INSOLVENCY AND BANKRUPTCY CODE AND ITS COMPARATIVE ANALYSIS

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ABSTRACT: The research paper focuses on the Insolvency and Bankruptcy Code, 2016 and its comparative Analysis with a view to examine its efficiency and to pluck the gray areas.

INSOLVENCY LAWS IN OTHER COUNTRIES:-
The research paper focuses on the Insolvency and Bankruptcy Code, 2016, and its practical application in India. The practical impact of IBC code 2016 is still up for debate, necessitating the present study. It is imperative to examine the efficiency of the Indian Insolvency Law (IBC) in contrast to similar laws, six years after this legislation IBC 2016 was passed. In this paper, the legal processes for insolvency and bankruptcy in India are compared to those in the US, the UK, Germany, Singapore, and Australia.

Comparative Analysis of Insolvency Laws:
How the Indian IBC 2016 compares to other insolvency codes adopted internationally is a common question that comes to mind. An examination into foreign insolvency and bankruptcy rules could provide additional information because they have been around for a while and have dealt with a number of situations. As far as we are aware, IBC 2016 is a new law that is still developing as it was passed in May 2016. The regulator (Insolvency & Bankruptcy Board of India) should be applauded for how quickly and pro-actively it responds to each new situation by enacting laws and procedures to deal with it effectively.

In India, resolving a company's insolvency takes an average of 1.6 years, compared to 1.0 years in the US, UK, and Australia, 1.2 years in Germany, and 0.8 years in Singapore, according to the 2019 World Bank Doing Business Report. Additionally, in comparison to other nations, the recovery rate is 71.6% lower. [1]At this point, it is vital to look at how other jurisdictions handle insolvency in order to gain some insight into how to reform the Indian insolvency regime.

KEY WORDS: Insolvency, Bankruptcy, IBC, Code, other countries.

INTRODUCTION:

The reason for conducting the comparison of insolvency laws between India and these countries, is that as per the rankings of World Bank, India ranks at 52 in its insolvency resolution, while US ranks at 2, UK is at 14, Germany is at 4, Australia is at 20 and Singapore is at 27. Therefore, even if India's score is rising, it still has a long way to go before catching up to these other nations in terms of insolvency resolution.[2]

Insolvency framework in United Kingdom:

The English Common Law serves as the basis for the vast majority of legal systems in most nations. Therefore, the IBC Code substantially resembling the UK Insolvency Regime is not surprising. Despite being based on the UK's framework, India has adequately adapted the Indian Insolvency and Bankruptcy Code, 2016, identifying essential elements of the legislation that may not apply in an Indian context.

The insolvency bankruptcy process can be started by the creditors or Debtor Company or holders of qualifying floating charges (QFC). The Moratorium begins after the court appoints the administrator.

Management control during insolvency proceedings - The administrator or insolvency practitioner gains management control. The directors, however, continue to be in charge of the company's day-to-day activities.

Sale of assets: Administrator is like an agent of the company, and has the power to enter into contracts without personal liability. They have the authority to sell any debtor property without the court's permission.

The UK Insolvency Act 1986 governs the insolvency law in the UK:

[1] World bank doing business report ,2019;https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency
[2] World bank doing business report ,2019;https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency

Following the Cork Report in 1982, the new policies of the United Kingdom's insolvency law have attempted to try and save a company that is in trouble, minimize losses, and ensure that the burdens placed on employees, the community, creditors, and other stakeholders as a result of enterprise failure are distributed fairly[3]. If a business is unable to be revived with the necessary assistance, it is "liquidated," which means its assets are sold to pay creditors according to their priority.

Insolvency framework in United States:
All bankruptcy cases in the United States of America are handled by federal courts in accordance with the guidelines set forth in the "Bankruptcy Code," a federal law. All bankruptcies in America are governed by the same federal statute. The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) controls the procedural parts of the bankruptcy process.

Chapter 11 of United states bankruptcy code:
The chapter is titled “Reorganization”." In contrast to Chapter 7, where the company shuts down and a trustee sells all of its assets, in Chapter 11 the debtor maintains control over its business operations while simultaneously repaying creditors through a court-approved restructuring plan.

American bankruptcy laws allow failing businesses to restructure their debts while still continuing to be in operation. Numerous businesses were well known to be revived under Chapter 11. Additionally, Chapter 11 guarantees the emergence of businesses with manageable debt levels and successful operations. Every business, whether it is set up as a corporation, partnership, or sole proprietorship, as well as individuals, are eligible to file for bankruptcy under Chapter 11, albeit corporate businesses are the ones that use it the most frequently.

A well-established procedure which is, Section 363 under Chapter 11 of US bankruptcy law allows businesses to sell assets free of debts and encumbrances in order to maintain the value of the company. A business under Chapter 11 can decide to sell off specific assets. This Code may be used by the "debtor"-a corporation that has declared bankruptcy, to "reorganize" its operations and return to profitability. The debtor or the trustee must perform other tasks mandated by the Bankruptcy Code in addition to managing the firm. They must also collaborate with creditors, the court, and other parties to obtain financing for continuous business operations.

Salient Features of Chapter 11 of United states bankruptcy code:

- Companies don't file for Chapter 11 protection in order to shut down their business; rather, they do so in order to carry on with their operations and take the necessary measures to become a stronger company financially, sometimes by reorganizing their operations or balance sheet or by selling nearly all of their assets.
- Throughout the chapter 11 rehabilitative process, management continues to be in charge of the business. Usually the administrators, trustees, and monitors are not appointed.
- An "automatic stay" often prevents parties from suing the company or seizing its assets, giving the company breathing room all through process.

The company sometimes devises a plan to become profitable again with success; other times, it eventually goes out of business. A company typically continues operating during a Chapter 11 reorganization, and its stock and bonds may be traded on the stock market.

One or more committees are appointed by the U.S. Trustee, which is the bankruptcy division of the Department of Justice, to represent the interests of creditors and stockholders in helping the company come up with a reorganization plan that will allow it to pay off its debt. The court must also approve the plan after being accepted by the creditors, bondholders, and stockholders. If the court decides that the plan treats creditors and stockholders fairly, the plan may still be approved even if the majority of creditors or stockholders vote against it.

The company, committees of creditors and stockholders discuss a strategy to release the company from making some debt repayments so that the company can resume its usual operations. The bankruptcy court must verify that the plan complies with the Bankruptcy Code before the plan can be put into action. Through Chapter 11, debtors also often keep a sizable portion of their assets.

A company may opt to sell off specific assets under this law. Subsidiaries of the company, outside the US are not required to be listed in Chapter 11 filings. Therefore, the company's subsidiaries that are kept out of Chapter 11 filings maintain their current legal position. Additionally, US bankruptcy laws provides and assists in debtor audits, debtor counselling, mandatory debtor education, etc., which further reduces false bankruptcies.

Conclusion:
Indian insolvency and bankruptcy law is a progressive statute that places a strong emphasis on the resolution process. One significant distinction between Indian law and US law is that Indian law calls for the management of the company by an insolvency professional, but US law calls for a "Debtor in Possession" approach (management retains control over running the company). The management of the company is best suited to running it for a quick reorganization plan rather than a new person who will have their

3

own learning curve and costs, according to US laws, but UK and Indian laws believe that an insolvency professional can run the company more effectively than the previous management.

Given the aforementioned, it is deemed necessary to have a legal framework in India that is similar to Chapter 11 of the US Bankruptcy Code which permits business continuity during bankruptcy proceedings, management control over the company filing the bankruptcy application, keeping subsidiaries and certain assets outside the scope of the bankruptcy application, etc.

All legal frameworks of various countries favor looking for resolution plan over liquidation. Insolvency regulator IBBI is proactively addressing the emerging situations which is remarkable. IBC has brought a culture change in corporate India, but it is a journey which is ongoing.

Cross Border Insolvency in India:

A lot of multinational companies which were formed due to rapid growth of technology and trade, engage in borderless relations to conduct businesses in various countries. Hence dispute arises in multiple jurisdictions having debtor and creditors at various locations with overlapping laws. Hence there is a need for cross border insolvency law to handle cases of overlapping laws of different jurisdictions in various countries.

Cross-border insolvencies are occurring more frequently, which is a reflection of the continued growth of international trade and investment. National insolvency laws, however, have generally not kept up with the trend and are sometimes ill-prepared to handle cross-border insolvency. Fraud committed by insolvent debtors is an issue that is getting worse both in terms of frequency and severity, especially when assets are hidden or moved to foreign countries. Additionally, there is a lack of coordination and communication between the courts and administrators from the relevant jurisdictions. These flaws typically lead to ineffective and discordant legal strategies, which make it more difficult to save financially distressed companies. The protection of the insolvent debtor's assets and the maximizing of their worth are hampered by such inadequate and uncoordinated legal procedures, which are not conducive to a fair and effective administration of cross-border insolvencies. Such methods lack transparency and the requisite resources to solve the problems, in addition to being unpredictable and time-consuming in their use. All of these factors have a negative impact on the assets of financially troubled companies and make it more difficult for them to be rescued. Additionally, the lack of consistency in the international insolvency procedures restricts capital flow and deters international investment**.**

Problems with cross-border insolvency extend beyond the failure of big international corporations. A foreign business may have domestic branches or subsidiaries or a domestic business may have foreign branches or subsidiaries. Foreign property may serve as security for a debt, allowing domestic assets to be utilized to pay off unsecured creditors. Domestic creditors may have valid claims in foreign bankruptcy cases and foreign creditors may have valid claims in domestic bankruptcy cases. A transnational insolvency problem can arise in any of these circumstances.

What is cross border insolvency?

- When a financially distressed debtor, has assets or creditors in more than one country, the treatment of such debtor is governed by cross-border bankruptcy (sometimes called international insolvency).
- The IBC code 2016 has successfully dealt with insolvency process in India, but there is still inadequate procedure for regulation of cross border insolvency.

Insolvency Law Committee on Cross Border Insolvency:

- The Insolvency Law Committee (ILC) was established by the Ministry of Corporate Affairs to recommend amendments to the Insolvency and Bankruptcy Code of India, 2016. On October 16, 2018, the Committee delivered its second report to the government, recommending changes to the Insolvency and Bankruptcy Code, 2016 with regard to cross-border insolvency. The UNCITRAL Model Law of Cross Border Insolvency, 1997 has been recommended for adoption by the Insolvency Law Committee (ILC), as it offers a comprehensive framework for addressing cross-border insolvency issues.[4]

KEY OBJECTIVES OF EFFECTIVE AND EFFICIENT INSOLVENCY LAW:

An effective and efficient insolvency policy should attempt to meet the following essential objectives in a balanced way, but approaches may differ across various countries.

- maximization of asset value
- provision for prompt, effective, and impartial bankruptcy resolution
- equal protection of the domestic and international creditors' interests
- To safeguard the assets of the debtors which are located in various jurisdictions.
- Bringing uniformity in the insolvency law and practices in different jurisdictions.
- Coordination among various jurisdictions and their domestic laws
- Determine the level of access which an insolvency administrator can exercise over assets held in a foreign jurisdiction.
- Whether the principle of secondary insolvency will be followed in the country i.e. the higher priority being given to the domestic creditors over their foreign counterparts.

[4] www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf

- In a foreign jurisdiction, the recognition of claims made by local creditors.
IBC contains two provisions which cover the cross border insolvency matter i.e. section 234 and section 235.

Agreements with foreign countries:
Under sec 234 the central government is empowered to reach agreements with other countries to address circumstances of cross border insolvency.

The Central Government may engage into an agreement with the Government of any country outside of India for the purpose of executing the provisions of this Code, according to Section 234 of the Code. [Section 234(1)]

By publishing a notification in the official gazette, the Central Government may order that the application of this Code's provisions to the assets or property of a corporate debtor or debtor, including, as applicable, a personal guarantor of a corporate debtor, located at any location in a foreign nation with which reciprocal agreements have been made, shall be subject to any conditions that may be specified. [Section 234(2)]

Letter of request to a country outside India in certain cases:
Sec 235-
The Adjudicating authority are empowered to issue letter of request to courts of foreign jurisdiction with which bilateral agreement has been entered into under section 234 , to decide the fate of foreign assets of corporate debtors which are located outside India.[5]

The adjudicating authority must apply competing clauses of different treaties entered by different jurisdictions where the corporate debtors' assets are present which can become a herculean task for the adjudicating authority.

India's present framework for dealing with cross-border insolvency depends on bilateral agreements it enters with other nations. Bilateral agreement finalization is a drawn-out process since it requires extensive, long-term negotiations. Additionally, each trade is unique, making it challenging for the adjudicating authorities to enforce the agreements or treaties signed with other nations.

However even sec 234 and 235 is insufficient to deal with the complex framework of cross border insolvency as admitted by ILC in its report in March 2018[6].

Hence UNICTRAL model needs to be adopted to resolve the dispute occurring in cross border insolvency.

A subsidiary body of the General Assembly is the United Nations Commission on International Trade Law (UNCITRAL). The United Nations Commission on International Trade Law creates international legislative texts for use by nations in reforming commercial law and preparing non-legislative texts for use by business parties in contract negotiations.

UNICTRAL model law on cross border insolvency is also a legislative text prepared by the UNICTRAL.

UNICTRAL MODEL LAW ON CROSS BORDER INSOLVENCY 1997:
The Model Law intends to help countries shape their bankruptcy laws into a contemporary, fair, and harmonized framework in order to more effectively address cases of cross-border insolvency. The Model Law, however, acknowledges the diversity of domestic legislation and places more of an emphasis on enhancing international cooperation and coordination than on seeking to unify the domestic laws.[7]

The UNICTRAL model law legislation is a key solution for solving the cross border insolvency issue. United States, Uk, Singapore, Australia and others have already adopted the model law into their local insolvency legislations[8].

- A wide ranging solution is offered by the model law to deal with cross border insolvency.
- The World Bank has recognized the international perspective of insolvency proceedings and has observed that the laws for international insolvency should provide for rules with respect to the cooperation among the Courts of various countries, choice of law, jurisdiction and recognition of foreign judgments.[9]
The four principles governing the model law are:-
1. Access:-
Providing direct access to domestic courts to the foreign creditors and/or professionals is the objective of the model law. Thereby this enables them to participate in or commence the insolvency proceedings against any concerned debtor.

5

6

7 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency

8 UNCITRAL, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table.pdf

9 World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, Principle 24, page 52. http://www.worldbank.org.

2. Recognition:
The Model Law permits domestic courts in any nation to recognize foreign proceedings and determine the relief to be provided in conformity with the foreign proceedings.

3. Cooperation:
Another objective of the Model Law is to ensure coordination to effectively manage the conduct of concurrent proceedings in different jurisdictions and to promote effective cooperation between insolvency professionals and courts in various jurisdictions.

4. **Coordination:**
The Model Law intends to help countries shape their bankruptcy laws into a contemporary, fair, and unified framework in order to more effectively address cases of cross-border insolvency. The Model Law, however, acknowledges the differences in domestic laws and places more of an emphasis on enhancing international cooperation and coordination than on seeking to unify the domestic laws.

DRAFT PART Z:
India has published a set of draft guidelines on cross-border insolvency, i.e. Part Z (the Draft chapter), with the goal of addressing the shortcomings of the current cross-border insolvency process, or the lack thereof.[10]

The Draft is built on the Model Law:
The Cross-border Insolvency Rules/ Regulation Committee (CBIRC) suggested the creation of Draft Part Z subordinate legislation after realizing the need to implement the Model law and began to combine its contents with the Indian legal system.[11]

Highlights of the Draft Chapter:

- The Draft Chapter does not apply to personal insolvency or individual debtors; rather, it is only applicable to corporate debtors.
- Only those nations who have incorporated the Model Law into their domestic legislation are subject to the provisions of the Draft Chapter.
- The Centre of Main Interests (COMI) is determined by the Draft Chapter. According to Section 14 of the Draft Chapter, it is assumed that the COMI for a corporate debtor is in its registered office subject to the condition that the registered office of the corporate debtor has not been moved to another jurisdiction within three months prior to the start of the insolvency proceedings.[12]

JUDICIAL RECOGNITION- JET AIRWAYS DISPUTE [State Bank of India v. Jet Airways (India) Ltd.]:
The first Indian company to be involved in a cross-border ruling in India was Jet Airways in 2019. The National Company Law Tribunal (NCLT) established an important precedent for the upcoming international insolvency disputes by authorizing the conduct of a "Joint Corporate Insolvency Resolution Process."

The State Bank of India filed an application under Section 7 of the IBC against Jet Airways, and upon admission, the corporate insolvency resolution procedure started on June 20, 2019.

The NCLT was kept informed of the initiation of insolvency proceedings against Jet Airways in the Dutch Court and the appointment of a bankruptcy administrator in the Netherlands to decide the fate of assets located in the Netherlands which belonged to the Jet Airways. When two European creditors filed a bankruptcy case against Jet Airways alleging unpaid debts totaling INR 280 crores, the Dutch judicial process commenced.

The Bankruptcy Administrator appointed by the Dutch Court filed a petition with the Mumbai Bench of the NCLT, requesting that the Bench recognise the insolvency proceedings that had begun in The Netherlands and stay the insolvency proceeding in India against Jet Airways because the matter was being decided by a competent Court in The Netherlands in accordance with Article 2(4) of the Dutch Bankruptcy Act.

The restructuring of the assets and claims against the corporate debtor would be affected by parallel proceedings in several countries, which would be detrimental to the interests of the creditors.

However, because Sections 234 and 235 of the IBC, which dealt with cross-border insolvency, had not been in effect, the NCLT declined to stop the proceedings, preventing the Bankruptcy Administrator from taking part in the Indian insolvency proceedings. Additionally, the NCLT invalidated the proceedings that had been initiated in The Netherlands and refused to acknowledge them. The Order issued by the NCLT was set aside following an appeal brought by the bankruptcy advisor before the National Company Law Appellate Tribunal (NCLAT), with the condition that the bankruptcy administrator would not sell any of Jet Airways' offshore assets.

[10] http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf
[11] https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf
[12] PublicNoiceCrossBorder_20062018.pdf (mca.gov.in)

Further, cooperation between the Bankruptcy Administrator and Resolution Professional was directed by the NCLAT whereby the Bankruptcy Administrator shall be allowed to participate in the meetings of the committee of creditors as well as an observer solely.

The Resolution Professional and the Bankruptcy Administrator created a cross-border insolvency protocol pursuant to the ruling in this case, after carefully considering the Model Law's guiding principles. The Dutch proceedings took place as non-main center proceedings, and India was recognized as the COMI.

Conclusion:
It is imperative to have a legal framework in India that is similar to Chapter 11 of the US Bankruptcy Code which permits business continuity during bankruptcy proceedings, management control over the company filing the bankruptcy application, keeping subsidiaries and certain assets outside the scope of the bankruptcy application, etc.

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