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CROSS BORDER INSOLVENCY ISSUES IN INDIA: IS ADOPTION OF THE UNCITRAL MODEL LAW THE ROAD AHEAD?

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ABSTRACT

In India, Sections 234 and 235 of the Insolvency and Bankruptcy Code deal with Cross border Insolvency scenarios. These provisions require the respective countries to enter into bilateral agreements in order to administer cross border insolvency proceedings. The legal framework in India provides only an enabling provision and fails to identify a proper structure for an international insolvency regime. Even after repeated recommendations of several expert committees that have been constituted by the government, the Indian Legislature has failed to introduce a unified international law. The Ministry of Corporate Affairs has planned to introduce draft chapter dealing with cross border insolvency under the Insolvency & Bankruptcy Code, 2016 (IB Code) and has issued a public notice inviting suggestions and comments on the same. The chapter on cross border insolvency will mostly be based on the United Nations Commission on International Trade Law Model Law on Cross Border Insolvency (the "UNCITRAL Model Law")1 . On 16th November 2017, Government of India also appointed 'Insolvency Law Committee' headed by Secretary of Ministry of Corporate Affairs (MCA) to give recommendations on adopting the Model Law in India. Through this paper, the author identifies the various issues in the existing legal framework governing cross border insolvency in the country. It also analyses the Committee report suggesting the adoption of the UNCITRAL Model Law on Cross Border Insolvency, formulated by the United Nations Commission on International Trade Law as a solution to these issues.

KEY WORDS

UNCITRAL Model Law, Corporate Debtor, Insolvency, Jurisdiction

RESEARCH QUESTIONS

1. What are the issues in the existing legal framework dealing with cross border insolvency in India?
2. Whether the adoption of the UNCITRAL Model Law on Cross Border Insolvency address those issues?
3. What are the benefits of adopting the UNCITRAL Model Law on Cross Border Insolvency over the existing legal framework?

RESEARCH METHODOLOGY

In order to answer the research questions, the researcher adopted the doctrinal method. The researcher examined the existing legislations and scholarly articles and journal publications along with a few judgments of various high courts and the Supreme Court.

CHAPTERS OF THE PAPER

1. INTRODUCTION

With rapid globalization and increasing foreign trade, many corporate entities tend to have businesses in several countries. As a result, their assets, debtors, creditors etc., are spread across different countries. This increases the risk of cross border insolvencies.[1] Insolvency refers to a situation where a financial debtor is unable to pay the debt owed by him. When a corporate entity has transactions in multiple countries, scenarios of insolvency may arise in various circumstances. These include situations where an Indian entity has both foreign as well as domestic creditors and is holding assets both in India and overseas; situations where the Indian entity has foreign subsidiaries and has guaranteed debts of such a subsidiary. Another situation arises where a foreign entity has foreign creditors who hold

[1] Neil Cooper and Rebecca Jarvis, "Recognition and Enforcement of Cross-Border Insolvency", (John Wiley & Sons 1996). A "truism of a free market economy is that there will be insolvencies"; Kent Anderson, "The Cross-border Insolvency Paradigm : A Defense of the Modified Universal Approach Considering the Japanese Experience", (2000) 21 U. Pa. J. Int'l Econ. L. 679.

assets in India.[2] Keeping in mind all these possible scenarios and rapid globalisation, it is widely accepted that there is a need for a uniform law and insolvency related rules across several nations. Co-operation of local authorities in international insolvency proceedings, help in protecting the rights of creditors and debtors and ensure just administration.[3]

Cross border Insolvency laws deal with answering three major questions: who has jurisdiction to administer the process, which laws should be applied and how the judgements are to be enforced? Cross-border insolvencies generate obvious coordination and governance difficulties. The fundamental issue which is the presence of assets, claims, and creditors in several jurisdictions , is amplified by the existence of complex, multinational enterprises working through corporate structures in various jurisdictions across the world. At whatever point there is a cross-border insolvency issue, these fundamental queries may emerge. Should the organization's undertakings be managed under a solitary worldwide regime, or would it be advisable for them to be managed piecemeal, jurisdiction by jurisdiction? In the event that there is to be a single worldwide regime, from which jurisdiction, and under which law, will it be actualized? Which law shall be applied for the distribution of assets, the law of the country in which those assets are situated or some other law, for example, that where the company was incorporated?

As of now, India does not have a clear legal framework to manage cross border insolvency and the Ministry of Corporate Affairs intends to introduce a draft chapter on cross border insolvency under the Insolvency & Bankruptcy Code, 2016 (IB Code) as it has issued a public notice welcoming suggestions and comments on the same. The chapter on cross border insolvency would be generally based on the United Nations Commission on International Trade Law Model Law on Cross Border Insolvency (the "UNCITRAL Model Law").

2. LEGAL FRAMWORK IN INDIA

[2] Ran Chakrabarti, KEY ISSUES IN CROSS-BORDER INSOLVENCY, , Vol. 30, No. 2 , National Law School of India Review , 119-135, (2018).
[3] World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, April 2001.

The Insolvency and Bankruptcy Code, 2016[4] is the law governing cross border insolvency in India. Section 234 of the Code enables the Central Government to enter into bilateral agreements with nations to determine disputes relating to cross border insolvency. Central Government can make any agreements with the foreign country to start with the insolvency proceedings. Central Government will do so with those nations with which there are reciprocal arrangements.[5] Section 235 enables the Hon'ble Adjudicating Authority to issue letter to the court of such nation with whom the bilateral agreement has been signed. This application ought to be addressed to the relevant authority that is an adjudicating body in a specific country to provide for evidence in relation to assets of the debtor in country. This application can only be sent to the countries having reciprocal arrangements with India.[6]

For foreign proceedings to be recognized in India, Civil Procedure Code, 1908[7] is applicable along with the principles that have been developed in English common Law. Section 44A of the Code of Civil Procedure of 1908, allows the Indian courts to implement the orders passed by non-Indian courts in "reciprocating territories". A country would be considered a reciprocating territory if it was declared by the Government of India through publication in the Official Gazette.[8]

The existing legislative framework is not sufficient to deal with situations like parallel proceedings, coordination, cooperation etc, and different agreement have to be made with different countries which leads to complexity. A model and common approach for all the Countries is required to have hassle free solutions. These provisions are inadequate and insufficient and face various challenges. It fails to address the issue when there are assets and creditors in countries with which there is no reciprocal agreement. It does not address matters with respect to assets which are in jurisdictions where a reciprocal arrangement exist with one country and absent in another. It does not provide for a fair, transparent, certain and predictable process. Moreover, it is inconsistent with the International best practices.

[4] Insolvency and bankruptcy Code, 2016, No. 31, Acts of Parliament,2016 (India).
[5] Section 234, Insolvency and bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[6] Section 235, Insolvency and bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[7] Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908 (India).
[8] Section 44A, Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908 (India).

An Insolvency Law Committee[9], headed by the Secretary of Ministry of Corporate Affairs, had been appointed by the Government of India on November 16, 2017 for reviewing the implementation of the Insolvency and Bankruptcy Code, 2016. The Committee was also required to give recommendations on the adoption of the UNCITRAL Model Law on Cross Border Insolvency, 1997.

In its report dated 16 October 2018, the committee recommended the adoption of the Model Law with necessary modifications. It proposed a draft Cross Border Insolvency legislation that would go into the IB Code. The proposed law included provisions relating to few key components like access of foreign representatives and creditors to the Adjudicating Authority, Recognition of Foreign Proceedings, Co-operation with foreign Courts in which concurrent proceedings are being carried out, etc.[10]

3. MAJOR ISSUES

Cross border Insolvency is subject to countless problems. The main reason behind these problems is the lack of a comprehensive cross border insolvency framework.

If insolvency proceedings are subject to the governance of the laws of multiple jurisdictions, it leads to conflict of laws, as a result of which issues arise. These issues include recognition and enforcement of foreign judicial decisions, recognition of interests of foreign creditors and variations in the applicable laws on disposal of the debtor's assets.[11]

A significant part of the academic debate over the method to be adopted to deal with international insolvencies revolves around the discussion of two contending theories: universalism and territorialism. The essence of territorialism is that local assets are utilized to satisfy local creditors in local proceedings with little regard for proceedings or parties somewhere else. Conversely, the point of universalism is to provide a single forum applying a single legal regime to all aspects of a debtor's affairs on a worldwide basis.

[9] Report of Insolvency Law Committee on Cross Border Insolvency, October 2018.
[10] Himanshu Handa, Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India, 2018 IJLMH | Volume 1, Issue 5 | ISSN: 2581-5369.
[11] MOHAN, S. Chandra. Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?. (2012). International Insolvency Review. 21, (3), 199-223.

As the name suggests, Universalism allows insolvency proceedings to be universally recognised in all those states in which the Debtor has dealings. Territorial Approach on the other hand, grants exclusive jurisdiction to each State over the insolvency of a particular Debtor.

The principle of Universalism has been propounded by Lord Hoffman in various cases. It recommends that there ought to be a unitary proceeding for bankruptcy in the bankrupt's home jurisdiction that will apply universally to all the bankrupts assets and will receive worldwide recognition. The object behind this principle is that a creditor must suffer a disadvantage merely because he lives in a jurisdiction where there are fewer assets or more creditors. Universalists encourage the judges to follow modified universalism and interpret Model Law enactments in way that approximates to universalism's ideal "one court, one law" approach.[12]

In Galbraith v. Grimshaw[13], the English Court held that there ought to be only one universal process for the distribution of a bankrupt's property and where that process was pending somewhere else, the English Courts ought not let the actions within its jurisdiction interfere with that process.

Professor Westbrook, a recognized American scholar, and others argue that universalism is fundamentally the best long haul answer to cross-border insolvency. He contends for the application of what he has called modified universalism. Under this approach, the underlying premise is that all the assets of the debtor should be collected and distributed on a worldwide basis in a single proceeding. However, the application of universalism is not automatic but, rather, is reliant on the local court being satisfied that the main proceedings are fair. Modified universalism is "modified" on the grounds that it grants local courts the power to evaluate the foreign law and the foreign courts before deferring to a main proceeding.

The UNCITRAL Model Law on Cross Border Insolvency has been recognized as an embodiment of "modified universalism". The Model Law accommodates a Universalist

[12] A K Sikri, CROSS BORDER INSOLVENCY: COURT-TO-COURT COOPERATION, Journal of the Indian Law Institute, Vol. 51, No. 4 (OCTOBER-DECEMBER 2009), pp. 467-493.
[13] Galbraith v. Grimshaw, AC 508 (1910).

framework for fair and efficient administration of cross border insolvencies in a single forum governed by a single law.[14]

The option in contrast to the universalist approach is a territorialism, which leads to a multiplicity of insolvency administrations in whatever jurisdictions the insolvent debtor has assets. Universalism, as advanced under the Model Law is intended to promote the objectives of the creditors as a whole yet not to the degree that the interests of local creditors are sacrificed, which are expressly protected.

The principle of universalism in cross border insolvency promotes the efficiency in insolvency administrations and greater cooperation across jurisdictions. An efficient administration will ordinarily prompt better outcomes for the creditors. There is scholarly consensus that universalism is an ideal framework for managing cross border insolvencies in a global market setting. The Model Law is neutral which makes it palatable for the countries to adopt. It is accepted that repeated transactions between enacting states will acclimate courts to cooperation among universalist lines.

Both Universalism and Territorialism have their advantages and disadvantages and as a result, most of the States have ended up adopting a stance somewhere in between the two extremes, known as modified Universalism or the hybrid approach in which jurisdictions try and work out the most relevant center for conducting the proceedings along with co-operation from other jurisdictions in relation to assets that are located there.

Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognize the jurisdiction of foreign courts in respect of the branches of foreign companies operating in India. Accordingly, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is filed before an insolvency court for the winding-up of its branches in India.[15]

4. THE JET AIRWAYS CASE

[14] Ran Chakrabarti, KEY ISSUES IN CROSS-BORDER INSOLVENCY, National Law School of India Review , Vol. 30, No. 2 (2018), pp. 119-135.

[15] A K Sikri, CROSS BORDER INSOLVENCY: COURT-TO-COURT COOPERATION, Journal of the Indian Law Institute, Vol. 51, No. 4 (OCTOBER-DECEMBER 2009), pp. 467-493.

In the Corporate Insolvency Resolution Process (CIRP) of *Jet Airways (India) Ltd*.[16], the issue came up for discussion on the validity and priority of the **Insolvency proceedings** being conducted at a country outside India, where the CIRP for Jet Airways is already initiated under Indian Insolvency Code, 2016. Jet Airways has properties in India and outside India too. At the point where CIRP against Jet Airways started under the Code in India where Registered Office of the 'Corporate Debtor' is situated and similar proceedings were already started at Netherland, where the Regional Hub of the 'Corporate Debtor' is situated. In Netherland, Jet Airways was declared bankrupt in response to a complaint filed by two European creditors where a Dutch court administrator is appointed who approached its Indian counterpart for access to the financials as well as assets of the Corporate Debtor. When Mumbai bench of NCLT vide its Order dated 20th June, 2019 declared the overseas bankruptcy proceedings against Jet Airway as null and void, the Dutch Court Administrator filed a petition at NCLAT against the order of the Mumbai NCLT.

NCLAT directed the Indian Resolution Professional to enter into arrangement with the Dutch court administrator on the terms agreed by him and put the draft agreement before NCLAT for consideration. NCLAT likewise directed COC to cooperate with the Indian Resolution Professional, in this regard. After various hearings, it was finally decided by NCLAT that the Dutch court administrator will have right to attend COC meetings though he cannot vote thereat. It denied the COC's stand of objecting the Dutch court administrator to participate in COC meeting stating that COC has no role to play since the Agreement is reached between the Dutch court administrator and Indian Resolution Professional.

This case clearly exhibits that there is a requirement for adopting and implementing provisions of the UNCITRAL Model Law on Cross Border Insolvency, 1997 by making the necessary amendments in Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016. This case focuses towards the fact that the judiciary has to investigate into the practical implementation of the existing legal provisions in the country. NCLAT endeavoured to provide a balanced solution by permitting participation of the Dutch Court administrator in COC meeting and at the same time restricting him from transferring the property in his possession till the matter is decided.

[16] State Bank of India and Ors. Vs. Jet Airways (India) Limited, 151 CLA 507, (2019).

5. UNCITRAL MODEL LAW

The UNCITRAL Model Law on Insolvency and Bankruptcy[17] is a broad framework for managing cross border insolvency issues. The Model Law has been established by the United Nations Commission on International Trade Law. The Model Law gives a mechanism to co-ordinate cross border insolvencies. It is intended to be adopted by nations and is not a treaty. It accommodates co-operation between courts, fair and efficient proceedings and means to ensure that the interest of all parties including domestic as well as foreign creditors, is protected.

The UNCITRAL Model Law sets out the principle of "center of main interest" or 'COMI' which is applied for deciding where the main proceeding should be commenced. The principle suggests that COMI is the seat of a corporate entity's significant and major stakes, whether in terms of control, the location of its assets or its significant operations. It is dictated by factors which are both objective and ascertainable by third parties, especially creditors and potential creditors.[18] The courts generally consider other factors, such as the location of the debtor's primary assets; location of the debtor's headquarters; the location of those who actually manage the debtor; the location of the majority of the debtor's creditors or of a majority of the creditors who might be affected by the case and the jurisdiction whose law would apply to most disputes.[19]

In the event that the COMI of an Indian debtor falls outside India, foreign main proceedings shall ensue in that jurisdiction, and the Insolvency and Bankruptcy Code, ceases to apply as it doesn't have extraterritorial effect. In consequence, the relief that was accessible to Indian creditors in that jurisdiction becomes subject to the laws of where the foreign main proceedings are initiated and the provision of the Code, shall be applicable, only in so far as it is consistent with or otherwise, at the discretion of the court in whose jurisdiction the foreign main proceedings are commenced. The UNCITRAL Model Law does not import the substantive law of the foreign system into the insolvency system of the enacting state, nor

[17] United Nations Commission on International Trade Law, Model Law on Cross Border Insolvency, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.
[18] Stanford International Bank Ltd., In re, 2011 Ch 33 : (2010) 3 WLR 941 : 2010 Bus LR 1270 (at ¶56).
[19] SphinX, Ltd., In re, (2007) 371 BR 10 (SDNY 2007).

does it apply the relief that would be available under the enacting state in any foreign proceedings. It does, however, grant recognition and assistance to foreign representatives of an insolvency resolution process in applying for interim relief and automatic stays, where available in that particular jurisdiction where such relief is sought.

The Model Law provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

6. CONCLUSION

There is pressing need to standardize the framework of cross border insolvency in India to have consonance with rapidly increasing foreign trade. The Model law tries to mitigate the repetitive issues by giving a straightforward, simple and realsitic legal framework. The goal is to execute a coherent, intelligible and efficient international legal system. It proposes four components to facilitate the cross-border insolvency resolution process - access, recognition, relief and cooperation.

It intends to give access for the person administering a foreign insolvency proceeding to the courts of the enacting state; to provide a transparent regime for the right of foreign creditors to initiate, or partake in, an insolvency proceeding in the enacting state; permit courts in the enacting state to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter; provide speedy access to foreign insolvency practitioners to the courts of enacting states to aid the prevention of the dissipation and transfer of assets out of the jurisdiction; and so on.

Adopting the UNICITRAL Model Law will aid in improving the ranking for ease of doing business, give priority to domestic proceeding, provide remedy in other jurisdictions for Indian creditors, serve as a mechanism of cooperation etc.

Adoption of the UNCITRAL Model Law with the necessary modifications would give the National Company Law Tribunal access to Corporate Insolvency Resolution Process that is being carried out in foreign courts, which would help in reducing the burden on the

judiciary in India and achieve the objective of completing the resolution process in a time-bound manner and maximize the value of the assets of the corporate debtor.[20]

The Model Law also provides a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting state.

The Government of India has proposed to adopt the UNCITRAL Model Law on cross border insolvency, into the existing IB Code with certain modifications. This would give NCLT the access to Corporate Insolvency Resolution Process that is being carried out in foreign courts, which would facilitate in reducing the burden on the judiciary in India and achieve the objective of completing the resolution process in a time- bound manner and maximize the value of the assets of the corporate debtor. The suggested draft chapter only provides for the bankruptcies of Corporate Debtors, which restricts the scope of cross- border insolvencies as individual debtors are not included. Reciprocity as such is not a requirement of the Model Law, but adopting the same will not restrict India from preserving the current provisions pertaining to cross- border insolvencies. The easiest solution would be for India to simply sign and ratify the Model Law and then incorporate that into the Code. In this way, the notification, setting out the draft chapter on cross-border insolvency is to be invited. However it is expected that it makes ready for India's accession to the UNCITRAL Model Law, as opposed to the relentless option of going into bilateral agreements with different jurisdictions.

TABLE OF CASES

1. Galbraith v. Grimshaw, 1910 AC 508.
2. Stanford International Bank Ltd., In re, 2011 Ch 33 : (2010) 3 WLR 941 : 2010 Bus LR 1270
3. SphinX, Ltd., In re, (2007) 371 BR 10 (SDNY 2007).
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[20] Himanshu Handa, Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India, 2018 IJLMH | Volume 1, Issue 5 | ISSN: 2581-5369.