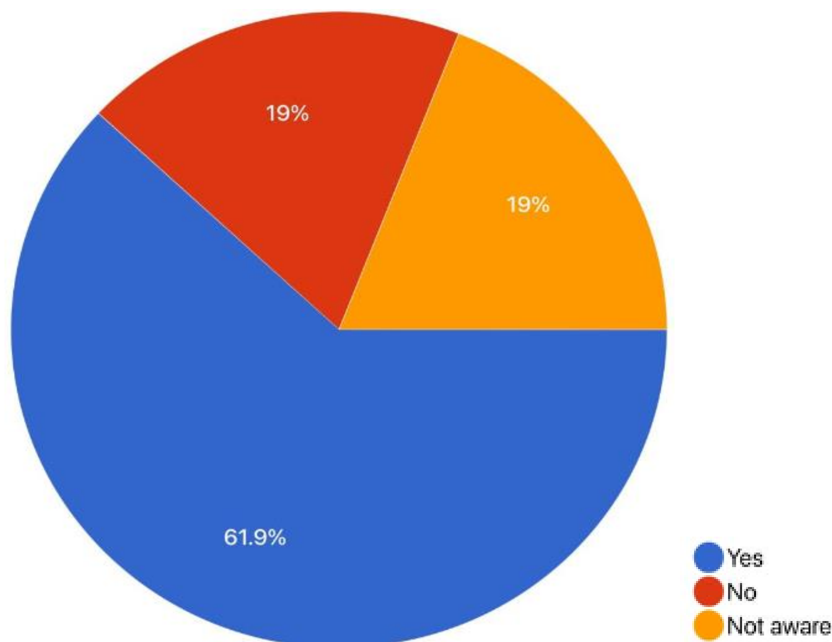


Fig.14

As recorded in Fig.14, about 61.90% respondents confirmed that it is easy to identify/locate the foreign assets of corporate debtors from enforcement perspective, while 19% deemed it to be a difficult task and the left chunk, 19% were not aware of the same.

15) Do you feel the need to develop SoPs for identification of foreign assets and liabilities of corporate debtors, and communication and cooperation among creditors on holding joint meetings?

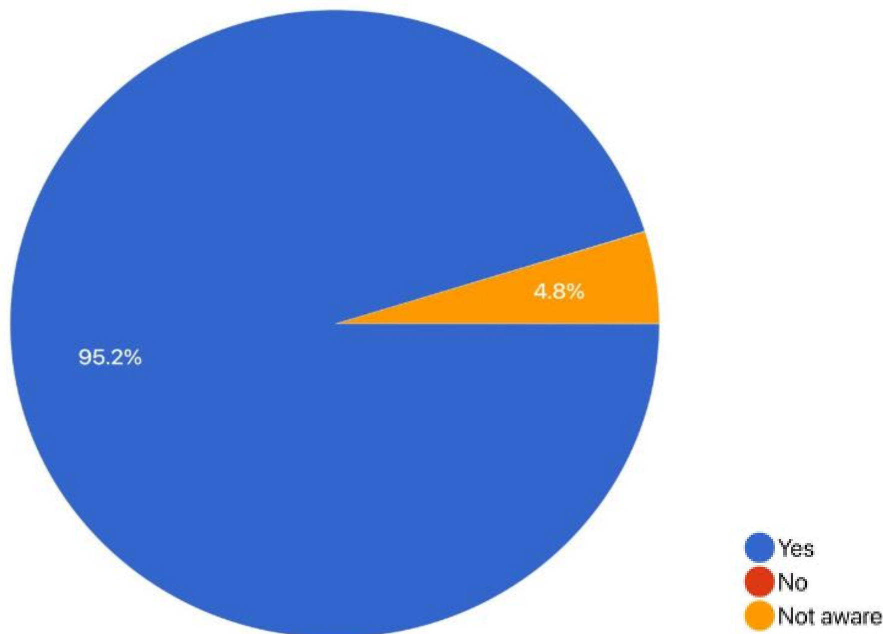


Fig.15

As recorded in Fig.15, about 95.20% respondents agreed that there was a need to develop SoPs for identification of foreign assets and liabilities of corporate debtors, and communication & cooperation among creditors on holding joint meetings, while 4.80% respondent did not feel such requirement. Suggestions/feedback as shared by the respondents are as follows:

a) Proper policies have to be designed;

b) Listing of legal procedures or action to be taken while recovery with timelines;

c) Such SOPs will enable the consortium of banks to regularly discuss and update the details of foreign assets/ liabilities of corporate debtors (including their exact location);

d) Cross-border assets and liabilities need to be identified at the time of appraisal, and like ROC charge registration, should be created at some global forum;

e) It has become a priority to mechanise the system to identify foreign assets, liabilities, and respective local laws.

f) A common body may be formed on behalf of participating countries, it can

develop a platform for identification of foreign assets & liabilities in countries.

16) Does your bank/institute have guidelines to look into the following locational aspects while lending to a corporate debtor?

- Location of assets of the corporate debtor;
- Location of book of accounts of the corporate debtor;
- Location of directors and senior management of the corporate debtor;
- Location of creditors of the corporate debtor;
- Location of execution of contracts and applicable law to key contracts and disputes;
- Location where financing was organised or authorised, or from where the cash management system was run;
- Location of corporate debtor's primary bank account; and
- Location from where purchasing and sales policy, staff, accounts payable and computer systems were managed.

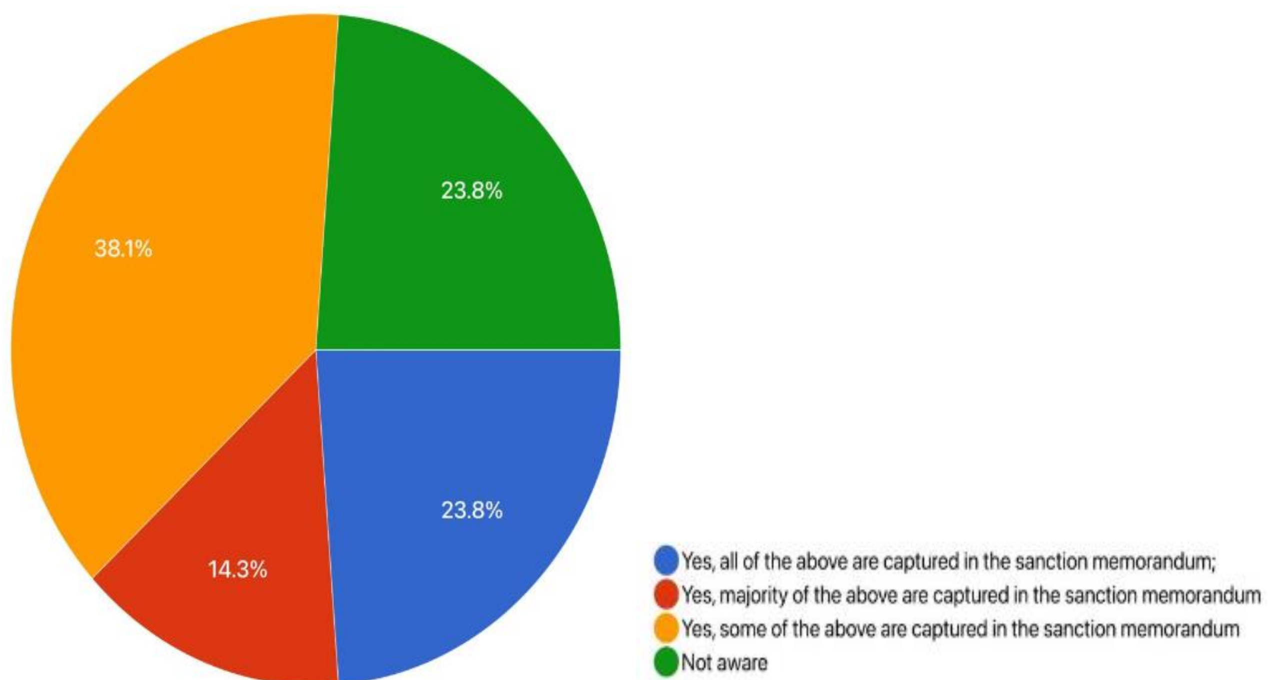


Fig.16

As recorded in Fig.16, about 23.80% respondents confirmed that all locational aspects as mentioned above are captured in the sanctioning memorandum, while 14.30% recorded in the survey that most of the assets were captured. 38.10% responded that some locational aspects are captured but not all, lastly 23.80% respondents were not aware of the matter.

17) Do you feel that there is a need to develop Cost and value analysis, and evaluation matrix to guide Banks/FIs on the cost involved and anticipated value before commencing cross-border insolvency in any case?

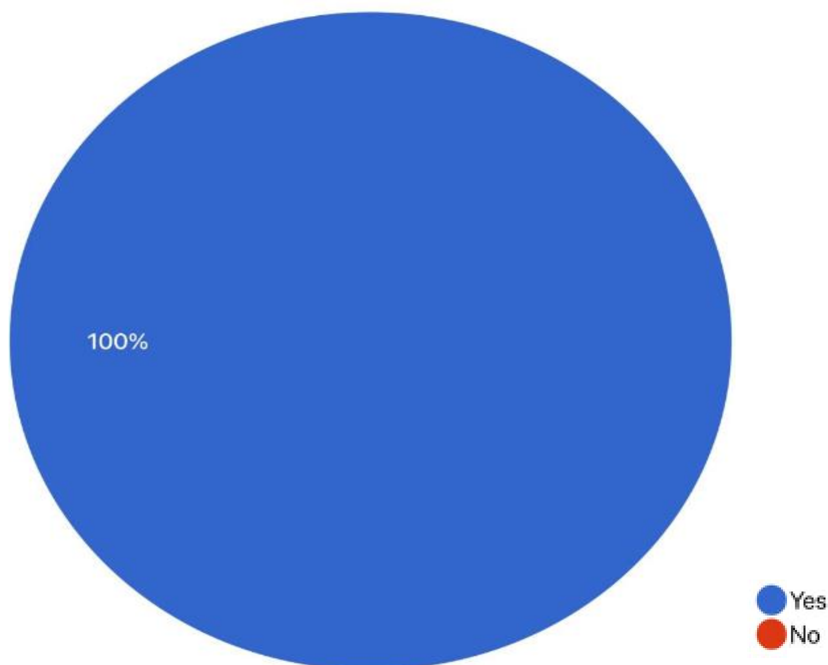


Fig.17

All respondents were agreeable for need to develop Cost and value analysis and evaluation matrix to guide Banks/FIs to consider for assessing cost involved and anticipated value before commencing cross-border insolvency in any case, as recorded in Fig.17.

18) Do you feel that there is a need at industry level for banking associations & regulators to come up with specified guidelines for dealing with cross-border insolvency?

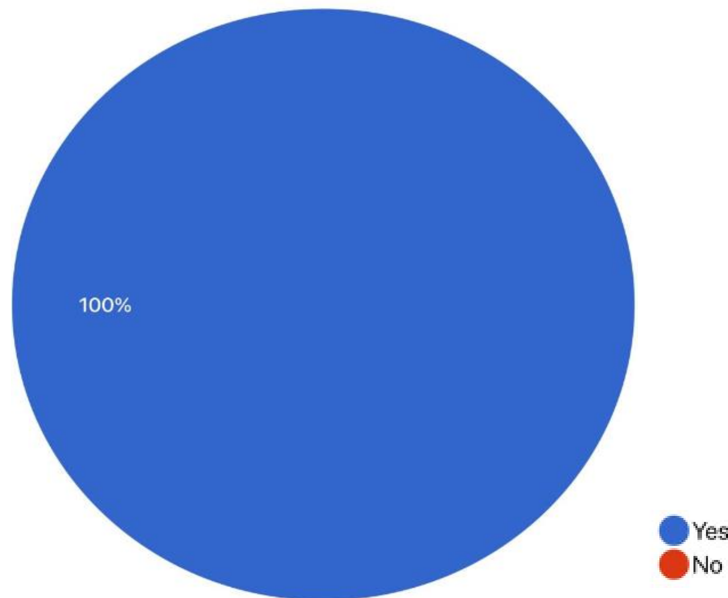


Fig.18

All respondents agreed that there was a need at industry level for banking associations andregulators to come up with specified guidelines for dealing with cross-border insolvency. Suggestions/feedback as shared by the respondents are as follows:

a) Brief about legal formalities and the cross-border procedures;

b) IBA in consultation with industry association/ bodies should formulate guidelines to deal with cross-border insolvency;

c) Foreign assets identification, charge creation and enforcement of security on the same needs to be emphasised, and

d) SOPs should be developed to cover international aspects of lending.

19) Do you feel that there is a need to form broad guidelines for empanelment & functioning of overseas law firms/ Insolvency representatives functioning on behalf of domestic creditors?

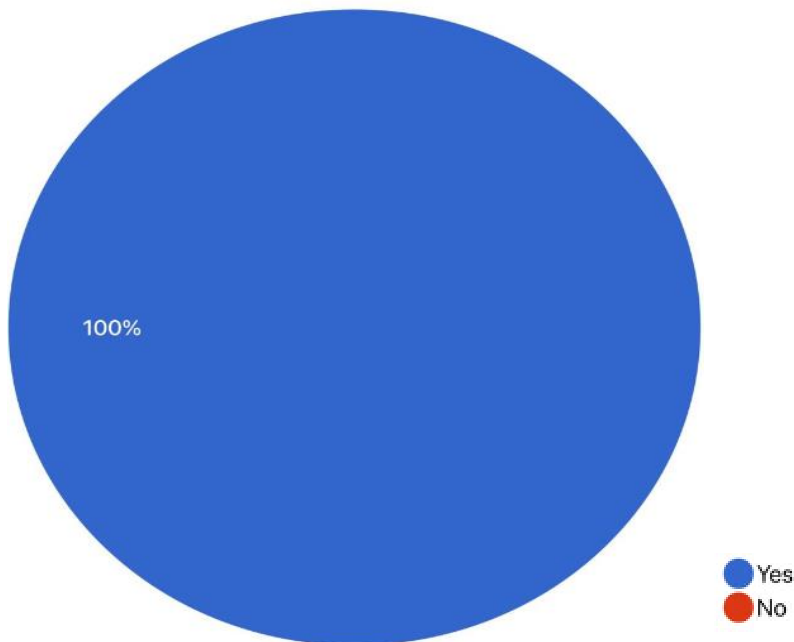


Fig.19

All respondents were agreeable that there was indeed a strong need to form broad guidelines for empanelment & functioning of overseas law firms/ Insolvency representatives functioning onbehalf of domestic creditors. Suggestions/feedback as shared by the respondents are as follows:

a) Listing, empanelment and credibility check, work system abroad, fee structure, etc. may be covered while framing guidelines, and

b) IBA or RBI may issue advisory/guidelines for empanelment and functioning of overseas law firm /insolvency representative which will help the domestic creditors/banks to carry out the cross-border insolvency smoothly and effectively.

20) Do you feel that there is a need to have a central repository of information on overseas beneficial owners of corporate debtors having borrowings in India?

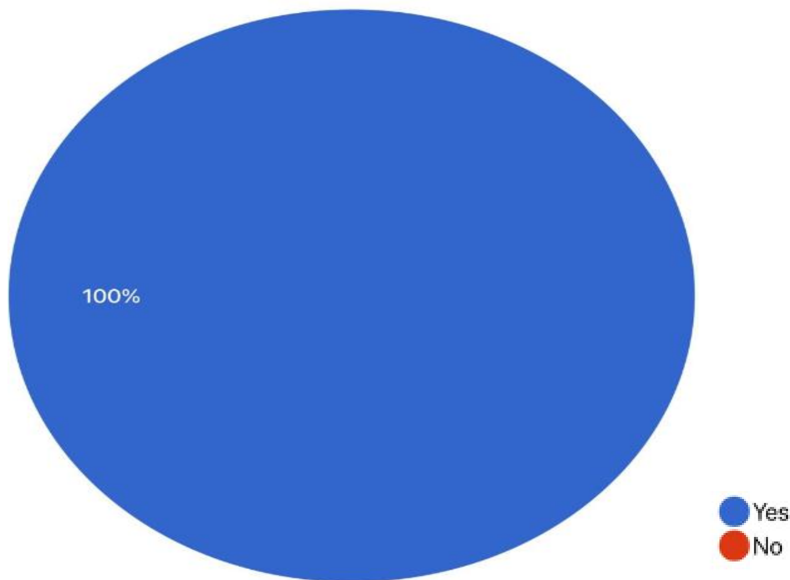


Fig.20

All respondents were agreeable to have a central repository of information on overseas beneficial owners of corporate debtors having borrowings in India wherein details to be captured for future references and similar to existing framework like ROC/CERSAI/CRILC.

21) Do you feel that there is a need to have a central repository of information on financial assets created abroad out of funding from Domestic Banks/FIs?

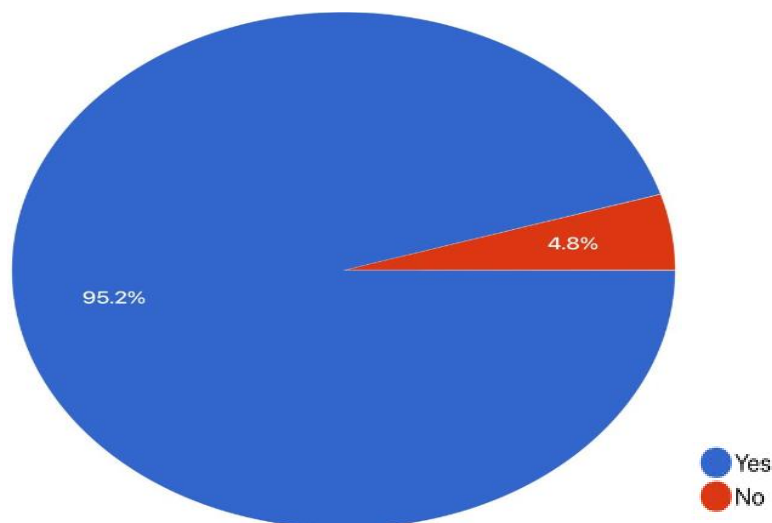


Fig.21

As recorded in Fig.21, about 95.20% respondents confirmed on the need of having a central repository of information on financial assets created abroad out of funding from Domestic Banks/FIs while remaining 4.80% were not in consonance for the same.

22) Do you feel that there is a need to have a central repository of information on foreign financial liabilities availed by a corporate debtor along with domestic borrowings from Domestic Banks/FIs?

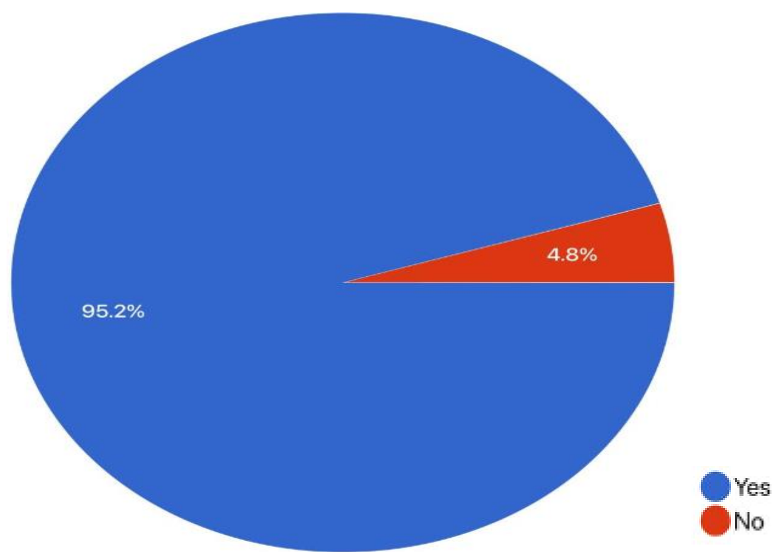


Fig.22

As recorded in Fig.22, about 95.20% respondents confirmed the need of having a central repository of information on foreign financial liabilities availed by a corporate debtor along with domestic borrowings from Domestic Banks/FIs. It may be mentioned that if such liability is covered by charge over some assets and charge is filed with Registrar of the Company (ROC) that may be traced easily or it could be identified through the Audited Balance Sheet of the companies.

23) Do you feel that there is a need to have a central repository of information on of personal/ corporate guarantors located abroad for financial guarantees extended in India?

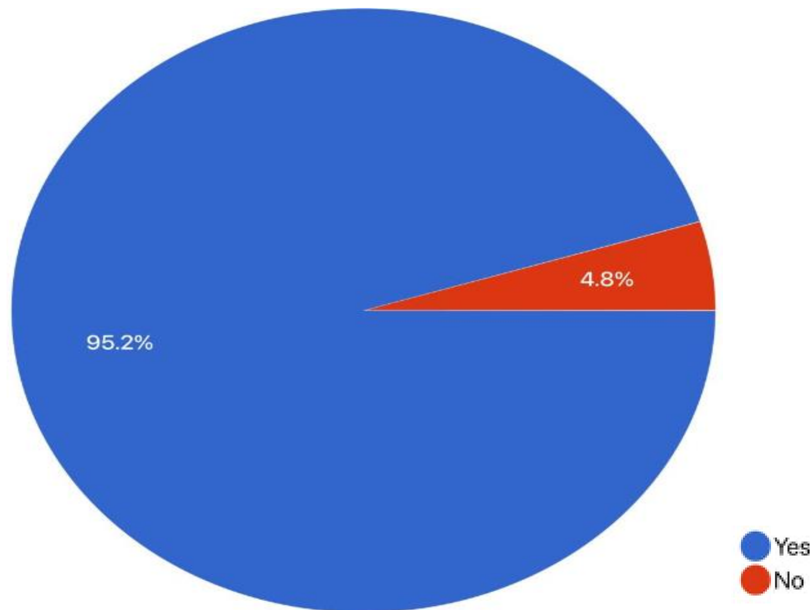


Fig.23

As recorded in Fig.23, about 95.20% respondents agreed on a central repository of information on of personal/ corporate guarantors located abroad for financial guarantees extended in India, while 4.80% were not in consonance for the same.

24) Any challenges (if any) that you've faced while taking legal action for enforcement of security/debtors assets located abroad?

Suggestions/feedback as shared by the respondents are as follows:

a) Cross-borders insolvency laws are yet to be enacted in the country as well as other developing economies;

b) Bankers have limited knowledge of foreign laws governing cross-border insolvency;

c) On account of jurisdiction issues as well as varied provisions of law in different countries, enforcing cross-border insolvency is a major issue presently;

d) There are lots of hurdles in handling cross-border issues and each country has separate laws to deal with; and

e) Cost involved in international proceedings may be huge.

25) Any suggestion for capacity building, in view of increasing participation of Indian banking system in globalisation & international trade as Indian banking system need to analyse the requirements of capacity building with Cross-border Insolvency.

Suggestions/feedback as shared by the respondents are as follows:

a) Courses to be made available with case studies for references; and

b) Training & awareness for bankers to review cross-border insolvency.

Chapter 8:

Conclusion

India is one of the fastest developing economies in the world and various steps are being taken to become a developed economy. As a nation India has to protect the interest of the foreign & domestic investors/creditors. In terms of the present laws related to cross border insolvency are Section 234 and 235 of IBC, 2016, India can endorse bilateral treaties in relation to insolvency proceedings with particular country with which reciprocal arrangements and further can make a letter of request for an insolvency proceedings.

However, the same doesn't provide pragmatic solution to the present day problem and hence, the country is looking forward to adopt the UNCITRAL Model Law on cross border insolvency with certain variations by introducing a bill for it and adding it as a new chapter to IBC.

The proposed framework for the Cross Border insolvency would definitely progress the Indian financial system. It would bring transparency (data dissemination, fiscal and monetary policy), financial stability, and marketing integration at the national and international levels. It would help the stakeholders to better manage their financial risk along with efficient access to credit and allocation of resources.

India may also incorporate the public policy doctrine with a wide scope likewise various other countries have, in their respective domestic cross border insolvency frameworks wherein the opinion of the adjudicating authority is contingent on the Indian government's submissions before any final determination. Additionally, the government may be granted *suo motu* powers to cause refusal of any action by the adjudicating authority, if the government opines that it is manifestly contrary to the

public policy of India. At the same time, it is felt that some threshold or benchmark of public policy must be provided with respect to the constitution and statutory laws in India. When the purpose of recognizing foreign proceedings is to enable a more cross-border complementary effort, making some adjustments keeping in mind the natural laws and fundamental principles of other nations is not always harmful.

Using the observations found during the study, it can be decisively concluded that a wide majority of the respondents confirmed that Indian banks are lending to corporate debtors with foreign liabilities/assets.

The majority of respondents supported formulation of SoPs and guidelines to identify these foreign assets and map the risks involved in cross-border transactions and believed there was a need for the Government to define the protocol for cross-border insolvency proceedings.

Indian banks are opening up to foreign businesses, and vice-versa, which heightens the need for standardised protocols. The Model Law attempts to standardize the process across the globe so that the foreign jurisdiction and the domestic local authorities do not have friction and can settle the insolvency seamlessly.

Recommendation and Suggested Capacity Building with regard to Human capacity, Standards of Procedures (SoPs), and Training:

It would be desirable to:

- Conduct or organise training and awareness programs for Bankers on IBC and Cross-border Insolvency;
- Develop SoPs/guidelines on how such matters will be attended and passage through the NCLT system;
- Train and make recovery & credit team for dealing with the wide range of issues and challenges that may arise in respect of cross-border matters;

- Develop SoPs on identification/tracing of foreign assets and liabilities of corporate debtors and norms communication & cooperation among creditors across nations on holding joint meetings;
- A brief assessment of foreign assets and liabilities of corporate debtors need to be incorporated in sanction memorandums while granting corporate loan;
- Identification of foreign assets/liabilities with details of location, legal rights etc. need to be looked into;
- Physical and technological capacity to monitor the borrower's Forex earnings/spending, foreign assets/ liabilities & exports and imports.
- Calibrated approach in lending to borrowers who have financial assets/guarantors at foreign location with no legal cross-border insolvency framework;
- Need to look into foreign jurisdictions which reciprocate and recognise the concurrent proceedings;
- Identification of COMI, norms for identifying main proceeding and non- main proceedings;
- Delegations & SOP guidelines for Bank officials to be framed for cross-border insolvency;
- Identification/empanelment of overseas legal firms & Insolvency representatives;
- Norms for empanelment of overseas legal firms/ Insolvency representatives to be formulated;
- Guidelines for accepting Personal Guarantees (PGs) of NRI/Foreign National to be formulated;
- Guidelines for accepting Corporate Guarantees (CGs) of foreign entity to be formulated.

- Need to develop Cost and value analysis and evaluation matrix to guide Banks/FIs on assessing the costs involved and anticipated value before commencing cross-border insolvency in any case. The same has been well defined in MCA draft for cross-border insolvency as the incentives of foreign creditors to initiate foreign proceedings will, hence, be driven by the size of the gap G, where G is defined as:

  $G_i = (L_i + C_i) - A_i$

  where,

  i: a foreign jurisdiction

  L_i: liabilities in jurisdiction i;

  C_i: insolvency process costs in jurisdiction i; and

  A_i: assets in jurisdiction i.

The lower the value of G_i, the higher the possibility of an insolvency proceeding in jurisdiction i to be successful. If a debtor company has multiple jurisdictions where G is low, it can expect multiple foreign insolvency proceedings.

- Capacity building at Banking Industry level (IBA/Regulators):
  - Formation of Central repository for oversees beneficial owners.
  - Formation Central repository of foreign assets created out of funding from domestic Banks/FIs.
  - Founding broad guidelines for empanelment & functioning of broad guidelines of overseas law firms/ Insolvency representatives functioning on behalf of domestic creditors.
  - Formation of Central repository for details of personal/ corporate guarantors located abroad.

“Banking System is a Continuous Process for Any Country, which shows the Firmness of the Country’s Economy.”

- Unknown

Appendix I

Questionnaire for Lending Institutions

Hello! We are conducting a survey to study the emerging issues from banking perspective under Cross-border Insolvency faced by lending institutions while lending to entities having foreign assets and liabilities or if the loan is covered by personal/ corporate guarantors located abroad. This is a research work titled “Cross-border Insolvency: Present Framework, Model Law & Emerging Issues from Banking Perspective” sponsored by IIBF (Indian Institute of Banking and Finance). We need your kind cooperation in completing this research. This information will not be used anywhere else and the name of the respondent as well as his/her organisation will not be disclosed. Thank you for your time and suggestions in advance.

<u>Target respondent</u>: The target audience for appended questionnaire are officers of Banks/FIs working in corporate lending, Legal Department & NPA Management Group handling Corporate Recovery across all level.

1) Are you working in a/an:

   a) Indian Bank;

   b) Indian Financial Institution;

   c) Foreign Bank;

   d) Foreign Financial Institution;

2) Does your bank/institution engage into corporate lending:

   a) Yes

   b) No

   c) Not aware

3) Which one of the appended constitutions of borrower best fit the term "*Corporate Debtor*"?

a) Individuals

b) Partnership firms

c) Domestic companies

d) Foreign Companies

4) Does your bank/institution give loan to "Corporate Debtor" having Foreign Assets, Liabilities and Operations?

a) Yes

b) No

c) Not aware

5) How high is the possibility of a corporate debtor holding any of the following foreign assets?

- Tangible assets in foreign country like Capital assets, including plant and machinery, office space and related assets and those that are work-in- progress, Movable assets, such as inventory.

a) High Possibility

b) Medium Possibility

c) Low Possibility

d) Least Possibility

6) How high is the possibility of a corporate debtor holding any of thefollowing foreign assets:

- Intangible assets in foreign country like Licenses, Intellectual Property Rights (IPRs) and long-term supply agreements.

  a) High Possibility

  b) Medium Possibility

  c) Low Possibility

  d) Least Possibility

7) How high is the possibility of a corporate debtor holding any of the following foreign assets:

- Loans and advances to foreign debtors like Loans given to third parties, to employees, to shareholders and directors, to associates and subsidiaries

  a) High Possibility

  b) Medium Possibility

  c) Low Possibility

  d) Least Possibility

8) How high is the possibility of a corporate debtor holding any of the following foreign assets:

- Foreign investments in foreign financial assets like in subsidiaries, associate companies and Joint Ventures (JVs)

  a) High Possibility

  b) Medium Possibility

  c) Low Possibility

  d) Least Possibility

9) How high is the possibility of a corporate debtor holding any of the following foreign assets:

- Receivables from foreign parties and Cash held in bank accounts in foreign countries, and petty cash in foreign operations.

    a) High Possibility

    b) Medium Possibility

    c) Low Possibility

    d) Least Possibility

10) How high is the possibility of a corporate debtor holding any of the following foreign assets:

- Foreign financial liabilities like secured/ unsecured loans, External Commercial Borrowings (ECBs), Fructified guarantees provided by the debtor to foreign persons.
- Foreign operational liabilities like trade payables, wages & salaries, statutory dues.

    a) High Possibility

    b) Medium Possibility

    c) Low Possibility

    d) Least Possibility

11) While sanctioning loans to corporate debtors, is there any formal assessment of these foreign assets, liabilities and operations with a view of any expected concurrent proceedings in a foreign jurisdiction, its impact & cost of participation in foreign proceedings?

a) Yes

b) No

c) Not aware

If yes, brief details thereof:

____

____

12) Does your bank/institute have laid-down guidelines/Standard operating Procedures (SoPs) for fructified guarantees provided by the debtor/guarantors to foreign persons?

a) Yes

b) No

c) Not aware

If yes, brief details thereof:

____

____

13) UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. Have you heardabout UNCITRAL Model Law earlier and its expected adoption in domestic context as part of Insolvency Bankruptcy Code?

a) Yes

b) No

14) Considering the increasing pace of global banking and financial business, do you acknowledge that it would be desirable to develop SoPs/guidelines on how cross-border matters/cases will be attended by Banks/Financial Institutions (FIs)?

a) Yes

b) No

If yes, brief suggestions/expectations thereof:

____

____

15) Do you feel the need to train the recovery & credit team for dealing with the wide range of issues and challenges that will arise in respect of cross-border matters?

a) Yes

b) No

16) Is it easy to identify/locate the foreign assets of corporate debtors from enforcement perspective?

a) Yes

b) No

c) Not aware

17) Do you feel the need to develop SoPs on identification of foreign assets and liabilities of corporate debtors and communication and cooperation among creditors on holding joint meetings?

a) Yes

b) No

c) Not aware

If yes, brief suggestions thereof:

____

____

18) Does your bank/institute have guidelines to look into following locational aspects while lending to a corporate debtor:

- location of assets of the corporate debtor;
- location of book of accounts of the corporate debtor;
- location of directors and senior management of the corporate debtor;
- location of creditors of the corporate debtor;
- location of execution of contracts and applicable law to key contracts and disputes;
- location where financing was organised or authorised, or from where the cash management system was run;
- location of corporate debtor’s primary bank account; and
- location from which purchasing and sales policy, staff, accounts payable and computer systems were managed.

a) Yes, all of the above are captured in the sanction memorandum;

b) Yes, majority of the above are captured in the sanction memorandum;

c) Yes, some of the above are captured in the sanction memorandum;

d) Not aware

If yes, tick the guidelines to be followed

19) Do you feel that there is need to develop Cost and value analysis and evaluation matrix to guide Banks/FIs to consider for assessing cost involved and anticipated value before commencing cross-border insolvency in any case?

a) Yes

b) No

20) Do you feel that there is a need at industry level for banking associations and regulators to come up with specified guidelines for dealing with cross-border insolvency?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

21) Do you feel that there is a need to form broad guidelines for empanelment & functioning of overseas law firms/ Insolvency representatives functioning on behalf of domestic creditors?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

22) Do you feel that there is a need to have a central repository of information on overseas beneficial owners of corporate debtors having borrowing in India?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

23) Do you feel that there is a need to have a central repository of information on financial assets created out of funding from Domestic Banks/FIs?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

24) Do you feel that there is a need to have a central repository of information on financial liabilities availed by a corporate debtor along with domestic borrowings from Domestic Banks/FIs?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

25) Do you feel that there is a need to have a central repository of information on of personal/ corporate guarantors located abroad for financial guarantees extended in India?

a) Yes

b) No

If yes, brief suggestions thereof:

____

____

26) Any challenges (if any) you faced while taking legal action for enforcement of security/debtors' assets located abroad?

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27) Any suggestion for capacity building, in view of increasing participation of Indian banking system in globalisation & international trade as Indian banking system needs to analyse the requirements of capacity building with Cross-border Insolvency.

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Appendix II

Questionnaire for Mid/Large Corporates

Hello! We are conducting a survey to study the emerging issues from banking perspective under Cross-border Insolvency faced by lending institutions while lending to entity's having foreign assets and liabilities or if the loan is covered by personal/corporate guarantors located abroad. This is a research work titled "Cross-border Insolvency: Present Framework, Model Law & Emerging Issues from Banking Perspective" sponsored by IIBF (Indian Institute of Banking and Finance). We need your kind cooperation in completing this research. This information willnot be used anywhere else and name of the respondent or his/her organisation will not be disclosed as well. Thank you for your time and suggestions in advance.

Target respondent: The target audience for appended questionnaire are management level officers (Middle/ Top Management) handling Finance in a corporate entity.

1) Are you working in a/an:
   a) Indian Company/entity;
   b) Foreign Company /entity;
   c) Multi-national Company/entity;
2) Has your company availed borrowing from Domestic Banks/Financial Institution (FI):
   a) Yes
   b) No
   c) Not aware

If yes, please share amount of borrowings availed

____

____

3) Has your companyavailed borrowing from Foreign Banks/FI:

a) Yes

b) No

c) Not aware

If yes, please share amount of borrowings availed

____

____

4) Is your company having *Foreign Assets & Liabilities*?

a) Yes

b) No

c) Not aware

5) Is your company having any of the following foreign assets? Please tickthe one or more applicable options:

a) Tangible assets in a foreign country like Capital assets, including plant and machinery, office space and related assets and those that are work-in- progress, Movable assets, such as inventory.

b) Intangible assets in foreign country like Licenses, Intellectual Property Rights (IPRs) and long-term supply agreements.

c) Loans and advances to foreign debtors like Loans given to third parties, to employees, to shareholders and directors, to associates and subsidiaries

d) Foreign investments in foreign financial assets like in subsidiaries, associate companies and Joint Ventures (JVs)

e) Receivables from foreign parties.

f) Cash held in bank accounts in foreign countries, and petty cash in foreign operations.

If Yes, Please provide the aggregate value of the foreign assets:

____

____

6) Is your companyhaving any of the following foreign liability? Please tick the one or more applicable options:

a) Foreign financial liabilities like secured/ unsecured loans, External Commercial Borrowings (ECBs), Fructified guarantees provided by the debtor to foreign persons.

b) Foreign operational liabilities like trade payables, wages & salaries, statutory dues.

c) If Yes, Please provide the aggregate value of the foreign liability:

____

____

7) Is your company conducting offshore operations?

a) Yes

b) No

c) Not aware

8) Has your company extended any corporate guarantee for your Wholly Own Subsidiary (WOS) / Group Company / Associate Company for loans taken abroad?

a) Yes

b) No

c) Not aware

If Yes, please provide the value of Guarantee extended for foreign creditors of WOS:

____

____

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vii) *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.*

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ix) https://ibbi.gov.in/en

x) Report *of the Cross Border Insolvency Rules/Regulations Committee-II ("CBIRC-II")*

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