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Forum Shopping in Cross Border in the Time of Insolvency Proceedings in India

MARY JERLIN¹ AND PARTHEESWARAN PARAMESWARAN²

ABSTRACT

Cross-border insolvency has emerged as a critical challenge in the era of globalization, where corporations operate across multiple jurisdictions and hold assets worldwide. This paper examines the phenomenon of forum shopping in cross-border insolvency proceedings, wherein debtors or creditors strategically select favorable jurisdictions to gain legal advantage. Such practices undermine fairness, legal certainty, and the equitable treatment of stakeholders.

The study adopts a doctrinal methodology, analysing the legal framework governing insolvency in India, particularly under the Insolvency and Bankruptcy Code, 2016, in comparison with international standards such as the UNCITRAL Model Law on Cross-Border Insolvency and the U.S. Bankruptcy Code. It explores competing theoretical approaches—universalism and territorialism—and evaluates the evolving concept of modified universalism as a balanced solution to address jurisdictional conflicts and forum shopping.

The paper identifies significant lacunae in the Indian framework, including the absence of a comprehensive cross-border insolvency regime and limited statutory provisions under Sections 234 and 235 of the IBC. While Indian courts have relied on principles such as comity and reciprocity, the lack of formal adoption of the UNCITRAL Model Law creates uncertainty and scope for strategic forum selection.

Through comparative and analytical evaluation, the study argues for the incorporation of key provisions of the UNCITRAL Model Law into Indian law to ensure greater cooperation, predictability, and protection of creditor and debtor interests. It concludes that adopting a modified universalist approach would help curb abusive forum shopping while preserving sovereign interests, thereby aligning India with global insolvency practices.

¹ Author is an Assistant Professor at SRM School of Law, Tamil Nadu, India.

² Author is an Assistant Professor at SRM School of Law, Tamil Nadu, India.

I. INTRODUCTION

“Bankruptcy is a legal proceeding in which you put your money in your pants pocket and give your coat to your creditors.”-

- Joey Lauren Adams (American actress and director)

Insolvency and bankruptcy codified laws now is the important domain of the laws because there is shift of nation's economical activity from being agricultural sector to corporate sector. The companies are the fuel of the 21st century to run a nation. According to theories like concession theory where the companies are the privilege that flows from the sovereign so the legal personality is a gift from the government³, so when a company becomes insolvent and cant able to pay back its debt then it goes into the insolvency proceeding where the same sovereign shreds the body of company during insolvency proceeding. Many say the concept of insolvency law emerged during 18th century in England but there are evidences to show the ancient period of Rome and Greece did had insolvency proceeding but it was for individuals.⁴

This is the ideal situation but when we see in the case of real world problem that too in present era globalization has spread out every where the boundaries of nations became thin and the economical activity deals with service and goods happens on a international scale, many companies became transnational and international companies exercising in various part in the world so when those kinds of companies become insolvent it will be of a major problem.

When a company assets located at various jurisdiction insolvent them is a tedious process because the assets will be in different country and getting in control of them and attaching those properties in the proceeding can be a problem because it is where many cross border sovereign comes into the picture so it is matter of private international law,⁵ where the other countries have to recognize each other laws and decision so it is mutual cooperation. So this is a developing area in the corporate law, it still haven't matured yet. Moreover the law hasn't evolved there is a risk of forum shopping where the creditors or the debtor who take advantage of the working process of different countries for their well being so in this paper the researcher tries to investigate on the forum shopping during the cross border insolvency whether there is a sufficient protection given to the creditor and debtor during insolvency and what can be the

³ CLS Blue Sky Blog. 2019. How Elizabeth Warren Is Reviving the Concession Theory of the Corporation. [ONLINE] Available at: <https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/>. [Accessed 18 July 2021].

⁴ Wikipedia. 2015. History of bankruptcy law. [ONLINE] Available at: https://en.wikipedia.org/wiki/History_of_bankruptcy_law. [Accessed 18 July 2021].

⁵ Gopalan, S., 2021. 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling', Vanderbilt Journal of Transnational Law, vol. 48, no. 15, pp. 1225.

possibility of forum shopping during cross border insolvency proceeding. This study also carries out a comparative study of legal framework between Indian laws and American laws with respect to UNCITRAL Model laws.

Cross border Insolvency:

Insolvency is a legal proceeding where when the company is unable to pay off its debt and the creditors form a committee and pass a resolution to either to revive a company or dissolve the company so it can pay off its debt and the remaining can be shared among the shareholders this is the usual insolvency proceeding but the cross border proceeding is much more challenging because of the private international element present⁶, there will be more than one state so the creditors or the property will be in other state so there will be conflict of laws which arises, so there will be clash of sovereign jurisdiction this can be rectified by cross border insolvency law and principle of comity.

Forum shopping in cross border insolvency:

The private international law is present in all the countries because of rapid globalization and the companies spreading out as transnational companies, so the areas of the economic activity is widening so as the legal conflict so when the companies faces any financial distress and couldn't pay off its debts then it will be subjected to insolvency so the parties tries to reach the jurisdiction which is favorable to that person that is called forum shopping⁷ and that is a common scenario in cross border insolvency proceeding. It wasn't a developed area before but due to rapid global economic activity the UNCITRAL suggested a model law and that has been adopted by many countries. Well developed countries like USA and UK have adopted the draft and even the Asian countries like Singapore have adopted cross border principles to govern the insolvency proceeding as well as curb unnecessary forum shopping.⁸

Research Questions:

1. Whether there is a sufficient legal protection given to creditors and debtors during cross border insolvency proceeding?
2. What are the lacunae in law which paves a way for bad forum shopping?
3. Whether Indian legal framework meets the global standards laid in UNICITRAL?

⁶ Gopalan, S., 2020. 'Cross-border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies—Determining Jurisdiction for Group Insolvencies', *SAGE Journal*, vol. 45, no. 2, pp. 93.

⁷ The Leap Blog. 2015. Inconsistencies and forum shopping in the Indian bankruptcy process. [ONLINE] Available at: <https://blog.theleapjournal.org/2015/11/by-aparna-ravi.html>. [Accessed 18 July 2021].

⁸ The Leap Blog. 2015. Inconsistencies and forum shopping in the Indian bankruptcy process. [ONLINE] Available at: <https://blog.theleapjournal.org/2015/11/by-aparna-ravi.html>. [Accessed 18 July 2021].

II. DATA AND METHODS

The current research is proposed to be a doctrinal study based on primary and as well as secondary sources. The primary sources include Insolvency and Bankruptcy Code 2016, company's act 2013 and the secondary sources may include articles, research work, text books, journals etc that will help in conducting this research study. The study will mostly be descriptive and as well as analytical. In the descriptive part, the study will focus on detailed explanations of the existing provision of IBC 2016. The analytical part will contain a critical analysis of the application of the mentioned legislation regulation & model law and its influence on working of insolvency proceeding

III. LIMITATIONS OF THE STUDY

The primary limitation of this study is, it is an analytical and descriptive study the outlook of the person will differ from that of a researcher and the materials used for the study are the articles written by different authors so the standpoint of the maybe relative. one of the important problem is that since this research was carried out during pandemic period so the materials used is so limited, so this research is done with limited best materials that has been found online and the time constraint was also an limitation for this study.

IV. CROSS BORDER INSOLVENCY

The concept of insolvency in cross border can a tricky part because the choice of the law and the COMI should be taken into consideration so usually if there is a agreement on it, then no court can exercise the proceeding in the other jurisdiction⁹. During the cross border insolvency it follows multiple forum proceeding which is tedious process.

Since there is no definite legal framework for cross border insolvency jurisprudence always the choice of the forum by the parties is taken into consideration. There are many theories which were developed to analysis and interpret the concept of international insolvency. There are two major theories have been formulated to exercise the cross border insolvency those are: 1) universalism 2) territorialism¹⁰

Universalism school of thoughts lays down that the pure form of ideal international jurisprudence, where it consider the world as one, it presumes that other nations will recognize

⁹ Insights. 2007. Understanding "Centre of Main Interests" Where Are We?. [ONLINE] Available at: <https://www.jonesday.com/en/insights/2007/10/understanding-centre-of-main-interests--where-are-we>. [Accessed 18 July 2021].

¹⁰ Franken, S. (2014). Cross-Border Insolvency Law: A Comparative Institutional Analysis. *Oxford Journal of Legal Studies*, 34(1), 97-131

the decision laid by the foreign jurisdiction and during the insolvency proceeding the country of the debtor will be considered will be the one and only jurisdiction and the laws will be directly applied to the assets that are there in the other countries. This concept of universalism is a ideal concept where there are many practical difficulty like the nation's sovereignty is been compromised and there are higher chances of developed nations controlling the less developed countries. ¹¹But it also have benefits like the proceeding aftermath can be predicated and the transaction will be cost effective.

Territorialism school it is more sovereign in nature it safeguards the sanctity of the sovereignty nature, unlike the universalism where it doesn't see world as one rather it agrees to the concept of separate nation and there are nothing like the supplementary proceeding or etc,¹² every proceeding that happens in various system are seen as individual proceedings and the laws followed will not be of that debtor rather it is the law of that forum. There will be a separate international administrator to oversee the insolvency. This jurisprudence mostly run because of the cooperative proceeding where they won't be a compromise of a nation's integrity and the parties will know the expectation and void of the contract¹³.

So both this theories has own pros and cons so there was new third that is hybrid or modified concept of this theory has been evolved to cover the loops like the forum shopping can be solved by coming up with new hybrid jurisprudence like there should be mutual respect and there should be cooperation and strict laws to curb out the forum shopping like primarily the laws of the debtor country will be exercised over all the assets in the other jurisdiction¹⁴. The country of the debtor will be taken as the home country and it the proceeding which is being conducted is called as the main proceeding and the countries where the asset of the respondent company, where to in-solve it there should be a separate proceeding should be exercised simultaneously and it will be the supplementary to this main proceeding. So this travels in between both principles.

V. RISK OF FORUM SHOPPING

The company diverse throughout the globe during their growing curve and they open a multinational chain it will be present more than one nation and when the company's economic

¹¹ OUATU M,(2014), Modified Universalism For Cross-Border Insolvencies: Does It Work In Practice?, THE UNIVERSITY OF BRITISH COLUMBIA

¹² Adams, E. and Finke, J., 2009. 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism', Columbia Journal of European Law, vol. 15, no. 1, pp. 43-88.

¹³ Kilborn, J. (2008). The Raging Debate Between Territorial and Universal Theories of Value Sharing in International Bankruptcy, University of Illinois at Chicago

¹⁴ McCormack, G. (2012). Universalism in Insolvency Proceedings and the Common Law. Oxford Journal of Legal Studies, 32(2), 325-347. Retrieved July 19, 2021, from <http://www.jstor.org/stable/41682781>

activity gets declined and couldn't pay off the debt then there will be insolvency proceeding will be take place, it's usually always the centre of main interest (COMI) which is the test for the company 's main interest so it will be taken when they important activity of the particular domain revolves it maybe of market or goods and service centre or something related to it.¹⁵ So when there is a insolvency proceeding which happens only this centre's forum will be taken consider off but it avoid this or to get unfair advantage of the legal proceeding either benefits themselves it may include both the respondent company or the creditors they opt for the forum which benefits them. It is called as the forum shopping.¹⁶

The concept of forum shopping got amplified in the recent days because due to the globalization the insolvent company or the people connected to make choice of law which gives them a big hand and they predict what will happen in the end of the proceeding so they will chose it over the actual COMI. This is technically a misuse of legal proceeding. , forum shopping is suitable for the for common law countries that abide the concept 'incorporation doctrine'¹⁷, But in the case of civil law country it adhere the concept of 'seat doctrine'¹⁸. When company follows seat doctrine it actually looks for the element of COMI so the chances of forum shopping is comparatively minimum.

A. Principle of comity:

This concept of comity is present in many countries' jurisprudence where there is element of recognition and mutual respect for other forum's court decision and when there is obligation between states to adhere to the laws and decision of a country then it is called as the principle of comity.¹⁹

India is no exception to this there is provision in law regarding the principle of comity. The principle of comity is found in the section 44A of the civil procedure of 1908,²⁰ it gives about the recognizing the mutual respect and cooperation with the country who falls under the reciprocating territories where it is been declared by the government of India. So when we say the reciprocating territories, it is the countries which mutually enforce each other countries

¹⁵ Veronika.S,(2019)The Never-Ending Challenge of Defining COMI (This Time Due to Groups of Companies) ,Charles University in Prague Faculty of Law Research Paper No. 2019/II/6

¹⁶ iPleaders. 2020. Forum shopping: Challenges in Private International Law. [ONLINE] Available at: <https://blog.ipleaders.in/forum-shopping-challenges-private-international-law/>. [Accessed 18 July 2021].

¹⁷ O'Keefe.R, (2008), The Doctrine of Incorporation Revisited . 79 British Year Book of International Law 7–85

¹⁸ Ebke. W(2002),The "Real Seat" Doctrine in the Conflict of Corporate Laws, University of Konstanz School of Law;

¹⁹ Yntema, H. (1966). The Comity Doctrine. Michigan Law Review, 65(1), 9-32.

²⁰ LiveLaw.in. 2020. Analyzing Section 44A Of CPC In The Light Of Recent Govt.Notification Declaring UAE As A Reciprocating Country. [ONLINE] Available at: <https://www.livelaw.in/columns/analyzing-section-44a-of-cpc-in-the-light-of-recent-govtnotification-declaring-uae-as-a-reciprocating-country-151843>. [Accessed 18 July 2021].

judicial order passed by the court. So by the comity law the insolvency proceeding which happened in cross border and that falls under reciprocating territory list then there decision will be binding here in Indian forum.

B. UNCITRAL Model Law on Cross-Border Insolvency

This model law was issued on 1997 for the protection of insolvency law and presently 23 countries have adopted this model. This law was issued to protect the interest of the parties like both creditor and Debtor Company and to bring mutual cooperation between to forum in respecting their individual sovereignty. It is a great effort to ease the legal certainty and efficiency.²¹

It also checks there are no unreasonable forum shopping because when there is higher chances of parties' interest get violated. So in order to protect that there is a whole chapter III of the model law deals with foreign proceeding and how it can be applicable. Totally 9 sections deal with the cross border insolvency it covers recognition, effects and intervention. It also deals about the forum shopping and recognition of foreign court decision. In the Art 21 it deals about the Relief that may be granted upon recognition of a foreign proceeding²², where it in the sub section 2 where it speaks about the mutual cooperation and recognition of the foreign proceeding and at the request of the administer the foreign court may entrust over the person in distribution of assets, so this is suggested to oversee the concept of forum shopping , so when a court feels the genuine interest of the parties are protected then it allows to entrust the asset over the foreign administrator

When they court feels it is unreasonable it can follow the one of the oldest norm in insolvency proceeding that is famously known as Gibbs principle laid in 1890 in Anthony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux ²³ case where the English court laid that the domestic court have power and control over the estate which is been located within the territory of the state, so it upholds the territorial principle , so if the domestic court find the said forum shopping is violative justice it can withhold the asset distribution inside its territory

C. Territorial nature of insolvency proceeding in India:

India follows the concept of territorial insolvency proceeding and it hasn't adopted the model law, where in many instance it has followed this concept it doesn't differentiate between the

²¹ UKCA partners. 2019. Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India. [ONLINE] Available at: <http://www.ukca.in/2019/08/30/evolution-of-competition-law-in-india-2/>. [Accessed 18 July 2021].

²² Article 21. Relief that may be granted upon recognition of a foreign proceeding

²³ ((1890) 25 QBD 399)

foreign and domestic creditors both have equal footing in Indian law, same is seen in the case of *The Rajah of Vizianagaram v. Official Liquidator*²⁴, where it is set that there is no privilege for the international creditors in order to secure money from the domestic debtor, so they have to proceed the case within Indian jurisdiction. In *Arvind Mills* case also it has been accepted that the cross border insolvency decision can't bind Indian courts.

The principle of comity is been followed by Indian courts like in the case of *Sumikin*²⁵ the Bombay high court where there was two decision from Hong Kong court and Singapore court because of Hong Kong being reciprocating state, India has accepted to Hong Kong and not Singapore court decision. The Indian court is against the concept of forum shopping that's why it adheres to the territorial principle but in recent days it is moving towards the concept of modified universalism

The Indian Court in the case of *Macquarie Bank Vs Shilpi Cable*²⁶ laid that foreign creditors will have equal rights as a domestic creditor to initiate insolvency proceeding and also to participate in corporate insolvency resolution process. The Apex Court laid that the word person will not only apply to the citizen but also foreigners if not it will discriminatory interpretation that would directly violate the right to equality given in the Indian Constitution of India

D. Articles should be incorporated in India from UNCITRAL Model:

When we see the UNCITRAL Model where the majority of the articles are in favor of the modified universalism theory because it just gives out the procedural aspect of the law and don't talk about the substantial law in recognizing the foreign judgments. In the entire chapter III it deals about Recognition of a foreign proceeding and relief. In art 15 that the country seeking for cross border insolvency may apply for it in the court and it will be scrutinized. The presumption of the debtor's country's judgment is dealt in art 16. The procedures for granting relief are mentioned in Art 19 of the model law it is more like an interim order as to protect and preserve the value of goods. Art 22 explicitly deals with the protection of interest of creditors and debtors. These are the important articles mentioned in UNCITRAL which can be incorporated in Indian law.

The modified principle of universalism should be adopted over the principle of comity because when we directly recognize the foreign judgment it might seriously damage the interest of one party and vice versa. So after the LPG era there are many economic legislation became more

²⁴ AIR 1952 Mad 136

²⁵ *Sumkin Bussan International vs King Shing Enterprises Ltd.* III (2006) BC 286

²⁶ Civil Appeal No.15135 OF 2017

welfare in nature likewise the rigidity of Indian laws should lighten as to welcome good forum shopping. So by this the concept of sovereignty won't get affected and it will help to secure the interest of debtor or creditor accordingly.

VI. COMPARISON BETWEEN IBC AND US BANKRUPTCY CODE

The comparison of two legislations is so important to understand or to navigate the place of our Indian law whether it is equal or more/less in the standard of the global standard, it will be important to find out the vacuum or the loopholes in the act, in order to revise the act and suggest changes with to the developed countries, so to the current position of the insolvency jurisprudence we do a comparative study on the Indian Insolvency and Bankruptcy Code, 2016 and 11 of U.S. Code where it deals with insolvency proceedings.

The model law was issued on the 1997 after it was issued many laws adopted and US being one of the countries which adopted it .US in 2005 there was a major amendment where there was removal of chapter 304 and inclusion of chapter 15²⁷ which solely deals with the cross border insolvency explicitly and whereas in India there was new legislation IBC which came into 2016.

The chapter 15 of the 11 U.S code was incorporated as to adhere with the model law it changed the old procedure in exercising the transnational insolvency proceeding, this was amended to promote cooperation and also brings legal certainty in the insolvency proceeding. This also prompted to concept of debtor friendly²⁸, where its ultimate aim is to protect the interest of the respondent company and to revive it. In India it has adopted the model law still it follows own territorial in nature and more briefly it allows the reciprocating states in respect to comity.

One of the major difference there is whole chapter deals with the cross border insolvency in US code but whereas in IBC it is just two section deals with the cross border insolvency that is namely 234²⁹ and 235 of IBC code. The 11 US code is so vast nearly 32 provisions deals with the foreign proceeding and it is vast that it covers almost every side of the proceeding like what is the right of domestic and foreign creditors who can initiate in the proceeding in §1513³⁰ where their rights and duties has been laid. There is also recognition towards the foreign proceeding where if there is any application towards the supreme court regarding the foreign forum award the application will be processed and will be recognized, there is mutual cooperation but this is like welcoming the new era of insolvency but this goes against the usual principle of comity

²⁷ EveryCSRReport.com. 2006. Chapter 15 of the U.S. Bankruptcy Code: Ancillary and Cross-Border Cases. [ONLINE] Available at: <https://www.everycsrreport.com/reports/RL33562.html>. [Accessed 18 July 2021].

²⁸ David Conaway (2015), Chapter 15 and CrossBorder Insolvency, Shumaker LLP

²⁹ Transitional provisions- Sec 234

³⁰ Access of foreign creditors to a case under this title

where there is no automatic approval of the reciprocating state decision but it recognize any territory but it has to go through the process, this is not in case of India , where it still follow the process the comity where it is seen both in IBC and CPC.

VII. CONCLUSION

From this we can understand the fathom of cross border insolvency in India because many nations like USA and Singapore have adopted the UNCITRAL model because the countries is expanding its boundaries and the world is becoming more closer. The business transaction and the cross border market became popular in this LPG era. So it has become mandatory for the states to recognize the cross border insolvency where country like India is still sticking to the old rigid principle of territorialism and comity but in this digital era , India has to loosen its string a bit as to match with other countries, where it should find a new modified territorialism principle and adopt it in the frame work. It is high time India should adopt certain model laws as said in UNCITRAL which helps to grow in our economical scale.
