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A CONCEPT OF INSOLVENCY AND BANKRUPTCY WITH A COMPARATIVE STUDY BETWEEN INDIA AND RUSSIA

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ABSTRACT

The concept of insolvency and bankruptcy represents pivotal aspects of financial jurisprudence, influencing the stability and functionality of economic systems of business. This abstract explores these concepts, providing insights into the differences between India and Russia's legal frameworks for addressing insolvency. It is a state where entities struggle to meet financial obligations, differs from bankruptcy, a legal process involving asset liquidation to settle outstanding debts. Various factors such as financial mismanagement or economic downturns can lead to insolvency. The UNCITRAL Model Law on Cross-Border Insolvency offers a harmonized approach to address conflicts of law in international insolvency proceedings. A comparative study between Indian and Russian laws reveals distinctive approaches. India's Insolvency and Bankruptcy Code (IBC) governs both corporate and individual insolvency, with the National Company Law Tribunal (NCLT) serving as the adjudicating authority. In contrast, Russia's Federal Law on Insolvency designates the Arbitration Court for bankruptcy cases. Key differences include legal frameworks, adjudicating authorities, resolution processes, and creditor involvement. India's IBC emphasizes creditor committees, resolution professionals, and a structured insolvency resolution process. In Russia, bankruptcy proceedings are supervised by the Federal Tax Service, involving negotiation, court trials, asset liquidation, and case closure.

This abstract underscores the critical importance of understanding these legal frameworks for stakeholders, offering a comprehensive overview of insolvency and bankruptcy concepts and facilitating a comparative understanding of the approaches adopted by India and Russia in managing financial distress.

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Keywords: Bankruptcy, Insolvency, Uncitral, cross-border insolvency, debtor, creditor.

THE CONCEPT OF BANKRUPTCY AND INSOLVENCY

Insolvency and bankruptcy are two terms that are often used interchangeably, but they have distinct differences in the context of business and finance. Insolvency refers to a situation where a company or individual is unable to pay their debts as they fall due, whereas bankruptcy is a legal process that involves the liquidation of assets to repay creditors when a person or organization is unable to pay their debts. Insolvency can be caused by various factors such as poor financial management, economic downturns, unexpected expenses, or overexpansion. When a company becomes insolvent, it means that its liabilities exceed its assets, making it difficult for the company to meet its financial obligations. In this scenario, the company may try to restructure its debt, negotiate with creditors, or seek external funding to address the issue or declare themselves as insolvent.

There are two types of Insolvency, Cash flow and Balance sheet. Cash flow insolvency occurs when a company or individual is unable to pay its debts as they fall due, despite having sufficient assets to cover the debts. e.g.- when a major customer fails to pay an invoice on time, Balance sheet insolvency occurs when a company's total liabilities exceed its total assets. This means that even if the company were to sell off all of its assets, it would still be unable to pay off its debts. Balance sheet insolvency is often seen as a more serious condition than cash flow insolvency.

Bankruptcy, on the other hand, is a more severe situation where a company's financial position has deteriorated to the point where it cannot be salvaged. Bankruptcy is a legal process that involves the appointment of a trustee who takes control of the company's assets and sells them off to repay creditors. The proceeds from the sale of assets are distributed among creditors according to a predetermined hierarchy, with secured creditors receiving payment first followed by unsecured creditors.

There are two types of liquidation Voluntary and involuntary, Voluntary liquidation occurs when the debtor itself decides to liquidate and files a petition with the court and Involuntary liquidation happens when a creditor files a petition with the court to force the debtor into liquidation because it owes them money.

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

In today's globalized world, international trade plays a pivotal role in driving economic growth and fostering cross-border relationships between nations. Sometimes it create a challenge for the parties of different states to choose applicable law for smooth functioning of the trade and to solve the dispute if happens because of territorial and conflict of law. To solve the issue of conflict of law and harmonise the law, UN has introduced The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, it is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.²

The UNCITRAL Model Law on Cross-Border Insolvency don't give the definition of insolvency and bankruptcy but in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law covers proceedings concerning different types of debtors and among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor as a commercial entity.³ The UNCITRAL Model Law provides guiding principles and legal frameworks that are non-binding in nature, serving as soft law recommendations for countries to

² *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014). UNITED NATIONS PUBLICATION.

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>

³ *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014).(para48). UNITED NATIONS PUBLICATION.

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013guide-enactment-e.pdf>

consider unified law over territorial laws to avoid conflict of law. Countries have the flexibility to adopt parts or whole Model Law, as needed, to create a uniform legal landscape.

FEATURES OF UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Harmonization of Laws: The Model Law promotes the harmonization of laws related to cross-border insolvency. By providing a standardized legal framework, it helps reduce legal uncertainties and inconsistencies that may arise when dealing with insolvency cases involving multiple jurisdictions.

Recognition of Foreign Proceedings: One of the primary functions of the Model Law is to provide a mechanism for the recognition of foreign insolvency proceedings. This allows for a more streamlined and coordinated approach to the resolution of insolvency cases involving assets and creditors in different countries.

Facilitation of Cooperation and Communication: The Model Law encourages cooperation and communication between courts, insolvency administrators, and other relevant parties in different jurisdictions. This cooperation is crucial for the efficient administration of the insolvency estate and the resolution of complex cross-border issues.

Access to Courts: The Model Law ensures that foreign representatives involved in cross-border insolvency proceedings have access to the courts and tribunals of the enacting state. This access facilitates the effective implementation of the insolvency proceedings and helps address any legal issues that may arise in the foreign jurisdiction.

Equal Treatment of Creditors: Ensuring the fair and equal treatment of creditors, regardless of their nationality or location, is a fundamental function of the Model Law. It aims to prevent discrimination against foreign creditors and promotes a level playing field for all stakeholders involved in the insolvency proceedings.

Coordination of Proceedings: The Model Law encourages the coordination of concurrent insolvency proceedings in different jurisdictions. This coordination helps avoid conflicts and ensures a more orderly and efficient resolution of the debtor's financial difficulties.

Flexibility in Adoption: The Model Law serves as a guide for countries seeking to enact or reform their domestic legislation on cross-border insolvency. Its flexible nature allows jurisdictions to adopt the Model Law in its entirety or choose specific provisions that align with their legal systems and economic contexts

INSOLVENCY AND BANKRUPTCY LEGISLATION IN INDIA AND RUSSIAN

INDIAN LEGISLATION

The Insolvency and Bankruptcy Code (Amendment) Act, 2021 is a key legislation in India for insolvency and bankruptcy matters. It was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders and to establish an Insolvency and Bankruptcy Board of India.

Appellate Institution: The National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) play crucial roles in the resolution process.

The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013, The National Company Law Tribunal (NCLT) is a quasi-judicial body in India with adjudicating authority relating to Indian companies including proceedings relating to arbitration, compromise, arrangements, reconstructions and the winding up of companies, insolvency resolution process of companies and limited liability partnerships under the Insolvency and Bankruptcy Code, 2016. Decisions of the tribunal may be appealed to the National Company Law Appellate Tribunal, the decisions of which may further be appealed to the Supreme Court of India on a point of law.⁴ In the event that if the Supreme Court determines the appeal to lack significance, it may exercise its discretionary power to dismiss the appeal and uphold the decision rendered by the National Company Law Tribunal (NCLT) or, subsequent to an appeal heard at the National Company Law Appellate Tribunal (NCLAT), the judgment shall be considered final and legally binding upon the parties involved.

⁴ <https://efiling.nclt.gov.in/mainPage.drt>

National Company Law Appellate Tribunal (NCLAT) was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of National Company Law Tribunal(s) (NCLT). NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by NCLT(s) under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC).⁵ The NCLAT has the authority to reject the appeal Even if the petition meets all of the provisions of section 7 of the Insolvency and Bankruptcy Code, 2016, but The court determined that the appeal was filed collusively, not with the bona fide intent to resolve the insolvency proceedings. In the case of **Hytone Merchants Pvt. Ltd. v. Satabadi Investment Consultants Pvt. Ltd.** (REED 2021 NCLAT Del 06591), a two-judge bench of the National Company Law Appellate Tribunal (NCLAT) convened at New Delhi, comprising Justice A.I.S. Cheema and V.P. Singh, evaluated the matter. Although the petition appeared to satisfy all the requirements of Section 7 of the Insolvency and Bankruptcy Code, 2016, the court found that it had been filed in a collusive manner, lacking the bona fide intention of addressing insolvency proceedings. Therefore, the bench decided that admitting the application aimed at preventing the corporate debtor from being subjected to the Corporate Insolvency Resolution Process would be unwarranted, considering the mala fide nature of the filing. Eventually, the esteemed tribunal determined that the appeals lacked merit and dismissed them."⁶

The Insolvency and Bankruptcy Board of India (IBBI) is the regulator for overseeing insolvency proceedings and entities like Insolvency Professional Agencies (IPA), Insolvency Professionals (IP) and Information Utilities (IU) in India.

PROCEDURE FOR BANKRUPTCY IN INDIA

Identifying the Nature of Debt: The first step in initiating insolvency proceedings is to identify whether the debt is a financial debt or an operational debt. Financial creditors, such as banks and financial institutions, have different rights and remedies than operational creditors, such as suppliers and employees.

Filing an application: Once the nature of the debt is identified, the creditor must file an application with the National Company Law Tribunal (NCLT) to initiate insolvency proceedings.

⁵ <https://nclat.nic.in/about-NCLAT>

⁶ *Hytone Merchants Private Limited vs Satabadi Investment Consultants* on 30 June, 2021. <https://indiankanoon.org/doc/125984746/>

The application should include details about the amount of debt, the default, and the grounds for seeking insolvency.

Acceptance of Application: After receiving the application, the NCLT will review it and ensure that it meets the requirements of the IBC. If the application is found to be complete and valid, the NCLT will admit it, and the insolvency process will begin.

Moratorium Period: Once the application is admitted, a moratorium period begins, during which all debt recovery actions against the company are prohibited. This allows the company to focus on restructuring its finances without being pressured by creditors.

Committee of Creditors (CoC): The CoC is formed within 30 days of the NCLT's admission of the application. The CoC consists of financial creditors who have more than 50% of the voting share in the total outstanding debt. The CoC plays a crucial role in deciding the fate

Resolution Professional (RP): The RP is appointed by the NCLT to manage the company's operations during the insolvency process. The RP acts as an intermediary between the debtor and the CoC and helps in preparing a resolution plan.

Approval of Resolution Plan: Once the CoC approves the resolution plan, it is submitted to the NCLT for final approval. The NCLT reviews the plan to ensure that it complies with the provisions of the IBC and is fair to all stakeholders.

Liquidation: If the resolution plan fails to receive the necessary approvals or if the company's financial situation is beyond repair, the NCLT may order liquidation of the company's assets. The sale proceeds from the liquidation are distributed among the creditors according to the priority laid down in the IBC.

RUSSIAN LEGISLATION

Insolvency and bankruptcy in Russia are regulated by the Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002 (as amended) (the "Bankruptcy Act").

According to this law, Both the term insolvency and bankruptcy are interchangeable and defined as the inability of a debtor to fulfill their obligations to creditors, resulting in the loss of their property rights.

The Insolvency Law applies to all legal entities, including individual entrepreneurs, commercial organizations, and non-profit organizations, that have been registered in accordance with the established procedure. The Law does not apply to certain types of legal entities, such as state-owned enterprises, government agencies, and religious organizations.

In Russia, the Federal Tax Service (FTS) plays a crucial role in bankruptcy proceedings, similar to the role of the Bankruptcy Board of India (IBBI) in insolvency and bankruptcy cases. The FTS is responsible for supervising and overseeing various aspects of bankruptcy cases, ensuring that they are handled in accordance with Russian law and regulations.

The bankruptcy cases of legal entities and sole proprietors in the Russian Federation are considered in the Arbitration court. As per the article 7 of **Federal Law "On Insolvency (Bankruptcy)** The right to apply to an arbitration court to declare a debtor bankrupt belongs to the debtor, bankruptcy creditor, authorized bodies, as well as employees, former employees of the debtor, who have claims for payment of severance pay and (or) wages.⁷

BANKRUPTCY PROCEDURE IN RUSSIA

Bankruptcy proceedings in Russia are conducted in accordance with the Insolvency Law and are supervised by the Federal Tax Service. The process involves several stages, including:

Pre-trial stage: At this stage, the debtor attempts to restructure its debt through negotiations with creditors. If the parties fail to reach an agreement, the debtor may file a petition for bankruptcy with the court.

Trial stage: The court reviews the petition and decides whether to open bankruptcy proceedings. If the petition is granted, a trustee is appointed to manage the debtor's assets and liabilities.

Liquidation stage: The trustee sells off the debtor's assets to cover the costs of the bankruptcy proceedings and pay off creditors. Creditors are paid in the order of priority established by law, which includes secured creditors, unsecured creditors, and shareholders.

⁷ Article-7, Federal Law of the Russian Federation on Bankruptcy No. 127-FZ

Closure stage: After all assets have been sold and creditors have been paid, the court closes the bankruptcy case, and the debtor is liquidated.

COMPARATIVE STUDY BETWEEN INDIAN AND RUSSIAN LAW

LEGAL FRAMEWORK

- **India:** Governed primarily by the Insolvency and Bankruptcy Code (IBC) of 2016.
- **Russia:** Governed by the Federal Law on Insolvency (Bankruptcy) of 2002.

ADJUDICATING AUTHORITY

- **India:** National Company Law Tribunal (NCLT) serves as the adjudicating authority for insolvency resolution processes.
- **Russia:** The insolvency process involves filing a bankruptcy petition with the Arbitration Court.

RESOLUTION PROCESS

- **India:** The resolution process involves the appointment of a resolution professional who manages the affairs of the debtor under the supervision of creditors.
- **Russia:** A trustee in bankruptcy is appointed to manage the debtor's assets and distribute them among creditors.

CORPORATE AND INDIVIDUAL INSOLVENCY

- **India:** The IBC covers both corporate and individual insolvency. Separate provisions exist for both.
- **Russia:** The Russian insolvency law applies to both corporate entities and individuals.

CREDITOR INVOLVEMENT

- **India:** Creditors play a significant role in the insolvency resolution process, with committees of creditors making crucial decisions.

- **Russia:** The trustee in bankruptcy manages the assets and distributes them among creditors according to the priority established by law.

CONCLUSION

In conclusion, the comparison between Russia and India's approaches to insolvency and bankruptcy reveals both similarities and differences. Both countries have adopted a creditor-in-control approach, where the creditors play a dominant role in the insolvency resolution process. However, there are differences in the way each country has implemented this approach.

India's Insolvency and Bankruptcy Code, 2016, provides for a time-bound process, with a maximum period of 270 days for resolving insolvency, whereas Russia's Law on Insolvency (Bankruptcy) of 2002, allows for a longer period of up to 6 months plus additional 6 months. Additionally, India has a dedicated adjudicating authority, the National Company Law Tribunal (NCLT), to oversee the insolvency resolution process, while Russia has multiple courts and agencies involved in the process such as Bankruptcy administrator. All the bankruptcy administrators are members of private professional communities of bankruptcy administrators (so-called self-regulating organizations – “SRO”).

Furthermore, India has a moratorium period during the insolvency resolution process, which prohibits any further litigation or proceedings against the debtor, whereas Russia does not have such a provision. India also has a mechanism for the appointment of a resolution professional who takes control of the debtor's assets and manages the insolvency resolution process, while Russia has a similar mechanism but with some differences in the roles and responsibilities of the insolvency administrator.

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