



IBC Knowledge Capsule 15

FRAMEWORK FOR CROSS-BORDER INSOLVENCY UNDER IBC, 2016

Introduction:

Cross-border insolvency (or **international insolvency** as it alternatively called), refers to the incident where financially distressed debtors have assets or creditors in more than one country. Typically, cross-border insolvency is more concerned with the insolvency of companies that operate in more than one country.

Section 234 and Section 235 of the Insolvency and Bankruptcy Code attempt to deal with the Cross Border Transactions. At the very outset, there exists a problem because these provisions are still not notified by the Central Government. Section 234 states that the Central Government may enter into bilateral agreements with other countries for purposes of enforcing the Code. Section 235 provides the relevant court or tribunal in India to issue a letter of request to a foreign court or tribunal seeking its assistance in situations where a debtor's assets may be located abroad. However, even if these provisions were notified, they would not provide an effective solution, primarily because of the procedure established under these provisions.

The Insolvency Law committee was constituted by the Ministry of Corporate Affairs (MCA) in 2016 to look into and prepare a draft Model Law on Cross-Border Insolvency on the lines of UNCITRAL Model Law. In October, 2018, Committee has submitted its report suggested major reforms to the IBC in keeping with this Model Law. The government is expected to bring out an ordinance to amend the Insolvency and Bankruptcy Code (IBC) to introduce a chapter on cross border insolvency cases.

The table has been color coded as follows:

Provisions of the Code	
Regulations/Rules	
Case laws	
Circulars/Notifications and Others	

TABLE: Cross-Border Insolvency under IBC

Source	Details	Explanation
Section 3(23) of the Code	3(23) “person” includes - (a) an individual; (b) a Hindu Undivided Family; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any other entity established by a statute, and includes a person resident outside India	Under Section 3(23) of the Code includes ‘person resident outside India’ in the definition of the term ‘Person’. Hence, allowing them to be either financial creditor or operational creditor for the Code.
Section 18(f)(i) of the Code	<i>(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including – (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;</i>	This section details the duties of the Resolution Professional which includes taking over assets located in a foreign country too for ongoing CIRPs in India.
Section 234 of the Code	<i>Agreements with foreign countries. – (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. (2) The Central Government may, by notification in the Official</i>	Section 234 of the code states that the Central Government can make any agreements with the foreign country to start with the insolvency proceedings. Central Government will do so with those countries with which

	<i>Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.</i>	there are reciprocal arrangements.
Section 235 of the Code	<i>235. Letter of request to a country outside India in certain cases. - (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. (2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.</i>	Section 235 of the said code states that the letter of request can be made to the authority of foreign nation with which such reciprocal arrangements have been made under Section 234. This application should be addressed to the relevant authority that is an adjudicating body in a particular country to provide for evidence in relation to assets of the debtor in country. This application can only be sent to the countries having reciprocal arrangements with India
In Re: M/s. Stanbic Bank Ghana Limited vs. Rajkumar Impex Pvt Ltd	The Division Bench of NCLT(Chennai) in the matter of M/s. Stanbic Bank Ghana Limited vs. Rajkumar Impex Pvt Ltd. admitted petition of a creditor whose ordinary place of residence was Ghana, for initiation of Corporate Insolvency Resolution Process against Indian Debtor.	The order of NCLT may be viewed at http://ibbi.gov.in/webadmin/pdf/order/2018/May/27th%20Apr%202018%20in%20the%20matter%20of%20Rajkumar%20Impex%20Private%20Limited%20C P-670-IB-2017_2018-05-01%2015:28:49.pdf
In Re: State Bank of India vs. Jet Airways(India) Limited. and in Re:	Jet Airways Ltd. was admitted to corporate insolvency resolution proceedings (CIRP) on June 20, 2019, a month after a district court in the Netherlands appointed a bankruptcy administrator to take charge of Jet's local estate in the Netherlands. Jet thus, faced two	While the recommendations of the ILC Committee are yet to be implemented, the NCLAT must be credited with its pragmatic approach of recognising the Dutch

<p>Jet Airways (India) Ltd. (Offshore Regional-SubOffices Through its Administrator Mr. Rocco Mulder) Vs. State Bank of India & Anr.</p>	<p>proceedings in relation to its financial viability in two different countries with very different regulatory regimes.</p> <p>At the outset, the Indian National Company Law Tribunal ('NCLT') observed that the order of the Netherlands district court could not be given effect to, under the IBC. However, this finding was reversed in appeal by the National Company Law Appellate Tribunal ('NCLAT'). This implied that two parallel insolvency proceedings could simultaneously be undertaken, one in India and the other one in the Netherlands.</p>	<p>bankruptcy proceedings and allowing the Indian resolution professional and the Dutch administrator to arrive at an arrangement that supports a consistent and coordinated approach in dealing with the assets of Jet Airways, without compromising the rights of the creditors. The NCLAT endorsed the spirit of modified universalism and that of the Model Law and has set a positive precedent for cross-border insolvency resolution.</p> <p>The Jet case is only the beginning of cross-border insolvency complications in India. Thus, adoption of the Model Law into the IBC is one of several key legislative changes required to be made.</p> <p>Order of NCLAT may be viewed at https://nclat.nic.in/Useradmin/upload/14226460455d285c7ad3076.pdf</p>
<p>Report of Insolvency Law Committee on Cross Border Insolvency dated October, 2018</p>	<p>The Insolvency Law Committee (ILC), constituted by the Ministry of Corporate Affairs to suggest amendments to the Insolvency and Bankruptcy Code of India, 2016, submitted its 2nd Report on Cross Border Insolvency.</p> <p>Recommendations by ILC: India should adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law of Cross Border Insolvency, 1997, as it provides for a comprehensive framework to deal with cross-border insolvency issues.</p> <p>The UNCITRAL Model Law has been adopted in 44 countries and, therefore, forms part of international best practices in dealing with cross border insolvency issues.</p>	<p>Report of ILC on Cross Border Insolvency can be viewed at https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf</p>

	It also recommended a few carve-outs to ensure that there is no inconsistency between the domestic insolvency framework and the proposed cross border insolvency framework.	
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Conclusion:

The necessity of having a cross-border insolvency framework under the IBC arises from the fact that many Indian companies have a global footprint and many foreign companies have a presence in multiple countries, including India. The inclusion of the Cross-Border Insolvency Chapter in the IBC will be a major step forward and will bring Indian Insolvency Law on a par with that of matured jurisdictions. The advantages of the model law are the precedence given to domestic proceedings and protection of public interest. The other advantages include greater confidence generation among foreign investors, adequate flexibility for seamless integration with the domestic Insolvency Law and a robust mechanism for international cooperation.

Notes:

Abbreviations used:

IBBI: Insolvency and Bankruptcy Board of India
IPA: Insolvency Professional Agency
ICSI IIP: ICSI Institute of Insolvency Professionals
IP: Insolvency Professional
CIRP: Corporate insolvency resolution process
IRP: Interim Resolution Professional
AR: Authorised Representative
COC: Committee of Creditors
CD: Corporate Debtor
FC: Financial Creditor
OC: Operational Creditor
Code: Insolvency and Bankruptcy Code, 2016

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