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CROSS-BORDER INSOLVENCY IN INDIA: ADOPTION OF THE UNCITRAL MODEL LAW AND ITS CHALLENGES

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ABSTRACT

Relating to cross-national disputes accounting for surging stake in large insolvency matters assessed at over ₹1.6 lakh crore in FY 2023–24, the heterogeneous regulatory architectures trans trans-jurisdictionally entailed in such insolvencies catalyze multifarious barriers. Ergo, insolvency regulation triggers "acute difficulties when it involves international dimensions." This article conducts a detailed critique of India's current insolvency framework, particularly its strengths in dealing with cross-border insolvency issues, and appraises the UNCITRAL Model Law on Cross-Border Insolvency as a putative modus operandi to magnify India's legal infrastructure. The evaluation accentuates the Model Law's core principles and reflects on their tangible outcomes for India in refining processual efficiency, judicial coordination, and asset recovery within jurisdictions. The article further explicates key institutional and legal impediments to adopting the Model Law and advocates for targeted strategic measures to integrate international standards within India's insolvency regime. It argues that such alignment is essential for India to effectively tackle the rising international dimensions of insolvency, foster investor confidence, and sustain its trajectory as a $4.3 trillion economy and emerging premier capital gateway.

Keywords: *Corporate Insolvency, IBC, Model Law, Creditor Interest, NCLT*

INTRODUCTION

Concerning the increasingly interconnected global economy, intricacies associated with cross-border insolvency have become more pronounced than ever before. As multinational enterprises

scale up their operations across jurisdictions, the room for financial strain transcending domestic boundaries has escalated significantly, implicating a wide array of international stakeholders. The convolutions of cross-border insolvency surface when a corporation with creditors, assets, and operations scattered across various jurisdictions becomes economically distressed, thereby mandating a harmonized legal approach equipped to reconcile polarized domestic insolvency regimes. In such instances, an equal shield for both domestic and foreign creditors require the establishment of a comprehensive infrastructure that efficiently balances the divergent interests across borders. The framework of cross-border insolvency is intensified by the conflicting frameworks of distinct nations, triggering incoherent proceedings.

India, pursuant to a visionary reform of its corporate insolvency architecture, introduced the Insolvency and Bankruptcy Code in 2016 **("IBC")** to streamline domestic resolution processes.[1] The Code substantially advanced the efficacy of internal insolvency proceedings however, it persists as inadequate in addressing the nuances of international insolvency disputes. It was tailored principally to consolidate and modernise the domestic insolvency framework, but it doesn't yet offer a structured framework to navigate complex insolvency matters across borders. The lacuna is compounded by India's resistance to integrating globally sanctioned instruments, such as the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency **("MODEL LAW")**[2], which is broadly adopted by nations including the United States of America **("U.S.")**, the United Kingdom **("UK")**, and Singapore.[3] India's constrained involvement with the model is a mounting concern, particularly as Indian enterprises are frequently immersed in transnational insolvency disputes. The indispensability of reform has also been highlighted in the landmark ruling of *Jet Airways. (India) Limited v. State Bank of India* & Anr.[4]

The article commences with assessing the current insolvency regime of India, exploring the extent and caveats of the IBC. It then examines the structure and worldwide relevance of the Model Law and analyses how its implementation could affect India's insolvency infrastructure. Lastly, the

[1] The Insolvency and Bankruptcy Code, 2016.
[2] International Insolvency Institute, Model Law on Cross-Border Insolvency, III GLOBAL (n.d.), <UNICTRAL Model Law on Insolvency with Guide to Enactment.PDF >.
[3] UNCITRAL, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (n.d.),< Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law>.
[4] UNCITRAL, v1-Cross-Border-Insolvency (n.d.), <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>.

paper scrutinizes the barriers to the implementation and offers strategic measures to bolster India's capability to navigate international insolvency issues efficiently.

INDIA'S CROSS-JURISDICTIONAL INSOLVENCY PARADIGM

India's stance on international insolvency has been adapting, markedly with the enforcement of the IBC in 2016, which substituted the formerly dispersed landscape of insolvency laws.[5] Before the IBC, the framework governing insolvency was expanded to several acts, such as the Companies Act, 1956 and the Sick Industrial Companies (Special Provisions) Act, 1985 **("SICA")**.[6] [7] These laws were principally dedicated to domestic insolvency cases and didn't offer an adequate set-up to confront the complexities of cross-border insolvency.

A. Insolvency and Bankruptcy Code, 2016

The IBC accelerated the procedure for resolving insolvencies. Nevertheless, it initially didn't possess an integrated model for coping with cross-border insolvency matters. The Bankruptcy Law Reforms Committee **("BLRC")**, which constructed the IBC, acknowledged this shortfall and recommended addressing the gap in prospective legislative updates. This culminated in the inclusion of Sections 234 and 235 in the IBC to set the basis for cross-border insolvency synergy with foreign jurisdictions.[8]

i. Agreements with foreign countries

Section 234 of the code bestows the Central Government the authority to embark on bilateral agreements with foreign jurisdictions in the furtherance of managing foreign insolvency disputes. These agreements can enable a cooperative framework for validating proceedings, fostering amicable settlements, and defending the claims of creditors across borders. Notwithstanding the existing provision, the Central Government awaits entering into any such accord with global counterparts, bypassing the execution of the section largely untested. This limitation significantly hampers the IBC's ability to effectively deal with cases, as there are no established protocols for cooperation.[9]

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[5] The Insolvency and Bankruptcy Code, 2016.
[6] The Companies Act, 1956.
[7] The Sick Industrial Companies (Special Provisions) Act, 1985.
[8] The Insolvency and Bankruptcy Code, supra note 5.
[9] The Insolvency and Bankruptcy Code, supra note 5, §234.

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ii. Letter of request to a country outside India in certain cases

Section 235 of the code authorises the National Company Law Tribunal **("NCLT")** to issue a letter of request to courts abroad in jurisdictions with which India has signed reciprocal agreements under Section 234. This letter of request stands as a formal plea for external courts to assist in facilitating insolvency proceedings existing in India, such as by freezing assets, enforcing foreign orders, or recognising judgments. Cognate to Section 234, Section 235's efficacy is restrained owing to the non-existence of reciprocal agreements. Until such agreements come into force, the ability of Indian courts to appeal for support from foreign courts lingers theoretical.[10]

While IBC establishes a bedrock for resolving cross-border insolvency, its blueprint prevails as largely territorial. This signifies that Indian insolvency adjudication predominantly limits attention to assets domiciled within its jurisdiction, and foreign assets are not incorporated by default in the procedure unless there is an agreement with foreign jurisdictions. This territorial restriction became strikingly evident in the Jet Airways (India) Pvt. Ltd. Insolvency.

B. The Jet Airways Case

The liquidation process of Jet Airways Private Ltd, at a time India's dominant private airline, denoted a substantial evolution in India's approach to cross-border insolvency. In June 2019, the State Bank of India **("SBI")** filed an application before the NCLT, triggering a corporate insolvency resolution process against Jet, citing defaults on loan repayments. NCLT accepted the applications, levied a moratorium, and appointed an interim resolution professional. Remarkably, the NCLT recognized that insolvency proceedings against Jet had already been initiated in the Netherlands before the Noord-Holland District Court in May 2019. The Dutch court had delegated an administrator, who in due course lodged a petition before the NCLT, pursuing acknowledgement of the Dutch proceedings in India. However, the NCLT turned down the request, quoting that the IBC is devoid of any provision to acknowledge external insolvency judgments, and proclaimed the Dutch court's order a 'nullity' in India. The ruling was appealed before the National Company Law Appellate Tribunal **("NCLAT")**, which stayed the NCLT's order insofar as it nullified the Dutch proceedings. The Appellate Tribunal directed the Indian resolution professional to

[10] The Insolvency and Bankruptcy Code, supra note 5, §235.

coordinate with the Dutch administrator. This prompted the establishment of a cross-border insolvency protocol, structured in conformity with the UNCITRAL Model Law. By virtue of this protocol, India was recognised as Jet's centre of main interests **("COMI")**, ratifying the Indian proceedings as the primary process. The case thus illustrated a critical departure from India's conventional territorial insolvency model, espousing judicial coordination and procedural cooperation in international cases.[11]

C. Code of Civil Procedure, 1908

Apart from IBC, Sections 13 and 44A of the Code of Civil Procedure, 1908 **("CPC")** provide some scope for the recognition and enforcement of foreign judgments. Section 44A incorporates the principle of "*comity of courts"*, which is a pillar of private international law. Pursuant to this principle, courts in one jurisdiction are expected to respect and enforce the decisions of courts in another jurisdiction out of mutual respect. It authorises the execution of decrees passed by 'superior courts' of foreign countries in India that are notified as 'reciprocating territories' by the Government of India through publication in the Official Gazette. An external judgment accredited under this section is executed in India in the manner of being passed by a domestic district court. [12] Nonetheless, Section 44A is explicitly barred by certain exceptions as provided under Section 13, which renders a foreign judgment unenforceable if it is deemed inconclusive.[13] The exceptions are as follows:

i. Where it has not been pronounced by a court of competent jurisdiction.
ii. Where it has not been given on the merits of the case.
iii. Where it is based on an incorrect view of international law or fails to recognise Indian law where applicable.
iv. Where the proceedings were contrary to principles of natural justice.
v. Where the judgment was obtained by fraud.
vi. Where it sustains a claim based on a breach of Indian law.

Indian courts don't evaluate the veracity of the judgment or the foreign legal process, enforcement is limited to judgments from reciprocating jurisdictions. Judgments from non-reciprocating

[11] UNCITRAL, v1-Cross-Border-Insolvency, supra note 4.
[12] The Code of Civil Procedure, 1908, §44A.
[13] Ibid., §13.

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territories mandate the filing of a fresh suit in India, which consequently leads to expensive litigation and procedural delays. The territorial and segmented nature of the prevailing civil enforcement regime limits the complete expression of the principle. Moreover, under Section 10 of the CPC, Indian courts may defer proceedings where the identical issue is sub judice before another Indian court, however, the provision explicates that parallel proceedings in a foreign court do not operate as a bar to suits in India.[14] Indian courts additionally have the jurisdiction to issue anti-suit injunctions to avert contradictory judgments in other jurisdictions, exercising India's jurisdiction over a case.[15]

In the world economy, insolvency no longer respects borders, yet India's legal infrastructure is rooted in territoriality. The judiciary has demonstrated intermittent progress, as evidenced in Jet Airways, albeit piecemeal solutions are not equivalent to a robust statutory regime. Much like a compass pointing towards global best practices, the UNCITRAL Model Law charts the course India requires.

UNCITRAL MODEL LAW

The UNCITRAL Model Law on Cross-Border Insolvency was adopted in 1997 by the UNCITRAL at its thirteenth session in Vienna.[16] It was proposed to manage the formidable concerns aligned with insolvency proceedings that are subject to multiple legal systems. It does not prescribe a compliance standard for states. Rather, it lays down a malleable foundation that permits constituent states to integrate its provisions into their internal law regime, absent the requirement to apprise the United Nations or other signatories. The framework prompted wide-scale implementation, including leading economies such as the U.S., UK, and Singapore, encompassing the Model Law into their domestic system.[17]

The overarching goal of the Model Law is to expedite the coordination of insolvency proceedings across diverse jurisdictions. It accomplishes this by articulating a set of fundamental principles that regulate the interaction between domestic courts and foreign insolvency proceedings and

[14] Ibid., §10.
[15] UNCITRAL, v1-Cross-Border-Insolvency, supra note 4.
[16] Model Law on Cross-Border Insolvency, supra note 2.
[17] UNCITRAL, Status: UNCITRAL Model Law on Cross-Border Insolvency, supra note 3.

verify that insolvency administrations confined to a particular jurisdiction do not unduly conflict with or disrupt the proceedings in other jurisdictions where the debtors hold business interests.[18]

The Model Law is not contingent upon the amalgamation of domestic legislation among signatory states. Instead, it implements four key principles: Access, Recognition, Relief, and Cooperation.[19]

A. Access

The primary tenet of the Model Law is Access, which authorizes foreign representatives to invoke the jurisdiction of domestic courts and request validation of foreign insolvency proceedings. This provision is pivotal for upholding that delegates appointed in an external territory can engage substantially in domestic courts to commence proceedings, pray for orders, or facilitate asset recovery in that territory.[20]

B. Recognition

The recognition principle ensures that proceedings introduced in the host country can be recognized and enforced in domestic courts, thereby permitting external creditors and practitioners to cooperate in domestic proceedings. This is notably vital as the Model Law contrasts between foreign main proceedings and foreign non-main proceedings. A foreign main proceeding is one initiated in the jurisdiction where the debtor's Centre of main interest persists, whereas a foreign non-main proceeding is held in a jurisdiction where the debtor has an inception, a non-transitory place of operations. The enforcement of these proceedings warrants that cross-border insolvency issues can be addressed without harmonious outcomes from courts in diverse states.[21]

C. Relief

The relief principle is the additional mainstay of the Model Law, permitting domestic courts to confer multiple forms of assistance in foreign insolvency cases. This may render orders that stay internal enforcement actions, suspend creditor claims, or, conversely, shield the debtor's estate for the benefit of the foreign proceedings. Such relief is imperative for establishing that internal

[18] Model Law on Cross-Border Insolvency, supra note 2.
[19] Model Law on Cross-Border Insolvency, supra note 2.
[20] Model Law on Cross-Border Insolvency, supra note 2.
[21] Model Law on Cross-Border Insolvency, supra note 2.

actions do not intrude with or sabotage the external insolvency process, enabling the foreign court to sustain its process with minimal disruption.[22]

D. Cooperation

Ultimately, the cooperation principle advocates that national courts work simultaneously with foreign courts in overseeing cross-border insolvency cases. By disseminating information sharing, transmission, and reciprocating aid, this principle strives to mitigate confrontations between courts and drive a cohesive strategy to the resolution. Cooperation is crucial in a dynamic global arena, where debtors may have assets that and be extended across different jurisdictions.[23]

A conspicuous trait of the Model Law is the public order reservation, which means that courts in compliant nations can abstain from acting in such a manner that would be manifestly contrary to the state policy of that nation. This exception empowers courts to repudiate foreign insolvency proceedings that may conflict with the pillar doctrines of the state, such as sovereignty, public order, or the safeguarding of domestic creditors. However, the term "manifestly" establishes a high threshold for invoking this exception, which is evident in territories such as the U.S. and the UK. In contrast, a few states, including Singapore, have omitted the inclusion of the word "manifestly" in their state policy exception, thereby delegating wider authority to domestic courts in rendering whether to reject foreign proceedings.[24]

Post-adoption, Model Law has been pervasively executed, although states have rolled out alterations to align with their domestic legal order. For instance, in the U.S., the Model Law's principles were incorporated into Chapter 15 of the U.S. Bankruptcy Code, with certain calibrated modifications to suit U.S. insolvency laws.[25] Correspondingly, the EU has adopted the Model Law's principles, annexing its jurisdiction-specific norms to navigate the multi-jurisdictional essence of insolvency within the EU.[26] While distinct states have made deviations in the

[22] Model Law on Cross-Border Insolvency, supra note 2.
[23] Model Law on Cross-Border Insolvency, supra note 2.
[24] Norton Rose Fulbright, Singapore: A Model (Law) Jurisdiction – Part 2: The Turnaround Decision in Re PT Garuda, NORTON ROSE FULBRIGHT (June 2024), <https://www.nortonrosefulbright.com/en/restructuring-touchpoint/blog/2024/06/singapore---a-model-law-jurisdiction---part-2-the-turnaround-decision-in-re-pt-garuda>.
[25] Chapter 15, U.S. Bankruptcy Code, 11 U.S.C. (2005) (U.S.).
[26] UNCITRAL, The Relevance of the Model Law on Cross-Border Insolvency (n.d.) <file:///C:/Users/poona/Downloads/The_Relevance_of_the_Model_Law_on_Cross-Border_Insolvency.pdf>.

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incorporation of the Model Law to align with their legal regimes, its key precepts remain fundamental in facilitating international cooperation in insolvency cases.

INDIA ON THE BRINK OF MODEL LAW ADOPTION

Adopting the UNCITRAL Model Law on Cross-Border Insolvency would significantly enhance the predictability and transparency of insolvency proceedings in India, offering foreign creditors a defined process for the recognition and enforcement of their claims. This clarity would not only provide foreign creditors with the confidence that their interests are safeguarded but also bolster India's position as a prime destination for foreign investment. The Model Law facilitates a standardized approach to cross-border insolvency, addressing the current lack of coordination between Indian and foreign courts. By reducing jurisdictional conflicts and delays, it fosters cooperation between courts, allowing foreign insolvency representatives to access Indian courts and manage assets efficiently.

Moreover, the Model Law introduces a streamlined framework for cross-border insolvency cases, replacing the inconsistencies of case-by-case judicial discretion with uniform rules for recognition and enforcement. This will accelerate the resolution process, minimise litigation time, and reduce costs, benefiting both creditors and businesses. Importantly, by adopting the Model Law, India would demonstrate its commitment to a transparent and efficient legal environment, enhancing the confidence of foreign investors and multinational corporations. This, in turn, would drive increased foreign direct investment **("FDI")**, stimulate economic growth, and support technological innovation, making India an even more attractive market for global business. While the benefits of adopting the Model Law are clear, several challenges need to be addressed to ensure smooth integration with India's existing insolvency framework.

A. Protection of Domestic Creditors

A primary concern is the potential for foreign creditors to receive preferential treatment over domestic creditors. To address this, India could introduce safeguards within the IBC, ensuring that domestic creditors are adequately protected. Prioritizing domestic creditors where assets are located within India would help maintain fairness in the insolvency process.

B. Risk of Forum Shopping

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The adoption of the Model Law could lead to forum shopping, where companies choose jurisdictions that offer more favorable insolvency outcomes. To mitigate this risk, India could adopt a clear definition of the COMI rule to prevent manipulation by debtors seeking to exploit more favorable foreign jurisdictions.

C. Lack of Reciprocal Agreements

Currently, Section 234 of the IBC does not include reciprocal agreements for cross-border insolvency. India can address this gap by adopting the Model Law and subsequently negotiating bilateral treaties and reciprocal agreements with other jurisdictions to facilitate smoother recognition and enforcement of foreign insolvency judgments.

D. Foreign Jurisdiction Interference

A final concern is the potential for interference by foreign jurisdictions in Indian insolvency proceedings, which could undermine India's sovereignty. India can protect its jurisdictional authority by ensuring that Indian courts retain final discretion over the recognition and enforcement of foreign insolvency proceedings, ensuring that India's judicial sovereignty remains intact.

CONCLUSION

The resolution to cross-border insolvency in India is patently transitioning, yet remains at a critical juncture. While the IBC has considerably refined its insolvency landscape, its operational structure is bereft of institutional depth and cross-jurisdictional mechanisms obligatory to effectively manage transnational insolvency disputes. The inclusion of Sections 234 and 235 was a significant legislative expression geared toward global solidarity. However, due to a lack of bilateral agreements and reciprocal arrangements, the provisions remain largely underutilized and dormant. Adopting the Model Law furnishes India with a global consensus framework that responds to current institutional deficiencies. Its implementation extends beyond procedural standardization for recognition and collaboration in cross-border insolvency cases, but also profoundly amplifies the foreseeability, efficiency, and integrity of India's insolvency regime.

Albeit, a cohesive alignment of the Model Law into India's legal system will compel a judicious approach. This feature shielding of domestic creditors through safeguards, mitigating the risk of

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forum shopping by unambiguously specifying the debtor's Centre of main interests, tackling the issue of reciprocal agreements by proactively engaging in bilateral treaties, and perpetuating judicial sovereignty by vesting Indian courts with supreme authority over the endorsement and execution of foreign proceedings. Implementing these measures in tandem with the Model Law would enable India to strike a deliberate equilibrium between openness to international cooperation and safeguarding national interests. In undertaking these measures, India would not only modernize its insolvency structure but also signal its readiness to operate within an interconnected global economic system.