CROSS-BORDER INSOLVENCY UNDER THE INSOLVENCY AND BANKRUPTCY CODE: NEED FOR REFORM

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ABSTRACT

The globalisation of trade and capital has produced a class of insolvencies whose assets, creditors and operations straddle several jurisdictions, yet the Insolvency and Bankruptcy Code, 2016 was principally conceived as a domestic, territorial statute. Its only original engagement with the transnational dimension lay in Sections 234 and 235, which permit the Central Government to conclude bilateral reciprocal agreements and empower the adjudicating authority to issue letters of request to foreign courts. This paper argues that the bilateral-treaty model has proved structurally inadequate: no reciprocal agreement has ever been concluded, the provisions have remained effectively dormant, and Indian tribunals have been left to improvise. The insolvency of Jet Airways (India) Limited, in which the National Company Law Appellate Tribunal sanctioned an ad hoc cooperation protocol between the Indian resolution professional and the Dutch trustee, exposed both the ingenuity and the fragility of judicial workarounds in the absence of a statutory framework. Drawing on the theoretical shift from strict territorialism towards modified universalism, the paper evaluates the UNCITRAL Model Law on Cross-Border Insolvency, 1997—now adopted in some sixty jurisdictions—and its pillars of access, recognition, relief and cooperation, together with the pivotal doctrine of the centre of main interests. It traces the domestic reform trajectory from the Insolvency Law Committee’s draft Part Z of 2018 through successive parliamentary committee recommendations, culminating in the Insolvency and Bankruptcy Code (Amendment) Bill, 2025, which was passed by both Houses of Parliament in early 2026. The paper contends that although the amendment marks a decisive break from the treaty model, its reliance on a bare enabling provision that delegates the entire framework to executive rule-making raises serious concerns of excessive delegation and legal uncertainty. It concludes that genuine reform demands substantive codification of the Model Law’s core principles within the Code itself, reinforced by specialised benches and institutional capacity, if India’s cross-border regime is to command international confidence.

Keywords: Cross-Border Insolvency; UNCITRAL Model Law; Insolvency and Bankruptcy Code, 2016; Sections 234 and 235; Centre of Main Interests; Modified Universalism

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I. Introduction

Three decades of economic liberalisation have woven Indian enterprises into global networks of ownership, finance and supply. A corporate debtor incorporated in India may today hold assets in Singapore, owe money to lenders in London and operate subsidiaries across the Gulf. When such an enterprise fails, its insolvency ceases to be a purely domestic event; it becomes a contest among creditors and courts spread across several sovereign jurisdictions. Cross-border insolvency is the branch of law that seeks to order this contest—principally by determining which court leads the proceedings, whether foreign proceedings and representatives will be recognised, and how competing estates are to be coordinated so that value is preserved rather than dissipated in a jurisdictional scramble.[1]

The Insolvency and Bankruptcy Code, 2016 (the Code) was a landmark consolidation of India's fragmented insolvency laws, but it was built around a domestic corporate debtor whose assets and creditors lie within India.[2] Its treatment of the transnational dimension was minimal and, as this paper argues, has proved unequal to the demands of modern commerce. Two provisions—Sections 234 and 235—were intended to bridge the gap, yet they rest upon a bilateral-treaty logic that has never been operationalised. The consequence has been a decade of judicial improvisation, culminating in a legislative response in 2025 that, while overdue, remains conceptually incomplete. This paper examines the existing regime, the judicial and theoretical responses to its deficiencies, and the shape that meaningful reform must take.

II. The Conceptual Framework and the UNCITRAL Model Law

Territorialism, universalism and modified universalism

Scholarship on cross-border insolvency oscillates between two poles. Strict territorialism treats each insolvency as confined to the territory of the forum: a court administers only assets situated within its borders and disregards foreign proceedings, producing a "grab rule" under which creditors race to seize local assets. Pure universalism, at the opposite extreme, envisages a single global proceeding conducted by the court of the debtor's home jurisdiction, whose orders bind assets everywhere. Neither pole is workable in a world of coequal sovereigns. The prevailing compromise, modified universalism, accepts a single main proceeding in the debtor's home jurisdiction while permitting ancillary or non-main proceedings elsewhere and

[1] Ian F. Fletcher, Insolvency in Private International Law 3-4 (Oxford University Press, Oxford, 2nd edn., 2005).
[2] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).

obliging courts to cooperate and coordinate. It is this philosophy that underpins the international instrument to which India's reformers have repeatedly turned.

The UNCITRAL Model Law, 1997

The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is not a treaty but a template offered to states for enactment into their domestic law.[3] It has been adopted, with local variations, in some sixty jurisdictions, including the United States, through Chapter 15 of its Bankruptcy Code, and the United Kingdom, through the Cross-Border Insolvency Regulations, 2006.[4] Its architecture rests on four pillars. First, access permits a foreign representative to apply directly to domestic courts. Second, recognition allows a domestic court to recognise a foreign proceeding as either a foreign main proceeding—one taking place where the debtor has its centre of main interests (COMI), presumptively the place of the registered office—or a foreign non-main proceeding, where the debtor merely maintains an establishment. Third, relief flows automatically or in the court's discretion upon recognition, chiefly a moratorium protecting the debtor's assets. Fourth, cooperation and coordination require courts and insolvency practitioners to communicate directly and to harmonise concurrent proceedings, subject always to a public-policy exception that preserves each state's power to refuse relief manifestly contrary to its fundamental values. The COMI concept is central: it identifies the jurisdiction whose proceeding is entitled to primacy and thereby supplies the very ordering principle that the Code's existing provisions conspicuously lack.

III. The Existing Regime: Sections 234 and 235

The statutory scheme

Section 234 empowers the Central Government to enter into bilateral agreements with the governments of foreign countries to give effect to the provisions of the Code, and to apply the Code, by notification, to assets of a corporate debtor situated in a country with which such an agreement subsists. Section 235 complements it by enabling the adjudicating authority, where satisfied that assets of the corporate debtor are situated abroad in such a country, to issue a letter of request to a court or authority of that country seeking action in respect of those assets.

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[3]UNCITRAL Model Law on Cross-Border Insolvency, adopted by the United Nations Commission on International Trade Law on May 30, 1997, available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last visited July 20, 2026).

[4]See 11 U.S.C., ch. 15 (2005) (United States); and The Cross-Border Insolvency Regulations, 2006 (S.I. 2006/1030) (United Kingdom).

Both provisions are thus expressly conditioned on the prior existence of a reciprocal arrangement.[5]

Structural deficiencies

The deficiencies of this design are fundamental rather than incidental. First, the entire scheme is contingent on bilateral treaties that have never materialised: to date India has concluded no such agreement, leaving both sections effectively dormant.[6] Second, treaty-making is inherently slow and piecemeal; negotiating separate reciprocal arrangements with each of India's many trading partners would take decades and would yield a patchwork of inconsistent standards. Third, the provisions confer power to seek cooperation abroad but say nothing of the converse and more common situation—how an Indian tribunal should treat a foreign proceeding, or a foreign representative seeking assistance in India. Fourth, the general law offers no adequate substitute: Section 13 of the Code of Civil Procedure, 1908 renders certain foreign judgments conclusive, and Section 44A permits execution of money decrees of reciprocating territories, but neither furnishes a mechanism for recognising foreign insolvency proceedings or coordinating parallel estates.[7] The result is a statutory vacuum that leaves Indian tribunals without guidance precisely when transnational insolvencies arise.

IV. Judicial Improvisation in the Absence of a Framework

The Jet Airways protocol

The inadequacy of the regime was thrown into sharp relief by the insolvency of Jet Airways (India) Limited. While corporate insolvency resolution proceedings were initiated in India in June 2019 by a consortium led by the State Bank of India, a court in the Netherlands had already declared the airline bankrupt and appointed a trustee at the instance of European creditors. The National Company Law Tribunal initially declared the Dutch proceedings a nullity, reasoning that, absent a reciprocal arrangement under Sections 234 and 235, the foreign order could not be recognised. On appeal, the National Company Law Appellate Tribunal took a markedly more pragmatic course: it directed the Indian resolution professional and the Dutch trustee to explore cooperation and, by its order of 26 September 2019, approved a cross-border

[5] The Insolvency and Bankruptcy Code, 2016, ss. 234-235.

[6] Report of the Insolvency Law Committee on Cross Border Insolvency 8-12 (Ministry of Corporate Affairs, Government of India, October 2018), available at: https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf (last visited July 20, 2026).

[7] The Code of Civil Procedure, 1908 (Act 5 of 1908), ss. 13, 44A.

insolvency protocol negotiated between them.[8] The protocol recognised India as the centre of main interests, treated the Indian process as the main proceeding, and permitted the Dutch trustee to participate in the Indian committee of creditors while the two estates shared information.

The limits of ad hoc solutions

The Jet Airways protocol was a creative and, ultimately, successful improvisation; it borrowed openly from the vocabulary of the Model Law even though that instrument has no force in India. Yet its very success underscores the problem. The outcome depended on the willingness of the tribunal and the foreign court to cooperate, on the goodwill of the practitioners, and on the fortuity that India was the natural COMI. A protocol negotiated case by case offers creditors no predictability, no certainty as to recognition, and no assurance that a differently constituted bench would reach the same result—an uncertainty ill-suited to the Code's paramount object of maximising the value of the corporate debtor's assets.[9] Comparable difficulties surfaced where the foreign assets of a corporate group had to be drawn into an Indian resolution, exposing the absence of any settled rule for group and cross-border coordination. Judicial ingenuity, in short, can mitigate but cannot cure a legislative gap.

V. The Reform Trajectory

From expert committees to draft Part Z

The case for adopting the Model Law is not new. Successive expert bodies had recommended a comprehensive cross-border framework long before the Code was enacted.[10] The decisive contribution came from the Insolvency Law Committee, whose Report on Cross-Border Insolvency of October 2018 concluded that Sections 234 and 235 were ad hoc and inadequate and recommended the enactment of a self-contained chapter, styled draft Part Z, modelled on the UNCITRAL Model Law with modifications suited to Indian conditions.[11] The draft addressed scope and applicability, recognition of foreign proceedings, access for foreign

[8] Jet Airways (India) Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 of 2019, order dated September 26, 2019 (NCLAT).

[9] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (recognising maximisation of the value of the corporate debtor's assets as a principal object of the Code).

[10] The recommendations of the Eradi Committee (2000), the Mitra Committee (2001) and the Irani Committee (2005) are discussed in the Report of the Insolvency Law Committee on Cross Border Insolvency, supra note 6, at 4-6.

[11] Id. at 13-15 (recommending the insertion of a self-contained "Part Z" modelled on the UNCITRAL Model Law, 1997, with modifications suited to Indian conditions).

representatives, the reliefs available, and cooperation and oversight, and it proposed confining Sections 234 and 235 to individuals and partnerships. Parliamentary standing committee reports in subsequent years reiterated the urgency of adopting such a framework.

The Insolvency and Bankruptcy Code (Amendment), 2025

After years of deliberation, the reform finally reached Parliament. The Insolvency and Bankruptcy Code (Amendment) Bill, 2025 was introduced in the Lok Sabha in August 2025, referred to a Select Committee, and passed by both Houses of Parliament by early 2026.[12] Among its several innovations—mandatory admission of complete applications, a creditor-initiated resolution process, and a framework for group insolvency—the Bill introduces, for the first time, a dedicated cross-border insolvency mechanism. Crucially, however, it does so through an enabling provision: rather than codifying the Model Law, it empowers the Central Government to prescribe by rules the manner and conditions for the administration and conduct of cross-border insolvency proceedings. The substantive framework—the definitions of main and non-main proceedings, the tests for recognition, and the reliefs available—is thereby left to subordinate legislation yet to be framed.

The concern of excessive delegation

This drafting choice lies at the heart of the continuing need for reform. By leaving the entire architecture of cross-border insolvency to executive rule-making, and by permitting rules to modify provisions of the Code and even the Companies Act, 2013, the amendment arguably strays into impermissible delegation of essential legislative function. The Supreme Court has long held that a legislature may not abdicate its duty to lay down policy and standards; delegation becomes excessive where the parent statute declares no policy, expresses it in vague and general terms, or confers unguided power on the executive to alter that policy at will.[13] The concern is not merely doctrinal. Foreign creditors and courts require the certainty of a statutory text to assess how their proceedings will be treated in India; a framework that exists only in prospective rules, and that may be altered at executive discretion, offers precisely the unpredictability that eroded confidence under the old regime. The Select Committee itself

[12]The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, introduced in the Lok Sabha on August 12, 2025, passed by the Lok Sabha on March 30, 2026 and by the Rajya Sabha on April 1, 2026. See also PRS Legislative Research, "The Insolvency and Bankruptcy Code (Amendment) Bill, 2025", available at: https://prsindia.org/billtrack/the-insolvency-and-bankruptcy-code-amendment-bill-2025 (last visited July 20, 2026).

[13]Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. Asstt. Commr., Sales Tax, (1974) 4 SCC 98.

recommended that the basic tenets of the framework be codified within the Code, rather than delegated wholesale.

Comparative lessons in codification

The experience of jurisdictions that have enacted the Model Law confirms the value of codification. In the United States, Chapter 15 sets out, within the primary bankruptcy statute, the tests for recognition, the automatic consequences that follow the recognition of a foreign main proceeding, and the discretionary relief available in aid of foreign representatives; that predictability has made the American courts a favoured venue for recognising and enforcing foreign restructurings. The United Kingdom, through the Cross-Border Insolvency Regulations, 2006, likewise gives the Model Law the force of domestic law while retaining a residual common-law power of assistance. In both systems the governing principles reside in a legislative text that creditors can read in advance, and the role of the executive is confined to procedural detail.[14] The lesson for India is direct. Where the substantive rules of recognition and relief are contained in primary legislation, foreign parties can predict the treatment of their proceedings and order their conduct accordingly; where those rules are consigned to as-yet-unframed executive rules, the very uncertainty that paralysed Sections 234 and 235 is reproduced in a new guise. Codification is therefore not a matter of drafting preference but of the reciprocal confidence on which cross-border cooperation ultimately depends.

VI. The Continuing Need for Reform

Reform, therefore, is not concluded by the 2025 amendment; it is only begun. Three measures are essential. First, the core principles of the Model Law—access, recognition on the basis of COMI, automatic and discretionary relief, and mandatory cooperation, together with a public-policy safeguard—should be enacted in the primary statute rather than relegated to rules, so that the framework carries the certainty and democratic legitimacy of legislation. Second, the concept of COMI must be defined with care, because the offshore holding structures common to Indian corporate groups can obscure where a debtor's true nerve-centre lies; a substance-over-form approach, anchored in the registered-office presumption but open to rebuttal, is preferable to a purely formal test. Third, institutional capacity must be built: the National Company Law Tribunal is already heavily burdened, and complex cross-border coordination

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

will demand specialised benches, trained members and settled protocols for direct court-to-court communication. Without this institutional investment, even a well-drafted law will falter in application.

VII. Conclusion

India's engagement with cross-border insolvency has moved, haltingly, from denial to improvisation to legislation. Sections 234 and 235 embodied a bilateral-treaty model that never left the drawing board; the Jet Airways protocol displayed both the necessity and the limits of judicial creativity; and the 2025 amendment has at last acknowledged, in statutory form, that a dedicated framework is indispensable. Yet by adopting an enabling shell in place of a codified regime, Parliament has deferred rather than resolved the central question. The measure of successful reform will be whether India ultimately embraces the substance of the UNCITRAL Model Law—predictable recognition, principled coordination and reciprocal confidence—within its primary law, and equips its tribunals to apply it. Until then, the need for reform, though narrowed, endures.