

## 2. OVERSEAS ASSET SAFARI: CROSS-BORDER INSOLVENCY ODYSSEY AND INDIA'S FUTURE COURSE

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### **Abstract**

*Cross-border insolvency is a complex legal issue that has a significant impact on the modern global financial landscape. India's efforts to expand the authority of the IBBI to handle cross-border insolvency cases have been noteworthy. The legal framework outlined u/s under sections 234 and 235 of the IBC 2016 are specifically formulated to ensure equitable treatment for creditors from both domestic and foreign jurisdictions while also preserving and upholding the utmost value of assets during cross-border insolvency proceedings. The article evaluates the incorporation of current cross-border insolvency models, such as the Territoriality Model and the influential concept of the COMI, into the Indian insolvency mechanism that can be exemplified by relevant cases such as State Bank of India v. Jet Airways (India) Ltd. It also focuses on the fundamental principles outlined in the UNCITRAL on Cross-Border Insolvency. The article reviews India's consideration of adopting the UNCITRAL Model Law and how it must align with the Indian insolvency resolution system, such as identifying the corporate debtor's COMI. The comprehensive initiatives undertaken by ILC and CBIRC reflect India's maturity in addressing cross-border insolvency cases. Thus, this article analyses the complex legal dynamics and global implications of cross-border insolvency, concentrating on India's changing approach.*

**Keywords:** *Cross-Border Insolvency, UNCITRAL, IBC, COMI, Draft Part Z*

### **INTRODUCTION**

One of the most crucial components for conveniently running businesses is the establishment of a robust and efficient insolvency framework. The growth of the economy, the creation of a competitive environment and services, and the encouragement of larger investments all depend on this. The economy's capacity for

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distributing limited assets efficiently is directly affected by this. India acknowledged the necessity to establish a competent insolvency and bankruptcy framework in 2016, which led to the enactment of the Insolvency and Bankruptcy Code 2016 (“IBC”). It reorganised the insolvency procedures and marked a new era towards a time-bound legal procedure for the resolution of financial crises affecting both creditors and debtors. With subsequent revisions and the growth of Indian law, the Code has modified and integrated global standards and best practices for the settlement of insolvency cases in India.

When a corporation has debts or assets in multiple countries, the insolvency process becomes considerably more complicated. Cross-border insolvency occurs when a corporate debtor has assets or financial obligations in countries apart from the one in which it was initially incorporated. In such situations, domestic insolvency laws are not the only ones that apply, but the laws of the foreign countries where the assets or liabilities are located may also exert some influence.

Inadequate and disorganised approaches to cross-border insolvency have developed due to the absence of effective insolvency regimes. These approaches are not only difficult to foresee and implement, but they also lack transparency and the resources to resolve potential conflicts and inconsistencies between national laws and insolvency regimes. All of these things have made it harder to rescue financially distressed creditors and debtors and prevent their assets from falling in vain.

The Insolvency and Bankruptcy Board of India (“IBBI”) has planned to expand its jurisdiction to include international insolvency cases, and this might happen shortly.<sup>1</sup> While discussing the importance of a strong domestic insolvency framework, the Bankruptcy Law Reforms Committee (“BLRC”) pointed out the urgency to address cross-border insolvency.<sup>2</sup>

Two sections, i.e., Sections 234 and 235, were subsequently included in the IBC by the Joint Parliamentary Committee on the Code that guaranteed the Code was not

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<sup>1</sup> Saikat Das, ‘Insolvency Board to Consider Cross-Border Norms’ (*The Economic Times*, January 10, 2018) <<https://economictimes.indiatimes.com/news/economy/policy/insolvency-board-to-consider-cross-border-norms/articleshow/62448869.cms>> accessed 28 November 2023

<sup>2</sup> Insolvency and Bankruptcy Board of India, ‘The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design’ (*Insolvency and Bankruptcy Board of India*, November 2015) <[https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 28 November 2023

lacklustre.<sup>3</sup> The new Code's Sections 234 and 235 demonstrate the chances to incorporate an effective cross-border insolvency framework. There is an absence of a comprehensive structure to address the issues that arise from cross-border insolvency proceedings.

A robust insolvency framework is required to ensure equitable protection of domestic and foreign creditors' interests, maximization of the valuation of debtors' assets located in different countries, assistance in coordinating functions between courts and judicial authorities of different nations to achieve a common goal, and prevention of situations involving conflicts of law are all necessary mechanisms.

The year 1997 saw the introduction of a Model Law on Cross-Border Insolvency by UNCITRAL, which was instrumental in shaping the idea of cross-border insolvency. The goal of this model law was to aid countries in resolving corporate insolvency and financial distress situations that involved corporations with assets in multiple countries. One of the key objectives of this Model Law was to foster cooperation among foreign judicial institutions and authorities in the context of cross-border insolvency scenarios.

## **CROSS-BORDER INSOLVENCY FRAMEWORK WITHIN THE IBC 2016: CURRENT MECHANISMS**

The cross-border insolvency law provides a streamlined restructuring process that protects the interests of both corporate creditors and debtors, promoting fairness and legal stability in international commerce and investment. Currently, the IBC 2016 includes two provisions related to cross-border matters, as advised by the Joint Committee. However, these provisions have not yet been put into effect by the central government.<sup>4</sup>

### **A. Section 234: Agreements Made with Foreign Countries.<sup>5</sup>**

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<sup>3</sup> Samyuktha R, 'Code of Conduct for Creditors under the Insolvency and Bankruptcy Code, 2016 - Fall of Supremacy of Committee of Creditors?' (*SSRN*, 10 October 2021) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4232323](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232323)> accessed 28 November 2023

<sup>4</sup> Himanshu Handa, 'Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India' (2018) 1(5) *IJLMH* <<https://ijlmh.com/orchestrating-the-uncitral-model-law-on-cross-border-insolvency-in-india/>> accessed 28 November 2023

<sup>5</sup> Insolvency and Bankruptcy Code 2016 (Act 31 of 2016), s 234

The Central Government has the authority to establish bilateral agreements with other countries to effectively implement the provisions of the IBC 2016. These agreements are designed to manage the consequences of cross-border insolvencies. Additionally, the government can also instruct the application of the Code in cases where the assets or property of a corporate debtor or its personal guarantor are located in a country with which a reciprocal arrangement has been specifically made.

**B. Section 235: Formal written communication seeking assistance or information.<sup>6</sup>**

This provision mandates the use of the principle of reciprocity in cases where, during the process of resolving insolvency, there is a need for evidence or action regarding the assets of a corporate debtor or its personal guarantor. In such situations, the Resolution Professional, Liquidator, or Bankruptcy Trustee must submit an application to the National Company Law Tribunal (NCLT). If the NCLT is convinced, it can send an official request to a court or authority in a nation that has agreed to deal with such matters.

The Code's inclusion of the provisions mentioned above serves primarily to increase the value of the assets held by the corporate debtor. Nevertheless, no nations have signed a reciprocal deal with India for this purpose, and no concrete steps have been made to put the intergovernmental accords into action.

Uncertainty in implementation originates from the fact that each country's treaty has its own unique set of prerequisites, which means that each country must engage in protracted bilateral negotiations. The workload of the judiciary will undoubtedly decrease if countries implement a consistent framework regarding cross-border insolvencies.<sup>7</sup>

## **DEFINING CROSS-BORDER INSOLVENCY MODELS**

**A. Universality Model**

This model posits that at the time of insolvency, all assets of the debtor, irrespective of their universal location, ought to be consolidated into a single, comprehensive estate.

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<sup>6</sup> Insolvency and Bankruptcy Code 2016 (Act 31 of 2016), s 235

<sup>7</sup> Nishith Desai Associates, 'Introduction to Cross-Border Insolvency' (*Nishith Desai Associates*, April 2020) <[www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Introduction-to-Cross-Border-Insolvency.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf)> accessed 28 November 2023

Subsequently, the laws and regulations of the corporate debtor's domicile would govern this estate. It resembles a one-size-fits-all insolvency strategy.

## **B. Territoriality Model**

Insolvency proceedings, according to this Model, should not extend beyond the borders of the country from whence they originated. In simple words, the jurisdiction in which an insolvency proceeding is first commenced determines the extent to which it will proceed.

## THE UNFOLDING STORY OF UNIVERSALISM TERRITORIALISM TO MODIFIED UNIVERSALISM

The most crucial aspect of the Model Law is its intended limitation of capacity. It fails to resolve the Universalism-Territorialism dispute. Contrary to expectations, the drafters seemed to avoid addressing this issue. They achieved this by a '*modified universalist*' principle: by finding a compromise between Universalism and Territorialism on contentious issues that required rational discussion, and by prioritizing practical factors in the majority of their decisions.<sup>8</sup> This deliberate decision, despite facing criticism from advocates of both regimes, can also be regarded as an intellectual concept implemented with the aim of garnering broader international acceptance, fostering opportunities for enhancement and advancement in the Model Law, and preventing it from being labelled as a biased law in its early stages.<sup>9</sup>

The Model Law prioritizes four essential factors crucial to the handling of cross-border insolvency cases: *Access*, *Recognition*, *Relief (Assistance)*, and *Cooperation and Coordination*.<sup>10</sup>

- i. *Access*: The purpose of the measures outlined in Chapter II of the Model Law is to ensure that representatives of foreign insolvency proceedings and creditors are

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<sup>8</sup> Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) MLR <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2797&context=mlr>> accessed 29 November 2023

<sup>9</sup> Francisco Satiro & Paulo Fernando Campana Filho, 'Transnational Insolvency: Beyond State Regulation and Towards Cooperation Agreements' (SSRN, 6 June 2011) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1858968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858968)> accessed 29 November 2023

<sup>10</sup> United Nations Commission On International Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (*United Nations Commission On International Trade Law*, 30 May 1997) <[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency)> accessed 29 November 2023

promptly and affirmatively granted access to the insolvency forum of the adopting nation in order to seek collaboration.<sup>11</sup> Foreign representatives or creditors are permitted to directly approach the court in a foreign country and request the initiation of insolvency proceedings with minimal bureaucratic processes and formalities.<sup>12</sup> The principle of equal treatment for municipal and foreign creditors is upheld with regard to their participation and engagement in insolvency proceedings. The law of the enacting countries governs the oversight, priority, and treatment of claims by foreign creditors. In order to ensure that such legal actions are more accommodating to foreign representatives and creditors, the court of the enacting state is instructed to personally inform the known creditors. It is important to note that no rogatory letters or other similar formalities are necessary for this notification. Article 5 grants the bankruptcy professional responsible for the primary proceedings the authority to act as a representative for the enacting state in all secondary processes, and vice versa.<sup>13</sup> Thus, reciprocating the access to the insolvency process in the jurisdiction of different enacting states.

- ii. *Recognition*: The primary objective of the Model Law is to establish efficient mechanisms for recognising foreign trials in order to avoid lengthy procedures that are typically involved and to provide assurance on the decision to accept such foreign proceedings. These central arrangements acknowledge orders from foreign courts to initiate actions and designate foreign agents, as long as certain requirements are met.<sup>14</sup>

The insolvency official seeks recognition of international proceedings by applying to a foreign court. The application must include either a certified copy of the decision that initiates the foreign proceeding and appoints the foreign

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<sup>11</sup> Dr. Binoy J. Kattadiyil & CS Nitika Manchanda, 'Cross Border Insolvency Framework In India' (2020) 9(4(7)) IJMER <[https://icsiip.in/panel/assets/images/research\\_articles/16331671708889CROSS%20BORDER%20INSOLVENCYFRAMEWORK%20IN%20INDIA%20volume9-issue4\(7\)-2020.pdf](https://icsiip.in/panel/assets/images/research_articles/16331671708889CROSS%20BORDER%20INSOLVENCYFRAMEWORK%20IN%20INDIA%20volume9-issue4(7)-2020.pdf)> accessed 29 November 2023

<sup>12</sup> *Maxwell Communication Corp. v National Westminster Bank plc (In re Maxwell Communication Corp.)* 170 B.R. 800 (Bankr. S.D.N.Y. 1994)

<sup>13</sup> UNCITRAL Model Law on Cross-Border Insolvency, Art. 16(3) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>

<sup>14</sup> Confederation of Indian Industry, 'Cross-Border & Personal Insolvency in India: Roadmap for Implementation' (*Confederation of Indian Industry*, 27 March 2019) <<https://cii.in/PublicationDetail.aspx?enc=VFFrY1+4/j6P7Pi3PkXpqqqMnYfeBl1mOCAP32cHfbBOFDfv6mKufUDeOeaccZy6q1GFLKxY5V/qwUscK4dbnaAJyvy2efcPEv9lqd9nd5P3ItKdwakONOVtzGpOwdYtWkjKorSl6huEMur1iy+4ivu+veQ6Wu4d/8+vK87Ak5ix20CjJkKOEgKM4z2Grt5a>> accessed 29 November 2023

representative, or a document from the foreign court confirming the existence of the foreign proceeding and the appointment of the foreign representative.<sup>15</sup> In addition, this application must be accompanied by any other type of proof, which such court would recognise, along with a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.<sup>16</sup> To ensure efficient and seamless recognition proceedings, the court assumes that all submitted documents are genuine and retains the authority to be informed and updated about any changes in the insolvency proceedings of the debtor in other countries as well. The courts are instructed to promptly acknowledge whether it is a foreign main proceeding or a foreign non-main proceeding. The Court has the authority to alter the recognition of a foreign procedure or withdraw recognition altogether if the recognition violates the state's public policy or if there are deficiencies, inaccuracies, or a complete absence of procedural and evidentiary standards.<sup>17</sup>

- iii. *Relief*: The key features of relief under the Model Law include *interim* or *emergency* measures to protect the corporate debtor's assets and address the concerns of creditors while the decision on the recognition of foreign proceedings is pending. These measures encompass actions such as:
- halting the enforcement of claims against the debtor's property;
  - suspending any rights to transfer, encumber, or dispose of the debtor's property;
  - allowing for the examination of witnesses and the disclosure of information regarding the debtor's assets, affairs, and obligations;
  - entrusting the debtor's property to a foreign representative or custodian to safeguard and maintain its value; and
  - any other relief that is available under the laws of the jurisdiction where the proceedings are taking place. This kind of "urgently needed" relief stops as and when the foreign proceeding is recognised.<sup>18</sup>

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<sup>15</sup> Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' [1991] ABJ 457

<sup>16</sup> *ibid*

<sup>17</sup> Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (BeardBooks 2001) 287

<sup>18</sup> Atul Pandey, Abhishek Sanyal, Indruj Rai & Hirak Mukhopadhyay, 'India: FEMA Cross Border Merger Regulations Issued By RBI' (*Mondaq*, 5 April 2018) <<https://www.mondaq.com/india/corporate-and-company-law/689316/fema-cross-border-merger-regulations-issued-by-rbi>> accessed 1 December 2023

Upon recognition of a Foreign Main Proceeding, a legal provision known as an ‘automatic stay’ or ‘moratorium’ is activated.<sup>19</sup> This provision entails the following:

- All individual actions or proceedings related to the debtor’s assets, rights, obligations, or liabilities are halted;
- Execution against the debtor’s assets is suspended; and
- The debtor’s ability to transfer, encumber, or dispose of any assets is temporarily restricted.

This automatic stay is universally applicable within the jurisdiction unless the court issues a contrary ruling. The automatic stay does not apply if the proceeding is classified as a non-main proceeding.

In addition, the court has the authority to award remedy, based on the applicable laws of each state, to safeguard the assets of the corporate debtor or the interests of the creditors after the case is recognised as either the main or non-main proceeding. Upon determining that the stakeholders are sufficiently safeguarded, the court may, at the request of the foreign representative, transfer the allocation of all or a portion of the corporate debtor’s assets located in the jurisdiction to the foreign administrator, or another individual designated by the court.<sup>20</sup> Once a foreign proceeding is admitted, the Model Law grants the judiciary an ample amount of leeway and potential choices. After recognising a foreign procedure, the court can decide to impose, modify, limit, or revoke any relief that has been granted.

- i. *Cooperation and Coordination*: The Model Law explicitly grants judges the authority to engage in the regions governed by it and to engage in specific discussions with other foreign administrations. Cooperation between courts and foreign delegates is also authorised. The arrangements aimed at coordinating simultaneous procedures aim to promote decisions that would most effectively achieve the objectives of both domestic and international procedures. The Model Law requirements require courts from other nations to engage in ‘maximum possible communication,’ either directly or indirectly,

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<sup>19</sup> Hiten Kotak & Lakshmisha S, ‘Cross-border mergers – Creating new frontiers and challenges’ (*LawStreetIndia*, 8 June 2018) <<https://www.lawstreetindia.com/experts/column?sid=229>> accessed 1 December 2023

<sup>20</sup> Richie Sancheti & Hanisha Amesur, ‘Taxation of Cross border M&A- A paradigm shift?’ (*Nishith Desai Associates*, October 2010) <[https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Taxation\\_of\\_Cross\\_Border\\_M-A\\_-\\_A\\_paradigm\\_shift-.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Taxation_of_Cross_Border_M-A_-_A_paradigm_shift-.pdf)> accessed 1 December 2023



such as through an authorised foreign representative or any other suitable means determined by the court.<sup>21</sup> The Model Law also includes provisions regarding the structure of foreign procedures. It is understood that multiple insolvency proceedings that are not subsidiary to each other might be initiated simultaneously in various nations, therefore referred to as '*Parallel Proceedings*.' These rules are designed to coordinate legal proceedings. For example, any benefits given when a foreign case is recognised must align with the local proceeding. The local court must also consider distributions made in a foreign proceeding to avoid an uneven distribution of funds.

India can benefit from adopting the Model Law instead of depending exclusively on bilateral agreements when it comes to addressing cross-border insolvencies. This approach offers various advantages. Initially, it introduces a universally acknowledged benchmark that has previously been adopted by other countries, providing foreign lenders with a familiar framework for determining and acknowledging foreign bankruptcy processes. This adoption would provide essential assurance for these creditors. In addition, opting for the Model Law would accelerate the procedure, bypassing the frequently laborious discussions needed for bilateral agreements, particularly with nations that have already adopted the Model Law. India would maintain the capacity to make essential modifications to harmonise the legislation with its own needs. Both the *Eradi Committee* in 2005 and the *N.L. Mitra Committee* in 2001 suggested that India should adopt the Model Law, although with certain modifications. However, this recommendation was not implemented.

Nevertheless, India must thoroughly analyse certain crucial factors before integrating the Model Law into its national legislation:

- i. *Establishing Centre of Main Interests ("COMI")*: The efficacy of the Model Law is contingent upon distinguishing between foreign main and non-main proceedings, principally based on the concept of COMI. For multi-national organisations that have operations in multiple jurisdictions, identifying

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<sup>21</sup> S Ramanujam, *Mergers et al—Issues, Implications and Case Law in Corporate Restructuring*, vol 1 (4<sup>th</sup> edn, LexisNexis 2019)

their COMI presents difficulties.<sup>22</sup> The legislation that includes the Model Law should clearly define the variables that help determine the COMI, taking into account factors such as the primary location of economic activities and the placement of assets. This clause would provide guidance to Indian courts in making findings regarding the COMI and reduce any ambiguity.<sup>23</sup>

- ii. *Concerns about Reciprocity:* The non-reciprocity provision of the Model Law grants foreign representatives access without necessitating their country to adopt the Model Law. However, this could result in unequal access, because Indian representatives may not have the same advantages in nations that do not follow the Model Law.
- iii. *Interaction with Domestic Laws:* India-specific legislation, such as the Foreign Exchange Management Act, 1999<sup>24</sup>, and RBI Capital Control Rules, may conflict with the provisions of the Model Law. To resolve this matter, it is necessary to conduct a new assessment to align the Model Law with India's current legal and bankruptcy structure.
- iv. *Tax Haven Conundrum:* Tax havens such as Luxembourg, Singapore, Cayman Islands, British Virgin Islands, Delaware in the USA, and other similar countries can pose a considerable obstacle in the process of enforcing cross-border insolvency statutes due to the complexity of the litigation and the monitoring of assets.<sup>25</sup> When it comes to the realisation of cross-border assets, one of the most significant challenges is asset tracing without a lot of information. The former management or promoters of a company may not disclose all of the facts on multi-layered structures and abroad investments during the insolvency proceedings. Therefore, Resolution Professionals ("RP") depend on sources from third parties as

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<sup>22</sup> UNCITRAL Model Law on Cross-Border Insolvency, Art. 16(3). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>

<sup>23</sup> C-341/04, *Eurofood IFSC Ltd, Re* [2006] ECR I-3813 para 17; *In re Bear Stearns High-Grade Structured Fund* 389 BR 325 (S.D.N.Y. 2008)

<sup>24</sup> Foreign Exchange Management Act 1999 (Act 42 of 1999)

<sup>25</sup> Ishwari Chavan, 'Explained: Cross border insolvency law, and why amendments in IBC are necessary' (*ETBFSI.com*, 14 February 2022) <<https://bfsi.economictimes.indiatimes.com/news/industry/explained-cross-border-insolvency-law-and-why-amendments-in-ibc-are-necessary/89542595>> accessed 10 December 2023

well as regulatory databases, both of which are significantly more difficult to access in tax havens. In tax havens, RPs would not have easy access to regulatory databases, which would prevent the detection of corporate debtor's assets and liabilities

Although these obstacles do not require a complete rejection of the Model Law, they do emphasise the need for revisions to ensure its implementation. The Model Law provides a well-organised foundation for addressing the intricacies involved in cross-border insolvencies. As India incorporates these matters into its domestic legislation, the Model Law serves as a valuable initial reference point.