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CROSS-BORDER INSOLVENCY IN INDIA: EVALUATING THE NEED AND PREPAREDNESS FOR IMPLEMENTING THE UNCITRAL MODEL LAW

Abstract

Globalization and increasing cross-border commercial activities have intensified the complexity of insolvency proceedings involving multinational enterprises. Insolvency cases often encompass assets, creditors, and operations situated across different jurisdictions, necessitating a coordinated mechanism for efficient resolution. Although the Insolvency and Bankruptcy Code, 2016 (IBC) has substantially transformed India's insolvency framework, the absence of a comprehensive cross-border insolvency regime remains a significant lacuna. Sections 234 and 235 of the IBC provide only a limited framework based on bilateral agreements and letters of request, rendering them inadequate in addressing contemporary transnational insolvency issues.

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997, has emerged as an internationally accepted framework promoting cooperation among courts, recognition of foreign proceedings, and equitable treatment of creditors. This paper evaluates India's preparedness for implementing the UNCITRAL Model Law by examining the existing legal framework, judicial developments, and recommendations of the Insolvency Law Committee. Through a comparative and doctrinal approach, the paper analyses whether India's institutional and legal mechanisms are sufficiently equipped to adopt the Model Law. The study concludes that while significant progress has been made under the IBC, legislative reforms and institutional capacity-building are essential for effective implementation of a comprehensive cross-border insolvency framework.

Keywords: Cross-border insolvency, Insolvency and Bankruptcy Code, UNCITRAL Model Law, Centre of Main Interests, corporate insolvency, India.

1. Introduction

The expansion of international trade and foreign investments has transformed business enterprises into multinational entities possessing assets and liabilities in multiple jurisdictions. Consequently, insolvency proceedings have increasingly acquired cross-border dimensions, requiring cooperation among domestic courts and foreign jurisdictions. Traditional insolvency laws, based upon territorial principles, often create uncertainty and jurisdictional conflicts, adversely affecting creditors and reducing asset value.

The Insolvency and Bankruptcy Code, 2016 consolidated India's insolvency laws and introduced a creditor-driven resolution mechanism. However, the Code lacks a comprehensive framework governing cross-border insolvency. Sections 234 and 235 depend upon reciprocal arrangements with foreign countries and have proved inadequate in addressing complex multinational insolvency proceedings. The necessity for harmonization with international standards has prompted discussions regarding the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997.

2. Research Objectives

1) To examine the concept and significance of cross-border insolvency.
2) To analyse the existing legal framework governing cross-border insolvency in India.
3) To evaluate the principles and features of the UNCITRAL Model Law.
4) To assess India's preparedness for implementing the Model Law.
5) To identify challenges and suggest reforms for effective implementation.

3. Research Methodology

The study adopts a doctrinal methodology based upon statutes, judicial decisions, books, reports, and scholarly articles. Comparative analysis of insolvency regimes in jurisdictions adopting the UNCITRAL Model Law has also been undertaken.

4. Concept of Cross-Border Insolvency

Cross-border insolvency refers to insolvency proceedings involving a debtor whose assets, creditors, liabilities, or business operations extend beyond a single jurisdiction. The phenomenon

has gained considerable significance owing to the rapid growth of international commerce and the increasing integration of national economies. A multinational corporation may have its headquarters in one country, manufacturing facilities in another, creditors located in several jurisdictions, and assets dispersed across multiple territories. In the event of insolvency, such a situation gives rise to numerous legal complexities concerning jurisdiction, recognition of foreign proceedings, distribution of assets, and cooperation between courts and insolvency administrators[1].

Historically, two competing theories have governed the treatment of cross-border insolvency. The territorial approach advocates separate insolvency proceedings in each jurisdiction where assets are located, with each country administering assets situated within its territory. Although this approach safeguards national sovereignty, it often results in fragmented proceedings and inconsistent treatment of creditors. In contrast, the universalist approach advocates a single insolvency proceeding administered by the courts of the debtor's home jurisdiction, thereby ensuring centralized control over the debtor's assets and liabilities. Recognizing the practical difficulties associated with absolute universalism, modern insolvency law has embraced the principle of modified universalism, which seeks to facilitate cooperation among courts while preserving the autonomy of domestic legal systems.

The UNCITRAL Model Law embodies the principle of modified universalism by establishing a framework for recognition of foreign proceedings and cooperation among courts and insolvency professionals. Its adoption is intended to minimize conflicts between jurisdictions, enhance predictability in international insolvency proceedings, and maximize the value of the debtor's estate for the benefit of creditors and other stakeholders[2].

5. Existing Framework under the Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 contains limited statutory provisions dealing with cross-border insolvency under Sections 234 and 235, which currently form the basic legal framework in India.

Section 234 – Agreements with foreign countries[3]

Section 234 provides that:

"The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code."

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[1] Roy Goode, Principles of Corporate Insolvency Law 578–79 (5th ed., Sweet & Maxwell 2018).

[2] UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations, New York, 2014).

[3] *The Insolvency and Bankruptcy Code, 2016* (Act No. 31 of 2016).

It further enables the Central Government, by notification, to apply the provisions of the Code in relation to assets or property of a corporate debtor or individual situated in a foreign country with which such agreement has been entered into.

Section 235 – Letter of request to a foreign court or authority[4]

Section 235 states that:

"Notwithstanding anything contained in this Code or any law for the time being in force, if, in the course of insolvency resolution, liquidation or bankruptcy proceedings, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the debtor are situated in a country outside India with which reciprocal arrangements have been made under Section 234, he may make an application to the Adjudicating Authority to issue a letter of request to a court or an authority of such country for dealing with such assets."

Under the Indian insolvency regime, cross-border insolvency is presently governed in a limited manner through Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016. Section 234 empowers the Central Government to enter into bilateral agreements with the governments of other countries for enforcing the provisions of the Code, thereby enabling reciprocal arrangements for recognition and implementation of insolvency proceedings across jurisdictions. Section 235 further authorises the adjudicating authority to issue a letter of request to a foreign court or tribunal, seeking its assistance in respect of assets of the corporate debtor situated outside India. Together, these provisions form a rudimentary and treaty-based framework for cross-border insolvency cooperation in India. However, their effectiveness has been limited due to the absence of concluded bilateral agreements and the lack of a comprehensive mechanism for recognition of foreign proceedings. Consequently, while Sections 234 and 235 indicate legislative intent to address cross-border insolvency, they fall short of providing a structured and operational regime akin to the UNCITRAL Model Law, thereby necessitating judicial innovation, as seen in cases like Jet Airways, to bridge the existing gaps.

Together, these two sections form a basic framework for cross-border insolvency based on cooperation through treaties and court-to-court assistance. However, they are largely ineffective in practice because Section 234 requires prior international agreements, and Section 235 depends on reciprocal arrangements that are rarely in place. As a result, India does not yet have a fully functional cross-border insolvency system under statute, and courts have had to rely on judicial innovation and principles of comity (as seen in the Jet Airways case) to manage such situations.

6. UNCITRAL Model Law on Cross-Border Insolvency, 1997

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 is a significant international legal framework developed to promote efficiency, fairness, and cooperation in insolvency cases

[4] *The Insolvency and Bankruptcy Code, 2016* (Act No. 31 of 2016).

involving more than one jurisdiction. It seeks to reduce legal uncertainty in cross-border insolvency matters by providing a harmonised approach that facilitates coordination between courts and insolvency authorities of different states. The Model Law is primarily based on four foundational pillars: access, recognition, relief, and cooperation and coordination.

The first pillar, access, ensures that foreign insolvency representatives are granted direct access to domestic courts of the enacting state. This provision eliminates procedural barriers that would otherwise prevent foreign representatives from participating effectively in insolvency proceedings. It enables them to initiate or defend proceedings and seek appropriate relief in the domestic jurisdiction.

The second pillar, recognition, provides a structured mechanism through which foreign insolvency proceedings may be formally recognised by domestic courts. Upon recognition, such proceedings are classified as either foreign main proceedings or foreign non-main proceedings. A foreign main proceeding is generally determined based on the debtor's Centre of Main Interests (COMI), whereas a non-main proceeding is based on the presence of an establishment of the debtor in that jurisdiction. This distinction is crucial as it determines the extent of relief and legal consequences that follow recognition.

The third pillar, relief, empowers domestic courts to grant a wide range of protective measures once a foreign proceeding is recognised. These may include interim relief, such as preservation of assets, as well as more substantive relief like the imposition of a stay on individual creditor actions. Such measures aim to protect the debtor's estate, prevent asset dissipation, and ensure an orderly and equitable insolvency process across jurisdictions.

The fourth pillar, cooperation and coordination, emphasizes active collaboration between domestic courts, insolvency professionals, and foreign judicial or administrative authorities. This cooperation is intended to ensure consistency in decision-making, avoid conflicting judgments, and promote the efficient administration of cross-border insolvency cases.

A central and unifying concept under the Model Law is the Centre of Main Interests (COMI), which serves as the key determinant for identifying the primary jurisdiction for insolvency proceedings. COMI ensures predictability in jurisdictional allocation and helps establish which court will oversee the main insolvency process, thereby providing stability and coherence in multi-jurisdictional insolvency situations[5].

7. Judicial Developments in India

Cross-border insolvency arises when a corporate debtor has assets, creditors, or business operations in more than one jurisdiction. In such situations, coordination between different national courts becomes essential to avoid conflicting judgments, ensure equitable distribution of

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[5] United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014).

assets, and preserve the value of the debtor's estate. The UNCITRAL Model Law on Cross-Border Insolvency, 1997 provides the most widely accepted international framework for addressing these challenges, based on principles of access, recognition, relief, and cooperation. Although India has not yet formally adopted the Model Law, its principles have been progressively reflected in judicial practice under the Insolvency and Bankruptcy Code, 2016.

Jet Airways (India) Ltd. Case[6]

The insolvency of Jet Airways marked the first significant instance of structured cross-border insolvency coordination in India. Proceedings were simultaneously initiated in India under the IBC and in the Netherlands, where insolvency proceedings were commenced concerning Jet Airways' assets and interests. This created a situation of parallel jurisdictional claims.

The National Company Law Appellate Tribunal (NCLAT) adopted a cooperative and pragmatic approach, allowing coordination between the Indian Resolution Professional and the Dutch Bankruptcy Administrator. A cross-border insolvency protocol was established to facilitate communication, sharing of information, and coordinated management of assets across jurisdictions.

A crucial issue in the case was the determination of the Centre of Main Interests (COMI). The Tribunal held that COMI was located in India, thereby giving primacy to Indian insolvency proceedings. However, it also permitted limited participation of the Dutch administrator, reflecting the principle of modified universalism rather than strict territoriality.

Significance: The case is widely regarded as India's de facto implementation of UNCITRAL Model Law principles and highlighted the urgent need for a formal statutory framework under the IBC (proposed Part Z on cross-border insolvency).

In re HIH Casualty and General Insurance Ltd. (2008, UK/Australia)

In this landmark case involving a multinational insurance group, insolvency proceedings were initiated in both the United Kingdom and Australia. The courts adopted a coordinated approach to avoid duplication and conflicting outcomes. The Privy Council emphasised the doctrine of modified universalism, under which courts should strive to administer insolvency on a global basis through cooperation with foreign proceedings.

Significance: The case strongly reinforced the principle that insolvency proceedings should, where possible, be consolidated under a single main jurisdiction, aligning closely with the UNCITRAL Model Law's objective of promoting international cooperation and judicial comity.

In **re Maxwell Communication Corporation (1992, UK/US)**[7]

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[6] Jet Airways (India) Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT).

[7] *Re Maxwell Communication Corporation plc (No. 2),* [1992] 1 WLR 1015 (Ch.)

This was one of the earliest and most influential cross-border insolvency cases involving parallel proceedings in the United Kingdom and the United States. The courts in both jurisdictions entered into a cooperation protocol to coordinate asset distribution and prevent inconsistent rulings. The decision highlighted the importance of comity between courts and laid the groundwork for modern cross-border insolvency practice.

8. Recommendations of the Insolvency Law Committee[8]

The Insolvency Law Committee (2018) recommended incorporation of the UNCITRAL Model Law with suitable modifications. It proposed:

1) The Insolvency Law Committee (2018) recommended the incorporation of the UNCITRAL Model Law into the Insolvency and Bankruptcy Code, 2016 with suitable modifications. It specifically proposed the introduction of a dedicated Part Z in the IBC to govern cross-border insolvency in a structured manner.
2) It further recommended statutory recognition of foreign insolvency proceedings to enable smoother cooperation between Indian and foreign courts. This would ensure effective coordination and reduce procedural delays in transnational insolvency cases.
3) The Committee also emphasized the need for a clear statutory framework for determining the Centre of Main Interests (COMI) to avoid jurisdictional uncertainty and forum shopping. In addition, it suggested the exclusion of financial service providers from the scope of cross-border insolvency provisions due to their systemic importance.
4) Another key recommendation was the incorporation of safeguards for public policy interests, allowing Indian courts to refuse recognition of foreign proceedings in exceptional circumstances. This ensures that domestic legal and economic interests are adequately protected.

9. Challenges in Implementing the Model Law

Despite the strong case for adoption, several challenges may arise in implementing the UNCITRAL Model Law in India. One of the primary difficulties is the determination of the Centre of Main Interests (COMI), as identifying the debtor's principal place of business can be complex in multinational corporate structures and may lead to jurisdictional disputes and forum shopping.

Another significant concern relates to judicial capacity, as effective implementation requires judges and insolvency professionals to be adequately trained in cross-border insolvency principles. Without specialized expertise, consistent and efficient application of the framework may be difficult to achieve.

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[8] Ministry of Corporate Affairs, Report of the Insolvency Law Committee (Oct. 2018).

The broad public policy exception also poses a challenge, as an expansive interpretation could undermine the objective of international cooperation by allowing domestic courts to frequently refuse recognition of foreign proceedings. This may weaken the effectiveness of the Model Law framework.

Additionally, corporate group insolvency presents complexities, since multinational corporate groups operate through interconnected entities across jurisdictions, requiring coordinated resolution mechanisms that are currently underdeveloped in Indian law. Finally, concerns relating to sovereignty remain significant, as India must carefully balance international cooperation with the protection of domestic legal, economic, and regulatory interests, which may at times create resistance to full harmonization with global insolvency standards[9].

10. India's Preparedness

Several factors indicate that India is reasonably prepared for the adoption of a comprehensive cross-border insolvency framework based on the UNCITRAL Model Law, particularly when viewed in light of the institutional and legislative developments under the Insolvency and Bankruptcy Code, 2016. One of the most significant indicators of this preparedness is the existence of a relatively mature insolvency framework under the IBC. The Code has fundamentally restructured India's insolvency regime by introducing a time-bound, creditor-in-control resolution process, replacing the earlier fragmented system. Over the years, the IBC has developed a substantial body of jurisprudence through judicial interpretation, thereby providing predictability and consistency in insolvency proceedings. This maturation of domestic insolvency law creates a strong foundation for integrating cross-border principles, as the domestic system is already functionally stable and procedurally well-defined.

Another important factor is the presence of specialized adjudicatory institutions such as the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). These bodies have been specifically constituted to handle corporate insolvency matters, ensuring sectoral expertise and procedural efficiency. Their institutional design enables them to deal with complex corporate disputes, including those involving foreign elements, as seen in cases where courts have coordinated with foreign insolvency proceedings. The existence of such specialized tribunals is crucial for implementing the UNCITRAL Model Law, which requires courts to engage in cross-border cooperation, recognition of foreign proceedings, and discretionary relief measures. The technical competence and growing experience of these tribunals significantly enhance India's institutional readiness for such a regime.

A further indicator of preparedness is the gradual and evolving judicial acceptance of cross-border insolvency cooperation. Although India does not yet have a full-fledged statutory framework based on the Model Law, courts and tribunals have shown a progressive approach in

[9] Sumant Batra, Corporate Insolvency: Law and Practice 1221–25 (Eastern Book Company 2021).

facilitating coordination with foreign jurisdictions. The Jet Airways insolvency case is a notable example, where Indian tribunals approved a cross-border insolvency protocol in cooperation with Dutch courts. This reflects an emerging judicial inclination toward the principle of modified universalism, which underpins the UNCITRAL Model Law. Such judicial openness demonstrates that, even in the absence of explicit legislation, Indian courts are willing to engage with international insolvency norms where necessary to ensure effective resolution of multinational insolvencies.

The recommendations of the Insolvency Law Committee further strengthen the argument for India's readiness. The Committee, in its 2018 report, explicitly recommended the adoption of the UNCITRAL Model Law with appropriate modifications to suit Indian conditions. It proposed the introduction of a separate chapter in the Insolvency and Bankruptcy Code dealing specifically with cross-border insolvency, including provisions for recognition of foreign proceedings, determination of the Centre of Main Interests (COMI), and protection of public policy interests. These recommendations indicate a strong policy-level recognition that India's existing framework is insufficient and that alignment with international standards is both necessary and desirable. The existence of such detailed institutional recommendations suggests that the conceptual and policy groundwork for adoption has already been substantially laid.

Additionally, India's increasing integration into global trade and investment networks has made the need for a robust cross-border insolvency regime more urgent. The rise in foreign direct investment, multinational corporate presence, and cross-border financial transactions means that insolvency proceedings are increasingly likely to involve foreign creditors and assets located outside India. In such a commercial environment, the absence of a structured mechanism for cross-border insolvency creates uncertainty and can adversely affect investor confidence. Aligning with the UNCITRAL Model Law would therefore enhance India's attractiveness as an investment destination by ensuring greater predictability, efficiency, and legal certainty in insolvency resolution involving international stakeholders.

Despite these positive indicators, it must be acknowledged that India is not yet fully prepared for complete implementation without further reforms. Institutional strengthening is required, particularly in terms of judicial training, insolvency professional capacity, and administrative coordination between domestic and foreign authorities. Moreover, legislative amendments are necessary to clearly define key concepts such as Centre of Main Interests (COMI), recognition standards for foreign proceedings, and the scope of public policy exceptions. Without such clarifications, the implementation of a Model Law–based framework may lead to interpretational inconsistencies and jurisdictional uncertainty. Therefore, while India demonstrates substantial readiness in principle, effective implementation will depend on a carefully structured legislative framework supported by robust institutional capacity-building.

11. Suggestions

1) The incorporation of a separate Part Z in the Insolvency and Bankruptcy Code, 2016, based on the UNCITRAL Model Law, is essential to create a structured and coherent legal framework for cross-border insolvency. This would ensure statutory recognition of foreign proceedings and provide clear procedural guidance for courts and insolvency professionals.
2) There is also a need to develop formal judicial cooperation protocols to facilitate communication and coordination between Indian courts and foreign insolvency authorities. Such mechanisms would enhance efficiency in handling parallel insolvency proceedings and reduce jurisdictional conflicts.
3) Comprehensive training programmes for judges and insolvency professionals should be introduced to equip them with the technical expertise required for dealing with complex cross-border insolvency matters. This will ensure uniformity in application and improve institutional capacity.
4) Clear statutory guidelines must be framed for determining the Centre of Main Interests (COMI) to avoid ambiguity and forum shopping in cross-border cases. A well-defined COMI framework will enhance predictability and legal certainty in insolvency proceedings.
5) India should also adopt provisions relating to enterprise group insolvency to address the growing complexity of multinational corporate structures. This would enable coordinated resolution of interconnected entities and maximize value for creditors across jurisdictions.
6) The public policy exception under the Model Law should be interpreted narrowly to prevent its misuse as a barrier to recognition of foreign proceedings. A restrictive approach will promote international cooperation while still safeguarding essential domestic legal principles.
7) Finally, specialized benches within the NCLT and NCLAT should be established to deal exclusively with international and cross-border insolvency matters. This specialization will improve consistency, efficiency, and expertise in adjudicating complex transnational insolvency disputes.

12. Conclusion

The increasing globalization of commerce has rendered traditional territorial approaches to insolvency inadequate. Although the Insolvency and Bankruptcy Code, 2016 has transformed insolvency law in India, the absence of a comprehensive cross-border mechanism remains a significant deficiency. Adoption of the UNCITRAL Model Law would align India with internationally accepted standards and facilitate efficient resolution of multinational insolvencies. The judicial experience in Jet Airways and the recommendations of the Insolvency Law Committee reveal that India possesses a substantial degree of preparedness. However, legislative reform, institutional capacity-building, and judicial expertise are indispensable for successful

implementation. A comprehensive cross-border insolvency regime would strengthen creditor confidence, enhance ease of doing business, and reinforce India's position in the global economy.

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