CROSS BORDER INSOLVENCY UNDER THE INDIAN INSOLVENCY AND BANKRUPTCY CODE, 2016

Rana Navneet Roy, Hidayatullah National Law University
Satyansh Gupta, Hidayatullah National Law University

ABSTRACT

This research explores the intricate landscape of insolvency laws in India, particularly focusing on the period preceding the enactment of the Insolvency and Bankruptcy Code (IBC) in 2016. It delves into the shortcomings of previous legislations like the SICA Act and examines other measures such as the SARFAESI Act and Corporate Debt Recovery mechanisms introduced by the RBI to combat NPAs and revive distressed assets. The study highlights the challenges faced by financial and operational creditors prior to the IBC's implementation and elucidates the motivations behind the IBC's creation. It evaluates the IBC's provisions regarding cross-border insolvency, notably Sec. 234 and 235, and their limitations, emphasizing the need for a more robust framework. The research also discusses the global context, UNICITRAL connections, and international agreements relevant to India's cross-border insolvency challenges. It further explores gaps in the existing IBC, particularly in the context of foreign debt recovery and individual bankruptcy. The study includes insights from notable cases like Jet Airways and analyzes the viability of Draft Part Z for cross-border insolvency, providing a comprehensive overview of India's evolving insolvency landscape and the critical issues it faces.

Keywords: Cross-border insolvency, UNCITRAL Model Law, Insolvency and Bankruptcy Code, Draft Part Z, CBIRC (Cross-Border Insolvency Rules/Regulation Committee).

INTRODUCTION

This landscape of insolvency law remains unchanged in India due to the lack of provisions addressing matters of cross-border insolvency inside the IBC. Lately there has been addition; the IBC saw the inclusion of two clauses: "*Agreements with Foreign Countries" and "Letter of Request to a Country Outside India in Certain Cases*," intended to grapple with cross-border challenges. However, upon further examination, these two provisions prove inadequate and extend limited assistance to entities wrestling with the complexities of cross-border insolvency.

Cross-border insolvency chiefly concerns debtors confronting insolvency while holding assets or creditors scattered across various legal jurisdictions or being subjected to insolvency matters in numerous such locations. The UNCITRAL Model Law on Cross-Border Insolvency defines trans-border insolvency as a condition in which the insolvent debtor holds possessions in multiple states or when certain creditors of the debtor come from states different from the one where the ongoing insolvency actions are occurring. The quick expansion of transnational trade, investments, and businesses has fostered the pervasive emergence of multinational enterprises functioning through various different sorts' entities like branches, agencies, franchises, subsidiaries, and other collaborative models spanning multiple nations

In scenarios involving cross-border insolvency, the situation emerges when a debtor holds possessions or creditors that span across multiple legal jurisdictions, or when separate

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insolvency proceedings are commenced in various such jurisdictions. As a result, the framework governing cross-border insolvency predominantly concentrates on overseeing insolvency processes that transcend the confines of domestic jurisdiction and its inherent limitations. Broadly, the subsequent factors play a pivotal role in the cross-border insolvency context:

1. Ensuring impartial protection for the welfares of both native and overseas creditors.
2. Preservation the valuation of a debtor's possessions dispersed across diverse legal jurisdictions.
3. Facilitating the harmonization and cooperation among courts and legal authorities across different jurisdictions, all while staying aligned with their respective domestic legislations.
4. Cultivating uniformity in insolvency laws and practices across diverse legal jurisdictions.

Within the Indian scenario, the central legislation overseeing insolvency and bankruptcy is the IBC (referred to as "*the Code*"). Although the Code has made notable progress in simplifying domestic insolvency processes, it falls short of providing a comprehensive framework to efficiently handle trans-border insolvency proceedings. Within the Code, there are two notable provisions, namely Sec. 234 and Sec. 235 that play a crucial role in tackling the complexities of cross-border insolvency. Sec. 234 awards power to the Central Government to launch mutual agreements with overseas countries, thereby facilitating the implementation of the Code's provisions. Similarly, Under Section 235, the adjudicating authority as defined in the Code holds the power to produce a formal memo of appeal to a court situated in a country that has forged a treaty as per Section 234. This letter of request outlines the strategy for effectively handling assets positioned within the jurisdiction of that foreign country.

Research Objectives

This research paper tries to achieve the following objectives:

1. Evaluation of India's Cross-Border Insolvency Landscape The central aim of this investigation is to thoroughly evaluate the state of cross-border insolvency in India before the introduction of the IBC in 2016.
2. A comprehensive case study strategy – spotlighting the pivotal Jet Airways case that catalysed a significant shift in India's approach to cross-border insolvency. The core objective is to meticulously analyse the legal proceedings, verdicts, and outcomes stemming from this case.
3. Scrutinizing the Viability of Draft Part Z for Cross-Border Insolvency The third research objective involves a thorough evaluation of the proposed Draft Part Z within the IBC – a provision designed to effectively address the intricate challenges of cross-border insolvency in India.

Research Questions

1. How does the absence of comprehensive provisions for handling cross-border insolvency within India's Insolvency and Bankruptcy code affect the effective resolution of international insolvency matters?
2. In what manner do the outcomes of the Jet Airways case and the potential implications of the proposed Draft Part Z shape the approach of India's legal framework in tackling the complexities posed by cross-border insolvency challenges?

RESEARCH METHODOLOGY

A comprehensive investigation into the UNCITRAL Model law on Cross-border Insolvency has been conducted to identify commonalities and gaps between international best practices and the Indian legal framework. Additionally, the research has focussed on the

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proposed Draft Part Z of the Insolvency and bankruptcy Code, deconstructing its clauses, potential ramifications, and alignment with UNCITRAL principles.

Situations for Cross-Border Insolvency

First and foremost, a financially distressed company might involve numerous foreign creditors who seek to safeguard their rights, even if their operational base doesn't align with the country where the insolvency proceedings are taking place. Secondly, the insolvent company could hold assets located in a different legal jurisdiction, prompting its creditors to pursue access as an intrinsic aspect of the insolvency processes. Lastly, insolvency proceedings relating to the same debtor might be initiated and ongoing across multiple countries. This situation often arises when corporate groups grapple with intricate financial challenges, leading to proceedings against distinct legal entities within the group being instituted across varying jurisdictions. Conventional insolvency laws have a foundation in territorial jurisdiction. This generates legal conflicts amid diverse jurisdictions asserting control over the assets. This intricacy underscores the compelling necessity for worldwide consensus and collaboration to ensure the impartial and equitable allocation of assets owned by an insolvent debtor.

When two courts from different countries apply their respective national laws but arrive at conflicting conclusions regarding the control of a debtor's assets and the jurisdiction for creditors' recovery, it creates an intricate scenario. Given the lack of a dedicated legislative or treaty framework to tackle cross-border insolvency, a range of approaches and principles come into play. These include the following approaches (Batra, 2017):

1. In jurisdictions following common law, courts often turn to the principle of comity, which entails displaying mutual respect for legal decisions made in other jurisdictions.
2. In jurisdictions with civil law systems, orders are issued with similar intentions to facilitate comparable objectives.
3. Foreign insolvency orders are enforced through the application of legislation designed for the enforcement of foreign judgments.
4. Techniques like letters rogatory are employed to transmit requests for judicial assistance and collaboration between courts.

These tactics are employed to navigate the complexities arising from cross-border insolvency, where conflicting opinions and disparities in jurisdiction give rise to significant challenges.

International Conventions

In reaction to the absence of substantial progress in national legal reform, several international initiatives emerged from specific non-governmental organizations. These initiatives aimed to establish a coherent legal framework for standardizing procedures in trans-border insolvency matters.

Model for international insolvency cooperation Act of 1989

The Model for International insolvency cooperation Act (known as "MIICA") was introduced by the International Bar Association. MIICA was designed as a prototype statute meant to be implemented at the national level. It proposed mechanisms through which a court could extend assistance and support to insolvency proceedings occurring in different jurisdictions. While it didn't attain widespread and active endorsement from governments and

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lawmakers, MIICA did play a vital role in advancing the concept of a model law. This idea gained acknowledgment as a practical approach to address the challenge stemming from the consistent inability to successfully formulate a comprehensive global treaty pertaining to insolvency matters (Somers, 1991).

Cross-Border Insolvency Concordat

During the early 1990s, the International Bar Association (IBA) embarked on another initiative that resulted in the expansion of a Cross-border Insolvency Concordat. This Concordat was established on principles derived from private international law and was designed to provide a comprehensive framework of guidelines to navigate the complexities of cross-border insolvency situations. It proposed pragmatic solutions that could be embraced by stakeholders or courts to navigate a wide spectrum of challenges.

Furthermore, cross-border insolvency agreements, taking inspiration from the Concordat model, were established between the United States and various legal jurisdictions. Israel, the islands of the Bahamas, the Cayman Islands, the United Kingdom, the United Kingdom, the island of Bermuda, and Switzerland were prominent among these nations. During the Maxwell Communication Corporation's insolvency proceedings in 1992, an important historical event of putting an insolvency treaty into practice occurred.

The Model Law on Cross-Border Insolvency Introduced by UNCITRAL

The UNCITRAL introduced the Model law (UNITED, 2023) on Trans -border Insolvency in 1997 with the intention of creating a legal structure that promotes collaboration and synchronization in scenarios concerning Trans-border insolvency matters. As clarified in its Preamble, the UNCITRAL Model law is dedicated to achieving overarching objectives, which encompass:

1. Promoting cooperation among the courts and relevant authorities of both the enacting jurisdiction and overseas jurisdictions intricate in matters of trans-border insolvency.
2. Enhancing the inevitability of legal outcomes for business and investment.
3. Ensuring an unbiased and effective management of trans-border insolvency proceedings that defends the rights of each parties involved, inclusion creditors and the debtor.
4. Preserving and make the most of the worth of the debtor's assets.
5. Accelerating the recovery of monetarily distressed enterprises, thereby safeguarding investments, and maintaining employment prospects.

The emergence of the UNCITRAL Model Law was the consequence of collaborative endeavours involving an intergovernmental working group. This group consisted of delegates from around 7 inter-governmental bodies, 27 states entities, and 10 NGOs. This collaborative endeavour unfolded between the years 1995 and 1997.

Aim of the UNCITRAL Model Law

The fundamental aim of the UNCITRAL Model law is to simplify the handling of trans-border insolvency matters and promote collaboration among different legal jurisdictions. While pursuing this goal, the UNCITRAL Model Law recognizes the intrinsic variations in procedural laws across nations and avoids striving for a complete alignment of substantive insolvency law, an aspect elaborated upon in the UNCITRAL Legislative Guide (United Nations Commission on International Trade Law, 2005) on Insolvency law.

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Additionally, UNCITRAL released a Guide to Interpretation and Enactment specifically for the UNCITRAL Model Law (referred to as the Model law Guide to Enactment). Originally intended for government executives and legislators involved in crafting the required implementing laws, this guide has developed into a valuable resource for individuals engaged in interpreting and applying the UNCITRAL Model Law. This includes judges, in addition to other users of the document like legal professionals and scholars. A revised edition of the Guide to Performing of the Model law was unveiled in 2013. Among its enhancements, it provides additional direction on interpreting and applying specific components of the Model Law, particularly those linked to the notion of the "*centre of main interests*."

Practice Guide on Trans-Border Insolvency

In 2000, UNCITRAL unveiled the "*UNCITRAL Practice Guide on Trans-Border Insolvency Cooperation*" as a response to a proposal put forth to the Commission. The proposal's main objective was to enhance collaboration in trans-border insolvency matters, with a specific focus on the effective use and negotiation of trans-border insolvency treaties. Following valuable input from governments and the Working Group, an updated version of the Practice Guide was developed and subsequently finalized and adopted during the Commission's 42nd Session in 2009. The text received unanimous endorsement on July 1, 2009.

The primary aim of the UNCITRAL Practice Guide is to provide practical guidance to legal professionals and judges regarding effective collaboration and communiqué in the context of trans-border insolvency situations. It specifically focuses on scenarios where insolvency proceedings encompass multiple jurisdictions, involving debtors facing insolvency with assets situated in diverse legal territories. Moreover, it encompasses situations where the creditors of the debtor are based in states separate from the one initiating the insolvency proceedings. These scenarios frequently encompass enterprise groups with extensive operations, offices, and assets distributed across various states.

Viewpoint of the International Judiciary on the UNCITRAL Model law for Cross-border Insolvency

The document titled "*The UNCITRAL Model Law on Cross-Border Insolvency: Judicial Insights*," (Majumdar, 2009) commonly referred to as Judicial Insights, reached its finalization and endorsement by UNCITRAL in July 2011This undertaking was sparked by a plea put forth by judges who engaged in the Eighth UNCITRAL/INSOL World Bank Multinational Judicial Colloquium hosted in Vancouver, Canada, in 2009. The heart of their appeal revolved around furnishing judges with guidance to adeptly handle challenges rising from the depiction of the Model law. In response, the Commission, in 2010, decided to address this need through informal consultations involving judges, insolvency practitioners, and other experts. This approach closely followed the methodology employed for crafting the UNCITRAL Practice Guide. In 2013, the judicial viewpoint received an update that incorporated the modifications introduced to the Guide for Performing of the Model Law. Trans-border insolvency under Indian Laws and Practice.

India experienced a notable shift in its legal approach to insolvency proceedings with the enactment of the IBC/Code. This legislative initiative aimed to streamline and revise the norms governing the resolution of insolvency cases concerning corporations, partnerships, and individuals, all within predefined timeframes.

At present, within the IBC, two sections are dedicated to matters concerning trans-border country insolvency, namely Sec. 234 and 235. Under Sec. 234, the Central

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Government possesses the power to forge mutual agreements with foreign countries to execute the stipulations detailed in the IBC, which was enacted in 2016. This section also grants the Central Government the authority to outline the conditions under which IBC provisions would be applicable to the possessions of a debtor located in a country that maintains a reciprocal arrangement. Conversely, Section 235 of the Code delineates a scenario in which insolvency resolution proceedings require the collection of evidence or execution of actions concerning assets located in a foreign country with a reciprocal arrangement. In such cases, the resolution professional or liquidator has the option to approach the NCLT, which functions as the Adjudicating Authority under the IBC. Upon meeting specific criteria, the NCLT is empowered to produce a communication of appeal to a fit court of law or authority in the overseas jurisdiction.

It's pertinent to acknowledge that both these provisions are contingent upon the existence of intergovernmental agreements and exclusively apply when such agreements are established between countries. Nevertheless, this mechanism proves intricate and lacks a seamless approach to facilitate cross-border insolvency proceedings. This deduction arises from various factors. Initially, identifying the countries involved in an insolvency proceeding poses a complex challenge that can only be addressed after the initiation of proceedings. As a result, the existing provisions effectively apply only if pre-existing intergovernmental agreements are in place. Additionally, negotiating separate agreements with numerous countries is a prolonged and intricate endeavor, often entailing concessions in unrelated areas. Moreover, crafting distinct agreements with individual countries would lead to varying standards across multiple jurisdictions, contributing to uncertainty within the cross-border insolvency framework. It's crucial to recognize that, potentially due to these considerations, the Government has yet to activate these two provisions, and progress toward their implementation has been limited.

Indian Judiciary and Cross Border Insolvency

In 2019, NCLAT issued a landmark decision that led to Jet Airways Limited becoming the inaugural Indian company subjected to trans-border insolvency proceedings. The verdict rendered by the NCLAT established a significant precedent in the progressing landscape of India’s law related to insolvency. This judgment required the implementation of a "*Joint Corporate Insolvency Resolution Process*" in adherence to the stipulations of the IBC.

The chain of events began with the submission of a Sec. 7 application by the SBI against Jet Airways. Following the acceptance of this application, the initiation of the CIRP for Jet Airways took place on 20th June 2019. Simultaneously, the adjudicating authority was conversant that Dutch Court had previously started insolvency matters and appointed a bankruptcy administrator in the Netherlands to oversee the management of Jet Airways' possessions located within that jurisdiction. This course of action was set in motion after the submission of a bankruptcy application by two European creditors against Jet Airways, citing unpaid dues totalling around Rupees 280 crores. Notably, these European creditors aimed to secure the confiscation of a Boeing 777 aircraft owned by Jet Airways, which was stationed at Amsterdam’s Schiphol airport.

NCLT’s Decision on Cross-Border Insolvency Case

Following Jet Airways' commencement of the CIRP in India, The Mumbai Bench of NCLT was approached the bankruptcy administrator which was appointed by the Dutch

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court. The intention behind this action was to seek acknowledgment of the ongoing insolvency matter in the Netherlands. Furthermore, the administrator appealed to the NCLT to halt the CIRP due to the simultaneous bankruptcy matter against Jet Airways in the pertinent court. This court's jurisdiction was based on Art. 2(4) of the Dutch Bankruptcy Act. The Administrator underscored the potential adverse impact of having dual insolvency proceedings across different jurisdictions on the restructuring process and the interests of creditors involved.

The primary matter under examination centered on the authority of Dutch courts to deliberate and issue appropriate rulings concerning the bankruptcy of Jet Airways, a corporation registered and established in India.

Nevertheless, the NCLT opted against pausing the insolvency proceedings within India. The rationale given was that Sec. 234 and 235 of the IBC, which pertain to trans-border insolvency issues, is to be yet put into motion. Consequently, the NCLT's verdict was that without the presence of these legal provisions, the Bankruptcy Administrator was not eligible to engage in the Indian insolvency accounts. Additionally, the Netherland proceedings was invalidated by NCLT.

Appeal and Ruling at NCLAT in the Jet Airways Case

Expressing discontent with the NCLT's ruling, the Bankruptcy Administrator filed an appeal against it at the NCLAT. Subsequently, the NCLAT upheld the appeal, subject to the following conditions (Johri, 2022):

1. The NCLAT overturned the NCLT's decision on the condition that the Bankruptcy Administrator guarantees the non-alienation of any outside assets owned by Jet Airways.
2. The NCLAT granted permission to the bankruptcy administrator for working together with resolution professional designated beneath the IBC, thereby fostering cooperation between the two entities. But, this involvement was restricted to observation and prevention of potential overlapping powers.
3. Moreover, the NCLAT facilitated collaboration between Indian entities and their Dutch counterparts to devise a resolve strategy that would be in the finest benefits of Jet Airways and overall investors involved.

Following the NCLAT's directives, the Resolution Professional and the Bankruptcy Administrator established a "*cross-border insolvency protocol*" in agreement. Built upon the tenets delineated in the UNCITRAL Model Law, this protocol was constructed. As a result, India's status as the "centre of main interest" was affirmed, while the proceedings conducted in the Netherlands were designated as "non-main insolvency proceedings." Jet Airways suit serves as a captivating exemplar, shedding light on the legal panorama surrounding trans-border insolvency procedures in India. It showcases the dedicated efforts of the Indian judiciary to pioneer the development of principles and strategies aimed at effectively managing cross-border insolvency cases.

Draft Z on Cross Border Insolvency

Given that Part III of the Indian IBC, 2016, pertaining to insolvency and bankruptcy of individuals and partnerships, remains unnotified, careful consideration is required for incorporating specific provisions for trans-border insolvency in the IBC. ILC has taken cognizance of this intricacy, particularly considering the ongoing handling of matters related to individuals and partnerships by Debt Recovery Tribunals. Consequently, extending the provisions outlined in the proposed Draft Part Z to individuals and partnerships has been deemed untimely by the ILC. Instead, the ILC's recommendation is to initially limit the

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applicability of these provisions to corporate debtors. Notably, the ILC expanded the definition of "*corporate debtor*" to include company incorporated outside India. This expanded interpretation pertains exclusively to the Draft Part Z and does not extend to other sections of the IBC. This nuanced approach aims to enable creditors and insolvency professionals dealing with foreign companies to effectively engage with these provisions, fostering cooperation and relief within the Indian context (Debasis, 2023).

Furthermore, the ILC's counsel is for the provisions of Draft Part Z to be applicable in two scenarios: firstly, in nations that have embraced the UNCITRAL Model law, and secondly, in countries that have established bilateral agreements with India for the mutual enforcement of cross-border insolvency provisions. This harmonized approach aligns with international norms, as several nations, including South Africa, Mexico, and Romania, have adopted similar strategies. This consistent stance is deemed pragmatic, as according unilateral access to foreign companies without affording equivalent privileges to Indian creditors could potentially introduce diplomatic complexities for the Indian government. This is especially pertinent in situations where Indian creditors seek access to assets located in other countries.

Additionally, the ILC's recommendation is to revise Sec. 234 and 235 of the IBC to solely apply to person and partnerships, aligning with the foundational principle of reciprocity outlined in clause 1 of Draft Part Z. This recommendation aims to establish a balanced and comprehensive legal agenda for trans-border insolvency proceedings in India. The Jet Airways case exemplifies India's evolving tactic to trans-border insolvency and underscores the potential advantages of aligning with the principles of the UNCITRAL Model law. The provisions of Draft Part Z closely mirror these principles and underscore the concerted efforts to institute actual instruments for addressing trans-border insolvency cases within India.

Proposals by CBIRC for Strengthening the International Insolvency Framework

The Ministry of Corporate Affairs, Government of India has formed the Cross-border Insolvency Rules/Regulation committee (also known as CBIRC) to address cross-border insolvency issues. Their second report, submitted on January 18, 2023, focused on enterprise group insolvency, an issue increasingly common among major multinational corporations facing financial difficulties. The report offered recommendations aimed at improving India's IBC to manage group insolvency cases more effectively.

To begin, the report emphasized the importance of permitting joint applications on behalf of multiple corporate debtors within the same group who have defaulted. It suggested adopting a comprehensive definition of a 'group,' based on criteria related to control and significant ownership. This approach would ensure that numerous corporate debtors fall under the purview of the group insolvency framework. Importantly, this framework would exclusively apply to corporate debtors involved in the Corporate Insolvency Resolution Process or undergoing liquidation proceedings.

Secondly, the report stressed the urgent need for enhanced communication and coordination among the various stakeholders involved in group insolvency cases. Effective communication among regulators, creditors, and shareholders is crucial for preventing delays and minimizing losses in managing these complex cases.

Lastly, the report advocated for the formation of a well-defined legal outline for trans-border group insolvency, the development of guidelines and standards for case management, and the creation of a specialized trans-border insolvency court. While recognizing the "*UNCITRAL Model law on Enterprise group Insolvency*" (MLEGI), it recommended that India consider its adoption after enacting laws for single-entity cross-border insolvency and

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gaining practical insights from its implementation. Instead, the report proposed a phased approach, commencing with provisions for domestic group insolvency and gradually introducing provisions for cross-border group insolvency.

In summary, the CBIRC's second report underscores the need for a comprehensive and adaptable framework to address the growing complexities of enterprise group insolvency. It emphasizes the importance of effective communication, transparency, and the gradual integration of international guidelines as India refines its approach to handling group insolvency.

CONCLUSION

Insolvency laws in India have changed significantly since the IBC was introduced in 2016. However, the difficulties associated with cross-border insolvency, particularly situations in which debtors or creditors work in various legal jurisdictions, continue to be challenging and dynamic problems. Although the IBC's Sections 234 and 235 are intended to handle cross-border bankruptcy issues, their ability to be effectively enforced has been constrained by the absence of bilateral agreements with other countries.

A significant instance of India's judiciary acting diligently in tackling the difficulties of international insolvency is the case of Jet Airways. The above instance demonstrated the critical need for effective systems to deal with these kinds of situations, which ultimately motivated the formation of the proposed Draft Part Z within the IBC. The Cross-Border Rules/Regulation Committee's (CBIRC) recommendations highlight the importance of a thorough approach to group insolvency. This plan calls for encouraging cooperative applications, improving communication, and gradually implementing global standards.

India must effectively balance the interests of both domestic and foreign parties as it continues to refine its insolvency system. The effective resolution of international insolvency situations depends on this balance. India can boost investor confidence, increase its economic resilience, and boost its competitiveness on the global stage by resolving these issues.

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