Page 825 - 835

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Steering through Cross-Border Insolvency Law: Insights from India's Legal Landscape

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ABSTRACT

The rapid advancement of trade and technology has significantly reduced the size of the world, fostering the rise of numerous multinational corporations that establish cross-border business relationships daily. This global business landscape inevitably leads to scenarios where debtors and creditors are situated in different jurisdictions, thereby triggering the application of diverse legal frameworks and the initiation of proceedings in multiple countries. Consequently, it becomes imperative to facilitate efficient asset recovery for creditors abroad and address the complex legal challenges associated with cross-border insolvency. This study meticulously explores the intricate aspects of cross-border insolvency within the Indian context. It traces the historical development of this legal domain, examines the relevant provisions of the Insolvency and Bankruptcy Code (IBC) of 2016, and critically evaluates their alignment with the UNCITRAL Model Law on Cross-Border Insolvency. The analysis extends to the practical implications of the Cross-Border Insolvency Rules of 2020 and the key provisions of Draft Z, which was prepared by the Insolvency Law Committee (ILC) based on the Model Law. Additionally, the study investigates the evolution of related legislation through recent judicial decisions. The author concludes by offering fundamental suggestions and recommendations to address the practical challenges within India's insolvency regime and to bridge the gaps left by existing legislation.

Keywords*: IBC, UNCITRAL Model Law, Draft Z, NCLT.*

I. INTRODUCTION

Insolvency is a financial state when a person's or entity's liabilities exceeds the value of its assets and is unable to pay the debts. However, as the name suggests cross border insolvency, also called as international insolvency is a scenario when the insolvent debtor has assets or creditors in more than one jurisdiction or country i.e. in different countries, having multiple jurisdictions. According to Professor Ian Fletcher, "Cross-Border Insolvency should be considered as a situation in which insolvency circumstance in some way or the other transcend the confines of a single legal system, and where a single set of domestic insolvency law

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provisions cannot be exclusively applied without giving due regard to the issues raised by the foreign elements of the case."[2] Cross-border insolvency is a multifaceted legal domain that transcends national boundaries, presenting a complex interplay of diverse legal systems, economic interests and judicial practices. The concept of cross-border insolvency acknowledges the evolving nature of contemporary commerce, where entities operate on a global scale, and financial distress in one jurisdiction can have ripple effects across borders. As nations became increasingly interconnected in the global economic landscape, the resolution of insolvency issues involving entities with cross-border operations has emerged as a critical facet of contemporary legal discourse. The United Nations Commission on International Trade Law (UNCITRAL) took the first step in creating a framework as Model Law on Cross-border Insolvency, that serves as an international benchmark for addressing cross-border insolvency issues, adopted in 1977 by 44 countries so far. The purpose of having a comprehensive Cross border insolvency regime is:

- To protect the rights and interests of both domestic and foreign creditors;
- To safeguard the assets of insolvent debtor in multiple jurisdictions;
- To help resolution professionals and creditors deal with cross border insolvency issues in an efficient way;
- To bring uniformity in international insolvency and bankruptcy laws of different jurisdictions.

The pertinent question that now arises is, what is the legal regime on international insolvency in India?

The Insolvency and Bankruptcy Code introduced in 2016 is an important legislation in India that makes the insolvency resolution process quick, robust and time efficient. It aimed to consolidate and amend the existing laws, providing a comprehensive framework for the resolution of insolvency and bankruptcy for individuals, companies, LLPs & partnership firms.

Sections 234 & 235 of IBC 2016 specifically addressed cross border insolvency, acknowledging the need for a structured approach to international economic transactions. However, as deliberated and noted by the Insolvency Law Committee (ILC), an extensive regime was required as the only existing two provisions did not provide a comprehensive framework on international insolvency matters and were not significant to address the practical

[2] Bogdan, M.,2000. Ian F. Fletcher, Insolvency in Private International Law: National and International Approaches, Nordic Journal of International Law, 69(4), pp.527-528. https://www.reedlaw.in/articles/the-need-of-cross-border-insolvency-framework-under-ibc.

difficulties in application. Now, let's delve into the study deeper to be acquainted with the past and current scenario of cross border insolvency regime in India.

II. BACKGROUND & ORIGIN

Justice Eradi Committee constituted in **1999**, also known as the High-Level Committee on law relating to Insolvency and Winding up of Companies, was tasked with examining and recommending reforms to outdated and inefficient Indian insolvency and bankruptcy laws. The Committee recommended to adopt globally recognized framework, UNCITRAL Model Law on Cross-Border Insolvency to facilitate cooperation between domestic and foreign courts and insolvency professionals. It also proposed that India should enter into bilateral agreements with other countries to facilitate cooperation in cross-border insolvency cases. The importance of addressing cross-border insolvency issues was highlighted in ***Bankruptcy Law Reforms Committee Report*** in ***2015***, which was later acknowledged by the ***Joint Parliamentary Committee*** in ***2016*** report and proposed the inclusion of Sections 234 and 235 in IBC 2016 to address these cross-border insolvency challenges. However, these provisions still do not prescribe any comprehensive framework for international insolvency resolution. The ***Insolvency Law Committee*** was constituted to review the implementation and effectiveness of the Insolvency and Bankruptcy Code. In a **2018 report**, it recommended the adoption of UNCITRAL Model Law on Cross-Border Insolvency to IBC, which was referred as a separate draft chapter as "Draft Part Z". In 2020, Cross Border Insolvency Rules Committee (CBIRC) in its report suggested additional modifications to Draft Part Z. However, these do not translated into law. Later in 2021, MCA introduced further revisions to ensure Draft Part Z could be finalized into law. The Insolvency and Bankruptcy Board of India (IBBI) has long been considering the implementation of a comprehensive framework for cross-border insolvency. Nevertheless, the UNCITRAL Model Law remains acknowledged as the most broadly accepted legal framework for addressing cross-border insolvency matters.

III. CURRENT LEGAL REGIME IN INDIA

Currently, the Insolvency and Bankruptcy Code (IBC) includes only two provisions related to cross-border insolvency cases, which are general and lack specific procedures. These provisions offer mainly guidance for addressing cross-border insolvency issues:

- **Section 234**: It empowers Central Government to enter into bilateral agreements with foreign countries for enforcing these provisions under IBC.

The Central Government may, by notification in the Official Gazette, direct that the application

of provisions of this Code in relation to assets or property of 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 with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.[3]

- **Section 235** : Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under Section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.[4]

The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

Thus, while Section 234 authorizes the Central Government to establish bilateral agreements with foreign jurisdictions to address cross border insolvency issues, Section 235, on the other hand, empowers the Adjudicating Authority to issue letters of request to courts in countries with which such bilateral agreements have been made under Section 234, aiming to manage the assets of corporate debtors located outside India.

However, it should be noted that these current provisions do not provide any detailed structure for handling the issue of cross border insolvency and fails to provide a comprehensive framework.

To address this, the Insolvency Law Committee has recommended the introduction of draft rules for a new segment within the current legislation, referred to as Part Z.

- **Draft Part Z**: Part Z is intended to be a dedicated cross-border framework within the code, governing applications for foreign insolvency proceedings and requests for co-operation from NCLT in such matters. Draft Part Z is a proposed set of guidelines

[3] Insolvency and Bankruptcy Code, Section 234, 2016.
[4] Insolvency and Bankruptcy Code, Section 235, 2016.

featuring a dedicated chapter aimed at addressing the shortcomings of the current cross-border insolvency framework. These draft guidelines are based on the Model Law on Cross-Border Insolvency. The ILC recommended these guidelines in its report submitted in 2020.

IV. DEVELOPMENTS IN THE LAW THROUGH JUDICIAL PRONOUNCEMENTS

Given the absence of a comprehensive statutory framework for cross-border insolvency in India, the Indian judiciary has recently played a crucial role in filling some gaps and developing the laws on cross-border insolvency.

(A) THE JET AIRWAYS CASE: *A catalyst for cross-border insolvency reforms in India*

In 2019, Jet Airways became the first Indian company to experience cross-border insolvency following a landmark ruling by NCLAT, which ordered a "Joint Corporate Insolvency Resolution Process" under the Insolvency and Bankruptcy Code(IBC). This decision marked a significant milestone in the development of insolvency law in India.

Background: Jet Airways faced severe financial difficulties due to mounting debts, operational issues and increasing competition. The company defaulted on its financial obligations in 2018 and therefore, faced concurrent insolvency proceedings in both India and the Netherlands. In the Netherlands, the Company was declared bankrupt and thus a Dutch trustee was appointed to oversee the company's assets. The NCLT declined the Dutch professional's contention to recognize the proceedings of Dutch Bankruptcy Court proceedings, underscoring the IBC's limitations in acknowledging foreign insolvency judgements. Consequently, the company was admitted to the Corporate Insolvency Resolution Process(CIRP) under the IBC, and a resolution professional was appointed.

However, on appeal, the NCLAT acknowledged the proceedings of both courts as " parallel proceedings". The court further ruled that the proceedings in India would be deemed as "foreign main proceedings" since the Corporate Debtor's Centre of Main Interest (COMI) was in India, given that its headquarters and the majority of its creditors were located there. It also mandated the application of certain cross-border insolvency principles through a "cross-border insolvency protocol" negotiated between the Dutch Administrator and Jet Airways' Resolution Professional. Consequently, the CIRP for the Corporate Debtor continued, with the Dutch Administrator granted the right to participate in the Committee of Creditors(CoC) meetings, ensuring equitable relief for all creditors in both India and the Netherlands.

In a recent development, the NCLAT issued a pivotal order on May 14, 2024, approving the resolution plan proposed by the Jalan Kalrock Consortium (JKC) and authorizing the transfer of ownership of Jet Airways to the consortium. The National Company Law Appellate Tribunal (NCLAT) also acknowledged the complexities of cross-border insolvency and the need for a structured mechanism to handle such cases.

Another landmark case in the evolution of cross-border insolvency in India is that of ***Videocon Industries,***[5]which established a crucial precedent for the consolidation of insolvency proceedings involving group companies. This case marked one of the earliest instances where the National Company Law Tribunal (NCLT) applied the concept of group insolvency in India. The NCLT approved the consolidation of insolvency proceedings for 13 Videocon Group companies, acknowledging the deep interconnections within their operations—such as shared assets and liabilities, and common directorship.

Recognizing the intricate challenges posed by group insolvency, the Insolvency and Bankruptcy Board of India (IBBI) constituted a Working Group in 2019. This group put forth several recommendations designed to address these complexities. The proposed measures aim to streamline the insolvency process, mitigate litigation, and foster a more coordinated approach to resolving financial distress within corporate groups. The effective implementation of these recommendations would necessitate amendments to the Insolvency and Bankruptcy Code (IBC) and potentially the introduction of new rules and regulations.

(B) UNCITRAL Model Law on Cross Border Insolvency

The *UNCITRAL Model Law on Cross-Border Insolvency*, adopted in 1997 by the United Nations Commission on International Trade Law, offers a robust and comprehensive framework tailored for addressing the complexities of cross-border insolvency cases. This Model Law serves as a blueprint for nations in managing insolvency scenarios where the involved parties, assets, or creditors span multiple jurisdictions. Its primary objective is to foster cooperation and coordination between the courts of different countries and insolvency practitioners, thereby ensuring the effective resolution of cross-border insolvency matters. To date, the Model Law has been embraced by over 50 countries, including key global economies such as the United States, the United Kingdom, Australia, Canada, and Japan. These nations have integrated the Model Law into their domestic insolvency regimes, often making adaptations to align with their unique legal systems.

While India has not yet officially adopted the UNCITRAL Model Law, it has taken

[5] State Bank of India vs. Videocon Industries Ltd & Ors., 2019.

considerable strides towards its incorporation. A draft chapter on cross-border insolvency, which is closely aligned with the principles of the UNCITRAL Model Law, has been developed and is currently under review. This draft, commonly referred to as **Draft Z**, is part of a broader initiative to amend the Insolvency and Bankruptcy Code (IBC), 2016. The aim is to establish a legal framework that can efficiently address cross-border insolvency cases, thereby aligning India's insolvency laws with international best practices and standards.

(C) DRAFT Z: *Roadmap to aligning with the UNCITRAL Model Law*

The Draft Chapter on Cross-Border Insolvency, often referred to as Draft Z, is a significant proposal aimed at integrating the principles of the UNCITRAL Model Law on Cross-Border insolvency into IBC. The lack of comprehensive provisions governing cross-border insolvency within the current legal framework has necessitated the introduction of Draft Z, which is a proposed chapter that closely mirrors the UNCITRAL Model Law on Cross-Border Insolvency. The key provisions of Draft Z are as follows:

1. **Adoption of the UNCITRAL Model Law on Cross-Border Insolvency**: The draft is based on the UNCITRAL Model Law on Cross-Border Insolvency (1997), which is widely accepted globally.
2. **Recognition of Foreign Main Proceedings**: Draft Z differentiates between "foreign main proceedings" and "foreign non-main proceedings," enabling Indian courts to classify foreign insolvency proceedings based on the debtor's center of main interests (COMI). This distinction is crucial, as it determines the level of relief and protection that may be afforded. When foreign proceedings are recognized as "main," they are prioritized in terms of relief and administrative control. Nevertheless, non-main proceedings can still be acknowledged and coordinated alongside ongoing insolvency processes in India.
3. **Access for Foreign Representatives**: Draft Z grants foreign insolvency representatives the ability to directly engage with Indian courts, whether to seek recognition of foreign proceedings, participate in domestic insolvency processes, or request specific relief measures.
4. **The Centre of Main Interests**: COMI is pivotal under the Model Law, as it allows for the recognition of foreign proceedings and the granting of relief based on whether the proceeding is deemed a main or non-main proceeding. The Insolvency Law Committee (ILC) recommended that a list of indicative factors defining COMI should be established through rule-making authority. These factors might include the location of

the debtor's financial records and the source of their financing. Additionally, the Committee advised that adjudicating authorities should proactively investigate these factors, and a look-back period of three months should be applied when enforcing the COMI presumption as a preventive measure.

5. **Cooperation Among Courts**: The draft chapter emphasizes the importance of collaboration between Indian courts, insolvency professionals and their foreign counterparts, fostering an environment of mutual cooperation to effectively manage insolvency cases that span multiple jurisdictions, involving assets or creditors in different countries. This includes sharing of information and coordinated handling of assets located in multiple jurisdictions.
6. **Automatic and Discretionary Relief**: Upon the recognition of foreign proceedings, Indian courts are empowered to provide automatic relief, such as imposing a moratorium on the transfer of assets. Additionally, the courts have the discretion to grant further relief tailored to the specific circumstances of the case, ensuring the protection of both creditors' and the debtor’s interests.
7. **Public Policy Exception:** Indian courts have the discretion to refuse the recognition of foreign proceedings if it is found to be contrary to India’s public policy. This ensures that foreign insolvency processes do not conflict with the country’s legal or economic interests.
8. **Reciprocity**: The draft includes a reciprocity clause, meaning that the provisions of the cross-border insolvency framework would apply only to those countries that have similar reciprocal arrangements with India.

Provisions within the Companies Act, 2013 still address the insolvency of foreign companies. For instance, section 375(3)(b) states that an unregistered company, including foreign companies, can be wound up if it is unable to pay its debts. The enactment of Part Z would introduce a dual framework for managing the insolvency of foreign companies. To prevent this, it has been recommended that these provisions in the 2013 Act be re-evaluated, and any ongoing cases under these provisions should be transferred for adjudication under the new framework. These provisions are part of India's initiative to enhance its insolvency framework, especially in the context of a global economy where businesses frequently operate across various countries. Implementing these measures would bring India's approach to cross-border insolvency more in line with international standards.

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V. PROPOSED ACTIONS & CONSIDERATIONS

The research has put forth several recommendations to address the practical challenges within India's insolvency framework and bridge the gaps left by current legislation. Primarily, the government should prioritize establishing reciprocity agreements with other nations to ensure mutual recognition and enforcement of insolvency proceedings. The creation of specialized insolvency benches within the NCLT and NCLAT is essential to expedite decision-making and enhance the quality of judgments. Additionally, there is a pressing need to accelerate the resolution process, which can be achieved by introducing fast-track mechanisms for straightforward cases, thereby allowing more complex cases to be handled with the necessary focus without overwhelming the system. Furthermore, the Insolvency and Bankruptcy Code (IBC) must undergo periodic and comprehensive reviews to stay in line with evolving global practices, technological advancements, and the shifting economic landscape. The implementation of the proposed Chapter Z in the IBC would significantly strengthen India's insolvency regime and align it more closely with the anticipated adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Conducting an in-depth gap analysis to pinpoint areas where current legislation falls short and introducing targeted amendments to address these deficiencies is also crucial. Additionally, fostering consistency in judicial pronouncements would greatly enhance the current regime. By embracing these recommendations, India can overcome the practical challenges in its insolvency framework, making it more robust, efficient, and better aligned with international standards.

VI. CONCLUSION

The growing incidence of cross-border insolvency cases, combined with the inadequacies of the current legal framework in India, highlights the pressing need for a robust and comprehensive legal structure. Although the enactment of the Insolvency and Bankruptcy Code, 2016 marked a pivotal advancement in streamlining domestic insolvency procedures, its provisions concerning cross-border insolvency remain insufficient. Despite the years that have passed since the IBC's implementation, India still lacks a well-rounded framework to effectively manage the complexities of international insolvency. The introduction of Sections 234 and 235 was a commendable initiative, yet they fall short of delivering a comprehensive solution to the challenges inherent in cross-border insolvency cases. India's cross-border insolvency law is at a pivotal point, characterized by notable progress but also facing significant challenges. The proposed adoption of the UNCITRAL Model Law on Cross-Border Insolvency, as outlined in Draft Z, is a forward-looking initiative aimed at aligning India's legal

framework with global standards. However, the coexistence of existing provisions under the Companies Act, 2013, alongside the need for comprehensive legislation, underscores the complexities in establishing an effective cross-border insolvency system. As global business operations continue to expand, it is essential for India to develop a strong, efficient, and harmonized cross-border insolvency framework that promotes cooperation with foreign jurisdictions, guarantees fair treatment of creditors, and improves the predictability of insolvency outcomes. Ongoing refinement of the Insolvency and Bankruptcy Code (IBC), active judicial involvement, and the establishment of international reciprocity agreements will be crucial in addressing current challenges and enhancing India's appeal as a global business hub. By tackling these issues, India can strengthen its insolvency regime, boosting confidence among international investors and creditors, and thereby contributing to the country's economic stability and growth.

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