# A CRITICAL ANALYSIS OF THE LEGISLATIVE GAPS AND JUDICIALTRENDS IN INDIA'S CROSS-BORDER INSOLVENCY REGIME

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## ABSTRACT

In an increasingly globalized economy, the insolvency of multinational corporations presents complex legal challenges that transcend national borders. While the Insolvency and Bankruptcy Code, 2016 (IBC) has fundamentally reformed India's domestic insolvency regime, its framework for addressing cross-border insolvency remains a critical legislative gap. This article critically analyzes the procedural and substantive hurdles arising from the non-enactment of Part Z of the Code, which is based on the UNCITRAL Model Law on Cross-Border Insolvency. In its absence, Indian courts and insolvency professionals are compelled to navigate complex issues through an ad-hoc mechanism, primarily relying on the limited scope of Sections 234 and 235 and the principle of judicial comity.

Employing a doctrinal and comparative methodology, this paper examines the efficacy of this judicially- driven approach. It delves into complex cross-border issues such as the recognition of foreign proceedings, cooperation between courts, asset tracing across jurisdictions, and the enforcement of foreign judgments, using the landmark case of *Jet Airways (India) Ltd.* as a central case study. The analysis reveals that the current framework, while demonstrating judicial pragmatism, fosters legal uncertainty, encourages fragmented parallel proceedings, and risks the erosion of asset value. It argues that ad-hoc protocols, though innovative, are an unsustainable substitute for a robust, predictable statutory regime. Ultimately, the article concludes that the immediate notification of Part Z is imperative for aligning India with international best practices. Adopting the UNCITRAL Model Law framework would provide the necessary legal certainty, enhance cooperation with foreign jurisdictions, and solidify the IBC's objective of maximizing value for all stakeholders, thereby boosting investor confidence in the Indian economy.

**Keywords**: UNCITRAL Model on cross border insolvency, International co-operation, foreign proceedings recognition, Insolvency Bankruptcy Code 2016.

**List of Abbreviations**

| **Abbreviation** | **Full Form** |
|---|---|
| **AA** | Adjudicating Authority (NCLT) |
| **CIRP** | Corporate Insolvency Resolution Process |
| **COMI** | Centre of Main Interests |
| **CPC** | Code of Civil Procedure, 1908 |
| **FDI** | Foreign Direct Investment |
| **IBC** | Insolvency and Bankruptcy Code, 2016 |
| **IBBI** | Insolvency and Bankruptcy Board of India |
| **ILC** | Insolvency Law Committee |
| **MCA** | Ministry of Corporate Affairs |
| **MLCBI** | Model Law on Cross-Border Insolvency |
| **NCLAT** | National Company Law Appellate Tribunal |
| **NCLT** | National Company Law Tribunal |
| **RP** | Resolution Professional |
| **UNCITRAL** | United Nations Commission on International Trade Law |

**Glossary of Key Terms**

- **Adjudicating Authority (AA):** For corporate debtors, this refers to the National Company Law Tribunal (NCLT).
- **Center of Main Interest (COMI):** The jurisdiction where a debtor conducts the administration of its interests on a regular basis; usually presumed to be the place of the registered office.
- **Comity:** The legal principle where one jurisdiction's courts recognize and give effect

to the judicial acts of another, out of mutual respect rather than a treaty obligation.

- **Corporate Insolvency Resolution Process (CIRP):** The time-bound process under the IBC for resolving the insolvency of a corporate debtor.
- **Foreign Main Proceeding:** A foreign insolvency proceeding taking place in the country where the debtor has its COMI.
- **Group Insolvency:** A framework that allows for the coordinated resolution of multiple companies belonging to the same corporate group.
- **Moratorium:** A period during which all legal proceedings, asset recoveries, and enforcement of security interests against the debtor are stayed.
- **Resolution Professional (RP):** An insolvency professional appointed to manage the debtor's affairs and conduct the resolution process.
- **UNCITRAL:** United Nations Commission on International Trade Law.

## 1. Introduction

Cross-border insolvency refers to a situation where an insolvent debtor has assets or creditors in more than one country. In a globalized economy, corporations often hold assets and incur liabilities across multiple jurisdictions. While India enacted the **Insolvency and Bankruptcy Code, 2016 (IBC)** to consolidate domestic insolvency laws, the code currently lacks a comprehensive framework for handling cross-border issues.

At present, India relies on a fragmented system governed by **Sections 234 and 235 of the IBC**, which depend on bilateral agreements and "letters of request." This research critically analyzes these legislative gaps and examines how the Indian judiciary has attempted to fill this void through innovative rulings, particularly in the landmark *Jet Airways* case, while evaluating the necessity of adopting the **UNCITRAL Model Law**.

## 2. Aim of the Study

To critically evaluate the efficacy of India’s current legal framework regarding cross-border insolvency and to analyze the role of the judiciary in bridging legislative gaps.

**3. Objectives**

1. To examine the existing provisions (**Sec 234 & 235**) of the IBC, 2016 regarding cross-border insolvency.

2. To identify specific legislative gaps that hinder the resolution of multinational insolvencies.

3. To analyze judicial trends and ad-hoc mechanisms (e.g., Cross-Border Protocols) adopted by NCLT/NCLAT.

4. To compare India's regime with international conventions, specifically the **UNCITRAL Model Law**.

5. To propose recommendations for the adoption of a standardized cross-border insolvency framework (Draft Part Z).

**4. Nature and Scope**

- **Nature:** This research is **doctrinal and analytical**. It relies on primary legal sources (statutes, case laws) and secondary sources (reports, journals).

- **Scope:** The study is limited to the Indian jurisdiction but draws comparative references from the UNCITRAL Model Law, US Bankruptcy Code (Chapter 15), and UK Insolvency laws to highlight global best practices.

**5. Research Hypothesis**

**Main Hypothesis (H1)**

"The current legislative framework under Sections 234 and 235 of the Insolvency and Bankruptcy Code (IBC), 2016, is **structurally inadequate** to address the complexities of transnational insolvencies, leading to a 'judicial vacuum' that necessitates the immediate adoption of the **UNCITRAL Model Law**."

***Null Hypothesis (H0):*** The current provisions under Sections 234 and 235 of the IBC are sufficient to handle cross-border insolvency cases in India.

**Alternative Hypothesis (H1***):* The lack of a standalone cross-border insolvency framework leads to judicial uncertainty, reduced asset value recovery, and necessitates the urgent adoption of the UNCITRAL Model Law.

## 6. Literature Review

- **Universalism vs. Territorialism:** Existing literature highlights the global debate between *Universalism* (one central court manages the global insolvency) and *Territorialism* (local courts grab local assets). Scholars like **LoPucki** argue for territorialism, while **Westbrook** argues for universalism.

- **Indian Context:** Reports by the **Insolvency Law Committee (ILC)** (2018) note that Sec 234/235 are "inadequate" because they require time-consuming bilateral treaties. Legal commentators observe that without a formal law, foreign creditors face uncertainty, impacting India’s "Ease of Doing Business" rankings.

## 7. Research Gap

While much has been written about the *need* for a law, there is limited comprehensive analysis on **how the judiciary is practically managing current cases** in the absence of such law. This research fills the gap by analyzing the "judge-made law" (judicial activism) in the *Jet Airways* and *Videocon* cases as a temporary substitute for legislation.

## 8. Research Methodology

- **Method:** Qualitative, Doctrinal Legal Research.

- **Sources:**

    - **Primary:** Insolvency and Bankruptcy Code, 2016; NCLT/NCLAT Judgments; UNCITRAL Model Law text.

    - **Secondary:** Law commission reports, ILC Reports, Academic journals, and Legal news analysis.

## Chapter 1: Evolution of Insolvency Laws in India

### 1.1 Introduction

The history of insolvency law in India is a narrative of a shifting economic philosophy—from a "Debtor-in-Possession" model, which often protected defaulting promoters, to the current "Creditor-in-Control" model under the IBC. Prior to 2016, the legal framework was fragmented, involving multiple laws and adjudicating forums, leading to systemic delays and asset value erosion. This chapter chronicles the legislative journey from the British era to the modern IBC regime.

### 1.2 The Pre-Independence Era: Focus on Individuals

Initial insolvency jurisprudence in India was heavily influenced by English law and focused primarily on individual bankruptcy rather than corporate insolvency.

- **The Presidency Towns Insolvency Act, 1909:** Applicable to the presidency towns of Calcutta, Bombay, and Madras.
- **The Provincial Insolvency Act, 1920:** Applicable to the rest of British India.
- *Limitation:* These acts dealt with personal insolvency and were inadequate for complex corporate structures. They remain technically valid for individuals (personal guarantors) not yet fully covered under the IBC's phased implementation.

### 1.3 Post-Independence to Liberalization (1947–1991)

For decades, corporate insolvency was governed by the **Companies Act, 1956**.

- **Winding Up:** The High Courts had the jurisdiction to order the winding up of companies due to the "inability to pay debts."
- **The Problem:** The process was adversarial and notoriously slow. Cases lingered for 10–15 years, by which time the assets had lost all economic value. It was a "death sentence" for companies rather than a mechanism for rescue.

### 1.4 The "Sick Industrial" Era (1985–1993)

In response to widespread industrial sickness, the government enacted the **Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)**.

- **Mechanism:** It established the **Board for Industrial and Financial Reconstruction (BIFR)**.
- **The Failure:** SICA became a haven for defaulting promoters. Once a company registered with the BIFR, it enjoyed an automatic moratorium (stay) on all legal proceedings. Unscrupulous promoters used this to keep creditors at bay while stripping the company of assets. It was widely criticized as keeping "sick companies alive on life support" indefinitely.

### 1.5 The Recovery Reforms (1993–2002)

Following the 1991 economic liberalization, the focus shifted from "rehabilitation" to "recovery" of dues for banks.

- **Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI):** This Act created **Debt Recovery Tribunals (DRTs)** to speed up bank recovery cases. However, DRTs quickly became clogged with cases and lacked the infrastructure to handle the volume.
- **SARFAESI Act, 2002:** The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act* was a radical step. It allowed secured creditors (banks) to seize assets **without court intervention**.
    - *Critique:* While effective for secured banks, it left operational creditors and unsecured lenders with no remedy. It was a tool for liquidation/recovery, not for resolving/saving a business.

### 1.6 The Search for a Comprehensive Code (2000s–2015)

By the 2010s, India's Non-Performing Asset (NPA) crisis was escalating. The existing laws (SICA, SARFAESI, Companies Act) operated in silos, leading to forum shopping and conflicting rulings.

- **Multiple Committees:** Various committees (Tiwari Committee, Narasimham Committee, Justice Eradi Committee) highlighted the need for reform.
- **The BLRC Report (2015):** The decisive moment came with the **Bankruptcy Law Reforms Committee (BLRC)** headed by Dr. T.K. Viswanathan. The BLRC recommended a single, comprehensive code that would consolidate all existing laws.
    - *Core Philosophy:* "Speed is of the essence." The law must separate commercial decisions (left to the Committee of Creditors) from judicial decisions (NCLT).

### 1.7 The Insolvency and Bankruptcy Code, 2016 (IBC)

Enacted in May 2016, the IBC marked a paradigm shift in India's economic legislation.

- **Consolidation:** It repealed SICA and amended 11 other laws (including the Companies Act and RDDBFI) to become the single umbrella legislation.
- **Institutional Infrastructure:** It created a robust ecosystem comprising:
    - **IBBI:** The Regulator.
    - **IPs:** Insolvency Professionals to manage the company.
    - **IU:** Information Utilities to store debt data.
    - **NCLT/NCLAT:** The Adjudicating Authorities.
- **Shift in Control:** The most significant change was shifting control from the "Debtor" (promoter) to the "Creditors" immediately upon default.

### 1.8 Conclusion of the Era

The evolution of Indian insolvency law reflects a journey from a weak, fragmented, and promoter-friendly regime to a robust, consolidated, and creditor-driven framework. However, while the IBC solved the *domestic* insolvency puzzle, the legislators in 2016 largely overlooked the complexities of **Cross-Border Insolvency**, leaving Sections 234 and 235 as mere placeholders—a gap that forms the crux of this research.

## Chapter 2: Anatomy of IBC Sections 234 & 235: The Bilateral Trap

### 2.1 Introduction

While the IBC was hailed as a revolutionary "one-stop shop" for domestic insolvency, its provisions for international cases were seemingly added as an afterthought. Sections 234 and 235 form the entirety of

India's codified cross-border framework. This chapter analyzes the mechanical failure of these sections, which rely on a "Reciprocal Arrangement" model that has proven to be a bottleneck rather than a bridge.

### 2.2 Section 234: The Requirement of Bilateral Treaties

Section 234 empowers the Central Government to enter into **bilateral agreements** with foreign governments to enforce the IBC.

- **The Intent:** To create a formal diplomatic channel where Country A and India agree to recognize each other's insolvency orders.
- **The Reality:** To date, India has not successfully notified a comprehensive bilateral treaty under this section with any major trading partner.
- **The "Trap":** By making the law contingent on executive diplomacy, the legislature effectively rendered the law "dormant." In a globalized economy with 190+ nations, negotiating individual treaties is a Herculean and impractical task.

### 2.3 Section 235: The Letter of Request (LoR)

This section outlines the procedure for an Indian Resolution Professional (RP) to act on assets located abroad. **Procedure:** If an RP finds assets in Country X, they must apply to the NCLT. If satisfied, the NCLT issues a **Letter of Request** to the foreign court.

- **The Fatal Link:** Section 235 is explicitly tied to Section 234. An NCLT can *only* issue an LoR to a country with which India has a **reciprocal arrangement**.
- **Consequence:** Since no such arrangements exist (per Sec 234), the power to issue an

LoR under Sec 235 remains largely symbolic and legally unenforceable in most practical scenarios.

### 2.4 Why the "Bilateral" Approach is a Failure

The "Bilateral Trap" refers to the systemic flaws in relying on treaties rather than a standardized law:

1. **Time and Cost:** Negotiating treaties takes years; insolvency resolution requires speed (the IBC's 330-day mandate).

2. **Lack of Uniformity:** Different treaties with different countries would create a "patchwork" of rules, leading to legal chaos for multinational corporate groups.

3. **The Reciprocity Barrier:** Many modern jurisdictions (like the US and UK) follow the **UNCITRAL Model Law**, which allows for cooperation without needing a pre-existing treaty. India's insistence on a "tit-for-tat" reciprocal treaty puts it out of sync with global standards.

### 2.5 Comparative Analysis: Treaty-based vs. Model Law

| **Feature** | **IBC Section 234 & 235** | **UNCITRAL Model Law** |
|---|---|---|
| **Prerequisite** | Mandatory Bilateral Treaty | No Treaty required (Comity-based) |
| **Access** | Indirect (via Central Government) | Direct (Foreign Rep to local Court) |
| **Speed** | Slow (Diplomatic channels) | Fast (Direct Judicial application) |
| **Moratorium** | No automatic stay on foreign assets | Automatic stay upon recognition |

### 2.6 Conclusion: A Statutory Deadlock

Sections 234 and 235 create a **statutory deadlock**. They acknowledge the existence of cross-border assets but provide a key that doesn't fit any lock. Without the "Reciprocal Arrangement," the Indian Resolution Professional is left powerless to prevent a "race to the courthouse" where foreign creditors might seize assets before the Indian process can conclude. This legislative gap forces the Indian judiciary to step in—a trend explored in the next chapter.

## Chapter 3: Judicial Activism: *Jet Airways* and the "Protocol" Era

### 3.1 Introduction

Judicial activism in the context of the IBC refers to the NCLT and NCLAT's willingness to "read into" the Code powers that are not explicitly provided, specifically to facilitate international cooperation. The *Jet Airways* insolvency (2019) served as the ultimate litmus test, forcing Indian tribunals to choose between rigid adherence to a hollow statute or the adoption of global principles of **comity**.

### 3.2 The *Jet Airways* Crisis: A Dual Insolvency

In 2019, Jet Airways (India) Ltd. faced simultaneous insolvency proceedings in two different jurisdictions:

1. **In India:** Before the NCLT Mumbai, initiated by State Bank of India.
2. **In the Netherlands:** Before the Noord-Holland District Court, initiated by a creditor for unpaid dues in Europe. A Dutch Trustee was appointed to seize Jet's assets (including a Boeing 777 parked at Schiphol Airport).

### 3.3 The NCLT's Initial Stand: Territorialism

Initially, the NCLT Mumbai took a **"Territorialist"** approach. It declared the Dutch proceedings as "null and void" and refused to recognize the Dutch Trustee, citing that the IBC did not have any provisions for recognizing foreign proceedings without a bilateral treaty. This created a stalemate: the Indian RP could not access European assets, and the Dutch Trustee could not participate in the Indian resolution.

### 3.4 The NCLAT's Intervention: A Paradigm Shift

On appeal, the National Company Law Appellate Tribunal (NCLAT) recognized that a "liquidation in isolation" would lead to a value massacre. The NCLAT directed the Indian RP and the Dutch Trustee to work together. **The Directive:** The NCLAT stayed the NCLT's order and allowed the Dutch Trustee to attend the meetings of the **Committee of Creditors (CoC)** as an observer.

- **The Birth of the "Protocol":** The court encouraged both parties to draft a **"Cross-Border Insolvency Protocol."**

### 3.5 The "Cross-Border Insolvency Protocol"

Since India had no law, the parties created their own "contractual law" for the case. The Protocol was based on the **UNCITRAL Model Law** and included:

- **The "Main" Proceeding:** Recognition of the Indian proceeding as the "Main" proceeding (since India was the company's Center of Main Interest or COMI).
- **The "Non-Main" Proceeding:** Recognition of the Dutch proceeding as a "Non-Main" proceeding.
- **Information Sharing:** Direct communication between the Indian RP and the Dutch Trustee.
- **Asset Maximization:** An agreement to sell assets in a coordinated manner to ensure the highest recovery for all creditors.

### 3.6 Significance of the "Protocol Era"

The *Jet Airways* case established several judicial milestones:

1. **De Facto Adoption of Model Law:** The NCLAT effectively adopted the principles of the UNCITRAL Model Law through judicial decree, bypassing the lack of a formal notification of Sections 234/235.
2. **Principle of Comity:** It reinforced the idea that Indian courts should respect foreign judicial proceedings provided they do not violate Indian public policy.
3. **Filling the Vacuum:** It proved that the judiciary could be an "engine of reform" when

the legislature is slow to act.

### 3.7 Conclusion: Limitations of Activism

While the *Jet Airways* protocol was a success, it remains an **ad-hoc solution**. Every such case currently requires a fresh application to the NCLAT, leading to uncertainty and high legal costs. Judicial activism is a "patchwork" solution; it cannot replace the certainty of a statutory framework. The "Protocol Era" highlights that while the courts are ready for cross-border insolvency, the law is not.

## Chapter 4: Group Insolvency and Foreign Subsidiaries (Videocon Analysis)

### 4.1 Introduction

Modern corporate structures rarely consist of a single legal entity. Instead, they operate as a web of holding companies and subsidiaries. The IBC, however, was designed on the principle of **"Single Entity Insolvency."** It treats every company as a distinct legal person. This chapter analyzes how this "Corporate Veil" creates hurdles when a group like Videocon holds its most valuable assets (oil and gas blocks) in foreign subsidiaries located in Brazil and Indonesia.

### 4.2 The *Videocon* Fact Matrix

Videocon Industries Ltd. (VIL) was part of a diversified conglomerate. While the Indian parent company was insolvent, its value was tied to its **foreign oil and gas assets**.

- **The Structure:** VIL held these assets through various foreign subsidiaries and "step-down" subsidiaries.
- **The Problem:** When the NCLT initiated Corporate Insolvency Resolution Process (CIRP) against Videocon, it technically only had jurisdiction over the Indian parent. It could not "reach" the foreign assets because they belonged to separate legal entities (subsidiaries) not undergoing CIRP in India.

### 4.3 Judicial Innovation: Substantive Consolidation

In *State Bank of India v.* Videocon Industries Ltd., the NCLT Mumbai took a landmark step by ordering **Substantive Consolidation**.

- **Definition:** Consolidation involves treating the assets and liabilities of different group companies as a single "pool" for the purpose of resolution.
- **The Criteria:** The Court identified "inter-dependence" and "common control" as grounds to ignore the separate legal personality of the entities.
- **The Cross-Border Gap:** While the court consolidated the domestic entities, it faced a "dead end" regarding the foreign subsidiaries. Without a cross-border framework, the Indian Resolution Professional (RP) could not exercise control over the directors of the Brazilian or Indonesian arms effectively.

### 4.4 The "Entity Shield" and Value Erosion

The *Videocon* case revealed a critical legislative gap: **The lack of "Group Insolvency" provisions in the IBC.**

1. **Asset Stranding:** Valuable foreign assets remained "stranded" outside the Indian resolution plan because foreign courts did not recognize the NCLT's consolidation order.
2. **Fragmented Resolution:** Creditors had to fight separate battles in different countries, leading to massive legal costs and a "fire sale" of assets.
3. **The Reliance Communications Parallel:** A similar issue arose with RCom, where the assets were tied up in undersea cables and foreign spectrum rights, making a holistic resolution impossible under the current law.

### 4.5 The Cross-Border Group Connection

In the absence of the **UNCITRAL Model Law**, India lacks the concept of **"COMI" (Center of Main Interest)** for a group.

- Under international standards, if the "mind and management" of the entire Videocon group were in India, foreign courts might have yielded to Indian jurisdiction.
- Under the current IBC, foreign courts see only a "foreign shareholder" (the Indian parent) trying to interfere in a local company's affairs, often leading to a refusal to

cooperate.

### 4.6 Conclusion: Beyond Single Entities

The *Videocon* analysis proves that cross-border insolvency is not just about a company having a bank account in London; it is about complex **Group Structures**. Until the IBC incorporates "Group Insolvency" rules and recognizes "Foreign Main Proceedings" as per UNCITRAL, the "Corporate Veil" will continue to be used as a shield to keep assets out of the reach of Indian creditors.

## Chapter 5: UNCITRAL Model Law: The Global Gold Standard

### 5.1 Introduction

The UNCITRAL Model Law on Cross-Border Insolvency (1997) was formulated to address the inadequacies of national laws in handling transnational insolvency. Unlike a "Treaty" (which is a binding contract between nations), a "Model Law" is a **template** that nations can adapt into their domestic legislation. It has been adopted by over 60 jurisdictions, including the US (Chapter 15), UK, Singapore, and Japan.

### 5.2 The Four Pillars of the Model Law

The Model Law is built on four functional pillars that directly solve the "Bilateral Trap" of IBC Sections 234 and 235:

1. **Direct Access:** Foreign insolvency representatives (like the Dutch Trustee in *Jet Airways*) can apply directly to Indian courts without needing a formal treaty or diplomatic intervention.

2. **Recognition:** It provides a streamlined process for an Indian court to recognize a "Foreign Proceeding" as either:

    - **Foreign Main Proceeding:** Where the debtor has its Center of Main Interest (COMI).

    - **Foreign Non-Main Proceeding:** Where the debtor has a mere establishment.

3. **Relief (Assistance):** Upon recognition, certain reliefs—like a **Moratorium** (stay on legal actions)—become available automatically or at the court's discretion to protect the debtor's assets from being siphoned off.

4. **Cooperation and Coordination:** It mandates that domestic courts and insolvency professionals communicate directly with their foreign counterparts, moving away from the slow "Letter of Request" system.

### 5.3 The Concept of COMI: The Heart of the Law

The most critical concept India needs to adopt is the **Center of Main Interest (COMI)**.

- **The Rule:** The "Main Proceeding" should happen in the country where the debtor conducts the administration of its interests on a regular basis, ascertainable by third parties.

- **The Presumption:** Generally, the **registered office** is presumed to be the COMI unless proven otherwise.

- **Benefit for India:** In the *Jet Airways* case, India was clearly the COMI. Under the Model Law, the Dutch court would have been legally obligated to recognize the Indian NCLT as the "Lead Court," preventing the seizure of the Boeing 777 in Amsterdam.

### 5.4 Modified Universalism vs. Territorialism

The Model Law follows **"Modified Universalism."**

- **Universalism:** The idea that one single court should handle all global assets.

- **The "Modified" Aspect:** It allows local courts to keep control over local assets if it's necessary to protect local creditors or public policy, but requires them to cooperate with the "Main" court to ensure the company doesn't fall apart.

### 5.5 Why India's Adoption is "In Progress"

The Insolvency Law Committee (ILC) submitted **"Draft Part Z"** in 2018, which is essentially the UNCITRAL Model Law tailored for the IBC.

- **The Delay:** Concerns regarding "Reciprocity" (the fear that India will recognize US orders, but the US won't recognize Indian orders) and "Public Policy" exceptions have slowed the legislative process.

- **The 2025 Amendment Bill:** Recent developments (as of late 2025/early 2026) suggest that the Indian government is finally moving toward a formal amendment to include these provisions, aiming to improve India's ranking in the "Ease of Doing Business" and "Resolving Insolvency" indices.

### 5.6 Conclusion

The UNCITRAL Model Law is not just a "Western" concept; it is a necessity for any nation that wants to attract global capital. For India, it represents the transition from a **territorial silos** approach to becoming a **global insolvency hub.**

## Chapter 6: Conclusions and A Way Forward (Draft Part Z)

### 6.1 The Culmination of Reform: Draft Part Z

Draft Part Z is the legislative manifestation of the UNCITRAL Model Law, tailored for the Indian legal ecosystem. It represents a shift from "Reciprocal Agreements" (the Bilateral Trap) to a **statutory recognition** of global insolvency proceedings.

**Key Components of Draft Part Z:**

- **Mandatory Recognition:** Unlike the current discretionary "Letters of Request," Part Z would mandate that NCLTs recognize foreign proceedings if they meet specified criteria (COMI or Establishment).

- **Public Policy Filter:** It includes a "Safety Valve," allowing Indian courts to refuse cooperation if a foreign order is *manifestly contrary* to the public policy of India.

- **Judicial Cooperation:** For the first time, it provides a legal basis for NCLT judges to communicate directly with foreign judges (e.g., via video conferencing or shared digital portals).

### 6.2 The IBC (Amendment) Bill, 2025

As of February 2026, the Indian government has introduced the **Insolvency and Bankruptcy Code (Amendment) Bill, 2025**. This Bill is currently the focal point of India's "Second Decade of IBC" reforms.

- **Legislative Progress:** The Bill was referred to a Parliamentary Select Committee in late 2025 and is expected to be passed during the **Budget Session of 2026**.

- **Inclusion of Group Insolvency:** Crucially, the 2025 Bill moves beyond single-entity insolvency to provide a framework for **Group Insolvency**, directly addressing the "Entity Shield" problems seen in the *Videocon* case.

### 6.3 Research Report: Critical Findings

Through this analysis, several critical findings emerge:

1. **Judicial Overreach as a Necessity:** In cases like *Jet Airways*, the judiciary did not overreach out of desire, but out of necessity to prevent the "Value Destruction" of national assets.

2. **Ease of Doing Business:** The lack of a cross-border regime remains a "Red Flag" for foreign institutional investors (FIIs) who fear their claims will be subordinated in Indian courts.

3. **The COMI Challenge:** Without statutory definitions, determining a company's "Center of Main Interest" remains a litigation-heavy process that delays resolution.

### 6.4 Confirmation of Main Hypothesis

**1. Statement of the Hypothesis (Recap)**

*"The current legislative framework under Sections 234 and 235 of the IBC, 2016, is structurally inadequate, creating a judicial vacuum that necessitates the adoption of the UNCITRAL Model Law."*

**2. Evidence for Confirmation**

***A. Failure of the "Bilateral" Experiment***

The research confirms that **Section 234** has remained a "dead letter" or a dormant provision. Between 2016 and early 2026, the Central Government failed to notify significant reciprocal bilateral agreements. This proves the hypothesis that a treaty-based system is too slow and diplomatically complex for the rapid world of corporate insolvency.

### *B. Judicial Innovation as a Proxy for Law*

The judicial trends analyzed (notably the *Jet Airways* and *Videocon* cases) prove that the NCLT and NCLAT were forced to "read into" the Code powers they did not technically have. The use of **ad-hoc protocols** and the principle of **Comity** confirms that there was indeed a "judicial vacuum" which the courts had to bridge manually.

### *C. Legislative Validation: The 2025 Amendment Bill*

The strongest confirmation of the hypothesis is the introduction of the **Insolvency and Bankruptcy Code (Amendment) Bill, 2025**. By incorporating an enabling framework for **Group Insolvency** and **Cross-Border Insolvency** (based on UNCITRAL principles), the legislature has effectively admitted that the original Sections 234 and 235 were "inadequate."

## 6.5 Conclusion of the Test

The research successfully **disproves the Null Hypothesis (H0)** and **validates the Alternative Hypothesis (H1)**. The shift from a "Bilateral Trap" to the "Draft Part Z" framework in 2026 serves as the final evidence

that India's economic interests are best served by a standardized, multilateral international framework rather than isolated treaties.

| **Hypothesis Aspect** | **Status** | **Primary Evidence** |
|---|---|---|
| **Inadequacy of Sec 234/235** | **Verified** | Zero notified bilateral treaties in 10 years. |
| **Existence of Judicial Vacuum** | **Verified** | Court-mandated protocols in *Jet Airways*. |
| **Need for UNCITRAL Model** | **Verified** | Implementation of the 2025 Amendment Bill. |

## Chapter 7: Final Conclusion and Recommendations

### Conclusion

India's cross-border insolvency regime is currently in a state of **transitional friction**. We have moved away from the complete isolation of the pre-2016 era, but we are yet to arrive at the "seamless integration" promised by the UNCITRAL Model Law. The "Bilateral Trap" of Sections 234 and 235 has proven to be a failed experiment. While the judiciary has provided a temporary bridge through innovative protocols, the 2025-26 legislative reforms are the only permanent solution to ensure India becomes a competitive destination for global capital.

### Recommendations

**Digital Integration:** Develop a "Cross-Border Case Management System" that allows foreign creditors to file claims digitally, authenticated through international standards (like Apostille or e-signatures).

1. **Legislative Recommendations (The "Draft Part Z" Model)**

Following the landmark IBC (Amendment) Bill, 2025, and the subsequent Select Committee Report (December 2025), the recommendations for India's cross-border regime have shifted from theoretical suggestions to concrete legislative mandates.

The **Insolvency Law Committee (ILC)** and the **Select Committee (2025)** have emphasized that India must move away from the "Bilateral Trap."

- **Adoption of UNCITRAL Model Law:** Replace the treaty-based system (Sections 234 & 235) with a standalone chapter (**Part Z**) based on the UNCITRAL Model Law. This provides a "ready-to-use" framework for recognition and relief without requiring individual treaties.

- **Dual-Track Reciprocity:** Initially adopt the Model Law on a **reciprocity basis** (recognizing only those countries that recognize Indian orders), with a provision to dilute this requirement once the Indian ecosystem matures.

- **Statutory Definition of COMI:** Instead of leaving it to judicial interpretation, the Code should include a list of **indicative factors** to determine the Center of Main Interest (e.g., location of books, records, and financing).

**2. Institutional & Procedural Recommendations**

- **Dedicated Cross-Border Benches:** Designate specific benches of the **NCLT (e.g., Mumbai, Delhi, and GIFT City)** to exclusively handle cases with foreign elements. This ensures the bench possesses the specialized knowledge required for private international law.
- **AI-Powered Claim Verification:** As highlighted in the **2026 reforms**, integrate AI and blockchain-verified portals for foreign creditors to submit claims, reducing the time spent on manual "proof of claim" verification for international debts.
- **Digital Communication Protocols:** Establish a "Green Channel" for direct communication (Judicial Coordination) between Indian NCLT judges and foreign courts, bypassing the slow diplomatic route of "Letters Rogatory."

**3. Recommendations for Group & Subsidiary Insolvency**

- **Substantive Consolidation Framework:** Formalize the "Videocon" judicial precedent into a statutory rule that allows for the **joint resolution of parent and subsidiary companies** across jurisdictions.
- **Foreign Subsidiary Cooperation:** Enable Indian Resolution Professionals (RPs) to take control of the management of foreign subsidiaries as "debtor-in-possession" if the parent's COMI is in India.

**4. Regulatory & Ethical Recommendations**

- **Specialized Licensing for IPs:** The IBBI should introduce a **mandatory license/certification** for RPs handling foreign claims exceeding a certain threshold (e.g., $10 million).
- **Separation of RP and Liquidator:** To eliminate "perverse incentives," the **Select Committee (2025)** recommended that an RP who conducts a resolution process should be **ineligible** to act as the liquidator for the same company.

- **Decriminalization of Technical Lapses:** Replace criminal penalties for "good-faith" technical lapses in cross-border filings with **civil penalties** to prevent litigation from stalling the resolution process.

**Table: The "Way Forward" Checklist**

| **Area of Reform** | **Recommendation** | **Goal** |
|---|---|---|
| **Legal Basis** | Notify **Part Z** of the IBC | Move to a global standard. |
| **Jurisdiction** | Define **COMI** via indicative factors | Reduce litigation on "lead court." |
| **Timeline** | Resolve cross-border CIRP in **180 days** | Enhance asset value maximization. |
| **Coordination** | Use **Court-to-Court Protocols** | Prevent conflicting foreign orders. |
| **Creditor Rights** | Enable **Virtual Hearings** for MNCs | Increase foreign investor confidence. |

**REFERENCES:**

**I. Primary Sources: Statutes & Legislation**

- The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
- Insolvency and Bankruptcy Code (Amendment) Bill, 2021 [Draft Part Z] (India).
- UNCITRAL Model Law on Cross-Border Insolvency, 1997.
- The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India).

**II. Primary Sources: Case Law (India)**

- *Jet Airways (India) Ltd. v. State Bank of India*, (2019) SCC OnLine NCLAT 613.
- *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 1.
- *Macquarie Bank Ltd. v. Uttam Galva Steels Ltd.*, (2018) 2 SCC 756.
- *Agrocorp International Private (PTE) Ltd. v. National Steel and Agro Industries Ltd.*, (2020) SCC OnLine NCLT 12454.
- *Adityaa Energy Resources Pte Ltd. v. Cauvery Power Generation Chennai (P) Ltd.*, CP/106/9/HDB/2019 (NCLT Hyderabad).
- *Videocon Industries Ltd. v. State Bank of India*, (2019) SCC OnLine NCLT 12555.
- *Rajah of Vizianagaram v. Official Receiver, Vizianagaram Mining Co. Ltd.*, AIR 1962 SC 500.

**III. Primary Sources: Case Law (International)**

- *Re Compuage Infocom Ltd.*, [2024] SGHC (Singapore).
- *Eurofood IFSC Ltd.*, Case C-341/04, [2006] ECR I-3813 (European Court of Justice).
- *In re Zetta Jet Pte Ltd.*, [2018] 4 SLR 801 (Singapore).

- *Maxwell Communications Corp. plc v. Société Générale*, 93 F.3d 1036 (2d Cir. 1996) (United States).

- *UP Health Holdings, Inc. v. Dr. Syed Sabahat Azim & Ors.*, (2023) (US Bankruptcy Court).

**IV. Reports & Government Documents**

- Insolvency Law Committee, *Report of the Insolvency Law Committee on Cross Border Insolvency*, Ministry of Corporate Affairs (Oct. 2018).

- UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, United Nations (2009).

**V. Secondary Sources: Articles & Journals**

- Olivia Nahak, *The Jet Airways Case: Addressing India's Cross-Border Insolvency Inadequacies*, IBC Law Reporter (2023).

- A. Chandra & S. Gupta, *India's Journey Towards Cross-Border Insolvency Law Reform*, 18 Asian J. Comp. L. 142 (2023).

- *A Global Guide to Cross-Border Insolvency*, REBUILDING SUCCESS (CAIRP), Fall/Winter 2025.