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AN ATROCIOUS NEED OF FULL DEVELOPED CROSS BORDER INSOLVENCY LAWS IN INDIA

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ABSTRACT

In an era of globalization and rapidly expanding cross-border trade, this study aims to explore the major concerns surrounding the bankruptcy of a corporation with worldwide asset connections. Because the Ministry of Corporate Affairs recently requested views on the draught chapter on cross-border insolvency that was intended to be incorporated to the Code, addressing these questions has become crucial to the development of insolvency laws in India. Given that India has not yet ratified the UNCITRAL Model Law on Cross-Border Insolvency, the country's legal system falls well short of international standards. By discussing the fundamental ideas of cross-border bankruptcy and outlining what could occur when an insolvent firm has significant assets abroad, this paper aims to close the gap in clarity.

Introduction

The rapid development of technology, global commerce, and the world of business has led to an increase in the number of multinational corporations, which has, in turn, led to the elimination of borders between nations and their respective business communities. At the moment, nearly every nation on earth has commercial ties with other nations that span more than one jurisdiction. When a company has a presence in a number of different countries, it naturally attracts creditors and debtors who are based in a variety of different places. Because of this, the process of becoming bankrupt, which includes the overlap of many separate laws and procedures, is a difficult one. On the other hand, there is a question that has to be answered about the degree to which the national laws correspond with the international regulation that is associated with bankruptcy.

The Insolvency and Bankruptcy Code was enacted in 2016, marking five years since its inception, first came into effect, and in that time, the law has seen a dramatic change from its infancy. Whenever possible, problems that have occurred in practise have been resolved by introducing new rules or citing previous cases. The legal situation with regard to cross-border insolvency has, on the other hand, been stuck in the debate stage for an indefinite amount of time. In spite of substantial progress made since 2018, the legal framework in India does not yet have a complete body of statutes addressing the issue. In addition, it was said in the Economic Survey 2021–22[1] that "at the current time, the Insolvency and Bankruptcy Code,

[1] https://www.indiabudget.gov.in/economicsurvey/2022.

2016 (IBC) provides for the domestic rules for the treatment of an insolvent firm." At this time, the IBC does not provide a standard instrument that may be used to restructure businesses that include several countries. Even though international creditors are allowed to lodge claims against a domestic firm at this time, the IBC does not yet provide automatic recognition of any bankruptcy procedures that take place in other countries[2]. Along the same lines as the previous proposal, the Union Budget 2022–23 has also suggested that "necessary adjustments in the Code would be carried out to strengthen the effectiveness of the resolution process and enable cross-border insolvency resolution."

Meaning of Cross border Insolvency

Cross-border bankruptcy, often known as international insolvency, refers to a situation in which an insolvent debtor has creditors and/or debtors located in more than one jurisdiction, i.e., in separate nations. The insolvency professional performs a number of tasks during domestic bankruptcy procedures, including inventorying the debtor's assets, cataloguing the creditors, and determining the amounts owed and payable to each. After receiving approval from the adjudicatory authority, the claims are then settled based on the priority rule, which dictates the order in which the claims are processed.

The Insolvency and Bankruptcy Code of 2016, often known as the IBC, is the key piece of law in India that governs insolvency and bankruptcy. In spite of the fact that the IBC has made headway toward the unification of the bankruptcy procedure in India, it does not provide an appropriate mechanism for the regulation of cross-border insolvency procedures.

In the context of cross-border bankruptcy, we refer to situations in which the insolvent debtor has assets and creditors located in more than one country or where insolvency procedures have been commenced against the insolvent debtor in more than one country. In India, the Ministry of Corporate Affairs established the Insolvency Law Committee (also known as the "ILC") for the purpose of analysing and evaluating how well the Insolvency and Bankruptcy Code of 2016, or "IBC," is operating and being put into effect. Since India's present insolvency system falls short of international norms, the Bankruptcy and Bankruptcy Code of India (ILC) recommended in its report that the country adopt the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") to address issues with cross-border insolvency. The ILC proposed this because the current framework was not in line with the global standards.

In the meantime, the implementation of the Code was evaluated by the Insolvency Law Committee on Cross-Border Insolvency (ILC), which is part of the “Ministry of Corporate Affairs” (MCA). The Indian Legislative Council (ILC) suggested in its report that the current insolvency framework be re-evaluated and that India adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997 (Model Law), in order to address the issues that are associated with cross-border insolvency in the

[2] Economic Survey, Chapter 04 – Monetary Management and Financial Intermediation – Para 4.66 to 4.68

country. This recommendation was made because the current insolvency framework does not meet global standards.

Framework in India

When it comes to insolvency, the procedure that pertains to cross-border insolvency is largely focused on regulating the insolvency processes that operate beyond the scope of domestic jurisdiction and the limits that are involved in the same.

Insolvency that occurs across international borders is complicated by the following factors:

- ensuring that the interests of both local and international creditors are protected to the same degree;
- the total value of a debtor's assets that are spread out across many countries and need to be protected;
- uniformity in the bankruptcy laws and practises of various jurisdictions; coordination and cooperation among the various courts other judicial authorities in various jurisdictions;
- the domestic laws that are applicable thereto.

Section 234 and Section 235, IBC 2019

Sections 234 and 235 of the International Business Companies Act are the two clauses that may be used to aid in cross-border insolvency issues. The Central Government is given the authority to engage into bilateral agreements with foreign jurisdictions under Section 234 of the IBC, which gives them the ability to handle concerns relating to cross-border bankruptcy. In contrast, Section 235 authorises the adjudicating authority to send letters of request to the courts of the country with which the bilateral agreement has been entered into under Section 234, with the goal of resolving the issue of what happens to the assets of corporate debtors located outside of India. Despite the fact that bilateral agreements are a source of dependency that is time-consuming, costly, and does not provide a definitive answer owing to the various levels of negotiation that are needed, these clauses at least shed light on the problem of cross-border bankruptcy in IBC.

Due to the corporate debtor's assets being located in multiple locations, the adjudicating authority may have to deal with one of the most difficult and time-consuming issues possible when trying to strike a balance between the conflicting clauses of the various treaties it has signed with the various jurisdictions. The International Law Commission (ILC) acknowledged in its March 2018 report that the current provisions of the International Business Companies Act (IBC), including Sections 234 and 235, do not provide a complete framework within which to manage cross-border challenges. Because of the complexity inherent in the cross-border regime, in-depth research was necessary prior to implementing the model legislation in India. As a result, adopting the basis of the Model Law appears to be a reasonable solution to this problem.

Although the "seat" of the corporate bankrupt firm, Maxwell Communications Corporation ("MCC"),[3] was located in England, the corporation had many other functioning companies located in the United States. As far as international bankruptcies go, this was an early one. Cross-border insolvency occurs "when a debtor has assets and creditors spread across different countries and/or when bankruptcy proceedings have been initiated against the debtor in more than one jurisdiction." Therefore, it is of the utmost importance for all of the involved jurisdictions to work together, as shown by the following quote from Justice Brozman, which illustrates the importance of this concept: "The joint administrators in England and the examiner in New York, subject to the jurisdiction of both courts, have carried out the administration of MCC in unprecedented cooperation with each other... in accordance with a document called the Protocol."[4]

In same way that the United States and the United Kingdom had a disagreement on MCC, India did not have any pre-existing law that outlined efficient methods to resolve cross-border disagreements. In the beginning, the country used a territorial approach, and it fully ignored the Dutch process, which declared such a method to be legally invalid. In spite of this, the National Company Law Appellate Tribunal (NCLAT) ruled in favour of allowing the first cross-border insolvency proceeding after "securing the cooperation" of the Dutch bankruptcy administrators. The main insolvency proceeding was held in India and was subject to the laws of that country. Once again, the collaboration between "the several jurisdictions" was achieved by means of an agreed-upon protocol that was established on the principle of "pure universalism." While Sections 234 and 235 of the Insolvency and Bankruptcy Code acknowledged the formation of a bilateral agreement that could serve as the foundation for such a "protocol," the Ministry of Finance determined that this kind of ad hoc procedure would significantly slow down the insolvency proceedings. So, every region needs its own "protocol" defining how it will handle cross-border issues including legal disagreements and international cooperation. The United Nations Commission on International Trade Law ("UNCITRAL") established the "Model Law on Cross-Border Insolvency" ("Model Law") in order to help all countries with their insolvency laws.

In **State Bank of India v. Jet Airways (India) Ltd[5]**

Jet Airways was the first Indian company to face a foreign judgement in India in 2019. An international issue involving India was the subject of the judgement. When it issued the direction to carry out a "Joint Corporate Insolvency Resolution Process," the National

[3] [1992] BCC 757

[4] Jay Lawrence Westbrook, The Lessons of Maxwell Communication, 64 Fordham L. Rev. 2531 (1996).

[5] Company Appeal (AT) (Insolvency) No. 707 of 2019.

Company Law Tribunal (NCLT) set a major precedent for future cross-border insolvency concerns. This is what is expected to occur in the future.

The State Bank of India took legal action against Jet Airways by filing an application under Section 7 of the Insolvency and Bankruptcy Code (IBC). On June 20, 2019, when the case was admitted, the process of corporate insolvency resolution got underway. The NCLT was aware that insolvency proceedings had been initiated against Jet Airways in the Dutch Court and that a bankruptcy administrator had been appointed in the Netherlands for the purpose of determining what would happen to the assets of Jet Airways that were based in the Netherlands. The legal process in the Netherlands got underway when two creditors from Europe presented a petition for bankruptcy against Jet Airways, claiming that the airline owed them a total of INR 280 crores in outstanding debts.

Since a competent court as per Article 2(4) of the Dutch Bankruptcy Act was adjudicating the matter in the Netherlands, the Bankruptcy Administrator appointed by the Dutch Court filed a motion with the Mumbai Bench of the National Company Law Tribunal (NCLT), requesting that the Bench recognise the insolvency proceedings that had begun in The Netherlands and stay the insolvency proceeding in India against Jet Airways. This was done since the issue was being decided by a competent court, as required by Article 2(4) of the Dutch Bankruptcy Act.

It would be detrimental to the interests of the creditors to have parallel processes in several jurisdictions, which would also have an impact on the reorganisation of the corporate debtor's assets and claims against the business. However, the NCLT did not agree to halt the proceedings because Sections 234 and 235 of the IBC, which dealt with insolvency that occurred across international borders, had not yet gone into effect. As a result, the Bankruptcy Administrator was unable to take part in the insolvency proceedings that were taking place in India. Additionally, the NCLT refused to accept the procedures that had begun in the Netherlands and ruled those processes null and invalid.

The order that was handed down by the NCLT was overturned as a result of an appeal filed by the bankruptcy advisor before the National Company Law Appellate Tribunal (NCLAT). A prerequisite of approving the appeal was that the bankruptcy trustee guarantee that no Jet Airways offshore assets will be sold or otherwise transferred. The NCLAT also mandated collaboration between the bankruptcy trustee and the resolution professional, leading to the trustee being allowed to attend committee of creditors sessions in an observer capacity. This was one of the directives issued by the NCLAT. As a result of the judgement, the resolution professional and the bankruptcy administrator came up with a cross-border insolvency protocol after taking into consideration the principles of the Model Law. It was determined that India would serve as the COMI, while the hearings in the Netherlands would take place as non-main centre proceedings.

Reports and Discussions

In the first part of its two-part study, the ILC suggested that India should adopt Model legislation in order to address and resolve the issues that are associated with cross-border bankruptcy in India. The International Law Commission (ILC) created the Draft Part Z in the second part of the Report that it produced. This draught was greatly influenced by the Model Law and incorporates within itself the most important aspects of the Model Law.[6] The following reasons, which are presented in the ILC's Report, were cited as justification for its acceptance by the ILC: The current rules on cross-border insolvency that are included in (Sections 234 and 235) of the IBC do not offer a wide or complete framework for cross-border insolvency cases. These provisions may be found in the IBC. The procedure for the incorporation of all insolvency orders into the Civil Procedure Code that is used for the execution of foreign verdicts is not sufficiently inclusive. The adoption of the Model Law would aid in attracting more foreign investment by facilitating the recognition of foreign insolvency procedures and enhancing the cooperation between domestic and foreign bankruptcy proceedings. This will be accomplished by providing avenues for recognition of foreign insolvency proceedings. The Model Law allows for some wiggle room so that the public interest may be protected, and it also gives domestic procedures precedence over international ones. Following the publication of the ILC Report, the Ministry of Corporate Affairs (MCA) established the Cross Border Insolvency Rules/ Regulations Committee (abbreviated as "CBIRC") by issuing an Office Order on the 23rd of January 2020.[7] This was done in order to guarantee the effective and efficient implementation of the cross-border insolvency provisions suggested by the ILC Reports. In order to put the ILC Report into action, the CBIRC was tasked with developing recommendations on the necessary laws and regulations.

After conducting an in-depth analysis of the provisions of the UNCITRAL Model Law, the International Law Commission (ILC) suggested adding Draft Part Z. The following is a list of key highlights from the Draft Part Z: application only in certain situations: Corporate debtors ("CD"), including international companies that are under the jurisdiction of the Companies Act 2013, are the only entities to whom the Draft Part Z currently applies ("CA"). Individual bankruptcies and international partnerships are excluded. The limited scope of the application is due to the fact that a full-scale execution may initially be difficult to execute due to an insufficient awareness of the potential practical obstacles.

For cases when a foreign court's ruling has to be enforced in a domestic court, the Draft Part Z allows for "legislative reciprocity," which means that the domestic court will do so provided that the foreign court has also established legislation along the same lines. In other words, legislative reciprocity allows for legislative recognition and enforcement. As a result, it would

[6] Adams, Edward S. and Finke, Jason, Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism (2009). Columbia Journal of European Law, Vol. 15, pp. 43-88, 2008-2009.

[7] Draft Part Z, Clause 11(1). See also: IBBI (Application to Adjudicating Authority) Rules, 2016.

be applicable in foreign jurisdictions that have accepted the UNCITRAL Model Law and in foreign jurisdictions with whom the Central Government has entered into an agreement to enforce sections of the Code. Also, those countries that have approved the UNCITRAL Model Law would be bound by it. Compensation for Overseas Investors: The foreign creditors shall have rights regarding the commencement of and participation in a proceeding on par with the domestic creditors, subject to the ranking of claims in a proceeding under the Code. These rights shall be indistinguishable from the rights of domestic creditors. Additionally, whenever a notice is necessary to be provided to a creditor in India, a comparable notice should also be issued to the international creditors. This is the case whenever a notice is required to be delivered. Center of the Most Important Concerns, or "COMI": If the CD's registered office has not been relocated to another nation during the previous three months, then the COMI serves as the CD's registered office. Otherwise, the CD's registered office remains in its original location. Additionally, in the process of calculating the COMI of the CD, the adjudicating authority may choose to undertake evaluation whenever it is necessary to do so.

Avoidance of actions that are detrimental to creditors: Upon recognition of the foreign proceeding, In order to prevent creditor-harming activities, the foreign representative may apply to the adjudicating authority ("AA") for an order pertaining to provisions 43, 45, 49, 50, and 66 of the IBC. And the starting date of the foreign proceedings should be chosen in accordance with the law of the country in which the foreign proceeding is taking place, for the purpose of defining the insolvency beginning date of the international procedures. Various types of legal procedures: In the Draft Part Z, there are descriptions of two different kinds of foreign procedures, which are as follows: Proceedings in a foreign primary jurisdiction take place in the territory in which the CD maintains its COMI.[8] Foreign non-main procedures are those that take place in a jurisdiction (or jurisdictions) other than the one in which the COMI is situated and in which the CD has an establishment. After the recognition of a foreign main proceeding, a new proceeding might be initiated as follows: Assets based in India will be the only ones affected by the proceedings, save to the extent that this is required to adopt measures of cooperation and coordination with other assets that, under Indian law, should be handled in that case. In order for international primary proceedings to be launched under this Code once they have been recognised, the corporate debtor must have assets in India.

Coordination between many legal processes conducted in a foreign country[9]: In light of the fact that coordination is an essential component, the ILC study included the following information: After the recognition of the foreign main proceedings, any relief that is awarded to the representative in the foreign non-main proceedings must be consistent with the foreign main proceedings. If the relief that was provided in foreign non-main proceedings is inconsistent with the review that was granted to the foreign representative in foreign main proceedings, then

[8] Box 15, CBIRC Report 2020, page 69.

[9] Millennium Global Emerging Credit Master Fund Ltd, District Court Southern District of New York, Case No. 11 Civ. 7865 (LBS) (25 June 2012)

the relief that was granted will be examined and maybe amended. If there are two or more non-main procedures that have been recognised, the adjudicating authority is required to amend, terminate, or give remedies in order to facilitate coordination between the non-main proceedings. Appeals and the Authorities That Hear Those Appeals: Within a period of thirty days, any appeal that challenges the decision of the adjudicating authority must be filed with the National Company Law Appellate Tribunal (NCLAT). However, if the NCLAT determines that there were compelling reasons for not filing an appeal within the aforementioned 30 days, it may grant an extension of up to 15 more days. An appeal against an order of the NCLAT that raises a question of law must be filed with the Supreme Court within 45 days of the day on which the order was received. The Supreme Court may grant a 15-day extension to the deadline for filing an appeal if it determines that good cause prevented the appeal from being filed within the first 45 days.

Conclusion

Decades ago, it became clear that dealing with bankruptcy on a global scale necessitated the existence of a comprehensive system that could tackle any and all specific challenges. Despite the fact that a number of committees have already published their recommendations on cross-border bankruptcy, the current framework, which consists of Sections 234 and 235 of the IBC, is insufficient to address all elements of insolvency.

The Model Law is a positive step that has been taken toward the construction of such a system; nonetheless, it is not independent of the limitations that are inherent to it. In the context of India's position on the implementation and acceptance of the Model Law, the issue of reciprocity is one of the most significant problems among all others, aside from the inefficiencies caused by India's infrastructure.

However, after the challenges and limitations have been surmounted, the Model Law may be able to guarantee cooperation and communication across a variety of countries, as well as effectively settle cross-border issues that include India.

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2. Economic Survey, Chapter 04 – Monetary Management and Financial Intermediation – Para 4.66 to 4.68

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5. Draft Part Z, Clause 11(1). See also: IBBI (Application to Adjudicating Authority) Rules, 2016.

6. Box 15, CBIRC Report 2020, page 69

7. Millennium Global Emerging Credit Master Fund Ltd, District Court Southern District of New York, Case No. 11 Civ. 7865 (LBS) (25 June 2012)