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The IBC Amendments to Usher in the Cross-Border Insolvency Resolution

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Abstract--- *If we speak globally, the cross-border insolvency laws have been based on one country which is providing the assistance to the other country in taking full control of the assets and also the eventual disposition of such assets of the debtor company. Such type of aims could be easily achieved by the mutual recognition of each country's insolvency regime. For instance, the UK has recognized the insolvency provisions of certain Commonwealth jurisdictions and also the courts in the UK have been bound to assist the courts in all such Commonwealth jurisdictions. India has not been one of the jurisdictions that would qualify for the benefit under this route. The European Union (EU) is also one of the most effective cross-border regimes where, under the Insolvency Regulation 1346 / 2000, the country where the proceedings have been initiated against the debtor and the Centre of Main Interests has been located in such a country, the laws of that country would automatically take the priority and have the same effect in all the other member states and would also govern all such issues except those which have been specifically excluded. With regard to the cross-border insolvency laws in India, under the Companies Act, 1956, a court could definitely order the winding up of an unregistered company, which had included a foreign company. However, if an Indian company with the assets abroad was sought to be wound up, there was no specific statutory process for conducting the proceedings. It was also based on the mutual recognition of the foreign decrees as in the Code of the Civil Procedure, 1908, in India. Further, the Foreign creditors could also independently proceed against the assets of the company as located under the foreign jurisdiction. In the absence of such a recognition, it is very much difficult for any liquidator to gather the information on the different assets and enforce the disposition of all the foreign assets in a liquidation process.*

Keywords--- *Cross Border Insolvency Resolution- Liquidation Process- Statutory Process for Conducting the Proceedings.*

I. INTRODUCTION

The Government of India would be expected to introduce different amendments to the Insolvency and the Bankruptcy Code (IBC), to introduce the provisions for putting in place a definite resolution framework in case of the individual insolvency and also the cross border insolvency, based on the sources.

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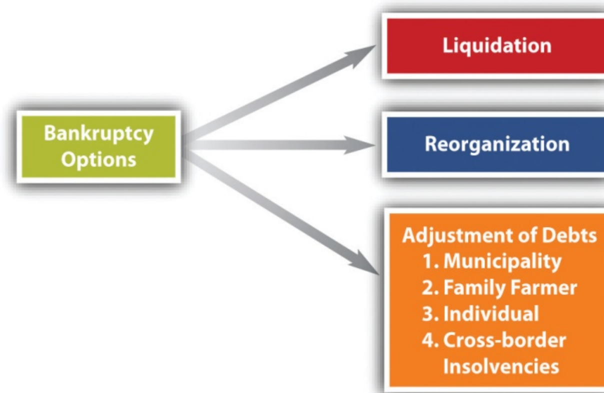
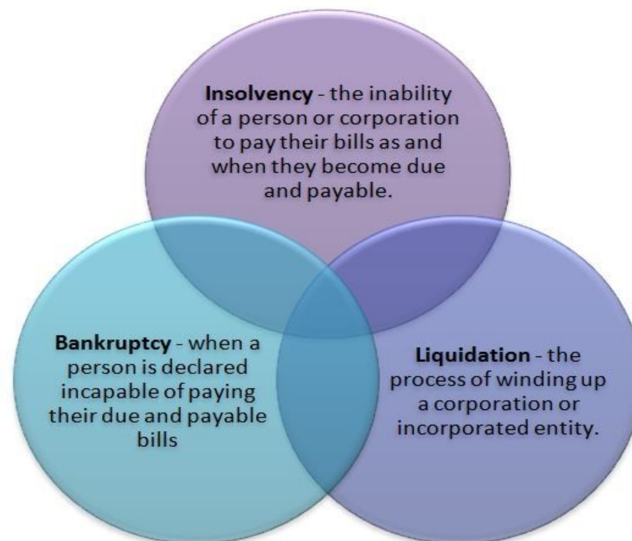


Different Amendments to the Insolvency and the Bankruptcy Code (IBC)

The Government of India would be expected to introduce different amendments to the Insolvency and the Bankruptcy Code (IBC), to introduce the provisions for putting in place a definite resolution framework in case of the individual insolvency and also the cross border insolvency, based on the sources. The changes would definitely enable the initiation of the resolution process in case of the personal guarantors to all the corporate debtors, the proprietorship and also the partnerships. The necessary provisions for the cross border insolvency would definitely enable most of the Indian firms to claim their dues from the foreign companies, while allowing the foreign creditors to recover the loans from the Indian companies, the sources said. Apart from the foreign creditors, this would also help all the foreign branches of the Indian banks to recover their dues in India without any problem.



The Bad loans: Is the NPA fire spreading every where? India's NPA cycle has appeared to be relentless. In 2014, the bad loans were confined to the non-financial corporate sector. But now, the NPA fire seems to spread to the micro, small and medium businesses (MSMEs), even drawing some of the retail loans into its fold. On the lenders side, if it were mostly the banks that were overwhelmed with the different bad loans some years ago, it was the non-bank segment that has been dragged in now.

A fresh cycle of all the toxic assets could further pressurize the financial system, which has already been under a tremendous strain over many years.

The Government has mulled amending the Insolvency Code to introduce a chapter on the cross border cases

The Cross-border insolvency Laws would give great power to the foreign creditors for recovering the money lent to the Indian companies and would also enable the Indian firms to also claim their dues from the foreign companies.

The Government would also expect to bring about an ordinance to properly amend the Insolvency and the Bankruptcy Code (IBC) to introduce a Chapter on the cross border insolvency cases.

"The main idea would be to bring about the proper laws that would describe about the insolvency of the subsidiary companies of a parent company which are located either in India or elsewhere", a senior Government official told the Money control.

The Government has planned to get a Cabinet nod when it would return to power. The Ordinance Bill will also be based on the United Nations Commission on the International Trade Law (UNCITRAL) model law for the cross-border insolvency, the official said.

The Cross-border insolvency laws would give a lot of power to the foreign creditors to recover all the money that was lent to the Indian companies and would also enable the Indian firms to also claim their dues from the foreign companies. The Cross-border insolvency provisions have been currently included in the sections 234 and 235 of the Code but will need to be notified in order to get them enforced in the due course.

"There is a need for us to definitely create a separate provision for the insolvency that would be globally accepted and also well organised," the official said.

"For the cross-border insolvency to get implemented, India would need strong bilateral treaties with the foreign Governments. The Government has been treading the ground with a great caution as finalizing the bilateral treaties would take a lot of time.Further, the different treaties would have different legal dimensions, which ultimately would give rise to a lot of uncertainty among the foreign investors", a senior lawyer dealing with the problem of insolvency and also a part of the Government's insolvency law committee said based on the condition of anonymity.

The actual need for separate bilateral treaties would always lead to a lot of confusion among the Indian courts and also the National Company Law Tribunal (NCLT), which have to treat each case separately, the lawyer said.

The use of UNCITRAL model law was being recommended by a panel of members headed by the Corporate Affairs Secretary Mr.Injeti Srinivas. The appropriate model law would deal with four major principles of the cross-border insolvency. It would always allow the foreign insolvency professionals and the foreign creditors to begin the domestic insolvency proceedings against a defaulting debtor, recognition of all the foreign proceedings and also the provision of remedies, proper cooperation between the domestic and the foreign courts and the domestic and the foreign insolvency practitioners, and also the coordination between two or more concurrent insolvency proceedings in different countries that are involved.

II. THE CASE STUDIES

The Reliance Infratel lenders have approachedthe NCLT against the interim RP's move A few lenders with the direct exposure to the Reliance Infratel (RITL) on Thursday have moved the National Company Law Tribunal (NCLT) against the interim resolution professional's admission of the different claims of the bankers. The bankers' claims were also reported to be around Rs 8,000 crore and based on the invoked corporate guarantees as issued by the RITL in favour of the Reliance Communication company.

The NCLT has given HDIL about 4 weeks timeto clear the lenders' dues. The bankruptcy court has also directed the Housing Development and Infrastructure Limited (HDIL) to clear all its outstanding dues to the Bank of India within 4 weeks in line with the one-time settlement procedure, which it had agreed to, or face all the consequences. The Mumbai bench of the National Company Law Tribunal (NCLT) on Tuesday said that the BSE-listed real estate developer will have to pay Rs 98 crore to the Bank of India within 4 weeks. The HDIL owes around Rs 520 crore to the Bank of India and it had agreed to pay all its dues in tranches.

Jaypee Infratech Insolvency: The Homebuyers' role key as COC votes on the NBCC bid Lenders to the insolvent Jaypee Infratech (JIL) on Thursday decided to put to vote the staterun NBCC's revised bid for the debt-laden realty firm. This exercise would go on for a period of 10 days from Friday onwards, in which apart from 13 banks, over 23,000 homebuyers too will cast their votes throughthe electronic mode.

The important question is "How to prevent the IBC from becoming a victim of its own success ?". The IBC has changed all of that and has also mandated a resolution of the insolvency within a period of 180 days (extendable by about 90 days if a majority of the creditors agree). The Creditors or the company itself could definitely initiate the process. In just a period of two years, it has emerged as a critical safety valve for the Indian capitalism, with a number of high profile cases and also some resolutions.

And at a time when ballooning the different bad loans are a major growing worry, many are counting on the IBC process to limit the damage that has occurred and retrieve the complete value from the failing company.

Manish Aggarwal, a partner with the KPMG, explained that the IBC has sent out a strong signal to the Indian promoters, that if they have defaulted, their companies will be altogether taken away. This message would seem to have finally gone through.

It is observed, that however, the rules have been kept changing. On 12th February, 2018, the RBI came out with yet another notification that has clearly insisted that the banks should recognize their defaulting loan accounts as NPAs on the day one of the default and if a resolution is not achieved in the next six months, they should refer all such accounts to the NCLT under the IBC. It has also led to a round of litigation and the challenges, now to be heard by the Supreme Court of India in November.

Definitely, it is a task that would need nerves of the steel. The former Tata Sons Director, R.Gopalakrishnan said that the process of turning around the defaulting debt laden, the Indian companies are not for the faint-hearted. He says: "The Euthanasia and the mortality of the terminally ill are the subjects for the robust-hearted doctors, not for the dilly dallying professionals."

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He further said that the lenders of India Inc., would be hung up on the concept of the promoter of a company and would definitely have contributed to the promoters trying to hang on to their companies. The IBC has been the first law for the debt resolution that would surely envisage a complete break from the promoter, andwould go much further than any of the earlier laws like the Sarfaesi Act.

It has been observed that while the 29A amendment made in November last year has plugged the fears that promoters could always regain the control of their companies, while the banks would have to take a haircut, there are still many fears that there are attempts being made to game the system in more subtle ways.

The Industrialist and the Chairman of the RPG Group, Mr.HarshGoenka, explained that the promoters of the defaulting companies have repeatedly tried to delay the process, while the competing bidders for the assets have also not acted in a fair manner, and instances of the defaulting promoters have been getting their friends to buy out the company as a benaami company, and at a discount are also doing the rounds.

One should understand that while a corporate entity may have creditors, the debtors and the assets in various countries, the Insolvency and the Bankruptcy Code, 2016 (IBC), in its current avatar has no comprehensive legal framework on the cross-border insolvency (CBI). The Ministry of Corporate Affairs on 20thJune 2018 has issued a public notice by inviting the comments on a draft chapter on the cross-border insolvency, which has been primarily based on the United Nations Commission on the International Trade Law Model Law on the Cross-Border Insolvency, 1997.

At present, the Sections 234 and 235 of the IBC would empower: (i) the Government to make all the bilateral agreements with other countries for enforcing the IBC; and (ii) the National Company Law Tribunal (NCLT) to issue a separate letter of request to a foreign court for necessary action on the debtor’s assets. Once a bilateral treaty has been executed, and these provisions have been notified, a foreign proceeding will have to be duelyrecognized in India, as per the Civil Procedure Code, 1908, while an Indian proceeding shall have to be recognized in the foreign country based on its own procedural rules.

Thus by dealing with the issue of the cross-border insolvency in the *Macquarie Bank Limited v Shilpi Cable Technologies Ltd*, the Supreme Court has recently gave many foreign creditors about the same right as a domestic creditor to properly initiate and participate in the corporate insolvency resolution process (CIRP). In this context of a lack of a comprehensive framework on the cross-border insolvency issues, the draft chapter would then apply when: (a) the assistance is being sought in India by a foreign court or a foreign representative with regard to a foreign proceeding; (b) the assistance has been sought in a foreign country regarding an IBC proceeding; (c) the foreign and also the Indian proceedings for a corporate debtor have been taking place concurrently; or (d) the creditors in a foreign state have an interest in presenting a request for the initiation of or the participation in the CIRP.

Based on a major departure from the Model Law, the draft chapter has adopted the principle of the reciprocity in that it woulddefinitely apply to the countries which have adopted the Model Law. Further, a proper access to the CIRP and also the information on the notifications that have been issued to a domestic creditor would then be provided to the foreign representatives and also the creditors.

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A foreign proceeding could also be recognized as a foreign main or non-main proceeding. This has beenvery much paramount in properly determining the right to relief that may be granted by the NCLT. In the Model Law, the principle of the centre of main interests (COMI) has been used to determine the location of the main proceeding. The COMI under the draft chapter has been presumed as the place of the debtor's registered office.

A foreign main proceeding would always take place in the country of the debtor's COMI, while a non-main proceeding would take place at the debtor's place of the establishment. During a foreign main proceeding, the NCLT would definitely ensure a moratorium on: (a) all the proceedings against the debtor (including the execution of different judgments); (b) the transferring, encumbering or disposing of any assets, rights or interests of the debtor; (c) the enforcing any security interest on the property of the debtor; and (d) the recovery of any property in the debtor's possession by its owner or lessor. In case of the non-main foreign proceedings, any relief would be at the discretion of the NCLT. Before granting suitable relief in a foreign proceeding, the NCLT has to ensure that the interests of all the creditors and the stakeholders including the corporate debtors are definitely protected. A foreign representative would also be entitled to apply to the NCLT in order to avoid the Acts that very much are harmful to the creditors.

The draft chapter has been provided for the necessary cooperation between the NCLT and the foreign court. The NCLT has all the powers to: (a) conduct a joint hearing with a foreign court; and (b) to communicate with, the request information or seek the cooperation from all the foreign representatives. The Resolution professionals (subject to the NCLT supervision) would also be empowered to communicate with the foreign courts and also the representatives. An efficient Coordination between the concurrent insolvency proceedings (for the same debtors) would also ensure that the relief once granted in a foreign non-main proceeding has to be consistent with the relief granted in a foreign main proceeding.

The NCLT would also have the power not to give any sort of effect to the cross-border insolvency provisions, if there is a severe violation of the public policy.

The draft chapter has been prepared is a sure step in the right direction. Among the different issues that would need redressal, it does not govern the cross-border insolvency proceedings of all the individuals. The term "foreign proceeding" would be limited to an insolvency process and does not cover any other forms of the arrangement. Where the COMI has fallen outside India, the relief would depend on the laws and the courts of the foreign country. The draft chapter has been silent on the rights and the duties of an insolvency professional in a foreign proceeding. As the public policy has not defined under the draft, the parameters that would need to ring-fence the judicial discretion may be adopted, considering the inconsistent judicial approach towards the public policy doctrine.

The global investor community would likely to take a positive view of the Centre's plan for ushering in the cross border insolvency framework, say the insolvency law experts.

Once it has been approved, the proposed cross border insolvency framework would ultimately lead to more cross-border deals and alsohelp in making India as an attractive FDI target by reducing all sorts of risks that are associated with the insolvency, they said.

The Corporate Affairs Ministry has been looking to introduce a globally accepted and well recognised cross-border insolvency framework, which is fine tuned to suit the needs of the aspirational Indian economy. The draft of the proposed cross border insolvency framework is also greatly exposed for all the stakeholder comments by 30th June.

The inflow of the foreign direct investment (FDI) into India during 2017-18 has increased to $ 61.96 billion compared to $60.08 billion in the corresponding during previous fiscal, the Commerce Minister Suresh Prabhu said recently.

The Government of India has also taken a good initiative for the Cross-Border Insolvency within the Insolvency and the Bankruptcy Code, 2016 (IBC) for providing an efficient and a comprehensive legal framework.

The global experience has clearly demonstrated about the cross-border investment decisions and also their outcomes, which are considerably affected by the insolvency laws in force in any country. Towards this end, although the IBC has necessarily resulted in making a significant improvement in India's insolvency regime, there has been a need to include the cross-border insolvency in the Code to provide a comprehensive insolvency framework in our country.

A proper inclusion of the cross-border insolvency framework has been expected to further enhance the ease of doing the business, and also provide a mechanism of the cooperation between India and many other countries in the area of the insolvency resolution, and also to protect all the creditors in the global scenario. Furthermore, it would also make India as an attractive investment destination for the foreign creditors given the increased predictability and also the certainty of the insolvency framework model.

III. THE EXPERTS VIEW

Harsh Pais, a Partner, Trilegal, a law firm, have emphasized that this (cross border insolvency framework) would be a positive step and would also meet one of the main lacunae in the bankruptcy code — the modern business is trans-national and the law should also proceed on that basis.

"The right choice has been made in the proper adoption of the global standard, viz, UNCITRAL model law", he said.

Dinkar Venkatasubramanian, a Partner (Restructuring and Turnaround Services), EY, said that the cross-border insolvency has always been intended to be an integral part of the law. He emphasized that the foreign creditors and also the Indian creditors would always be at par if the framework on the cross-border insolvency would ultimately be introduced in India.

Thus "It would provide a greater efficiency and also the certainty on all the cross-border insolvency issues. The levelling of the playing field has been a significant move which would be viewed positively by all the global investor community and also by multinational corporations", he said.

Venkatasubramanian also said that the model law will soon make it extremely easy for all the Indian MNCs and also the global MNCs to resolve the issue of insolvencies seamlessly across the borders.

Asked about the implications or the consequences of the cross-border insolvency law on the M& A deals, Abhijeet Biswas, the MD &also the Co-Founder, 7i Advisors LLP, an investment banking firm that is very much involved in the cross-border M&As, said that overall this regulation, if approved, it would certainly help in making India an attractive FDI target by efficiently reducing all the risks that are associated with the insolvency and also hence would lead to many cross border deals in future.

Thus "It is also a big positive step for all the lenders including the equity investors as it would definitely set the right tone to their investment committee that the due processes would be followed,which are also very much globally acceptable," he said.

Biswas said that the cross-border deals, both inbound and also the outbound, would greatly benefit from the reduced risk perception of India as a suitable destination where the strong Insolvency law exists. This would also encourage lot many lenders to consider backing the M&A transactions involving India, he said.

REFERENCES

[1] Report of the The Bankruptcy Law Reforms Committee (BLRC).
[2] Press release of Ministry of Finance dated 12 May 2016.