



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti-Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala. He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University. He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and

a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB, LLM degrees from Banaras Hindu University & PHD from university of Kota. He has successfully completed UGC sponsored M.R.P for the work in the Ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; PH.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St. Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing PH.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of Law, Forensic Justice and Policy Studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Inter-country adoption laws from Uttarakhand University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, PH.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, PH.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University. More than 25 Publications in renowned National and International Journals and has authored a Text book on CR.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); PH.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A TANGLED PROCEDURE OF CROSS-BORDER INSOLVENCY REGIME IN INDIA

AUTHORED BY - GUNJAN RATHORE

Businesses no longer function within the tidy borders of a single nation in our globalized world. A single business may have headquarters in one country, production in another, clients in a few more, and creditors all over the world. Even though globalization has brought about amazing benefits, it also has drawbacks, particularly when a business experiences financial difficulties. What occurs if a business like that goes bankrupt? Which laws are in effect? Which nation's courts are in charge? In what ways do debtors in various nations receive equitable treatment? Governments establish specialist committees like the Cross-Border Insolvency Rules and Regulations Committee to address these issues and provide much-needed clarity to a convoluted area of law. In today's current world scenario, almost every nation has extended its trade relations from one jurisdiction to another jurisdiction due to the globalization of trade and commerce. This scenario has created interconnectedness between the different world economies. As a result of having its presence in divergent places, which impliedly results in having creditors and debtors established in varying jurisdictions of other nations. Following some of the previous years, it has seen a significant boost in the effect of globalization, resulting in a significant increase in international insolvency (i.e. insolvency across borders). The insolvency proceedings will also include a crisscrossing of divergent laws of different lands and their legal proceedings, which makes it a very complicated process. There is a significant amount of confusion around India's current cross-border insolvency relief policy. Specifically, it is unclear whether international insolvency-related judgments and decrees would be recognized and enforced.

What is cross-border insolvency?

The phrase "cross-border insolvency" refers to situations in which a person or insolvent debtor has credit on his head that is present in multiple jurisdictions, or in numerous different countries. This situation is also known as "international insolvency." The way an Indian corporate debtor handles its overseas creditors is one of the important aspects of cross-border insolvency.

Three situations that are generally related to international or cross-border insolvency are as follows:

1. When insolvency proceedings have been started and a foreign creditor, such as a corporate debtor in another nation, has a claim over the debtor's assets;
2. In situations in which a corporate debtor has several branches or locations for trade and business, resulting in assets in countries other than the one where the insolvency proceedings have been started; and
3. In cases where the corporate debtor is the focus of multiple legal actions in numerous countries.

Cross-Border Insolvency, IBC & it's challenges/roadblocks.

With India becoming more and more involved in international investment, a robust and reliable framework for cross-border insolvency is needed. In order to address cross-border insolvency, two clauses—Sections 234 and 235 of the IBC code—were added in the Joint Parliamentary Report on the Insolvency Bankruptcy Code, or IBC, 2016. Only these two IBC, 2016 laws currently address domestic insolvency processes in India.

Section 234 of the Indian Business Code of 2016 addresses agreements made with nations in other jurisdictions. According to this, the Indian government may also cooperate with governments of other nations to enforce the IBC, 2016's requirements. With respect to the assets or property of the corporate debtor or/and debtor, including a personal guarantor of a corporate debtor, as the case may be, located at any location in a country outside of India with which reciprocal arrangements have been made, the Government of India may, by means of any official notification in the Gazette, direct the application of provisions of the Insolvency Bankruptcy Code, 2016 subject to the conditions that may be specified according to the time. However, this IBC, 2016 regulation has been linked to a number of disadvantages and difficulties that are impeding implementation.

First and foremost, the Indian government must sign a bilateral agreement with the relevant countries. This process may or may not be completed, and it could take a while. Second, there is a possibility that each nation would decide to implement different elements in the bilateral agreement, which could result in the partition of India's cross-border insolvency regime. Finally, if the corporate debtor has assets located in more than one jurisdiction of the relevant

nation, it may potentially trigger several lawsuits.¹

There are various situations in which a model bilateral insolvency arrangement might be both beneficial and detrimental. It's possible that certain nations won't accept a single uniform accord. Model bilateral insolvency will attempt to align with the various countries' jurisdictions and make things consistent with the circumstances. This could result in insubstantiality, make it challenging to implement in accordance with various national regulations, and prevent the intended implementation and efficacy. The adjudicating authority may, in accordance with Section 235, write a "Letter of Request" to the foreign court with which the bilateral agreement was signed under Section 234 to address the disposition of the corporate debtors' assets, which are situated outside of Indian jurisdiction.²

First off, under this Code, any proof or action pertaining to assets of a corporate debtor or debtor, including a personal guarantor of a corporate debtor, located in a country outside of India with which reciprocal arrangements have been made under section 234—either during the insolvency resolution process, liquidation, or bankruptcy proceedings, as the case may be—is required in connection with proceedings if a resolution professional, liquidator, or bankruptcy trustee believes that such assets are located in a country outside of India with which reciprocal arrangements have been made under section 234. Following receipt of an application under sub-section 235 (1), an adjudicating authority may, upon being convinced that the insolvency resolution process, liquidation, or bankruptcy proceeding requires evidence pertaining to assets under sub-section 235 (1), issue a letter requesting that the relevant court in that nation handle the request.³

Even though maintaining consistency across different insolvency laws and procedures is one of the most important aspects of cross-border insolvency, the very reliance on bilateral agreements opens up a wider scope of negotiations that would ultimately result in complexities and inconsistencies when handling such cases. Maintaining the balance of conflicting rules of international treaties is one of the adjudicating authority's biggest issues because the assets of the corporate debtor may be spread throughout multiple nations. It may be challenging to locate

¹ Goswami, Debaranjan and Godwin, Andrew and Garg, Dr. Risham, *Cross-Border Insolvency Law in India: Are the Principles of Comity of Courts and Inherent Common Law Jurisdiction Relevant?* (January 30, 2023). Available at SSRN: <https://ssrn.com/abstract=4348824>

² *Insolvency Bankruptcy Code, 2016*

³ *Insolvency Bankruptcy Board of India*

and secure assets located in foreign nations. Navigating several bankruptcy procedures and maybe running into resistance from local creditors are two challenges when enforcing Indian insolvency decisions on assets situated abroad.

The Hon'ble National Company Law Appellate Tribunal (NCLAT) has provided some insight into how coordinated hearings lead to convenience in the following seminal decisions. The NCLAT approved an insolvency procedure developed by the Dutch administrator and the Resolution Professional in India. In particular, the adjudicating body in the Stanbic Bank Ghana case noted that it only took cognizance of the foreign decree and lacked the capacity to enforce it when it admitted a Section 7 IBC application based on it. Both the Supreme Court of India and the NCLAT upheld the aforementioned admission. ⁴

Jet Airways (India) Ltd. vs. State Bank of India and Anr.⁵

- The court raised issues regarding parallel processes, the legitimacy and precedence of bankruptcy proceedings in India and other jurisdictions, and the debtor's determination of COMI in this first cross-border insolvency case. In this instance, the State Bank of India filed an application against Jet Airways under section 7 of the Insolvency Bankruptcy Code, 2016, and as a result, Jet Airways' CIRP was started in June 2019. In the Netherlands' jurisdiction, the airlines went insolvent. As a result, the Court of Dutch appointed a trustee and petitioned the Indian courts to acknowledge the Dutch procedures and stop the Indian ones. The NCLT, Mumbai Bench ruled that the Dutch proceedings were unlawful, citing provisions 234 and 235 of the Code of bankruptcy Bankruptcy, 2016 as well as the lack of a clear-cut legislative framework regarding cross-border bankruptcy.

While the Insolvency Resolution Process had already started in India, the case addresses the legitimacy and priority of the insolvency procedures being held in another country (the Netherlands). By changing the providing provisions of Sections 234 and 235 of the Code of Insolvency and Bankruptcy, 2016, the case highlights the pressing need for the UNCITRAL Model Law to be implemented. ⁶

⁴ www.barandbench.com

⁵ 2019/ibclaw.in 629 NCLAT/Company Appeal (AT) (Ins) No.707 of 2019

⁶ www.cyrilshroff.com

- **Stanbic Bank Ghana Limited vs. M/s. Rajkumar Impex Pvt.**⁷

Rajkumar Impex Ghana Limited (primary borrower), a fully owned subsidiary of Rajkumar Impex Private Limited (guarantor), had received a loan from Stanbic Bank Ghana Limited. Following default, the financial creditor filed lawsuits in Ghana against the principal borrower and in England against the guarantor. The English Court issued an injunction against the guarantor on August 8, 2017, despite the fact that the Ghana Court's proceedings were still pending. In accordance with the ruling, the financial creditor filed a corporate insolvency resolution action against the guarantor in the English Court using Section 7 of the Insolvency and Bankruptcy Code 2016 (the "IBC") of India. The English Court issued an injunction against the guarantor on August 8, 2017, while the Ghana Court's proceedings were ongoing. In accordance with the aforementioned decision, the Financial Creditor submitted an application for the beginning of the guarantor's CIRP under section 7 of the Code.

The petitioner established a prima facie case and demonstrated that the Principal Borrower owed money and that the Respondent/Guarantor was the subject of a decree when the Adjudicating Authority admitted the application. Although this Tribunal lacks the authority to enforce the foreign decree, it is free to take cognizance of it.

An appeal of the case was filed with the National Company Law Appellate Tribunal, or "NCLAT," which denied the petition. The Honourable Supreme Court also denied a statutory appeal, noting that it could not identify any justification to overrule the NCLAT's aforementioned ruling. The National Company Law Tribunal's (NCLT) pertinent ruling was upheld by the honourable Supreme Court and NCLAT.

The Stanbic decision states that an order from a foreign court may be utilized to trigger the provisions of the IBC in circumstances involving financial debt and may be considered evidence of the failure of an Indian corporate debtor. In a similar vein, a foreign creditor may start the bankruptcy resolution process by using a foreign arbitral award. It is questionable, though, that the NCLT is the appropriate venue for considering such actions. This is because, depending on the circumstances, a foreign judgment must meet the requirements of the Arbitration Act or the CPC in order to be recognized. As the NCLT in Stanbic correctly noted, no authority has been granted under the IBC has been conferred ON NCLT. Because of this, it appears controversial that the High Court decided in a derivative action case brought by two shareholders of the same corporate debtor that, after

⁷ (2018) *ibclaw.in* 46 NCLT/Appeal no. CP/670/IB/2017

the IBC was put into effect, the NCLT must decide whether to recognize and enforce a foreign judgment when admitting an insolvency application before the matter is sent to the proper courts.⁸

United Nations Commission on International Trade Law i.e. UNCITRAL Model, 19971

One of the most well-known guidelines for cross-border insolvency is the United Nations Commission on International Trade Law. As part of its mission to reform and update international trade and commercial law, UNCITRAL model is one of the instrumental in creating and upholding a strong legal framework against cross-border insolvency, which facilitates international investment and commerce. UNCITRAL carries out these duties by establishing and encouraging the application of both legislative and non-legislative tools in a number of commercial law domains. Modern, comprehensible, and integrated regulations for trade and commerce transactions have been developed using the UNCITRAL paradigm. It includes various conventions, internationally recognized model laws and regulations, readable and legislative guidelines and recommendations that are very useful in practice, up-to-date information on various case laws and uniform enactments for commercial law, technical support for legal initiatives, as well as nationwide and regional workshops on consistent commercial law.⁹

The Insolvency Law Committee, 2018

- Legal action is taken in several nations when an international corporation fails. However, there is frequently misunderstanding, duplication, and delay because every nation has its own insolvency laws. Chaos is frequently the result of creditors rushing to seize whatever assets they can. Making sense of this circumstance is the Committee's responsibility. Its role is to:
 - Establish precise guidelines for managing instances involving international insolvency.
 - Ensure equitable treatment for both domestic and foreign creditors.
 - Make suggestions about how courts in different nations might interact and work together.

⁸ <https://ibclaw.in>
⁹ uncitral.un.org

- Conform national legislation to global norms, such as the UNCITRAL Model Law on Cross-Border Insolvency.

To put it simply, this committee seeks to develop a plan for addressing financial difficulties when they arise internationally. On 16th November, 2017 the 'Insolvency Law Committee' was formed by the Ministry of Corporate Affairs i.e. MCA. The very first report was submitted in March 2018, which recommended different amendments to the Insolvency and Bankruptcy Code, 2016. However, concerning 'Cross Border Insolvency', the Insolvency Law Committee submitted its recommendations by considering the difficulty of the subject matter and the need for in-depth research to apply the UNCITRAL Model Law for India. The Committee observed that in a number of court rulings, purchasers of units that were still under construction were not regarded as either operational or financial debtors. Organizations that provide loans are considered financial creditors, but those who owe money for the supply of goods and services are considered operational creditors. The Committee pointed out that homebuyers are financial creditors since the money raised under housing contracts is a way to raise money. It suggested that the Code be amended to make it clear that homebuyers would be considered financial creditors.

The Committee pointed out that, in accordance with the Code, anybody who oversees, manages, or controls the company's operations may apply to start the corporate insolvency resolution procedure (CIPR) without the consent of partners or shareholders. The Committee suggested that the Code be changed to provide for a special majority of partners or shareholders (three-fourth majority) to approve an application. The Committee noted that the Code requires that a majority of at least 75% of the voting shares of the financial creditors be present for all decisions made by the CoC. The Committee took notice of stakeholder concerns that the resolution process would be hampered by the high threshold. In certain crucial areas, such as approving the resolution plan, the Committee suggested lowering the vote share from 75% to 66%. The vote threshold may be lowered to 51% for ordinary actions (like hiring an insolvency specialist).

Accordingly, the second part of the Insolvency Law Committee Report was submitted to MCA in 2018. In 2020, MCA also formed the Cross Border Insolvency Rules and Regulations Committee (CBIRC) and appointed Dr. K.P. Krishnan as its chair in order to draft the subordinate laws. The Cross Border Insolvency Rules and Regulations Committee (CBIRC)

submitted its findings in June 2020. Simplifying the processes for cooperation and communication between Indian courts and foreign authorities would be one of the major benefits. This may mean establishing standardized communication protocols, designating certain authorities or focal points to manage cross-border insolvency cases, and perhaps investigating methods to acknowledge insolvency decisions across national borders.¹⁰ In today's globalized economy, corporations often have assets, creditors, and operations spread across multiple countries. When such a company becomes insolvent, resolving claims and coordinating proceedings across borders becomes a complex challenge. Recognizing this, many jurisdictions have formed or are considering forming Cross-Border Insolvency Rules and Regulations Committees to create a coherent, fair, and efficient framework for international insolvency cases.

The committee's primary areas of focus are:

- **Recognition of Foreign Cases:** The group establishes the criteria for when and how Indian courts should accept insolvency proceedings that have been started in other nations, particularly where the corporation has assets in India.
- **Court Collaboration:** It outlines protocols for simple and lawful communication between judges and insolvency specialists from several nations via shared orders, emails, or even online meetings.
- **COMI (Centre of Main Interests) definition:** Which nation should take the lead in the insolvency case is determined in part by this premise. It is typically the primary location for managing the business.
- **Equitable Treatment for Debtors:** The committee makes sure that, absent a compelling public interest argument, local creditors are not unjustly given preference over foreign ones.
- **Preserving Indian Autonomy:** The committee makes ensuring that India maintains authority over issues that impact public policy or the interests of the country, even while it collaborates internationally.

India has made significant progress. Within the Ministry of Corporate Affairs, a Cross-Border Insolvency Committee was established. According to its most recent recommendations, the UNCITRAL Model Law should be adopted with minor adjustments to account for Indian reality.

¹⁰ Ministry of Corporate Affairs Government of India

The committee has recommended:

- Establishing a specific chapter for cross-border issues under the Insolvency and Bankruptcy Code (IBC).
- Enabling direct access to Indian courts by foreign officials.
- Establishing procedures for judicial collaboration with foreign nations.

With the expected adoption of these amendments in the near future, India will join an increasing number of countries with strong cross-border bankruptcy systems.¹¹

Conclusion

Common law courts in India have the important authority to recognize and support cross-border insolvency proceedings in accordance with common law principles and their inherent authority. This authority is especially important prior to India passing the Model Law. Foreign representatives should be encouraged to investigate the potential of receiving assistance from India's commercial courts by utilizing the common law provisions governing cross-border insolvency, according to the authors, who admit the flaws of the current system under the CPC. Additionally, they believe that Indian courts ought to be open to this concept. One of the goals of the Cross-Border insolvency framework is to settle individual cases; another is to establish a more stable and investment-friendly environment for India's global economic activities. By looking for answers and observing best practices, India may effectively handle the complexities of cross-border insolvency and position itself as a leader in handling such cases.

India is still developing the international insolvency arrangements and its norms; our country has not adhered to the UNICITRAL model laws yet.

Only two sections of the Insolvency and Bankruptcy Code—Sections 234 and 235 of the Code of Indian Bankruptcy—can now be regarded as enabling provisions for cross-border insolvency. The IBBI has been incorporating with the charge to expand the scope of these two provisions. The Insolvency Bankruptcy Code, of 2016 has been proven to be a phenomenal reform in the regime of Indian Insolvency. It is playing a crucial role in improving the system of domestic insolvency in India. Due to the lack of stable law on insolvency, there are many instances when our countrymen have borne losses like scams by the owner of

¹¹ *Report of Insolvency law committee; Ministry of Corporate Affairs*

Kingfisher, Nirav Modi and so on. The rapid growth in the proliferation of globalization has resulted in a significant increase in cross-border international insolvency. Therefore, to meet the needs of growing contemporary issues, it is essential to develop a firm structure of cross-border insolvency in the Indian regime to deal with high-profile and complicated cases. The introduction of such a comprehensive regime would also be incorporated with the guidelines of the government which depicts the nation as the fastest growing trade and commerce centre. Additionally, this will pave the way for a more equitable and effective system that will benefit all parties involved, including foreign investors, borrowers, and creditors.

