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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated 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

# **LIQUIDATION AND WINDING UP OF CROSS BORDER COMPANIES**

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## **INTRODUCTION**

Cross-border company winding up, a critical facet of international insolvency law, arises when companies with operations spanning multiple jurisdictions encounter financial distress necessitating dissolution. In today's interconnected global economy, multinational corporations often operate subsidiaries, branches, or affiliates across various countries, thereby introducing intricate challenges when addressing insolvency proceedings. Cross-border company winding up involves harmonizing legal frameworks, resolving jurisdictional conflicts, and ensuring equitable treatment of creditors across borders.

The primary objective of cross-border company winding up is to provide a structured and coherent process for managing insolvency proceedings that transcend national boundaries. It addresses issues that stem from the dispersal of assets, liabilities, and creditors across multiple jurisdictions, ensuring an organized and equitable distribution of funds. This is crucial for maintaining investor confidence, promoting international trade, and safeguarding the interests of creditors and stakeholders.

Challenges inherent in multinational insolvencies include the potential for conflicting court decisions, forum shopping, varied legal systems, and the need to balance the interests of creditors from different jurisdictions. Without a standardized legal framework for cross-border winding up, the potential for chaos and unfair treatment of stakeholders is considerable. The emergence of the UNCITRAL Model Law on Cross-Border Insolvency serves as a beacon of international cooperation, providing guiding principles for harmonizing the resolution of multinational insolvencies.

This project seeks to delve into the intricate landscape of cross-border company winding up,



examining the legal provisions, principles, and mechanisms that facilitate the harmonious resolution of insolvency proceedings across jurisdictions. By comprehensively exploring this topic, we aim to contribute to the understanding of the challenges and solutions associated with cross-border insolvencies, shedding light on the efforts to ensure fairness, consistency, and cooperation in an era of globalized commerce.

## **AIMS AND OBJECTIVE**

- **Comprehensive Understanding:** To gain a comprehensive understanding of the legal and practical complexities involved in cross-border company winding up, including the challenges and benefits.
- **Examination of Legal Frameworks:** To analyze the legal frameworks, including international conventions and domestic laws, that govern cross-border company winding up and insolvency proceedings.
- **Identification of Challenges:** To identify the key challenges faced in cross-border company winding up, including jurisdictional conflicts, recognition of foreign proceedings, and coordination among multiple stakeholders.

## **HYPOTHESIS**

- The legal framework's provisions on cross-border company winding up and liquidation promote international cooperation and consistency in resolving multinational
- insolvencies.

## **RESEARCH QUESTIONS**

- How does the legal framework for cross-border company winding up contribute to the harmonization and coordination of insolvency proceedings across multiple jurisdictions?
- What are the challenges and complexities faced by stakeholders, including creditors, shareholders, and employees, in cross-border company winding up cases, and how are these challenges addressed?
- What role does communication, coordination, and cooperation play among different jurisdictions, insolvency practitioners, and stakeholders in successfully resolving crossborder



company winding up cases?

## **RESEARCH METHODOLOGY**

- Doctrinal method of research has been followed by the Researcher.

## **LIMITATION OF STUDY**

- Scope and Depth: Due to the vastness of the subject and the complexities of this topic, it might not be possible to cover every jurisdiction, international agreement, or legal aspect in detail within the project's scope.
- Changing Legal Landscape: The legal frameworks related to cross-border insolvency are subject to changes and updates. The project's findings and conclusions might not capture future legal developments after the project is completed.
- Data Availability: Access to accurate and up-to-date data on specific cross-border insolvency cases, especially those with limited public documentation, might be challenging. This could affect the depth of case studies or comparative analyses.

## **TENTATIVE CHAPTERISATION**

### **LITERATURE REVIEW**

#### **1. Chapter 1: Introduction**

- **KEY REASONS WHY ORGANIZATIONS ENTER FOREIGN MARKETS :**

**Irina Onyusheva**

□ In this Chapter with the help of this piece of literature I have discussed about the cross border companies and their significance. This article also discusses about the reasons why companies enter foreign markets and what drives these companies to expand their operations beyond national border.

#### **2. Chapter 2: Cross-Border Company Winding Up: Key Concepts**

- **An overview of Cross-Border Insolvency in India: Mr.Rohit Lalwani and Aditi Tiwari**

(2022)

☐ In this chapter with the help of the above-mentioned article I have discussed the concept of cross-border insolvency and the Legal framework governing cross- border insolvency in India, UNICTRAL model law on cross-border insolvency, and Draft Part Z.

### 3. Chapter 3: Cooperation and Coordination Among Jurisdictions

- **The Case for Cooperation and Communication in Cross-Border Insolvency Proceedings: Justice Kannah Ramesh, (2023)**

☐ In this chapter with the help of above-mentioned piece of literature I have discussed the obligation of cooperation and communication in cross border insolvency, various tools to facilitate cooperation and coordination, and the benefits of coordination and cooperation in cross-border insolvency

### 4. Chapter 4: Challenges and limitations in cross border insolvency

- **Challenges and solutions in cross border insolvency cases: varsha, BNB legal (2023)**

☐ In this chapter with the help of the above mentioned piece of literature I have discussed about the challenges which emerges during cross border insolvency and the limitations of the legal framework of cross border insolvency in India

### 5. Chapter 5 : Case study related to cross-border insolvency

- **Cross Border Insolvency Regime In India: Zulifiquar memon, Abhishek Gupta, Aakansha Luhach (2021)**

☐ In this Chapter with the help of this article I have discussed about the case of SBI v. Jet Airways which includes the matter related to cross border insolvency

- **Dr. Risham: Cross border and personal insolvency in India, NLU Delhi**

☐ In this chapter I have discussed about the case of Maxwell Communication Corp in brief which deals with the case of cooperation in cross border insolvency

## Chapter 1: Cross Border Companies

There are several reasons because of which the companies enter into foreign markets and change their

status to cross border companies. There are several drivers which motivates companies to become a cross border company by globalising itself. some of the reasons are given below:

Increasing sales is one of the reason why companies enter into foreign market because by entering foreign market they increase their consumer base and thus the sales of the companies gets increased and which leads to its growth. Many a times the home country of the company has a very limited market and this also leads to reduction of sales of the company. companies enter into foreign market also because they might have reached the saturation point in their domestic market and now by entering the foreign market they tend to increase their sales.<sup>1</sup>

Improving profits is also a reason to enter into foreign markets and this is done by two methods, firstly by entering into foreign markets the market size increases due to which profit improves and secondly many foreign countries have lower cost of production like India and by entering into this countries companies can lower their production cost and due to which the profit improves.

Short term security is also a reason behind entering the foreign market because when company operates in a single market the risk of failure of the company is higher as compared to when it operates in more than one market.

Improvement in innovation is also a reason why companies enter into foreign markets because when the consumer base of the company is increased it tends to receive large number of feedbacks and because of which it knows what the consumer wants and according to which it can make innovations and improvements.

## **CHAPTER 2: Cross Border Company Winding Up :**

### **Key Concepts**

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<sup>1</sup> Onyusheva, I. (2018) KEY REASONS WHY ORGANIZATIONS ENTER FOREIGN MARKETS, Euraseans.com. Available at: <https://euraseans.com/index.php/journal/article/view/108/103> (Accessed: 19 September 2023).

Cross-border insolvency refers to the legal framework that addresses financial distress and bankruptcy of individuals or businesses with assets and creditors in multiple countries. It involves coordinating insolvency proceedings across different jurisdictions to ensure fair treatment of creditors and efficient resolution of debts. The main objective is to promote international cooperation, protect the interests of creditors, and maximize asset distribution to achieve a more equitable and orderly resolution of insolvency cases. Cross-border insolvency often relies on treaties, laws, or conventions to facilitate communication and collaboration between courts, insolvency administrators, and stakeholders in different countries.

Insolvency and bankruptcy code is the main legislation which governs the insolvency and bankruptcy proceedings in India . Although it has smoothened the process to a great extent but it still lacks in having sufficient provision for cross border insolvency.

Section 234 of the IBC<sup>2</sup> grants power to the Central Government to engage in mutual agreements with foreign jurisdictions, aimed at resolving international insolvency matters. Meanwhile, Section 235 confers authority upon the Adjudicating Authority to issue letters of request to the courts of countries that have entered into mutual agreements under Section 234.

This is done to address the disposition of assets of corporate debtors situated outside India.

Although mutual agreements are known for being time-consuming, costly, and not entirely conclusive due to the complexities of negotiations, these provisions do shed some light on the international insolvency issue within the IBC. Balancing conflicting clauses from various treaties made with different jurisdictions, particularly when a corporate debtor's assets are spread across multiple locations, presents one of the most challenging tasks for the adjudicating authority.

The Insolvency Law Committee (ILC), in its March 2018 report, acknowledged that the existing provisions, Sections 234 and 235 of the IBC, fall short of providing a comprehensive framework for addressing international issues.

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<sup>2</sup> Insolvency and Bankruptcy Code, 2016



The UNICITRAL Model Law on Cross border insolvency<sup>3</sup>, adopted in 1997, is intended to provide a structure for dealing with insolvency cases that involve multiple territories. It is based on various principles:

**Acknowledgment of overseas bankruptcy proceedings:** allowing courts in one territory to recognize and collaborate with insolvency procedures from another territory. This concept helps ensure the efficient management of resources and claims in cross border insolvency cases.

**Coordination and Cooperation:** The Model Law emphasizes collaboration and harmony among courts and bankruptcy administrators in different nations. This collaboration is crucial for overseeing the affairs of the bankrupt debtor, preserving resources, and ensuring an equitable distribution of resources among creditors.<sup>4</sup>

**Equality among Creditors:** The Model Law advances the fair treatment of all creditors, regardless of their citizenship or the location of their claims. It aims to prevent bias against foreign creditors and guarantees that they have the same rights and standing as domestic creditors.

**Safeguarding Public Interest:** While Safeguarding the public interest and preserving essential public services: It allows courts to implement measures to protect public policy concerns while still facilitating the resolution of cross border bankruptcy cases.

These concepts serve as the groundwork for the UNICITRAL Model Law on Cross border Bankruptcy, providing a structure for territories to enact legislation and regulations that facilitate the effective resolution of bankruptcy cases with international aspects. It helps establish a more predictable and unified approach to cross border bankruptcy matters.

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<sup>3</sup> Das, I. (2020). The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016. *Vikalpa*, 45(2), 104–114. <https://doi.org/10.1177/0256090920946519>

<sup>4</sup> Amlegals (2022) An overview of Cross-Border Insolvency in India, Amlegals. Available at: <https://amlegals.com/an-overview-of-cross-border-insolvency-in-india/> (Accessed: 19 September 2023).

To address the limitation of the mechanism related to cross border insolvency in India. India introduced Draft part Z which contained various rules and regulations regarding cross border insolvency and it was also based on the principles of the UNICTRAL model law and it was applicable only upon the corporate debtors not on the personal insolvency matters and it involved two types of foreign proceedings.

## **CHAPTER 3: Cooperation and Coordination among Jurisdiction**

Cooperation, coordination and communication plays an important role in the resolution of crossborder insolvency cases and if these three aspects are fulfilled effectively then the procedure will be fast and smooth.

There exists a obligation of cooperation and communication in cross border insolvency<sup>5</sup> as discussed by the model law. It is significant that cooperation between courts is furthermost objective of the model law as it requires for fair dealing of the debtor's insolvency and for benefit of the creditor and there should be communication and cooperation between the foreign and receiving court as much as possible.<sup>6</sup>

There should be a proper coordination between the courts, administrators and other stakeholders for efficient administration of assets and liabilities. Cooperation also involves the harmonisation of legal framework of different jurisdiction and adopting model law for common legal framework for resolving the cross border insolvency issues.

Clear and effective communication channels are also needed for effective communication which involves the regular meeting and conferences for discussing updates and decision making.

## **CHAPTER 4: Challenges and limitation in cross border**

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<sup>5</sup> mohan, s. chandra (2012) Cross-border Insolvency Problems: Is the ... - Wiley Online Library, wiley online library. Available at: <https://onlinelibrary.wiley.com/doi/10.1002/iir.1203> (Accessed: 19 September 2023).

<sup>6</sup> ramesh, justice kannan (2023) The Case for Cooperation and Communication in Cross-Border Insolvency Proceedings, ibbi.gov.in. Available at: <https://ibbi.gov.in/uploads/resources/783a7a063499e21c0165fd151f936431.pdf> (Accessed: 19 September 2023).

## **Insolvency**

Cross borders insolvency cases present several challenges and limitations due to their intricate nature and the involvement of multiple jurisdictions. Here are some of the main challenges and limitations:

- **Various Legal Systems:** Different countries have distinct legal systems, insolvency laws, and court procedures. Coordinating these divergent legal frameworks can be challenging.<sup>7</sup>
- **Acknowledgment of Foreign Proceedings:** Achieving acknowledgment of foreign insolvency proceedings can be difficult, and it may require negotiation and formal agreements between jurisdictions.
- **Language and Communication Obstacles:** Crossing borders cases often involve multiple languages, making communication and documentation translation a challenge.
- **Misunderstandings** can arise due to linguistic differences.
- **Contradictory Priorities:** Creditors in different jurisdictions may have conflicting interests. Some may prioritize the recovery of debts in their own country, potentially leading to disputes over asset distribution.
- **Asset Location:** Identifying, securing, and valuing assets located in different countries can be burdensome. This can delay the insolvency process and increase administrative costs.
- **Complicated Jurisdictional Issues:** Determining which jurisdiction has primary authority over the insolvency proceedings can be challenging, especially when a debtor has assets or creditors in numerous countries.
- **Lengthy and Expensive Proceedings:** Crossing borders insolvency proceedings are often more time-consuming and costly due to the need for extensive legal and administrative work across borders.
- **Lack of Consistency:** There is no global standard for crossing borders insolvency proceedings, which means that approaches and outcomes can vary widely from one case to another.

It takes extensive negotiations to finalize a mutual pact which would create uncertainty for the court as the Indian court have to handle each treaty separately. The mutual pacts will have to be invoked in multiple jurisdictions owing to the legal and procedural complexities and unnecessary organizational burdens. In cases where there are no mutual agreements between countries, and assets of the Indian

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<sup>7</sup> varsha (2023) Challenges and Solutions in Cross Border Insolvency Cases, B&B Associates LLP. Available at: <https://bnblegal.com/article/challenges-and-solutions-in-cross-border-insolvency-cases/> (Accessed: 19 September 2023).

debtor are located in a foreign country, no guidance is provided on remedies available to Indian solvency professionals so that they can take action against such assets of the debtor. The report was presented by the committee where the emphasis was placed on the need for a broader cross-border insolvency framework.<sup>8</sup>

## **CHAPTER 5: Case related to cross border insolvency**

### **JET AIRWAYS CASE:**

In 2019, the National Company Law Appellate Tribunal (NCLAT) issued a momentous decision, making Jet Airways (India) Limited (referred to as "Jet Airways") the primary Indian company to be subject to Cross border insolvency proceedings. This ruling by the NCLAT established a significant precedent in the developing field of insolvency law in India.

The NCLAT's decision directed the initiation of a "Combined Corporate Insolvency Resolution Process" under the Insolvency and Bankruptcy Code (IBC).

The sequence of events leading up to this ruling began when the State Bank of India filed a Section 7 application against Jet Airways, provoking the commencement of the Corporate Insolvency Resolution Process (CIRP) for Jet Airways on June 20, 2019.

Subsequently, the adjudicating authority became aware that a Dutch Court had already initiated insolvency proceedings and appointed a Bankruptcy Administrator in the Netherlands to oversee Jet Airways' assets located there. This action was taken in response to a bankruptcy petition filed by two European creditors who were seeking to recover unpaid dues totaling approximately INR 280 crores. Notably, the European creditors aimed to secure one of Jet Airways' Boeing 777 aircraft, which was parked at Schiphol Airport in Amsterdam.

However, the NCLT refused to withhold the Indian insolvency proceedings. The basis provided for the same was that Section 234 and Section 235 of the Code, deal with cross-border insolvency and they were not yet brought into effect. Hence, the NCLT held that in absence of such a law, the

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<sup>8</sup> Chhabra, R.K. (2021) Cross Border Insolvency in Indian Perspective: A Comparative Study, Legal Bites. Available at: <https://www.legalbites.in/cross-border-insolvency-indian-perspective/> (Accessed: 19 September 2023).



Bankruptcy Administrator was barred from participating in the Indian insolvency proceedings and further declared that ongoing proceedings in Netherlands were null and void.<sup>9</sup>

Pursuing the guidelines of the NCLAT, the Resolution Professional functioning under the Code and the Bankruptcy Administrator appointed by the Dutch Court reached a collaborative agreement known as a "cross-border insolvency protocol." This protocol was essentially constructed based on the principles outlined in the UNCITRAL Model Law.

As a result, India was recognized as the "central place of main interest," and the proceedings conducted in the Netherlands were classified as "secondary insolvency proceedings." Consequently, the Jet Airways case distinguishes itself as an intriguing subject for examination regarding the legal framework encircling cross-border insolvency proceedings in India. It emphasizes a determined effort by the Indian judiciary to assume a pioneering role in developing principles and mechanisms for addressing cross-border insolvency cases.

## **MAXWELL COMMUNICATION CORPORATION**

Maxwell Corporation Group pursued a scandalous path of events that ultimately led the global corporation into bankruptcy. When the company voluntarily declared bankruptcy, it was headquartered and managed in the UK and had accumulated the majority of its debts under UK jurisdiction. Remarkably, approximately 80% of Maxwell's assets were located in the United States, primarily<sup>10</sup> within its two major subsidiaries. In the aftermath of the bankruptcy declaration, Maxwell initiated a petition for restructuring under Chapter 11 of the US Bankruptcy Code.

Simultaneously, it filed a petition for an administration order (similar to a restructuring petition) with the High Court of Justice in London. These simultaneous legal proceedings in different countries, particularly in complex cases involving multiple parties like bankruptcies, can lead to inconsistencies and conflicts. However, both the UK and US courts independently raised the idea of establishing a

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<sup>9</sup> Memon, Z. (2021) Cross Border Insolvency Regime In India - Insolvency/Bankruptcy - India. Available at: <https://www.mondaq.com/india/insolvencybankruptcy/1123982/cross-border-insolvency-regime-in-india> (Accessed: 19 September 2023).

<sup>10</sup> Chhabra, R.K. (2021) Cross Border Insolvency in Indian Perspective: A Comparative Study, Legal Bites. Available at: <https://www.legalbites.in/cross-border-insolvency-indian-perspective/> (Accessed: 19 September 2023).

protocol between their respective administrations. This protocol was seen as advantageous not only for resolving potential standoffs but also for facilitating more efficient and timely exchanges of information.

The parallel proceedings in the UK and US courts ultimately resulted in a high level of international cooperation and a significant alignment of the laws of the two countries.<sup>11</sup>

## CONCLUSION

Summarising this project, this project focused on the legal framework which regulates the cross-border insolvency in India and the limitations attached to the existing legal framework. We came to know that cooperation and coordination are the most important aspects when it comes to resolving the cross-border insolvency matters and if the focus is made on cooperation, coordination and communication between the courts, insolvency administrators and other stakeholders the process of cross-border insolvency can become efficient.

In light of the study's findings, it is clear that an effective cross-border insolvency framework is essential in the modern, globally integrated corporate world. The capacity to efficiently wind down and liquidate such corporations is crucial for conserving value, safeguarding creditors' rights, and sustaining trust in global trade as businesses increasingly expand their activities across borders.

This initiative has advanced knowledge of cross-border insolvency by putting light on both its challenges and its potential remedies. It is our aim that the information provided here will assist academics, legislators, and attorneys in their efforts to improve the efficiency of cross-border company liquidation procedures, which will promote monetary stability and global business development.

As we look to the future, it is evident that the field of cross-border insolvency will continue to evolve, demanding ongoing research and adaptation of legal and regulatory frameworks to meet the needs of an interconnected global economy.

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<sup>11</sup> Dr. Risham (no date) Cross border and personal insolvency in India, NLU Delhi. Available at: <https://nludelhi.ac.in/download/ssr/Book%20Chapter/Dr.%20Risham%20Cross%20Border%20and%20Personal%20Insolvency%20in%20India.pdf> (Accessed: 19 September 2023).

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