



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS



Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

IS A NEW REGIME OF CROSS-BORDER INSOLVENCY REQUIRED IN INDIA?

AUTHORED BY - ARNAV CHOPRA (220049)

& SAYOR RAY (220046)

INTRODUCTION

There is no doubt that the growth of any economy is facilitated by cross-border trade and commerce. It should be noted that a uniform language would help in inter-state economic activity. This can also be done with the help of uniform law.¹ But, there is a significant difference between language and commercial law and it should be recognised at the forefront. The language does not address the different issues that would happen in an economy, which can be dealt by the commercial law.² Because of the aforementioned reason, development of uniform or universal law is prevented. One must consider that people involved in business transactions frequently change occupations in order to comprehend how the distributive problems inherent in substantive commercial law obstruct the bottom-up development of uniform commercial law.

As a result, people could favour the law of one nation for making a transaction that region while they the law of another nation for making a transaction in that region.³ Therefore, it is improbable that the process of unifying substantive business law will be self-enforcing. Therefore, for unification to occur, states must concur on a common strategy.⁴ Since a society's distributional decisions are reflected in its commercial law, coordination of states to achieve commercial law unification is a difficult process. It suggests that states might be forced to give up their preferred form of commercial law and as expected, states frequently fail to harmonise substantive business law.⁵

States focus on resolving the legal conflict that arises from cross-border commerce if they are unsuccessful in coordinating substantive commercial law. This article addresses “cross-border insolvency law”, a legal area that deals with the potential for legal conflicts that can occur when

¹ Edward P. Lazear, Culture and Language, 107 J. POL. ECON. 95, (1999).

² 11 DOUGLASS C. NORTH, Structure and Change in Economic History (Cambridge University Press, 1981).

³ S. M. Franken, Cross-Border Insolvency Law: A Comparative Institutional Analysis, 34 OXFORD JOURNAL OF LEGAL STUDIES, 97, 124–128 (2014)

⁴ *Id.*

⁵ *Id.*

a bankrupt has assets in more than one state. State-to-state differences exist in cross-border insolvency legislation. States conventionally had two choices when it came to dealing with cross-border insolvency and these are territorialism and universalism. The assets of a multinational company that is governed by a state are subject to that state's substantive insolvency legislation, in accordance with a territorial approach.⁶

Cross-border insolvency laws vary from one jurisdiction to another. Territorialism and universalism are effectively the only options available to states in terms of international insolvency law.⁷

Notably, the UN Commission on International Trade Law (UNCITRAL) approved the UNCITRAL Model Law on Cross-Border Insolvency on May 30, 1997, and nations may immediately incorporate it into their respective legal frameworks.⁸ In those Member States of the European Union that ratify it, the Regulation sets a set of common conflict-of-laws norms that are immediately applicable and legally binding. This law became effective in 2002.⁹

This paper explains how the exogenous force of international economic interdependence affects changes in cross-border insolvency legislation. There are two reasons why states prefer to apply their own national bankruptcy rules in the event of cross-border insolvency. Firstly, it reduces the expense to their constituents who conduct international business of being familiar with foreign bankruptcy legislation. Secondly, even if there were no transaction costs or learning costs, the incomparable cost of giving up the desired distributional objectives of their own insolvency legislation is reduced. Governments naturally favour the extra-territorial application of their own insolvency laws as well as the territorial application of the insolvency legislation of other states given their preferences.

LITERATURE REVIEW

When it comes to addressing cross-border bankruptcy, recognition and reinforcement are the two challenges rather than solutions that every state wants. However, there is a difference between

⁶ *Id.*

⁷ Case C-341/04 Eurofood IFSC Ltd [2006] OJ C 143/11; Case C-396/09 Interedil Srl [2011] OJ C 362/04.

⁸ Council Regulation (EC) 1346/2000 of 19 May 2000 on insolvency proceedings [2000] OJ L160/1 (EC Insolvency Regulation).

⁹ *Id.*

the modified universalism model proposed by Anderson¹⁰ and Ouatu¹¹. They understand the importance of universalism and why territorial approach would not be the best answer to the cross-border insolvency proceedings. These differences would be explored in the section below where we discuss theories of cross-border insolvency. The goal of this paper is to evaluate different proposals and their usefulness in resolving international insolvency. What are the other nations' models for cross-border insolvency protocols? Why are cross-border insolvency laws still having trouble being included to the IBC? What exactly are the rules in other jurisdictions? We will be looking at these topics and a few more in this paper. For the purpose of this paper, the Insolvency and Bankruptcy Code, 2016, Sections 234 and 235 (India); Chapter 15, Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 (US Code); European Regulation on Insolvency Proceedings (EU); and Cross-Border Insolvency Regulations, 2006 (UK) have been considered.

RESEARCH QUESTIONS

The reasoning and rationale for writing this paper originates from Cross-border Insolvency procedure considering its implementation in various Countries. The paper considers practical application of the Cross-border regime in the context of Indian Law. Additionally, the interpretation of cross-border insolvency regimes has been clear, but additional scholarly discussion is required to fully grasp its implications. The following are the research questions that will be investigated:

1. What are the approaches to Cross-Border Insolvency Proceedings?
2. What are the Problems with Cross-Border Insolvency considering its Applications in India?
3. Why does India not follow the UNCITRAL Model of Cross-Border Insolvency?
4. What regime of Cross-border insolvency is followed by other countries?

HYPOTHESIS

The hypothesis for this paper is that India's decision to not incorporate the UNCITRAL Model Law on Cross-Border Insolvency has slowed down India's goals pertaining to the same. As the

¹⁰ Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, U. Pa. J. Int'l Econ. L. 679, 682 (2000).

¹¹ Marcela Ouatu, *Modified Universalism For Cross-Border Insolvency: Does It Work In Practice?*, 27 Univ. of B.C. V. (2014).

Cross-border insolvency proceedings have broadly two approaches which have created a havoc as there both approaches have their nuances. The modern-approach towards the Cross-border insolvency introduced under UNCITRAL Model Law on Cross-Border Insolvency is the most appropriate way to go about the regime. India has although introduced Cross-Border Insolvency in the Insolvency Code, while it should be noted that regime that is followed is too old and strict to follow through. As Insolvency should be a smooth sailing boat, India's stance on not including the UNCITRAL model slows down the whole insolvency process. Moreover, a comparison between the Indian regime and regime followed in other jurisdictions show a paradigm shift towards UNCITRAL Model.

RESEARCH METHODOLOGY

This paper uses an analytical approach to understand and comprehend the practical implications of Cross-border insolvency and how it is practiced in India. While doing so the paper also takes into account and analyses the various problems faced by the Cross-border Insolvency regime in India. The Paper also makes a comparison between the Indian regime of cross-border insolvency and the UNCITRAL Model law and analyses India's the reason for not adopting the same and consequences thereof. Moreover, the study also analyses the cross-border regime that is being followed in other jurisdictions in order to understand the shift from their Cross-border insolvency regimes and their shift towards the UNCITRAL Model, in hope of moving towards a modified universalist model of cross-border insolvency.

SCOPE

This paper deals with Cross-border insolvency as has been established in India which require heavy amendments and modifications in order to fit in with the Universal context of Cross-border insolvency proceedings. This paper is only limited to examining the scope of Cross-border insolvency proceedings in India while also taking into context the problems that are faced under these proceedings. It is pertinent to mention that this paper solely focusses on Cross-border Proceedings in India, the EU, the USA and the UK. The reason for the same is the fact that the Indian Cross-border insolvency has still not adopted the universal changes brought by the UNCITRAL Model of Cross-border Insolvency, while the other countries mentioned and the EU have already interpreted the problems with their regimes and have adopted the UNCITRAL Model.

ANALYSIS

CHAPTER-I

WHAT ARE THE VARIOUS APPROACHES TO CROSS-BORDER INSOLVENCY PROCEEDINGS?

The Conventional Methods of Cross-Border Insolvency Proceedings

The two most common approaches to cross-border insolvency are territorialism and universalism.¹² Over time, other solutions have developed in an effort to solve the limitations of these approaches.¹³

According to the territorial approach, the insolvency proceedings will be held in the country where the assets are located, and the laws of that country will apply.¹⁴ This means that the proceedings in a particular country would only be concerned with the assets situated in its jurisdiction.¹⁵ Many nations have favoured territorialism throughout history because it respects “sovereignty”.¹⁶ Without interference from the laws of other nations, jurisdictions have complete authority over the proceedings and assets.¹⁷

But this theory has numerous shortcomings.¹⁸ A process that could have been addressed in one court is unnecessarily prolonged and costs more money when separate processes are held in every country where the debtor’s assets are located.¹⁹ Thus, insolvency proceedings that follow the territorialism approach are time-consuming and expensive.²⁰

Under the theory of universalism, notwithstanding the location of the creditors or the assets, the proceedings are held in the country where the debtor is.²¹ As a result, the entire case against the

¹² Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, U. PA. J. INT’L ECON. L. 679, 682 (2000).

¹³ *Id.*

¹⁴ *Id.*, at 681.

¹⁵ *Id.*

¹⁶ Marcela Ouatu, *Modified Universalism For Cross-Border Insolvency: Does It Work In Practice?*, 27 UNIV. OF B.C. V. (2014).

¹⁷ *Id.*, at 1,2.

¹⁸ Anderson, *supra* note 10.

¹⁹ Ouatu, *supra* note 14, at 19.

²⁰ Anderson, *supra* note 10.

²¹ Anderson, *supra* note 10; Ouatu, *supra* note 14, at 1,2.

debtor is governed by a single court and by the laws of the country where the court is situated.²² Additionally, the verdict from such proceedings is accepted and upheld in all the countries where the assets and creditors are situated.²³ As against Territorialism, this strategy offers a quicker, more economical, and consistent process for all stakeholders.²⁴ Although universalism presents a more unified and stable strategy, it is legally unworkable since it presupposes that every nation would give up its sovereignty and submit to the laws and rulings of other nations.²⁵

Finding a Middle Ground: Modified Universalism

Given the stark differences between the two systems discussed above and their drawbacks, another theory was developed which was a hybrid of the two theories.²⁶ This theory was termed modified universalism and it sought to blend universalism and territorialism in order to find a balance.²⁷ According to this theory, an insolvency proceeding would take place in a single jurisdiction.²⁸ The laws of the jurisdiction where the proceedings are held, are followed by other countries that are involved in the proceedings.²⁹ But, the interests of the other countries involved in the proceedings is still considered under this theory because the other countries are at liberty to decide whether or not to implement the outcome of the proceedings depending on factors like to what extent the ruling interferes with the interest of the country in question.³⁰ Therefore, sovereignty of the countries is still valued as the jurisdiction may choose to not recognise the proceeding.³¹ This alternative model, which offers a more equal and fair process, has been implemented by several jurisdictions.³² Non-governmental organisations have created legal frameworks based on the theory of modified universalism that nations may use to promote justice on a global scale.³³ Thus, a Model Law on Cross-Border Insolvency was created by the United Nations Commission on International Trade Law (UNCITRAL).³⁴

²² Anderson, *supra* note 10; Ouatu, *supra* note 14, at 1,2.

²³ Ouatu, *supra* note 14, at 19.

²⁴ Anderson, *supra* note 10, at 682.

²⁵ *Id.*

²⁶ Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil*, 32 HOUS. J. INT'L L. 97, 106 (2009).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ouatu, *supra* note 14, at 27-30.

³⁰ Anderson, *supra* note 10, at 691.

³¹ *Id.*

³² Anderson, *supra* note 10, at 691; Ouatu, *supra* note 14, at 27-30.

³³ Anderson, *supra* note 10, at 691; Ouatu, *supra* note 14, at 27-30.

³⁴ Anderson, *supra* note 10, at 691.

The UNCITRAL Model of Cross-Border Insolvency

The UNCITRAL is that branch of the United Nations that deals with trade and investment. Its mission is the promotion of trade at the international level by preparing model laws that countries can follow for the regulation of international trade.³⁵ The rise in globalisation and the subsequent increase in international trade warranted the preparation of a framework to regulate cross-border insolvency and so, the UNCITRAL model of cross-border insolvency was drafted and later adopted by UNCITRAL in 1997 for facilitating cross-border insolvency proceedings across countries.³⁶

It focuses on four key aspects of international insolvency proceedings that are mentioned below-³⁷

1. Representatives and Creditors from other countries that are party to the proceedings are given access to the court where the insolvency proceedings take place.
2. The orders given by foreign courts are recognised in other countries which were party to the insolvency proceedings.
3. Relief is granted to assist foreign proceedings.
4. Cooperation and Coordination between foreign courts and representatives from foreign countries.

Foreign representatives³⁸ are permitted access to the foreign court³⁹ where the proceedings are taking place and they can represent their client in that country.⁴⁰ The foreign representative is entitled to both start and participate in the judicial proceedings of that court in the foreign country.⁴¹ Seemingly, both domestic and foreign parties are treated equally as creditors from other countries are also informed of any information or development regarding the proceedings.⁴²

³⁵ UNCITRAL Model Law on Cross-Border Insolvency (1997), UNITED NATIONS,

³⁶ *Id.*

³⁷ *Id.*

³⁸ UNCITRAL, Model Law On Cross-Border Insolvency With Guide To Enactment And Interpretation, United Nations Commission On International Trade Law, Part One, Art. 2(a).

³⁹ *Id.*, at Art. 2(e).

⁴⁰ *Id.*, at Chapter II.

⁴¹ *Id.*, at Art. 12.

⁴² *Id.*, at Art. 14.

Recognition of foreign proceedings is the second principal of the UNCITRAL Model Law.⁴³ In order to avoid time-consuming legalisation or other processes that frequently apply and to give certainty regarding the recognition decision, one of the main goals of the Model Law is to develop straightforward procedures for the recognition of eligible foreign proceedings.⁴⁴ For this, the model law identifies the venue for both the principal proceedings and any secondary proceedings that may take place. Under the UNCITRAL mode law on cross-border insolvency, the principal proceedings are known as the main proceedings⁴⁵ and the secondary proceedings are called non-main proceedings⁴⁶. The principal proceedings take place at the location of the debtor's centre of main interest.⁴⁷ The centre of main interest is presumed to be that place where the debtor has his registered offices or residence notwithstanding the places or countries where the debtor's assets are located.⁴⁸ The secondary proceedings or take place in those places where the debtor has his establishment which have been defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and good or services."⁴⁹ The overall goal of this process seems to be to convince other countries involved in the insolvency proceedings to acknowledge the foreign proceedings.

Relief makes up the third principle.⁵⁰ Interim relief⁵¹, discretionary relief⁵², automatic relief⁵³, etc. are the kinds of relief that may be offered under the Model Law. The enacting state may provide additional relief to the foreign representative as well.⁵⁴ The foreign proceeding may get one or more types of relief, provided that the proceedings are recognised.⁵⁵ As a result, several forms of remedies may be granted, such as a "stay of action" or a prohibition against the debtor transferring his assets.⁵⁶

Finally, while there are ongoing proceedings, the Model Law emphasises the importance of the

⁴³ *Id.*, at Chapter III.

⁴⁴ UNCITRAL, *supra* note 33.

⁴⁵ UNCITRAL, *supra* note 33, at Art. 2(b).

⁴⁶ *Id.*, at Art. 2(c).

⁴⁷ *Id.*, at Art. 2(b).

⁴⁸ *Id.*, at Art. 16.

⁴⁹ *Id.*, at Art. 2(f).

⁵⁰ *Id.*, at Chapter III.

⁵¹ *Id.*, at Part Two, Para. 36.

⁵² *Id.*

⁵³ *Id.*, at Para. 44.

⁵⁴ *Id.*, at Part One, Art. 7.

⁵⁵ *Id.*, at Art. 19, 20, 21.

⁵⁶ *Id.*, at Part Two, Para. 37.

jurisdictions collaborating and coordinating with one another.⁵⁷ This chapter describes how foreign states and representatives should seek out information and interact to ensure that processes go smoothly.⁵⁸

By facilitating fair and effective administration of cross-border insolvency proceedings, the UNCITRAL model law seeks to maximise the value of the debtor's assets and uphold and respect the laws of the different countries that are party to the proceedings through cooperation.⁵⁹ The Model Law provides flexibility because nations can accept and alter the clauses to fit their goals and so it provides stability to the involved parties.⁶⁰ But despite these perks, India has refrained from adopting the Model Law. Although the Model Law was not officially incorporated into the Bankruptcy and Bankruptcy Code that India passed in 2016, it did specifically draft Articles 234 and 235 to regulate cross-border insolvency.⁶¹

CHAPTER-II

WHAT ARE THE PROBLEMS WITH CROSS-BORDER INSOLVENCY CONSIDERING ITS APPLICATIONS IN INDIA?

What is the Model of Cross-Border Insolvency followed in India?

Since India lacked the necessary legal framework before 2016 in order to carry out a bankruptcy proceeding smoothly and the creditors' nor the debtors' requirements were not being met by the previous laws on bankruptcy, Insolvency and bankruptcy laws in India were updated in 2016 and codified under the Insolvency and Bankruptcy Code, 2016 (IBC).⁶² The Code applies to businesses, partnerships, and people who are involved in bankruptcy or insolvency proceedings.⁶³ The "debtor in possession" paradigm, under which the debtor would continue to control their assets and business while the case was underway,⁶⁴ has been replaced by the "creditor in control"

⁵⁷ *Id.*, at Part Two, Chapter IV.

⁵⁸ *Id.*

⁵⁹ *Id.*, at Part One, Preamble.

⁶⁰ Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross-border Insolvency in India*, IBC LAWS (July 24, 2020), <https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-makharia/> (last visited October 22, 2022).

⁶¹ The Insolvency and Bankruptcy Code, 2016, No. 31, Act of Parliament, 2016, (India), Art. 234, 235.

⁶² *Id.*

⁶³ *Id.*, § 2(a)-2(e).

⁶⁴ *Decoding the Code: Survey on Twenty-One Months of IBC In India*, PWC (August 2018), <https://www.pwc.in/assets/pdfs/publications/2018/decoding-the-code-survey-on-twenty-one-months-of-ibc-in-india.pdf> (last visited October 22, 2022).

framework, in which creditors have more influence during the proceeding.⁶⁵ This ensures to an extent that the creditors are treated fairly.⁶⁶ To guarantee that matters are settled in a reasonable amount of time, the Code also establishes a 180-day window with a potential 90-day extension.⁶⁷

Although the Code has aided in the simplification of the bankruptcy procedure in India, cross-border insolvency is one issue that the Code does not adequately address in a thorough and systematic manner.⁶⁸ Sections 234 and 235 of the Code are the two sections that deal with cross-border insolvency.⁶⁹ These were inserted after the recommendations of the Joint Committee on the Insolvency and Bankruptcy Code.⁷⁰ India is allowed to enter into “reciprocity agreements” with other nations under Section 234.⁷¹ With such a contract, even if the assets are situated abroad, they might be subject to the IBC requirements. However, because the government makes such decisions on a case-by-case basis, it lacks the structure to ensure uniformity and efficiency.⁷² Under Section 235 of the IBC, the liquidator, resolution professional or bankruptcy trustee may ask the National Company Law Tribunal, i.e., the adjudicating body to request information or evidence from foreign nations or initiate action in relation to the assets of the debtor in the foreign nations if a reciprocity agreement exists between India and the foreign nations in concern.⁷³ Though India has granted some rights to foreign parties under this regime and has partially allowed for cross-border insolvency, the present system is still far from perfect. It is evident that India has reservations about the UNCITRAL Model Law as it has refrained from incorporating the Model Law despite having the opportunity to do the same.⁷⁴

⁶⁵ Enakshi Jha, *The Costs and Benefits of Creditor Control under Insolvency Law*, INDIACORPLAW (September 2, 2017), <https://indiacorplaw.in/2017/09/costs-benefits-creditor-control-insolvency-law.html> (last visited October 22, 2022).

⁶⁶ *Id.*

⁶⁷ IBC, *supra* note 59, at § 12.

⁶⁸ Abhishek Saxena, *India: Cross-Border Insolvency: Breaking Down the Indian Insolvency and Bankruptcy Code*, PHOENIX LEGAL (July 5, 2016), <https://www.mondaq.com/india/insolvencybankruptcy/506600/cross-border-insolvency-breaking-down-the-indian-insolvency-and-bankruptcy-code-2016> (last visited October 22, 2022).

⁶⁹ IBC, *supra* note 59.

⁷⁰ Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 (April, 2016), https://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf.

⁷¹ IBC, *supra* note 59, at § 234.

⁷² Sneha Singh, *Duality of Regime to Handle Insolvency of Foreign Companies in India*, 10 INDIAN J.L. & JUST. 155, 156-159 (2019).

⁷³ IBC, *supra* note 59, at § 235.

⁷⁴ Singh, *supra* note 70, at 158.

CHAPTER-III

HAS INDIA'S DECISION TO NOT INCORPORATE THE UNCITRAL MODEL LAW HELPED IT ACHIEVE ITS GOALS PERTAINING TO CROSS-BORDER INSOLVENCY?

Effectively, India took a territorial approach towards cross-border insolvency.⁷⁵ India has only two sections dealing with cross-border insolvency proceedings instead of incorporating the UNCITRAL Model Law on Cross-Border Insolvency.⁷⁶ The current provision has generated questions and concerns due to the lack of uniformity. When a framework, such as the Model Law, is not incorporated, a proceeding of cross-border insolvency can become extremely complex, as demonstrated by the *Jet Airways (India) Ltd. v. State Bank of India and Anr. case.*⁷⁷

Insolvency proceedings were started in both India and the Netherlands, where Jet Airways had assets.⁷⁸ However, the National Company Law Tribunal of India refused to acknowledge the Dutch insolvency process and refused to give the Dutch court any information until both nations adopted “A Cross-Border Insolvency Protocol” based on the UNCITRAL Model Law for Cross-Border Insolvency.⁷⁹ The protocol designates India as the “main proceeding” and the Netherlands proceeding as the “secondary proceeding” in order to maintain a streamlined procedure that safeguards the interests of the parties and respects laws of both countries.⁸⁰

Although neither nation has ratified the Model Law, the lack of a consistent framework for deciding these procedures effectively forced the nations to develop a framework that is analogous to the Model Law for this specific case in order to ensure uniformity.⁸¹ India's initial refusal to acknowledge the Netherlands' court decision reflects its reluctance to delegate legal authority to foreign jurisdictions and Jet Airways is a prime example of the complexities and difficulties of cross-border insolvency procedures when nations do not enact the Model Law.⁸²

⁷⁵ Anderson, *supra* note 10, at 679,680.

⁷⁶ IBC, *supra* note 59.

⁷⁷ *Jet Airways (India) Ltd. v. State Bank of India and Anr.*, 2019 SCC OnLine NCLAT 1216.

⁷⁸ Sumant Batra, *Cross-border Insolvency Protocol Fills a Gap, But Is not a Comprehensive Law*, FINANCIAL EXPRESS (2019), <https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/> (last visited October 22, 2022).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

The UNCITRAL Model Law on Cross-Border Insolvency was proposed for adoption by India in October 2018 by the Insolvency Law Committee and inclusion of a “reciprocity” clause in the model was one of their recommendations.⁸³ The Committee outlined how the reciprocity provision requires that India “recognise and enforce” judgments and legal actions from other countries if those countries have enacted the Model Law or a similar legal system.⁸⁴ Even though the Committee advised making this provision temporary, it demonstrates India’s reluctance to adopt the Model Law because including the reciprocity clause places restrictions on the recognition of foreign proceedings and decisions.⁸⁵ Unless a specific agreement has been made with a foreign country, India’s current cross-border insolvency structure enables the nation to maintain complete control over the proceedings.⁸⁶ The IBC grants the government and the courts the authority to enable foreign parties to intervene with their judicial system.⁸⁷

If India adopts the UNCITRAL model law, the framework would allow, from the very start of an insolvency proceeding, for countries to cooperate with India without needing a case-by-case agreement.⁸⁸ Though India would have the liberty to incorporate the model law and amend it as per its requirements, it seems that India does not want to take the chance of giving up its current control over overseeing insolvency proceedings even if it means adopting a more uniform process.⁸⁹

Lately, India has streamlined the Foreign Direct Investment (FDI) process and the country has seen a growth in FDI which has benefited the economy.⁹⁰ But the non-incorporation of the model law might make foreign investors uneasy since the outcome of a bankruptcy proceeding would be unpredictable and prolonged because of a lack of uniformity. A single case of cross-border insolvency involving India that potentially puts creditors at a loss would have a catastrophic effect on an already plummeting economy of India as new investors would become more apprehensive and the Insolvency Law Committee’s 2018 report also advises that incorporating the model law

⁸³ Report of Insolvency Law Committee On Cross-Border Insolvency 18-19 (Oct. 2018), https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ IBC, *supra* note 59, at § 234.

⁸⁸ Batra, *supra* note 76.

⁸⁹ *Id.*

⁹⁰ *India gets the Highest Annual FDI Inflow of USD 83.57 Billion in FY21-22*, MINISTRY OF COMMERCE AND INDUSTRY (May 20, 2022), <https://pib.gov.in/PressReleasePage.aspx?PRID=1826946> (last visited October 22, 2022).

would increase foreign investment in India.⁹¹

Section 234 of the IBC enables the Central Government to make bilateral agreements with other countries for the purpose of cross-border insolvency proceedings.⁹² The very act of entering into bilateral agreements with different countries instead of adopting the UNCITRAL Model Law on Cross-border Insolvency is a time-consuming process.⁹³ This also leaves room for India to make agreements with other countries and the agreement with each country may have different provisions based on the negotiations.⁹⁴ This may lead to a multitude of proceedings and separate claims from different countries if a cross-border insolvency proceeding occurs.⁹⁵ Implementing the decisions of different courts across countries would become taxing.

Section 235 of the IBC embodies the cooperation and coordination principle of the UNCITRAL Model Law but it does not lay down the procedure of such cooperation between countries.⁹⁶ Further, the sending of the letters of request by the adjudicating authority via official channels would prolong the process of receiving evidence, adding to the delay in resolving the proceeding.⁹⁷

It is evident from the discussion above that Sections 234 and 235 of the IBC are far from comprehensive and would have a lot of trouble and delay while resolving a cross-border insolvency proceeding.

⁹¹ Insolvency Law Committee Report, *supra* note 72, at Page 5,6.

⁹² IBC, *supra* note 59, at § 234.

⁹³ Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, 45 VIKALPA J. 104, 110 (2020).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ IBC, *supra* note 59, at § 235.

⁹⁷ *Das*, *supra* note 91.

CHAPTER-IV

CROSS-BORDER INSOLVENCY REGIME FOLLOWED BY OTHER COUNTRIES?

Cross-Border Insolvency in EU

The EIR⁹⁸ governs cross-border insolvency in the whole of European Union. The New legislation which went into effect on June 26, 2017, makes the assumption that the centre of main interest and the debtor's registered office are one and the same.⁹⁹ When an application for insolvency is submitted, centre of main interest is discovered.¹⁰⁰ An assumption identical to the one described in India exists in the EU. If a presumption is being rebutted, the petitioner must present supporting documentation. Additionally, courts will actually abide by the Indicative list.¹⁰¹

Along with the EIR Recast, the Cape Town Convention of 2001¹⁰² and the UNCITRAL Model Law both employ the well-known yet used for multiple reasons "centre of main interest" (COMI) concept.¹⁰³ The jurisdiction in which primary insolvency proceedings may be commenced is determined by COMI under the EIR Recast framework.¹⁰⁴ When a foreign procedure is recognised, the Model Law specifies various implications (relief) depending on whether it is major or not.¹⁰⁵

The EIR provides a substantive framework for cross-border insolvency in addition to dealing with procedural issues. By providing Annexes A through C, it specifies which proceedings the regulation will apply to as well as who may start them.¹⁰⁶ Due to variations in national language and law, this has not totally eliminated uncertainty over the existence of foreign insolvency procedures, but it nevertheless provides helpful assistance to local courts.¹⁰⁷ The Regulation also includes "uniform norms on conflict of law", in accordance with which the European Court of

⁹⁸ REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2015 ON INSOLVENCY PROCEEDINGS (RECAST), 141 OJ L (2015)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Cape Town Convention on International Interests in Mobile Equipment, 2001

¹⁰³ COMI under European and American Insolvency Law, <https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law> (last visited Oct 22, 2022).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Article 1 read with Articles 2(a)-(c) of the EC Insolvency Regulation.

¹⁰⁷ *Id.*

Justice (CJEU) has amassed a substantial body of precedent.¹⁰⁸

The Regulation also includes “universal rules on conflict of law”, which have allowed the European Court of Justice (CJEU) to amass a substantial body of precedent.¹⁰⁹ The Regulation, for instance, states that the debtor’s “centre of main interests” (COMI) is the location where he “conducts the administration of his interests on a regular basis and is consequently ascertainable by third parties.”¹¹⁰ The location of the primary insolvency procedures can be determined based on the COMI, which also identifies the location from which all of the debtor’s assets should be managed.¹¹¹

Cross-Border Insolvency in the US

In October 2005, the United States of America ratified the UNCITRAL Model legislation. It is crucial to understand that the US considers every significant court hearing to be ancillary, which implies it adds to the main procedure rather than being a supplementary one.¹¹² Furthermore, the US bankruptcy code's Chapter 15 has provisions on cross-border insolvency laws that facilitate cooperation between US and foreign courts and officials and assist debtors in maximising the value of their assets.¹¹³ By enacting Chapter 15, the range of international cases that the US recognised was expanded to include interim and extrajudicial procedures that have been authorised by a court.¹¹⁴ This insinuates that the USA recognises the cases brought by foreign administrators in which there are no cross-border mechanisms.¹¹⁵ However, the US continues to treat its creditors unfairly and refuses to acknowledge them in return, upholding a public policy that is also enshrined in Chapter 15.¹¹⁶

Cross-Border Insolvency in the UK after Brexit

Under English law, there are currently four main legal sources that address cross-border insolvency. First was the May 29, 2000 approval of the EU Council Regulation on Insolvency

¹⁰⁸ Recital 23, EIR.

¹⁰⁹ EIR, supra note 96.

¹¹⁰ Recital 13, EIR

¹¹¹ Case C-396/09, *Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915.

¹¹² Ipsita Rout, *Universalism V. Territorialism: A Plethora of Issues In Cross Border Insolvency Across Jurisdictions*, 2 IJLLR (2021).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Proceedings, which did not take effect until May 31, 2002.¹¹⁷ With the exception of Denmark, this rule is regarded as directly applicable throughout the EU, supersedes all national legislation therein, and does not call for the participation of member states in its implementation.¹¹⁸

The Cross-Border Insolvency Regulations of 2006, which were passed with the Model Law in mind, serve as the second framework dealing with cross-border insolvency. The CBIR are applicable without the requirement that it also be implemented in another nation.¹¹⁹ The CBIR differs considerably from the EC Regulation in that it only applies when the UK acknowledges international proceedings, while the former mandates automatic acknowledgement. The lawsuit further established this. In the matter of *Namirei-Showa Co.*¹²⁰ In this instance, the Japanese representatives prevailed in their request that a Japanese-based bankruptcy action be recognised as a foreign primary proceeding since they were in possession of the necessary supporting documentation. The UK High Court of Justice ruled in their favour as a result, and the case was recognised as a foreign main process.¹²¹

Section 426 of the 1986 Insolvency Act is the third legal foundation. The courts of “relevant nations” that request help must get it from the UK courts, according to this provision. The UK courts help with this by granting orders allowing office-holders abroad the power to use the UK insolvency laws or even by applying in the UK, the local insolvency laws of the country where the requesting court is situated.¹²²

The transition phase, which began with the divorce deal for the UK’s exit from the EU and concluded on January 31, 2020, will allow the EU and the UK to explore their future relations.¹²³ During the transition period, the UK is still a part of the EU’s single market and customs union, but it has no role to EU’s political institutions.¹²⁴ The legislative framework for insolvency procedures in the UK will depend on the negotiations it has with the EU and other Member States

¹¹⁷ Simran Singh, Comparative Study of Cross-Border Insolvency in India and U.K., 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 2727, (2021).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Namirei Showa Co. Ltd.*, High Ct (Ch) 16 October 2008, 7542/08, CLOUT 1004

¹²¹ *Id.*

¹²² *U.K. Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?*, Jones Day <https://www.jonesday.com/en/insights/2009/09/uk-perspective-recognition-of-overseasinsolvency-procedures-spoiled-for-choice>.

¹²³ *Id.*

¹²⁴ *Id.*

because the country is in a transitional phase.¹²⁵ Although the Insolvency Regulation will apply to insolvency matters, local UK laws will be used, which may leave the parties involved in uncertainty, if such an agreement is not achieved at that time.¹²⁶

CONCLUSION

It is evident from the discussion in the paper that Cross-border insolvency is still an emerging topic for India. The Insolvency Law Committee has made an effort to broaden the scope of the insolvency laws to cover cross-border insolvency and it also analyses and puts into reality the procedures set forth in the UNCITRAL Model Law. Although the IBC allows India to enter into agreements with other countries and decide on the terms of a cross-border insolvency proceedings, doing so might make the situation perplexing. Instead, the Model Law can be ratified and incorporated into the IBC. Doing so might place a general limitation on India's power over the proceedings but it would make the insolvency process smoother.

The hypothesis with which the authors proceeded holds true as India's decision to not incorporate the UNCITRAL Model Law on cross-border insolvency has indeed slowed down India's goals pertaining to the same. Moreover, the problems faced by India with their territorial regime is one which is inherent and cannot be absolved by bringing in minor changes to the Code. The Insolvency Law Committee on Cross-Border Insolvency's 2018-19 report should be taken into account to understand the gravity of the changes that are required in the IBC in context with Cross-border insolvency. Moreover, on a comparison of Indian Regime to the other regime followed in the US or EU, it is extremely evident that the all the other countries used to follow the same territorial approach adopted by India which was cumbersome and problematic for the foreign creditors as well as investors. Introducing the UNCITRAL Model of Cross-border insolvency and adopting the same has created a streamlined process which indeed has effect on the length and accessibility to the process.

The UNCITRAL framework would enable international cooperation with India from the very beginning of an Insolvency procedure without the requirement for a case-by-case agreement if India were to adopt the model legislation. Although India would be free to adopt the model law and modify it as necessary, it appears that India does not want to take the possibility of letting go

¹²⁵ *Id.*

¹²⁶ *Brexit: What Might Change*, LOYENS & LOEFF, (April 20, 2020), <https://www.loyensloeff.com/media/476497/memo-brexit-insolvency-restructuring.pdf>.

of its existing power over monitoring insolvency procedures, even if doing so would result in a more consistent procedure. Therefore, it appears that there is a dire need for India to compromise on its power over monitoring insolvency proceedings for it to be made possible to move towards a consistent procedure that would streamline the process of cross-border insolvency.

BIBLIOGRAPHY

Primary Sources

Indian Legislations

1. Insolvency and Bankruptcy Code, 2016 [India].

Indian Cases

1. Jet Airways (India) Ltd. v. State Bank of India and Anr., 2019 SCC OnLine NCLAT 1216.

Secondary Sources

Foreign and International Legislations and Conventions

1. Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 [US Code].
2. Cape Town Convention on International Interests in Mobile Equipment, 2001.
3. Council Regulation (EC) 1346/2000 of 19 May 2000 on insolvency proceedings [2000] OJ L160/1 (EC Insolvency Regulation [EU]).
4. Cross-Border Insolvency Regulations, 2006 [UK].
5. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), 141 OJ L (2015) [EU].
6. UNCITRAL Model Law on Cross-Border Insolvency (1997), United Nations.

Foreign and International Cases

1. Case C-341/04 Eurofood IFSC Ltd [2006] OJ C 143/11; Case C-396/09 Interedil Srl [2011] OJ C 362/04.
2. Namirei Showa Co. Ltd., High Ct (Ch) 16 October 2008, 7542/08, CLOUT 1004.

Reports

1. Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 (April, 2016).
2. Report of Insolvency Law Committee on Cross-Border Insolvency (Oct., 2018).

Journals

1. Edward P. Lazear, *Culture and Language*, 107 J. POL. ECON. 95, (1999).
2. S. M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 Oxford Journal of Legal Studies, 97, 124–128 (2014).
3. Ipsita Rout, *Universalism V. Territorialism: A Plethora of Issues In Cross Border Insolvency Across Jurisdictions*, 2 IJLLR (2021).
4. Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, 45 VIKALPA J. 104, 110 (2020).
5. Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, U. PA. J. INT'L ECON. L. 679, 682 (2000).
6. Marcela Ouatu, *Modified Universalism For Cross-Border Insolvency: Does It Work In Practice?*, 27 UNIV. OF B.C. V. (2014).
7. Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil*, 32 HOUS. J. INT'L L. 97, 106 (2009).
8. Simran Singh, *Comparative Study of Cross-Border Insolvency in India and U.K.*, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 2727, (2021).
9. Sneha Singh, *Duality of Regime to Handle Insolvency of Foreign Companies in India*, 10 INDIAN J.L. & JUST. 155, 156-159 (2019).

Books

- 11 Douglass C. North, *Structure and Change in Economic History* (Cambridge University Press, 1981).

Online Websites

1. Abhishek Saxena, *India: Cross-Border Insolvency: Breaking Down the Indian Insolvency and Bankruptcy Code*, PHOENIX LEGAL (July 5, 2016), <https://www.mondaq.com/india/insolvencybankruptcy/506600/cross-border-insolvency-breaking-down-the-indian-insolvency-and-bankruptcy-code-2016> (last visited October 22, 2022).
2. *Brexit: What Might Change*, LOYENS & LOEFF (April 20, 2020), <https://www.loyensloeff.com/media/476497/memo-brexit-insolvency-restructuring.pdf> (last visited October 22, 2022).

3. *Decoding the Code: Survey on Twenty-One Months of IBC In India*, PWC (August 2018), <https://www.pwc.in/assets/pdfs/publications/2018/decoding-the-code-survey-on-twenty-one-months-of-ibc-in-india.pdf> (last visited October 22, 2022).
4. Enakshi Jha, *The Costs and Benefits of Creditor Control under Insolvency Law*, INDIA CORPLAW (September 2, 2017), <https://indiacorplaw.in/2017/09/costs-benefits-creditor-control-insolvency-law.html> (last visited October 22, 2022).
5. *India gets the Highest Annual FDI Inflow of USD 83.57 Billion in FY21-22*, MINISTRY OF COMMERCE AND INDUSTRY (May 20, 2022), <https://pib.gov.in/PressReleasePage.aspx?PRID=1826946> (last visited October 22, 2022).
6. Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross-border Insolvency in India*, IBC LAWS (July 24, 2020), <https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-makharia/> (last visited October 22, 2022).
7. Sumant Batra, *Cross-border Insolvency Protocol Fills a Gap, But Is not a Comprehensive Law*, FINANCIAL EXPRESS (2019), <https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/> (last visited October 22, 2022).
8. *U.K. Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?*, JONES DAY (September/October 2009), <https://www.jonesday.com/en/insights/2009/09/uk-perspective-recognition-of-overseasinsolvency-procedures-spoiled-for-choice> (last visited October 22, 2022).

IJLRA