Cross Border Insolvency Reforms

Why in News?

Insolvency and Bankruptcy Code 2016 is now set for another amendment to expand the scope of the Code to include cross-border insolvency matters.

What is Cross-border insolvency?

- Cross-border insolvency involves a situation where an insolvent debtor has assets or creditors in more than one country.
- Thereby, it transcends the confines of a single legal system.
- The issue is when different countries have conflicting domestic bankruptcy and insolvency regimes, governed by principles of territorialism.
- There is also the issue of lack of co-operation amongst foreign courts and statutory agencies.

What is UNCITRAL Model Law?

- United Nations Commission on International Trade Law proposed the UNCITRAL Model Law on Cross Border Insolvency to deal with such issues.
- The proposal was adopted in 1997 at the 13th session of UNCITRAL held in Vienna.
- It can be adopted by countries with modifications, which suit their domestic context.
- It has provisions allowing foreign insolvency courts, and officials access to domestic courts (and vice versa).
- It also provides for recognition of orders and judgments passed by insolvency courts located in foreign jurisdictions.
- Increasing cross-border trade, prompted several Asian nations (Myanmar, the Philippines, Republic of Korea and many more) to adopt the Model Law in the last decade.
- The Model Law has till date been adopted by 49 countries.

What are the efforts taken by India for Cross-border insolvency?

- The Insolvency and Bankruptcy Code (IBC) 2016 is regarded as landmark legislation.
- A Model Law has been tweaked to suit India's context and requirements.
- The draft rules were first released in October 2018 by the Insolvency Law Committee (ILC).
- The MCA constituted a Cross-Border Insolvency Rules and Regulations Committee (CBIRC) to make recommendations to the draft rules.
- Notable features include its applicability to corporate debtors and personal guarantors.
- It is also indicated that financial service providers and pre-packaged process may be outside the proposed framework.

Why Cross-border insolvency reform is essential now?

- Economic growth since the 1990s has been driven by LPG reforms.
- Increased interdependence of economies has resulted in high levels of cross-border investments, foreign borrowing, and movement of people across countries.
- So the risk of failure is also no longer restricted to a single economy.
- Financial risks are transmitted through global markets and the absence of a comprehensive framework to deal with cross-border risks hampers prospective businesses and investments.
- The Joint Parliamentary Committee, while reviewing the draft IBC Bill in 2016, emphasised the need for a cross-border resolution framework.
- Adoption of the Model Law by economies such as Brazil (2020), serves as a strong signal to India.

What are the challenges associated?

- **Enforcement of foreign judgments -** The Code of Civil Procedure (CPC) supports recognition and enforcement of foreign judgments.
- CPC is used despite the wide differences in interpretation given by the Indian courts in dealing with foreign judgments.
- The use of these provisions involves going through already heavily backlogged Indian courts.
- Since insolvency matters need timely addressing, this would be both time-consuming and costly.
- **Bilateral agreements -** The IBC envisages entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities.
- Negotiating such agreements with countries entails time, effort and costs.
- Our previous experience shows that bilateral economic arrangements have not always given the desired results.
- Arriving at an agreement applicable to several countries is challenging because of several flavours of insolvency frameworks across countries.
- **Issues with non-reciprocating countries -** Settlement of insolvency matters with non-reciprocating countries requires filing new suits.
- Along with it come the capacity constraints in terms of the coordination between insolvency practitioners, greater delays in understanding, interpreting and expanding scope of laws, and increased transaction costs.

What are the benefits of having a Cross-border insolvency framework?

- Dispute settlement.
- Access to assets held abroad in foreign subsidiaries.
- Information sharing and cooperation of foreign agencies and reduce litigations across jurisdictions.
- Encompasses suitable timelines, skilled professional capacity, and coordination requirements.
- Indicates clear supportive measures available to foreign jurisdictions in India.
- Indian creditors and investors lending/investing aboard will also benefit from a clearly defined resolution mechanism.

Reference

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