Significance of Cross-Border Insolvency

What is the issue?

The Insolvency and Bankruptcy Code has faced grave implementation challenges in recent times.

What is a brief overview of Insolvency and Bankruptcy Code?

- The Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy.
- When a default in repayment occurs, creditors gain control over the debtor's assets and must make decisions to resolve insolvency within a 180-day period.
- To ensure an uninterrupted resolution process, the Code also provides immunity to debtors from resolution claims of creditors during this period.
- The Code also consolidates provisions of the current legislative framework to form a common forum for debtors and creditors of all classes to resolve insolvency.
- The Insolvency Professionals, Insolvency Professional Agencies, Adjudicating authorities like NCLT, Debt recovery tribunals facilitates the insolvency resolution under the Code.

What are the implementation challenges involved in IBC?

- It was widely expected that the cross-border insolvency provisions would be part of the IBC or enacted soon after.
- However, Insolvency and Bankruptcy Bill in the year 2016 did not address this.
- Many large cases undergoing insolvency, such as, Amtek Auto, Videocon Industries, Essar Steel, Jet Airways and others are confronted with complex cross-border issues.
- Absence of a framework to deal with cross-border insolvency is likely to result in significant loss in value of assets of such companies.
- The government has shown no urgency to enact the law.

What measures has taken on Cross-Border Insolvency?

- Eventually, the judiciary had to step in to plug the gap in cross border insolvency through the case of Jet Airways insolvency.
- In May this year, a Dutch Court passed an order of insolvency of Jet Airways on a petition of creditors based in Netherlands and appointed a Trustee.
- Jet Airways has its regional hub in Schiphol Airport, following this the NCLT directed the Interim Resolution Professional to ignore the order of Dutch Court and Trustee.
- Recognizing the threat ignoring Dutch Court and Trustee pose to a sustainable insolvency resolution outcome of Jet Airways, the NCLAT advised exploration of a framework of cooperation.
- After extensive negotiations, a Cross Border Insolvency Protocol (Protocol) was agreed upon.
- Designed on the principles of UNCITRAL Cross Border Insolvency Model Law, the Protocol provides a framework of international coordination, while respecting the independent jurisdiction, sovereignty, and authority of the NCLT/NCLAT and the Dutch Court.
- The Protocol recognized that given Jet Airways was an Indian company with its center of main interest in India, the IBC proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings.
- The Protocol seeks to promote international cooperation and coordination of activities to

1. Provide for their orderly and timely administration in order to reduce cost.
2. Promote communication among the parties and the committee of creditors.
3. Provide, wherever possible, for direct communication among NCLT, NCLAT and Dutch Court.
4. Provide for the sharing of relevant information and data among the parties to avoid duplication of effort and activities.
5. To identify, preserve, and maximize the value of Jet Airway’s worldwide assets for collective benefit of all.

- The Protocol was approved by the NCLAT in September and viewed as a historical development by the international community and signals a rapidly maturing insolvency market in India.
- It is likely to benefit the outcomes in Jet Airways and set a healthy precedent for similar cases.

What lies ahead?

- While the Protocol plugs a huge gap, it is in no way a substitute for a comprehensive cross-border insolvency law.
- Most sophisticated economies have well developed cross-border insolvency laws.
- Adoption of the UNCITRAL Model Law is a necessity and not an option for India.
- Thus provisions for cross-border insolvency cannot be ignored if India is to have a comprehensive and long-lasting insolvency law.

Source: Financial Express

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