
CROSS BORDER BANKRUPTCY: AN ANALYSIS

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ABSTRACT

The two terminologies Bankruptcy and Insolvency has variance on a very surface level, referring to each other's as synonyms by a layman does not mean they are completely wrong, the basic context insolvency is similar as bankruptcy but not absolute in nature As, bankrupt is insolvent but insolvent is not necessarily bankrupt. That's when the space for international laws for Cross Border Bankruptcy come into existence, not just by any random notion but due to the indispensable part which it plays in resolution between different houses with territorial jurisdictions. Wherein the extensional developed and established body for the same in the international board in the UNCITRAL United Nations Commission on International Trade Law, through the diligence of which many worldwide municipal states have adopted the Modern Laws for the harmonious justice process between the nations and legal bodies. More overly it is pleaded and acknowledged internationally, that the basic idea of the Modern Laws is create what is known as the 'main proceedings', related to the insolvency setups. Regardless of the Modern Laws, the municipal states too have their insolvency and bankruptcy laws governing there domestic and foreign entity issues. In which the Bankruptcy Code of 2016 is the legal framework functioning in India, were its ambit quite small and not really accommodative on the international platform.

What is Cross Border Bankruptcy and Insolvency

A major proportion of people use the terms 'Insolvency' and 'Bankruptcy' as synonyms of each other, where in the case they are not completely wrong. As the fundamental being of the insolvency is the same as bankruptcy but not at full, as there are similar to understand in the context of Contract, were in "All the contracts are agreements but all the agreements are not contracts", similarly "A person or entity who is bankrupt is insolvent but an insolvent person or entity is not necessarily bankrupt".

Wherein Insolvency is a term used to describe a person or a company as due, is not in capacity to discharge its financial debts and liabilities responsible to clear off, and bankruptcy refers to a person or company, that has no more resources to pay back its debts, where it's the same as what insolvency is called. But the ambit of bankruptcy is more extended, where bankruptcy is overcoming the insolvency with the prescribed legal set of rules, guidelines and instructions made by a court of law.

International Laws in aspect of Cross Border Bankruptcy/Insolvency

As the term suggests the Cross Border Insolvency is the scenario where in the insolvent and bankrupt debtor owns assets in more than one country or many different jurisdiction, and the discharge of the assets of the debtor are required to pay off the respective creditors of the same debtor, hence when it com the part of dischargement of the assets which are in different territorial jurisdiction the function of international law come in picture, as in such an scenario there is going to be the interaction of two or more different legal systems and courts in accordance with their jurisdiction. Hence it is a point where the International Laws and Commissions come into play to make the whole proceedings harmonious, easy and exsicating smoothly, which is of a great help as there are different governing Municipal insolvency law.

Bankruptcy and Insolvency Laws & Commissions on International level

Now, a common question which come our mind regarding the international trade in insolvency matters is that, there are so many different countries with different set of law, courts and legal structure dealing with the bankruptcy and insolvency issues, then how in particle does all of the legal bankruptcy proceedings is actually performed and is there any international standard sets of law which is been adapted by number of Municipal States (Nations) for mutual convenience while dealing with the related matters and there the part of UNCITRAL comes,

where the United Nations Commission on International Trade Law has set forward the Modern Law which is been adopted back on 30 June 1997 to deal with matters of cross border insolvency, where at present there are 46 jurisdiction that has substantially adopted and implemented the Modern Law in their own jurisdictions, which includes significant economies of the world who has large volume of cross border trades like the United States, United Kingdom, Australia, Japan and Canada, also emerging economies like Mexico and South Africa.

The fundamental idea of the Modern Laws is to establish what is called as the “main proceedings” which are in relation to the international insolvency and rest are referred as “non-main proceedings”, basically the modern law focuses on (1) to ensure the states provide assistance to the insolvency officials from other nations in aspect of the main proceedings and non-main proceedings and (2) to eliminate the preference of the local creditors over the international creditors.

1. The other major aspect in with these laws help is: The adopted laws help in providing effective mechanism for dealing with cross border bankruptcy through promoting cooperation in between the courts and other authorities of different countries.
2. Proving greater legal certainty for trade and investments for promotion of fair and efficient administration of cross border bankruptcy which will ultimately protect the interest of all the stakeholders.

Indian Legal framework governing Cross Border insolvency

The legal framework governing the cross-border insolvency in India primarily is the Bankruptcy Code of 2016. It is a major back drop of the India when it comes to dealing with international cross border insolvency matters, as even through the Code had established a stride in drastically harmonizing process, it is still not sufficient and not accountable for procedure to regulate the cross-border insolvency proceedings. As the code offers only 2 provisions dealing with the matters, which are the Section 234 and section 235. Where in the section 234 provides and empowers the central government to enter into bilateral agreements with the foreign nations for the purpose of enforcing the Code and section 235 deals with the aspect of empowering the adjudicating authorities under the code to issue letter of request to the courts in the countries under which an agreement under the section 234 was entered into, to deal with assets situated in that respective country in the said specific manner.

Conclusion

In my personal note for the conclusion part, I would comment and address this conclusion in two part which is in respect to the UNCITRAL and the Indian insolvency laws dealing with the issues of cross border bankruptcy.

In my opinion the UNCITRAL Modern Law is an essential set of legal framework which has been developed and in a favorable manner also been adopted by many countries as well, where is quit evident to say that the modern law had provided a fairly independent framework which has allowed the concerning jurisdictions to thereby evaluate and decide the operation in the best suited landscape, as the modern law as effectively presented a very wide scope of benefits and clarity in respect to issues of cross border bankruptcy disputes.

In my opinion the Indian legal framework in the horizon of cross border insolvency is still as very weak, unclear and narrowed set which is unable to support the working and global trade motion of India with world, which is indeed holding the nation to a back step when it comes to the coordination and smooth execution of the cross-border bankruptcy issues, which would ultimately proving hinderance to the country's foreign trade. There is big need to bring necessary modification in the Insolvency Code of the country to meet the global performance and standards.