

Cross Border Insolvency

Kumar Vikram Aditya

Assistant Professor, Bihar Institute of Law

Email – kvaditya45@gmail.com

Abstract: *Earlier there was no single law dealing with insolvency and bankruptcy provisions and thus on 28th of May 2016, Insolvency and Bankruptcy Code, 2016 was enacted with an objective to make a single law for insolvency and bankruptcy, for time bound resolution and promote credit availability. But still this Code deals with certain lacunas in field of Cross Border Insolvency and thus to correct those, Ministry of Corporate Affairs set up an Insolvency Law committee on 16th Nov. 2017 to take stock of functioning and implementation of IBC and identify issues related. The committee recommended suggestions with respect to cross border insolvency and the paper deals with some of the suggestions given.*

Key Words: *IBC, Cross Border Insolvency, Suggestions.*

1. INTRODUCTION:

With the advent of Globalization and increase in demands there has been upsurge in the Global trade volume and with that there has been a drastic increase in the number of disputes too. Companies did nurture domestically and globally both and thus there was a need for uniform Insolvency and Bankruptcy Code because “the existing frame work for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution.”¹ There was no single law in India that dealt with the process of Insolvency and Bankruptcy and provisions can be earlier found Companies Act, 2013, SARFAESI Act, 2002 etc. Thus on 28th of May, 2016 an act was enacted by the parliament with an objective “to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner, for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India. This was also done keeping in view the Resolution of UN General Assembly, Resolution No.59/40, passed on 2nd December, 2004 which was a guide to all the nations and acted as a model law for Insolvency to frame their own laws of Insolvency. This was done because of the increasing cooperation and coordination among different player and stakeholders in international arena and substantially increasing the dispute between them during transactions. The relevancy of the model law was also examined by Supreme Court in the year 2017.

When the debtor is unable to pay its debt when they become due, then he will become a defaulter and later an insolvent. This insolvency becomes bankruptcy when the defaulting debtor is unable to address the claim of the creditors. This is the major difference between insolvency and bankruptcy. We can say that bankruptcy precede insolvency. Bankruptcy is legal status of Insolvency. In general both creditor or creditors and debtor or debtors resides in the same place. Then the process of insolvency is carried on as per the provisions of IBC, 2016 but this is not so every time. Insolvency, because of globalization may occur in a country different from the country where the creditors reside. In such a scenario cross border insolvency helps the creditors to make their claim from the debtors.

1.1. OBJECTIVES OF THE STUDY: -

To know the Concept of Cross Border Insolvency along with analyzing the lacunas affecting its implementation and also to suggest some recommendations with respect to it.

2. PRESENT SCENARIO OF CROSS BORDER INSOLVENCY: -

Cross Border Insolvency is dealt under section 234 and 235 of the IBC, 2016. The committee, while the code was being discussed in the parliament, recommended insertion of new provisions relating to cross border insolvency. The Committee deliberated the issue and noted that the Code at present does not explicitly deal with issues and text related to cross border insolvency. However given that many corporate transactions and businesses today involve an international and cross border element, the implications of cross border insolvency cannot be ignored for too long if India is to have a comprehensive and long lasting insolvency law as the Code aims to achieve. Not incorporating this

¹ State of Objects and Reasons, Insolvency and Bankruptcy Code, 2016.

will lead to an incomplete Code.² These sections provide that Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of IBC and further the Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made.³ Corporate debtor means a corporate person who owes a debt to any person.⁴ During the process if it is opined that assets of the corporate debtor or debtor are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. The Adjudicating Authority on receipt of an application may issue a letter of request to a court or an authority of such country competent to deal with such request.⁵

3. CONCLUSION AND RECOMMENDATIONS: -

But the provisions related to Cross Border insolvency in the code was still insufficient and ineffective to deal with cross birder insolvency and thus, Ministry of Corporate Affairs set up an Insolvency Law committee on 16th Nov. 2017 to take stock of functioning and implementation of IBC and identify issues related. It reiterated the four basic principles of UNCITRAL Model Laws on which our Code is bases i.e. Accessibility of the parties to the Domestic Courts, Recognition of the Awards and Foreign Decisions, Co-operation and Co-ordination with respect to Implementation and execution of the award.

The recommendations of the committee can be formulated in broad points:-

- The committee recommended that the RP or liquidator should be authorized to act in foreign country on behalf of the proceeding as permitted by the foreign law with an exception that the adjudicating authority may refuse the implementation of the action if contrary to the public policy.
- Foreign Representative⁶ is entitled to apply to the adjudicating authority and exercise his power and functions and can participate in the proceeding. Further the committee recommended that the foreign creditors shall also have the same right to access and participate in the proceeding as a creditor in India has.
- The committee further recommended for application by the foreign representative for recognition of the foreign proceeding by presenting certified copies of all the documents.
- Further there was recommendation of recognition of the decision of the foreign proceeding if it satisfies the requirement set and an application has been made for its effective recognition. On recognition there will be suspension of all suit and proceeding in any court of law or tribunal.
- Further the committee recommended certain principles in case of concurrent proceeding also and lastly it recommended for co-operation and co-ordination with foreign courts and foreign representative.⁷

With respect to all the recommendation given by the committee, the central government must work to enact the laws in the code and also to make proper implementation to it. Further the central government may also establish an Institute that would act as a linking bridge between the foreign and domestic representative.

REFERENCES: -

1. Insolvency and Bankruptcy Code, 2016.
2. Report of The Joint Committee on The Insolvency and Bankruptcy Code, 2015, 16th Lok Sabha.

² Report of The Joint Committee on The Insolvency and Bankruptcy Code, 2015, 16th Lok Sabha

<http://prsindia.org/uploads/media/Bankruptcy/JC%20Report%20on%20Insolvency%20and%20Bankruptcy%20Code.pdf>

³ Section 234: Agreements with foreign countries, Insolvency and Bankruptcy Code, 2016

⁴ Section 3(8), Insolvency and Bankruptcy Code, 2016

⁵ Section 235: Letter of request to a country outside India in certain cases, Insolvency and Bankruptcy Code, 2016

⁶ Foreign representative means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the corporate debtor's assets or affairs or to act as a representative of the foreign proceeding and includes any person or a body appointed on an interim basis.

⁷ Report of The Joint Committee on The Insolvency and Bankruptcy Code, 2015, 16th Lok Sabha

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