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Cross-Border Insolvency Regime in India: A Comprehensive Analysis

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ABSTRACT

Cross Border Insolvency is the process where an insolvent debtor or a company having financial losses have assets or their operation in more than one jurisdiction or country. Cross Border Insolvency is primarily focused on the operation of insolvency beyond the domestic insolvency proceedings of a country. The United Nations Commission on International Trade Law (UNCITRAL) has developed the Model Law on Cross-Border Insolvency, which provides a framework for countries to harmonize their insolvency laws and facilitate cooperation between different jurisdictions. It is important to note that the UNCITRAL Model Law is not binding, and each jurisdiction has the discretion to adopt, modify, or reject its provisions, however India has not ratified the same. In India the Insolvency and Bankruptcy Code of 2016 governs the insolvency procedure in India but it does not provide sufficient framework for cross border insolvency. Due to this, the procedure involving insolvency of companies with multiple jurisdiction can be challenging. This article mainly deals with the issues and challenges which companies face during cross border insolvency and also provide the legislative developments for making the insolvency proceedings much easier.

Keywords*: Bankruptcy, Cross Border Insolvency, Jurisdiction, Model Law, UNCITRAL.*

I. INTRODUCTION

Cross-border insolvency has emerged as a critical area of concern in the increasingly interconnected global economy, where businesses often operate and hold assets in multiple jurisdictions. The complexity of dealing with insolvency proceedings that span across borders necessitates a robust legal framework to ensure the orderly administration of a debtor's assets, fair treatment of creditors, and the maximization of value. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, adopted in 1997, provides such a framework. It aims to facilitate international cooperation and coordination, addressing the challenges posed by cross-border insolvency cases. The Model Law distinguishes between foreign main proceedings, initiated where the debtor's Center of

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Main Interests (COMI) is located, and foreign non-main proceedings, offering mechanisms for recognition and relief across jurisdictions. Despite its global relevance, the application of the Model Law varies significantly across different countries, reflecting diverse legal traditions and economic priorities.

India, a major player in the global market, has seen significant legal reforms with the introduction of the Insolvency and Bankruptcy Code (IBC) in 2016. The IBC aims to consolidate and amend the laws relating to reorganization and insolvency resolution, providing a comprehensive framework for dealing with insolvency and bankruptcy in a time-bound manner. However, the IBC's current provisions for cross-border insolvency are relatively underdeveloped compared to international standards. Recognizing this gap, the Indian government has proposed amendments to incorporate the principles of the UNCITRAL Model Law, aiming to align India's insolvency regime with global best practices. This proposed adoption is expected to address critical issues such as the recognition of foreign insolvency proceedings, cooperation between Indian and foreign courts, and the participation of foreign representatives in Indian insolvency proceedings.

This research paper delves into the intricacies of India's cross-border insolvency regime, providing a comprehensive analysis of its current state, challenges, and potential reforms. It begins with an overview of the UNCITRAL Model Law, highlighting its key provisions and objectives. The paper then examines the existing framework under the IBC, identifying the gaps and limitations in handling cross-border insolvency cases. Through comparative analysis, it explores how other jurisdictions have implemented the Model Law, drawing lessons that could inform India's approach. Special attention is given to the concept of the Center of Main Interests (COMI), a pivotal element in determining the jurisdiction for main insolvency proceedings, and how its interpretation could impact Indian insolvency cases with international elements.

Furthermore, the paper discusses the proposed amendments to the IBC, evaluating their potential effectiveness in bridging the current gaps. It assesses the implications for various stakeholders, including creditors, insolvency practitioners, and multinational corporations, emphasizing the importance of a balanced and efficient cross-border insolvency regime. The research also considers the broader economic and legal implications of aligning India's insolvency laws with international standards, arguing that such alignment could enhance investor confidence and facilitate smoother cross-border trade and investment. Through this comprehensive analysis, the paper aims to contribute to the ongoing discourse on insolvency law reform in India, offering insights and recommendations for policymakers, legal

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practitioners, and scholars interested in the intersection of domestic and international insolvency law.

(A) Research Objective

The primary objective of this research paper is to conduct a thorough and comprehensive analysis of the Cross-Border Insolvency Regime in India. Through an in-depth examination of the legal, economic, and procedural aspects of cross-border insolvency, this study aims to provide a clear understanding of the current framework's strengths, weaknesses, and implications. By assessing the effectiveness of the existing regulations, case studies, and comparative analyses with international models, the research intends to identify potential areas of improvement and recommend suitable measures to enhance India's cross-border insolvency regime. Through this analysis, the paper seeks to contribute to the academic discourse on insolvency law and offer practical insights for policymakers, legal practitioners, and stakeholders involved in cross-border insolvency proceedings in India.

II. EVOLUTION OF CROSS-BORDER INSOLVENCY REGIME IN INDIA WITH RESPECT TO IBC 2016

The Bankruptcy Law Reforms Committee (BLRC) recognized the need to address cross-border insolvency (CBI) issues in 2015 and came up with its report in November 2015. They expressed the need to address issues such as Indian financial firms having claims on global defaulting firms and global financial persons having claims on Indian defaulting firms.

The Joint Parliamentary Committee reviewed the BLRC's report in April 2016 and recommended adding Sections 234 and 235 to the Insolvency and Bankruptcy Code (IBC). Section 234 allows the Central Government to enter into an agreement with a foreign government to enforce provisions of the Code, while Section 235 deals with letters of request for assets of a corporate debtor located outside India. The interpretation of the section was ambiguous and led to the question of whether foreign investors can participate in the insolvency proceedings. Later on, the Supreme Court clarified that foreign creditors can participate in the insolvency resolution process in India in the case of Macquarie Bank Limited Shilpi Cable Technologies Ltd. The court stated that the definition of "person" under Section 3(23) of the Code includes persons resident outside India. The question of up to what extent these foreign personnel can participate still remains a doubt.

The Insolvency Law Committee (ILC) suggested inserting a new chapter dealing with CBI into the Code in its report of March 2018. The draft chapter, known as Draft Part Z, was released in June 2018 and built on the Model Law. The draft was also incompetent to address

issues like - penalties and power regulation absence, and this led to the ILC releasing a second report which provided a much more comprehensive understanding of the legislation. The second report included the code of conduct of foreign personnel, registration of foreign entities etc. But there are still new issues popping up now with Draft Z.

The NCLT, Mumbai Bench, in the case of State Bank of India Jet Airways (India) Ltd., held that there is no provision and mechanism in the Code to recognize the judgment of an insolvency court of any foreign nation, and the Sections 234 and 235 have not been notified as enforceable yet. The case went for an appeal before the NCLAT, New Delhi Bench, which issued procedural directions for balancing the interests of all stakeholders. These directions included cooperation between professionals from both countries, collation of claims of creditors from both countries, and interim stay on the selling, alienation, or transfer of assets in both countries.

The CBIRC made more modifications to Draft Part Z in its report of June 2020 based on the developments then which includes the case of SBI v. SEL Mfg. Co. Ltd. and recognised the "foreign main proceedings" under the US bankruptcy code [section 1502(4)] based on model law. The MCA released another slew of recommendations in November 2021 to ensure Draft Part Z is finally made into law. These recommendations include extending the coverage to include personal guarantors, clarifying that the pre-packaged insolvency resolution process shall not entertain CBI provisions, and recommending that all benches of the NCLT and DRT have jurisdiction to adjudicate applications under Draft Part Z.[3]

As seen above, the different interpretations and applications of model law have increased the gaps and ambiguity in the legislation. For example- the term "public policy" in Draft Z has a very wide scope of interpretation and requires clarification. So considering all these developments, India still has a long road ahead to come up with proper Cross border insolvency laws.

(A) The UNCITRAL Model law and the difference in Indian Model law

The UNCITRAL Model Law provides a framework for handling international insolvency cases. Instead of creating a single insolvency legislation, it offers a means for insolvency specialists hired in one jurisdiction to be acknowledged and permitted to take part in proceedings in other countries. According to the Model Law, the best place to start insolvency

[3] Rakhi Nargolkar, CROSS BORDER INSOLVENCY- STATE BANK OF INDIA v. JET AIRWAYS (INDIA) LTD, INDIAN JOURNAL OF CORPORATE LAW AND POLICY (Sep. 10,2023, 9:20PM), https://ijclp.com/cross-border-insolvency-state-bank-of-india-v-jet-airways-india-ltd/

proceedings is the insolvent entity's center of major interests (COMI). The term "COMI" is not defined in the Model Law, although it is usually accepted to refer to the location of the entity's key operations and assets.

For foreign creditors, bankruptcy proceedings initiated in India shall be regarded as the "foreign main proceedings" if the COMI of an Indian corporate entity is located there. This indicates that the Indian Insolvency and Bankruptcy Code's provisions will take effect right now. If an Indian business entity's COMI is located outside of India, foreign main proceedings will start in that country. In certain situations, the Indian Insolvency and Bankruptcy Code won't directly apply, although Indian creditors may be able to seek relief through the foreign jurisdiction's courts where the primary procedures are started.[4]

The foreign system's substantive legislation is not imported into the enacting state's bankruptcy system through the UNCITRAL Model legislation. Furthermore, it does not apply in any international proceedings the relief that would be available under the enacting state. It does, however, recognise and support international representatives of an insolvency resolution process when they request for automatic stays and temporary relief, if those are available in the specific jurisdiction where the relief is sought.[5]

In short, the UNCITRAL Model Law provides a framework for cooperation and coordination between jurisdictions in cross-border insolvency proceedings. It does not create a unified insolvency law, but it does provide ways for insolvency professionals and creditors to access relief in multiple jurisdictions.

(B) The Insolvency and Bankruptcy Code, 2016 and recent amendments (IBC) and section 234 to 235 of IBC 2016

A limited amount of cross-border insolvency is addressed in Sections 234 and 235 of the Indian Insolvency and Bankruptcy Code (Code). They enable the Adjudicating Authority under the Code to send letters of request to courts in other nations, enabling the government to enter into treaties with those nations. Theoretically, this might offer a framework for foreign agents to apply to Indian courts for a way to deal with assets there in accordance with the insolvency laws of the country where the foreign primary proceedings have been begun.

Foreign processes must be recognized in India through the implementation of the Civil Procedure Code of 1908 and the principles of English common law. This is a challenging task.

[4] Ran Chakrabarti, KEY ISSUES IN CROSS-BORDER INSOLVENCY, Vol. 30 National Law School of India Review 119, 120-130 (2018).
[5] *Id*. at 2

Similar to this, the procedural laws of the foreign jurisdiction must be followed for Indian procedures to be recognized there.

It would be impractical and time-consuming to negotiate up to 200 different bilateral treaties in order to apply the UNCITRAL Model Law. Additionally, it would make matters more difficult since in any cross-border insolvency case, Indian courts would have to take each treaty's specifics into account.

The UNCITRAL Model Law might be included into the Code more easily if India will only sign and approve it. This would offer a precise and dependable structure for handling international insolvency proceedings.[6]

In other words, the current system for dealing with cross-border insolvency in India is complex and inefficient. Signing and ratifying the UNCITRAL Model Law would be a simpler and more effective way to deal with cross-border insolvency matters.

(C) Jet Airways (India) Limited vs State Bank Of India & Anr

Due to a significant amount of unpaid debt, three petitions to begin Corporate Insolvency Proceedings (CIRP) were filed against Jet Airways, the corporate debtor in this case. The NCLT bench was notified during the first hearing that Jet Airways had filed for bankruptcy one month earlier in a Dutch district court. In this regard, the Council determined that holding concurrent sessions on the same matter would cause delays and skew the procedures in this particular instance. The justification offered is that the conditions for the Government of India to enter into reciprocal agreements with foreign nations are outlined in Sections 234 and 235 of the Code on Recognition of Orders of Foreign Jurisdictions. The Court concluded that, in this instance, no common understanding had been achieved with the Dutch authorities.

The Bench further held the opinion that as Jet Airways had its registered office and significant assets in India, NCLT had the required jurisdiction to handle the current case. By ruling on June 20, 2019, the Bench ruled that the proceedings of the District Court of the Netherlands were unlawful and cancelled. The NCLT has approved the start of corporate insolvency proceedings against Jet Airways in India.

Jet Airways was facing simultaneous insolvency procedures in the Netherlands and India. The Dutch Trustees contested decisions made by the NCLT Benchmark on non-approved parts of the Dutch procedure before the NCLAT. After reviewing the appeal, the NCLAT directed the "Resolution Professional" appointed by Jet Airways to collaborate with the Dutch Trustee to

[6] Chakrabarti, supra note 4

investigate the viability of a joint "Corporate Insolvency Resolution Process." Following this directive, the RP and the Dutch trustee came to an understanding to hasten the settlement process by utilizing a "proposed model of co-operation." The suggested model was finally agreed upon by the parties and submitted for NCLAT's approval. The model on order dated September 26th was then accepted by NCLAT. Dutch court representatives were also permitted by Bank to attend Jet Airways meetings. Indian laws apply to foreign assets located in the Netherlands because, according to the protocol, "The Parties recognize that the Company being an Indian company with its Center of main interest in India, the Indian Proceedings are the main insolvency proceedings, and the Dutch Proceedings are the non-main insolvency proceedings."

NCLAT allowed Dutch authorities to attend the creditors' committee, but they were not allowed to vote. In order to carry out the bankruptcy procedures collaboratively, the Resolution Professionals and the creditor's committee were directed to collaborate with the Dutch trustees and to sign such cooperation agreements. Both parties had complied with the NCLAT's directive to join the "cross-border insolvency protocol". This protocol allowed the Dutch Trustees and the Insolvency Professional to combine the claim within their purview and examine additional procedures in light of the data gathered.

A motion was filed with the NCLT Mumbai Bench requesting final approval of the settlement plan. The majority of the "windup plan" was approved by Bench on June 22, 2021, and the consortium was given 90 days to get the required regulatory clearances. Additionally, the Directorate General of Civil Aviation (DGCA) approved the creation of a Monitoring board, which was tasked with supervising the whole process. With this, India's first international bankruptcy under the 2016 Insolvency and Bankruptcy Code came to an end.[7]

III. CHALLENGES AND GAPS IN THE CROSS-BORDER INSOLVENCY REGIME

1) Limitations Of the Existing Framework

- India lacks a comprehensive legal framework for cross-border insolvency, which leads to a number of challenges.
- One challenge is that India needs to negotiate and enter into bilateral treaties with foreign governments in order to deal with cross-border insolvency cases. This is a time-consuming and burdensome process, and it is not always possible to reach an agreement with all relevant countries.

[7] Jet Airways (India) Limited vs State Bank Of India & Anr 2019 SCC OnLine NCLAT 385

- Another challenge is that there is no procedure in place for dealing with cross-border insolvency cases when the debtor's assets or creditors are located in a country with which India has not signed a bilateral treaty. This can make it difficult for Indian companies to do business internationally and for foreign companies to invest in India.
- Even in cases where India has a bilateral treaty with the relevant country, there is limited guidance available to insolvency professionals on the process and options available to them. This can lead to uncertainty and delays in the insolvency process.
- Finally, the Civil Procedure Code of 1908, which is India's main law for enforcing foreign judgments, does not adequately cover cross-border insolvency cases. This can make it difficult for foreign creditors to enforce their rights in India.[8]
- Overall, India's current cross-border insolvency framework is complex, inefficient, and unpredictable. This can be a deterrent to foreign investment and can make it difficult for Indian companies to do business internationally.

2) Draft Provision

The Insolvency Law Committee of India recommended in 2018 that the country adopt the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law is a comprehensive framework for resolving cross-border insolvency cases and has been adopted by 51 countries.

The advantages of adopting the Model Law for India include reciprocity with other countries that have adopted it, such as Singapore, the United Kingdom, and the United States. Additionally, the Model Law would provide a clear and efficient framework for dealing with cross-border insolvency cases, which could help to attract foreign investment and make it easier for Indian companies to do business internationally.

The Committee has proposed a draft chapter of the Model Law that is tailored to the Indian legal system. This chapter addresses the complex issues that can arise in cross-border insolvency cases, such as jurisdiction, recognition of foreign judgments, and cooperation among courts from different countries.[9]

Overall, the adoption of the UNCITRAL Model Law on Cross-Border Insolvency would be a significant step forward for India's cross-border insolvency framework. It would make it easier and more efficient to resolve cross-border insolvency cases, which would benefit both Indian

[8] Zulfiquar Memon, India: Cross Border Insolvency Regime In India, Mondaq (Oct. 31, 2021, 10:04 AM), https://www.mondaq.com/india/insolvencybankruptcy/1123982/cross-border-insolvency-regime-in-india

[9] Manasi Lad-Gudhate, Cross border inslovency, ICSI (Apr.8, 2023, 3:32 PM), https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf

and foreign businesses.

IV. A WAY FORWARD

Adopting the UNCITRAL Model Law on Cross-Border Insolvency presents both significant benefits and notable challenges for India. On the positive side, integrating the Model Law into the Indian insolvency framework could greatly enhance the country's attractiveness to foreign investors. By aligning with international best practices, India would offer greater legal certainty and predictability for international creditors and investors. This alignment could facilitate smoother resolution of cross-border insolvency cases, ensuring that foreign creditors are treated equitably and that their rights are protected. Such a move would bolster investor confidence, potentially leading to increased foreign direct investment and enhanced participation of multinational corporations in the Indian market. Moreover, it would position India as a more reliable and stable destination for global business operations, fostering economic growth and development.

However, the adoption of the Model Law also poses significant challenges. One major concern is the potential loss of control over domestic insolvency proceedings. The Model Law emphasizes cooperation and coordination with foreign courts and insolvency practitioners, which could sometimes conflict with national interests or domestic legal principles. This could lead to situations where Indian courts might need to recognize and enforce foreign court decisions that might not fully align with Indian laws or economic priorities. Additionally, the implementation of the Model Law requires substantial changes to existing legal and institutional frameworks, necessitating extensive training for judiciary and insolvency professionals to ensure effective application.

Furthermore, the diversity of India's legal and economic landscape adds complexity to the adoption process. India's legal infrastructure varies significantly across states, and ensuring uniform application of the Model Law could be challenging. Policymakers would need to carefully consider these factors, balancing the potential for increased foreign investment against the need to maintain sovereignty over domestic insolvency proceedings. Ultimately, the decision to adopt the Model Law requires a nuanced approach, weighing the anticipated economic benefits against the practical and legal challenges to ensure that the move aligns with India's broader economic and legal objectives.

V. CONCLUSION

India's current cross-border insolvency framework is territorial and lacks uniformity, which poses challenges for multinational companies. The Jet Airways case is an example of the

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complexities that can arise in cross-border insolvency cases when there is no clear framework in place. Some experts have recommended that India adopt the UNCITRAL Model Law on Cross-Border Insolvency, which is a fairer and more consistent framework. However, India has not yet adopted the Model Law, and it is unclear whether and when it will do so.

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