CROSS BORDER INSOLVENCY AND INDIA

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ABSTRACT

Insolvency is itself is a lengthy subject. Within this subject, corporate insolvency has taken manifolds. One of the reasons is the structure of the business organization and another one is ambit of growth. A corporate is allowed to grow at both domestic and international level. The issue starts in international scenario and not at domestic level because of change in laws. When a corporation crosses boundaries, the applicability of domestic law is out of scope and in that case the nations involved have to carve out the applicable law. The primary issue in addressing the issue of cross border insolvency is applicability of law as if the law is specified then all the issues of jurisdiction, priority of interest will be addressed. In this paper, the author has tried to figure out the applicable laws on the said issue from UNICTRAL Model Law to EU regulations and how the theories behind these model laws are working. The author has tried to identify certain issues which are still unaddressed and tried to find out possible approach to the said issues.

INTRODUCTION

This is a proven fact of life that whatever has begun will come to an end one day. The same rule for economic life prevail that businesses fail. The growth of international business, therefore, has brought with it a growth in the number of international insolvency.[1] The word "Insolvency" is not defined anywhere under the recently promulgated Insolvency and Bankruptcy Code 2016. Prof Ian Fletcher stated "unenviable state of negative net worth is traditionally understood as insolvency" which is substituted today with the name balance sheet insolvency or absolute insolvency.[2] In simple terminology Insolvency is a condition of debtor where his liabilities are more than its assets. In the age of Globalization this state of indebtness is not limited to one state. It is an imperative need of states to resolve the issue of insolvency when it crosses boundaries and enters into sovereignty of another state. The huge increase in international trade in modern times and development of global market has increased the number, issues and complexities in cross border insolvencies.[3] Economists have termed those states obsolete where a corporation can invest but while taking out the money; process is long, cumbersome and ambiguous.[4] It is noted that English literature on cross-border insolvencies dates back almost two centuries, it is only during last two decades the subject has truly emerged out of shadows.[5] The moment some foreign element is included, the subject is under the purview of Private International Law. Private International Law though has international facet but is part of municipal law.[6] The issue of cross border insolvencies in case of companies when read with Private International Law become complex because of various stakeholder and their stakes in different forms. The issue of prioritizing stakes, streamlining needs to be addressed and this issue are more complex when more than one state is included. In this paper, the author has tried to address the issues relating to cross border insolvency with reference to companies. Part I of the Article gives an introduction. Part II deals with the theories till date relating to

[1] Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, Michigan Law Review, Vol. 98, No. 7 (Jun., 2000), pp. 2177-2215. The author has quoted Well-known examples of transnational bankruptcies include Maxwell Communications, see In re Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994); Bank of Credit & Commerce International (BCCI), see Hal S. Scott, Supervision of International Banking Post-BCCI, 8 GA. ST. U. L. REV. 487 (1992); and Olympia and York, see In re Olympia & York Devs. Ltd. [1993] 12 O.R.3

[2] Fletcher .F.Ian, "Insolvency in Private International Law", Second Edition, Oxford University Press, Pg 1

[3] Sir Peter Millet,"Cross- Border Insolvency: The Judicial Approach", 1997 John Wiley & Sons Ltd, Pg 1.

[4] Supra 2

[5] Philip Smart and Charles D Booth, "Cross Border Insolvency and Discharge of Debts", Insolvency Law & Practice, Vol 20, No 4, 2004, Pg 1

[6] Diwan Paras, "Private International Law", Fourth Edition, Deep &Deep Publications, Pg 37.

resolution of cross border is discussed. Part III states the cross border scenario of UK, US along with UNCITRAL model. Part IV raises the issues and position of India and Part V concludes.

PART II: THEORIES FOR ADDRESSING CROSS BORDER INSOLVENCY

Whenever a matter crosses boundaries, the main issue to be decided is of jurisdiction[7]. The second important issue to be addressed is distribution or appropriation and priority in appropriation.[8]The Private International in general irrespective of the country casts its jurisdiction either on basis of nationality or residence[9]

In English Private International Law as far as corporations are concerned, a country where it has its central management and control, the jurisdiction will be of that country. Further, it can be possible that a corporation has its central control at more than one place.[10] As far as Insolvency law in Private international Law is concerned, there are two theories: First is Territoriality and other one is Universalism. [11]

Territorialism

This theory lays down its basis on Domicile, Residence, and nationality of a corporation. This approach is referred as traditional approach[12]. In case a company is incorporated in country A and has its assets in company, then in that case it is presumed that country A has jurisdiction overriding the fact that company is carrying out its operations pan world. Under this theory a separate and independent plenary case is pursued in each forum in which the debtor's assets are located.[13] The advocates of this theory carved out various advantages. One of the major advantage is there is no need to any special legislation, nor does it deviate from the universally adopted rules of jurisdiction and sovereignty.[14]

[7] L.R.Kiestra, *The Impact of the European Conventions on Human Rights and on Private International Law*, T.M.C Asser Press, 2014
[8] Ibid Pg 14
[9] Supra 5 pg 388-389
[10] Supra 5 Pg 390
[11] John Pottow, *Procedural Incrementalism: A Model For International Bankruptcy, John M. Olin Center For Law & Economics*,University of Michigan, 2006 Pg 944.
[12] Ibid
[13] Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience, U. Pa. J. Int'l Econ. L, Pg 695.*
[14] Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post Universalist Approach, 84 CORNELL L. REV. 696 (1999), Pg 701.

This theory also avoids conflicts among priority and other substantive insolvency rules, because each court deals exclusively with local interests pursuant to local laws[15]. In addition while making lending decisions this theory provide consistency in mind of creditors as they lend keeping in mind the laws of their country.[16] Therefore, it is unfair in case law of another nation is applied when the company has reached in its insolvency.[17]

After all this stated above, territorialism has problems. It is said that this system encourages creditors to file for insolvency in their jurisdiction as early as possible so that they can sell and distribute the income before some other nations claim comes on the issue of jurisdiction.[18] This notion undermines clear distribution of debtor assets. In fact, it maximizes the chances of a fractious resolution.[19]

Universalism:

This theory is antithesis of territorialism or vice versa.[20] This theory "universalism" refers to a system in which a single bankruptcy court controls the administration of the debtor's assets and makes the distributions to creditors worldwide. The court can be a court where the bankruptcy initiated at first point of time or where the domicile of the corporation or where the corporations centre of main interest lies.[21] However, the supporters of said theory specify the court of the "home country" or the "center of the debtor's interests" as the proper forum.[22] Due to sovereignty issue generally no country will permit foreign courts to make and directly enforce orders within its borders.[23] If permitted, the local courts will be bound to follow and enforce orders of foreign court. Thus a sub system or sub model under this model was launched which is referred as “modified universalism”. Under the so called modified universalism, the local courts are free to decide on enforcement of orders of foreign court.[24] The supporters of this

[15] *Ibid* pg 752
[16] *Ibid* Pg 751
[17] *Supra* note 11, Pg 698
[18] *Supra* note 9 Pg 946.
[19] *Ibid*
[20] Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post Universalist Approach, 84 CORNELL L. REV. 696 (1999),
[21] Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience, U. Pa. J. Int'I Econ. L, Pg 704.*
[22] Supra note 18.
[23] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, Michigan Law Review, Vol. 98, No. 7 (Jun., 2000), pp. 2216-2251
[24] *Ibid*.

theory while carving out the advantages said that this y will reduce the confusion associated with territorialism's competing domestic priority rules[25], reduce monitoring costs of creditors, [26]enhance overall asset value, and minimize administrative difficulties.[27] Professor Westbrook aggregates these predicted benefits under the label of "Transactional Gain."[28] This theory states that in case two countries have initiated insolvency proceedings, then in that case the country which initiated at first point of time will be termed as Primary and all other courts will be secondary. This is also termed as issue or problem with this theory for sovereign-conscious states. These states will favour application of their own local laws broadly.[29]

MODELS FOR RESOLVING CROSS BORDER INSOLVENCY

UNICTRAL Model code on Cross border Insolvency

This model in its prologue states out its purpose.[30] It states that this model only assist states so as to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings.[31] The model specifically and unambiguously asserts that it focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than unification of substantive insolvency law.[32] This clearly shows that difference between procedural laws of different nations was given due recognition. However, it is an assertive statement that this code was a result of various failed past concordats.

[25] Jay L. Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 AM. BANKR. L.J. 457, 487 (1991)
[26] Supra note 1 at pg 2179-80
[27] Supra note 25
[28] Supra note 11, Pg 947
[29] Supra note 11 Pg 951.
[30] See Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 8, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998) [hereinafter Enactment Guide]. THe guide states that the work was completed with the input of thirty-six member and forty observer states of UNCITRAL, as well as thirteen international organizations.
[31] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last accessed on 21/07/2018)
[32] *Ibid*

The model was laying down its guide recognized past efforts made in this direction.[33] Efforts were made by United States after World War II in 1960. The United Nations Commission on International Trade Law ("UNCITRAL")' was formed shortly thereafter in 1967, and the Organization of American States ("OAS") started with Inter-American Specialized Conferences on Private International Law ("CIDIPs"), the first of which took place in 1975.[34] However, these efforts failed to create a cross-border insolvency system. [35] Afterwards a common market draft, which is commonly known as 1982 draft was issued but it failed.[36] Likewise, Europeans suffered blow in Brussels Convention as they missed out on issue of insolvency. The Council of Europe's Istanbul Convention of June 5, 1990, also failed, ratified only by Cyprus. The European Union Convention of Insolvency Proceedings was not ratified till 1996 and hence expired.[37] International Bar association also tried to promulgate law in 1989 and subsequently in 1996. These laws were only general principles and tried to assist nations but these laws failed to provide concrete way for transnational insolvencies.[38]

The Model

The model provides flexibility as the sates can modify or have reservations regarding some provisions.[39] Prof John Pottow has divided model law into two parts: administrative and substantial. Further the administrative part is divided into cooperation and communication between nations and another one is anti-discriminatory rules.[40] Article 25, Article 26, Article 27 and Article 30 enumerates principles of cooperation and communication between nations. The stated articles empower local courts to communicate and ask for assistance directly. [41]

[33] Para 10 of Enactment Guide recognized European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EC Regulation"), the European Convention on Certain International Aspects of Bankruptcy (1990), the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928). Proposals from Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by International Bar Association

[34] Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, Fordham Law Review, Volume 64, Issue 6, Article 4, Pg 2544-2545

[35] Ibid Pg 2545.

[36] Donald T. Trautman, Jay Lawrence Westbrook and Emmanuel Gaillard, *Four Models for International Bankruptcy*, the American Journal of Comparative Law, Vol. 41, No. 4 (Autumn, 1993), pp. 573- 625. This article discusses this draft in length as to what the salient features were and why this draft failed.

[37] JOHN POTTOW, *Procedural Incrementalism: A Model For International Bankruptcy*, John M. Olin Center For Law & Economics, University of Michigan, 2006, Pg 957. However, it is mentioned here that now EC regulations on insolvency of 2000 which is on same lines is ratified.

[38] Ibid. THe reason of failure of these laws were they supported theory of universalism aggressively. Pg 958

[39] See Para 20 of the Enactment Guide to UNICTRAL Model.

[40] Supra note 37, Pg 961.

[41] See UNICTRAL MODEL on Cross- border Insolvency.

Similarly, Article 9 (Right of direct access), Article 12 (Participation of a foreign representative in a domestic insolvency), Article 13 (Access of foreign creditors to a domestic insolvency proceeding), and Article 24 (Intervention by a foreign representative in proceedings in this State) gives a sight of nondiscrimination among nations without going in Universalism – territorialism debate. These provisions require a state to accord full access and treatment to foreign bankruptcy representatives and creditors.[42]

Main Provisions of the Model

The Model classifies proceedings in foreign main proceedings or non-main proceedings. The foreign main proceedings are explained as a foreign proceeding taking place in the State where the debtor has the centre of its main interests.[43] After initiating insolvency proceedings, the notification of such proceedings will be given to all creditors.[44] Subsequently after issuing notification, a foreign representative[45] may apply for recognition of the foreign proceeding in which the foreign representative has been appointed.[46] Article 21 of the model law specifies the relief which may be granted after recognitions. The reliefs include a provision which directs a domestic court to determine first whether the request emanates from a "main" or "non-main" foreign bankruptcy proceeding.[47] The model law specifies that when request comes from foreign main proceeding then the stay will automatically get enforced.[48] The Model Law also gives recognition to the proceedings of a state as per his own insolvency laws[49]. Also, the provision[50] of imposition of an automatic stay is important, as the stay of proceedings triggered

[42] Supra note 37, Pg 962.

[43] COMI is generally the place where the debtor conducts the administration of his interests on a regular basis as ascertainable by third parties. There is in most cases a rebuttable presumption that a corporate debtor's COMI is the location of its registered office (*article 3, Insolvency Regulation 2000 and Recast Insolvency Regulation* and *article 16(3), Model Law*) https://uk.practicallaw.thomsonreuters.com/6-503-3605?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1

[44] Article 14(2) of the UNICTRAL Model:" Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required"

[45] Article 2(d) of the UNICTRAL Model defines "Foreign representative" as a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

[46] Article 15 of UNICTRAL Model.

[47] Article 21(1) says " Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief". Now this relief depends upon the fact as to whether the reqest has come from a representative of foreign main proceeding or foreign non main proceeding.

[48] Article 20 UNICTRAL Model

[49] Article 28 and Article 29 of the UNITRAL Model state that foreign proceedings may commence and coordinated after recognition of foreign main proceeding.

[50] Article 20(1)(b) of the Model Law

by the initiation of an insolvency action is a core element of many insolvency regimes.[51] The model law in its provisions has given choice of law rule.[52]

After all the substantial noted important points or advantages, the Model law was criticized saying that this law has found a mid-way between two theories.[53] The Model Law, at first glance respected both theories and give due recognition, however, it tries to compromise with one theory at one end and second on another end.[54]

European Council (EC) Regulation 2000 on insolvency

European Union is a unified commercial market of Europe and has one law for cross border disputes. The Regulation of European Union which got expired in 1996 got ratified by members of EU excluding Denmark in 2000[55]. The regulation while addressing the Jurisdiction issue cited "centre of main interest" as focal point[56]. An Insolvency proceeding can be issued by another member state only if in case the debtor has its establishment[57] in that member state.

An important aspect of said regulation is right of set off. Article 6 postulates right of set-off[58] and Article 4(2) (d) further reinforces by stating that law of forum where insolvency proceedings are initiated, will govern set off rights.[59] Article 7 reserves seller title by stating that opening of insolvency proceedings against the purchaser shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings[60].

[51] JOHN POTTOW, *Procedural Incrementalism: A Model For International Bankruptcy*, John M. Olin Center For Law & Economics, University of Michigan, 2006, Pg 971
[52] Article 5 of the model Law.
[53] Article 6 of the UNICTRAL Model states a escape route where foreign main proceedings may not be recognized on ground of public policy.
[54] Supra note 37. Pg 969.
[55] Point no 33 of the introduction of EC Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings specifically excludes Denmark. The official document can be accessed https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=EN
[56] Article 3(2) of the regulation
[57] Article 2(h) of the regulation defines Establishment as establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.
[58] Article 6: The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims through a set-off; against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.
[59] Article 4 of the Regulation
[60] Article 7(1) of EC Regulation

Article 8 reiterates basic law that law of a member state will be applicable on property where immovable property is situated.[61] Article 9 provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system.[62]

The Model Law and EC Regulation have distinction in themselves. First distinction is automatic recognition of proceeding under EC regulation unlike Model Law.[63] Unlike, Model Law where proceedings are as foreign main and non –main proceedings, in this regulation proceedings is referred as Main and Secondary. Under the EC regulation, insolvency proceedings in one member state have the same effect in other EC states also whereas under the Model Law the recognition depends on recognizing state. Also, Model Law has left Choice of Law whereas EC regulation fixes law of forum is the law.[64]

The famous case of Parmalat Group and Eurofood case cited certain ambiguities or lack of interpretation in EC Regulation. On one side in Parmalat Group case, overriding laid down principle of comity, the insolvency were initiated and continued in spite of laid down principle of jurisdiction. The factual circumstance that one or more group companies have its registered offices abroad was not dealt.[65] In Eurofood case, one more gap was surfaced. The EC regulations are silent on the issue where two member states deem jurisdiction on COMI.[66] Scholars and critics stated that these ambiguities opened forum shopping. [67]

EC Regulation subsequently issued Recast Regulation on insolvency in 2015 applicable from 2017 with Denmark included as party. The definition of "Establishment" got widened.[68] Further, a new concept of "Group Coordination Proceedings" is initiated. Under this provision

[61] Article 8 of EC Regulation
[62] Article 9 of EC Regulation
[63] Point 24 of EC regulation
[64] Gerard McCormack, "*Jurisdictional Competition and Forum Shopping in Insolvency Proceedings",* The Cambridge Law Journal, Vol. 68, No. 1 (Mar., 2009), pp. 169-197, Pg 171
[65] Cecilia Carrara, "*The "Parmalat" case*", The Rabel Journal of Comparative and International Private Law, Bd. 70, H. 3, Europäisches und internationales Insolvenzrecht (Juli 2006), pp. 538-562,
[66] Ibid Pg 569
[67] In civil law cases, "forum shopping" refers to the practice by some parties in some cases of deliberately searching through multiple courts or **jurisdictions** in order to file or transfer the case to one that is most likely to give that party the result he wants. http://www.rotlaw.com/legal-library/what-is-forum-shopping/
[68] The new definition added a period of 3 months for assessing Establishment. See Article 2(10) of EC Recast Regulation 2015

an Insolvency Professional may request the opening of group coordination proceedings by filing a request at any relevant court having jurisdiction over the insolvency proceedings of any group company.[69]

However, after exit of Britain from EU which is popularly referred as Brexit will have its effect on applicability of said regulation on UK. Upon leaving, the UK will not be a member state. However on 28 February 2018, EU passed a draft legislation withdrawing UK from EU and put an end to the transition period. With respect to cross border insolvency proceedings, the draft establishes that the EU Recast Regulation on Insolvency 2015 will continue to be applicable to all insolvency proceedings which are commenced in the Member States including UK till 31 December 31 2020.[70] The effect of Brexit on cross border Insolvency is still awaited.

TREATMENT OF CROSS BORDER CASES: INTERNATIONAL POSITION

English Law

Corporation in English Common law is referred as an entity which has its legal personality separate from its members comprising it. As a legal personality, corporation has its own rights, duties and liabilities with a perpetual succession. From this, the "place of incorporation" is treated as its base for suing or corporate to sue. [71] When the English Law is read with EC Regulations, it can be said if the Centre of main Interest (COMI) is in UK, then the main proceedings will held there. If in case, a corporate has its establishment in UK then the law of UK will have restricted effect. Thus "place of incorporation" will not a determining factor for casting jurisdiction and COMI has to be read with. As far as winding up of Foreign Companies under the UK is concerned, the question is settled with decision in Re Real Estate Development

[69] See Guide of Ec Recast Regulation 2015, the guide states "An insolvency practitioner appointed in insolvency proceedings opened in relation to a member of a group of companies should be able to request the opening of group coordination proceedings. However, where the law applicable to the insolvency so requires, that insolvency practitioner should obtain the necessary authorisation before making such a request. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to whom should be appointed as coordinator and an outline of the estimated costs of the coordination."

[70] https://blogs.lexisnexis.co.uk/randi/brexit-and-the-end-of-the-transition-period-insolvency-and-pre-insolvency-impacts-from-31-december-2020-onwards/

[71] Fletcher F.Ian, "Insolvency in Private International Law", 2nd Edition, Oxford Press, Pg 141

Co[72] and Diffraction Diamonds DMCC, Re[73] that for a winding up proceedings of a foreign company in England, there must be sufficient connection. The interpretation of sufficient connection depends upon common sense and commercial acumen of judges.[74]

United States

Within, USA test of "state of incorporation" is applied to determine the question of applicability of law. The important point here is US recognizes principle of dual citizenship for corporations. Thus in case the domicile of a company is at one place and the company is carrying out its core business operations in another states the corporation shall be deemed to be a citizen of both states. [75] With regard to cross border insolvency, US bankruptcy courts have to recognize a foreign proceeding when conditions laid down in Chapter 15 of Bankruptcy Code of US are satisfied.[76] In re Tri-Continental Exchange Ltd,[77] the issue of foreign main proceeding and non-main proceeding was raised. The US court took reference of COMI definition from EU Regulation and held that where the debtor had its principal office and primary concentration of employees was the COMI of the debtor.[78]

Further in re Sphinx, Ltd[79], US court referred to the reasoning of Eurofoods case and held that a hedge fund registered in the Cayman Islands will have its COMI in the US when most of its assets were located in the US and the debtor conducted most of its business in the US.[80] Other provisions of automatic relief like stay of execution proceedings regarding assets located in US after recognition, permissive relief[81] will be granted. The US code allows concurrent proceedings against debtor once foreign proceedings are recognized.[82]

[72] [1991] B.C.I.C 210(Knox J)
[73] [2017] EWHC 1368 (Ch)
[74] https://www.haroldbenjamin.com/site/blog/harold-benjamin-blog/can-a-foreign-company-be-found-up-in-england
[75] Supra note 71 Pg 146
[76] See Chapter 15 of US Bankruptcy Code
[77] 349 B.R. 627 (Bankr. E.D. Calif.(2006)
[78] http://leshawlaw.com/wp-content/uploads/2013/06/Cross-Border-Article.pdf
[79] 351 B.R. 103 (Bankr. S.D.N.Y. (2006)
[80] http://leshawlaw.com/wp-content/uploads/2013/06/Cross-Border-Article.pdf
[81] In the case of In re Muscletech, 349 B.R. 333 (S.D.N.Y. 2006), a US court granted permissive relief requested after recognition of a Canadian main proceeding, and entered an order compelling US creditors to submit to arbitration in Canada as required in the Canadian insolvency proceeding.
[82] The relevant provisions are contained in Chapter 7 and chapter 11 of US Bankruptcy Code.

ISSUES IN CROSS BORDER INSOLVENCY & POSITION OF INDIA

In India the issue of Insolvency was unanswered for a long time. Under Companies Act, 1956 it was permissible to order a winding up of a company not registered under the Act. However no law provides for seizure of assets of Indian Company in case assets of company are situated abroad. The Code of Civil Procedure was of little help in this regard.[83] This problem was recognized by the Justice V. Balakrishna Eradi committee in 2000[84] where adoption of model law for cases of cross border insolvency was strongly recommended. Thereafter, the N.L. Mitra committee report[85] also recommended adoption of UNICTRAL Model Law on Cross Border Insolvency.

India promulgated Insolvency and Bankruptcy code vide gazette notification 31 of 2016 dated 28.05.2016 after repealing The Presidency Towns Insolvency Act 1909 and The Provincial Insolvency Act, 1920 vide Section 243 of the Code[86]. As far as issue of Cross border Insolvency is concerned, the code contains two sections: Section 234 and section 235.[87] Section 234 of the code postulates bilateral agreements between states for addressing the cross border issue whereas Section 235 states about letter of request.

On 20.07.2018, the Indian authorities issued a statement that the work on Cross border Insolvency is taking shape.[88] The authorities have issued a white paper and called suggestions on the draft. India has adopted UNICTRAL Model with certain alterations. The draft contains various reasons as to why bilateral treaties will not be concrete in long run.[89] It is pointed out in the draft that in case of multiple jurisdictions, bilateral treaties, if invoked, will lead to ambiguity. Also, in case of bilateral arrangement it will be difficult to initiate proceedings

[83] Available at https://www.livemint.com/Opinion/ojupMIwmMalVd8vY29p7OP/Resolving-crossborder-insolvencies.html
[84] The report can be accessed from http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf
[85] The Report is available at https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225
[86] Section 243 of the Insolvency and Bankruptcy code 2016
[87] Please refer to the mentioned section in the Code.
[88] https://www.thehindu.com/business/Economy/ibbi-working-on-cross-border-insolvency-norms-sahoo/article24464026.ece
[89] Please refer to the draft along with public notice issued by Ministry of Corportae affairs on 20.06.2018. The draft is available at http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

under the mentioned code.[90] Section 26 and Section 28 of the draft regulations which contain provisions of coordination in case of more than one proceeding and rule of payment of claims is definitely an appreciable step. Although the draft regulations are in nascent stage, but if we analyse the draft then it can be said that it contain certain ambiguities. One of the important drawbacks is of Jurisdiction as for COMI the registered office of the company is determining factor. Thus India is trying to adopt territorial approach whereas UNICTRAL Model is a mixture of both and the definition of COMI is dissimilar.

Issues in Cross Border Insolvency

Almost all the above referred models address various issues but there are certain issues, if not addressed, will create an impediment in long run for all nations.

1. The important issue is setting out one principle for conferring Jurisdiction. The states have to settle out one universal definition of COMI.
2. Also, apart from definition of COMI the issue of multiple COMI has to be addressed.
3. In case a foreign proceeding is launched against corporate debtor then there should be an automatic recognition and the decision should not be left in hands of Adjudicating Authority.
4. It should be settled out universally that a decision of a competent court with regard to a matter directly in issue or collaterally in issue will be recognized in each state where ever that decision has sought to be enforced. For e.g.: In case, a corporate veil is lifted between a corporate and its directors, and the directors are held to be personally liable for defrauding interest of creditors, then in that scenario the liability of the directors will not be questioned if in case that order need to be executed outside country.
5. The case of Maxwell Corporation[91] where although dismissal of the case on basis of jurisdiction was denied but the authorities provided unprecedented support for an orderly liquidation.[92]
6. As far as issue of priority of claims is concerned, the creditors will be taken at one level and harmonious interpretation of claim is required so as to enable courts to reach at an amicable and justified rulings.

[90] Please refer to section II of the draft regulations where drawbacks of bilateral treaty is mentioned, available at http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf
[91] 170 B.R 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995).
[92] Jay Lawrence Westbrook, "*The Lessons of Maxwell Communication",* Fordham Law Review,Vol64 Issue 6, Pg 2535-2536

CONCLUSION

The subject of insolvency, although, is age old, however, recently this subject has come out of shadows and gained importance. Since the International Trade is growing everyday then with that pace liquidation proceedings should also be made speedier and effective in all ways from sorting out to issue to appropriation. If, nations are able to achieve it then this will help in increasing cooperation between nation in economic and political sense.