FROM ASPIRATION TO OPERATION: TRACING THE STRUCTURAL FAILURE OF SECTION 234 AND 235 AND THE PROMISE OF THE 2026 AMENDMENT

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ABSTRACT

India's Insolvency and Bankruptcy Code, 2016[1] marked a transformative shift in domestic insolvency resolution. Yet its cross-border provisions (Section 234 and 235) remained operationally dormant for nearly a decade. Existing scholarship attributes this failure to legislative inadequacy and non -adoption of the UNCITRAL Model Law on Cross-Border Insolvency,1997[2]. This paper aims to present an alternative understanding to the underutilization of Section 234 and 235, by tracing it within a deeper sovereign-protective policy temperament. Analyzed from India's international economic engagement in this period, most sharply in its 2016 model Bilateral Investment Treaty[3], which similarly demanded reciprocity as a condition of cooperation and resisted automatic deference to foreign legal systems, making international adjudication operationally impracticable, this paper argues that the bilateral agreement requirement of Section 234 was not a drafting oversight but a structural choice. Through this lens, the paper traces how judicial improvisation in Jet Airways and Videocon exposed the cost of this legislative dormancy and evaluates the concept of modified universalism as India's emerging jurisprudential response to the absence of statutory guidance. It then assesses the Insolvency and Bankruptcy Code (Amendment) Act, 2026[4], examining whether its cross-border provisions represent a genuine philosophical departure from India's territorialist instinct or merely a procedural recalibration that leaves the deeper structural resistance intact. Further the paper aims to identify reforms that remain necessary for India's cross-border regime to match the ambition of its domestic framework.

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1 Insolvency and Bankruptcy Code 2016 <https://ibclaw.in/insolvency-and-bankruptcy-code-2016-ibc-bare-act/>accessed 5 June 2026.

2 United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997) UN Doc A/52/17, annex I <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency >accessed 5 June 2026.

3 Ministry of Finance, Government of India, Model Text for the Indian Bilateral Investment Treaty (2016) <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf >accessed 5 June 2026.

4 President Assents to Insolvency and Bankruptcy Code (Amendment) Act 2026' (IBC Laws) <https://ibclaw.in/president-assents-to-insolvency-and-bankruptcy-code-amendment-act-2026/ >accessed 5 June 2026.

Introduction

India's economic ambition over the years has consistently positioned itself as a destination for global capital and a participant in international commerce. The Insolvency Code was in many ways the legal infrastructure that this ambition demanded. Within a few years of its enactment, the IBC had demonstrably improved recovery rates, reduced resolution timelines, and transformed the culture of credit discipline in Indian markets[5].

While the IBC overhauled domestic insolvency resolution, it left its cross-border provisions in a state of studied inertia. Section 234 and 235 existed but were never operationalized or tested[6]. India did not conclude a single bilateral agreement under Section 234. Not one letter of request was issued under Section 235. For an economy increasingly integrated into global supply chains and capital markets, this was a striking omission[7].

The standard explanation, that India simply had not yet adopted the UNCITRAL Model law is accurate. However, it describes a symptom without explaining the cause. A deeper understanding of the cause can be traced through the policy temperament that was simultaneously at work across India's international economic engagements. The same years that saw the dormancy of Section 234 and 235 also saw India terminate over fifty bilateral investment treaties, produce a 2016 Model BIT that made international arbitration practically inaccessible, and adopt an across-the-board posture of resistance to automatic deference to foreign legal systems[8]. The bilateral agreement requirement of Section 234 was structurally identical in its effect to the Model BIT's five-year exhaustion of local remedies requirement. Both acknowledged international cooperation in the text of the law while ensuring it remained unreachable in practice[9].

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[5] Indian Institute of Management Ahmedabad and Insolvency and Bankruptcy Board of India, *Report of Study on Effectiveness of the Resolution Process: Firm Outcomes in the Post-IBC Period* (IBBI 2023) <https://ibbi.gov.in/uploads/whatsnew/59f737b213b4700cc16428aefd62869a.pdf >accessed 5 June 2026.

[6] ICSI Institute of Insolvency Professionals, 'Framework for Cross-Border Insolvency under IBC, 2016' IBC Knowledge Capsule Series 15 <https://icsiiip.in/panel/assets/images/knowledge_capsules/16331593188523IBC_Knowledge_Capsule_15.pdf> accessed 5 June 2026.

[7] Melan Martin, 'Bankruptcy and Insolvency Issues Across the Border' (2026) 12(1) International Journal of Law 422< https://www.lawjournals.org/assets/archives/2026/vol12issue1/12086.pdf >accessed 5 June 2026.

[8] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) Northwestern Journal of International Law and Business 1 <https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss1/1/ >accessed 5 June 2026.

[9] Matthew Hodgson and Sanya Sharma, 'The Aftermath of India's 2016 Model BIT: Safeguarding Present and Future Investments' (2022) 8(1) NLSBLR, Article 3 <https://repository.nls.ac.in/nlsblr/vol8/iss1/3 >accessed 5

The courts, left without legislative guidance improvised. In Jet Airways, the NCLAT fashioned a cooperative arrangement with the Dutch bankruptcy administrator that had no statutory basis, recognizing parallel proceedings under what is characterized as pure universalism[10]. In Videocon, the NCLT applied the doctrine of substantive consolidation to extend the moratorium of foreign assets, reaching for an international insolvency concept without any framework to define its limits or protect dissenting creditors, an approach subsequently reversed by the NCLAT in 2026, which held that foreign assets held through subsidiaries could not be treated as assets of the parent company for CIRP purposes. These decisions were pragmatically useful and doctrinally significant, but they were also fragile as their outcomes were dependent on the disposition of particular benches rather than predictable legal rules. They pointed, imperfectly, towards a modified universalism as India's instinctive jurisprudential response, without the legislative foundation.

However, The Insolvency and Bankruptcy Code (Amendment) Act, 2026 now creates the legislative space that these decisions exposed as necessary. The Central Government is empowered to prescribe rules for cross-border insolvency proceedings including recognition of foreign insolvency proceedings, with special benches designated for such cases. Whether that space is used to build a genuinely universalist framework or whether the sovereign - protective instinct that kept Section 234 and 235 dormant reasserts itself through reciprocity condition and the broad public policy exceptions in the subordinate legislation that follows is the question on which the success of this reform will turn.

The Original Promise: Legislative Assumptions Behind Section 234 and 235

Understanding the original legislative assumption is essential to understanding why Section 234 and 235 failure was structural rather than incidental. The legislative architecture of 2016 reflected a specific set of assumptions about how cross-border insolvency would develop. Parliament assumed, first, that bilateral agreements would be concluded with India's major trading partners within a reasonable period following enactment. Section 234 empowered the Central Government to enter into such agreements, while Section 235 built its entire operational mechanism on their prior existence as the letter of request mechanism was only available in relation to countries with which reciprocal arrangements had already been made

June 2026.

[10] Aditi Singh, 'India's Tryst with Cross-Border Insolvency: A Crooked Choice between Territorialism and Universalism' (2024) 1.2 CLCR 226< https://www.scconline.com >accessed 5 June 2026.

under Section 234[11]. The implication was therefore clear, that bilateral agreements were not a contingency but an expectation. The provision was drafted on the assumption that executive action would follow legislative authorization in the ordinary course.

The second assumption was that this bilateral framework would be sufficient for India's cross-border insolvency needs in the near term. The cross-border dimension, while acknowledged, was treated as secondary to the domestic architecture. The Insolvency Law Committee, constituted by the Ministry of Corporate Affairs to suggest amendments to the IBC, itself decided to submit its cross-border recommendations separately, considering the complexity of the subject matter and the requirement of in-depth research to adopt the UNCITRAL Model Law for India[12]. What Parliament did not anticipate was that the bilateral agreement mechanism would prove not merely slow but categorically inadequate for the cross-border insolvency challenges. The primary motive of the code is to establish a consolidated framework for insolvency in a time-bound manner[13]. A bilateral treaty framework, requiring independent diplomatic negotiation with each jurisdiction, was fundamentally incompatible with this time-bound objective. By the time the government entered into an agreement, the value of the debtor's assets would have depreciated, leading to loss for both creditors and debtors[14].

However, the most consequential assumption was that India's sovereign-protective instincts in international economic law would not obstruct the operationalization of Section 234 and 235. This assumption was proved wrong, as the same period that saw these sections lie dormant witnessed India terminate over fifty bilateral investment treaties and produce a Model BIT that made international adjudication practically inaccessible[15]. The structural parallel is precise. Just as the Model BIT acknowledged international arbitration in its text while building in conditions that made it operationally unreachable, Section 234 and 235 acknowledged cross-border cooperation in their text while conditioning it on bilateral agreements that were never concluded. The provisions therefore failed not because Parliament forgot to operationalize them, but because the policy environment in which they were embedded made operationalization structurally improbable. Even if these provisions were notified, they would not have provided an effective solution. The original promise of Section 234 and 235 was

[11] ICSI Institute of Insolvency Professionals (n 2).
[12] Manasi Lad-Gudhate, 'Cross-Border Insolvency' (2023) Chartered Secretary 67 https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf accessed 5 June 2026.
[13] Melan Martin (n3).
[14] Aditi Singh (n6).
[15] Ranjan and Anand (n4).

therefore undermined at the moment of their drafting, not by what they stated, but by what they assumed.

The Judicial Vacuum and Limits of Judicial Intervention

In the absence of any operative statutory framework, Indian courts were left to navigate cross-border insolvency through improvisation. The results were neither consistent nor predictable. The Jet Airways and Videocon insolvencies, the two most significant cross-border cases India has encountered, illustrate both the judicial creativity this vacuum demanded and its inherent limitations.

In Jet Airways, the NCLT held that the Dutch court order was a nullity in the eyes of Indian Law, that Section 234 and 235 were unenforceable, and that no reciprocal arrangement with the Netherlands existed, directing the IRP to proceed without being influenced by the foreign proceedings whatsoever[16]. The NCLAT reversed this entirely on appeal[17], fashioning a cooperative protocol between the Dutch Administrator and the Indian Resolution Professional under what it characterized as the spirit of modified universalism[18]. Two tribunals, applying identical statutory provisions to identical facts, reached diametrically opposite conclusions. This was not judicial disagreement about law but was evidence that the law provided no answer at all.

Videocon compounded the problem. The NCLT applied substantive consolidation to extend the moratorium to foreign assets and subsidiaries, reaching for an international insolvency doctrine that had no statutory basis, no defined scope, and no protective framework for dissenting creditors[19]. In each case, the outcome depended not on the application of law but on the judicial temperament of the bench. The NCLAT ultimately reversed this position in 2026, reaffirming the principle of separate legal personality of subsidiaries[20]. This

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[16] State Bank of India v Jet Airways (India) Limited, CP 2205 (IB)/MB/2019, NCLT Mumbai, Order dated 20 June 2019 <https://ibclaw.in/state-bank-of-india-vs-jet-airways-india-ltd-nclt-mumbai-bench/ >accessed 5 June 2026.

[17] Jet Airways (India) Limited (Offshore Regional Hub) v State Bank of India & Anr, NCLAT New Delhi <https://ibclaw.in/jet-airways-india-ltd-offshore-regional-hub-vs-state-bank-of-india-anr-nclat-new-delhi-2/ >accessed 5 June 2026.

[18] Aditi Singh (n6).

[19] State Bank of India v Videocon Industries Limited, NCLT Mumbai, Order dated 12 February 2020 <https://ibclaw.in/wp-content/uploads/2021/01/State-Bank-of-India-Vs.-Videocon-Industries-Limited-VIL-and-Ors.-12.02.2020.pdf >accessed 5 June 2026.

[20] State Bank of India v Venugopal Dhoot, (2026) ibclaw.in 666 NCLAT <https://ibclaw.in/nclat-rules-foreign-oil-and-gas-assets-of-subsidiaries-cannot-be-included-in-cirp-of-videocon-industries-ltd/>accessed 5 June 2026.

demonstrates that without statutory guardrails, even the outcomes of judicial improvisation remain unstable and reversible.

The principle that emerged from these decisions is modified universalism, as it acknowledges the practical impossibility of pure territorialism and pure universalism alike, and centers cooperation and comity as its organizing values[21]. The Jet Airways and Videocon cases were impliedly adhering to its principles, and a structured framework recognizing the concept would assist India in setting internationally acceptable judicial precedents. But a principle without a statute is not a framework but a judicial disposition that produces workable outcomes in individual cases while generating no predictable rule for the next case.

The contrast with jurisdictions that have enacted the UNCITRAL Model Law makes this gap concrete. For example, in Australia, the Cross-Border Insolvency Act 2008 gives the Model law the force of law, creating a structured recognition regime[22]. Under Article 15, the court examines COMI through the rebuttable presumption of Article 16, and recognition follows as of right upon satisfaction defined criteria under Article 17. When the Australian Court declined recognition in Re O'Neill Partners, it did so not for want of power but because evidentiary requirements had not been met, directing the applicant to file further evidence[23]. Refusal was itself rule-bound and correctable. Indian courts in Jet Airways had no such architecture. The NCLAT improvised one because none existed. The difference between these outcomes was the presence or absence of a statute.

This is precisely why judicial creativity alone was never going to be sufficient and why the 2026 Amendment, which for the first time creates legislative space for a statutory recognition framework, marks a genuine departure and a new starting point. Whether that space is used to build what Jet Airways and Videocon exposed as necessary is the question the next section addresses.

[21] Aditi Singh (n6).
[22]Australian Restructuring Insolvency and Turnaround Association https://arita.com.au/ARITA/ARITA/z_Old_content/Insolvency_Law_Reform/Corporate_Insolvency_Law_Reform_items/2008/Cross-Border_Insolvency_Act_2008.aspx, 'Cross-Border Insolvency Act 2008' accessed 5 June 2026.
[23] In Re O'Neill Partners Commercial Lawyers Incorporating Sally Nash & Co and Ors, NSD 866 of 2016, Federal Court of Australia, 4 July 2016< https://d2-manupatra-in.opj.remotlog.com/ShowPDF.asp?flname=In_Re_Oneill_partners_commercial_lawyers_incorporaAUFC2016211223112614124lCOM83353.pdf >accessed 5 June 2026.

The 2026 Amendment: Departure or Continuity?

A. From Bilateral Diplomacy to Judicial Recognition

India's cross-border insolvency reform cannot be read in isolation from its broader economic trajectory. The 2026 Amendment arrives as part of a sustained legislative effort to position India as a credible destination for global capital, an effort that has included overhauling its arbitration framework, streamlining corporate governance and strengthening creditor rights through the IBC itself. Cross-border insolvency reform is the missing piece of this architecture. India's absence from the Global Model Law framework has been conspicuous and costly as foreign creditors have faced uncertainty about the recognition of their rights in Indian CIRPs[24].

Section 240C of the 2026 Amendment addresses this directly, by empowering the Central Government to prescribe rules for recognition of foreign insolvency proceedings generally without requiring the country-specific bilateral agreements as a precondition. It moves cross-border insolvency from the domain of diplomacy to the domain of law. The COMI doctrine (center of main interest), once codified through rules, would allow Indian insolvency proceeding to claim primacy and seek recognition abroad, which is transformative for Indian creditors pursuing foreign assets of insolvent companies[25]. This is a genuine departure from the architecture of Section 234 and 235.

B. Recognition and COMI: What the Amendment Changes

Section 240C creates legislative space not a framework. The recognition criteria, COMI determination standards, relief available upon recognition, and power of foreign representative remain entirely deferred to subordinate legislature not yet enacted. The Jet Airways problem is therefore acknowledged by the amendment but not solved by it. Similarly, the group insolvency provisions under Section 59A acknowledge the Videocon problem without resolving it. Rules may provide for common benches, coordinate proceeding among Committee of Creditors but the operative content remains with the Central Government. What the 2026 amendment achieves is converting judicial improvisation into a legislative mandate as court will no longer

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[24] Shubhamkar Bhandari, 'Insolvency Globalization: India's Adoption of the UNCITRAL Model Law' (Khurana and Khurana, Mondaq, 9 May 2025). <https://www.mondaq.com/india/insolvencybankruptcy/1622318/insolvency-globalization-indias-adoption-of-the-uncitral-model-law >accessed 5 June 2026.

[25] Bhandari (n20).

need to reach for modified universalism without authority. That shift is itself significant, even if the architecture has not yet been built.

C. Does Sovereign Control Still Persist?

The more difficult question that remains to be answered is whether the sovereign-protective instinct that produced Section 234 and 235 has been genuinely abandoned or merely repackaged. Two features of Section 240C suggest the latter remains a serious possibility.

The first is the notification-based architecture. Section 240C empowers rules to apply to proceedings involving such countries or territories as may be notified by the Central Government. Whether the notification power will be exercised broadly that is extending recognition regardless of whether a foreign state has adopted the Model Law or narrowly, limiting cooperation to select jurisdictions remains unknown. If the Central Government notifies only countries that have adopted the Model Law or concluded cooperation arrangements with India, the amendment reintroduces country-specific conditionality through subordinate legislation which functionally replicates the bilateral agreement requirement of Section 234 in a more sophisticated form. The United States, United Kingdom and Australia all operate without reciprocity requirements, extending recognition regardless of whether the foreign state has adopted the model law[26]. If India's notification choices produce a functionally equivalent gatekeeping effect, the amendment will have replaced the bilateral agreement requirement of Section 234 with a more sophisticated version of the same sovereign-protective conditionality. Section 240C therefore has left this question open and entirely to executive discretion which is precisely what Section 234 and 235 did a decade ago.

The second is the public policy exception. India's own BIT experience is instructive here as the 2016 Model BIT eliminated Fair and Equitable treatment and introduced exhaustive local remedies requirements, each mechanism through which international cooperation was acknowledged in principle while being constrained in practice. A broadly interpreted public policy exception in cross-border insolvency rules would perform the same function, allowing refusal of recognition on grounds that replicate the sovereign-protective gatekeeping of Section 234 and 235 without explicitly reinstating the bilateral architecture. The public policy

[26] Manjima Banerjee, 'Integrating the UNCITRAL Model Law into India's Insolvency Framework: Challenges and Solutions' (2024) 6(5) International Journal for Multidisciplinary Research 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6216458 accessed 5 June 2026

exception in UNCITRAL model is deliberately narrow, framed around the word manifestly to signal that ordinary policy disagreements do not qualify[27]. Indian courts have historically applied public policy exception broadly, a disposition that, applied to cross-border insolvency recognition, could functionally negate the amendment's cooperative intent.

The 2026 Amendment therefore represents a genuine but incomplete departure. It abandons the mechanics of Section 234 and 235, but the policy instincts that produced those mechanics has not been legislatively foreclosed. They remain available to reassert themselves through notification choices, reciprocity conditions, broad public policy exceptions and institutional inertia in the subordinate legislation that follows. The amendment is best understood not as a solution but as a threshold that India has now crossed. What remains is the genuine harder work of universalist commitment.

Conclusion

India's cross-border insolvency journey has been, at its core, a story of structural ambivalence. The IBC arrived in 2016 as a genuine transformative domestic instrument, yet its cross-border provisions were designed, from the outset, to remain inoperative. The paper has argued that this inoperability was not accidental. Section 234 and 235 reflected the same sovereign-protective policy temperament that simultaneously produced a 2016 Model BIT making international adjudication practically inaccessible. Both frameworks acknowledging international cooperation in their text while building in conditions that made it unreachable in practice.

The judicial consequences of this dormancy were significant. Jet Airways demonstrated that in the absence of statutory recognition mechanisms, the outcome of cross-border insolvency depended entirely on which tribunal heard the case. The NCLT found itself with no legal basis to engage with the Dutch proceedings. The NCLAT improvised cooperation from first principles. Videocon extended this improvisation to substantive consolidation without legislative guardrails. These decisions were pragmatically useful but jurisprudentially fragile as they created no framework within which foreign creditors could reliably plan.

The 2026 Amendment's section 240C marks a genuine threshold. The shift from bilateral diplomacy to general legislative empowerment is architecturally significant as it abandons the

27 Manjma Banerjee n(2).

design of section 234 and 235. But the amendment is enabling legislation not a framework. The question that will determine whether India builds a genuinely universalist cross-border insolvency regime and whether notification choices introduce reciprocity through the back door or whether the public policy exception is interpreted narrowly or broadly still remains unresolved. Therefore the 2026 Amendment abandons the mechanics of Section 234 and 235, but not necessarily the policy instincts that produced them. Whether those instincts are overcome will be determined not by what parliament enacted but what the executive does next.