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LEGAL ISSUES INVOLVED IN CROSS-BORDER INSOLVENCY IN INDIA

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In 1990's Indian economy lead to the inflow of foreign direct investment many companies like multinational companies thought India as a viable market for goods and services for the international investors but unfortunately, there is an area which requires adequate changes or amendments is corporate insolvency. As the existing laws and their resolution plans under corporate insolvency is not completely successful in every situation like cross-border insolvency.

Under the realm of cross-border insolvency, India requires provisions, enactments resolution plans or any model which can regulate this sector. As the Indian laws in majority referred from the British common law, when there is a case occurred related to adjudicating winding up petition having an overseas component then the judges of India think of innovative technique and incorporate few elements from the common law for adjudication of the case. These techniques are not successful in the real world because of the difference in jurisdiction and conflict of laws. In the absence of positive enactment of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on Cross-Border Insolvency ("Model Law") or any other statute consolidating the Indian insolvency regime, the current judicial approach of dealing with cross-border insolvencies in India is disorderly, chaotic, and leads to forum shopping.[1]

Cross-border insolvency is an insolvency process which occurs due to financial distress in a company related to assets, unable to pay debts and creditors who are there in more than one country. As India doesn't have any particular enactment for cross-border insolvency it becomes very difficult to deal with the cases having a foreign element in it. Typically, cross-border insolvency is more concerned with the insolvency of companies which operate in more than one country rather than the bankruptcy of individuals. Like traditional conflict of laws rules, cross-border insolvency focuses upon three areas: choice of law rules, jurisdiction rules and enforcement of judgment rules.[2]

[1] Mithilesh Kumar, Cross Border Insolvency: Indian Law Vis A Vis International Law: UNCITRAL Model, MONDAQ: INDIAN LEGAL IMPETUS (Aug. 12, 2013)
[2] Andrew Keay and Peter Walton (2011). Insolvency Law (2nd ed.). Jordans. p. 385. ISBN 978-1846611193

Since early stage there has been a several attempts to develop and improve the cross-border insolvency matters cross the globe.

i. In 1889 seven treaties were signed in Montevideo with the aim to harmonising private international law in the signatory states (Argentina, Bolivia, Paraguay, Peru and Uruguay),[3] one of which related to the regulation of bankruptcies between member states. The treaty was updated in 1930, and broadly provided for a system which was more closely akin to territorialism than universality, providing for multiple bankruptcy administrations in different states for multinational companies.[4]

ii. In 1933 Denmark, Finland, Iceland, Norway and Sweden signed into law the Nordic Bankruptcy Convention which, although not a lengthy document, is still in force today and facilitates administration of cross border bankruptcies in the Scandinavia region.[5]

In the 1980s the International Bar Association published a model law, the Model International Insolvency Co-operation Act,[6] thus this Model International Insolvency co-operation approach was an unsuccessful attempt.

CROSS-BORDER INSOLVENCY ASPECTS

(i) Insolvent company where foreign creditors have rights/claims over a debtor's assets where there assets are protected and secured in another jurisdiction where insolvency proceedings are taking place;

(ii) Where a debtor has an assets in several or another jurisdictions, which its creditor wants to access the asset as a part in insolvency proceedings.

(iii) Where a debtor entity is subject to insolvency proceedings simultaneously in one or more jurisdictions.[7]

[3] Wyndham Bewes. "The Treaties of Montevideo (1889)". JSTOR 742785.
[4] Philip Wood (2007). Principles of International Insolvency. 29-080: Sweet & Maxwell. ISBN 9781847032102. Retrieved 23 June 2015.
[5] Carl Hugo Parment. "The Nordic Bankruptcy Convention - An Introduction" (PDF). Archived from the original (PDF) on 23 June 2015. Retrieved 23 June 2015.
[6] Elizabeth Somers (2011). "The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation". American University International Law Review. 6 (4): 677.
[7] http://www.mondaq.com/india/x/506600/Insolvency+Bankruptcy

OVERVIEW OF MODEL LAW

The Model Law is based on respecting the differences of the legal systems of Member States and a non-insistence on substantive unification of insolvency law.[8] This Model Law is needed for the unification of law this give uniformity and certainty to the cross-border insolvency proceedings. The difference in law which differs according to the geographical locations, different country to country which creates conflict of laws. This law can provide the court a power and the discretion to rationally deal with the cross-border insolvency proceedings.

THE MAIN OBJECTIVES OF MODEL LAW:

The first objective is to promote cooperation between the courts and other authorities of countries involved in cross-border insolvency proceedings.[9] The Model Law provides the greater scope and certainty legally in the sector of trade and investment. The investors are more secured than before and the debtors are also secured. They have access to have a free, fair and efficient international system in cross-border insolvency. The Model Law also seeks to "protect and maximize the value of the debtor's assets." Finally, it aims to "facilitate the rescue, restructure, and reorganization of financially troubled businesses," thereby protecting investment and preserving employment.[10] . This Model Law has presently been adopted by total 41 countries, including the US and the UK but India has still not adopted this Model Law Policy.

LAWS RELEVENT UNDER CODE OF CIVIL PROCEDURE, 1908 FOR CROSS-BORDER INSOLVENCY

[8] UNCITRAL, UNCITRAL MODEL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION 10 (2005), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf [hereinafter UNCITRAL MODEL PRACTICE GUIDE] (noting that the UN General Assembly respected differences in the procedural and judicial systems of States and that the differences would only contribute to the development of international trade); see also The UNCITRAL Model Insolvency Law vis-à-vis Indian Insolvency Regime, 3, http://indiancaselaws.files.wordpress.com/2014/04/the-uncitral-model-insolvency-law-visc3a0-vis-indian-insolvency-regime.pdf [hereinafter UNCITRAL Model Insolvency Law vis-à vis India] (asserting that Model Law is based is respect to the differences among national laws and non-insistence on substantive unification of insolvency law).

[9] UNCITRAL MODEL PRACTICE GUIDE, 12 (citing cooperation as the first objective of the preamble); *see also* UNCITRAL Model Insolvency Law vis-a-vis India, *supra* note 32, at 3 (recognizing cooperation between courts as the first objective).

[10] UNCITRAL, A JUDICIAL PERSPECTIVE, 6 (stating that the Model Law facilitates the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment); see also UNCITRAL Model Insolvency Law vis-a-vis India, 4 (quoting the UNCITRAL JUDICIAL PERSPECTIVE).

Indian laws recognize the principle of comity.[11] This principle is embodied in Section 44A of The Code of Civil Procedure of 1908 ("CPC").[12] Section 44A allows Indian courts to enforce the orders passed by foreign court and foreign judgement in "Reciprocating Territories." A country would be considered a reciprocating territory if it were declared one by the Government of India through publication in the Official Gazette. However, Section 44A is limited by Section 13 of the CPC.[13]

According to Section 13, a non-Indian judgment cannot been forced if:

(a) the court issuing the judgment does not have competent jurisdiction;

(b) the judgment was not passed on the merits of the case;

(c) it appears that the proceedings are founded on an incorrect view of international law or ;

(d) refusal to recognize the law of India in cases in which such law is applicable;

(e) the judgment was a result of proceedings opposed to public order;

(f) the judgment has been obtained by fraud; and

(g) where the judgment sustains a claim founded on a breach of any law in force in India.[14]

THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Section-234, Agreements with foreign countries:

(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) 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

[11] INDIA CODE CIV. PROC. (1908), §§ 13, 44A (determining the conclusiveness of a judgment under Section 13 and recognizing the ability of Indian courts to execute judgments passed in foreign courts of reciprocating territories under Section 44A; the recognition of judgments of a court in one jurisdiction by a court in another jurisdiction is known as comity)
[12] INDIA CODE CIV. PROC. (1908), § 44A
[13] (Together, Section 13 defines the characteristics of a valid foreign judgment and Section 44A provides for execution only of those judgments that fit the criteria laid down in Section 13).
[14] INDIA CODE CIV. PROC. (1908), § 13.

any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.[15]

Section-235, Letter of request to a country outside India in certain cases:

(1) 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.

(2) 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 35 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.[16]

THE ERADI COMMITTEE REPORT

The Department of Company Affairs (DCA) is said to have appointed a core group to examine and draft necessary amendment in the Companies Act following the recommendations suggested by the Justice V. Balakrishna Eradi Committee report on `Insolvency law'.[17]

The other immediate concern in the context of Global dimension of the structure of Insolvency in various countries is to consider adoption, fully or partly, of "The UNCITRAL Model Law in Cross-Border Insolvency", as adopted by United Nations General Assembly Resolution 52/158 dated 15th December, 1997. As 'a member of United Nations, India should implement it. This resolution therefore, has to be implemented by India by making suitable

[15] http://ca2013.com/section-234-agreements-foreign-countries/
[16] http://ca2013.com/section-235-letter-request-country-outside-india-certain-cases/
[17] https://www.thehindubusinessline.com/2000/09/03/stories/14031801.htm

changes. This apart, Committee is of the opinion that the implementation of the Model Law will facilitate International trade. The Committee is of the opinion that Part VII of the Companies Act, 1956 should be amended to correspond to provisions for Model Law as reproduced below for cross-border insolvency:

(a) The case of an in-bound request for recognition of foreign proceedings.

(b) An outward-bound request from a court or administrator in the enacting state.

(c) Coordination proceedings in two or more States and

(d) Participation of foreign creditors in insolvency proceedings taking place in enacting States. The Articles which are there in Model Law may refer in the substantive provision and provisions and they themselves reproduced as a Schedule to the Companies Act, 1956. The Tribunal should empower to strike an equitable balance between rights of Indian and foreign creditors, particularly in the matter of proof and priorities of their respective claims.[18]

THE N.L.MITRA COMMITTEE REPORT

The Advisory Group on "Bankruptcy Laws" under the Chairmanship of Dr. N. L. Mitra. The N. L. Mitra Committee noted that Indian laws on cross-border insolvency are obsolete & that they aren't comparable to any standards set in international legal requirement & as such, stands apart & alone. It was noted that when the event occurs of an international insolvency proceeding involving the Indian company, courts are unable to provide the assistance or help to a foreign liquidator, foreign creditors and other insolvency official if this was to be detrimental to the companies' creditors on basis of how those creditors are or would have been treated under any equivalent Indian law insolvency proceeding.

The Committee also recommended that the jurisdiction, the power & the authority relating to the winding up of companies be vested in National Company Law Tribunal (NCLT) instead of the High Court as at present. The National Company Law Tribunal (NCLT).

The committee recommended the adoption of the UNCITRAL Model Law in the Companies Act in India itself to deal with all cases of which comes "Cross-Border Insolvency and Bankruptcy".

[18] http://reports.mca.gov.in/Reports/24-Eradi

DRAWBACKS

Under cross border insolvency, the bilateral agreement always takes time to negotiate and needs to be done individually. It is a time taking process thus, it consumes a lot of time. This bilateral agreement varies from country to country as the law changes with the change in jurisdiction. The difference in jurisdiction creates conflict of law and makes it is difficult to Bargen and comes with one agreement which can be regulated between the two different countries.

UNCITRAL MODEL LAW

UNCITRAL Model Law is a procedural framework for information, exchange, coordination, and cooperation in the Cross-border Insolvency. This model has an ample guidance on coordinated and effective resolution approach for multi- national companies. This model is a mixture of Private International Law and Insolvency Law.

a) The provisions give representatives of foreign insolvency representatives and creditors an access to the courts in the local enacting State to seek assistance.
b) One of the key objectives of the Model Law is to establish the procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty to the decision to recognise these the important provisions related to recognition to orders issues by foreign which is qualifying under foreign proceedings and the appointment of the foreign representative of those proceedings.

It also satisfies the requirements:

- Foreign main proceeding- Centre of Main Interest ”COMI”
- Foreign non- main proceedings
- Relief granted recognition.

c) Coordination, cooperation and direct communication between the court and the representatives of the insolvency proceedings.
d) The concurrent insolvency proceedings has been dealt here.[19]

[19] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

THE RAJAH OF VIZIANAGARAM V. OFFICIAL LIQUIDATOR

The Companies Act of 1956 does not provide explicit relief to international (non-Indian) creditors for their claims or causes of action. As early as 1962, however, the Supreme Court of India held in *Rajah of Vizianagaram v. Official Receiver* that international creditors and contributories can bring an action and file a claim under the Companies Act.[20] Through this case, the Supreme Court of India established the law governing international insolvencies in India. In this case, the debtor company was incorporated in England under the English Companies Act in force at the time. The object of the debtor company was the mining of manganese in Kodur, Vizagapatnam District in India.[21] As the company proved to be unprofitable, it was unable to pay its debts, including rent due to the Rajah of Vizianagaram.[22]

The petitioner filed the case for winding-up proceedings that resulted in the appointment of an Official Liquidator. International creditors of the company filed and showed the proofs of debts owed to them by the debtor company. The petitioner objected, and contended that the liquidation proceedings were exclusively for the benefit of Indian creditors. The question which was raised before the Supreme Court, whether international creditors of a company not incorporated in India and subject to a winding-up proceeding initiated in India, with respect to the business of the debtor company in India, and can prove their claims before the Official Liquidator which was been appointed for the insolvency proceedings. The Supreme Court, after examining various English precedents, held that under the provisions of the Companies Act and general principles of comity, international creditors could prove their claims in the winding-up of unregistered companies in India.[23] However, the Court did not answer questions regarding recognition of international judgments.[24] Therefore, loopholes in the matter of cross-border insolvency proceedings still remained.

[20] Rajah of Vizianagaram v. Official Receiver, AIR. 1962 S.C. 500, ¶¶ 6, 27 (holding that foreign creditors can prove their claims in winding-up proceedings).
[21] Id. (affirming that the object of the debtor company was the mining of manganese in Kodur, Vizagapatnam District).
[22] Id. ¶ 3 (declaring that being unprofitable, the company was unable to pay its debts, including rent due to the Rajah of Vizianagaram).
[23] Id. ¶ 27 (holding after thorough analysis of English judgments that foreign creditors can prove their claims in winding-up proceedings).
[24] See generally supra notes 91-99 and accompanying parentheticals (explaining the only issue resolved in this case).

RESTRUCTURING CASE

Restructuring refers as to reorganisation, rehabilitation and revival of those companies who are unable to pay the debts. In this situation these are cases in which courts comes into picture and they save the insolvent companies from liquidation, in some situations the judges adjudicate cases on international level and introduce an international standards of adjudication in India.

RESERVE BANK OF INDIA V. BCCI

The Indian courts demonstrated a skilled and efficient approach when handling the cross-border insolvency and liquidation of the Indian operations of the Bank of Credit & Commerce International (Overseas) ("BCCI"). In this case, the Reserve Bank of India ("RBI"), the federal bank of India, filed a petition for winding-up BCCI.[25]

BCCI was incorporated in the Cayman Islands. It was considered as an unregistered company even though it had a branch which was situated in Mumbai. BCCI was unable to meet its debt obligations. So, thus on that basis, insolvency proceedings were first commenced in the Cayman Islands, and a Receiver was being appointed. RBI filed a petition in India for the faxed version of the order appointing the Receiver, and the information received from the Provisional Liquidator appointed at UK branches of BCCI. High Court, Bombay appointed the State Bank of India ("SBI") as the Official Liquidator on the petition which was filed by RBI. The Court provided for a "scheme of arrangement" in which SBI would take over the Mumbai Branch of BCCI. The scheme proved to be a blessing in disguise as the depositors, creditors, and employees of BCCI benefited from it.[26]Here, despite the lack of appropriate legislation, the court took the correct approach by restructuring the Mumbai Branch of BCCI.[27]

[25] Reserve Bank of India v. Bank of Credit & Commerce International, AIR 1994 BOM. 177, ¶ 1 (stating the cause of action in the suit).
[26] See supra notes 139-45 and accompanying parentheticals (explaining the actions of the Bombay High Court despite appropriate legal framework)
[27] See supra notes 139-45 and accompanying parentheticals.

CONCLUSION

India has already begun talks with countries such as the US for entering into reciprocal agreements, opting for reciprocal arrangements instead of adopting the Model Law is a move that is likely to be debated. In fact, even if India were to adopt the Model Law, the Model Law allows for a system where agreements entered into with a country could supersede the provisions of the Model Law.

The Interim Report of the Bankruptcy Law Reforms Committee (constituted in 2014 by the Department of Economic Affairs to study the corporate bankruptcy legal framework in India and to submit a report) had recommended the adoption of the Model Law. This model law should be taken only after observing the effectiveness of the regime proposed by the Code. In the Joint Committee's report, the Government of India has indicated that it will come up with a framework on cross-border insolvency at the appropriate stage and that additional issues with global ramifications can be considered later on. This includes cross-border insolvency issues relating to multinational companies with foreign investors and creditors with branches in multiple jurisdictions.

To conclude, the matters related to cross-border insolvency should be taken seriously in the country like India, as this India is one most important country for trade and business. People from all over the world invest their money in Indian companies. The model law will help the country to establish the cooperation, coordination between the courts and insolvency representatives in cross-border insolvency proceedings and as this model law has been accepted by many countries the conflict of law due to difference in jurisdiction would be less. The fact that there has not been an outright rejection of alternative methods to address cross-border insolvency issues, the overall state of affairs in India's insolvency regime needs to be proved on the issue of cross border insolvency and it can only be solved by adopting UNCITRAL Model Law.