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CROSS BORDER INSOLVENCY

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Overview of Insolvency and Bankruptcy Code?

The Insolvency and Bankruptcy Code was adopted in the year 2016, which consolidates the prevailing framework by creating a single law for insolvency and bankruptcy in India. Once there is a default in the reimbursement of the loans the creditors will gain control and management over the assets of the debtors.

The creditor should make decisions to resolve insolvency within 180 days period. In order to make sure that the process of resolution is not interrupted the Insolvency and Bankruptcy Code provides for immunity to the debtors from the varied resolution claims of the creditors throughout the period of the resolution.

The Insolvency and Bankruptcy code also brings together the provisions of the current legislative framework in order to form a common forum for the debtors and the creditors of the all classes in order to resolve the insolvency i.e. it consolidates the provisions in current legislative framework.

The Various Authorities underneath the Insolvency and Bankruptcy Code:

1. **Insolvency Professional (I.P.)-** They are primarily concerned in the dissolution process of the Limited Liability Partnership, individual etc. They're approved to act on behalf of the insolvent individuals, firms etc. They have played a really vital role in liquidating the assets and other settlement process.
2. **Insolvency Professional Agencies (IPA)-** The main function of those agencies is to develop the professional standards and also the code of the ethics for the Insolvency Professional members.

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3. **Adjudicating Authorities**- A. NCLT- National Company Law tribunal for corporate and B. DRT- Debt Recovery Tribunal for the individuals.

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What is Cross Border Insolvency?

The cross-border insolvency is additionally referred as the international insolvency. Cross Border Insolvency also regulates the treatment of the financial distressed debtors wherever such debtors have assets or the creditors in numerous countries i.e. it's not restricted to at least one country solely/ only. The cross-border insolvency is essentially concerned about those companies or the individuals who have the businesses and the assets in more than one country.

So Usually, the Cross-Border Insolvency is more concerned with the insolvency of the companies which operates in various countries rather than of the bankruptcy of the individual, it is just like the traditional conflict of the laws and rules.

The cross-border insolvency focuses upon the three areas:

1. Choices of the law rules- What rules may be created.
2. Jurisdiction rules- It specifies the limit of the jurisdiction and
3. Enforcement of the judgment rules – A way to enforce strict implementation of the principles of the judgment.

In regard to the insolvency the principle focus tends to be recognition of the foreign insolvency officials and their powers.

There are 3 theories in relation to the cross-border insolvency:

1. **Territorial Approach-** In Territorial Approach whereby each country exercises its own domestic insolvency laws in respect to the all of the debtor's property and all of the creditors that are being situated within its jurisdiction. This approach doesn't acknowledge any extra territorial dimensions to the insolvency laws.
2. **Universal Approach-** Wherever by any cross-border insolvencies are administered pursuant to the single global insolvency regime and all of the debtor's assets are distributed by a single insolvency office holder regardless where the assets and also the claimants are located.
3. **Hybrid Approach-** A Variety of the hybrid approaches exist within the theory or practice as well as modifying universalism whereby the individual or the countries seeks to identify the most relevant jurisdiction in which to conduct the proceedings and every one of the opposite states will collaborate with and it also facilities such

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proceeding which is subject to the limits of the public policy or the cooperative territorialism which is loosely speaking is predicated on the territorial approach which is supplemented by the multi-lateral conventions. It is typically speaking that the universal approach remains mostly holistic ideal and for the most part of the countries of the world are divided into those which takes the purely territorial approach and those which applies on form of hybrid approach.

Challenges in Cross Border Insolvency:

The Insolvency and Bankruptcy Code was enacted in the year 2016 which believed that the Cross-Border Insolvency provisions would be enacted soon however from the year 2016 until currently the problem of cross border insolvency has not been addressed by the Insolvency and Bankruptcy Code. Thus primarily, there is absence of the framework to deal with the cross-border insolvency and this absence will seemingly to result in the significant losses of the assets of the such companies. There is also one of the bigger concerns that the government also has not shown urgency to the enact a law inside the Insolvency and Bankruptcy code to deal with Cross Border Insolvency. The two more challenges that must be addressed while dealing with the cross-border insolvency is that first there must be the judicial corporation between the bankruptcy code of the different jurisdictions and second is that there must be the time period to deal with the international insolvency. There are no procedures to deal with the cross-border insolvencies issues where the creditors, assets of debtors are in that country where there is no reciprocal agreement.

Measures on the Cross-Border Insolvency

1. **Judicial Involvement**- As we can say that there is the absence of the provisions or the framework within the Insolvency Bankruptcy Code to deal with the Cross-Border Insolvency so in this gap the judiciary has to step-in, in order to plug in the gap in cross border insolvency. This judicial involvement was first happened in case of the Jet Airways Insolvency. While dealing with the case of the Jet Airways insolvency the judiciary had stepped up in order to make regarding the cross-border insolvency. So, in month of May 2019 a Dutch Court passed an order of insolvency of the jet airways on the petition of creditors based in Netherlands'. The Dutch court basically appoints a trustee and the Jet airways has its regional hub in Shefford airport in Netherlands' and following this the National Company Law tribunal directed the Interim Resolution Officer to ignore the order of the Dutch Court and the trustee and after recognizing the threat ignoring the Dutch Court and the Trustee. So, the threat it will post

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towards sustainability insolvency resolution outcome of the jet airways. The NCLAT advises the exploration of the framework of the corporation and after extensive negotiation the Cross-Border Insolvency Protocol was agreed upon.

2. **Cross Border Insolvency Protocol**- This protocol is based on the principles of UNCITRAL model i.e. (United Nations Commotion's on International Trade Law) and the headquarters of the UNCITRAL model is in Vienna (Austria). It was founded in the year 1966. This protocol provides a framework of the international coordination at the same time respecting the independent jurisdiction i.e. sovereignty and the authority of the National Company Law Tribunal or the Appellate Tribunal and also the Dutch court. So, the Cross-Border Insolvency Protocol recognizes that the Jet Airways it was an Indian Company and had its main economic interest in the India. It agreed that the proceeding under the Insolvency and Bankruptcy Code in India should be in the insolvency proceeding against the jet airways.

The protocol regarding the Cross-Border Insolvency Protocol i.e. this protocol seeks to promote the international cooperation and the coordination. So, the international corporation and coordination should be ensured in following ways:

- A. To provide for orderly and the timely administration in order to reduce the cost.
- B. To promote the communication among the parties and the committee of the creditors.
- C. To enhance and facilitate the communication among the NCLT, NCLAT and the Dutch Court.
- D. To provide for sharing of the information and the data among the parties in order to avoid the duplication of the efforts and the activities.
- E. To identify and to preserve the value of the Jet Airways worldwide as assets. So, when the value is maximum the benefits are also maximum for everyone and so this protocol was approved by the NCLAT in the month of the September and this is viewed as the historical development by the international community and this is the signal that the Insolvency Market in the India is maturing.

What has to be done/ Way Ahead

We have seen that the Cross-Border Insolvency Protocol has narrowed down the gap between the cross-border insolvency provisions available and what is to be needed. So, this gap has been definitely narrowed down but what we need is a Comprehensive Cross Border Insolvency Law as this protocol is specifically available to the Jet Airways Case. Within Our Insolvency and Bankruptcy Code we should include the provisions dealing with the Cross-Border Insolvencies

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as well and Most of the sophisticated economies of the world has the well-developed Cross Border Insolvency Laws so India should also have one.

Regarding the UNICITRAL Model Law (United Nations Commotion's on International Trade Law) it is a necessity for the India not an option. So, the comprehensive law should adopt the modern law which is already framed by the UNCITRAL.