

## **Cross Border Insolvency: A Pearl in the Ocean**

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### **Abstract**

International Insolvency can also be termed as Cross Border Insolvency, when the debtor having assets or liabilities in more than one jurisdiction. International insolvency sometimes termed as Cross-Border insolvency was in practice since early stages in England and it was governed by the common Law of England. The **Solomon v. Ross** was the first case recorded in 1764, in this case English creditor brought action in England against the sum owing to the Dutch firm which was declared as bankrupt in Netherlands. The historical development of Cross-Border insolvency can be traced back since modern Private International Law's birth, when state use to enter into agreements and sign treaties, to harmonize their relationship and to resolve their conflicts. The treaty of Montevideo was signed by five countries in 1889 to harmonize their fiscal policies, was the first to recognise Cross-border Insolvency. Due to the Advent of globalisation, The insolvency Law Committee was formed for drafting the bill of Insolvency and Bankruptcy bill and it Included 2 provisions for dealing with the Cross Border Insolvency issues and the increasing foreign direct investment in India, there is a strong need of increasing incorporation of company in various jurisdictions and there is an urgent need for Law on Cross Border Insolvency for solving the disputes across jurisdictions

**Keywords:** Cross Border Insolvency, Insolvency. Bankruptcy. Insolvency Law committee

### **Introduction**

In the era of globalisation the most important development of the last centuries is the integration of the national economies into a global economic system. Globalisation has resulted in improving international trade globally in a drastic manner. Foreign investors take into consideration various factors like strong insolvency law and the procedures while investing in a country. At the time of the insolvency of the company, foreign investors of that company would like to save their interests, privileges and rights over the companies.

This situation where the cross border insolvency law comes into existence. Cross border insolvency Law is which regulates the companies operating in more than one Jurisdiction. The Insolvency and bankruptcy code, 2016 enactment is one of the most significant legislative frameworks which deals with the approach towards the company in our jurisdictions and also deals with the companies situated in more than one jurisdiction. During the span of all these years since the enactment of the IBC Code it has passed through many test of limitus and passed through many storms for making its justification of its very objectives and purposes.

Even though the insolvency and bankruptcy code deals with various aspects like insolvency process, liquidation etc. it is yet there is no proper framework over the provisions dealing with Cross border insolvency in India and its procedure. But the recent landmark cases like the case of Jet Air Insolvency and Videocon case, dealing with the provisions relating to the subject matter of cross border insolvency, if properly added it will be cherry on the cake over the IBC Code.

The Covid-19 shutdown has effectively changed all economic activity. Global growth is predicted to be -4.9% in 2020 and 612% lower in the year 2021 compared to January 2020, pre-COVID-19 predictions. Forecasts indicate that FDI flows will drop by up to 40% in 2020, then another 5% to 10% in 2021, before slowly increasing in 2022. Global trade flows are expected to decrease in 2020 by between 12.9% (the optimistic scenario) and 31.9% (the pessimistic scenario), recovering gradually in 2021. A new wave of pessimism, which has written off globalization, has been brought on by looming uncertainty and a gloomy future.

The impact of the pandemic is set to have long term scarring for businesses. As the pandemic continues to spread, market-led probabilities of default have increased<sup>1</sup> in G-20 and emerging market economies alike. As businesses use up their financial reserves, bankruptcies will become increasingly frequent.

A huge multinational corporation's collapse can have a significant impact on the sector it is a key player in, the nations where most of its activities are concentrated, and even the whole global supply chain. With the exception of the recent downturn in global development and trade (beginning 2019), this decade has seen the world's goods commerce reach a record USD 19.67 trillion in 2018.

India moved up to position 11 in 2018 from 17th on the list of top exporters of products and services in 2008. India got USD 42 billion and ranked as the 8th largest host nation for investments out of a record USD 1.41 trillion in global FDI flow in 2018.

Cross-border mergers and acquisitions valued at USD 816 billion and USD 999 billion in Greenfield. FDI projects were announced globally in 2018. Between 2017 and the middle of 2019, there were an estimated 164 million people working overseas; 5.2 million of them were Indians. By many counts, India is now more globally linked than it has ever been, and globalisation is still as powerful a force today as it was in 1991. In the worst-case situation, when numerous multinational firms are compelled into bankruptcy resolution processes, having an insolvency legislation that can deal with cross-border concerns successfully would give the required solace.

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<sup>1</sup> IMF July 2020, G 20 Surveillance Note.

A thorough reaction is now required in light of the current pandemic's demanding considerations about the soundness of bankruptcy rules addressing cross-border insolvencies. However, the choice of framework is influenced by a number of factors, including the degree of economic integration of the nation, the sophistication of the existing insolvency system, the sophistication of the legal systems generally,

By allowing the Central Government to engage into agreements or reciprocal arrangements with other nations for executing the Code's provisions, the bankruptcy and Bankruptcy Code, 2016 (Code) aimed to resolve cross-border bankruptcy<sup>2</sup>. The Insolvency Law Committee<sup>3</sup>In its report on cross-border bankruptcy from October 2018, the bankruptcy Law Committee recommended that the Model Law be adopted by the Government. This essay examines regional initiatives to resolve cross-border insolvency against this background.

In this regard, it also discusses the UNCITRAL framework and then evaluates the alternatives for India in moving forward. Following this introductory section, the next section presents the evolution of cross border insolvency measures including the Model Law. Section III assesses whether India needs a cross border insolvency framework and section IV assesses the alternatives available. The assessment favors bilateral arrangements over an overarching framework and it suggest that such arrangements may look beyond the Model Law for doing so.

International insolvency sometimes termed as Cross-Border insolvency was in practice since early stages in England and it was governed by the common Law of England. The **Solomon v. Ross**<sup>4</sup> was the first case recorded in 1764, in this case English creditor brought action in England against the sum owing to the Dutch firm which was declared as bankrupt in Netherlands.

The historical development of Cross-Border insolvency can be traced back since modern Private International Law's birth, when state use to enter into agreements and sign treaties, to harmonize their relationship and to resolve their conflicts. The treaty of Montevideo<sup>5</sup> was signed by five countries in 1889 to harmonize their fiscal policies, was the first to recognise Cross-border Insolvency.

Argentina, Paraguay, Bolivia Uruguay, and Peru were the five signatories to the agreement, which aimed to improve ties and control bankruptcies. Another five nations signed the Nordic Bankruptcy conventions<sup>6</sup> in 1933 to control the Scandinavian region, which was signed into law by Denmark, Finland, Iceland, Norway, and Sweden. The International Bar association attempted to enact the Model Insolvency Cooperation Act in 1980, but it was futile when none of the countries accepted it.

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<sup>2</sup>Insolvency and Bankruptcy code, 2016, Sec 234, No. 31, Acts of Parliament, 2016 (India).

<sup>3</sup> Report of Insolvency Law Committee on Cross Border Insolvency, New Delhi, 16th October, 2018.

<sup>4</sup>Solomon v. Ross (1764) 1 H B1 131n.

<sup>5</sup>AnaDelic, "The Birth of Modern Private International Law": The Treaties of Montevideo (1889, amended 1940)", available at: <https://opil.ouplaw.com/page/treaties-Montevideo/the-birth-of-modern-private-international-law>.

<sup>6</sup>Carl Hugo Pament, "The NORDIC BANKRPTCY CONVENTION- AN INTRODUCTION" available at: <https://web.archive.org/Web/20150623141319/>.

However the UNCITRAL Model Law on Cross-Border Insolvency is the most significant development that was made in the context of cross-Border Insolvency (30<sup>th</sup> of June 1997), at present 46 jurisdictions put in place the Model Law in their local Laws.

Where, another significant legislation in the EC (European Council) regulation on Insolvency proceedings, 2002 (which was passed on May 29,2000 and came into effect from (May 31, 2002)<sup>7</sup> , as the name suggests that it applies to the member countries of European Union and regulates the Insolvency Proceedings among the Member states.

### **Objectives of the Study**

The research project is taken with specific objectives cited below to give a comprehensive approach to the theme.

- The objective of the study is to give an overview about the cross- border insolvency in India and whether the present provisions 234 and 235 of the insolvency and bankruptcy code, 2016, is sufficient enough to cover the cross border insolvency.
- The study also covers about whether the provisions of UNCITRAL model law will be conducive in India.
- The study mainly focus on the need for having a proper legislative framework dealing with the disputes of the companies situated in more than one jurisdictions by using the cross border insolvency Law.
- The aim of the study is to analyse the UNCITRAL model law of cross border insolvency and to determine its adoption in India and also analyse the Draft Z protocol in order to apply in India accurately.

For the purpose of the study, various literatures were reviewed on the theme of the paper. I found that various scholars have tried to explain the concept of Cross-Border Insolvency at the global level. Few journals have made a report on the above-mentioned topic and the impact it has created in the Insolvency process of the company having assets globally. I have given a brief summary of few selected literature reviewed for justifying the study.

1. The author NidhiShetye, “International Insolvency: An Indian perspective on Cross Border Treatment of Cases” published in FORDHAM INTERNATIONAL LAW JOURNAL, Volume 39, Issue 4, p. 1046-1079, has discussed about the Cross Border Insolvency legal framework prior to the provisions inserted regarding this IBC Code and also he discuss about the subject matter UNCITRAL Model Law on Cross Border Insolvency and how far it has its enforceability in India with the cases.

2. The author R.K. Chhabra, “Cross-Border Insolvency in Indian Perspective: A Comparative Study”, Published in Legal Bites (Law & Beyond), has analysed the features of UNCITAL Model Law on Cross-Border Insolvency and also dealt with the harmonization of insolvency laws of multiple jurisdictions with multiple legal framework can be achieved by incorporating the International Insolvency framework of UNCITRAL Model law in the domestic legislation.

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<sup>7</sup>Elvinger Hoss &prussen, “Luxembourg: *EU Regulation on Insolvency Proceedings*”, available at: <https://www.Mondaq.com/Inoslveny,Bankruptcyrestructuring/620148/Eu-Regulation-on-Insolvency-proceedings> (published on august 15, 2017).

3. The author Nishith Desai Associates,” Introduction to the Cross- Border Insolvency, April 2020 analysed the status of Cross Border Insolvency in India in par with the recommendation of the Insolvency Law committee and the practical implications in India.

4. The Insolvency Law Committee report on Cross-Border Insolvency, October, 2018, the committee comes to the conclusion that the existing legislative framework in the Insolvency and Bankruptcy Code,(sec.234 and 235), is not sufficient and it does not clearly determine the procedure for dealing with Cross Border insolvency cases in India and there is a need to adopt the proper legislative framework for dealing with Cross border insolvency in India on the basis of UNCITRAL Model Law On the Cross border insolvency,1997.

### **What is cross-border insolvency?**

Cross border insolvency in simple parlance, it means where an insolvent debtor has assets or liabilities in more than one jurisdiction across countries or the creditor whose place of origin or residence or place of business is from the different place other than the place of insolvency proceedings. It can also be termed as **International Insolvency**. This Law helps to recover assets kept overseas and help to deal with cross border jurisdiction and other disposal of assets and other legal issues.

On 16<sup>th</sup> November 2017, for the purpose of implementation of Insolvency and Bankruptcy Code 2016 (“**IBC/Code**”) and for the proper functioning of Stock, a Committee was constituted termed as “The Insolvency law committee” was constituted by Ministry of Corporate affairs under the Chairmanship of Mr. Injeti Srinivas.

The initial stage of drafting the bill of Insolvency and Bankruptcy Bill does not contain any provisions for dealing with the issues and jurisdictions relating to Cross Border Insolvency. Then on the recommendation of the Bankruptcy Law Reforms Committee (“**BLRC**”), the draft Bill Prepared and drafted and was reviewed by Parliamentary Committee (“**JPC**”) before its enactment. Impliedly on the first go, two provisions were added into the draft Bill to deal with cross border insolvency is section 234 and 235 of IBC.

**Section 234 of the Companies Act, 2013**– empowers the Central Government to enter into bilateral agreements with other countries to resolve situation of cross- border insolvency.

**Section 235 of the Companies Act, 2013** – the Adjudicating Authority (**AA**) to issue a letter of request to court in a country with which the agreement is under section 234.

As such present legal system governing cross Border insolvency in India comes nowhere close to addressing the real issues associated with the process and have many drawbacks

- **Section 234** and **section 235** of the code have not been notified and no steps have been taken to implement them before the department of the cross border insolvency regime is mostly still up in the air and not many positive steps have been taken in that regard
- India’s willingness and ability to negotiate and then enter into bilateral treaties with foreign governments One of the pre requisite for the smooth functioning of cross border insolvency the burden some nature of the tasks involved in the time required in negotiating and finalising such treaties cannot be undermined.
- Exist not procedure to deal with cross border insolvency issues in a scenario where the assets or creditors of the debtors are situated in a country with which no bilateral

treaty has been effected.

- Father there is not much guidance on the process and options available to insolvency professionals to avail evidence etc in a case where the asset of an Indian debtor is located in different jurisdiction.

### **Features of the UNCITREAL Model Law and India's draft guidelines**

The United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on cross border insolvency, 1997 (“**Model Law**”) was a International framework which is globally recognized and accepted throughout the world. The Model Law was approved by UNCITRAL since then it has been implemented by 44 countries, including the United Kingdom (UK), the United States of America (US), Japan, South Korea and Singapore.

There are 4 components to promote the mechanism of cross border insolvency resolution:

- **Access:** UNCITRAL Model Law allows foreign insolvency officials and foreign creditors which directs access to Jurisdiction to the domestic court and its ability to participate in commence domestic insolvency proceedings against debtor

- **Recognition and Relief:** The Model Law allows recognition of foreign proceedings and relief by the domestic court based such recognition if domestic quotes determine that the debtor has its centre of main interest in a foreign country they will consider insolvency proceedings in such foreign country to be the main proceedings courts otherwise they will consider as non- main proceedings.

- Recognition as the main proceedings will result in automatic relief such and enforcing a moratorium on domestic proceedings regarding the debtor and providing great power to the foreign representative in handling the estate of the debtor for non- main proceeding such relief is the discretion of the domestic court

- **Cooperation:** The Model Law lays down the basic framework for cooperation between domestic and foreign courts in domestic and foreign insolvency professionals. It provides a direct cooperation between:

- domestic courts and foreign insolvency professional
- domestic courts and foreign courts
- foreign courts and domestic insolvency professionals
- foreign insolvency professionals and domestic insolvency professional

- **Coordination:** The Model Law also provides a framework for commencement of domestic insolvency proceedings when foreign insolvency proceedings has already commenced or vice versa. It provides for coordination of 2 or more concurrent insolvency proceedings in different States of encouraging cooperation against courts

There are 2 types of procedure:

- Foreign main proceedings
- Foreign non- main proceedings.

### **International Scenario for Cross Border Insolvency Laws:**

The UNCITRAL Model Law on Cross Border Insolvency was enacted for Facilitating Cross Border Resolution and used to approach the Jurisdiction of any court to initiate the Proceedings against corporate Debtor who is the National of another country which has adopted the Model Law.

#### **1. United Kingdom:**

The United Kingdom adopted The UNCITRAL MODEL Law on Cross Border Insolvency Laws as adopted by United Nations on May 30<sup>th</sup> 1997, by way of a 2006 Regulation named as “THE CROSS BORDER INSOLVENCY REGULATIONS, 2006. It contains various Articles for Enforcing the Model law, such as British Insolvency Officeholders has been authorized to act on behalf of the British Insolvency proceedings which was stated under Article 4 in the 2006 Regulations.

#### **2. United States of America:**

During Early 90’s, the United States initiated the first step to provide clarification for solving the issue of Cross Border Insolvency also for providing clarification and advise to the Bankruptcy Courts in the United States. As a result of the initiation the Bankruptcy Abuse Prevention and Consumer protection Act adopted the Model Law under the Bankruptcy code in April 2005 by Repealing Section 304 of the said Act.

### **Need for the Separate Legislation for Cross Border Insolvency Laws in India:**

In the recent scenario, due to the advent of Globalisation and the increasing of foreign direct investment many foreign creditors of the different Country are Interested in Investing in India, but due to lack for detailed Cross Border Insolvency Legislation and the Principle of Comity and the lack of Reciprocal Agreements among the Countries, there is a fear among the Creditors to invest in our country.

After the Legislation of the Bankruptcy Law in India, there was a great ship in the Change of the Insolvency Laws but the legal position of the Cross Border Insolvency law has been long sprouted but it is stagnantly in the budding stage for a quite longer period. Despite the effect of the various law committee stressing the importance of Cross Border Insolvency in its every report, but its recommendations was not taken into consideration by the Parliament.

It was observed in the economic survey 2021-22, the IBC uses domestic laws for handling the Insolvent Enterprise, but it has no enough mechanism for dealing with the issue for solving the Cross Border Jurisdictions problems. In the recent times, foreign creditors can make claims against a domestic company; whereas the Insolvency and Bankruptcy Code currently does not allow for automatic recognition of any insolvency proceedings in other countries.

In the Union Budget of 2022-2023 which was held on Tuesday in the Parliament, the Finance Minister Nirmala Sitaraman, has also proposed that “Necessary amendments in the Code will be carried out to enhance the efficacy of the resolution process and facilitate cross border insolvency resolution.”

The Government stated the various initiations taken by them in the regime of Cross Border Insolvency Laws, that it had suspended the Corporate Insolvency Process for the period of 1 year for granting the relief for all the companies which has suffered a lot during the Pandemic

Situation. It reduced the threshold limit from 1 lakh to 1 Crore for the Process of the Insolvency. It was stated that it initiated the alternative resolution process in view of dealing with micro, small and large companies, many corporate debtors have been saved due to this legislation and furthermore application of corporate debtor will be processed quickly through this fast track resolution process.

### **Benefits of enacting the model Law**

- **Ease doing of business:** Enacting efficient cross border insolvency law shall make India an attractive investment destination for foreign creditors given the increased predictability and certainty of the insolvency framework for foreigners. There are 3 main economic benefits achieved by Model Law:

1. Reduction in time of exchanging necessary information between countries
2. Increase in credit recovery efficiency
3. Cooperation and assistance helps in preserving the company's asset from dissipating resulting in successful reorganization

- **Dynamic in Nature:** The modern law is designed to flexible and respect the differences among national laws on insolvency

- **Protection of domestic interest:** the modern law permits countries to refuse recognition of foreign proceedings or provision of any other assistance if such action would be manifestly contrary to the domestic public policy

- **Domestic proceedings given the Priority:** the model law prioritizes domestic insolvency proceedings above foreign proceedings.

- **Protection for Indian Creditors:** the scheme of Model Law is that any relief given to the foreign insolvency representative in relative to the foreign proceedings shall be subject to protection of domestic creditors and interested person including the debtor.

- **Remedial measures in jurisdiction with reciprocity:** some jurisdiction like Romania, Mexico etc have enact the Modern law with requirement of legislative reciprocity this means that such a country would only grant recognition cooperation, etc to India proceedings if India were to adopt the modern law (or have an effective cross border insolvency law).

Thus in considering for developing the Corporate Structure of India and for amending the Insolvency and bankruptcy Laws for huge economic growth and to invite more investment from the Foreign Creditor, it is now mandatory to provide a detail legislation in dealing with the Cross insolvency issues in par with other countries which do not have the reciprocal agreements among them.



## **Conclusion**

We've seen how rules pertaining to cross-border insolvency have evolved through time on the previous few pages. This section primarily focuses on India's position on cross-border insolvency, namely the Model Law. For the time being, let's look at Indian rules pertaining to cross-border bankruptcy. The Presidency Town Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, both of which are based on English Law, govern insolvency in India. When it comes to the question of choice of a law, Indian courts use the notion of *lex fori*, which means they use the law of the forum where the proceeding was started. This is obsolete in and of itself, as modern insolvency laws provide a regime based on *lex situs*, or the law of the forum in which the property is located. There were several committees constituted by the Ministry of Corporate affairs which proposed for the adoption of UNCITRAL Model Law on Cross Border Insolvency in India in consonance with the domestic law of our country, so that it will serve the fruitful needs while dealing with the issues.

As a part of the immediate demand on the field for dealing with the insolvency proceedings in the different jurisdiction, India on 2018 has formulated the Draft Z, on Cross Border Insolvency. In that it discussed in detail about the various provisions and the adjudicatory body and for dealing with the Jurisdictional issues. But still it has not been brought into force due to certain contingencies. Apart from that, the Ministry of corporate affairs orders in respect of the Cross-Border Insolvency Rules/Regulations Committee under the Chairmanship of Dr. K.P. Krishnan the said committee, to constitute the committee for recommending Rules and Regulatory framework for smooth implementation of proposed Cross Border Insolvency Provisions in the Insolvency and Bankruptcy Code, 2016. As a part of this the Ministry of Corporate affairs have drafted the model laws for the Insolvency Laws.

The key highlights of the 'Cross Border Insolvency Rules Committee' Part I and Part II are as follows:

1. Firstly the Committee recommended the border and Wide definition for Group Insolvency
2. Secondly it also stresses that the Framework for group insolvency shall only be applicable to Corporate Debtor against whom Cross Border Insolvency Resolution Proceeding is presently existing
3. Thirdly it also recommending for granting permission for Filing of applications jointly for Cross border Insolvency Resolution Proceedings against the multiple corporate debtors, but they placed the mandate that the application form for each debtor should be filed individually
4. It also recommends that all the Proceedings in respect of corporate debtors of the same group may take place under same Adjudicating Authority. For making this possible it also recommends to transfer all the pending proceedings and application to the NCLT, which is the first steps for initiating the Insolvency Process.
5. The Committee also suggest for the Formation of Group CoC comprising representative from CoCs from all spheres of group members but it can be done only subject to the negotiation made amongst the parties, it said that the group CoC can also provide procedural assistance to the group members and the decisions taken should not affect the substantive rights and obligation to the parties.

6. The Committee also recommends for the Mandatorily Cooperation should be made among the same group members and Coordination among CoCs and Insolvency Professionals for group corporate debtors belonging to the same group

7. The Committee also recommends for the Voluntary Participation of Corporate Debtor in group coordination proceedings. It also suggest to opt for the flexibility proceedings in group for 30 days after its opening and at least 50% voting shares.

8. Approval of Participating CoCs by 66% of voting shares to be required for Group Strategy

9. Cost of conducting group coordination proceedings should form part of liquidation process costs

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