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Cross-Border Insolvency: The Case for India to Adopt the UNCITRAL Model Law

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ABSTRACT

This article delves into the concept of cross-border bankruptcy proceedings, where a debtor holds assets, creditors, or both in multiple jurisdictions, leading to insolvency issues that transcend the boundaries of a single legal system. Recent high-profile cases involving companies such as Videocon Industries and Essar Steel underscore the pressing need for a comprehensive statute in India to effectively address these challenges. These cases have brought to light various difficulties, including complications in asset disbursement, procedural intricacies, and prolonged legal processes, resulting in significant losses for corporations.

To tackle these complexities and enhance efficiency, the article proposes adopting a legal framework for cross-border bankruptcy, facilitating a single consolidated insolvency process across jurisdictions. This becomes crucial in light of India's growing prominence as a major global player and its efforts to attract foreign investment through initiatives like Make-in-India and FDI regulatory relaxations. Ensuring protection and procedural fairness for all stakeholders involved in cross-border insolvency cases is paramount to encouraging business activities in India.

The article also examines the UNCITRAL Model Law as a potential solution to India's cross-border insolvency challenges. The Model Law aims to provide an efficient framework for governments to address insolvency issues and harmonize different legal systems and the promotion of collaboration between national and international courts and insolvency specialists. Additionally, it emphasizes the recommendations made by the Insolvency Committee, suggesting the inclusion of a chapter on cross-border insolvency, inspired by the Model Law, into India's legislative framework.

Despite the potential benefits, the article acknowledges several challenges, such as the need to negotiate bilateral agreements with other countries, address procedural and legal complexities, and consider the suggestion of adopting the Model Law on a Reciprocal Bargain.

Keywords: *Cross Border, UNCITRAL Model Law, Insolvency, Globalisation, Bankruptcy.*

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I. INTRODUCTION

Cross-border bankruptcy proceedings pertain to a debtor who possesses assets, creditors, or both in multiple jurisdictions. This situation is characterized by insolvency that goes beyond the boundaries of a single legal system. As a result, applying domestic insolvency laws exclusively may not suffice without considering the foreign elements involved.²

To enhance efficiency, a legal framework for cross-border bankruptcy allows for a single consolidated insolvency process instead of multiple separate proceedings in each jurisdiction where the debtor has obligations or assets. This becomes especially significant due to the global expansion of businesses, including India's emergence as a major player in the world economy and an attractive business destination³. Ensuring protection and procedural fairness for all parties involved in cross-border insolvency cases becomes essential to encourage business activities in India.

The implementation of laws addressing this matter yields several advantages, such as promoting cooperation between jurisdictions and providing legal clarity for businesses and investments⁴. Conversely, inconsistent cross-border insolvency outcomes can lead to uncertainties in global business relations and impact international funding agreements⁵. Conflict and variations in insolvency laws among different countries can influence the liquidation and reorganization of corporations.⁶

In the present context, the global epidemic and its aftermath have adversely affected numerous enterprises and economies worldwide. Many individuals find themselves with limited options and facing challenges. Recognizing the need for an Indian legislative framework for cross-border insolvency, the Standing Committee on Finance stressed this point on March 4, 2020. The proposed bill by the Insolvency Law Committee seeks to adopt the UNCITRAL Model Law and evaluate its implications on India's current approach to handling cross-border insolvency, addressing any potential changes in this domain.

² M. Bogdan, *Insolvency in Private International Law: National and International Approaches*, 69(4) *NORD J. LAW* 527, 527-528 (2000).

³ The World Bank, *GDP Rankings, World Bank Development Indicators*, THE WORLD BANK DATA CATALOG, <https://datacatalog.worldbank.org/dataset/gdp-ranking>.

⁴ Victor Nayak & Ishita Pal, *Analysis of Cross Border Insolvency Issues in India: A Regulatory Conundrum*, SSRN, <https://ssrn.com/abstract=3501468>.

⁵ Rona R. Mears, *Cross-Border Insolvencies in the 21st Century: A Proposal for International Cooperation*, 11*INT. INSOLV. REV.* 23, 23-24 (1991).

⁶ RICHARD A. GITLIN, *INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES*, (Rona M. Mears ed., Lexis Pub 1989).

II. CRITICAL ANALYSIS

In today's era of increasing globalization and interconnectivity, no country can thrive in isolation. Various creditors and corporate entities from different parts of the world engage in ongoing business transactions to support the growth of their respective local economies. India's Make-in-India initiative and FDI regulatory relaxations have attracted a significant number of foreign investors. However, merely offering capital expenditures and tax advantages may not be sufficient, as foreign investors tend to favour countries with robust insolvency legal frameworks. Presently, India lacks a reliable cross-border system.

(A) Cross-Border Insolvency Laws In India

Insolvency arises when an individual or a business fails to fulfil its financial obligations to creditors. The term "cross-border insolvency" refers to insolvency proceedings involving multinational corporate enterprises. In such cases, the bankrupt company or debtor possesses assets or creditors in multiple foreign countries. These global insolvency issues are governed by two theoretical approaches and a hybrid strategy.

The "territorial approach" suggests that a nation's courts should have exclusive jurisdiction over assets within its territory. Conversely, the "universalist perspective" views foreign insolvency actions as part of a unified global framework. The "modified universalism approach," the third theoretical approach, combines elements of territorialism and universalism. It promotes voluntary cooperation for international judicial collaboration without being obligatory. For instance, in the *In Re Maxwell Communication Corp Case*⁷, the US court adopted the modified universalism strategy. It allowed for the gathering and distribution of assets on an international scale while respecting the rights of local creditors by deciding at the discretion of the local court. Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 (the "Code") currently govern cross-border insolvency in India. Section 234 permits the Central Government to enter into a reciprocal arrangement with a foreign government⁸ and Section 235 empowers the adjudicating authority to send a letter of request to its bilateral treaty partner to address matters related to foreign assets⁹.

III. FLAWS IN THE CURRENT REGIME

The current insolvency system in India faces several challenges.

⁷ *Re Maxwell Communication Corp Case*, 186 B.R. 807 (S.D.N.Y 1995)

⁸ Insolvency and Bankruptcy Code, 2016 Section 234

⁹ Insolvency and Bankruptcy Code, 2016 Section 235

- Firstly, only countries that have signed bilateral treaties with India fall under the scope of Sections 234 and 235. Negotiating these bilateral agreements can be time-consuming and costly. The situation becomes even more complex when multiple jurisdictions are involved, such as when a debtor has assets in countries A and B, and creditors are in nation C. Negotiating bilateral agreements with each state in such cases adds administrative burden and time delays. Moreover, addressing each treaty separately could make it more challenging for Indian courts to handle cross-border insolvency cases.

- Secondly, the Code remains silent on the proper conduct of cross-border insolvency proceedings without bilateral agreements. The absence of such agreements makes the resolution process more difficult since each state has different insolvency laws.

- Thirdly, India does not fully recognize international insolvency proceedings. While international judgments and decrees from certain reciprocating nations like Singapore and the United Kingdom can be recognized under Section 44A of the Code of Civil Procedure, 1908¹⁰, the scope is limited and subject to specific requirements listed in Section 13 of the CPC¹¹. This limitation could render numerous judgments concerning insolvency in India void. Additionally, the current framework struggles to handle complex situations, as seen in cases like *Jet Airways*¹² and *Videocon Industries*¹³.

To address these issues, India needs to establish a comprehensive legislative framework for cross-border insolvency. The Insolvency Law Committee recommended the inclusion of a chapter on cross-border insolvency based on the Model Law in its 2018 report.

IV. UNCITRAL MODEL LAW

The UNCITRAL Model Law was approved on May 30, 1997, to provide governments with an efficient framework for cross-border insolvency. It allows them to apply this framework to their domestic systems, addressing insolvency issues and bringing uniformity to diverse legal systems. Presently, 48 states, including major industrialized nations like the United States and the United Kingdom, have incorporated the Model Law into their domestic legal systems.

(A) Reasons for India to Adopt the UNCITRAL Model Law:

The Committee has proposed a model "Part Z" on cross-border insolvency along with

¹⁰ Code of Civil Procedure, 1908 Section 44A

¹¹ Code of Civil Procedure, 1908 Section 13

¹² *State Bank of India v Jet Airways (India) Ltd*, CP 2205 (IB)/MB/2019

¹³ *State Bank of India v Videocam Industries Ltd*, 2019 SCC OnLine NCLT 745

suggestions based on the Model Law to tackle the complex challenges mentioned earlier.¹⁴

Under the Model Law, international insolvency specialists and creditors gain direct access to domestic courts and can participate in domestic bankruptcy proceedings against the debtor. The Committee supports this approach and has established a system for foreign representatives to access Indian courts, allowing them to initiate bankruptcy proceedings against a debtor. Instead of direct access to Indian proceedings, the Committee advises appointing an Indian insolvency professional to act as the foreign professional's agent. The Committee recommends that the Central Government grant full access rights.

Furthermore, the Model Law provides guidelines for selecting the "most appropriate jurisdiction" to commence insolvency procedures. Rooted in the "modified universalist approach," the procedure enables local courts to recognize foreign proceedings and offer corresponding remedies. It involves assessing whether the debtor's "centre of main interests" (COMI), presumed to be the debtor's registered office or customary residence, recognizes the overseas "main proceedings." Non-main proceedings, occurring in jurisdictions where the debtor is present, are left to the discretion of local courts.¹⁵ Recognition of the main process triggers an automatic stay or moratorium on the debtor's asset transfers, granting the foreign representative greater authority to safeguard the debtor's assets.

Indian courts have already embraced the idea of modified universalism, as seen in the Jet Airways case where concurrent insolvency procedures in the Netherlands were acknowledged. Adopting the Model Law can lay the foundation for international bankruptcy law in India and address other complex business issues.

The Model Law encourages collaboration among national and international courts, as well as local and global insolvency specialists, to bridge gaps in state laws and find optimal solutions for business reorganization, preventing asset wastage. Considering India's early stage in this matter, the Committee suggests limiting the issues for Central Government screening while fostering cooperation and communication.¹⁶

The Model Law's implementation is straightforward since it is a unilateral framework that does

¹⁴ PRS Legislative Research, Report Summary Insolvency Law Committee on Cross-Border Insolvency, PRS India(1-11-2018), https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/ILC%20Summary%20%20Cross%20Border%20Insolvency.pdf.

¹⁵ Principles for Effective Insolvency and Creditor/Debtor Regimes, World Bank (2015), <<http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>>

¹⁶ Andre J. Berends, The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview, 6 Tul. J. Int'l & Comp. L. 309 (1998).

not require reciprocity. As different adopting countries may have varying national laws, it does not mandate the unification of different states' insolvency laws or notification to the UN or other states when adopting it.

However, some of the Committee's recommendations require reconsideration. The Model Law on a Reciprocal Bargain implies that India will only accept nations that have adopted the Model Law or a comparable legal framework, potentially limiting the adjudicating authority's scope. This might revert to Sections 234 and 235, which could restrict the court's capacity to handle certain international insolvency proceedings. Instead of adopting reciprocity, India can maintain the essence of the Model Law without harming the economy by following the Singaporean idea of removing the phrase "manifestly" from Article 6 and broadening the definition of "public policy."

V. CONCLUSION

After conducting a thorough analysis of India's cross-border bankruptcy structure, it has been determined that the country lacks a comprehensive statute on this matter. Notably, recent high-profile cases involving Videocon Industries, Essar Steel, Amtek Auto, and others have highlighted various difficulties arising from cross-border issues, including challenges with asset disbursement, procedural complexities, and prolonged legal processes, resulting in significant losses for corporations. The absence of substantial and effective methods has been a major contributing factor to these problems. The Insolvency Committee has taken steps to address this by developing a chapter based on the Model Law and advocating for its adoption, but its implementation remains uncertain.

In certain insolvency cases like Jet Airways and Videocon Industries, India has employed a Model Law approach using tools like the "Cross Border Insolvency Protocol" and "overseas assets recognition." These instances demonstrate the significance and practical utility of the Model Law. However, relying solely on case-by-case precedents set by the judiciary cannot offer a comprehensive solution to address all the complexities.

To effectively address these challenges, there is a pressing need for well-crafted cross-border legislation. The adoption of the Model Law will enhance India's collaboration with other countries in resolving bankruptcy cases and attract more foreign investment. By reinforcing India's existing provisions on cross-border insolvency, the drafting clause can help the country strengthen its position in dealing with such matters, despite potential procedural and legal challenges that may arise in the future.
