

**PRISMATIC RESOLUTIONS: INSOLVENCY KALIEDOSCOPE THROUGH  
ARBITRATION'S LENS IN INDIA**

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**ABSTRACT**

As globalization continues to expand, enticing existing companies to broaden their operations worldwide, it simultaneously ushers in a host of challenges. Alongside the current wave of industrialization and the fluidity of capital across borders, inevitable disputes and conflicts arise. Among these challenges lies the persistent issue of financial strains and the incapacity to fulfill obligations worldwide. This prompts a crucial question: what repercussions await the network of all the interconnected branch companies when financial difficulties emerge within the mother lode tree? This query serves as the focal point of ongoing research. In the narrative of this paper, each analytical stage acts as a connection with the vibrant colors reminiscent of a kaleidoscope, portraying the intricate spectrum of challenges. Furthermore, the paper delves into the fusion of contemporary dispute resolution methodologies to address these complexities in furtherance to the existing legal frameworks that are in use in India. Hence, there will be a critical analysis as to the role of Arbitration in the web i.e Cross Border Insolvency.

**Keywords:** Cross Border Insolvency, International Commercial Arbitration, India, Alternative Dispute Resolution, Issues, Challenges.

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## ***I. Crimson Conundrum: Cross-Border Insolvency Challenges in India***

The color *Red*, symbolizing challenges, underscores the complexities inherent in addressing cross-border insolvency issues in India. It serves as a visual reminder of the myriad obstacles and hurdles encountered in navigating the legal landscape of international insolvency matters, which will further be discussed in the paper.

In light of the same notion, today's problem revolves around Cross Border Insolvency; which can be defined in layman's terms as a situation that comes into light when there is an insolvent debtor who owes money or has multiple creditors in more than one or multiple jurisdictions, the same can be referred to as 'cross border insolvency' or 'international insolvency'<sup>3</sup>. The problems stemming from these scenarios are intricate, especially when a parent company guarantees the debts of several overseas subsidiaries or other group entities. This creates potential liabilities for the parent company if any of its subsidiaries or group entities cannot meet their financial obligations. If multiple subsidiaries or group entities fail, the total demand on the contingent liabilities from the guarantees might be so significant that the parent guarantor cannot fulfill its obligations<sup>4</sup>. This is when the problem of insolvency arises as such.

In early June 2019, SBI-led creditors sought bankruptcy declaration for Jet Airways<sup>5</sup> in India, as creditors in the Netherlands filed for bankruptcy over unpaid dues. Insolvency proceedings were initiated in India following the application of creditors within the country, while similar proceedings occurred in the Netherlands due to claims from European creditors. In response, a Resolution Professional was appointed in India, while a Bankruptcy Trustee was designated in the Netherlands<sup>6</sup>. Hence, despite NCLT's initial rejection due to unnotified cross-border insolvency provisions, NCLAT allowed cooperation between Indian and Dutch administrators, establishing a "cross-border insolvency protocol" aligned with the Model Law framework<sup>7</sup>. This case has

<sup>3</sup> Manasi Lad Gudhate, "Corporate Social Responsibility - A New Strategic Tool for Enhancing Business Efficiency: A Study of Selected Companies in Pune," *The Chartered Secretary* 45, no. 4 (2015): 445-452, <https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf>.

<sup>4</sup> Ran Chakrabarti, "Key Issues in Cross-Border Insolvency," *National Law School of India Review* 30, no. 2 (2018): 119-135, <https://www.jstor.org/stable/10.2307/26743940>.

<sup>5</sup> *SBI v. Jet Airways (India) Ltd.*, CP 2205 (IB)/MB/2019.

<sup>6</sup> Shikha Sharma Jaipuria, "Cross-Border Insolvency in India: A New Regime in the Making," *Manupatra Articles*, <https://articles.manupatra.com/article-details/CROSS-BORDER-INSOLVENCY-IN-INDIA-A-NEW-REGIME-IN-THE-MAKING> (last visited March 15, 2024).

<sup>7</sup> Manisha Arora & Raushan Kumar, "Cross-Border Insolvency Law," *SCOnline Blog* (Apr. 16, 2024, 8:29 PM), <https://www.sconline.com/blog/post/2021/04/16/cross-border-insolvency-law/>.

provided an opportunity for the Indian insolvency law framework to demonstrate its readiness to accommodate cross-border proceedings and has been recognized as a significant precedent-setting event<sup>8</sup>. Yet, it was NCAT's ingenuity to address such an intricate challenge, particularly within India's existing legal structures. This case serves as a reminder of the need for the research and analysis of the current system, and a need to have a futuristic view regarding the same.

## ***II. Shades of Grey in the Indian Cross Border Insolvency Framework***

The color *Grey* or the shade between black and white often symbolizes ambiguity, uncertainty, and neutrality, suggesting that the situation may be complex or difficult to define precisely.

In this regard, it is imperative to examine the existing legal structure in India to establish a framework for addressing cross-border insolvency issues.:

### **a. Insolvency and Bankruptcy Code, 2016<sup>9</sup>**

Section 234 of the Insolvency and Bankruptcy Code (IBC) bestows and guarantees authority to the Central Government to allow for the establishment of bilateral agreements with foreign jurisdictions to deal with cross-border insolvency matters. Meanwhile, Section 235 allows the Adjudicating Authority to issue letters of request to courts in countries with where bilateral agreements have been formed under the Section 234. These letters aim to address the disposition of assets of corporate debtors situated outside India<sup>10</sup>. The Insolvency Law Committee (Hereinafter referred to as "ILC"), established by the Ministry of Corporate Affairs, released its initial report in March 2018. This report suggested revisions to the Insolvency and Bankruptcy Code, 2016, based on experiences gathered during its implementation. Concerning cross-border insolvency, the committee noted deficiencies in the existing provisions of the Code (Sections 234 and 235) for addressing such issues comprehensively<sup>11</sup>.

### **b. UNCITRAL Model Law On Cross-Border Insolvency, 1997<sup>12</sup>**

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<sup>8</sup> Ishan Zahoor, "Covid-19: Indian Precedent Case for Cross-Border Insolvencies is Now Gaining Importance," Pinsent Masons (August 6, 2020).

<sup>9</sup> Insolvency and Bankruptcy Code, 2016, No.31, Acts of Parliament 2016 (India)

<sup>10</sup> Insolvency and Bankruptcy Code, 2016 § 234-235, No.31, Acts of Parliament 2016 (India)

<sup>11</sup> Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India (March 2018) p. 5.

<sup>12</sup> UNCITRAL Model Law on Cross-Border Insolvency (1997).

In regards to "Cross Border Insolvency," the committee decided to issue its recommendations in a separate report due to the complexity of the subject and the need for extensive research to incorporate the UNICITRAL Model Law into Indian legislation. As a result, the second part of the ILC Report was submitted to the Ministry of Corporate Affairs on October 16, 2018<sup>13</sup>. The UNICITRAL Model Law serves as a comprehensive guideline for nations dealing with cross border insolvency matters. It's highly recommended for its effectiveness in resolving such issues<sup>14</sup>. The ILC Report, made recommendation bases on the following principles<sup>15</sup>:

- i. *Access to foreign creditors and foreign representatives:* According to the ILC Draft, upon recognition of foreign proceedings under the Code, the respective foreign representative gains the right to engage in proceedings concerning the corporate debtor.
- ii. *Recognition of foreign proceedings:* The ILC Draft suggests integrating the principle of reciprocity from the Model Law for jurisdictions where India plans to form reciprocity agreements, as well as those specified in the proposed Schedule to the ILC Draft. It also outlines procedures for identifying the center of the main interest (Hereinafter referred to as "COMI").
- iii. *Cooperation with foreign courts and representatives:* The ILC suggests creating a cooperation framework, determined by the Central Government in consultation with the adjudicating authority, to benefit all parties involved.
- iv. *Collaboration with foreign courts and representatives:* The ILC proposes establishing a framework for cooperation, to be defined by the Central Government in coordination with the adjudicating authority, aiming to benefit all stakeholders.

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<sup>13</sup> Ministry of Corporate Affairs, Government of India, Report on Cross-Border Insolvency: A Framework for International Cooperation (October 22, 2018),

[https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport\\_22102018.pdf](https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf).

<sup>14</sup>AMLEGALS, An Overview of Cross-Border Insolvency in India, Lexology, (March 21<sup>st</sup>, 2024, 7:45PM)<https://www.lexology.com/library/detail.aspx?g=83c36e66-e1e2-4804-a2ca-329ddb9d8fc1>

<sup>15</sup>AZB Advocates and Solicitors, Cross-Border and Personal Insolvency in India, National Law University, Delhi, (March 23<sup>rd</sup>, 2024, 9:45PM)

<https://nludelhi.ac.in/download/ssr/Book%20Chapter/Dr.%20Risham%20Cross%20Border%20and%20Personal%20Insolvency%20in%20India.pdf>.

c. Draft Part Z<sup>16</sup>:

Recognizing the necessity of incorporating the Model Law for cross-border insolvency, initiatives to blend its principles with the Indian legal framework led to the formulation of Draft Part Z, recommended by the Cross-border Insolvency Rules/Regulation Committee (CBIRC). Draft Part Z comprises guidelines aimed at addressing the deficiencies in the existing cross-border insolvency mechanism, with inspiration drawn from the Model Law (MLCBI). These draft guidelines were recommended in the ILC report submitted on October 16, 2018<sup>17</sup>. The Cross Border Insolvency Rules/Regulations Committee, established by the Ministry, submitted draft rules, regulations, and notifications for Part Z implementation in its June 2020 report<sup>18</sup>. This initiative aims to establish a consistent mechanism, fostering procedural standardization and facilitating effective international cooperation<sup>19,20</sup>. Some of the important facets of Draft Part Z have been highlighted below:

- i. The Draft Chapter applies solely to corporate debtors and does not encompass personal insolvency or individual debtors.
- ii. It is only applicable to countries that have integrated the Model Law into their domestic legislation.
- iii. The Draft Chapter establishes the COMI presuming it to be the registered office of a corporate debtor, unless the registered office has changed jurisdictions within three months before insolvency proceedings commence.
- iv. It delineates between two kinds of foreign proceedings: Foreign Main Proceedings and Foreign Non-main Proceedings.

At one point of time there were even discussions by the Insolvency Law Committee recommended integrating the UNCITRAL Model Law on Cross Border Insolvency (1997) into the Code<sup>21</sup>. In establishing the legal framework for cross-border insolvency in India, it's imperative to align it

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<sup>16</sup> Ministry of Corporate Affairs, Government of India, Public Notice - Implementation of the Cross-Border Insolvency Provisions under the Insolvency and Bankruptcy Code, 2016 (June 20, 2018), [https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder\\_20062018.pdf](https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf).

<sup>17</sup> Id. at 1

<sup>18</sup> Ministry of Corporate Affairs, Government of India, Report on Rules and Regulations for Cross-Border Insolvency Resolution (June 2020), <https://www.ibbi.gov.in/uploads/resources/47fe7576712190d5554e2e50ce646e2f.pdf>.

<sup>19</sup> Draft Part Z § 1(2).

<sup>20</sup> Cyril Amarchand Mangaldas, White Paper on Cross-Border Insolvency Tools and how Indian Companies can benefit from them, (March 28<sup>th</sup>, 2024, 8:15PM) <https://www.cyrilshroff.com/wp-content/uploads/2020/09/Cross-border-insolvency-tools-CAM-Thought-Leadership-Article.pdf>.

<sup>21</sup> Id. at 11

with the existing laws in partner countries covered by the Draft Regulations. Drawing heavily from the Model Laws, already embraced by 44 nations, offers a favorable approach, fostering synergy and minimizing disparities crucial for the success of a Cross-Border regime<sup>22</sup>. Despite the aptness of these recommendations in regulations and provisions, their implementation is still pending, awaiting realization, since its still in the form of a Draft.

### ***III. A Green Oasis: The Role of International Commercial Arbitration in Cross-border Insolvency***

In the vibrant spectrum of problem-solving, the color *Green* emerges as a beacon of solutions, embodying growth, harmony, and renewal. Positioned snugly beneath is Arbitration, ready to navigate and nurture resolutions with its impartiality and finesse.

Before one delves into the role of Arbitration issues surrounding Cross Border Insolvency, lets go back to the basics. International Commercial Arbitration serves as a method of resolving disputes within international commercial agreements. It encompasses arbitrations concerning commercial disputes involving at least one party from a foreign country<sup>23</sup>. The same has been defined under the Arbitration and Conciliation Act, 1996<sup>24</sup>, which came into effect because India was a signatory to the UNCITRAL Model Law on Arbitration, 1985<sup>25</sup>, which forms a foundation for the sought-after alignment and enhancement of domestic laws, encompassing every phase of the arbitration procedure. It becomes essential to evaluate the pros of one while following the principles of International Commercial Arbitration:

- i. Parties may opt for arbitration to evade the hefty expenses of litigation, the unpredictability of foreign court systems and laws, and the challenges in enforcing foreign judgments.
- ii. Arbitration typically yields binding decisions and generally does not entail extensive appeal procedures.
- iii. Arbitral awards are usually kept confidential, unlike the public nature of court litigation outcomes.

<sup>22</sup> Neha Malu & Shreyan Srivastava, "Cross Border Insolvency in India: A Long Due Dream," Vinod Kothari Consultants (March 24, 2022, 9:35PM), <https://vinodkothari.com/?p=38412>.

<sup>23</sup> International Arbitration, Punjab and Haryana High Court, [https://www.highcourtchd.gov.in/sub\\_pages/top\\_menu/about/events\\_files/InternationalArbitration.pdf](https://www.highcourtchd.gov.in/sub_pages/top_menu/about/events_files/InternationalArbitration.pdf).

<sup>24</sup> Arbitration and Conciliation Act, 1996 § 2(1)(f), No.26, Acts of Parliament 1996 (India)

<sup>25</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985.

- iv. Traditionally, disputing parties have the autonomy to select arbitrators, enabling the appointment of experts well-versed in the relevant subject matter<sup>26</sup>.

The growing globalization of commerce and the escalating preference for arbitration as a primary form of alternative dispute resolution (ADR) have led to a convergence of arbitration and insolvency. Arbitration is now frequently employed to address diverse issues linked to insolvency, including cross-border insolvency and conflicts between creditors and debtors during insolvency proceedings<sup>27</sup>. Hence, Arbitration is an already existing tool to solve the intricacies of Cross border Insolvency in various part of the world. However, the same isn't without issues as well.

When viewed individually, both arbitration and insolvency proceedings have established legal frameworks. However, when conducted concurrently across jurisdictions, various challenges arise. These include the enforceability of pre-insolvency arbitration agreements, the scope of arbitration concerning insolvency matters, the possibility of staying arbitral proceedings during insolvency, challenges to arbitral awards amidst or post-insolvency, and the judiciary's role in overseeing insolvency proceedings amidst ongoing arbitration. This complexity necessitates the development of domestic legal frameworks to address these issues cohesively. Unfortunately, many countries, including India, have yet to address this gap. Urgent consideration of such measures is essential, particularly in the current post-pandemic context<sup>28</sup>. It's essential to develop a uniform set of arbitration rules customized for insolvency scenarios. These rules should be easily applicable in insolvency-related arbitrations, mitigating potential disputes among different creditor groups. They would cover essential aspects like arbitration venue, procedural guidelines, arbitrator jurisdiction, award dispute procedures, and confidentiality clauses. Additionally, they would cover substantive laws governing insolvency claims and priorities, as well as the procedures for initiating

<sup>26</sup> International Commercial Arbitration Research Guide, Arthur W. Diamond Law Library, Columbia Law School

<sup>27</sup> Reza Shahrokhi & Akshay Gandotra, Arbitration for Insolvency: Streamlining the Scope of Arbitrability, Kluwer Arbitration Blog (March 31<sup>st</sup>, 2024, 6:45PM) <https://arbitrationblog.kluwerarbitration.com/2023/07/13/arbitration-for-insolvency-streamlining-the-scope-of-arbitrability/#:~:text=Cross%2Dborder%20insolvency%20disputes%20raise,Law%20on%20Cross%2DBorder%20Insolvency.>

<sup>28</sup> Nidhi Thakur & Akshita Tiwary, Cross-Border Insolvency and International Commercial Arbitration: The Need for Legislation, Centre for Business and Commercial Laws, National Law Institute University, Bhopal, (March 31<sup>st</sup>, 2024, 6:45PM ) <https://cbcl.nliu.ac.in/arbitration-law/cross-border-insolvency-and-international-commercial-arbitration-the-need-for-legislation/>

formal insolvency proceedings if an arbitral award remains unfulfilled. One potential approach is the adoption of insolvency-specific arbitral rules that embody best practices in the field<sup>29</sup>.

At the heart of these considerations lie two pivotal decisions. Firstly, there's the decision to opt for arbitration, offering parties the opportunity to resolve disputes outside of the insolvency proceedings and potentially secure stays or other relief supportive of arbitration. Secondly, there's the crucial choice of arbitration seat, a factor well-recognized by arbitration practitioners for its paramount importance. Factors influencing this choice include the jurisdiction's arbitration-friendly policies and the seat court's stance on recognizing and enforcing arbitral awards. Thus, when selecting a seat, it's imperative for practitioners to also consider the principles that courts at the chosen seat will apply in the event of insolvency, adding another layer of insight to their decision-making process<sup>30</sup>.

Yes, International Commercial Arbitration has proven effective in resolving disputes, yet it encounters obstacles that can be addressed through various measures like one of many decisions already illustrated above. These include cost reduction, timeliness improvement, establishment of dedicated oversight bodies, and distinct legal frameworks for domestic and international matters. Implementing these measures would not only broaden the scope of International Commercial Arbitration but also encourage its use for resolving small claims. Particularly in developing countries like India, where the economy is rapidly growing due to globalization, mechanisms like International Commercial Arbitration can facilitate economic growth<sup>31</sup>.

#### ***IV. Blue Horizons: Suggestions and Recommendations***

The color *Blue* often signifies calmness, trust, and stability, making it an apt choice for suggesting solutions or strategies. In the context of cross-border insolvency and arbitration, the color blue

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<sup>29</sup> Scott Atkins, The Role and Potential for Arbitration in Cross-Border Insolvency Disputes, Norton Rose Fulbright (March 31<sup>st</sup>, 2024, 7:35PM), <https://www.nortonrosefulbright.com/en/knowledge/publications/6c35defc/the-role-and-potential-for-arbitration-in-cross-border-insolvency-disputes>

<sup>30</sup> Sharmistha Chakrabarti, International Arbitration v. Cross-Border Insolvency: Channeling 'The Conflict of Polar Extremes' into Effective Litigation Strategy, Skadden, Arps, Slate, Meagher & Flom LLP, New York, (March 30<sup>th</sup>, 2024, 9:55 PM) <https://www.skadden.com/-/media/files/publications/2021/09/internationalarbitrationvcrossborderinsolvencychannelingtheconflictofpolarextremesintoeffectivelitig.pdf>

<sup>31</sup> Id. at 21



represents a reliable and reasoned approach, offering guidance and clarity amid complex challenges.

Therefore, To effectively address the intersection of arbitration and insolvency, several key considerations must be taken into account. Firstly, ensuring the enforceability of pre-insolvency arbitration agreements is paramount. Establishing clear guidelines and mechanisms to validate and enforce such agreements will provide certainty to all parties involved. Secondly, clarifying the scope of arbitration in insolvency matters is crucial. Clearly, defining what issues can be arbitrated and what should be addressed through insolvency proceedings will streamline the resolution process and minimize jurisdictional conflicts. Thirdly, implementing mechanisms to stay arbitral proceedings during insolvency is essential. This safeguards the interests of all stakeholders and prevents conflicts between arbitration and insolvency proceedings. Fourthly, addressing challenges related to arbitral awards amidst or post-insolvency is imperative. Establishing clear procedures for enforcing or challenging arbitral awards within the context of insolvency will ensure fairness and consistency for all parties. Lastly, defining the role of the judiciary in overseeing insolvency proceedings alongside ongoing arbitration is necessary. Establishing clear guidelines for coordination and cooperation between arbitration and insolvency proceedings will facilitate effective dispute resolution.

In furtherance to the above suggestion that the author, on a cautionary note I would like to say that the arbitration in itself is a process entitled with sanctity, and further very flexible and fair. Hence, the above general suggestions may be rephrased according to each type of case, the laws followed in the involved nations and the agreement agreed upon by evaluating the clauses of the parties, ensuring an effective application of this alternative form of dispute resolution.

#### V. *Dusk Descends: The Conclusion*

As the curtain draws on the kaleidoscope of cross-border insolvency, the author's conclusion emerges in hues of *Black*, symbolizing the role of arbitration as a clarifying lens amidst the intricate patterns of financial distress i.e cross border insolvency.

The current global framework lacks clarity on how to effectively manage insolvency situations within the context of arbitration, and vice versa. This ambiguity often leads to confusion and

challenges for parties involved in contractual agreements. To address this issue, legal experts with expertise in both areas should initiate discussions, propose solutions, and recommend implementation strategies to align and streamline these intersecting proceedings. It is advisable to anticipate and address these issues proactively during contract negotiations, as the complexities that arise post-insolvency leave little room for maneuvering. In conclusion, despite the challenges that arise when integrating arbitration into cross-border insolvency proceedings, it remains a valuable mechanism for resolving such complex issues. While there are obstacles to overcome, the essence of arbitration lies in its adaptability and flexibility. Just as beauty is in the eye of the beholder, arbitration can be tailored and refined to effectively address the intricacies of cross-border insolvency. By implementing measures to reduce costs, improve efficiency, establish oversight mechanisms, and develop specific legal frameworks, arbitration can continue to be a crucial tool for resolving disputes in the globalized business landscape.

As we peer through the ever-shifting kaleidoscope of cross-border insolvency, arbitration emerges as the crucial lens, refracting complexities into manageable patterns of cooperation and resolution. In the words of John F. Kennedy, "The greater our knowledge increases, the greater our ignorance unfolds." Embracing arbitration amidst these intricacies unveils new avenues for collaboration, guiding us towards a more harmonious and prosperous global economic landscape.