EVOLUTION OF CROSS BORDER INSOLVENCY IN INDIAN LEGISLATION: A STUDY

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ABSTRACT

With the growing outreach of globalization, the blurring state and national boundaries have become a pseudo-reality that hovers disparately over matters of trade and commerce. The primary issue that crops up in this scenario pertains to the national laws governing internal trading activities and matters of insolvency within the national boundaries that often come to pose contrasts between the trading partners from different nations. Thus, the disregard for national boundaries of a globalized system of trade comes to be jolted when it comes to the regulative authorities overlooking their activities. This hereby calls for a need for a unified system applicable to all the nations indiscriminately. In this paper we therefore examine the evolution of the existing laws within the Indian legal system with respect to "Cross-border Insolvency" and assess the need for the adaptation of the UNCITRAL Model. We shall engage in a deductive approach of research through analysis of case laws to attain the objective of this paper.

I. INTRODUCTION

The jurisprudence overriding the insolvency laws are premised upon three critical questions, those being; "*which* law should be applied; *who* has jurisdiction to administer the insolvency process; and *how* are judgments asserting control over assets enforced?[2]" These primary questions shall be investigated to establish the need for the UNCITRAL Model to approach a

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[2] Chakrabarti, R. (2018). "KEY ISSUES IN CROSS-BORDER INSOLVENCY. *National Law School of India Review , Vol. 30, No. 2*, 119-135".

notion of "Territorialism versus Universalism.[3]" The Competitive market created as a byproduct of globalisation has usurped the world economy within the unilateral activities of a concentrated few economic capitals of the West. The instances of "collapse of U.S. subprime mortgage markets" or the 'Bear Stearns bankruptcy' in 2007-08, the "shadow financial system" or the AIG bailout which later translated into "and finance ministry initiatives (predominantly in the United States and Europe) that achieved arguably artificial stability by effectively transforming private credit risk into sovereign risk" point towards an urging need for uniformity in the global banking system[4].

II. LITERATURE REVIEW

There has been extensive research and investigation invested in the critical examination and comprehension of the laws governing matters of "cross-border insolvency" within the "Insolvency and Bankruptcy Code" that provides as the cornerstone in cases pertaining to insolvency associated with foreign creditors.

The review of literature hereby looks into the current legal framework through firsthand inspection of primary sources such as statutes (the IBC) and the CPC in order to identify the drawbacks and also covers the review of secondary sources such as research articles as *"Key Issues in Cross-border Insolvency"* by R. Chakrabarti or proceedings of conference such as *"Prospects for Coordination and Competition in Global Finance"* as documented by B.C. Mathews, apart from the critical analysis of several landmark judgements and legal blogs as the one on *"Tryst with corss-border insolvency law: How series of Judicial Pronouncements Pave the Way"* by K. Raushan and M. Arora has been extracted.

This paper intends probe into the current fallacies associated with such laws through an evolutionary study of the code and arrive at possible solutions in the form of models that can bring about uniformity and ease the task of the judiciary in resolving cross-border insolvency cases. In order to investigate and reflect extensively upon the advocacy of uniform international model for cross-border insolvency laws, further research on this domain is encouraged.

[3] Franken, S. M. (2014). "Cross-Border Insolvency Law: A Comparative Institutional Analysis. *Oxford Journal of Legal Studies*, 97-131".

[4] Matthews, B. C. (2010). "Prospects for Coordination and Competition in Global Finance. *Proceedings of the Annual Meeting (American Society of International Law) , Vol.104, International Law in a Time of Change*, 289-295".

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III. RESEARCH QUESTIONS/OBJECTIVES

- Whether national boundaries and laws pose contradictions in matters trade and business in a globalized world?
- Whether in cases of "cross-border insolvency" a particular jurisdiction of either of the nation states shall enjoy predominance?
- Whether the neo-liberal free market system demands the implementation of a system of uniform model in matters of cross-border insolvency?

IV. METHODOLOGY

This research paper adopts a deductive approach towards analysing secondary data and review of relevant literature to obtain answers to our research question in order to arrive at conclusive resolutions.

V. CURRENT LEGAL FRAMEWORK

Currently, "sections 234 and 235" govern how cross-border insolvency is handled. To address international bankruptcy problems, "Section 234 grants[5]" the Union Government the power to sign bilateral pacts with other nations. The Adjudicating Authority is permitted by "Section 235 of the Code[6]" to write to a judicature in a country in which a "Section 234" agreement has already been struck and ask that assets there be dealt with in a certain manner.[7] The "Civil Procedure Code of 1908[8]" includes ideas from the "common law" of England that apply for procedures brought in other countries to be recognised in India.

If a country has accepted the "Model Law", then the procedures will be recognised without India requiring to do likewise. For Indian procedures to be recognised overseas, the law of that country has to be applied. On the other hand, there may be reciprocal obligations in nations that are yet to ratify the "Model Law" or have approved it with changes.

[5] "Insolvency and Bankruptcy Code § Section 234, 2016".
[6] "Insolvency and Bankruptcy Code § Section 235, 2016".
[7] K. Raushan, M. Arora. (2021). "India's Tryst with cross-border Insolvency law: How series of Judicial Pronouncements Pave the Way . *SCC Online blog".*
[8] "Code of Civil Procedure, 1908".

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VI. DRAWBACKS

The Code's existing structure for "cross-border insolvency" is dependent on India reaching bilateral agreements with other nations. Such bilateral agreements take extensive talks to be finalised, and as Indian courts must apply every agreement individually, this tends to lead to uncertainty.

Bilateral accords with each nation will need to be enforced in several jurisdictions, adding additional administration hurdles and complicating legislative and procedural problems.

There is no advice on measures accessible to Indian insolvency practitioners to provide proof or undertake action about the assets in question of the borrower in circumstances wherein the assets of an Indian borrower are situated in a foreign jurisdiction where there aren't any bilateral arrangements.

VII. IMPACT AND ANALYSIS OF UNCITRAL MODEL

With regulations constructed around the "Model Law" having been passed in 44 countries and 46 jurisdictions, the "UNCITRAL Model Law" has emerged as the most widely used regulatory structure for resolving cross-border insolvency issues internationally.[9]

The "Model Law" has its foundation on the four guiding concepts listed below:

Accessibility: The "Model Law" gives foreign insolvency practitioners and "foreign creditors" immediate accessibility to the local courts in addition to its ability to take part and start local insolvency proceedings against a debtor.

Acknowledgment: The "Model Law" gives local courts the authority to acknowledge global actions and offer relief in accordance with this acknowledgment. Relief may be awarded regardless of whether the foreign process is the main or non-primary procedure.

Collaboration: It is established amongst local and "foreign courts" and bankruptcy professionals under the "Model Law". According to the "Model Law", it is required to maintain direct communication between deciding bodies, foreign and local insolvency specialists, and

[9] *"United Nations Commission on International Trade Law.* Retrieved from United Nations: https://uncitral.un.org/"

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local bankruptcy practitioners and "foreign courts". Foreign procedures that are yet to be designated as major or non-major, which also might get collaborative assistance.

Co-operation: The "Model Law" provides a structure for the start of local bankruptcy proceedings where a foreign bankruptcy procedure has already started or the other way around. Additionally, it promotes court cooperation to manage two or more concurrent bankruptcy proceedings in different countries.[10]

Now let's talk about its impact

Adaptability: The suggested portion takes into consideration the diversity of laws governing "National Bankruptcy" and allows retiral from the "UNCITRAL Model Law" as much possible and tries to adhre with "local bankruptcy laws".

Simplicity in conducting business: Due to enhanced confidence and certainty of the insolvency system for "foreigners", the promulgation of competent global insolvency law would make our nation a compelling investment destination for international lenders.[11]

Preservation of local interests: The part that has been proposed allows for the dismissal of foreign lawsuits or the offering of any other kind of support if doing so would be obviously against India's public policies. Therefore, it is unlikely that foreign "creditors", "borrowers", or other parties will abuse the legal system. [12]

Priority is given to local bankruptcy proceedings: Local bankruptcy proceedings have priority over global insolvency proceedings, as per the "Model Law". As a result, initiation of "local bankruptcy proceedings" wouldn't be set aside by a "moratorium" established as an outcome of the acknowledgment of international proceedings.

Solution in "jurisdictions" with mutuality: Many countries that have adopted the "UNCITRAL Model Law" have made it a requirement for "legislation-based reciprocity",

[10] (2018). "*Report of Insolvency Law Committee on Cross Border Insolvency* . New Delhi: Ministry of Corporate Affairs Government of India".
[11]"Memon, Z. et al. (2021, October 31). *Cross Border Insolvency Regime In India.* Retrieved from Mondaq: Connecting Knowledge and People: https://www.mondaq.com/india/insolvencybankruptcy/1123982/cross-border-insolvency-regime-in-india".
[12] "UNCITRAL Model Law on Cross-Border Insolvency § Article 6, 1997".

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which means that if our country has approved it in some form, the country will provide Indian proceedings recognition, collaboration, and other benefits.

VIII. INCORPORATING THE UNCITRAL WITHIN INDIAN LEGISLATION

The complexities looming over implementation of laws governing cases of cross-border insolvency have determined the evolutionary trajectory of such laws through precedents. In order to examine further into such laws to formulate a comprehensive structure or a proposed model of Cross-border insolvency laws and their applicability within the Indian jurisdiction we engage in the analysis of the following cases. We start by looking into the case of *"Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux,[13]"* wherein a key decision was taken that erupted debates within common law nations with respect to the recognition of foreign court rulings on discharging debtor liabilities. This has translated as the "Gibbs Rule" which nonetheless has met with several criticisms in English courts, concerning a deemed supposition for the submission of jurisdiction to the concerned insolvency court(s), and this rule has thereby proposed a stray from the rule as per various courts. The curtailment on behalf of the corporate debtor[14] considering the discharge of funds across multiple jurisdictions poses as the fundamental hindrance in this regard.

Recent developments in the processes of insolvency resolution processes have engulfed high-value companies possessing assets and creditors beyond India's borders which has raised posit questions regarding the incorporation of appropriate procedures in such cases. The first such case that confronted India came with "*P. MacFadyen & Co., In re[15]"* which involved the 'liquidation of an Anglo-Indian partnership.' This case has provided a pioneering specimen of cooperation of trustees between London and Madras that had been deemed beneficial by their respective courts in the interest of global distribution.

It is the absence of specific legislation for cross-border insolvency that has made the judicial precedents crucial in cases addressing such matters. The case of "*SBI vs Jet Airways (India) Ltd[16]"* provided a momentous insight to befit the Indian milieu. The case dealt with the jurisdictional qualifications of the "National Company Law Appellate Tribunal (NCLAT)" in

[13] *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.
[14] K. Raushan, M. Arora. (2021). "India's Tryst with cross-border Insolvency law: How series of Judicial Pronouncements Pave the Way . *SCC Online blog".*
[15] re P. Macfadyen & Co. Ex parte Vizianagaram Co. Ltd., [1908] 1 K.B. 67.
[16] Jet Airways (India) Ltd. v. State Bank of India, 2019 SCC Online NCLAT 1216.

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directing "Joint Corporate Insolvency Resolution Process" under the “Insolvency and Bankruptcy Code (IBC)section”. The jurisdictional authorities of both the Indian as well as the Dutch courts were contested in determining the jurisdiction in an issue concerning the bankruptcy of an Indian-international airline. Despite a lack of concrete cross-border legislation, through this case, the NCLAT has endorsed the “UNCITRAL Model Law” in such cases.

A "cross-border insolvency protocol" was established on the Appellate Tribunal's directive, designating India as the "centre of main interest." With the protocol directing their contacts, the NCLAT facilitated cooperation involving Indian and Dutch parties. The Netherlands prefers a "territoriality approach" to cross-border bankruptcy, but India sticks to a "universalist approach," raising the issue of jurisdictional viewpoints. In response to the Dutch administrator's appeal, the NCLAT balanced the needs of stakeholders with the rights of foreign representatives in line with the structure of the Model Law.

The *“State Bank of India vs Videocon Industries Ltd case*[17]*”* serves as another illustration of how the NCLT's Mumbai Bench has used the concept of "substantial consolidation." This theory made it possible to combine many Videocon Group firms, opening the door to IBC group insolvency procedures. The NCLT's dependence on foreign case law was evidence of its efforts to fill up legislative loopholes. In order to maximise the value of the debtor's assets while protecting the needs of creditors, it underlined the possible advantages of integrating assets and obligations.

The Indian judicial system is essential in navigating the complex world of international bankruptcy issues. The judiciary's flexibility is seen in cases like *“Jet Airways and Videocon Industries”,* where foreign guidelines/norms and precedents are used to address legislative gaps and speed up rulings.

IX. CONCLUSION

In view of the inconsistencies posited within the existing sections of the “Insolvency and Bankruptcy Code” the ardent needs to accommodate the aspects of accessibility, acknowledgement, collaboration, co-operation, adaptability, simplicity in conducting business, preservation of local interests, priorities given to local bankruptcy proceedings and solution in

[17] “State Bank of India v. Videocon Industries Ltd., 2019 SCC Online NCLT 745”.

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jurisdictions with mutuality felt more than ever. The pressing needs have been realized further through the precedents forwarded in the mentioned case laws of "*Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux*, *Jet Airways case* and *Videocon Industries case"*. A thorough examination of the cases and the existing drawbacks within the Indian statutes thereby justifies adoption of the UNCITRAL Model Laws and its ratification. This provides as the reasonable solution to bring forth a global uniformity in matters of cross-border insolvency jurisdictions.

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