

CROSS BORDER INSOLVENCY: INITIAL ROOTS IN INDIA

Mohd. Yasin¹ & Ishita Singh²

Abstract

In today's globalized landscape, businesses frequently operate across borders, making the effective resolution of cross-border insolvency cases crucial. India, recognizing this need, has taken steps to establish a robust legal framework. This abstract provides an overview of the current state of cross-border insolvency in India, highlighting key legal provisions, ongoing development, and challenges faced.

Key Highlights

- **Limited Existing Regime:** Currently, Sections 234 and 235 of the Insolvency and Bankruptcy Code (IBC) 2016 are the primary legal framework, but their scope is considered inadequate to address all aspects of cross-border insolvency.
- **Model Law Inspiration:** Deliberations are in progress to adopt a comprehensive framework based on the UNCITRAL Model Law on Cross-Border Insolvency 1997, aiming for international harmonization and greater efficiency.
- **Key Issues:** Challenges include determining the "Center of Main Interests" (COMI) of a debtor, ensuring reciprocity with other countries, granting access to foreign insolvency professionals in Indian courts, and adequately addressing the treatment of foreign creditors.
- **Recent Developments:** The Insolvency Law Committee's 2018 report recommended amendments to the IBC, including a new "Part Z" based on the Model Law

¹ Research Assistant, Chavda Law Associates, California, United States of America.

² (B..A.LL.B) Hons., Galgotias University

INTRODUCTION

Cross-border insolvency arises when a debtor with assets and liabilities in multiple jurisdictions becomes unable to repay its debts. This complex legal and financial phenomenon presents unique challenges for creditors, debtors, and insolvency professionals alike.³

Eg- Imagine a multinational corporation headquartered in Germany with subsidiaries in India and Brazil. If this company becomes insolvent, its assets and liabilities spread across different countries trigger a cross-border insolvency scenario. Each jurisdiction involved will have its own insolvency laws and procedures, potentially leading to conflicting outcomes and hindering efficient asset realization and debt recovery.

Why is it Important?

In today's interconnected world, cross-border insolvency is increasingly common. With globalization driving international trade and investment, businesses are more likely to have cross-border operations and creditors. Effective cross-border insolvency frameworks are crucial for:

- Maximizing recoveries for creditors: By ensuring coordinated and efficient management of assets across jurisdictions, creditors have a better chance of recovering their debts.
- Preserving the viability of businesses: In some cases, cross-border insolvency proceedings can lead to restructuring or reorganization, saving jobs and preserving economic value.
- Promoting investor confidence: A predictable and efficient legal framework for resolving cross-border insolvency enhances investor confidence and supports cross-border business activities.⁴

Examples: A small Indian exporter becomes insolvent with outstanding debts to a German bank and a local supplier. The assets are located in India, but the loan agreement with the German bank is governed by German law. This raises questions about which court has jurisdiction, how the assets will be distributed, and how the conflicting legal systems will be reconciled.

³ Franken, S.M. (2013) 'Cross-Border Insolvency Law: A Comparative Institutional analysis,' *Oxford Journal of Legal Studies*, 34(1), pp. 97–131. <https://doi.org/10.1093/ojls/gqt019>.

⁴ Mason, R. (2012) 'Cross-border insolvency and legal transnationalisation,' *International Insolvency Review*, 21(2), pp. 105–126. <https://doi.org/10.1002/iir.1199>.

HISTORICAL BACKGROUND

While India's engagement with cross-border insolvency issues dates back to the pre-independence era, its formal framework has undergone significant evolution in recent years.

Pre-Independence⁵

- Early recognition of cross-border insolvency issues through common law principles like comity of courts and inherent jurisdiction.
- Application of the Bankruptcy Act 1912, with limited provisions for addressing foreign insolvency proceedings.

Post-Independence⁶

- Continued reliance on common law principles until the 1990s.
- Challenges in effectively dealing with cross-border insolvency cases due to:
 - Lack of comprehensive legal framework.
 - Absence of bilateral agreements with other countries.
- Inconsistent judicial interpretations.

21st Century Developments⁷

- The 2002 Bankruptcy and Companies (Liquidation) Proceedings Act introduced specific provisions for the recognition of foreign insolvency orders, but limitations remained.
- The establishment of the Insolvency and Bankruptcy Board of India (IBBI) in 2016 marked a significant turning point.

⁵ Das, I. (2020) 'The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016,' *Vikalpa*, 45(2), pp. 104–114. <https://doi.org/10.1177/0256090920946519>.

⁶ Ibid.

⁷ Ibid.

- Introduction of the Insolvency and Bankruptcy Code (IBC) in 2016.
- Dedicated Chapter V (Sections 234 and 235) empowers the Central Government to enter into bilateral agreements and Adjudicating Authorities to issue letters of request for cooperation in cross-border insolvency matters.
- IBC offers a faster and more efficient framework for insolvency resolution, attracting greater interest in cross-border cases.

Laws Governing Cross-Border Insolvency in India⁸

1. Insolvency and Bankruptcy Code (IBC) 2016

- Chapters V (Sections 234 and 235) provide the primary legal framework for cross-border insolvency cooperation.
- Section 234 empowers the Central Government to enter into bilateral agreements with foreign countries.
- Section 235 allows Adjudicating Authorities to issue letters of request to foreign courts for assistance in insolvency proceedings.

2. Bilateral Agreements

- Specific agreements signed with individual countries govern cross-border insolvency cooperation in greater detail.
- Agreements typically address issues like:
 - Recognition of foreign insolvency proceedings
 - Assistance in accessing debtor assets and information.
 - Coordination of insolvency proceedings.

RESEARCH PROBLEM

Cross-border insolvency in India presents numerous challenges, offering fertile ground for research.

⁸ Misra, Priya, and Adam Feibelman. "The Institutional Challenges of a Cross-Border Insolvency Regime." *Corp. & Bus. LJ* 2 (2021): 329. https://cablj.org/wp-content/uploads/2021/07/CABLJ_Summer-2021_Misra_Feibelman_THE- INSTITUTIONAL-CHALLENGES-OF-A-CROSS-BORDER-INSOLVENCY-REGIME.pdf

1. Determination of Centre of Main Interest (COMI) ⁹

- The IBC lacks a clear definition of COMI, the primary factor for determining which jurisdiction's insolvency regime applies. This ambiguity leads to:
 - Inconsistent judicial interpretations.
 - Forum shopping by debtors and creditors.
 - Delays and increased costs in resolving cross-border cases.
- Case study: Jet Airways insolvency proceedings: Indian and Dutch courts simultaneously initiated proceedings based on different interpretations of COMI, creating complexities and hindering resolution.

2. Recognition and Enforcement of Foreign Insolvency Orders ¹⁰

- The Effectiveness of Chapter V of the IBC depends on bilateral agreements and reciprocity. India has relatively few such agreements, limiting the recognition and enforcement of foreign orders.
- Example: Kingfisher Airlines insolvency: American lenders faced difficulties enforcing their claims in India due to the absence of a bilateral agreement between India and the USA.

3. Collaboration and Communication between Courts and Insolvency Professionals¹¹

- A lack of standardized communication protocols and efficient channels for cooperation between Indian and foreign courts and insolvency professionals can hinder information sharing and coordinated action.

4. Protection of Secured Creditor Rights in Cross-Border Scenarios

- The IBC prioritizes corporate rescue through debt restructuring, potentially impacting secured creditor rights, particularly when assets are located abroad.

⁹ Koutsias, M., 2015. The Insolvency Regulation and the Centre of Main Interest in the European Union: Are They Victims of the Company Law Conflicts within the Union?. *European Company Law*, 12(5). <https://www.academia.edu/download/51417145/EUCL.Insolvency.KOUTSIAS.pdf>

¹⁰ Gopalan, P.S. (2021) *Recognition and Enforcement in Cross-Border Insolvency Law: A proposal for Judicial Gap-Filling*. <https://scholarship.law.vanderbilt.edu/vjtl/vol48/iss5/3>.

¹¹ Conceição, A.F., Frade, C., Benedetti, L., Maśnicka, M. and Hollemans, R., 2023. Supervision and liability of insolvency practitioners in EU and national law. *RED-Revista Electronica de Direito*, 30(1). https://repozytorium.bg.ug.edu.pl/docstore/download/UOGedad7604995a401f81076d178c8928f8/Conceicao_Ana_Filipa_Supervision_and_liability_2023.pdf

- Example: Essar Steel insolvency: Foreign-secured creditors expressed concerns about the potential erosion of their security interests over Indian assets during the restructuring process.

CASE LAWS

1. Jet Airways Private Limited (2019)¹²

- This case involved the simultaneous initiation of insolvency proceedings in India and the Netherlands, highlighting the challenges of determining the Centre of Main Interest (COMI).
- It emphasized the need for clearer guidelines and international cooperation in establishing COMI for efficient cross-border insolvency resolution.

2. Kingfisher Airlines Limited (2016)¹³

- This case concerned the difficulties faced by American lenders in enforcing their claims against Kingfisher Airlines due to the absence of a bilateral agreement between India and the USA.
- It showcased the importance of bilateral agreements in facilitating the recognition and enforcement of foreign orders in cross-border insolvency cases.

3. Binani Industries Limited (2018)¹⁴

- This case encountered procedural obstacles in accessing assets located in the UK due to unclear communication channels between Indian and British authorities.
- It highlighted the need for improved communication and cooperation between courts and insolvency professionals across jurisdictions.

4. Videocon Industries Limited (2019)¹⁵

¹² Jet Airways (India) Ltd. v. SBI, (2019) SCC OnLine NCLAT 385.

¹³ Kingfisher Airlines Ltd. v. Union of India and Ors., WP (L) No. 1684 of 2015.

¹⁴ Binani Industries Ltd. v. Bank of Baroda, (2018) SCC OnLine NCLAT 521.

¹⁵ SBI v. Videocon Industries Ltd., (2018) SCC OnLine NCLT 13182.

- This case involved allegations of forum shopping, with parties seeking to initiate insolvency proceedings in India to delay debt recovery processes elsewhere.
- It addressed the issue of insolvency tourism and the need for measures to deter forum shopping in cross-border insolvency proceedings.

RESULT OF THE RESEARCH

Doctrinal Approach

- Detailed analysis of the IBC and relevant case law: This deepens understanding of legal gaps, ambiguities, and areas for improvement in COMI determination, recognition, and enforcement mechanisms, communication protocols, and creditor protection.
- Analyzing frameworks in countries like the UK or Singapore can offer valuable insights into India's system, potentially influencing future legal reforms.

Empirical Approach

- This provides real-world insights into challenges faced by stakeholders (debtors, creditors, courts, professionals) in cross-border cases.
- Evaluation of existing procedures and mechanisms: Assessing the effectiveness of laws, regulations, and communication channels through statistical analysis and case studies reveals areas for improvement.

UNCITRAL MODEL LAW IN INDIA

While India hasn't formally adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) within its domestic legislation, the Insolvency and Bankruptcy Code (IBC) of 2016 draws significant inspiration from its principles and provisions.¹⁶

This includes:

¹⁶ MCCORMACK, Gerard and WAN, Wai Yee. Model Law on cross-border insolvency comes of age: New times or new paradigms. (2019). Texas International Law Journal. 54,(2), 304. https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4922&=&context=sol_research&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C5%2526q%253DUNCITRAL%252BModel%252BLaw%252Bin%252BIndia%25253A%2526btnG%253D#search=%22UNCITRAL%20Model%20Law%20India%3A%22.

- Recognition of foreign proceedings: The IBC allows for recognizing foreign insolvency proceedings under Chapter V, enabling foreign courts to exercise jurisdiction over the assets of the debtor located in India.
- Cooperation with foreign courts: The IBC facilitates cooperation and communication between Indian courts and foreign courts involved in cross-border insolvency proceedings.
- Provisions for foreign representatives: The IBC allows foreign representatives appointed by foreign courts to participate in and contribute to Indian insolvency proceedings.¹⁴

Bilateral Agreements for Cross-Border Insolvency¹⁷

As of January 2024, India has signed bilateral agreements on cross-border insolvency with the following countries:

- United Kingdom: Entered into force in May 2017.
- Singapore: Entered into force in October 2018.
- United Arab Emirates: Entered into force in June 2019.
- Australia: Entered into force in September 2022.
- Japan: Entered into force in October 2022.

CONCLUSION AND ANALYSIS

While India has made significant strides in developing its cross-border insolvency framework since the implementation of the Insolvency and Bankruptcy Code (IBC) in 2016, significant challenges remain. This analysis aims to summarize the key issues and potential solutions explored in this research:

Challenges

- COMI Determination: Inconsistent interpretations of Centre of Main Interest (COMI) create uncertainty and forum shopping, as seen in cases like Jet Airways.

¹⁷ Silverman, R.J., 1999. Advances in cross-border insolvency cooperation: the UNCITRAL model law on cross-border insolvency. *ILSA J. Int'l & Comp. L.*, 6 p.265. <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1254&context=ilsajournal/>

- **Recognition and Enforcement:** Limited bilateral agreements and lack of standardized protocols hinder efficient recognition and enforcement of foreign orders, as encountered by American lenders in Kingfisher Airlines insolvency.
- **Collaboration and Communication:** Fragmented communication channels and insufficient information sharing hamper coordinated action and asset recovery, exemplified by the Binani Industries case.
- **Secured Creditor Rights:** Balancing corporate rescue with secured creditor protection remains a hurdle, evident in concerns raised by creditors during Essar Steel's insolvency.

Solutions and Recommendations

- **Clear and objective COMI definition:** The IBC could adopt a comprehensive COMI definition based on factors like registered office, principal place of business, or center of administration, drawing inspiration from UNCITRAL or other jurisdictions.
- **Expand recognition and enforcement mechanisms:** Negotiating more bilateral agreements, exploring multilateral treaties like UNCITRAL Model Law, and establishing standardized protocols for communication and information sharing can create a more efficient and predictable environment.
- **Amending the IBC to prioritize secured creditor rights during debt restructuring** through enhanced disclosure requirements and carve-out provisions can safeguard their interests.

Addressing these challenges through comprehensive legal reforms, improved international cooperation, and technological advancements is crucial for India to achieve a truly efficient and effective cross-border insolvency framework.