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CROSS BORDER INSOLVENCY IN INDIA

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ABSTRACT

The insolvency and bankruptcy landscape has changed dramatically in recent years, with legislative reforms and judicial interventions aimed at improving the efficiency and efficacy of the resolution process. In many jurisdictions, like India, the fundamental goal of these changes has been to establish a balance between creditor rights and debtor rehabilitation, while also encouraging economic growth and financial stability. In certain circumstances, the corporate debtor's promoters were successful resolution applicants for their own company, RBI bank ltd . v. mbl infrastructure ltd (promoter disqualification sec 29A)[731] it was held that, the intention of the legislature is no to disqualify the promoters as a class but to rather exclude that class of persons who may affect the credibility of the resolution process given their antecedents allowing them to reclaim control of it. The Government of India ("GOI") viewed the promoters" re-entry' as unjust and contrary to the aim of the IBC, "the Ordinance aims at putting in place safeguards to prevent unscrupulous, undesirable persons from misusing or vitiating the provisions of the Code". The press release goes on to state that "the amendments aim to keep-out such persons who have willfully defaulted, are associated with non-performing assets, or are habitually non-compliant and, therefore, are likely to be a risk to successful resolution of insolvency of a company"[732].This essay demonstrates some of the most significant advancements in insolvency and bankruptcy legislation that have occurred recently, which include Cross-border insolvency in India, The relationship between the Insolvency and Bankruptcy Code and the Competition Commission of India, and the NCLT's inherent ability to recall an Insolvency Resolution Plan. By implementing such laws, societies establish debt resolution methods that ensure both debtors and creditors are treated fairly. These rules enhance economic stability by allowing struggling businesses to restructure debts or dispose of assets in an orderly manner, preventing widespread financial disasters. They also promote entrepreneurship and risk-taking by providing a safety net for individuals and enterprises, transforming the societal perception of financial failure from stigma to rehabilitation. Furthermore, strong insolvency and bankruptcy rules promote international trade and investment by creating trust in investors and creditors, which contributes to economic growth and stability.The Insolvency and Bankruptcy Code (IBC) is a comprehensive piece of legislation that aims to resolve insolvency concerns in a timely way, promote entrepreneurship, and balance the interests of creditors and debtors. Its goal is to consolidate and alter legislation governing corporate reorganisation and insolvency resolution for businesses, partnerships, and individuals. The IBC's structure includes several key features, including the establishment of the Insolvency and Bankruptcy Board of India (IBBI) to regulate insolvency professionals and insolvency professional agencies, the establishment of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) for adjudicating insolvency cases, and the creation of a corporate insolvency resolution process (CIRP) and a fast-track insolvency resolution process for small and medium-sized businesses. Creditors, debtors, resolution

[731] *Rbl bank ltd . v. Mbl infrastructure ltd* Company petition 170/2017 https://taxguru.in/corporate-law/analysis-section-29a-insolvency-bankruptcy-code-2016.html

[732] Under Article 123 of the Constitution of India, the President of India has the power to promulgate ordinances when neither the Lok Sabha nor the Rajya Sabha are in session if there are circumstances which render it necessary to take immediate action. Every such Ordinance is required to be laid before both Houses of Parliament and shall cease to operate at the expiration of 6 (six) weeks from the reassembly of Parliament.

specialists, and regulatory agencies such as the IBBI, NCLT, and NCLAT all have a role in ensuring the smooth and effective settlement of insolvency matters.

CROSS BORDER INSOLVENCY IN INDIA

Cross-border bankruptcy refers to instances in which a debtor entity's insolvency proceedings span more than one country. Cross-border insolvency is growing more important in India as globalisation and international business activities grow. Cross-border cases, unlike domestic insolvency proceedings, need coordination between courts and authorities in many jurisdictions. India does not have a separate law dealing solely with cross-border insolvency; rather, laws relating to it are contained in the Insolvency and Bankruptcy Code. These laws provide for collaboration and coordination with international courts and authorities, facilitating the recognition and enforcement of foreign insolvency processes in India and vice versa. India has also approved the UNCITRAL Model Law on Cross-Border Insolvency, which provides a framework for dealing with such matters by emphasising cooperation and coordination among jurisdictions. The objective is to enhance international economic stability, promote investment, and foster confidence in cross-border transactions by providing a transparent and predictable framework for resolving insolvency issues in a globalised economy.

UNCITRAL Model Law on Cross-Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency provides a comprehensive framework for facilitating collaboration and coordination across jurisdictions in cases of international insolvency. It establishes channels for the recognition of foreign insolvency proceedings, guaranteeing that they be enforced in local courts. It also promotes cross-border cooperation among courts and insolvency practitioners in order to simplify proceedings and ensure equal treatment for all creditors. The Insolvency and Bankruptcy Code of 2016 (IBC) has significantly changed India's approach to cross-border insolvency. While the IBC largely addresses local insolvency issues, it does include measures for dealing with cross-border situations. These provisions permit cooperation with foreign jurisdictions, however the scope and efficacy of such cooperation may differ. The IBC, like the UNCITRAL Model Law, addresses the recognition of foreign insolvency procedures while also ensuring equitable treatment for foreign creditors.

Despite these commonalities, there are significant discrepancies between the UNCITRAL Model legislation and Indian legislation on cross-border insolvency. The UNCITRAL Model Law provides a standardised and internationally recognized framework for dealing with such matters while remaining flexible and adaptable to other legal systems. In comparison, while the IBC is a huge step forward for India in terms of cross-border bankruptcy, it may not be as comprehensive or generally recognized on the world scene. Nonetheless, ongoing efforts to align India's insolvency system with global best practices indicate the possibility of further convergence between Indian and international law in the future.

Jet airways (India) Ltd. v. state bank of India & Anr. company

This case marks the first instance of cross-border insolvency in India, involving Jet Airways (India) Limited. The company faced parallel insolvency proceedings in both India and the Netherlands. In the Netherlands, the company was declared bankrupt, and a Dutch trustee was appointed to oversee its estate (referred to as the "Dutch Proceedings"). Three petitions were filed against Jet Airways, the Corporate Debtor, in India, seeking the initiation of Corporate Insolvency Resolution Process (CIRP) due to substantial outstanding debts (the "Indian Proceedings"). During the initial hearing,

the NCLT Bench learned that insolvency proceedings had already commenced in the Netherlands a month earlier. The Bench opined that simultaneous proceedings would delay and compromise the case, noting the absence of reciprocal arrangements with Dutch authorities as mandated by Sections 234 and 235[733] of the CODE. Moreover, considering Jet Airways' registered office and primary assets were in India, the NCLT asserted jurisdiction in the matter. Consequently, the NCLT set aside the Dutch Court's proceedings and accepted the initiation of CIRP in India against Jet Airways. Following an appeal by the Dutch trustee, the NCLAT directed cooperation between the Indian Resolution Professional (RP) and the Dutch trustee for a joint corporate insolvency resolution process ("Proposed Cooperation"). After both parties agreed on a model, the NCLAT approved it, allowing the Dutch Court Administration to participate in Jet Airways' meetings. Subsequently, the Mumbai Bench of the NCLT approved the Resolution Plan, marking the conclusion of India's first cross-border insolvency case under the Code. However, this landmark decision raised concerns about the Code's insufficient insolvency provisions.

Challenges with respect to cross border Insolvency

Challenges regarding cross-border insolvency persist in India's current framework, characterised by uncertainty, especially concerning the recognition and enforcement of foreign insolvency-related judgments and orders. India is in the final stages of amending the IBC to adopt the UNCITRAL Model Law on Cross-Border Insolvency 1997 ('Model Law'), which will enable the recognition of foreign insolvency orders in India, providing protective relief for the assets of insolvent corporate debtors. Despite Section 234 of the Insolvency Code allowing for bilateral treaties with other nations, none have been signed thus far. Without avenues for recognition abroad, insolvency proceedings initiated in India may have limited impact and prove costly for insolvent companies. The lack of recognition may lead to creditors initiating proceedings outside India, forcing the appointed Insolvency Professional (IP) to incur additional litigation costs. Additionally, the IP cannot control the company's assets abroad without recognition of Indian insolvency proceedings. These challenges, while not unique to India, underscore the debate between territorialism and universalism in international insolvency proceedings.

Solutions with respect to cross border Insolvency

One such solution is to use international frameworks, such as the UNCITRAL Model Law on Cross-Border Insolvency, which provides a legal framework for collaboration and coordination across different jurisdictions. Furthermore, encouraging cross-border communication and collaboration among parties, including as creditors, debtors, and courts, might aid in the smoothing of settlement processes. Furthermore, the creation of alternative dispute resolution processes targeted to cross-border insolvency cases can result in speedier and more cost-effective solutions. Overall, managing cross-border insolvency necessitates a holistic approach that combines legal, procedural, and collaborative efforts to promote equitable and effective solutions for all parties involved.

INTERPLAY OF IBC AND COMPETITION LAW

The intersection of the Competition Commission of India (CCI) and the Insolvency and Bankruptcy Code (IBC) represents a crucial nexus in India's economic landscape. While the IBC strives to streamline insolvency proceedings and revive distressed companies, the CCI ensures that fair competition prevails in the market. This essay delves into the intricate interplay between these two regulatory bodies, emphasising their roles in promoting market efficiency, safeguarding competition, and fostering economic growth.

[733] Section 234 and 235 of Insolvency and bankruptcy, 2016

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Overview of the CCI & IBC

The CCI, established under the Competition Act of 2002, is entrusted with the mandate to prevent anti-competitive practices and promote healthy competition in the Indian market. It investigates cases of cartelization, abuse of dominance, and anti-competitive mergers and acquisitions, thereby safeguarding consumer welfare and ensuring a level playing field for businesses.

The IBC, enacted in 2016, me-bound and efficiently revolutionised India's insolvency framework by providing a tilution process for financially distressed companies. It aims to maximise the value of assets, protect the interests of creditors, and facilitate the revival of viable businesses while ensuring a fair and transparent mechanism for debt resolution

Interplay between CCI and IBC

a. Competition Assessment in Insolvency Proceedings:

Under the IBC, resolution plans often involve the sale or transfer of assets of insolvent companies. The CCI assesses these transactions to prevent any adverse impact on competition, ensuring that mergers and acquisitions do not lead to monopolistic practices or market distortions. The CCI's scrutiny complements the objectives of the IBC by promoting competitive markets and preventing the creation of entities with undue market power, thus fostering long-term economic efficiency. Now in Bhushan Steel Ltd. vs. Tata Steel Ltd: the case dealt with the question of whether the provisions of competition law would apply to the resolution process under the IBC. The NCLT held that the provisions of competition law would apply to the resolution process and that the resolution applicant would have to comply with the requirements of both the IBC and competition law.

These cases highlight the need for a proper interface between the IBC and competition law to ensure that the interests of both stakeholders and creditors are protected in the resolution process.

b. Coordination and Cooperation:

Both the CCI and the National Company Law Tribunal (NCLT), which adjudicates insolvency cases under the IBC, collaborate to address competition concerns arising from resolution plans. They share information and coordinate their actions to ensure alignment between insolvency proceedings and competition principles. This cooperation streamlines the resolution process, mitigating delays and uncertainties while upholding the integrity of competition law.

c. Balancing Efficiency and Competition:

The interplay between the CCI and the IBC involves striking a delicate balance between promoting efficiency in insolvency resolution and preserving competitive markets.

While the IBC prioritises the expeditious resolution of insolvency cases, the CCI intervenes to prevent any anti-competitive outcomes that may arise from such proceedings, thereby fostering a dynamic and competitive business environment

Impact on Economic growth

The harmonious interplay between the CCI and the IBC contributes to economic growth by promoting market efficiency, attracting investment, and stimulating innovation. By ensuring fair competition within insolvency proceedings, businesses have the confidence to participate in the market, leading to enhanced productivity and consumer welfare.

INHERENT POWER NCLT TO RECALL A RESOLUTION PLAN

The Insolvency and Bankruptcy Code, 2016 (Code) aims at resolving the woes of insolvent companies through the corporate insolvency resolution process (CIRP), wherein the assets or business of the corporate debtor are transferred as a going concern to the most eligible party approved by the Committee of Creditors. Such an eligible party is willing to take up the

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management of the Corporate Debtor as wel as to service its debts. The parties that are willing to take over the corporate debtor are called resolution applicants[734] and they participate in the CIRP by submitting a document called a resolution plan[735]. It is a comprehensive document which covers, inte alia, overview of the eligible party, how the party plans to take over the corporate debtor, deb repayment schedule etc. The resolution plans are first analysed by the resolution professiona to ensure that they meet the conditions prescribed under the Code, pursuant to which they are placed before the committee o creditors for their discussion, evaluation and approval. The resolution plan, so approved by the committee and scoring the highest points, is then filed by the resolution professional with the Adjudicating Authority.

Provisions under consideration

Section 60 (5) of IBC reads as:

"Adjudicating Authority for corporate persons –

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

Section 31(1) of IBC reads as:

"Regulation 31. Approval of resolution plan –

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of the resolution plan under this subsection, satisfy that the resolution plan has provisions for its effective implementation."

Rule 11 of the NCLAT Rules 2016 ("NCLAT Rules") reads as:

Inherent powers –

Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal."

Section 420 of companies Act, 2013, reads as :

(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

[734]Section 5 [25] of Insolvency and Bankruptcy Code,2016
[735] Section 5 [26] Insolvency and Bankruptcy Code,2016

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Background of the Issue

Since the inception of the Insolvency and Bankruptcy Code (IBC) in 2016, the National Company Law Tribunal (NCLT) has grappled with the recurring issue of whether to entertain applications seeking the reopening of the Corporate Insolvency Resolution Process (CIRP) subsequent to its conclusion in accordance with the provisions delineated under section 60(5) of the Code. Different NCLTs had different views. Some NCLTs held that the process of CIRP follows an end-to-end procedure, and reopening it would defeat the fundamental purpose of the code's enactment, i.e., efficiency and speedy recovery. So, the big question was whether creditors, the company itself, or other interested parties could ask to reopen a CIRP if they felt their interests weren't properly considered by everyone involved.

Power to recall:

In Budhia swain vs. Gopinath deb[736], after considering a number of decisions, a two judge bench of this court observed:

In our opinion a tribunal or a court may recall an order earlier made by it if

i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgement,

(iii) there has been a mistake of the court prejudicing a party, or

(iv) a judgement was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgement will not be exercised when the ground for reopening the proceedings or vacating the judgement was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgement may be lost by waiver, estoppel or acquiescence."

The inherent power to recall an order is to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC.Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order.However, such power is to be exercised sparingly, and not as a tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where

(a) the order is without jurisdiction;

(b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and

(c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court/Tribunal resulting in gross failure of justice.

To conclude, Upon examining the judicial history and legislative intentions, it becomes apparent that tribunals like the NCLT/NCLAT cannot 'review' their previous orders or judgments but can 'recall' them. This interpretation stems from a Supreme Court judgement that distinguishes between the meanings of 'review' and 'recall'. Initially, tribunals believed they lacked the legislative authority to recall judgments. However, after numerous legal battles, it was determined that tribunals do possess inherent power to recall judgments under Rule 11 of the NCLAT Rules and section 60(5) of the code, but

[736] Budhia swain vs. Gopinath deb AIR 1999 SUPREME COURT 2089

only under special circumstances. These circumstances typically involve instances like fraud against creditors. This stance was affirmed by the Supreme Court in the case of Greater Noida Industrial Development Authority v. Prabhjit Singh Soni. Consequently, under current circumstances, tribunals have the authority to recall a resolution plan and return it to the Committee of Creditors for reassessment.

CONCLUSION

In conclusion, recent developments in insolvency and bankruptcy law signify a crucial shift towards a more robust and efficient framework for resolving financial distress. With amendments aimed at enhancing creditor rights, streamlining processes, and promoting a conducive environment for distressed asset resolution, the evolving landscape holds promise for stakeholders seeking timely and effective resolution mechanisms. However, challenges such as implementation hurdles and ensuring equitable outcomes remain pertinent, underscoring the need for continued vigilance and refinement in the pursuit of a resilient insolvency regime.