
A COMPREHENSIVE ANALYSIS OF CROSS-BORDER INSOLVENCY

Anushka Sonavane, B.A. LL.B., SVKM'S Pravin Gandhi College of Law

ABSTRACT

Cross-border insolvency also known as international insolvency has gained significance in the era of globalization, where businesses operate across multiple jurisdictions. The lack of a uniform legal frameworks poses challenges in resolving cross-border insolvency disputes.

This paper explores the concept, principles, international frameworks, judicial cooperation, and emerging trends in cross-border insolvency. It examines key legislations such as the UNCITRAL Model Law and its adoption across jurisdictions while assessing challenges in its implementation.

The paper concludes with recommendations for strengthening global insolvency frameworks to enhance predictability and efficiency in cross-border insolvency proceedings.

Keywords: Cross-border insolvency, UNCITRAL Model Law, judicial cooperation, insolvency frameworks, globalization.

Introduction:

“With great investments comes the great risk of Insolvency.” India, stands out as on the key destination for cross-border capital. The country recorded an impressive INR 91.6 million unique investments in the financial year 2024; reflecting its increasing integration with global capital markets and international business. The transformation of India from a largely closed and state-controlled economy, restricted with foreign trade, limited foreign investments and protectionist policies to becoming a blooming hub for foreign investments and international business, globalisation took a foot step in India, expanding its way to the International Market.

The economic liberalisation in the early 1990's, marked with the introduction of the New Economic Policy-1991, brought a paradigm shift in Indian economy. The unsustainable Balance of payments (BOP), galloping inflation, First Gulf war, Rise in fiscal deficit; led to formulation of a policy which concentrated solely on recovering India's economy via LPG- Liberalisation, Privatisation and Globalisation. This framework catalysed the establishment of Multinational Companies, Private and Global Banks, encouraged Cross-border Mergers and acquisitions and triggered a substantial inflow of Foreign Direct Investments (FDI), fundamentally transforming India's economic landscape by inculcating financial discipline.

Globalisation not only brought prosperity, employment opportunities, and technological advancements; it also carried new challenges- particularly in the domain of corporate insolvency and financial distress. With the beginning of global operation in Indian market, concern regarding potential failure by these companies extended far beyond their shareholders. The interconnected nature of cross-border entities meant that insolvency could adversely impact a wide spectrum of stakeholders: Banks, Financial Institutions, MSMEs, Employees, Workmen, Suppliers, Customers, and Creditors; both domestic and international.

The interdependence created systemic vulnerabilities, with the risk of economic instability in cases of corporate failures left Indian creditors and courts grappling with legal uncertainties; thus, establishing a need for a comprehensive legal framework to deal with such cross-border insolvency. The Indian legislature in need to address these challenges, enacted a unified and time-bound mechanism - Insolvency and Bankruptcy Code (IBC), 2016.

The main objective of the code was to consolidate and amend laws relating to restructurization and insolvency resolution of corporates, partnership firms and individuals; considering the

interests of relevant stakeholders. Hence, laying foundation for addressing the cross-border insolvency is essential, as it is a growing concern in the age of globalisation.

While IBC made a significant progress in streamlining domestic insolvency processes, its provisions regarding cross-border insolvency remained limited. Simultaneously, questioning India's ability to resolve disputes involving foreign creditors, offshore assets and multinational corporate structures in an internationally accepted manner. Thus, highlighting the Indian laws to be aligned with harmonised global standards such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border insolvency.

Meaning of Cross-border Insolvency:

In a globalised world, the interconnected and co-dependent economies have given rise to numerous multinational corporations (MNCs) to engage in cross-border trade and investment, by spreading its assets, operation over multiple jurisdictions.

While such entities face financial distress and run into insolvency in one jurisdiction, the interconnectedness of economies hampers the entities assets in multiple jurisdictions. Thus, leading to Cross-border insolvency, also known as international insolvency.

Hence when an insolvent debtor has credit and/or debtors in more than one jurisdiction i.e. in different countries, this circumstance is referred to as cross-border insolvency or international insolvency.¹

Legal Frameworks Governing Cross-Border Insolvency:

Cross-border insolvency necessitates international cooperation as traditional domestic insolvency framework often proves inadequate while dealing with the complex cross-border claims. The complexities arise due to conflicting national laws, jurisdictional overlaps, differences in legal principles, and significant challenges in recognition and enforcement of foreign insolvency judgements or proceedings.

In order to ensure the application of principle of natural justice, and to establish a fair, efficient and equitable resolution of insolvency cases that transcend national boundaries; cross-border

¹ <https://www.lexology.com/library/detail.aspx?g=83c36e66-e1e2-4804-a2ca-329ddb9d8fc1>

insolvency requires international cooperation and harmonisation of laws. Thus, collectively requiring a mechanism that facilitates coordination between courts and insolvency professionals across different jurisdictions.

Cross-Border Insolvency And IBC:

The integration of India's economy with global markets has brought prosperity to the country, however, it has also introduced complex legal challenges particularly when an insolvent debtor's assets or creditors are spread across multiple jurisdictions.

In order to address these challenges, the Insolvency and Bankruptcy Code, 2016 (IBC) incorporates certain provisions aimed at facilitating cooperation in cross-border insolvency matters, primarily through Section 234 and Section 235.

While these provisions mark an important step towards recognising the global nature of insolvency disputes, they remain limited in scope and application.

- **Section 234-Bilateral Agreements-**

Section 234 empowers the Central Government to enter into bilateral agreements with government of any foreign country for the purpose of enforcing the provisions of the IBC in situations involving cross-border insolvencies. This provision applies to a corporate debtor or a personal guarantor is applicable to corporate debtor or personal guarantor of a corporate debtor, where the assets or properties are situated outside India. The applicability of this section is subject to conditions specified in the respective bilateral agreements.

- **Section 235- Application when there is a Bilateral Agreement-**

Section 235 of IBC, allows resolution professional, liquidator, or bankruptcy trustee, to make an application under section 234 to make application in case of insolvency resolution process, or liquidation, or bankruptcy proceedings, regarding assets of corporate debtor or debtor including a personal guarantor of corporate debtor, situated in outside India, provided there is a bilateral agreement with India under section 234.

However, it's has been clearly proven that these present provisions fail to provide a

comprehensive framework to address cross-border insolvency issues.

The major reasons for such failure can be highlighted as follows: ²

1. Bilateral agreements are a time-consuming, expensive and not conclusive source of reliance due to the multiple layers of negotiation involved.
2. Balancing competing clauses of different treaties entered into with separate jurisdictions due to the presence of assets of the corporate debtor's assets in multiple locations could be one of the most cumbersome issues to be addressed by the adjudicating authority.
3. Such an ad-hoc procedure as provided under these sections of IBC would significantly delay the insolvency proceedings.

The UNCITRAL Model Law on Cross-Border Insolvency:

India's framework in relation to cross-border mergers are found in Section 230-234 of the Companies Act, 2013 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 permitting a smooth legal ground for Foreign Companies to merge with Indian Companies.³ As per the MCA notification of 13 April 2017, these include the US, UK, Singapore, and others.⁴

While progressive, these provisions address **corporate restructuring in solvent companies**, not insolvency.⁵

The objectives of merger law is market expansion, operational efficiency, corporate consolidation; making it entirely different from the objectives of Insolvency law, which focus primarily on equitable asset distribution, creditor protection, and business continuity.

Thus, the limitations of Section 234 and Section 235 of the IBC, needs its compliance with a more uniform law like UNCITRAL; in order to overcome these shortfalls.

The UNCITRAL Model Law on Cross-border Insolvency (1997) is designed by the United

² <https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf>

³ Companies Act 2013, s 234

⁴ MCA, 'Notification of Jurisdictions for the Purpose of Section 234' (13 April 2017) <https://www.mca.gov.in>

⁵ Umakanth Varottil, 'Cross-Border Mergers and Acquisitions' (2018) 31 NLSIR 1, 5.

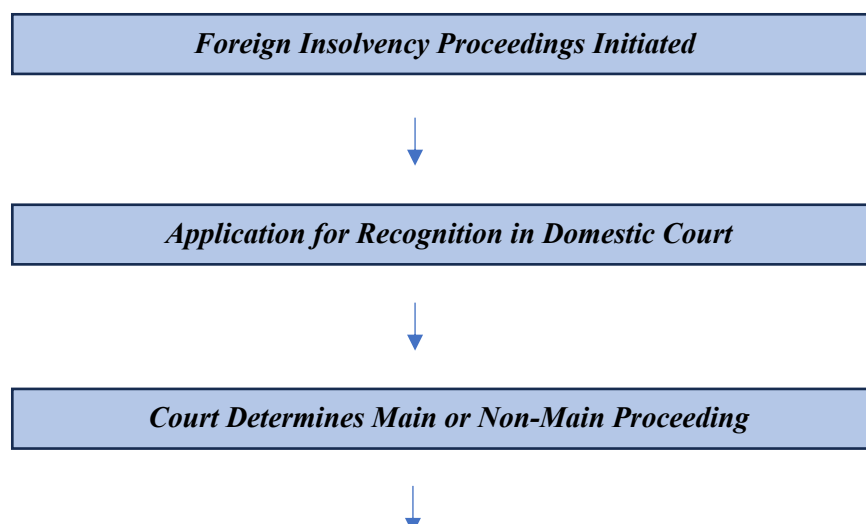
Nations Commission aims at harmonising cooperation between domestic and foreign courts in Insolvency proceedings. It also facilitates recognition of foreign insolvency proceedings and foreign representatives. Balances the interests of domestic and international creditors by ensuring fair and efficient administration of cross-border insolvency cases. Thus, provides predictability and legal certainty, enhancing the investors' confidence and protecting the value of assets.

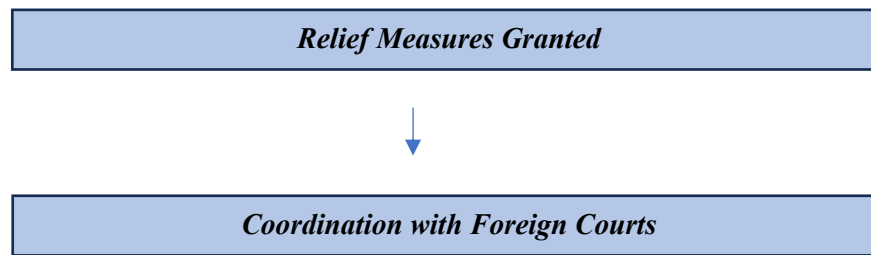
It has been adopted by over 50 jurisdictions including United States, United Kingdom, and Australia. The key principle of model law includes

- **Access:** Foreign representatives can directly access domestic courts.
- **Recognition:** Courts recognize foreign insolvency proceedings, ensuring cooperation.
- **Relief:** Provision of interim and permanent relief to protect creditors' rights.
- **Coordination:** Mechanisms for cooperation between courts and insolvency practitioners across jurisdictions.

Despite its global recognition, the model law has not been uniformly adopted leading to inconsistencies in international insolvency practice. Some countries have introduced modification in the domestic version of the law, which creates challenges.

India needs to adopt the principles of UNCITRAL Model Law in order to address the gaps and allow Indian courts to recognise foreign proceedings without the need for separate bilateral treaties; reducing procedural delays.



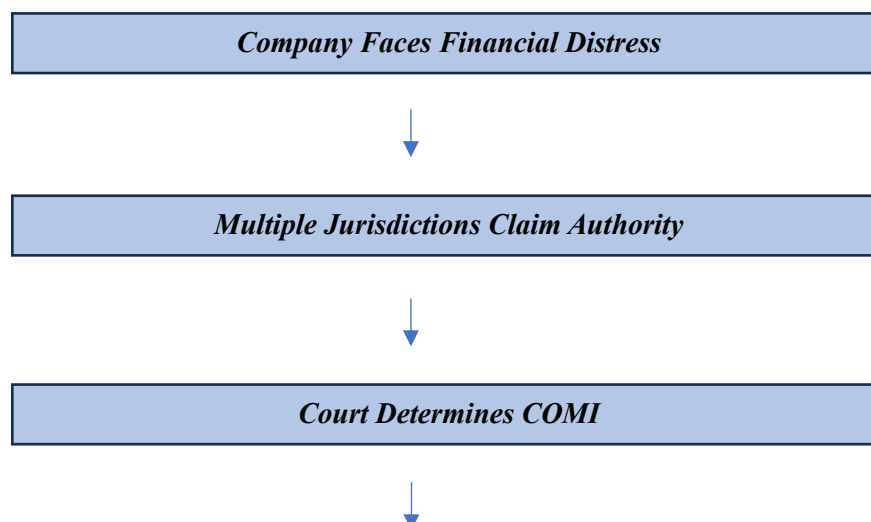


European Union Insolvency Regulation:

The UNCITRAL Model Law serves as a global benchmark for cross-border insolvency cooperation. However, the regional blocs have crafted their own tailored frameworks in alignment to UNCITRAL Model Laws to address the unique legal, economic, and political realities of their member states. The **European Insolvency Regulation (Recast) 2015/848** governs cross-border insolvency within the EU. It focuses on:

- **Centre of Main Interests (COMI):** Determining jurisdiction for insolvency proceedings.
- **Automatic Recognition:** Decisions in one member state are recognized across the EU.
- **Cooperation Mechanisms:** Judicial cooperation between member states.

A significant advantage of EU regulation is its structured approach to jurisdiction and corporation. However, Brexit has created uncertainty regarding cross-border insolvency between UK and EU member states, leading to complexities in recognition and enforcement.



Proceedings Initiated in Recognized Jurisdiction**US Bankruptcy Code - Chapter 15**

Similarly, like the European Union, The **United States incorporated the UNCITRAL Model Law into its legal system through Chapter 15 of the Bankruptcy Code**. This provision facilitates:

- Access for foreign representatives to US courts.
- Coordination between US and foreign insolvency proceedings.
- Protection against fraudulent transfers.

However, US courts retain discretion and recognising foreign insolvency cases, and conflicts sometimes arise between domestic priorities and international committee principles.

Key Challenges in Cross-Border Insolvency**1. Jurisdictional Conflicts**

Determining Centre of Main Interest (COMI) is often contentious, as different jurisdiction may claim authority over insolvency proceedings. This can lead to parallel proceedings, conflicting judgements, and increased legal uncertainty. Moreover, debtors may attempt to shift the COMI to jurisdiction with more favourable insolvency laws, leading to forum shopping, undermining the predictability and fairness of the process.

2. Lack of Uniform Adoption

Despite the widespread adoption of model law across multiple-jurisdictions, this variation in implementation across countries, indicates inconsistencies in cross-border cooperation. This lack of synchronisation can discourage foreign investment and dent the core purpose of the Model Law.

3. Judicial Cooperation and Enforcement

Judicial corporation remains a challenge due to difference in legal tradition, procedural laws

and policy concerns, enforcement of foreign judgement and order is often subject to domestic laws, leading to delays. Divergent judicial attitudes towards foreign insolvency proceedings further complicate matters, particularly where courts are reluctant to recognise foreign appointed insolvency practitioners.

4. Creditor Protection

Ensuring the equitable treatment of creditors across the restriction is complex. Difference in priority rule and claim recognition affect creditors recovery. Some jurisdiction favour, domestic creditors over foreign creditors, resulting in unfair outcomes in cross-border insolvency cases.

Proposed Solutions to address the Challenges:

In order to address the above stated challenges and bring a harmonised approach in Insolvency Laws, following initiatives can be looked forward to:

- **Clear COMI Determination Rules-** Statutory criteria must be established for identifying COMI. Additionally, these should be supported by remarkable judicial precedents and guidance notes. Hence, minimising forum shopping between the debtors.
- **Phased and Harmonised Adoption-** The implementation of Model Laws should be through phases. The initial phase shall be of sectors highly exposed to cross-border insolvencies. Additionally, to implement this, uniformity should be promoted by engaging in bilateral and regional agreements.
- **Judicial Training & Specialised Benches-** An efficient and effective training should be given to Insolvency judges, improving their ability to resolve complex cases and maintain stability in the global economy. Furthermore, specialised benches can be set up to deal with insolvency matters and bring consistency.
- **Reciprocity & Enforcement Protocols-** Fast track mechanism along with reciprocity clauses must be adopted for recognising and enforcing foreign insolvency judgements to bind and safeguard national interests.
- **Creditor Equality Safeguards-** Equal treatment of domestic and foreign creditors

must be legally mandated, with limiting its exception only in cases that overrides public interest.

India, can similarly adhere to such solutions and align its laws and statutes to the UNCITRAL Model Law. Thus, bridging the gap between international best practices and local economic realities. The goal of India, should be extended to shape a resilient, transparent and investor-friendly regime that sustains cross-border commerce and proliferates the Indian economy with global nuances.

Case Studies of Cross-Border Insolvency

In a way to demonstrate roles of courts and regulators in case of cross-border insolvencies. Practical experience acts like a precedent in order to reveal the strengths and shortcomings of legal framework more vividly than theory. High-profile insolvency cases across jurisdictions demonstrate how courts and regulators respond to conflicts in recognition, coordination, and asset distribution. The following case studies highlight both the challenges and successful attempts at cooperation in cross-border insolvency proceedings.

1. Lehman Brothers (2008)⁶

The insolvency of Lehman Brothers involved in multiple jurisdictions with over 75 insolvency proceedings worldwide. The case highlighted challenges in asset, recovery, creditor, claims and judicial coordination. The lack of uniform global framework led to prolong disputes over asset distribution quotes in different countries had to decide on recognising foreign insolvency proceedings, often leading to conflicting decisions. The case highlighted challenges in asset recovery, creditor claims, and judicial coordination.

2. Jet Airways (India) Ltd. (2019)⁷

Jet Airways insolvency involved parallel proceeding in India and the Netherlands. The Dutch court appointed as an administrator. But, initially, Indian authorities- NCLT, Mumbai did not recognise the Dutch proceedings due to lack of statutory framework. Eventually, India's National Company Law Tribunal permitted cooperation between Indian Resolution

⁶ *In re Lehman Brothers Holdings, Inc.*, 415 B.R. 77 (N.D.N.Y. 2009)

⁷ *Jet Airways (India) Ltd. v. State Bank of India & Anr.* (2020 SCC OnLine NCLAT 1198)

Professional and between the Dutch insolvency professional, setting up first precedent for cross-border insolvency coordination in India.

3. Nortel Networks (2009)⁸

Nortel's insolvency required asset distribution among Canada, the US and the UK. The courts in these jurisdictions coordinated proceedings, ultimately deciding to adopt Pro rata allocation i.e. distribute asset based on revenue contribution from each country. The case demonstrated successful cross border cooperation despite complex legal challenges in absence of a binding treaty.

4. Videocon Industries Ltd. (India) (2020)⁹

Videocon's insolvency proceeding involved asset in India and overseas jurisdictions. The absence of formal recognition procedure for foreign proceedings in India led to delay asset realisation. The case strengthened the call for India to adopt a legislative framework aligned with the UNCITRAL Model Law.

5. Yukos Oil Company (Russia) (2006)¹⁰

Yukos' bankruptcy case spanned multiple jurisdictions involving the US, Netherlands and Russia. The Courts in different countries took varied stance on asset distribution and recognition of foreign proceeding, the case underscored the challenges post by political and legal differences in cross border insolvency.

6. Kingfisher Airlines Ltd. (2012)¹¹

The Kingfisher airline collapse created disputes involving foreign creditors and unpaid dues in multiple jurisdictions. The failure of international asset recovery mechanism underlined the need for structured framework in India for recognising foreign insolvency proceedings.

⁸ *In re Nortel Networks Inc.*, Case No. 09-10138-KG, C. A. No. 10-230-JJF-MPT (D. Del. Aug. 5, 2010)

⁹ *State Bank of India Vs. Videocon Industries Limited (VIL) and Ors.* (2020) ibclaw.in 158 NCLT

¹⁰ <https://www.reuters.com/article/world/europe/takeover-of-dutch-parts-of-yukos-oil-was-illegal-supreme-court-idUSKCN1PC1DP/>

¹¹ *State Bank of India & Others v. Kingfisher Airlines (AIRONLINE 2017 SC 750)*

Emerging Trends and Future of Cross-border Insolvency:

1. **Increased Adoption of UNCITRAL Model Law-** Countries like Singapore, South Africa and India are considering or have incorporated the Model Law to facilitate cross-border insolvency proceedings. India has proposed a cross-border insolvency framework aligned with the Model Law.
2. **Digitalization of Insolvency Proceedings-** Technological advancements enable better coordination through virtual court hearings and digital case management. The increased use of AI will be beneficial in predicting outcomes and streamlining case management in the legal arena.
3. **Rise of International Insolvency Networks-** Organizations like the International Insolvency Institute (III) and INSOL International play a crucial role in fostering cooperation among practitioners and regulators. Such networks promote knowledge-sharing and best practices in cross-border insolvency.
4. **Post COVID-19 Insolvency Restructuring-** The pandemic has accelerated insolvency filings worldwide, necessitating stronger cross-border mechanisms for business restructuring and resolution. Governments are exploring innovative solutions to prevent business collapses while ensuring creditor rights.
5. **Shift towards Sustainable and ESG-Conscious Insolvency-** Future cross-border framework are likely to incorporate climate-related financial risk assessment and social impact criteria. Thus, integrating Environmental, Social and Governance (ESG) considerations within insolvency and restructuring strategies.

Conclusion

Cross border insolvency sits at the intersection of global commerce, national sovereignty and creditor protection. The increasing interconnectedness of markets makes it inevitable that insolvency cases will involve assets, creditors, and proceedings spanning multiple jurisdictions. While existing frameworks like such as UNCITRAL Model Law provide a foundation for resolving such matters, jurisdictional conflicts, recognition issues, and enforcement hurdles continue to persist.

The Case studies discussed from Lehman Brothers to Jet Airways and Nortel Networks, demonstrate both the successes and the shortcomings of current systems. They emphasise a clear need for greater judicial cooperation, harmonisation of insolvency laws, and structured recognition mechanisms to avoid conflicting decisions.

As globalisation continues to reshape financial markets, the future of cross-border insolvency will depend on strengthening legal frameworks, fostering mutual recognition among jurisdictions, and embracing technology to streamline proceedings. A robust, harmonised approach will be vital to maintaining economic stability, preserving business value, and ensuring equitable treatment of all stakeholders in an increasingly borderless financial world.