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Cross Border Insolvency in India : A Cherry on the Cake

Enactment of the Insolvency and Bankruptcy Code, 2016 ("Code") is one of the jewel in the Indian statute book and one of the biggest economic legislative reform. Considered as a progressive and dynamic economic legislation, the Code is a true embodiment of proactive approach towards ensuring revival and resolution of companies in a time bound and justified manner. There is no cynicism in saying that in a time span of mere three years, Code has passed many litmus tests and weathered many storms from time to time on various platforms by justifying its very purpose of enactment and paving a way towards endless hope for plethora of stakeholders.

Though Code provides for the provisions pertaining to the corporate insolvency resolution process, fast track insolvency resolution process, liquidation, voluntary liquidation, personal guarantor's insolvency and bankruptcy process all under one umbrella. Yet after so many achievements and crossing various milestones, Code is akin to a half-baked cake as it is yet to bring on board the provisions pertaining to the dealing of the cross border insolvency in India. With the advent of landmark cases like insolvency of Jet Airways and Videocon Group, ***robust provisions dealing with cross border insolvency if introduced timely under the Code will add one more golden feather in the cap of the Indian legislature and will be a cherry on the cake in terms of the Code.***

What is Cross Border Insolvency?

Cross Border Insolvency is a mechanism to deal with the insolvency of financially distressed companies where such companies have assets or creditors present in different international jurisdiction. The process is concerned more with regulating the insolvencies of companies that operates beyond domestic borders rather than bankruptcy of individuals. With the globalization of global economies and access to the worldwide technology at a mouse click, crossing international boundaries by businesses is no more a big deal. Attracting best capital returns and cracking sound investment deals is what every business is looking for across the globe. However, the real problem arises when the business tapping the global market having assets and creditors spread across various international geographies turns out to be insolvent. Such a situation calls for respective

countries to have a well-structured law and systematic procedural framework to deal with such instance of international insolvency.

The Cross Border Insolvency deals with the following aspects:

a. Protection and safeguarding of the interest of domestic and international creditors at par.
b. Protection and preservation of the value of the assets of the debtor lying in more than one country.
c. Coordination and cooperation between the laws and judicial practices of different jurisdictions.
d. Standardization and harmonization of insolvency practices of different jurisdictions.

Theories of Cross Border Insolvency

The subject of Cross Border Insolvency revolves around the following three theories:

- **Territorialism :** An approach pursuant to which each country exercises their own domestic insolvency laws in relation to all the debtor's assets and creditors located within their respective jurisdiction. This approach does not recognise any extraterritorial dimension to insolvency law.
- **Universalism :** An approach under which cross border insolvencies are administered by a single global insolvency regime pursuant to which debtor's assets and liabilities are distributed regardless of the fact where the assets or claimants are located.
- **Modified Universalism:** A hybrid approach which provides for individual countries to identify the most relevant jurisdiction for conducting the primary insolvency proceeding and other countries to cooperate and facilitate such proceedings. This theory combines mix of the elements of universalism and territorialism.

Traditional Regime Vs. Modern Regime

Since early stages there have been piecemeal efforts to develop a framework on cross border insolvency. Traditionally, countries followed Territorialism Theory to deal with the cases involving international insolvencies. Various countries entered into a treaty to develop a memorandum of understanding on the subject and to work out a system to deal with multiple bankruptcy administrations in different countries.

In 1980, International Bar Association published a Model Law namely "*Model International Insolvency Co-operation Act*" , however same was not adopted by any country. With the passage of time, different laws of different jurisdictions dealing with insolvency and bankruptcy realised the need of support and cooperation to the insolvency practitioners of different jurisdictions in order to ensure effective administration of estates and assets of the company undergoing insolvency.

The significant reforms happened on the subject with the development and adoption of the **United Nation Commission on International Trade Law Model Law on Cross Border Insolvency** ("UNCITRAL

Model Law") in June 1997 and **EC Regulation on Insolvency Proceedings 2000** ("EC Regulations") which came into effect in May 2002.

A) UNCITRAL Model Law

- It is based on Modified Universalism Theory and 46 countries have substantially implemented the Model Law into their domestic legislation. It is a widely accepted blue print to sagaciously deal with international insolvencies.
- This law works on the concept of Centre of Main interest ("COMI") and identifies "Main Proceedings" and "Non Main Proceedings".
- Main Proceedings are concerned with the jurisdiction where the debtor has COMI whereas Non Main Proceedings are concerned with the jurisdiction where the debtor has commercial establishment.
- Model Law provides for the insolvency practitioner of a foreign insolvency proceeding to access the courts of enacting country and vice versa, recognition of the orders passed by the foreign courts, relief to assist foreign proceedings and cooperation between the courts of the countries where the assets and creditors of debtors are located.

B) EC Regulations

- These regulations are practised between the members of the European Union and pivots upon creating a framework for the commencement of proceedings and for the automatic recognition and co-operation between the different member states.
- Like the UNCITRAL Model Law, the EC Regulations also works on the concept of COMI and members of European Union are empowered to define the scope of COMI.

Concept of Center of Main Interest

Identification of the debtor's COMI is the most fundamental and paramount while dealing with the subject of cross border insolvency. The concept of COMI is not defined anywhere and is left open to different jurisdictions to decide on their own. In the simple language, COMI means the jurisdiction with which the debtor or the company is most closely associated for the purposes of cross border insolvency proceedings. UNCITRAL Model Law and EU Regulations both recognizes the concept of COMI.UNCITRAL Model Law determines the degree to which the courts of one jurisdiction are obliged to recognise and assist insolvency proceedings commenced in a different jurisdiction. However in absentia of a precise definition may sometimes act as a stumbling block in the form of jurisdictional conflicts or situation where COMI of the same debtor company is found in different jurisdictions at same time.

Few of the following parameters may be taken into consideration while deciding the COMI of a debtor. It can be the jurisdiction where the :

a. Registered office of the company is located.
b. Books and accounts of the company are maintained.

c. Principal assets of the company are located.
d. Major operations are taking place.
e. Maximum employees are posted.
f. Local jurisdiction of the company is regulated.
g. Law would apply to the most disputes.
h. Principal bank account(s) of the company are maintained.
i. Interest of the company's business is administered on regular basis by third parties.
j. Management and supervision of the company is highly exercised.

Since the definition lacks coherence, therefore insolvency practitioners should look into the decisions of the national courts for guidance regarding the factors to be taken into consideration while determining a company's COMI. Like US Courts determine COMI more on the basis of the jurisdiction that will enable speed and convenience in handling the international insolvency of the debtor. US Courts also determine COMI on the basis of "Establishment". Under chapter 11 of US Bankruptcy Code, Establishment is defined as a place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services. Whereas on same hand European Courts requires an applicant to justify with sufficient evidences why a particular jurisdiction should be treated as a COMI in a particular case.

INDIA'S EXISTING FRAMEWORK ON CROSS BORDER INSOLVENCY

From time to time different committees in India have put forward their report before the government accentuating the need to bring in place a robust framework to deal with the issues of cross border insolvencies.

Hailing back to 2000, the first report was put forward by the **Justice Eradi Committee** taking into the account the reality of globalisation of trade and opening up of global economy for Indian businesses which in turns mandates the adoption of UNCITRAL Model Law in India to deal with the issues of cross border insolvency effectively. Afterwards in 2002 it was **Professor Mitra Committee** that bring to the light a need to have in place a law in India to deal with cross border insolvency. In 2005, **JJ Irani Committee** expressed a need for Indian economy to articulate a comprehensive framework that addresses global insolvency issues.

In 2015, when **Bankruptcy Law Reforms Committee** recommended Insolvency and Bankruptcy Bill,2015 it didn't recommended the provisions addressing cross border insolvency on account of lack of institutional backup in India In terms of judicial infrastructure, experienced insolvency practitioners and strong structure ensuring flawless communication between bankruptcy courts of different countries. To cover this interstice, **Joint Parliamentary Committee** recommended for Section 234 and Section 235 in the Code. However, both the Sections at present do not provides for a comprehensive framework to deal with the cross border insolvency issues.

*Section 234 of the Code deals with the **"Agreements with Foreign Countries"** and provides that the Central Government may enter into an agreement with the government of any country outside India for*

enforcing the provisions of the Code in relation to the assets or property of the corporate debtor or debtor, including a personal guarantor of a corporate debtor (as the case may be) situated at any place in a country outside India subject to such conditions as may be specified.

*Section 235 of the Code deals with the **"Letter of Request to a country outside India in certain cases"** and provides if during corporate insolvency resolution process, liquidation process or bankruptcy process, Insolvency Professional is of opinion that the assets of the corporate debtor or debtor, personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been entered pursuant to Section 234 of the Code, then such Insolvency Professional can make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. Upon being satisfied, Adjudicating Authority may issue a Letter of Request to a court or an authority of such country outside India to deal with such request.*

In 2018, the **Insolvency Law Committee** submitted its report to the Ministry of Corporate Affairs recommending amendments in the Code with respect to the cross border insolvency. The Committee proposed a draft 'Part Z' in the Code, based on an analysis of the UNCITRAL Model Law. Part Z contains 31 Clauses dealing with the General Provisions and Public Policy, Access of Foreign Representatives and Creditors to the Adjudicating Authority, Recognition of a Foreign Proceeding and Relief, Cooperation with Foreign Courts and Foreign Representatives, Concurrent Proceedings and miscellaneous provisions. In January 2020, Ministry of Corporate Affairs has constituted a special committee to recommend rules and regulatory framework for smooth implementation of proposed cross border insolvency provisions in the Code. The Committee is expected to submit its first report within three months from their first meeting.

CHALLENGES IN EXISTING FRAMEWORK

Since Code is also evolving and every maiden legislative framework take its own time to settle down, therefore in order to have a fairly and squarely arrangement to deal with cross border insolvency issues in India, following challenging domains need to be cater well in advance by the upcoming law on the subject.

a. Mechanism to ensure judicial cooperation between bankruptcy courts of different jurisdictions.
b. A developed theory on the concept of COMI.
c. Time period to deal with issues pertaining to international insolvency.
d. Alignment and standardization of framework with best international practices.
e. Provisions to deal with situation where conflicting provisions exists in bi-lateral arrangements.
f. Entering into reciprocal arrangements with different countries to safeguard the interest of domestic parties.
g. Procedure to deal with cross border insolvency issues in the situation where the assets and creditors of the debtor are in the country with which there is no reciprocal arrangement.
h. Situation where assets and creditors of debtor lies in different countries where reciprocal arrangement exist with only few such countries.

EPILOGUE

With proliferating of globalization, the investment of different countries in India has also multiplied. With such increase in international investment, foreign nations should be given a protection, a sense of security and comfort that their investments are safe in India. Formal cross border insolvency laws is quintessential need of an hour to protect the rights of domestic as well as foreign investors.

In order to emerge as a global leader in the area of turnaround and restructuring and a staunch restructuring hub, now is the apt time that all the stanchions of the Code in India works rigorously on familiarising themselves with this subject in terms of knowledge, practices and expertise. Huge international literature and landmark judgements are available on the subject to keep oneself equipped with the knowledge of this dimension of insolvency. Legislature work in India on this front is well in progress and it is firmly believed that on the basis of the experience of different jurisdiction and learning from their practices on dealing with the issues pertaining to international insolvency, India will be successful in coming out with an exhaustive framework on the referred theme.

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