

“LAWS RELATING TO CROSS-BORDER INSOLVENCY IN INDIA AND ITS DEFECTS”

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Cross-Border Insolvency is a term which includes two words that is Cross-Border and Insolvency, where Cross-Border represents the involvement of countries (crossing borders of more than one nation), whereas Insolvency reflects a state of an individual or corporate becoming incompetent to pay back the debts which are due. Cross-Border Insolvency is a situation which deals with the matters, where the parties dealing with the Insolvency belongs to different countries, it also deals with the circumstances in which the Insolvent debtor's assets or creditor's assets are located in numerous jurisdictions.

The Cross Border Insolvency deals with three major aspects¹;

- i) Protecting the rights of foreign creditors on the debtor's assets which are located in numerous jurisdictions where proceedings of insolvency are taking place.
- ii) Helping Creditor in order to involve all the assets of debtors which are situated in different jurisdictions.
- iii) When the insolvency proceedings, going on in multiple jurisdictions on same debtor.

With the origin of technology in the modern world, the cross-border trade is not anymore preserved only for giant Multi-national Companies, but it also gave opportunity to many businesses to go beyond the jurisdiction of their home countries and increase their activities on global scale. As a result of globalization, the investments on global scale are increasing day by day. With such an increase the investing nations also require certain protections in order to ensure that their investments are safe.

Historical Development of the Cross Border Insolvency

The Cross-Border Insolvency sometimes referred as International Insolvency was in practice since early stages in England and it use to govern by Common Law, the first case which was recorded in 1764 was *Solomon v. Ross*², in this case English Creditor brought action in England against sums owing to Dutch Firm which was declared Bankrupt in Netherland.

The historical development of Cross-Border Insolvency can be traced back since modern Private International Law's birth, when State use to enter into agreements and sign treaties, to harmonize their relationships and to resolve the conflicts. The Cross Border Insolvency was first recognized in 1889 Treaty of Montevideo³, signed by 5 Countries to harmonize their relations and to regulate the Bankruptcies among 5 signatories, they were Argentina, Paraguay, Bolivia, Uruguay, and Peru. In the year 1933, another 5 nations signed a convention to regulate Scandinavia region, Nordic Bankruptcy Convention⁴ which was signed into the law by Denmark, Finland, Iceland, Norway, and Sweden. In 1980, An attempt was made to introduce the Model Insolvency Cooperation Act by International Bar Association, but it became unsuccessful when none of the countries adopted it.

¹ Sarthak Jain and Anushka Sheth, “Cross Border Insolvency: Why India Should Adopt the Uncitral Model Law”, ILJ (2018), available at: <https://www.indialawjournal.org/cross-border-insolvency.php>, (Last accessed on April 18, 2020).

² *Solomons v. Ross* (1764) 1 H Bl 131n.

³ Ana Delić, “The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)”, available at: <https://opil.ouplaw.com/page/Treaties-Montevideo/the-birth-of-modern-private-international-law-the-treaties-of-montevideo-1889-amended-1940> (Last Accessed on May 24, 2020).

⁴ Carl Hugo Pament, “THE NORDIC BANKRUPTCY CONVENTION – AN INTRODUCTION” available at: https://web.archive.org/web/20150623141319/http://test.iiiglobal.org/downloads/country/20resources/Norway/Articles/1~_Nordic_Bankruptcy.pdf (Last Accessed on May 24, 2020).

However, the most significant development that was made in context of Cross-Border Insolvency is UNCITRAL Model Law on Cross Border Insolvency (30 June 1997), at present 46 jurisdictions put in place the Model law in their local laws.

Another significant legislation is the EC (European Council) regulation on Insolvency proceedings, 2002 (which was passed on May 29, 2000 and came into effect from May 31, 2002)⁵, as its name suggests that it applies to member countries of European union and regulates the insolvency proceedings among the member states.

Risks involved in the Cross Border Insolvency

Even though the domestic Insolvency also includes certain risks such as identifying debtor's assets, calling in those assets and liquidating them and making distribution in order to ensure appropriate priority and so on and so forth. But in the state of Cross-Border Insolvency, certain additional risks⁶ may rise such as;

- i) To identify the extent upto which the access to the assets situated in a foreign country may be obtained by Insolvency administrator.
- ii) To prioritize distribution of money, whether to consider the local-creditors first or they have to line up with the foreign-creditors.
- iii) To recognize of rights of local-creditors in a foreign insolvency administration process.
- iv) Balance between local and foreign priorities for distribution of Money among creditors.

It is important to have an adequate measure to avoid complexities, and also which could efficiently deal with all the risks and uncertainty that costs to businesses in the context of the Cross-Border Insolvency.

Mechanism bestowed by Insolvency and Bankruptcy Code, 2016

In India, the Insolvency and Bankruptcy are governed by Insolvency and Bankruptcy Code, 2016 (31 of 2016). It was enacted on 28th May 2016, with the intent to consolidate and amend the existing laws and to produce a detailed and unified code which will address with the issues relating to Insolvency and Bankruptcy.

At the time of introduction in the house, the Insolvency and Bankruptcy Code, 2016 was reticent on the issue relating to the Cross-Border Insolvency, efforts were made by the Joint-Committee on the Insolvency and Bankruptcy Code (introduced in 2015 and also known as Bhupendra Yadav Committee, is a 30 member joint committee of members of Parliament) through its reports and recommendations, the mechanism in regards to the Cross-Border Insolvency was introduced.

- i) **Under Part II, Chapter 2: Section-18 of Insolvency and Bankruptcy Code, 2016⁷**: It empowers Interim Resolution Professional under situation of Insolvency proceedings against Corporate Debtor, for controlling the debtor's assets (located in the foreign countries) and taking them into his custody.
- ii) **Under Part II, Chapter 3: Section-35 of Insolvency and Bankruptcy Code, 2016⁸**: It empowers the liquidator for taking control, custody and selling the debtor's assets which are situated in the foreign countries.
- iii) **Under Part V: Section-234 of Insolvency and Bankruptcy Code, 2016⁹**: It provides a procedure for agreements with foreign countries, this section enables Center Government of India for entering into the reciprocal agreements with the any

⁵ Elvinger Hoss & Prussen, "Luxembourg: EU Regulation On Insolvency Proceedings", available at: <https://www.mondaq.com/InsolvencyBankruptcyRe-structuring/620148/EU-Regulation-On-Insolvency-Proceedings> (Published on August 15, 2017).

⁶ Corporate Law Economic Reform Program Proposals for Reform: Cross-Border Insolvency - Promoting international cooperation and coordination (2002) available at: <https://treasury.gov.au/publication/clerp-paper-no-8-proposals-for-reform-cross-border-insolvency>, (Last Accessed on May 24, 2020).

⁷ The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).

⁸ *Ibid.*

⁹ *Ibid.*

other Country's Government, in order to enforce the provisions of this Code. Clause 2 of this section allows Center Government to give direction by notifying in official Gazette to take appropriate action or put certain conditions on the debtor's assets (including Companies at default and their personal guarantor located in a foreign country).

iv) **Under Part V: Section-235 of Insolvency and Bankruptcy Code, 2016¹⁰**: entails the procedure to present a letter of requests before a foreign country (certain cases), it allows the resolution professional, liquidator or bankruptcy trustee, perhaps (for their respective proceedings), making an application to concerned adjudicating authority (National Company Law Tribunal-NCLT for Companies / Debt Recovery Tribunal-DRT for individuals or unlimited liability partnerships), to collect the evidences or to seek action related to debtor's assets or their personal guarantors situated in a foreign country with whom India has made reciprocal arrangements under **Section 234** of the Code or otherwise. If Authorized authority is insatiate with the collected evidences or action taken, it may direct the competent court or the competent authority to take the appropriate action.

Issues with the provided law for Cross-Border Insolvency bestowed by Insolvency and Bankruptcy Code, 2016

Even though Insolvency and Bankruptcy Code provides for reciprocal arrangements to address the circumstances which refer back to foreign countries but still there are some issues which need to be addressed such as, these arrangements are based upon unbounded negotiations with each-country, it cannot bring efficiency than a uniform code for bringing cooperation among different countries. Also, different reciprocal arrangements may lead to complexity in order to finalize and recognize the insolvency proceedings and assets located in more than one foreign country.

Establishments made through Case Laws as to Cross-Border Insolvency in India

Hitherto, there is no comprehensive framework to address the issues regarding Cross-Border Insolvency, The Supreme Court of India has number of times addressed those issues. In the case of Macquarie Bank Limited v. Shilpi Cable Technologies Ltd¹¹ Supreme Court held that to initiate and participate in the Corporate Insolvency Resolution Process (CIRP), the foreign creditors have the same rights as of the domestic creditors. In the Jet Airways (India) Pvt. Ltd. Insolvency¹² proceedings the National Company Law Appellate Tribunal (NCLAT) upheld the recent Cross Border Insolvency Protocol held that the Resolution Professional (RP) appointed by National Company Law Tribunal (NCLT) is equal to the Dutch trustee appointed by the Dutch Insolvency Trustee. Thus, the Dutch trustee has right to participate in Committee of Creditor's meeting as per Insolvency Law. The protocol recognized that Jet Airways, an Indian company having prime interest vested in India, making Insolvency and Bankruptcy proceedings as main proceedings and the Dutch one as its non-main. The Protocol was based on UNCITRAL Model law for the Cross-Border Insolvency to promote harmony, maintain balance, to coordinate and cooperate between the countries in question. Jet Airways Insolvency¹³ is one of the sensational cases of Cross-Border Insolvency, where National Company Law Tribunal held that there are no certain provisions in Insolvency and Bankruptcy Code to recognize the foreign judgment, even if it is verified and true but cannot be taken on record by Indian Courts. In this case Jet Airways is facing Insolvency proceedings in Netherland and India at the same time, where Netherland requested National Company Law Tribunal (NCLT – Mumbai) to recognize the Dutch proceedings but NCLT rejected the plea and hence they moved to National Company Law Appellate Tribunal (NCLAT).

¹⁰ *Ibid.*

¹¹ Macquarie Bank Limited v. Shilpi Cable Technologies Ltd, 2017 (Supreme Court).

¹² Shweta Bharti and Sukrit Kapoor, "India at crossroads with cross-border insolvency", available at <https://www.vantageasia.com/india-crossroads-cross-border-insolvency/> (Published on October 31, 2019).

¹³ State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/ MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.", available at <https://www.jetairways.com/insolvencyproceedings/Documents/NCLT-Order.pdf/> (Last Accessed on May 28, 2020).

The United Nations Commission on International Trade Law (UNCITRAL Model Law) and the Cross Border Insolvency

UNCITRAL on the Cross Border Insolvency (Model Law), 1977 was introduced to provide regulatory framework to address the Cross Border Insolvency issues and to make sure the less invasion of country's local insolvency law. The need to introduce this model arose due to lack of uniform ways to manage the issues relating to Cross-Border Insolvency, the content of Model Law on the Cross-Border Insolvency issues was received by UNCITRAL on 30 May 1997 and thereby passed by General Assembly on 15 December 1997.¹⁴

The issues relating to Cross Border Insolvency were first determined by V. Balakrishna Eradi Committee on the laws relating to insolvency and winding up of the companies in the year 2000, which suggested to amend the Companies Act, 1956, and to introduce the recognition, cooperation and participation of foreign creditors. It was again recommended in the year 2001 by N.L. Mitra Committee (constituted with effect from February 8, 2000 it was more of Advisory group Committee with the main objects to introduce Corporate Bankruptcy, integrate Insolvency Laws and to meet with the International standards in the field) to adopt Model law in India to deal with the Insolvency, it also suggested for enacting a separate law for the Insolvency and Bankruptcy.

UNCITRAL Model-Law is considered to be a blueprint for all the legal systems; it deals with four major principles:

- i) In the Insolvency proceedings the direct access should be given to the concerned foreign Insolvency Professionals, participation of foreign creditors should be allowed to initiate the proceedings against the debtor in default.
- ii) Foreign proceedings should be recognized.
- iii) The domestic and foreign courts as well as Insolvency practitioners should Cooperate with each other and act in coordination.
- iv) Maintain harmony and cooperation between two countries in relation with concurrent insolvency proceedings.

Conclusion

Insolvency is a financial state of an individual or a company where their liability exceeds the total value of its assets and they are unable to raise funds to pay back their obligations or debts which become due. Cross-Border Insolvency is a situation which deals with the matters, where the parties dealing with the Insolvency belongs to different countries.

The existing provisions under the present law (Section-234 and 235 of the Insolvency and Bankruptcy Code) are insufficient and time consuming. As it is all about reciprocal arrangements based upon unbounded negotiations with other country, it cannot bring efficiency than a uniform code for bringing cooperation among different countries. Also, different reciprocal arrangements may lead to complexity in order to finalize and recognize the insolvency proceedings and assets located in more than one foreign country.

There is an urgent need to overcome this drawback and strengthen the regulatory framework dealing with the concerns relating to Cross Border Insolvency. Most fitting solution is to adopt the Model Law on the cross-border insolvency, to ensure uniformity and coordination to resolve matters relating to Cross Border Insolvency. Also, it will come up with several advantages as opposed to relying on bilateral agreements.

- i) It will help in attracting more foreign investors because exchanging necessary information will become easier, credit recovery efficiency will increase and will also help in preserving the assets of Corporate and help in reorganization.
- ii) The Model law is clearer and more specific in regard to the Cross-Border Insolvency as compare to Insolvency and Bankruptcy Code.
- iii) It is flexible and allows to make changes as per domestic needs of the Country.

¹⁴ *Supra*, Note 1.

- iv) It lays down a clear procedure when and how to recognize the foreign proceedings
- v) It will enhance coordination and cooperation among the courts and insolvency practitioners, be it on domestic level or international level.

In this Global Competitiveness the Companies focuses more on achieving the International standards and to give its hundred percent to acquire the number one positions and now that Corporate Insolvency has become more prevalent. A Company requires strong and well developed legal framework, the Model-Law is best fitted to fulfill all the requirements. There are around 23 jurisdictions at present who have adopted the Model Law, including the United States as well as United Kingdom. The Interim Report given by the Bankruptcy Law Reforms Committee (composed on August 22, 2014 by the Ministry of Finance; also known as BLRC – Bankruptcy Legislative Reforms Committee) made recommendations for adoption of the Model-Law. Moreover, the Committee’s report states that the Indian Government has also indicated for coming up with a new framework on the Cross Border Insolvency at a suitable time. The Complete Insolvency and Bankruptcy Code, 2016 needs to be amend and upgrade keeping in mind the global perception and ease of doing business regime for a smooth run.