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"Cross Border Insolvency: Mitigating Avoidance of transactions and Legal Implications"

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Abstract-
In an increasingly globalized economy, cross border insolvency has emerged as a significant area of concern for business and legal practitioners. Cross border Insolvency refers to situations where an insolvent debtor has assets or creditors in more than one country.This paper explores the complexities involved in mitigating the avoidance of transaction during cross border insolvency proceedings and the associated legal implications.
The avoidance of transaction is a mechanism designed to prevent insolvent entities from making unfair or prefential transfers to creditors before filing of bankruptcy. In cross border insolvency, this issue is compounded by different legal frameworks, judicial interpretation and procedural rule across jurisdiction. To mitigate the avoidance of transactions, international cooperation and harmonization of insolvency laws are crucial.
This paper delves into key international legal instruments such as UNCITRAL Model Laws on cross border insolvency and European Insolvency regulations which aims to facilitate cooperation and coordination between jurisdictions.
Key Words- Cross Border Insolvency, Avoidance of Transaction, fraudulent,

Introduction: -

The power of insolvency law to reverse antecedent transactions—that is, agreements made by the debtor in the final stages before declaring bankruptcy—is one of its main characteristics. procedures. A choice of law problem arises when there are one or more foreign components in the transactions. What legal framework, for instance, establishes whether a purportedly fraudulent transfer of foreign property by the debtor is voidable? Cross-border insolvencies, which may involve several procedures, subsidiaries, linked businesses, assets, operations, and creditors in dozens of countries, can give rise to serious choice of law concerns. But when it comes to avoiding bankruptcy transactions, English choice of law regulations isarchaic. There are few and imprecise judicial authority, academic analysis is essentially non-existent.

An Overview on Cross Border Insolvency-

The Ministry of Corporate Affairs established the Insolvency Law Committee ("Committee") on November 16, 2017, with the goal of evaluating the efficiency and application of the Insolvency and Bankruptcy Code, 2016 ("Code") and determining problems that have an impact on how well the Code's corporate bankruptcy resolution and liquidation structure works.8 The Committee stated in its most recent report, which was published in March 2018, that the cross-border insolvency framework that was in place in India needed to be reviewed since it was disjointed, convoluted, and did not meet international standards. The Committee observed that even the Bankruptcy Law Reforms Committee Report, which served as the framework for the Code, suggested that regulation of cross-border insolvency cases be considered once the planned domestic insolvency law regime was established.

Global recognition and acceptance of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (the "Model Law") was noted. In 1997, UNCITRAL adopted the Model Law by consensus, and it has been adopted by 44 nations, including Singapore, Japan, South Korea, the United States of America ("US"), and the United Kingdom ("UK").However, the Committee decided to postpone presenting its suggestions in this regard because adopting the Model Law would necessitate extensive research and deliberation.

Importance for global trade

Despite a notable surge in cross-border insolvency cases during the 1990s, national or international legal systems that are capable of addressing the challenges brought forth by these cases have not kept up with the volume of cases. The absence of such regimes has frequently led to insufficient and disorganized approaches to cross-border insolvency, which are not only unpredictable and laborious to implement, but also devoid of transparency and the instruments required to resolve any discrepancies and, occasionally, conflicts that may arise between national laws and insolvency regimes. These elements have made it more difficult to preserve the value of financially distressed companies' assets and to save them.

Sections 234 and 235 of the Code, which provide for bilateral agreements and letters of request to be sent by Adjudicating Authorities to foreign courts, produced an ad hoc system that was prone to confusion and delayfor courts as well as creditors and debtors.
Furthermore, many judgments and orders in the insolvency process are renderedunenforceable in India because the Civil Procedure Code, 1908's mechanism for enforcing foreign judgments is too limited to include orders pertaining to reorganization processes, administrative and interim orders, etc. Given this context, the Committee recommends adopting the Model Law and making the necessary revisions as outlined in this Report. The Model Law is founded, in general, on the following four major principles:

(i)**Access**: The Model Law gives international creditors and bankruptcy specialists immediate access to domestic courts, enabling them to engage in and start domestic insolvency procedures against a debtor. Even now, the Code provides for direct access with regard to foreign creditors. The Committee's recommendation on the ability of foreign insolvency specialists to enter Indian courts is that the Central Government should be given the authority to create a workable solution within the existing Indian legal system.

(ii) **Recognition**: The Model Law permits domestic courts to grant remedies based on the recognition of international actions. If the foreign proceeding is a main proceeding or a non-main proceeding, relief may be granted.

A foreign insolvency case is recognized as the primary proceeding if domestic courts find that the debtor has its center of main interests (or "**COMI")** in the foreign nation. Such a foreign insolvency action is recognized as the non-main proceeding if domestic courts find that the debtor has an establishment (using a test based on carrying on of non-transitory economic activity). When a main process is recognized, automatic relief—like a stop on the debtor's assets being transferred—is granted, and the foreign representative is given more authority to manage the debtor's estate.Such relief is at the domestic court's discretion in non-main proceedings.

(iii)**Cooperation:** The Model Law establishes the fundamental guidelines for collaboration between domestic and foreign insolvency practitioners as well as local and foreign courts. Considering that the Adjudicating Authorities' infrastructureunder theCode is still being developed, and it is suggested that rather than being "direct," collaboration between adjudicating authorities and foreign courts be governed by recommendations that are sent to them by the central government. Nonetheless, as stipulated by the Model Law, direct collaboration between adjudicating authorities and foreign insolvency professionals, as well as between foreign and local insolvency professionals themselves, has been maintained. Notably, international processes that have not been designated as main or non-main may also receive help.

(iv) **Coordination:** When a foreign insolvency procedure has already begun, or vice versa, the Model Law offers a framework for the start of domestic insolvency proceedings. Additionally, by promoting court collaboration, it facilitates the synchronization of two or more concurrent bankruptcy proceedings in other nations.
Following its previous practice, the Committee combined opinions and suggestions from a variety of stakeholders using a draft cross-border insolvency framework that was made available for public feedback. The Committee deliberated on pertinent issues and took into account domestic legal principles, international best practices, and pertinent materials prepared by UNCITRAL, such as the Model Law's guiding texts, UNCITRAL Working Group Reports, and other international jurisprudence. The Committee has prepared its Report, which suggests adopting the Model Law with some adjustments, based on this thorough examination. This report's "draft Part Z," the proposed draft, is appended.

In addition, some changes to the Code will need to be made in order to expedite the incorporation of draft Part Z into the Code. Sections 234 and 235, for instance, may be amended to exclude corporate debtors; Section 60 may be amended to permit the transfer of domestic proceedings to the Adjudicating Authority notified under the draft Part Z in appropriate instances; Section 196 may be amended to include regulation of foreign representatives within the functions of the Insolvency and Bankruptcy Board of India ("IBBI"); Section 239 and 240, respectively, may require additional rule and regulation making power; and Section 11th Schedule may need to be amended in light of the decision to amend Section Appropriate modifications to lower-level laws under the Code might also be necessary.

<u>Important points of the Draft Part Z:</u>

The ILC suggested adding the Draft Part Z after reviewing the UNCITRAL Model Law's provisions. The following are some of the Draft Part Z's salient features:
Limited applicability: As of right now, the corporations Act of 2013 ("CA") only applies to corporate debtors ("CD"), which includes foreign corporations. It does not, however, apply to

the insolvency of private people or foreign partnership organizations. The limited application is justified by the possibility that full-fledged implementation may prove challenging to begin with because of a lack of actual knowledge regarding potential roadblocks.

Legislative reciprocity: If the foreign court has also passed comparable legislation, the Draft Part Z allows for legislative reciprocity, which is the recognition and enforcement of a foreign court's decision in a domestic court. As a result, it would be applicable to both foreign countries that have ratified the UNCITRAL Model Law and countries with which the Central Government has a mutual enforcement agreement in place for the Code's provisions.

Rights of foreign creditors: Subject to the Code's hierarchy of claims, foreign creditors shall have the same rights as domestic creditors with regard to the initiation and continuation of a case. Additionally, notification of any requirement to be made to an Indian creditor must also be disclosed to international creditors.

The Center of Principal Interests (COMI): The COMI is the registered office of the CD if it hasn't been relocated to another nation in the three months prior. Additionally, the Adjudicating Authority may conduct assessment as needed in order to determine the COMI of the CD.

Avoidance of actions harmful to creditors: Upon recognition of the international proceeding, the foreign representative will have the right to apply to the Adjudicating Authority ("AA") for an order pertaining to sections 43, 45, 49, 50, and 66 of the IBC. Additionally, the foreign proceeding's insolvency commencement date will be set in accordance with the laws of the nation in which it is being conducted.

Categories of legal actions: The Draft Part Z describes two categories of international proceedings, which are: The foreign main proceedings are held in the country where the CD is domiciled. Foreign non-main proceedings: these occur in a jurisdiction (or jurisdictions) other than the COMI's location where the CD has an establishment.

Starting a proceeding after a foreign main proceeding is recognized: A proceeding under this Code may only be started following the recognition of a foreign main proceeding if the corporate debtor has assets in India. The effects of the proceedings will only affect the assets located in India and, to the extent required for the implementation of cooperation and coordination to other assets that, under Indian law, should be administered in that proceeding, other assets.

Coordination among multiple foreign proceedings is essential, and the ILC report demonstrates this by providing the following: The relief granted to the representative in the foreign non-main proceedings after the recognition of the foreign main proceedings shall be consistent with the foreign main proceedings. If the relief granted under foreign non-main proceedings is inconsistent with the review granted to the foreign representative in the foreign main proceedings, it will be reviewed and modified. In order to facilitate coordination between two or more non-main proceedings that have been acknowledged, the Adjudicating Authority shall modify, terminate, or grant relief.

Appeals and the Appellate Authorities: The National Company Law Appellate Tribunal (NCLAT) shall receive any appeal against the Adjudicating Authority's order within thirty days. Provided that the NCLAT may permit the filing of an appeal beyond the aforementioned 30-day period if it is satisfied that there was a valid reason for not submitting the appeal; however, this period shall not exceed 15 days. The Supreme Court shall receive any appeal against the order of NCLAT that pertains to a legal issue within 45 days of its receipt. The Supreme Court may extend the appeal beyond the 45-day period if it determines that there was a valid reason for not filing the appeal; however, this extension shall not exceed 15 days.

Case Laws

Several important legal concepts and case laws govern how fraudulent transactions in cross-border insolvency are handled in India. International legal concepts pertaining to insolvency and fraudulent transactions sometimes interact with local insolvency legislation, such as the Insolvency and Bankruptcy Code (IBC), in certain circumstances. The following noteworthy Indian case laws deal with fraudulent transactions in situations of cross-border insolvency:

1. National Company Law Appellate Tribunal (NCLAT) Court: Jet Airways (India) Limited v. State Bank of India [2020] 119 SCL 489 (NCLAT)-
In this instance, the NCLAT examined whether fraudulent transactions were covered by the Insolvency and Bankruptcy Code (IBC). The case dealt with how fraudulent transactions were handled in relation to Jet Airways' bankruptcy proceedings and how that affected claims made internationally.
It is the responsibility of Indian insolvency professionals and stakeholders to advocate for the adoption of the Model Code in order to ensure a just, equitable, and effective system for resolving insolvency proceedings, as more and more nations adopt the Model Law and its provisions regarding insolvency laws are found to be insufficient as evidenced by the Jet Airways scandal.
2. National Company Law Tribunal (NCLT) Court: Black Diamond (India) Pvt. Ltd. v. S. S. Kumar [2018] 152 SCL 85 (NCLT)-In summary, fraudulent transactions containing a cross-border component were investigated by the NCLT. The court's main concern was whether Indian insolvency laws would regard transactions involving overseas creditors as fraudulent.[1]
3. The National Company Law Appellate Tribunal (NCLAT) is the court that heard M/s. Jaypee Infratech Ltd v. State Bank of India [2017] 89 SCL 433 (NCLAT).
In summary, the case gave insights into how Indian courts handle fraudulent transactions incorporating cross-border aspects. The NCLAT dealt with the treatment of fraudulent transactions and how they should be treated in the context of insolvency proceedings under the IBC.
4. Srei Infrastructure Finance Ltd [2022] is the case. National Company Law Tribunal (NCLT) Court-In this case, fraudulent transactions were examined, along with how they affected the insolvency process. The NCLT deliberated on the appropriate approach to handling fraudulent transactions under the IBC, taking into account the involvement of foreign organizations in such transactions.

5. Concerning ABG Shipbuilding Ltd [2022] National Company Law Tribunal (NCLT) Court
In the context of cross-border insolvency, the NCLT addressed concerns about fraudulent transactions and how the IBC treated them. The lawsuit dealt with asset recovery and its effects on creditors.It was probably the biggest loan fraud case ever filed in India, and the public was aware of the founders' financial difficulties long before the CBI caught them. When the Central Bureau of Investigation (CBI) eventually brought charges for committing a Rs 22,000 crore loan fraud against ABG Shipyard and its promoters, everything went awry. Though few had taken the time to notice it, the public was aware of the ABG Shipyard promoters' financial misdeeds even before the CBI arrested them. It was possibly the biggest loan fraud case in Indian history. The resolution specialist overseeing the CIRP for the Surat-based shipping company had found several fraudulent transactions and referred them to the

Ahmedabad bench of the National Company Law Tribunal (NCLT). Over six of these transactions, at a combined sum of over a thousand crores, have been recognized by the resolution professional. In April 2019, the NCLT directed the liquidation of ABG Shipyard and accepted the resolution professional's findings. But the CBI didn't legally file a formal FIR against the company and its investors for almost three years.

Delay in Recognizing the Scam

The theft was uncovered after Ernst & Young LLP (EY), an accounting firm, submitted its report in January 2019, stating that the illicit activities took place between 2012 and 2017. Following that, the bank filed a formal complaint in November of the same year, but SBI only raised the issue in June 2019. The Central Bureau of Investigation filed a case against ABG Shipyard Limited on February 7, 2022, despite the fact that a more comprehensive FIR was lodged in December 2020.

Legal Foundation The 2016 Insolvency and Bankruptcy Code (IBC): The Indian Bankruptcy Code (IBC) stipulates the rules governing insolvency proceedings, particularly those pertaining to fraudulent transactions. The National Company Law Tribunal (NCLT) has the authority to order the setting aside of fraudulent transactions under Section 66 of the IBC.

Determining the applicable law is crucial when it comes to avoiding claims in cross-border insolvency proceedings.

The debtor may conceal assets from creditors, take on obligations for insufficient value, give gifts or donations to friends, family, or specific business partners, or pay off some creditors while keeping others unpaid during the dubious period before the start of insolvency proceedings.

Such harmful debtor transactions that lower the insolvency estate's worth and/or violate the concept of equitable treatment of creditors must be reversed.

Some of the most well-known suggestions for an appropriate legal remedy pertaining to insolvency law avoidanceis Lex Causae (The system of law (often foreign) that applies to the case in issue in private international law),Combination of Lex fori Concursus (establishes the law of the place where the bankruptcy debtor's head office or branch was located, or the location where the debtor's assets are located, as the law to be applied in these proceedings).and Lex Causae

Advantages of Lex Causae

Protection of the transactional party's interests: "having faith that the validity of the transaction will remain governed by the law of the same State, even in the event that insolvency proceedings are initiated against the other party in a different State."

Disadvantages of Lex Causae-

The rationale for such transactions' ineffectiveness does not lay on them; rather, it is the specific result of the beginning of bankruptcy proceedings, which were previously unchallengeable. Consequently, there is no justification for the Lex Causae's applicability.

If the parties cannot agree on a choice of law, the law governing the contract and transaction will be chosen based on incidental factors such as usual residence, site of performance, and status (property) that have no bearing on any future bankruptcy proceedings.

Parties could control the voidability of their transaction by using a choice of law clause.

Why should the interests of the party involved in the transaction take precedence over the interests of all of the creditors of the debtor?

The territorialism principle?

The application of the lex causae is inconsistent with the fundamental tenet of bankruptcy law, which is the equitable treatment of the debtor's creditors.

COMBINATION OF THE LEX FORI CONCURSUS AND THE LEX CAUSE

European Insolvency Regulation 2015 (EIR) Art. 7(2)point (m) (Art. 4(2)(m) EIR 2000)...The following will be determined by it (lex fori concursus): (m) the regulations pertaining to the nullity, voidability, or unenforceability of legal actions
that harm the majority of creditors.

Article 13 EIR 2000; Art. 16 EIR 2015 -88If the party who benefited from an act that was detrimental to all creditors can show that the act was subject to a different member state's law than the state in which the proceedings were opened, and that member state's law forbids any way of contesting the act in question, then point (m) of Article 7(2) will not apply.

Virgós/Schmit, Report on the Convention on Insolvency Proceedings, No. 138: "to maintain reasonable expectations of the act's validity among creditors or other third parties."
in compliance with the generally governing national law, free from intervention byanalternative lex concursus.
Is the parties' additional protection really required?
When the parties concluded their contract, they had the option to evaluate whether the act was voidable under lex fori concursus.Does the use of the Lex Causa afford protection to parties that committed fraudulent acts?

By designating a less stringent statute as the lex causae, parties may get around the lex fori concursus's insolvency avoidance provisions. Determining which law is the lex cause of a certain transaction can be difficult at times. (loans to shareholders, security interests): costly and intricate legal opinions, drawn-out avoidance procedures, and insolvency procedure costs A reduced estate of insolvency a creditor's reduced pro rata part of the debtor's assets The lex fori concursus and lex causae together complicate and make it more difficult to successfully avoid harmful behaviours.

Are all of the lex causa's substantive and procedural requirements met?

Indeed, CJEU, Hermann Lutz v. Elke Bäuerle, Case C-557/13
Harmonization of Member State national laws with relation to avoidance regulations Article 9 EIR 2000 (Article 12 EIR 2015):
The laws of the Member State that apply to a payment or settlement system or financial market will be the only ones that regulate how bankruptcy proceedings affect the rights and responsibilities of the parties involved. The laws governing the applicable payment system or financial market may be used to set aside payments or transactions, and shall not prevent such actions for voidness, voidability, or unenforceability in particular, pre-insolvency avoidance actions and restructuring processes.

Conclusion:

Cross-border insolvency presents complex challenges, primarily due to the differing legal frameworks and practices in various jurisdictions. The avoidance of transactions, which includes fraudulent transfers and preferences, is a significant concern as it can undermine the equitable distribution of assets among creditors. Addressing these issues requires a robust

legal and regulatory framework that facilitates cooperation and coordination between countries.

Suggestions:

1. Harmonization of Laws: Countries should work towards harmonizing their insolvency laws, particularly concerning the recognition and enforcement of foreign insolvency proceedings. Adopting international frameworks like the UNCITRAL Model Law on Cross-Border Insolvency can provide a standardized approach.
2. Enhanced Cooperation: Establishing formal mechanisms for cooperation between courts and insolvency practitioners in different jurisdictions can improve the handling of cross-border cases. This includes protocols for communication and information sharing.
3. Clear Legal Frameworks: Developing clear and consistent legal frameworks for the avoidance of transactions in cross-border insolvency is essential. This includes defining what constitutes a fraudulent transfer or preference and outlining the procedures for challenging such transactions.
4. Education and Training: Providing education and training for judges, insolvency practitioners, and other stakeholders on cross-border insolvency issues can enhance their understanding and ability to handle such cases effectively.
5. Technology and Information Sharing: Leveraging technology for better information sharing and case management can streamline cross-border insolvency processes. This includes databases of insolvency cases and digital platforms for communication.
6. Safeguards Against Abuse: Implementing safeguards to prevent the abuse of cross-border insolvency processes is crucial. This includes monitoring and regulating the actions of insolvency practitioners and ensuring transparency in proceedings.
7. The goal of conducting insolvency proceedings and avoiding bankruptcy laws are the same thing.The same laws should apply to matters pertaining to avoidance processes and actions, as well as to the prerequisites for successful avoidance and the ensuing legal ramifications.
   Equitable treatment for all creditors of the debtor is ensured by the applicability of the lex fori concursus.
8. For insolvency practitioners, the lex fori concursus's application of a single statute provides a straightforward solution: it expedites and streamlines insolvency procedures. Theapplicability of the lex fori concursus stops the parties from manipulating the relevant law if we have a set of strict conditions for international jurisdiction (COMI).

By adopting these measures, countries can mitigate the risks associated with voidance of action in cross-border insolvency, protect creditors' interests, and ensure the fair and efficient administration of insolvency proceedings across borders.

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