

A cross-border leap for insolvency reforms

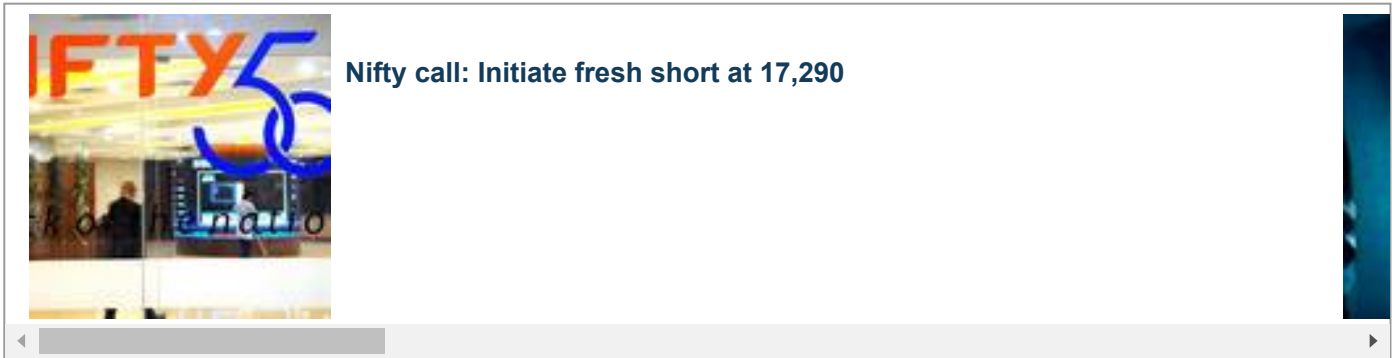
Kokila Jayaram/Namrata Nair | Updated on December 13, 2021



Insolvencies can have cross-border implications. An insolvency framework that lays down common principles is crucial

The Insolvency and Bankruptcy Code, 2016 is regarded as a landmark legislation. The law has evolved at every step and continues to achieve the objectives enshrined for it. The IBC, through frequent amendments, has addressed well the challenges the Indian situation throws up. The most recent and welcome move was the launching of pre-packaged insolvencies for the benefit of MSMEs.

The five-year-old law is now set for another amendment, the second for this year, to expand the scope of the Code to include cross-border insolvency matters. The proposed framework is a novel one. It has tweaked the Model Law to suit India's context and requirements. It provides for a broad principle-level statutory framework in Draft Part Z, put out by the Government for public comments.

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The economic imperative for introducing a cross-border framework is compelling. Economic growth since the 1990s has been driven by liberalisation, modernisation and globalisation, ensuring global allocative efficiency of economic activities. Increased interdependence of economies has resulted in high levels of cross-border investments, foreign borrowing, and movement of people across countries.

Amidst all gains, lies the real risk of failure which also is no longer restricted to a single economy. Financial risks are transmitted through global markets and the absence of a comprehensive framework to deal with cross-border risks hampers prospective businesses and investments. Cross-border resolution issues are further complicated when an insolvent debtor has assets and/or creditors across more than one territorial jurisdiction which have conflicting domestic bankruptcy and insolvency regimes, governed by principles of territorialism.

There is also the issue of lack of co-operation amongst foreign courts and statutory agencies. It is important to have common legal principles to deal with such matters in a holistic and coordinated manner in today's globally connected world.

The Code of Civil Procedure (CPC) supports recognition and enforcement of foreign judgments. Provisions of the CPC are used despite the wide differences in interpretation given by the Indian courts in dealing with foreign judgments. The use of these provisions involves going through already heavily backlogged Indian courts. For insolvency matters that need timely addressing, this would be both time-consuming and costly.

The IBC envisages entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities. This would provide an operational insolvency resolution framework with countries once a bilateral agreement is in place, but negotiating such agreements with countries entails time, effort and costs.

If India's experience with trade agreements and bilateral investment treaties clearly shows that bilateral economic arrangements are not easy to arrive at and have not always given the desired results.

It will also be a challenge to arrive at a model cross-border insolvency agreement applicable to several countries, as there exist several flavours of insolvency frameworks across countries. Uniform procedural laws will also not be possible. Both the CPC and the bilateral agreement route allow for enforcement of decrees from reciprocal and non-reciprocal countries, however, there are bound to be delays in the latter set of countries.

Settlement of insolvency matters with non-reciprocating countries requires filing new suits; is faced with capacity constraints in terms of the coordination between insolvency practitioners of different jurisdictions; greater delays in understanding, interpreting and expanding scope of laws, and increased transaction costs.

Lessons from the past

The country has witnessed a slew of matters pertaining to cross-border insolvency, lessons from which highlight the need for a comprehensive cross-border insolvency framework. A precedent has been set in the matter of Jet Airways Cooperation between the Dutch and Indian jurisdictions, enabled through a 'protocol' that led to coordinated proceedings. Such cooperation facilitated realisation in the Netherlands, has been transferred to India from such sale. This was possible as the Appellate Tribunal used its inherent powers, as a provision was lacking in the Code.

In the matter of SEL Manufacturing, a corporate debtor undergoing resolution in India, access to assets in the US has been enabled due to cooperation of the resolution professional and the US Bankruptcy Courts. The professional has been granted rights, powers, protections, privileges, and immunities of a trustee in a bankruptcy in the US. These are just the beginning of possible benefits to be harnessed if a formal cross-border framework is available as part of the Code. Such a framework would also help address issues of access to assets held abroad in foreign subsidiaries, information sharing and cooperation of foreign agencies and reduce litigations across jurisdictions.

The Joint Parliamentary Committee, while reviewing the draft IBC Bill in April 2016, emphasised the need for a cross-border resolution framework in order "to have a comprehensive and long lasting insolvency law". Well then, the question one must ask is: How does India stand to benefit from a new, formal cross-border insolvency framework?

Benefits of cross-border insolvency framework go beyond dispute settlement. Such a framework will encompass suitable timelines, skilled professional capacity, and coordination requirements. It will indicate clear supportive measures available to foreign jurisdictions in India. Indian creditors and investors lending/investing abroad will also benefit from a clearly defined resolution mechanism.

India on numerous occasions has expanded the scope of its extant laws to accommodate developments in cross-border dispute resolution. Expanding the horizon of the insolvency law would also be beneficial. The Insolvency Law Committee recommended adoption of the United National Commission on International Trade Law's Model Law on Cross-border Insolvency (Model Law), with some changes. The Government, based on the recommendation, proposed to incorporate the provisions of the Model Law in the Code.

The Model Law, adopted by 49 countries (53 jurisdictions) is a widely accepted legal framework for cross-border insolvency. Increasing cross-border trade flows to developing nations, prompted several Asian jurisdictions (Myanmar, the Philippines, Republic of Korea and many more) to adopt the Model Law in the last decade. Many countries have started revising domestic insolvency laws to adequately deal with cross-border insolvency matters. Adoption of the Model Law by economies such as Brazil (2020), serves as a strong signal to India. Its adoption can communicate India's intent to further cooperation in matters of economic legislation and a maturing modern insolvency framework.

The proposed framework under Draft Part Z is intended to be the cross-border framework under the IBC, which will govern all applications seeking recognition of foreign insolvency proceedings as well as applications from foreign jurisdictions seeking co-operation in Indian proceedings. Notable features include its applicability to corporate debtors and personal guarantors. It is also indicated that financial service providers and pre-packaged process may be outside the proposed framework. It is hoped that the gains stemming from such a novel framework will go a long way in redefining India's relations with the rest of the world.

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