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## Context

- The **growth of international trade has underscored the importance of effective regulation** to address the complex **challenges of cross-border insolvency.**
- A **predictable insolvency framework is essential for developing economic stability**, attracting foreign investments, and enabling corporate restructuring.
- However, **India’s historical and current approaches to insolvency law have struggled to address cross-border complexities**

## Historical Evolution of Insolvency Laws in India

- **Colonial Era**
    - **The Indian Insolvency Act of 1848 was the country’s first insolvency law,** followed by the Presidency-Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920.

    - While these laws provided a structure for managing domestic insolvencies, **they were ill-equipped to handle cross-border cases,** leaving a critical gap in the legal system.
- **Post-Independence**
    - Post-independence, **these laws remained largely unchanged despite recommendations from the Third Law Commission** in 1964 for modernisation.
    - **It was only in the 1990s**, driven by economic liberalization and globalisation, **that the need for a comprehensive insolvency law,** including provisions for cross-border cases, **gained national attention.**
    - **Committees like the Eradi Committee (2000), Mitra Committee (2001), and Irani Committee (2005) advocated** for the adoption of the **United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997.**
- **Introduction of the Insolvency and Bankruptcy Code (IBC)**
    - The Insolvency and Bankruptcy Code (IBC), **introduced in 2016, marked a significant step forward, focusing on domestic insolvency.**
    - However, despite the inclusion of Sections 234 and 235 to address cross-border insolvency, **these provisions remain dormant due to the lack of reciprocal agreements and government notification,** rendering them legally unenforceable.

## Challenges in India's Existing Cross-Border Insolvency Framework

- **Dormant Provisions in the IBC**
    - **Sections 234 and 235 of the IBC**, introduced to manage cross-border insolvency cases, **have been rendered ineffective due to their dormant status.**
    - **Section 234 allows the Indian government to enter into reciprocal agreements** with foreign countries to enforce insolvency resolutions, **while Section 235 outlines the procedure for seeking cooperation from foreign courts** through letters of request.
    - However, these provisions are yet to be operationalised because of two primary issues:
        - **India has not established reciprocal arrangements** with any foreign jurisdiction. These agreements are vital for enabling mutual recognition and enforcement of insolvency proceedings.
        - Without such agreements, the implementation of Section 234 remains impractical.
    - **Sections 234 and 235 have not been notified by the government**, rendering them legally unenforceable.
    - This **inaction has left a critical gap in India's insolvency framework**, forcing courts and stakeholders to rely on ad hoc solutions.
- **Judicial Challenges**
    - **Limited Powers of the NCLT**
        - The **National Company Law Tribunal (NCLT) is the primary adjudicating authority for insolvency matters** under the IBC.
        - However, **it lacks the power to recognise or enforce foreign insolvency judgments**. This limitation hampers its ability to address cross-border insolvency comprehensively.

        - Additionally, **Rule 11 of the NCLAT Rules, 2016, which could allow the NCLT to exercise inherent jurisdiction and facilitate comity with foreign courts**, **has not been implemented** for IBC matters.
    - **Dependence on Ad Hoc Protocols**
        - In the absence of a formal framework, **Indian courts have resorted to ad hoc cross-border insolvency protocols.**
        - While these have been helpful in individual cases, **such as Jet Airways (India) Limited vs. State Bank of India (2019), they are temporary solutions.**
        - **These protocols increase the judicial burden**, elevate transaction costs, and delay resolutions, often reducing the value of a debtor's assets.
    - **Outdated Communication Mechanisms**
        - **Communication between Indian and foreign courts** in insolvency matters is **inefficient and outdated.**
        - Traditional methods of issuing letters of request lack the transparency and speed required for **resolving complex cross-border cases.**
        - This creates additional delays, **increasing uncertainty for stakeholders.**
- **Regulatory and Legislative Shortcomings**
    - **Unclear Framework for Recognition of Foreign Proceedings**
        - Unlike countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency, **India does not have a clear mechanism for recognising foreign insolvency proceedings**.
        - This **results in inconsistent judicial decisions**, as courts often rely on discretionary powers or general principles of comity.
    - **Inadequate Coordination with Foreign Jurisdictions**
        - **Cross-border insolvency cases often require seamless coordination** between domestic and foreign jurisdictions.
        - However, I**ndia's lack of a structured framework for judicial cooperation undermines the efficiency and fairness** of insolvency proceedings.

## Case Study: State Bank of India vs. Jet Airways (India) Limited (2019)

- **The Jet Airways case is a landmark example of the challenges posed by India's inadequate cross-border insolvency framework**. The NCLT highlighted two major issues:
- The **absence of a reciprocal agreement** between India and the Netherlands made it impossible to enforce insolvency proceedings in the latter jurisdiction.
- **Sections 234 and 235,** which could have addressed these issues, **were deemed "dead letters" due to their non-operational status.**
- Although **an ad hoc cross-border insolvency protocol was developed** to coordinate proceedings between Indian and Dutch administrators, **this solution was neither sustainable nor efficient.**

## Recommendations for Reform

- **Adopting the UNCITRAL Model Law**:

    - **The model law offers a structured and internationally recognised framework** for managing cross-border insolvencies.
    - Its adoption would enhance predictability, improve efficiency, and strengthen investor confidence in India's insolvency regime.
- **Modernising Judicial Communication**
    - Outdated communication methods between Indian and foreign courts **hinder the resolution of cross-border insolvency cases.**
    - **Implementing the Judicial Insolvency Network (JIN) Guidelines (2016) and its Modalities of Court-to-Court Communication (2018) would modernise judicial coordination**, enhance transparency, and streamline cross-border insolvency proceedings.
- **Expanding the Powers of the NCLT**
    - **Section 60(5) of the IBC restricts civil courts from exercising jurisdiction over insolvency matters,** making the NCLT the sole adjudicating authority.
    - However, **the NCLT lacks the authority to recognize or enforce foreign judgments, limiting its effectiveness.**
    - **Expanding the NCLT's powers and implementing Rule 11 of the NCLAT Rules**, 2016, would enable it to address cross-border insolvency issues comprehensively.

## Conclusion

- **India's economic integration** with the global market **necessitates a robust cross-border insolvency framework.**
- While the IBC has laid a strong foundation for managing domestic insolvencies, **its limitations in addressing cross-border cases remain a significant challenge.**
- **Adopting the UNCITRAL Model Law, modernising judicial communication**, and empowering the NCLT are **crucial steps toward bridging this gap.**

**source**: The Hindu

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