

CROSS BORDER INSOLVENCY IN INDIA: THE WAY AHEAD

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ABSTRACT

Multinational firms with debtors and assets located in several countries have increased as a result of globalization. As the internal boundaries between countries are so thin, the impact of a multinational corporation's actions may be felt all around the world. In order to increase the level of certainty in international trade, it is necessary to create basic procedural rules that are universally acknowledged and involved in cross-border bankruptcy situations. Cross-border trade has increased rapidly and national economies have converged into a global economic system, changing the company structure. As a result of globalization and the expansion of international trade, businesses now operate in a variety of jurisdictions around the globe. Countries are required to abide by a set of universally accepted standards for cross-border trade because business interfaces frequently traverse international borders and because cross-border insolvency proceedings are ineffective, time-consuming, and expensive. It's important to bring changes in the current legal mechanism to coup up with it.

Keywords: Insolvency, Legal Mechanism, UNCITRAL, Foreign Proceedings.

INTRODUCTION

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When an insolvent business or person has assets, creditors, or other stakeholders spread across many nations, a complicated legal and financial scenario known as cross-border insolvency results. This could happen under a number of circumstances, such as when a multinational corporation is having financial problems or when someone has assets or debts in several different nations. The risk of legal disagreements and jurisdictional problems is one of the biggest obstacles to cross-border insolvency. Effective management of the problem may be challenging due to the potential involvement of several legal systems, languages, and cultural norms. For instance, certain assets may need to be liquidated under the insolvency rules of one nation, but they may be shielded from seizure under the insolvency laws of another nation. There are various cross-border insolvency frameworks and approaches available to address these issues. The UNCITRAL Model Law on Cross-Border Insolvency is one example of a

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model since it offers a framework for international judicial collaboration and coordination¹. The Model Law intends to increase the efficiency and predictability of cross-border insolvency processes by enabling courts to acknowledge and collaborate with international insolvency proceedings. Conflicts amongst creditors could be another issue with cross-border insolvency. There may be disagreements and delays in the insolvency process since different creditors' rights and priorities may vary depending on the country. Several forums and processes have been set up to help with negotiations and compromise among creditors to address this problem. In general, cross-border insolvency is an intricate and difficult financial and legal scenario that calls for collaboration and coordination among many legal systems and stakeholders. To manage the situation successfully, it is crucial to have a thorough awareness of the pertinent laws and regulations as well as to obtain professional assistance and guidance.

LEGAL FRAMEWORK FOR CROSS BORDER INSOLVENCY IN INDIA

The Insolvency and Bankruptcy Code, 2016 (IBC), which was passed in May 2016, serves as the primary legal framework in India for cross-border insolvency. The Indian Bankruptcy Code (IBC) is the main law governing insolvency and bankruptcy in India and offers a thorough framework for resolving insolvency and liquidating assets. In addition to including provisions for cross-border insolvency, the IBC is applicable to all corporations, limited liability partnerships, and individuals. The Model Law on Cross-Border Insolvency of the United Nations Committee on International Trade Law (UNCITRAL), which India ratified in 2018, served as the foundation for these rules. According to the IBC, a foreign creditor or debtor who has a claim against a debtor who has assets in India or who has a foreign creditor who has a claim against the debtor who has assets in India may start insolvency proceedings in India. Foreign parties with a stake in the case may also participate as creditors or debtors in Indian insolvency proceedings. A letter of request for the foreign court to recognize and enforce Indian insolvency proceedings may be sent if an Indian court determines that a foreign action meets the criteria for being a foreign main procedure. A foreign main proceeding is one that happens in the country where the debtor's center of primary interest is.

Additionally, the IBC allows for coordination and collaboration in cross-border insolvency matters between Indian and foreign courts. The foreign court and the Indian court are able to interact, work together, and exchange requests for information and support. Generally

¹ Ristovska Katerina & Ristovska Aneta, The Impact of Globalization on the Business; available at: <https://core.ac.uk/download/pdf/33812244.pdf> (Last visited on November 5, 2020).

speaking, India's legal system for cross-border insolvency is still developing and some issues remain unresolved². The IBC, on the other hand, offers a thorough framework for handling cross-border insolvency matters and is anticipated to make such cases easier to resolve in India in a more expeditious and effective manner.

The code does not specifically have a different set of rules for domestic as well as foreign creditors. The recent judgment passed by the National Company Law Tribunal Mumbai bench in the case of Forever Glory Trading Limited VS Global Power House (India) Limited is a landmark in this subject³. Where the respected bench rejected the contention which engages that a nondomestic creditor company was intrinsically not capable to file a petition under the purview of section 9 and following the precedent Macquarie Bank Limited VS Shilpi Cable Technologies Limited, stated that such a nondomestic creditor is included under section 3 (23)(g) and section 3(25) of Insolvency and Bankruptcy Code and under the rules set by this code⁴. They can proceed with initiating insolvency proceedings under this code. However, even after that the legal Framework discussed is incapable of tackling two situations, in one of which a company may hold assets in different jurisdictions which its creditors could apply to be included in the insolvency procedural proceedings. Wherein another situation is when proceeding regarding insolvency concerning the previous or same debtor which can be initiated in more than a single country. However, an attempt was made to cool down the following situations by section 234 and section 235⁵ of the Insolvency and Bankruptcy Code which practically were inadequate in handling insolvency. These provisions were also not embedded in Banking Law Reforms Committee (2015) Report, since countries suffer the absence of judicial infrastructure to handle cross-border insolvency⁶. However, Joint Parliamentary Committee found these effective and essential in nature, and therefore both of the sections were added to the Insolvency and Bankruptcy Code. As section included section 234 of the code facilitates the Central Government can enter into a bilateral agreement with foreign Nations to cope with the problem of cross-border insolvency. Agreements as such are in form of reciprocity agreements and will allow for coordination and cooperation in insolvency

² 6 Anchal Jindal, Cross Border Insolvency in India : A Cherry on the Cake, IBC Laws; <https://ibclaw.in/cross-border-insolvency-in-india-a-cherry-on-the-cake-by-cs-anchal-jindal/> .(Last visited on November 16, 2020).

³ Forever Glory Trading Limited VS Global Power House (India) Limited, CP (IB) No.3735/NCLT/MB/2018, <https://www.casemine.com/judgement/in/5f7c170a9fca190f571715be>

⁴ Macquarie Bank Limited vs Shilpi Cable Technologies Ltd, (2018) 2 SCC 674, CIVIL APPEAL NO.15135 OF 2017, <https://indiankanoon.org/doc/185937110/>

⁵ Insolvency and Bankruptcy Code, 2016

⁶ The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015, Available on: https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

proceedings court of such national and Indian courts. Whereas, section 235 of such Code provides that when there is the reciprocating agreement that already exists, the adjudicating authority On the Appeal of Resolution Professional, Bankruptcy Trustee, and liquidator as the case may be, can issue a ' Letter Of Request ' to courts of the such nation hoping action against the corporate debtor according to the provisions and condition of the agreement. There are certain problems that create havoc in the whole mechanism proposed under these two sections of the insolvency and bankruptcy code. The procedure of getting into the two parties or bilateral treaties with other nations in order to facilitate the whole mechanism of the cross-border insolvency is too much time-consuming and will include long lengthy rounds of negotiations with every country which India proposes to deal with. Also, discussions with other countries can be problematic because different countries have a wide variation in their own legal regimes. The two sections included do not talk about mechanisms with the countries, which are not a part of the bilateral agreement. Hence, the insolvency and bankruptcy code recognizes this basic principle of reciprocity as the only way out for corporation and coordination in the cases of cross-border insolvency. Therefore, it can be safe to the whole state that the present legal regime in accordance with cross-border insolvency under the Insolvency and Bankruptcy Code is unsatisfactory and inadequate. Thus, needs a full and overall overhaul for it to tackle the neo complexities of cross-border investment, broader its trade, and insolvency too⁷. Also, many landmark judgments given by the Indian judicial system pave the way for the overall Indian legal Framework for cross-border insolvency. In the case of Jet Airways (India) Limited VS State Bank Of India, the National Company Law Appellant Tribunal held that and coordination with a court of another nation where a simultaneous proceeding for insolvency is going on against the same corporate debtor, even though the existing Insolvency and Bankruptcy Code not include any scenario like it⁸. It was further stated in the judgment that parallel cross-border insolvency proceedings can neither be recognized nor can be handled by Indian Tribunals as section 235 and section 234 of the Insolvency and Bankruptcy Code had not been notified to date by the government. However, later it was implemented. Later the order of the National Company Law Tribunal was overturned by the National Company Law Appellant Tribunal where broader insolvency protocol into a comprehensive definition of the " joint corporate

⁷ Anush Rajaan, India's proposal to recognise cross border insolvency, Lakshmikumaran & Sridharan attorneys, Apr. 19, 2020), Available at: <https://www.lakshmisri.com/insights/articles/india-proposal-to-recognise-cross-borderinsolvency/>

⁸ Jet Airways (India) Ltd. Vs State Bank of India, CP 2205 (IB)/ MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019, <https://indiankanoon.org/doc/12824528/>

insolvency resolution process of the company"⁹. In one of the Other Landmark cases, the National Company Law Tribunal Mumbai bench gave a decision for State Bank of India VS Videocon Industries Limited, where the bench favored the inclusion of foreign assets of the company under the corporate insolvency resolution process in India¹⁰. The effectiveness of the Insolvency and Bankruptcy Code to regulate cross-border insolvency has directly compelled the courts to proceed on a case-by-case concept, where there is no compulsory precedent as a guideline to be performed, thus creating a lot of grey areas.

LIMITATION OF CURRENT LEGAL FRAMEWORK

The Insolvency and Bankruptcy Code (IBC), which was passed in 2016, principally governs the legal framework for cross-border insolvency in India. Although the IBC contains procedures for handling cross-border insolvency, the current Indian legal system still has a number of severe flaws, including:

- **Restricted scope:** Personal bankruptcy and insolvency are not covered by the IBC, which solely applies to business debtors. This restriction may be a serious disadvantage for people dealing with cross-border insolvency.
- **Absence of recognition of Foreign proceedings:** Insolvency proceedings from other countries are not automatically recognized under the existing Indian legal system. For international creditors attempting to collect their obligations in India, this lack of recognition may provide serious difficulties¹¹.
- **Lack of a system for coordination with international courts:** This can result in inconsistent rulings and delays in the insolvency process because the IBC does not provide a mechanism for coordination with other courts.
- **Lack of jurisdictional clarity:** The Indian legal system does not clearly define the jurisdiction of Indian courts in international insolvency cases. Conflicts over jurisdiction may arise as a result of this ambiguity, slowing down the legal process and raising costs.

⁹ Rongeeet Poddar, Cross-Border Insolvency in India: The National Company Law Appellate Tribunal Paves the Way, IndiaCorpLaw; available at: <https://indiacorplaw.in/2019/09/cross-border-insolvency-india-nationalcompany-law-appellate-tribunal-paves-way.html>. (Last visited on November 9, 2020).

¹⁰ State Bank of India v. Videocon Industries Limited & Others, MA 2385/2019 in C.P. (IB)-02/MB/2018, <https://indiankanoon.org/doc/92445816/>

¹¹ Sanjana Parisaboina, Cross Border Insolvency in India, (3 Feb, 2022), <https://ijclp.com/cross-border-insolvency-in-india/>

jurisdiction may arise as a result of this ambiguity, slowing down the legal process and raising costs¹².

- Restricted collaboration with international insolvency practitioners: The IBC lacks a structure for collaborative work with foreign insolvency practitioners, which may reduce the efficacy of cross-border bankruptcy proceedings.

In conclusion, the Indian legal framework for cross-border insolvency has a number of significant flaws, including a constrained scope, a lack of recognition of foreign proceedings, a lack of a mechanism for coordination with foreign courts, a lack of clarity regarding jurisdiction, and a limited level of cooperation with foreign insolvency practitioners¹³. For both domestic and international parties involved in cross-border insolvency proceedings in India, these disadvantages may pose serious difficulties.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) ON CROSS-BORDER INSOLVENCY

A legal framework known as the UNCITRAL Model Law on Cross-Border Insolvency was developed by the United Nations Commission on International Trade Law (UNCITRAL) to serve as a guide for nations looking to construct efficient rules and procedures for addressing cross-border insolvency cases¹⁴. In order to maximize the value of the debtor's assets and safeguard the interests of all parties involved in the case, the model law is created to make collaboration and coordination between other nations' insolvency systems easier¹⁵.

The UNCITRAL Model Law on Cross-Border Insolvency's guiding principles are as follows:

Cooperation - The necessity of cooperation between other nations and their insolvency systems is emphasized in the model law in order to produce the best results for all parties engaged in the case.

¹² Sadhak Sharma, Cross Border Insolvency Mechanism in India: The Need to Adopt UNCITRAL Model Law, Vol. 4(Issue- 1), International Journal of Law Management & Humanities, 376, 2021, Available on: <https://www.ijlmh.com/wp-content/uploads/Cross-Border-Insolvency-Mechanism-in-India-The-Need-to-Adopt-UNCITRAL-Model-Law.pdf>

¹³ Ishita Das, The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016, Vikalpa, Vol. 45 Issue 2 (2020).

¹⁴ UNCITRAL Model Law on Cross-Border Insolvency (1997), United Nations Commission on International Trade Law; https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency . (Last visited on November 16, 2020).

¹⁵ Wai Yee Wan & Gerard McCormack, Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL, Emory Bankruptcy Developments Journal, Vol. 36 (2020)

Recognition: The model law enables the local courts to recognize international insolvency procedures, facilitating the more simplified and effective management of cross-border insolvency matters¹⁶.

Coordination: In order to reduce conflicts and increase the value of the debtor's assets, the model law encourages coordination and communication between various courts and bankruptcy administrators involved in a cross-border insolvency case.

Protection of creditors' rights: Regardless of a creditor's citizenship or the location of their assets, the model law assures that their rights are safeguarded.

Asset protection for the debtor: The model law protects the debtor's assets in order to increase their value and guarantee a fair distribution to all creditors.

Public transparency: The model law places a strong emphasis on the necessity of public transparency in insolvency proceedings, ensuring that all parties involved have access to pertinent information and can take part in the processes with full knowledge of the issues at hand¹⁷

Non-discrimination: The model law forbids treating foreign creditors or bankruptcy proceedings differently from domestic ones, assuring fair treatment for all parties involved in a cross-border insolvency case.

Collaboration with foreign courts and insolvency administrators: The model law enables collaboration with foreign courts and insolvency administrators, enabling more effective management of cross-border insolvency matters.

Many nations have used the UNCITRAL Model Law on Cross-Border Insolvency as the foundation for their own national insolvency legislation. The model law aids in fostering collaboration and coordination across various nations and their insolvency systems, maximizing the value of the debtor's assets, and safeguarding the interests of all parties engaged in the case by providing a common legal framework for cross-border insolvency proceedings.

¹⁶ Nora Wouters & Alla Raykin, Corporate Group Cross-Border Insolvencies between The United States & European Union: Legal & Economic Developments, Emory Bankruptcy Developments Journal, Vol. 29 (2013).

¹⁷ Aditi Mozika, The Limits of Comity: Refusal to Recognise Foreign Insolvency Proceedings, IndiaCorpLaw; available at: <https://indiacorplaw.in/2020/01/limits-comity-refusal-recognise-foreign-insolvencyproceedings.html> . (Last visited on November 22, 2020).

HOW WE CAN CONTAIN CROSS-BORDER INSOLVENCY?

By strengthening Insolvency and bankruptcy code - The lack of uniformity and clarity in the legal framework is one of the major issues with cross-border insolvency proceedings. India should provide more uniformity and clarity in the handling of such situations by bolstering the IBC with measures that particularly address cross-border insolvency proceedings. To better safeguard the rights of creditors in cases of international insolvency, the IBC can be strengthened. To achieve this, it is necessary to guarantee that creditors receive equal treatment and that their rights are upheld in international insolvency proceedings. Insolvency specialists' roles in cross-border insolvency situations can be improved by strengthening the IBC. A transparent and effective process can help to enhance outcomes for all parties involved, and insolvency specialists can assist in making sure this happens.

By developing a precise database- Information from a database may be helpful for making decisions in international insolvency proceedings. It can be beneficial in establishing resolution strategies to detect potential jurisdictional and conflict of law difficulties, for instance. Databases can aid in coordinating legal actions between countries. A database, for instance, can assist in ensuring that the bankruptcy processes are carried out in a coordinated and effective manner when a debtor has assets spread across several jurisdictions. In cross-border insolvency situations, a database can be used to identify a debtor's assets and obligations, which can be used to estimate the worth of the estate and the potential recovery for creditors.

By promoting alternate dispute resolution - Arbitration, for example, can offer cross-border enforceability, which entails that the result of an arbitration case may be upheld in other jurisdictions. In cross-border bankruptcy disputes, this may serve to increase clarity and predictability. Cross-border bankruptcy problems may be more successfully and economically resolved using ADR techniques like mediation and arbitration. By doing so, it may be possible to cut down on the time and expense of litigation, which can be a major impediment to settling international bankruptcy disputes. Cross-border bankruptcy disputes can help to maintain relationships between parties using ADR techniques. When parties may need to continue working together even after the insolvency proceedings are over, this can be especially helpful. When resolving international bankruptcy disputes, ADR techniques might offer more flexibility and anonymity. This can be especially helpful when parties might be hesitant to reveal sensitive material in a public forum.

By establishing cross border insolvency committee - A cross-border insolvency committee can support and encourage coordination and collaboration across several jurisdictions. This can be crucial in making sure insolvency processes are carried out in a coordinated and effective manner, which can assist to save costs and enhance outcomes for all stakeholders. A committee devoted to preventing cross-border insolvency can promote laws and rules with this aim. The legal framework for handling cross-border insolvency matters can be made more uniform and predictable as a result. Stakeholders interested in cross-border insolvency matters may seek the advice of a cross-border insolvency committee. Involved parties will be better able to make informed decisions about how to continue if they are aware of their rights and responsibilities. In cross-border insolvency situations, a cross-border insolvency committee can assist in resolving disputes. When judicial actions in various jurisdictions are at odds with one another, this can be especially helpful. The creation of best practices and standards for handling cross-border insolvency situations can be assisted by a cross-border insolvency committee. All parties concerned may profit if this helps to ensure that insolvency proceedings are conducted fairly and openly.

By spreading awareness about cross-border insolvency- Cooperation between stakeholders in various jurisdictions can be made easier by educating them about cross-border insolvency. This can help to guarantee that the administration of insolvency procedures is done in a coordinated and effective manner, which can help to save costs and enhance outcomes for all parties. Reduced misunderstandings and false beliefs about the insolvency process can be achieved through education and knowledge of cross-border insolvency. As a result, stakeholders may be better able to understand their obligations and rights and decide how to proceed. Communication between stakeholders in various jurisdictions can be improved by education and understanding of cross-border insolvency. The integrity of the insolvency processes may be maintained by ensuring that information is exchanged successfully in this way.

CONCLUSION

The rapidly globalizing and booming corporate world has made multinational entities buy products that surpass International boundaries and directly help in forging borderless National relations among many businesses. However, if a multinational business model has two sustain or undergoes a process of insolvency the complexity of the overall mechanism start getting highlighted which majorly includes overlapping and nonsimilar Legal procedure of multiple jurisdictions making the whole mechanism typical and impossible to handle. As we all know

that cross border insolvency means when the debtor who is declared insolvent has his assets and creditors in more than one country are also in the case where proceedings have been started against insolvent debtors in many countries. To coup up with this problem India has adopted many laws and amended time to time, Insolvency and Bankruptcy Code is another example of it. However, many times Indian Court has laid many Landmark decisions regarding cross-border insolvency to contain it and lead invaluable guidelines regarding tackling situations where COMI recognition is under contention. Also, to understand and manage these problems it is essential to have a detailed awareness of laws pertaining to it and also to get professional guidance and assistance. With the growth of the idea of globalization, India has in itself power in the global investment business but it also lacks behind in a judicial and legal Regime to tackle cross-border insolvency incidents. As well as recent COVID-19 pandemic had created a greater threat to cross-borderer insolvency whose mechanism to address the problem as multinational businesses across the whole globe are economically strained and are in struggling nature with already disrupted supply chains another problem was a sharp decrease in spending of consumers and there was a rise in liquidity issues, which also lead to many businesses filled for the insolvency. Hence, it has become necessary for countries like India to institutionalize a cross-border insolvency regime insolvency and the bankruptcy code is not much loud on the issue of cross-border insolvency. there are many complexities of issues that are involved in cross-border insolvency mechanisms and hence it raises the need of addressing the problems in the current legal regime. the current legal regime has very much restricted scope over the whole issue, as well as the absence of recognition of foreign proceedings for the exaggeration of the issue and further taken away by lack of a system for coordination with international courts, another point of friction is that the Indian legal system not clearly define the jurisdiction of Indian courts in cases related to International insolvency. These problems directly imply that there are flaws in the current legal framework and the system. In this scenario adoption of the United Nations Commission on International Trade Law to tackle cross-border insolvency seems to be a viable option. However, there are other measures like as strengthening the current insolvency and bankruptcy code by developing a precise database and promoting alternate dispute resolution can be another method to cope with this problem, and developing a cross-border committee can help us to find measures to address this issue.