

## INDIA'S INSOLVENCY CODE (IBC 2016): CROSS-BORDER PERSPECTIVES

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### ABSTRACT

*The enactment of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as the IBC 2016 or Code) provides a strong framework where the cost, time and effort is minimised in attaining liquidation process. IBC is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy cases. The bankruptcy code is one stop solution for resolving insolvencies which was a long process and did not provide an economic and viable solution. Cross-border Insolvency has several problems, including forum selection, enforcement of judgments, rights of the creditors and centre of main interest of Corporate Debtor. Differences in cross-border insolvency regimes created major issues among countries. The secured financing law of many countries is out of date or uncoordinated with other laws, such as civil procedure, insolvency law and intellectual property law. The United Nation Commission on International Trade Law (UNCITRAL) a subsidiary of U.N General Assembly seeks to address these issues by creating standards which is a part of sustainable development goals as well. The UNCITRAL (Model law) is reproduced by the most of the countries of the world with suitable modifications as they deem necessary. Each country is developing its corporate insolvency system at a distinct level. In this paper an attempt is made to identify the issues, challenges and way forward to resolve the problems which emerges in the enactment and implementation of Cross-border Insolvency Law.*

**Keywords:** *Insolvency and Bankruptcy Code, Cross-border Insolvency, UNCITRAL & Liquidation.*

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### Introduction

Insolvency is a financial situation when the corporate debtor cannot meet its financial obligations whereas bankruptcy is a legal declaration of insolvency. In the latter condition a court declares corporate debtors as insolvent or a creditor files an application against corporate debtor in the court. In practice both the terms are interchangeably used. In India prior to the enactment of IBC the issues were handled under thirteen different laws. The Code seeks to replace the Presidency Town Insolvency Act, 1909 and Presidential Insolvency Act 1920. In addition, it seeks to amend 11 laws such as: the Companies Act, 2013, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Sick Industrial Companies [Special Provisions] Repeal Act, 2003. Prior to enactment of the IBC 2016 average time required in insolvency and bankruptcy procedures was four years which is now reduced to few months. The delay was causing acute devaluation of assets of Debtor Company (Insolvent Company). The new Code seeks to keep the role of adjudicator to the minimum which curbs red-tapes, chronic corruption and nepotism.

On 22<sup>nd</sup> August 2014 the Minister of Finance created Bankruptcy Legislative Reforms Committee (BLRC), headed by T.K. Viswanathan, former Union Law Secretary and Secretary General Lok Sabha. The mandate of the BLRC was to draft a new Bankruptcy law, along the work done by Justice B.N. Srikrishna lead Financial Sector Legislative Reforms Commission (FSLRC). The law drafted

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by the BLRC was a consolidated bankruptcy framework, covering both individuals as well as legal entities, and aims to be a holistic reform of the insolvency resolution process for all enterprises in India. The reforms focus to improve the time taken to resolve insolvency and improve loss incurred due to default on repayment of credit. In turn, this can lead to a significant improvement of the ease and cost of doing business in India and expected to develop the credit and the debt securities market. The committee submitted its report to the FM on 4<sup>th</sup> November, 2015. The structure of the report is similar to the work on FSLRC of Justice B.N. Srikrishna. The economics rational and design features of a new legislative framework to resolve insolvency & bankruptcy was in volume 1 and the draft bill was in volume 2. A modified version of the draft bill with public comments incorporated, was tabled in Parliament in the winter session on 23<sup>rd</sup> December, 2015. Once it was tabled, Joint Parliamentary Committee (JPC) on Insolvency and Bankruptcy 2015 was set up to analyse the draft bill detail. The JPC submitted its report. The report included a new draft of the bill, which was then passed by both the houses of Parliament. The bill received consent of the President on 28<sup>th</sup> May, 2016; and is called the "Insolvency and Bankruptcy Code, 2016" (*Finance Research Group*, n.d.). The Code contains special provisions which speed-up the insolvency procedure for small, start-ups and unlisted corporates with total assets of less than one crore rupees. The provisions are covered under sections 55, 56, 57 and 58 of chapter IV of part II for fast-track resolutions of insolvency. Only designated people are allowed to submit applications to commence process (*India Code: Insolvency and Bankruptcy Code, 2016.*, n.d.).

### **Review of Literature**

The Indian cross-border insolvency system should have a proper mechanism of cooperation and coordination between local courts and insolvency representatives on one hand and foreign courts and foreign representatives on the other side (Das, 2020). The UNCITRAL Model Law was hailed as the forerunner of norms that all nations might emulate with the appropriate revisions they may deem necessary (Shukla, 2020). Cross-border insolvencies have increased in frequency as corporations have expanded their global presence. Businesses have complex corporate groups made-up of numerous subsidiaries spread across several nations and owned by different companies. Corporate structures of corporations are becoming increasingly complicated, resulting in more complex cross-border insolvencies (Halimi, 2017). A working paper on Global Cross-border Insolvency Framework for Financial Institution suggests that the key implications need to be recognized in order to make a global cross-border insolvency framework. A mandatory and internationally consistent, homogenous cross-border insolvency framework is essential to prevent the crisis and its disruptive impact (Programme et al., 2015).

A study conducted by Bu Qingxiu in the year 2010 showed that though China had not adopted the UNCITRAL Model Law, it had essentially considered those factors which were deemed necessary by China's Court and its counterparts in US and UK (Bu Qingxiu, 2010). (Mevorach, 2018)

### **Research Methodology**

This part of the study is discussed under the following headings enunciated here under:

#### **Problem Statement**

Cross-border insolvency issues can be challenging and risky, which costs businesses money. Over the past few decades, it has been more necessary in many jurisdictions, particularly under the auspices of the Model Law, to build robust institutional procedures to address cross-border bankruptcy issues in order to manage these issues holistically. The study is conducted to answer the problems faced by creditors of an insolvent corporate whose business is spread across the globe.

#### **Need of the Study**

The following are the core significance of the study:

- The study assists to identify the issues which arise in cross-border insolvency of corporates.
- The study attempts to provide solution to the law-makers to find the ways to address the issues faced by the corporates due to Cross-border Insolvency.

#### **Objectives of the Study**

The core aims of the study is to achieve the following objectives:

- To focus the issues and challenges faced by creditors due to cross-border insolvency from perspectives of India.
- To find the way forward to overcome the cross-border Insolvency issues from the perspectives of India.

### Types of Research

The current topic titled “India’s Insolvency Code (IBC 2016): Cross-Border Perspectives” is descriptive in nature which is conducted to study the issues and challenges and its way forward on account of cross-border insolvency.

### Method of Data Collection

The information for the research study on Cross-border Insolvency is obtained from secondary sources such as the official websites of Insolvency and Bankruptcy Board of India (IBBI), National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), Ministry of Corporate Affairs of Government of India (MCA), Legislative Department of Ministry of Law and Justice of Government of India, and United Nation Commission on International Trade Law (UNCITRAL). It also includes Judgments of Supreme Court of India, NCLT, NCLAT, legal practices followed in India and Bare Act.

### Issues and Challenges of Cross-Border Insolvency

Inclusive and equitable finance is at the heart of UNCITRAL’s work in the area of security interests. The secured financing law of many countries is out of date or uncoordinated with other laws, such as civil procedure, insolvency law and intellectual property law. UNCITRAL Model Law seeks to address these problems by creating standards which is a part of sustainable development goals (Sustainable Development Goals | United Nations Commission On International Trade Law, n.d.). It acts as catalyst in accomplishing few of the Sustainable Development Goals (SDGs) prominent among them are Decent Work and Economic Growth (goal 8), Industry, Innovation and Infrastructure (goal 9), Peace, Justice and Strong Institutions (goal 16). The Model Law on Cross-Border Insolvency, adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997, was designed to assist states to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one state or where some of the creditors of the debtor are not from the state in which the insolvency proceeding is taken place. In principle, the proceeding which is pending in the debtor’s centre of main interests (COMI) is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of states in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs (Nations et al., n.d.).

### Way Forward

The Insolvency Law Committee chaired by Mr Injeti Srinivas submitted its second report to the Ministry of Corporate Affairs on October 16, 2018 recommending amendments in the Insolvency and Bankruptcy Code, 2016 with respect to cross-border insolvency. The Code provides a time-bound 180 days process to resolve insolvency of companies and in the Committee proposed a draft ‘Part Z’ in the Code, based on an analysis of the Model Law on Cross-Border Insolvency, 1997. The Model Law provides a legal framework that countries may adopt in their domestic legislation to deal with cross-border insolvency issues (*Committee Reports*, n.d.). In this regard recommendations of the Committee become fruitful for resolving the Insolvency and Bankruptcy issues:

### Applicability of ‘Part Z’

It is advised that at this time, draft “Part Z” only apply to Corporate Debtors.

- **Duplication of Regulations:** It should be noted that the 2013 Companies Act includes measures for handling foreign company insolvency. It was noted that after Part Z is implemented, there will be two regimes to handle foreign company insolvency. It is advised that the Ministry of Corporate Affairs analyse these clauses in the 2013 Act to determine whether to retain or amend them.
- **Reciprocity:** It is suggested that the Model Law be originally accepted on the basis of reciprocity. According to reciprocity, a domestic court will only acknowledge and uphold a judgment rendered by a foreign court if the foreign country has passed laws that are comparable to those of the local company.
- **Access to Foreign Representatives:** It is advised that the Central Government has to provide authority to create a process that is workable within the current Indian legal system for access by overseas insolvency practitioners to Indian courts.

- **Centre of Main Interests:** If the domestic courts determine that the debtor has its COMI in a foreign country, such foreign proceedings will be recognised as the main proceedings. This recognition will result in certain automatic relief, such as allowing foreign representatives greater powers in handling the debtor's assets. For non-main proceedings, such relief is at the discretion of the domestic court.
- **Concurrent Proceedings:** The Model Law establishes guidelines for the initiation of domestic insolvency proceedings while a foreign insolvency procedure has already been initiated, or vice versa. By promoting court collaboration, it also enables coordination of two or more concurrent insolvency cases in different nations. In this regard the typology of cross-border insolvency cases provided in Table 1 is noteworthy:

**Table 1: Report on the Rules and Regulations for Cross-Border Insolvency Resolution June 2020**

Debtor company	Case types
Indian company	<ol style="list-style-type: none"> <li>1. Indian proceeding (under IBC),</li> <li>2. Only foreign proceedings, one or many,</li> <li>3. Concurrent proceedings <i>i.e.</i> Indian proceeding + one or more foreign proceedings</li> </ol>
Foreign company	<ol style="list-style-type: none"> <li>1. Domestic proceedings in the debtor company's home jurisdiction,</li> <li>2. Indian proceeding,</li> <li>3. Foreign proceeding in a jurisdiction outside India and outside the home jurisdiction of the debtor company, and</li> <li>4. Concurrent proceeding, <i>i.e.</i> Indian proceedings + domestic proceeding or one or more foreign proceedings</li> </ol>

Source: Report on the rules and regulations for cross-border insolvency resolution June 2020

- **Public Interest:** 'Part Z' stipulates that the Adjudicating Authority may decline to act in accordance with the Code if it would be in the public interest. It is advised that notification be given to the central government in any proceedings where the Authority believes there may be a potential breach of public policy.
- **Essence of Speed:** Speed is the essence for the enactment of the Insolvency and bankruptcy Code, the same should be applied for Cross-border Insolvencies as well. It assists in mitigation of loss due to substantial depreciation in the value of assets of Corporate Debtor.

### Findings

The Indian insolvency regime has undergone a historic change with enactment of the Insolvency and Bankruptcy Code, 2016 (Chatterjee et al., 2018). India's insolvency law plays a crucial part in maintaining investors' confidence through utilising insolvency proceedings as a means of international debt enforcement. The legal framework governing insolvency and bankruptcy is commonly considered as a major indicator in accelerating India's transition to a modern and market-based economy. Nearly two decades of drafting of UNCITRAL Model Law, India enacted Insolvency and Bankruptcy Code on 28<sup>th</sup> May, 2016 by the Act of the Parliament. The ground-breaking legislation is an effort to bring India's insolvency regime in line with international standards and market-based economies, which attempts to enhance the incentives and increase the confidence of foreign investors which will become the locomotive for the growth of the country (Bu Qingxiu, 2010).

### Conclusion & Suggestions

The Indian transnational insolvency system ought to have a proper mechanism of cooperation and coordination among Tribunals and insolvency representatives on one hand, and foreign courts and foreign representatives on the other hand. The recommendations of Insolvency Law Committee should be given due regard in this scenario. The Debt Recovery Tribunals, National Company Law Tribunal, National Company Law Appellate Tribunal, Insolvency and Bankruptcy Board of India need to be empowered to resolve the issues of cross-border insolvencies and bankruptcies to fast-track the process. They must also be empowered to entertain the order passed by the foreign jurisdiction in the case, where registered office of the Corporate Debtor is situated in India, and jurisdiction specifically lies with

Tribunals. Indian Tribunals should not withhold any proceedings which is pending in foreign court. The fast-track resolution of insolvency cases would improve the recovery of debt, reduces NPAs which resolves the conflicts among Corporate Debtors and creditors across the regimes.

### Select Acronyms and Terms

The abbreviations and terms used in this paper shall have the meaning enunciated below for each such terms.

Code	:	Insolvency and Bankruptcy Code, 2016
COMI	:	Centre of Main Interests
FSLRC	:	Financial Sector Legislative Reforms Commission
IBBI	:	Insolvency Bankruptcy Board of India
IBC	:	Insolvency and Bankruptcy Code
JPC	:	Joint Parliamentary Committee
MCA	:	Ministry of Corporate Affairs
Model Law	:	UNCITRAL Law on Cross-border Insolvency, 1997
NCLAT	:	National Company Law Appellate Tribunal
NCLT	:	National Company Law Tribunal
NPA	:	Non-performing assets
SDG	:	Sustainable Development Goals
UNCITRAL	:	United Nation Commission on International Trade Law

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