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Cross border insolvency in India: A Legal Study

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Abstract

Cross-border insolvency is a challenging and essential area of law for insolvent enterprises with assets, creditors, or activities in multiple countries. In today's globalized economy, an effective cross-border insolvency framework is crucial, as businesses frequently operate across international borders. In recent years, India and the United Kingdom have made significant enhancements to their respective insolvency regimes to address the issues of cross-border insolvency. These modifications were prompted by the need for a robust legal framework that can foster collaboration and coordination between jurisdictions, assure equitable treatment of stakeholders, and maximize the value of insolvent assets.

This article aims to compare and contrast the cross-border insolvency regimes in India and the UK to determine whether or not they are sufficient to address the challenges posed by international insolvencies.

Key words: Insolvency, Cross border, India, United Kingdom, Bankruptcy Code, UNCITRAL

I. Introduction

The "**Insolvency and Bankruptcy Code of 2016**" (IBC) unified and modernized India's formerly fragmented insolvency regime. The objectives of the IBC are to expedite the resolution of insolvency cases, make it simpler to hold all parties accountable, and increase transparency. Since its inception, the IBC has provided the legal foundation for a number of high-profile insolvency cases involving multinational corporations. As against India other states like the United Kingdom has long been recognized as a global hub for insolvency and restructuring. Its insolvency procedure, which is primarily governed by the Insolvency Act of 1986, has been lauded for its adaptability, creditor-friendliness, and well-established legal concepts. Because of the United Kingdom's longstanding practice of recognizing and dealing with foreign insolvencies, the English courts are typically the preferred venue for resolving complex cross-border disputes.[2]

A cross-border insolvency procedure may be required "when an insolvent debtor has assets in more than one country or when part of the debtor's creditors are located in a country other than the one in which the bankruptcy procedures have been initiated". An international insolvency process describes this type of action. Professor Ian Fletcher has stated that the term "Cross-Border Insolvency refers to instances in which insolvency circumstances cross the borders of a single legal system and where the provisions of domestic insolvency law cannot be applied without taking into account the issues raised by the foreign elements of the case".[3] This is so because the term "Cross-Border Insolvency is used to describe instances whereby insolvency issues cross national boundaries. Since the issue involves many countries, the applicable bankruptcy laws of each of those countries must be considered. This is due to the presence of irrelevant outside factors in the case. Cross-border insolvencies are unusual because most multinational corporations with international operations only file for bankruptcy in one of those nations. As a direct result of the expansion of international trade and the globalisation of economic activity, it is increasingly commonplace for firms to interact with many legal systems". In light of this, it is not surprising that the bankruptcy of a

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[2] Manikyamba Komallapalli, Aarthi Tyagi, and, R. P Yadav, "Cross-Border Insolvency a Need for India" SSRN (October 3, 2021) https://ssrn.com/abstract=3935087.

[3] Vaibhav Sangam Mishra & Janmejay Singh, *Alternative Dispute Resolution & Its Comparative Study with India and USA*, 1 JUS CORPUS L.J. 78 (2021). ("Mishra")

multinational firm might have serious consequences for the world economy.[4]

Scope and objective

This article aims to provide a critical analysis of the following aspects of cross-border insolvency law and procedure in India. An examination of the applicable statutes, regulations, and case law in both nations governing the recognition and enforcement of international bankruptcy procedures. Analyse the creditor rights and remedies in cross-border insolvency cases, Including priority of claims, asset distribution, and creditor interest protection. Examine the processes and procedures available to save financially distressed businesses, such as plans of arrangement, pre-pack administrations, and debtor-in-possession financing. Examines the challenges and constraints of cross-border insolvency from the perspectives of India as well as potential areas for future reform and harmonization of international insolvency law. This article further aims to contribute to the existing literature on international insolvency law by conducting a comparative study of cross-border insolvency in India.

EVOLUTION OF CROSS BORDER INSOLVENCY REGIMES

- **19th Century Regional Efforts**

In the eighteenth century, the province pursued the following objectives: During the South American Congress on International Private Law, which was held in Latin America between 1888 and 1989, international insolvency issues were first thoroughly discussed. "The Montevideo Treaty of 1889" established liquidation standards, the concept of procedural unity, and jurisdiction in the state where the debtor's business was located at the time of insolvency.[5] The 1940 revision to the Treaty included provisions for compositions, suspension of payments, and other pertinent actions (Majumdar, 2009). In addition, the term "commercial domicile" has been defined. In 1928, fifteen Latin American nations ratified the Bustamante Code during the Havana Conference. Certain nations discovered in it a source that united them and contributed to their universality.[6] These were some of the earliest attempts to develop a standardised framework for addressing the challenges associated with declaring bankruptcy in nations with comparable economic and legal systems. Cunningham and Werlen (1996) state that despite their ubiquitous use, they give preference to local creditors. In 1933, Denmark, Finland, Iceland, Norway, and Sweden reached an agreement on how to handle the issue of insolvency in each of their respective countries. New versions of this convention were adopted and implemented in 1977 and 1982.[7] The assets of the insolvent person or business would be gathered into a singular estate and then distributed in accordance with the laws of the state where insolvency proceedings were initiated. It allowed for judicial cooperation, the recognition of judicial decisions, and the recognition of bankruptcy procedures in other jurisdictions. In Europe, work on the Hague Conference began in 1894. The multilateral convention was converted into a model bilateral treaty in 1928, but it has not yet been ratified. "The European Convention on Certain International Aspects of Bankruptcy", which was ratified by the Council of Europe in 1990, resulted in the establishment of both the primary and secondary bankruptcy procedures. In May of 2002, "Regulation (EU) No. 1346" of the European Union (EU) entered into force. In May 2015, it was replaced by "Regulation (EU) No. 2015/848", which was then followed by the "Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency." The "Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency" followed both of these regulations. Instead of establishing standard regulations, "Regulation 1346 coordinated insolvency processes as they existed in member states", whereas "Regulation 848 and the Recommendation signal the new approach. The objective is to create a uniform legal, economic, and financial environment between the EU and the US and to promote the adoption of a standard legislative framework for company restructurings within the EU."[8] In addition, the objective is to create a uniform legal environment between the EU and the US. The most recent EU regulation must also fully address the

[4] *Id*.

[5] Sudhaker Shukla & Kokila Jayaram, "*Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL*" 307, https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf.

[6] UNCITRAL (1993), "Possible future work on Cross-Border Insolvency", 26th session, Vienna, 5-23, July

[7] Priya Misra, "*Cross-border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies—Determining Jurisdiction for Group Insolvencies*" 45 (2) Vikalpa: The Journal for Decision Makers (2020), https://doi.org/10.1177/0256090920946267.

[8] 26th Session, *supra* note 12.

need for international cooperation in bankruptcy proceedings.

- **UNCITRAL Model Law on Cross Border Insolvency**

At the Congress on "International Trade Law" in New York in May 1992, governments recommended that the UNCITRAL (Commission) explore international bankruptcy. The 1992 Model Law on Cross-Border Insolvency was implemented on May 30, 1997. The Commission's Insolvency Law Working Group is methodically addressing challenges that occur when a multinational corporation declares insolvency in another jurisdiction. The Model Law gives nations legislative advice, unlike other international treaties. The bill aims to "assist states in equipping their insolvency laws with a modern, harmonised, and fair framework to address cross-border insolvency more effectively."[9] Instead of unity, it promotes state collaboration and respects different legal systems. Access, recognition, collaboration, and coordination underpin the Model Law. Thus, international specialists and creditors can quickly file bankruptcy against a debtor in local courts. Foreign cases are accepted by local courts. It allows insolvency practitioners and national courts to coordinate during concurrent proceedings. The paper appears to be comprehensive, as it is based on previous bilateral frameworks and allows for jurisdiction-specific modifications. At best, the Model Law provides a broad framework, leaving operational details to be determined by individual jurisdictions, and wholly avoids suggesting any mechanism for resolving differences in approaches within the scope of Model Laws as adopted by different nations.[10]

Following its adoption in 47 states, it now has 50 jurisdictions.[11] The countries that have ratified the Model Law differ in a number of ways. This category includes affluent nations like the United Kingdom and the United States, as well as minor developing nations like Chad, Chile, the Congo, Togo, Myanmar, and Uganda, among others. The BRIC nations (with the exception of South Africa), the rest of ASEAN (with the exception of Singapore and Malaysia), and the European Union (with the exception of the United Kingdom) have not yet accepted the Model Law. Despite the fact that the UNCITRAL Model Laws offer a multilateral approach, a number of economically advanced nations have chosen not to participate, thereby diminishing the Model Laws' utility.

CROSS BORDER INSOLVENCY: IN INDIA

Insolvency can result when a person, company, or organisation cannot make payments when they are due. When a company decides to file for bankruptcy, it must go through several phases, culminating in the liquidator's process of collecting and selling all of the company's assets to pay off its debts. As previously stated, "cross-border insolvency" refers to a situation in which a debtor is located in one foreign jurisdiction, and their creditors are located in another.[12]

The current bankruptcy legislation does not address the rights of overseas creditors to file petitions with the National Company Law Tribunal (NCLT). International insolvency and bankruptcy are covered in Sections 234 and 235, respectively, of the Code. Section 235 of the Code permits the adjudicating authority to request a court in a country with which it has engaged in a bilateral agreement under Section 234 to handle assets located in that country in a particular manner. By Section 234 of the Code, the Central Government can enter into bilateral agreements with any foreign nation to resolve cross-border insolvency issues. The resultant ad hoc framework has caused delays and uncertainty for creditors, debtors, and courts.[13]

In the 2017 case "Macquarie Bank Limited v. Shilpi Cable Technologies Ltd."[14], the Apex Court of India decided that international creditors have the same right as domestic creditors to start and participate in IBC corporate bankruptcy resolution. The court expanded "person" to include non-Indians. Foreign procedures in India are guaranteed under the 1961 Foreign procedures Act and 1908 Civil Procedure Code. Indian courts can enforce non-Indian tribunal judgements in "Reciprocating Territories" under Section 44A of the CPC.[15] The

[9] "UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY" (1997), https://uncitral.un.org/en/texts/insolvency/
[10] *Id.*
[11] "*P. Macfadyen & Co. Ex parte Vizianagaram Co., Ltd.*" [1908] 1 K.B. 67.
[12] Sean E. Story, "*Cross-Border Insolvency: A Comparative Analysis*", 32 ARIZ. J. INT'L & COMP. L. 431 (2015).
[13] Simran Singh, "*Comparative Study of Cross-Border Insolvency in India and U.K*"., 4 INT'L J.L. MGMT. & HUMAN. 2727 (2021).
[14] CA No. 15135/2017. ("CA")
[15] Code of Civil Procedure, 1908 , § 44A, Acts of Parliament (India).

Official Gazette will be revised if India officially acknowledges a reciprocal territory. In India20, many insolvency verdicts and decrees have been rendered unenforceable due to the CPC's limited scope of authority. This is because they were issued during reorganisation or as an interim order.[16] Similarly, the laws of the relevant nation will determine the procedure that must be followed for Indian proceedings to be recognised outside of India. India's acceptance of the UNCITRAL Model Law is optional for the proceedings to be recognised in a nation that has accepted the Model Law. Conversely, having a cross-border insolvency law based on the Model Law may necessitate reciprocity from India. This is because having a law founded on the Model law would imply that the other country would only provide recognition, cooperation, etc., about Indian insolvency proceedings if certain conditions are met by domestic Indian law. In other terms, having a rule based on the Model law could necessitate India's reciprocity.[17]

- **Issues India facing to implement Cross-Border Insolvency**

The Ministry of Corporate Affairs formed the Insolvency Law Committee on November 16, 2017, in order to provide the government with advice on issues that developed following the adoption of the 2016 Insolvency and Bankruptcy Code. The Report of the Committee was turned in on March 26, 2018, and it emphasised the requirement for a more comprehensive insolvency system that operates across international borders. After conducting an in-depth investigation, the committee came to the conclusion that the two provisions of the legislation that are now in effect, sections 234 and 235, do not offer a solid basis for dealing with insolvencies that occur across international borders. It has suggested a drafting that might be adopted in India that is based on the "UNCITRAL Model Law on Cross-Border Insolvency".[18]

As of right now, 44 countries have approved the UNCITRAL Model Law to assist them in managing financial concerns and bankruptcy in international trade. This was accomplished via the use of the law. The most challenging component of dealing with a cross-border bankruptcy is figuring out where your principal interests lie and where they are protected. The ILC Draught includes a rebuttable presumption that the location of incorporation or legal domicile of a commercial entity qualifies as the entity's COMI. This presumption was added in 2010. A basic list of COMI criteria may be found in the statutes of a number of different countries. The Indian Insolvency Law Committee (ILC) is of the opinion that the country should behave in the same manner. In order to encourage reciprocity and develop formal mechanisms for addressing cross-border insolvencies with trade partners, the ILC has suggested that India engage into bilateral agreements with key trading nations such as the UK and the US.[19] An illustrated list of factors will assist the adjudicating authority in arriving at a judgement in a timely manner, which is compatible with the goal of the Code, which is the speedy settlement of commercial disputes, and was also advocated by ILC. In addition, this will help meet the requirements of the Uniform Commercial Code.[20]

Discussions on Cross-Border Insolvency by the Insolvency Committee

According to the ILC, there is a "lack of clarity regarding the efficiency of the cross-border insolvency system provided by Sections 234 and 235." In international bankruptcy cases, neither clause addresses "assets, creditors, or parallel proceedings in foreign jurisdictions" in an appropriate manner. Consequently, it sought to replicate the UNCITRAL model law on cross-border insolvency and offered a comprehensive framework. According to ILC, the subject of how insolvency regulations apply to business conglomerates is complex.[21]

The current legal framework for insolvency may be insufficiently developed to effectively manage a complex scenario of this nature. The UNCITRAL legislative guideline has noted that the enactment of bankruptcy legislation for corporate entities is a complex and heterogeneous process across different jurisdictions. ILC In the event that the current system demonstrates efficacy, the lifting of the corporate veil during insolvency proceedings could potentially result in significant consequences for corporate debtors. The International Law Commission (ILC) recommends the incorporation of a novel chapter in the Insolvency and Bankruptcy (I&B) Code to effectively incorporate the suggested modifications. The assessment and disapproval of

[16] *Id.*
[17] CA, *supra* note 14.
[18] Ramesh Kumar, "*Understanding Cross Border Insolvency: An Indian Overview*", 1 Jus Corpus L.J. 98 (2021). ("Kumar")
[19] Mishra, *supra* note 7.
[20] Kumar, *supra* note 18.
[21] *Id.*

Cross Border Insolvency regulations by the Insolvency Law Committee carry noteworthy implications. In order to mitigate any potential inconsistencies that may arise between regional and projected Cross-Border Insolvency frameworks, the Committee has deliberated the possibility of incorporating the UNCITRAL Model Law with slight modifications.[22]

- **Centre of Main Interest (COMI)**

If there is no evidence to the contrary, the Insolvency Law Report considers the corporate debtor's centre of major interests (COMI) to be its registered office for this Part. The presumption in paragraph (1) does not apply if the corporate debtor's registered office was moved abroad within three months of filing an insolvency petition. The presumption in paragraph (1) will also not apply if the corporate debtor's registered office has not been moved abroad within three months of filing an insolvency petition. If the Adjudicating Authority cannot determine the corporate debtor's primary objective using the criteria in paragraph (3), it may use the Central Government's criteria for this purpose.[23]

- **Brexit Effect**

In a June 2016 referendum dubbed "Brexit" (a portmanteau of "British" and "Exit"), British electors supported leaving the European Union. The formal date of withdrawal from the EU was January 31, 2020, at 11:59 p.m. GMT, as announced by the British government in March 2017. Given the intricate labyrinth of commercial ties between India and the United Kingdom, this will almost certainly have an effect on bilateral trade.[24] This agreement establishes a transition period from January 23, 2020 (the date the Withdrawal Agreement Act goes into effect) to December 31, 2020. During this period, the United Kingdom can negotiate trade agreements with anyone, including the European Union (EU).

II. Conclusion

Each of the prospective outcomes under consideration carries with it both positives and negatives. Despite widespread support for enacting the Model Law, its implementation in countries that have done so in the past has been met with criticism, and it has been adopted by even fewer Indian-relevant jurisdictions. Despite this broad agreement, the Model Law has not been adopted. It is difficult to disregard the Model Law because it contains the distilled knowledge of cases spanning more than half a century and from diverse nations with various approaches to bankruptcy. Due to its incorporation of case data, the Model Law is difficult to disregard despite its apparent flaws, such as its exclusion of certain categories of businesses, such as banks. Given that financial integration contributes to the process of economic globalization, it is concerning that some nations are prohibited from participating in international insolvency proceedings.

Should India desires a more realistic framework that extends the objectives for the resolution of local bankruptcy cases to cross-border situations, then the Model Law is manifestly inadequate to meet their needs. The Model Law should not be the sole focus of legal research in India. The G20-affiliated Financial Stability Board (FSB) issued a set of principles in 2015 to facilitate the efficient and effective resolution of cross-border financial institutions and other firms in the financial sector. This collection of supplemental instructions expands upon the Model Law. It proposes a legal framework that permits the recognition of resolution acts carried out in other nations, as well as additional measures and commercial agreements. The authors conclude that the Model Law is insufficient and suggests that India would be wise to begin by moving beyond the Model Law's confines and toward the FSB's framework. However, recommending the structure of a functioning system in India is outside the scope of this investigation. India may deviate from the Model Law's guidelines while adhering to the law's fundamental principles. Adopting a country-by-country strategy with the economic interests of each nation in mind would be a courageous and well-targeted move. This strategy may serve as an example in a future world where globalisation is undergoing significant change as a result of an issue comparable to the current pandemic.

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[22] Chakrabarti, Ran. "*Key Issues in Cross-Border Insolvency*" 30(2) NATIONAL LAW SCHOOL OF INDIA REVIEW 119–35 (2018), https://www.jstor.org/stable/26743940.

[23] *Id.*

[24] Kumar, *supra* note 18.