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Regime of Cross Border Insolvency in India

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Abstract

India is an evolving country and to make it rise, India participates in trade and investment with various countries. Currently India too is expanding its business overseas, and when such situation related to exchange happens between nations, disputes also arise. Whenever any company expand its business overseas, situations of financial distress is common in this regard. Every country has its own law related to Insolvency. Emergence of Insolvency law was felt as, the Public International Law could not prove to be a success. Thus, when exchange and disputes happen within two different countries happen, the term Cross Border Insolvency emerges. Recently an escalation has been seen in the matters related to cross border insolvency due to Globalization.

The term Cross Border Insolvency denotes the scenario via which the Corporate Debtor has either assets/or creditors in more than one country and when the company is unable to pay its debt it results into the Insolvency of the company. Initially when India had executed this IBC, 2016 the Code did not contain any provision for Insolvency and Bankruptcy.

This article deals with the stance of Cross Border Insolvency, Judiciary view point, and when the interest of the parties are taken into consideration. Though Cross Border Insolvency has not gained eminent position in India and only precedent in this regard is that of Jet Airways Insolvency Case. Therefore this present article is an attempt to give background of the cross border insolvency. Article has been divided into various sections. First section deals with Cross Border Insolvency in IBC, proceeding with this is the existing framework of cross border insolvency via IBC, Provisions related to cross border insolvency, next section explores the judicial precedent in regard to cross border insolvency, further a critical analysis has been laid down in the article in regard to report of working group on cross border insolvency. Last section of the article contains some remarks and suggestions.

Keywords: Cross Border, Insolvency, Law

Introduction

The first part being the Introduction deals with the scenario of Insolvency law in India only. Insolvency and Bankruptcy Code, 2016 is thus a domestic insolvency law. Cross Border Insolvency is a term which denotes the liabilities of the company. Thus Liability arises in two different situation, i.e. when an Indian company has liability to foreign company and another situation wherein a Foreign Country has liability in India. Thus, in simple words the term denotes the dues which any Nation owes to other foreign Nation and thus here comes the role of Cross Border Insolvency.

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In a Cross Border Insolvency, complexities are huge. The grim part is that in Cross Border Insolvency case, Law of 2 different nations come into play, and apart from these 2 nations law, sometimes need arises of taking reference to other rules as well.

Existing Framework of Cross Border Insolvency in IBC, 2016

Vide Section 234, 235 as mentioned in the Part 5 of the Code, Power has been enumerated in the hands of the Central Government to enter into an agreement with any other country outside India to enforce provisions of the code. Thus till now there are only 2 provisions under Part V related to cross border insolvency.

Judicial Precedents of Cross Border Insolvency before IBC, 2016

IBC was enacted in 2016 but before the emergence of the code, the Indian Judiciary has witnessed the cases related to winding up of company and has recognized that a foreign creditor has a right to enforce its claim in India. Before enactment of the IBC, matters related to winding up and insolvency were dealt under the old Laws such as Companies act, Presidency Towns Insolvency Act 1909 and Provincial Insolvency Act 1920. This was the situation under the Old Companies Law and other related laws. Thus, it can be asserted that before the enactment of the IBC Code, Indian Judiciary had some framework related to cross border issues. And even in the absence of such a great law, these legislations were definitely a welcome step.

Rajah of Vizianagaram v. Official Receiver and Official Liquidator of the Vizianagaram Mining Company Ltd.[1]

Issue in the present case was whether a foreign creditor of the firm having business incorporated in England and is carrying on business in India can prove their claims in winding up proceedings of the firm. Thus, relevant facts are mentioned here that this Vizianagaram company ("said company") was incorporated in England and was having business in India. Further the company was unable to pay its debts and had entered in financial crisis. Thereafter certain creditors of the firm filed their claim before the Liquidator. Thus, Court evaluated the contentions of the parties and gave its ruling that "We are therefore of the opinion that both on account of the specific provisions of the act and of the general principles, the view taken by the court below that foreign creditors can prove their claims in the winding up of the unregistered company is correct".

Intesa Sanpaulo S.P.A. v. Videocon Industries Ltd.[2]

Issue enumerated in this case was that an Italy based Bank was seeking winding up of Videocon, an Indian based company. A Guarantee was also executed between the parties, which was termed as Patronage Letter. Vide the patronage letter Videocon has sworn to pay Intesa the principal, interest, expenses, taxes and ancillary costs. But later on it was found that Videocon Industries had defaulted in payment of Intesa Sanpaulo. Thus, court viewed that Italian Bank can file a claim and may bring an action for winding up of Videocon Industries.

[1] Rajah of Vizianagaram v. Official Receiver and Official Liquidator of the Vizianagaram Mining Company Ltd. AIR 1962 SC 500 (¶24).
[2] Intesa Sanpaulo S.P.A. v. Videocon Industries Limited [2013] SCC OnLine Bom 1910

Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises & Anr.[3]

Counsel of Appellant in this case was of the view that so far there is no treaty on cross border insolvency between India & Singapore. In this case Sumkin Bussan had initiated execution proceedings against the property of other party. Further a warrant of sale was issued. Meanwhile Respondent no. 2 in the case was adjudicated as Bankrupt by High Court of Singapore. Research proposition of the present case is that whether Singapore court has jurisdiction to interfere with Defendants execution against Mumbai property in India. Initially stay was granted by High court of Bombay but later on case was analysed in which a conclusion came that there is lack of framework for cross border insolvency so far in India.

Judicial Precedents of Cross Border Insolvency after the IBC, 2016

Concept of Cross Border Insolvency cannot be said to be completely new-fangled for India. Because some attempts were made earlier and one such stance is that the code recognizes foreign creditors as "Financial Creditors". Thus, a Foreign creditor may file a petition before NCLT. Currently, only Section 234 and 235 of the code deals with provision of cross border insolvency.

P. Macfadyen & Co. Ex Parte Vizianagaram Co. Ltd[4]

This is recognized as the first case of cross border insolvency.[5] Relevant facts for the case are enumerated as, follows: Vizianagaram a Mining company which was incorporated under the Companies acts in India, though the registered office of the mining company was located in London. P. Macfadyen was the chairman of the company. In this case after the death of one of the partners the debtor company which was an Anglo Indian company was liquidated. Therefore, the parties entered in an agreement.

Jet Airways (India) Ltd. v. State Bank of India and Another[6]

Case of Jet Airways is one such precedent in India to know about the Cross Border Insolvency. Proceedings have been initiated against Jet Airways in India as well as in Netherland. To manage the assets of Jet Airways, a Dutch Trustee has been appointed in Netherland. Thus, vide this case facts came forward that Ashish Chhawchharia as Resolution Professional of Jet Airways has entered into a Protocol with the Dutch Trustee. Parallel proceedings are going on against Jet Airways. In India the company has entered into CIRP stage whereas in Netherlands, Company has been avowed as a Bankrupt by the District Court of North Holland, within the meaning of their code. Initially an application was sent by the Dutch Trustee wherein a request was placed to coordinate in this matter and to reach to a mutual arrangement to give best interests to the company. Finally Parties entered into the protocol. The said Protocol was also based on UNCITRAL Model law. Protocol also mentions that India shall be recognized as the centre of main interest whereas Proceedings in Dutch shall be recognized as "Non-main insolvency proceedings."

[3] Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises & Anr. (2005) 6 Bom C.R. 240
[4] P. Macfadyen & Co. Ex parte Vizianagaram Co. Ltd. [1908] 1 K.B. 675
[5] https://www.scconline.com/blog/?p=247207
[6] Jet Airways (India) Ltd. v. State Bank of India and Another 2019 SCC OnLine NCLAT 1216

Vide this NCLAT Judgment the judgment delivered by the NCLT, Mumbai Bench was also set aside, wherein it was stated that the Dutch Court has no jurisdiction in Corporate Insolvency Resolution Process of Jet Airways.

This is the first cross border insolvency case which had prompted India to make robust framework of Cross Border Insolvency for the best interests of the parties.

Apart from example of Jet Airways case, we have Essar Steel, Videocon and Amtek Auto case too which had further prompted India to make framework related to Cross Border Insolvency.

Amtek Auto case:

Amtek Auto Case is another example wherein the company had assets in varied different jurisdictions and with this, parallel restructurings were taking place.[7]

Videocon Case:

In Videocon case the relevant facts are that NCLT had ordered for inclusion of assets of Videocon in overseas.[8]

Challenges in the light of Cross Border Insolvency

Enforcement of Domestic Insolvency law can be said to be easy to some extent but when matters related to Cross Border Insolvency emerges, complexities and challenges also get hyped. This is a true fact with reference to Cross Border Insolvency. Whenever parallel proceedings are going on in said two nations, then each nation attempts to establish its supremacy over the other. Sometimes, situation also emerges wherein one nation would not consider the proceedings of other nation. Ultimately this effect the interests of the company who is insolvent.

Issue of determination of Centre of Main Interest

One of the main issues regarding cross border insolvency is how to decide the Centre of Main Interest. Centre of Main Interest is basically a notion that has been implemented to decide that where will be the insolvency proceedings held. Centre of Main interest is basically the place of incorporation of the company.

Lack of provision related to cross border insolvency in Indian Framework

Universalism and Territorialism approach towards Cross Border Insolvency

Vide judgment of Jet Airways, Indian Courts had not followed the principle of neither Universalism nor Territorialism. Universalism denotes the position wherein Insolvency of the Corporate Debtor is managed by One single nation, and the location is basically where the Corporate Debtor is located, and it's a unified system, even though the Debtor has business, assets and creditors across many countries, still there will be only one court that will deal with the whole proceeding against debtor. Thus, in some countries concept of Universalism prevails,

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[7] Application Initiating CIRP Must Meet The Threshold As Mentioned In Amended S.4 IBC, Even Though Notice U/S 8 Was Issued Prior To Such Amendment (livelaw.in)

[8] https://www.ipaicmai.in/IPANEW/UploadFiles/PPT/Cross_Border_Insolvency_in_India_Key_Issues_Cases_17-April-2020_RGarg.pdf

wherein only one single court will apply and manage the insolvency of the debtor. In Universalism principle, proceedings will be held in that country where debtor's belong to, meaning thereby that location of debtor matters the most. Therefore, only the courts where the debtor is domiciled, will be able to continue the proceedings. Whereas, India so far has not paved its way towards the principle of Territorialism or Universalism. The principle of Universalism was not good enough therefore came another principle, which is Territorialism.[9] On one side there is Universalism and on other side there is Territorialism, which denotes that Debtor's insolvency shall be managed by the Domestic as well as Foreign Insolvency law. Thus, in this case the country where assets are located and the country of the company (the debtor) both shall be managing the insolvency. Brazil, China, Russia are some countries which had adopted Territorialism model of cross border insolvency. These are two sets of approaches which are existing in cross border insolvency. On one spectrum there is the principle of Universalism and on other end, there works the principle of Universalism.[10]

India's approach towards Modified Universalism

As the spectrum of Universalism and Territorialism didn't worked, a completely new approach emerged. The new approach is a hybrid approach combing advantages of both previous approaches into one.

The concept of Modified Universalism came forward with the Model Law of 1997. Modified Universalism is a better approach from the traditional approach, as it combines the advantages of both approaches. This approach has been followed by India, if we evaluate the cross border insolvency case of Jet Airways. In Modified Universalism, courts are free to cooperate with courts of other jurisdictions wherein insolvency proceedings shall take place but they are not obligated in doing so. Modified Universalism works on the concept of jurisdiction in Main interest point of the company as well as place of non-main insolvency proceedings. Thus, the National Company Law Appellate Tribunal (NCLAT), while delivering the judgment in case of Jet Airways Ltd. v. State Bank of India and another has taken note of the fact that parties has mentioned that the *"Centre of main interest for the company shall be India, thus the Indian Proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings".*

Apart from India, United States had adopted the modified universalism approach. Even the UNCITRAL Model Law also works on the principle of modified universalism. Thus, in this approach one court will be the main place related to insolvency, main place is basically understood as "centre of main interests" and other place shall be considered as "non-main" point, and its function shall only be to provide cooperation and assistance to the main proceeding of the insolvency.[11]

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[9] Raj Bhala, International Dimensions of Japanese Insolvency Law, Monetary and Economic Studies February 2001, https://www.imes.boj.or.jp/research/papers/english/me19-1-5.pdf

[10] https://deliverypdf.ssrn.com/delivery.php?ID=716097073084074001119117071110117004042021055002019085109020124093009000126106009018021054116024117056041071111027108100082065055058046000054087099096066092117113126093026076124069082010125125103087064085117000127028123092105030108067006110094064096017&EXT=pdf&INDEX=TRUE

[11] https://cbcl.nliu.ac.in/insolvency-law/cross-border-insolvency-under-the-insolvency-and-bankruptcy-code-2016-opportunities-and-challenges/

Role of UNCITRAL Model Law

UNCITRAL Model Law is the base for the designing of the cross border insolvency in India. UNCITRAL is the only universal law so far. UNCITRAL Model Law, 1997 works on the principle of fair and cost effective manner of providing insolvency. UNCITRAL is the only body that is making efforts for harmonizing International commercial law.[12] Model Law contains provision wherein a foreign creditor can approach the Courts in which company is incorporated for seeking any assistance.[13]

Instances where cross border insolvency was not an effective tool

Nirav Modi case is one such instance where Indian Courts had not adopted cross border insolvency. This was due to the fact that India at that time was not well versed with the idea of cross border insolvency. Relevant facts for the case is that Indian lenders found themselves unable to deal with assets of Nirav Modi as U.S. had already filed for bankruptcy of Nirav Modi. Therefore, a need was felt that India needs to adopt an exhaustive cross border insolvency laws.

Challenges in cross border insolvency

One of the key consideration before India, which is also a challenge is the cost. As the company is already distressed, then cost in payment of arbitrators fees can be one of the issues for the distressed company. Because as the matter is between multiple jurisdictions, either it will be solved by some protocol or through arbitrator.

Another challenge is coordination, co-operation and communication. India is not so well versed now, to deal with cross border insolvency. Though the result of proceeding of Jet Airways and Videocon was good enough but the initial view of the courts regarding cross border insolvency was not so welcoming.

Another challenge is till now India has only limited precedent related to cross border insolvency, and one of the landmark is of Jet airways case. Apart from this, India does not have any matters pertaining to Cross Border Insolvency. India needs to expand its approach towards cross border insolvency.

Another challenge before India is, India has not till now adopted Model Law fully. "*The Committee has recommended to adopt Model law initially on a reciprocity basis, and if it deem fit after examination, we will consider it later on. Reciprocity imply that domestic court will only recognize and enforce the judgment of foreign court only in one situation, i.e. when the foreign country has adopted similar legislation to domestic country."*[14]

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[12] Sandra M. Rocks and Kate A. Sawyer, "International Commercial Law: 2005 Developments, International Commercial Law: 2005 Developments (jstor.org)

[13] The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016 (sagepub.com)

[14] PRS Legislative Research, Report summary Insolvency Law Committee on Cross Border Insolvency, https://prsindia.org/files/policy/policy_committee_reports/ILC%20Summary%20-%20Cross%20Border%20Insolvency.pdf

Another challenge is absence of a good framework which includes all possible situations related to who will access the assets, etc. Thus author is of the view that India needs a consolidated framework now to reach to next step of cross border insolvency.

Author's comment

Sometimes, creditor surrender themselves to only one nation wherein they can see that their assets and profits can be maximised in only that jurisdiction.[15] If company is already been declared dissolved, then question of arbitration does not arise in such situation.

Author is of the view that foreign jurisdiction never view India as a choice for resolving their dispute. This is because of bad impression of India. One such country is United Kingdom. *"The United Kingdom, although it does not recognize India as a relevant country under the provisions of Section 426 of the Insolvency act of 1986."*[16]

There can be some situations wherein there will be difficulty in coming to a mutual decision between two nations, then in such scenario either of the two nations should stay back and let the other nation to proceed. This has happened in Cambridge Gas case, The defendants well knew that proceedings had already been started in the U.S., but the petitioner chose to stay away from the U.S. proceedings in order to maintain cordial relations between the two nations. And this approach is very welcoming too.[17]

According to author, the report has missed on some important aspects, some of them are: Who will be having jurisdiction to take control of assets of the debtor, which nation Resolution Professional will be having jurisdiction to take assets, what will be the quantum of Resolution Professional, whether there will be only 1 or more than 1. These are some instances which according to author is being left undiscussed.

Though, recently Union Budget 2022 has been passed in India. Finance Minister Nirmala Sitharaman has given her speech while presenting the budget 2022-2023, wherein she states that the current budget focus on cross border insolvency as well. Further she stated that India is still stuggling with Omicron virus, and with this Indian economy has suffered a lot, therefore a vision has been adopted *that "Amendments will be done in the IBC Code in order to have the resolution process work in a systematic manner and that will further help in achieving the goal of cross border insolvency resolution*".[18] Some amendments have been prescribed via Union Budge of 2022 within Cross Border Insolvency by the Finance Minister Nirmala Sitharaman. This is a indeed a good step that will further help in making the provisions related to cross border insolvency seamless. Aim to make such amendment was felt as presently, India has no standard instrument to restructure distressed companies involving disputes of cross border

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[15] Priya Misra, Cross Border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies- Determining Jurisdiction for Group Insolvencies.
[16] Ran Chakrabarti, Key Issues in Cross Border insolvency, KEY ISSUES IN CROSS-BORDER INSOLVENCY (jstor.org)
[17] Professor Sandeep Gopalan and Michael Guihot, Recognition and enforcement in Cross Border Insolvency Law: A proposal for judicial gap filling, https://www.iiiglobal.org/sites/default/files/18848888v1%20-%20Recognition%20and%20Enforcement%20in%20Cross-Border%20Insolvency%20Law%20%20%28Michael%20Guihot%29.PDF
[18] Speech of Nirmala Sitharaman Minister of Finance, Budget 2022-2023, https://www.indiabudget.gov.in/doc/budget_speech.pdf

insolvency. Even Legal experts are of the view that this step by Finance Minister will definitely going to make India's future great. Raj Bhalla, who is the partner at MV Kini sated with respect to Budget announcement that, *"A framework for cross border insolvency will be prepared with amendments in the provisions of Section 234 and 235 of Insolvency and Bankruptcy Code 2016 for recovery of assets of Corporate Debtor available outside the country. The present two section of the IBC code are not much adequate and thus a need was felt to make a better framework"*[19]

Budget session also discusses that presently India does not have a robust and standardised framework for cross border insolvency and therefore we will try to frame such a framework for India.[20] Therefore for Indians Union Budget 2022 is the only hope that will lead to betterment of Cross border insolvency provisions.

Suggestions

Author therefore provides some suggestions on which India needs to work upon. These are mentioned as under:

- India needs to increase cooperation with foreign jurisdictions.
- India needs to adopt fair strategy in order to enable itself as a competent jurisdiction.
- India needs to become the hub for cross border insolvency disputes. And for this, initially it needs to adopt some principles so that it can estimate its potentiality.
- The Model law should be sufficient enough, so that both countries are happy with the decision.

[19] Dinesh Unnikrishnan, Why amendment to cross border IBC rules is important, February 3, 2022, Explained | Why amendment to cross-border IBC rules is important (moneycontrol.com)

[20] Lalatendu Mishra, Economic Survey 2022 calls for standardised Cross border insolvency framework, https://www.thehindu.com/business/budget/economic-survey-2022-calls-for-standardised-cross-border-insolvency-framework/article38352831.ece