CROSS BORDER INSOLVENCY, ITS APPLICATION IN INDIA, AND LATEST JUDGEMENT

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Abstract

Due to the effects of globalisation, nations and their businesses are now highly interdependent. For businesses involved in international trade, cross-border insolvency has major legal implications. The paper is largely talking about the cross border insolvency. How is insolvency dissimilar to bankruptcy. Defining both the terms with relevant examples. This paper describes the authorities, processes, and challenges associated with cross-border insolvency. This paper also includes some of the laws related to insolvency International Laws of UNCITRAL MODEL LAW(United Nations Commission on International Trade Law),mentioning the laws which are adopted by other countries like United States of America, Singapore, UK etc. Historical background that how this law is adopted in India, mentioninglaws in India Insolvency and Bankruptcy Code 2016, Also mentioning the landmark judgements present in India.

Keywords – Cross border insolvency, Insolvency and Bankruptcy Code 2016, UNCITRAL, Bankruptcy, International Trade.

Introduction

Cross-border insolvency, often known as international insolvency, governs how financially unstable debtors are handled when they have assets or creditors in multiple nations around the world. This can be categorised into important areas like: Foreign creditors have rights or claims over a debtor's assets in another country where insolvency proceedings are pending; the debtor has assets or branches in several countries, including one where insolvency proceedings are not yet in progress; and the debtor entity is simultaneously facing insolvency proceedings in one or more countries.

Cross-border insolvency cases may include a variety of circumstances, including: Many overseas creditors of an insolvent company ensure that their rights are preserved even if they may not be headquartered in the nation where the bankruptcy resolution is being handled. It is

possible for an insolvent firm to have assets in another country or jurisdiction that creditors might want to access as part of the insolvency proceedings. A bankrupt corporation may have insolvency proceedings started and ongoing for the same debtor in many nations. A corporate group may encounter financial problems and legal actions brought by several group members in various jurisdictions against them.

What is bankruptcy? Bankruptcy is a legal procedure. When someone can no longer afford to pay off their liabilities, they start this process. If you owe a creditor ₹6,000 or more, they may choose to file to have you declared bankrupt, instead of you. You can then apply for relief from part or all of your debts once a court declares you bankrupt. Although it doesn't apply to partnerships or limited firms, bankruptcy is one means for individuals to cope with debt. It relieves pressure since once you declare bankruptcy, your creditors are no longer able to demand payment from you, add interest, or pursue any legal action against you.

What is insolvency? A state of being financially insolvent. When you file for bankruptcy, you are declaring insolvency because you are unable to make your debt payments when they are due. Insolvency can relate to either a person or a business, but businesses are the ones most frequently mentioned when the phrase is used. One of two things can cause a company to go insolvent, or both at once: Cashflow insolvency: Your company has illiquid assets but not enough readily available cash to pay off debt. Debts exceeding total assets on your company's balance sheet indicates that it is insolvent (liquid and illiquid).

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UNCITRAL Model Law

The UNCITRAL Model Law on Cross Border Insolvency, 1997 ("Model Law") was proposed by the United Nations Commission on International Trade Law in order to establish an efficient procedure to manage situations involving cross-border insolvency. States can use the Model Law to help with coordination and dispute resolution within their domestic systems. The Model Law distinguishes between two types of foreign proceedings: main proceedings and non-main proceedings. A foreign main proceeding occurs in the State in which the debtor has the "centre of its primary interests". If the debtor has an "establishment" in a foreign process, it is referred to be a foreign non-main proceeding. The Model Law offers instructions on how to locate the "centre of main interests." The Model Law also defines "establishment" as a centre of operations where the debtor engages in a non-transitory economic activity involving human resources and commodities or services for the purposes

of recognising a foreign non-main proceeding. A further public policy exception in the Model Law states that courts in a Country may decline to take an action covered by the Model Law if such an action would be "manifestly opposed to the public policy" of that State. States have modified the Model Law to fit their own jurisdictions' needs before incorporating it into their national legal systems. Under the public policy exception noted above, for instance, the phrase "manifestly" is not present in legal provisions in nations like Singapore, although it is present in the laws of the UK and USA.

The UNCITRAL Model Law is governed by the four guiding principles of Access, Recognition, Cooperation, and Coordination. In order for them to engage in and/or start local insolvency procedures against the relevant debtor, it aims to give international professionals and creditors direct access to domestic courts.

The “access” principle, according to the Model Law's provisions, it will eliminate or lessen many of the current obstacles that foreign liquidators face with regard to jurisdiction, standing, and the right to be heard. It will also enable any foreign member to apply directly to the court of a State that has incorporated the Model Law in order to start domestic insolvency proceedings.

The “relief” principle The UNCITRAL Model Law allows the courts to determine the appropriate relief to be provided by taking into account the recognition of international actions in domestic courts. Relief that can be given in the non-main procedures as well as the foreign main proceedings. The ongoing domestic proceedings will be put on hold and the issue therein will be addressed by the foreign representative thus appointed if NCLT deems that a proceeding is a foreign main proceeding. Whereas, if a procedure is designated as a foreign non-main proceeding, the domestic court may grant such relief at its discretion.

The Model Law establishes the fundamental guidelines for fostering the greatest degree of coordination and communication between local and international courts, as well as insolvency experts. It also offers a framework for concurrent insolvency processes, or for starting domestic proceedings after starting a foreign proceeding or vice versa. Also, it facilitates cooperation between two or more concurrent insolvency proceedings that are occurring in separate nations, allowing for coordination between them. Additionally, the Model Law includes a clause known as the "public policy exemption," which allows courts to refuse to recognise foreign proceedings or to take appropriate legal action against them if doing so would be against their country's public policy. At varied degrees, a large number of

nations, notably the USA, the UK, and Singapore, have incorporated the public policy exception into their own legal systems.

The second Insolvency Law Committee Report of 2018 has argued for the inclusion of cross-border insolvency provisions based on the Model Law in the IBC due to its universality and the flexibility it offers by accommodating domestic laws with the required revisions. Adopting the Model Law will send a powerful message, and it might be viewed as a progressive, forward-thinking market reform that enhances the country's standing abroad.

EC Regulation on Insolvency Proceedings

In order to provide the member states of the European Union (EU) with a framework, the European Commission (EC) has developed legislation on cross-border bankruptcy. Council Regulation (EC) No. 1346/2000 (the "EC Regulation"), which governs insolvency proceedings, was adopted by the EC on May 29, 2000. It became effective on May 31, 2002. 22 Except for Denmark, every member state of the EU is subject to the EC Regulation, which has 47 articles and 3 annexures. It is not the intention of the EC Regulation to harmonise the national insolvency laws of EU states. Instead, it aids the member States in deciding the venue and rules of law for international insolvency proceedings. Additionally, it offers automatic recognition of insolvency processes among EU members. The scope of the EC Regulation is limited to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.”[1]

Three different types of insolvency proceedings are recognised by the EC Regulation:

main proceedings, where the debtor has its centre of main interest within the EU: The EU Regulations recognise primary insolvency proceedings in one jurisdiction and secondary proceedings in another when insolvency proceedings may be brought in more than one jurisdiction. The primary proceedings are global in scope and are intended to include all of the debtor's assets. A procedure must have the debtor's "centre of primary interests" within the jurisdiction of that Member State in order to be recognised as a "main proceeding." The location where the debtor frequently manages his interests and where third parties can locate him is known as the centre of principal interests.

[1] Article 1(1), EC Regulation

secondary proceedings, where the debtor has an establishment; According to EC Regulation, a Member State where the debtor has a "establishment" may open supplementary proceedings. Any location where the debtor engages in non-transitory economic activity using human resources and goods while the main procedures are ongoing is considered an establishment. In the Member State where the debtor has an establishment, secondary procedures may be initiated. Secondary proceedings only have an impact on assets that are situated in that State, territorial proceedings, where there is an establishment for the debtor, but no primary actions have yet started elsewhere.

United States of America

The Bankruptcy Code of the USA, Chapter 15, contains laws relating to cross-border transactions. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added this chapter. In order for the USA to accept the UNCITRAL Model Law, it took the place of Section 304 of the Bankruptcy Code. As a result, in order to create a standard and coordinated legal framework for cross-border bankruptcy situations, the U.S. interpretation must be coordinated with the interpretation provided by other nations that have embraced it as domestic law. The five tiers of objectives set forth in the law carry this out. To begin with, to encourage collaboration in cross-border bankruptcy proceedings between US Courts, parties concerned, and other US Courts, as well as other US Courts, and foreign courts and foreign competent authorities. To create more legal certainty is the second goal. Finally, to foster justice and effectiveness in cross-border insolvencies to safeguard the interests of all parties Fifth, to make it easier to save struggling companies from financial ruin. Fourth, to provide protection and maximise the value of the debtor's assets.

Singapore Model Law

The UNCITRAL Model Law has been adopted by Singapore. In keeping with this, on May 23, 2017, changes to the Companies Act went into effect. First-hand legal tools to improve cross-border insolvency were introduced by the addition of Section 354B and the Xth Schedule to the Companies Act. The modifications now allow for the recognition of foreign bankruptcy procedures and insolvency representatives in Singapore, among other things. Moreover, arrangements have been made to impose and uphold a moratorium in accordance

with the UNCITRAL Model Law. Additionally, the Model Law safeguards the ability of Singapore's courts to take action, where doing so would compromise Singapore's public policy. By virtue of Article 7 thereof, the Singapore Model Law denotes that the legal system will continue to play a part in interpreting its sections as well as for the alternative relief alternatives. Recently, in the case of Re. Zetta[2], The Singapore High Court recognised Zetta entities' ongoing cases in the US as foreign main proceedings. As a result of Zetta businesses' presence in Singapore, the Court struggled to identify a centre of material interest. The issue was addressed by the courts by adopting the US stance and giving priority to the date on which an application for recognition was made. To promote communication and collaboration among national courts, the Supreme Court announced in October 2016 the formation of a network of insolvency judges from several jurisdictions.

CROSS-BORDER INSOLVENCY IN INDIA

Historical background

Our nation became a common law nation as a result of the 200 years of British control, and this system continues to influence both businesses and individuals on a daily basis. After gaining its independence, India's economy closed its doors to international investment since its foreign policy was built on import substitution and Indian regulations, especially the insolvency laws, remained adhered to British precedents. The Companies Act of 1956, an Indian corporate law, was finally passed and provided for the winding up of insolvent corporations. Later, as the Indian economy became more liberalised and more foreign direct investment entered the country, international corporations began to do business there. The Presidency Towns Insolvency Act of 1909 and the Provincial Insolvency Act of 1920 were superseded by the Insolvency and Bankruptcy Code, which went into effect on May 28, 2016, and were repealed under Section 243 of the Code.[3]

Existing legal scenario of cross-border insolvency

When a person, group, or corporation is unable to make their debt payments on time, they are said to be insolvent. When a company is declared insolvent, there are a number of procedures

[2] Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53
[3] Insolvency and Bankruptcy Act, No. 31 of 2016, § 243.

that must be followed, with the final one involving the liquidator purchasing all of the company's assets and selling them to pay off any outstanding obligations. Cross-border insolvency, as previously discussed, refers to the condition of having debt that spans international territorial boundaries, with the debtor being in one or more jurisdictions and the creditor being in one or more additional jurisdictions. Currently, there is no mention of the situation of a foreign creditor's right to seek the National Company Law Tribunal (NCLT) to begin corporate insolvency proceedings under the legal framework governing corporate insolvency. The provisions 234 and 235 of the Code deal with cross-border insolvency.

Section 234 : Agreements with foreign countries- The Central Government is authorised to enter into the bilateral agreements with other countries in order to enforce the provisions of the IBC. It may also direct the application of the Code when the assets or property of a corporate debtor or its personal guarantor are located anywhere in a country with which a reciprocal arrangement has been explicitly signed.

Section 235 : Letter of request- This clause mandates the use of the doctrine of reciprocity. If any evidence or action pertaining to the assets of a principal debtor or its personal guarantor is needed during the insolvency resolution process, the resolution professional, liquidator, or bankruptcy trustee must submit an application to the National Company Law Tribunal (hereinafter referred to as "NCLT"). If NCLT is satisfied, it may then issue a letter of request to a court.

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The primary goal of including the aforementioned provisions in the Code is to increase the asset value of the principal debtor, but up to this point, neither India nor any other country has signed a reciprocal agreement for that purpose, nor have any effective steps been taken to put the inter-government agreements into practise. The sheer fact that treaties with many nations would entail differing terms and necessitate protracted talks between nations acting in their respective capacities is the basis for the uncertainty surrounding implementation. But, if the nations establish a common framework regarding cross-border insolvencies, the pressure on the judiciary will undoubtedly be reduced. The Honourable Supreme Court established a precedent in Macquarie Bank Limited v. Shilpi Cable Technologies Ltd. in 2017, which stated that foreign creditors shall be given the same rights as those available to domestic creditors to initiate and take part in corporate insolvency resolution processes under the IBC. It also broadened the definition of "person" to include individuals residing outside of India.

Under the CPC, 1908 and the common law principles of England, foreign procedures are recognised in India. Orders issued by non-Indian courts in "Reciprocating Territories" may be enforced by Indian courts under Section 44A. If a nation is designated as a reciprocating territory by the Indian government by publishing in the Official Gazette, it is regarded as such. Several judgements and decisions of such insolvency processes are rendered ineffective in India as a result of this mechanism under CPC not being comprehensive enough to embrace all insolvency orders such as reorganisation proceedings, interim orders, etc. The regulations of that jurisdiction regulating the procedure for the same shall apply in a way similar to that for Indian procedures to be recognised abroad. India does not need to have adopted the Model legislation in order for a country to recognise the proceedings if that country has approved the Model law (UNCITRAL). While other nations may demand reciprocity from India in order for India to have a cross-border insolvency law based on the Model legislation if certain requirements are met by the domestic Indian law, as opposed to nations who have not accepted the Model law or have implemented it with some adjustments.

Impact on India on the adoption of Model Law

The Government of India established a committee to create a much more broader legal framework, taking in mind that commercial transactions occur in more than one state and that their assets are likewise dispersed across several jurisdictions. It was determined that the framework that was acknowledged and accepted on a global scale was the UNCITRAL Model Law, 1997. It will offer a way to liquidate foreign assets of insolvent Indian corporate debtors or the reverse, and it also suggests that cross-border bankruptcy procedures be applied first to corporate debtors before being eventually expanded to person insolvency. It is accompanied by an Annexure that contains the proposed Cross Border Insolvency Act that, after being approved by the legislature, will be implemented in IBC. The other impacts that this Model Law will have are –

1. Legal access to ratifying States' courts.
2. acceptance of a foreign non-principal proceeding or a foreign main proceeding.
3. coordination between the courts where the debtor's assets are located and the courts where concurrent proceedings are being conducted.
4. Relief that will be granted for the rational and ethical handling of the international insolvency . The proposed amendment has also provided for joint hearings of the

NCLT and the Foreign Court. In addition, the Insolvency Resolution Professional will also have the power to communicate with the Foreign Courts and Representatives to conduct his obligations under the IBC. The Model Law permits direct interaction between the Foreign Courts and the Adjudicating Authority, i.e., the NCLT.

The Jet Airways saga: First Indian cross-border insolvency case

Jet Airways recently, in 2019, became the first Indian company to experience cross-border insolvency as a result of the NCLAT decision ordering a "Joint Corporate Insolvency Resolution Process" under IBC, setting a milestone for the nation's developing insolvency law. The key issue relates to the bankrupt Indian-international airline with its headquarters in Mumbai, which was believed to owe its domestic and international lenders, as well as operating creditors, a total obligation of more than Rs 36,000 crores. The key issue in the current case that has reignited discussion is whether the Netherlands court has the authority to hear the case involving the bankruptcy of the airline established and incorporated in India and to issue the appropriate restructuring orders.

Early in June 2019, a group of creditors led by SBI filed a petition with NCLT asking for an official declaration of Jet's bankruptcy and the start of CIRP proceedings to prevent the transfer of the assets covered by Section 14 of the IBC. After Jet was accepted into CIRP, on June 20, the adjudicating tribunal learned that, in fact, a bankruptcy plea had been filed against the airline in the Noord-Holland District Court of the Netherlands two months prior for asserted claims of unpaid dues totalling nearly Rs 280 crores, by the two European creditors of the group, seeking the seizure of one of Jet Airways' Boeing 777 aircraft that was parked in the Schiphol airport. After that, a couple of months later, the Dutch Court designated a bankruptcy administrator with a base in the Netherlands to oversee Jet's Dutch-based assets.

The administrator assigned by the Dutch Court approached NCLT, Mumbai Bench shortly after Jet Airways was admitted to the CIRP in India, asking it to recognise the insolvency proceedings in the Netherlands and to halt the CIRP proceedings taking place in India as the insolvency proceedings are already ongoing against the airline in the competent court, which claims its jurisdiction under Article 2(4) of the Dutch Bankruptcy Act. The NCLT, however, refused to halt the Indian proceedings on the grounds that Sections 234 and 235, which deal with cross-border insolvency under the IBC, had not yet been notified by the government. In

the absence of such a law, the Tribunal categorically declared in Paragraph 29 of its order that the Administrator so appointed by the Dutch Court was ineligible to participate in the IBC proceedings. The Netherlands Court-appointed administrator filed an appeal against the NCLT's ruling because he was upset with the adjudicating authority's judgement. The Appellate Tribunal reversed the NCLT's order and further permitted the Dutch Administrator to collaborate with the Indian Insolvency Resolution Professional and to attend meetings of the Committee of Creditors on the condition that the administrator would not alienate any of the airline's offshore assets. The NCLAT took a step further and permitted smooth communication between the Netherlands counterpart and the Indian parties to get to a settlement plan that was in the best interests of Jet Airlines and all of its stakeholders. Hence, until the law is adopted, the judiciary made an innovative attempt to incorporate the Model Law framework into the Indian insolvency law and practise as a result of the curious case of Jet Airlines.

In accordance with the Appellate Tribunal's instructions, Resolution Professional and the Netherland Court-appointed Administrator came to an agreement on a "cross-border insolvency protocol" construed in accordance with the framework of Model Law, recognising India as the "centre of main interest" and the proceedings in the Netherlands as the "non-main insolvency proceedings." The Dutch Administrator was not given the authority to vote in the CoC, but the NCLAT took responsibility for coordination and only permitted him to attend meetings to the amount necessary to avoid any potential power overlaps. It restricts the court's authority to assets that are located on State territory and forbids the administrator who was assigned to manage assets that are not located on that territory. However, the Netherland Supreme Court in Yukos Finance v. Liquidator, OAO Yukos Oil Company had permitted the foreign administrator to effectively exercise its powers without endangering the interests of the creditors located in the Netherlands, based on a prerequisite that his actions are in compliance with the laws of the jurisdiction in which the insolvency proceedings are being initiated. In accordance with the goal of the Model Law framework, NCLAT was successful in its decision in striking a "balance between the relief awarded to the foreign representatives and the interests of those affected by such relief." It's interesting to note that the Jet Airlines case is just one of numerous instances when it was necessary to amend existing rules to include a cross-border insolvency process.

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The Curious Case of Videocon Industries : First Indian "Group Insolvency" Case

The NCLT Bombay Bench recognised the idea of "significant consolidation" in August 2019 and permitted the combination of 13 of the 15 entities that make up the Videocon Group. For the first time, group company consolidation for bankruptcy proceedings got approval under the IBC on the grounds that it would maximise the debtor's asset worth and establish a standard for group insolvency. The "substantial consolidation" doctrine is primarily an enabling doctrine, allowing the adjudicating authority to combine/merge the assets and debts of the individual corporate entities and move forward with a common insolvency resolution and restructuring process to arrive at a fair value for the stressed assets of group companies while keeping the interests of the creditors in mind.

In order to admit and begin CIRP proceedings against Videocon Industries, SBI filed an insolvency application at the Bombay Bench of the NCLT in December 2017. Soon after Videocon Industries was accepted into the CIRP, a consortium led by SBI filed a request for "substantial consolidation" of the 15 entities that made up the corporate debtor, with the consortium serving as the common creditor. Separate CIRP actions were started in the meantime against each individual entity, but due to the lack of collateral assets and the inability of the individual firms to subsist, it was unable to attract any competitive bids. Although the Code does not contain any explicit provisions, the Tribunal examined US and UK bankruptcy law before exercising its equity authority to rule in favour of the consortium. It's interesting to note that in February 2020, the NCLT approved Videocon Industries' second phase of group insolvency, which included four foreign-based entities. On a request for an extension of the moratorium made by the managing director of the Videocon Group, the Tribunal ordered to club overseas oil and gas companies in the ongoing insolvency proceedings, calling into question the extraterritorial applicability of the IBC and the process used to combine assets of foreign subsidiaries with those in India. This case once again highlighted the problems with the coordination theory in cross-border insolvency and the requirement for corresponding legislation.

Concluding remarks

The findings of the courts in recent cases suggest a positive judicial trend about the potential of India to develop a corporate-friendly strategy due to the lack of a legal framework to handle cross-border disputes under IBC. Nonetheless, these instances should serve as a wake-

up call to the government to hasten the incorporation of cross-border insolvency procedures. Significantly, if accepted, the draught provisions as put out by the ILC would offer a framework that might significantly improve cooperation and communication among States in order to successfully settle cross-border insolvency issues. If implemented, a bill in conformity with the Model Law will sufficiently reinforce the Code and stimulate foreign direct investment (FDI), paving the path for the urgently needed ease of doing business in India. Furthermore, even if Articles 234 and 235 of the IBC offer a solution for handling foreign insolvencies, their application in more real-world situations is complicated. The entire procedure entails negotiating bilateral agreements with many countries, each of which has its own set of conditions of arrangement that requires extensive talks to iron out. What would be the backup plan, for instance, if there was no bilateral agreement with the foreign country? These ramifications make it necessary to develop a consistent and reliable framework, such as a Model Law, to settle cross-border insolvency cases and so simplify the entire process. Thus, it's like a half-baked cake that IBC is absolutely mute on cross-border insolvency.

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