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Public Policy – The Unruly Horse

Introduction

When the Lehman Brothers collapsed in 2008 it had presence in 40 different jurisdictions through 650 different legal entities. Conducting insolvency proceedings of such a huge corporation became a nightmare because filing for bankruptcy entailed more than 75 different proceedings in nine different countries. To deal with the daunting task of coordinating an international bankruptcy of this size and complexity, the interested parties entered into an agreement called the cross-border insolvency protocol for Lehman Brothers. Twelve years after the global financial crisis which led to the death of the Lehman Brothers, we are once again staring at a global economic crisis.

Considering that the outbreak of novel Corona virus has pushed the world economy into a situation worse than the 2008 global financial crisis and many firms such as Avianca Airlines and Diamond offshore drilling have gone under there is a very high probability that what happened in 2008 to Lehman Brothers may happen again. Dealing with complicated cross border insolvencies might become a real challenge for different courts across the globe. However, UNCITRAL's Model Law on cross border insolvency which has already been adopted by 48 states can be a solution to this looming problem. While it is true that in the Jet Airway's case the courts in India and Netherlands were able to come to an agreement and were able to coordinate without adoption of Model Law, the adoption the model law has its own set of benefits. Adopting the Model Law will lead to reduced time in exchanging necessary information between countries and increase in credit recovery efficiency.

Despite the recommendation of insolvency law committee in its 2018 Report the model law has not been adopted in India. However, merely adopting the Model Law is not going to be the answer to all the woes. Adoption of the model law comes with a set of challenges which must be first overcome for an efficient and effective application of the model law. Of these numerous challenges the biggest one is that of "Public Policy exception". Burrough J while deciding the case of Richardson v. Mellish famously said "Public policy is a very unruly horse, and when you get astride, you never know where

it will carry you". The courts till date haven't been able to mount this unruly horse. This article throws light on the problem of "Public Policy exception" in the global as well as Indian context.

Public Policy Exception – Global Context

Article 6 of the UNCITRAL model law states

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

The scope of what entails as public policy has not been defined in the Model Law. Therefore, this provision of the model law effectively gives the sovereign an unfettered power to carve out exceptions for application of the model law as and when they deem fit. Anything can be twisted and coiled in such a way that it appears as if it is against the public policy of the country when what public policy is remains undefined. The UNCITRAL Guide to Enactment recommends that the interpretation of "public policy" be kept as narrow as possible. However, even then there is a huge scope for countries who have adopted the model law to unnecessarily evoke the exception of public policy. Broad interpretation of the term "public policy" can unnecessarily hamper international cooperation.

Many countries such as Singapore have dropped the word "manifestly" while adopting the model law. The Singaporean court in the Zetta case interpreting this act of legislature said that this must mean that the court has the power to deny recognition if the recognition is merely contrary to public policy without being manifestly so. The court in this case did not list out as to what would trigger public policy bar. The court however said

"While the court's power to refuse recognition under Article 6 of the Singapore Model Law is discretionary, *it would be rare for the court not to refuse recognition where there has been non-compliance with a Singapore court order."* (emphasis added)

This means that the non-compliance to Singaporean laws shall be enough to trigger the exception of public policy. It is very common for different states to have contradictory and clashing provisions of law on the same matter. And if such contradictory provisions of two states become a ground to invoke Article 6 of the model law then the model law does not serve any purpose and states are again on square one.

Public Policy Exception – Indian context

In Egerton v Brownlow the House of Lords, which was till 2009 the highest court of Appeal, was of the opinion that public policy is an extremely vague term which may be interpreted in various ways. This might lead to uncertainty when applied to the decision of legal rights. The court opined that normally "public policy" is understood as "political expedience" or that which is best for the common good of the country. Halsbury's Laws of England states that "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." Public policy is synonymous to public good and the elements that constitute public good do not change. This article, therefore, in absence of any judicial precedents regarding "public policy" in relation to cross border insolvency to analyse the doctrine of public policy borrows jurisprudence from the field of arbitration.

Renusagar Power Co. Ltd. v. General Electric Co. **was the first case in which interpretation of public policy with regards to foreign arbitration came up. The Supreme Court deliberated on whether a narrow or wide interpretation should be applied to the exception of public policy. It was decided that the exception of public policy must be interpreted narrowly and that mere contravention of the law cannot attract the bar of public policy. Only on three grounds the exception of public policy could be invoked**

1. Contrary to fundamental policy of Indian law
2. Contrary to the interests of India
3. Contrary to justice and morality

In Vijay Karia. v. Prysmian Cavi E Sistemi SRL *the Supreme Court delivering the judgement on the line of Renusagar case said that the bar of public policy may only be attracted only if the breach of legal principle or legislation would be in the contravention of the fundamental policy of the India. The court while stating what fundamental policy would mean stated*

"Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts."

It is safe to say that the view of Indian courts on when the exception of public policy may not be triggered is clear. However, this does not mean that the scope of public policy has been completely defined or that the situations which may result into triggering of the exception of public policy have been set in stone. It is in the province of statesman and not of the judiciary to decide what is the best for the public good and to provide for it by proper enactments. Therefore, the onus is on the legislature and not the judiciary to provides a clear-cut understanding of what the scope of public policy is and when the exception of public policy may be triggered.

Conclusion

In the wake of the Covid-19 pandemic and the impending problem of mass bankruptcies adoption of the UNCITRAL model law is imperative. However, such adoption also has its own challenges. Thrashing out the problem of when the exception of public policy maybe triggered is of vital importance for an effective and efficient application of the model law. In the absence of any clarity on the issue of exception of public policy it is possible that the purpose of the model law is frustrated in its entirety.

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