

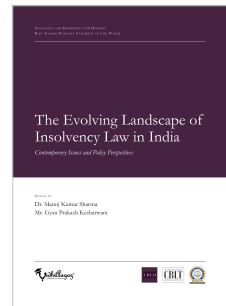
CHAPTER 11

The Gibbs Principle Paradox: India's Cross-Border Insolvency through the UNCITRAL Model Law Lens

Mihir N Singh and Tia Sikka

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CHAPTER 11

The Gibbs Principle Paradox: India's Cross-Border Insolvency through the UNCITRAL Model Law Lens

MIHIR N SINGH* AND TIA SIKKA**

The transformative reforms brought by the Insolvency and Bankruptcy Code, 2016 (IBC), significantly impact India's legal framework yet face challenges in addressing cross-border insolvency, a critical gap in a globalised economy. This underscores the crucial need for robust and internationally balanced insolvency laws. This need becomes apparent when corporate debtors with assets across multiple nations face financial distress, revealing complexities within India's cross-border insolvency framework.

This paper critically examines the deficiency in India's existing cross-border insolvency provisions, i.e., Sections 234 and 235 of the IBC. These sections rely on bilateral agreements and ad hoc letters of request but have proved largely ineffective due to the complex realities of negotiating country-specific treaties and a noteworthy absence of clearly defined procedural rules for judicial cooperation and the recognition of foreign proceedings. Currently, India lacks a dedicated and comprehensive statutory framework for cross-border insolvency. This legal vacuum creates pervasive uncertainty and can lead to the application of common law principles such as the Gibbs Principle. Under this principle, a discharge from debt granted by an Indian insolvency proceeding may not be recognised in foreign jurisdictions unless the foreign creditors have voluntarily submitted to the Indian proceedings. This undermines the principle of universality in insolvency resolutions, potentially leading to fragmented proceedings, reduced asset recovery, and a chilling effect on international credit.

While the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) is widely adopted as the international best practice for facilitating cooperation and recognition of foreign insolvency proceedings, it has yet to be fully endorsed into Indian domestic law. Despite recommendations and draft legislative proposals, the continued non-enactment of the MLCBI prevents the effective implementation of a structured framework, thus aggravating the complexities faced by corporate debtors and foreign creditors alike.

This paper argues that while the 2025 amendment is a step forward, India must adopt a contextualised version of the UNCITRAL Model Law that reconciles sovereignty concerns with global creditor confidence,

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particularly in the light of the Gibbs principle. The proposed framework combines doctrinal analysis with the set of redefined rules, ensuring both feasibility and international credibility.

Keywords: Cross-border insolvency, UNCITRAL Model Law, Gibbs Principle, Insolvency and Bankruptcy Code (IBC)

1 INTRODUCTION

As the economy grows, the aggregate global trade and investment in and out of the country also significantly increase. The rapid rise in corporations expanding, cross-border investment, and international debt financing has posed an adversity in domestic laws; they are insufficient to govern cross-border insolvency and bankruptcy. Therefore, a necessity has been felt for an unambiguous and strong framework in the realm of cross-border insolvency in India as well.¹

The question is, what is cross-border insolvency in the context of India? It is the reference of disputes regarding insolvency that arises between parties based out of different jurisdictions. The major challenges, however, faced in the event worldwide include choice of forums, nation-to-nation enforceability and diversity in laws, causing an overall lowered confidence amongst investors.² Cross-border insolvency in India has been at a nascent stage, however, developing. It has brought about shifts in the Insolvency and Bankruptcy Code, 2016³ (the code), especially in 2025 with the new amendment⁴ tabled in August. The amended code, although still, does not include cross-border insolvency; however, it empowers the government to make rules and conditions in which the process of cross-border insolvency resolution can be initiated. While that is the case, the centre continues to struggle with the adoption of the UNCITRAL model law on cross-border insolvency (model law)⁵ within the code. A foreseeable challenge, in the coming time, will also be the framing of rules under the code for cross-border insolvency and their effective enforcement, particularly in relation to companies or investors already incorporated or registered in India.⁶

India has been expanding in its GDP vastly and attracting foreign investment in diverse sectors, including technology, aviation, infrastructure, finance and manufacturing.⁷ Indian

¹ Debaranjan Goswami & Andrew Godwin, *India's Journey Towards Cross-Border Insolvency Law Reform*, 19 ASIAN J. COMP. L. 197 (2024).

² Nasser Al-Adba, *Guest Blog: Legal Insights on Cross-Border Disputes*, ICC - INTERNATIONAL CHAMBER OF COMMERCE (July 2, 2025), <https://iccwbo.org/news-publications/guests-blog-speeches/guest-blog-legal-insights-on-cross-border-disputes/>.

³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/en/legal-framework/act> (last visited Aug. 31, 2025).

⁴ *Id.*

⁵ UNCITRAL Model Law on Cross-Border Insolvency (1997) (adopted May 30, 1997).

⁶ R.J.R. Kasibhatla, *Commercial and Investor-State Disputes Settlement, the Role of UNCITRAL and Indian Practice: An Analysis*, in INDIAN PRACTICE OF INTERNATIONAL LAW (2024).

⁷ PIB HEADQUARTERS, <http://www.pib.gov.in/PressNoteDetails.aspx?NoteId=154840> (last visited Aug. 31, 2025).

conglomerates have also been raising capital abroad, showcasing that insolvency is rarely a purely domestic issue but rather an international one. India's need for a robust cross-border insolvency framework is pressing. On one hand, the state aspires to project itself as a reliable destination for international investment; on the other, it is hesitant to embrace wholesale international standards for fear of compromising domestic creditor protection and sovereign control. This tension lies at the heart of the current debate. The 2016 code contained only two provisions in relation to this, which in recent times have proved to be inadequate. While the 2025 amendment⁸ empowers the government to notify rules on cross-border insolvency, it remains unclear whether these rules will adequately address the systemic concerns that India faces.⁹

The foremost concern at present is the sheer volume of foreign law-governed contracts that are held by Indian corporations. These external borrowings, etc., are also governed by either English law or US law. In the situation, if India fails to create a framework for foreign courts' recognition of domestic restructuring or insolvency proceedings, or vice versa, the practical effect of the proceedings may be undermined. As the case may be, creditors may take cases abroad to have a safety net, corroding the basics of insolvency law in India.¹⁰ A secondary problem that faced it was the judicial capacity. The National Company Law Tribunal (NCLT) has been overburdened by cases, and additionally subjecting them to cross-border insolvency cases would further delay the process. This is also considering that the same is a highly specialised area of law requiring professionals from the field to adjudicate the matter.¹¹ Any lapses in judgements would reduce creditor and investor confidence, potentially lowering the same in India. Without a bench specifically designated for this, there is a risk that all cases may be a part of the backlog that plagues domestic insolvency, further discouraging foreign participation.¹²

The centre has specified the use of a sensitive approach to be taken in order to ensure the sovereign functioning of the state. It faces an imbalance in public policy and foreign investor protection.¹³ Insolvency as established is not just a matter of debt recovery but

⁸ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

⁹ Akhilesh Kumar, *Harmonization of International Bankruptcy Law: Is It Need of Hour? Is It Possible? An Indian Perspective*, 35 ASIAN BUS. LAW. 155 (2025).

¹⁰ *India's Approach Towards Cross-Border Insolvency Law: The Way Forward*, TAXMANN.COM, <https://www.taxmann.com/research/ibc/top-story/10501000000026523/indias-approach-towards-cross-border-insolvency-law-the-way-forward-experts-opinion> (last visited Aug. 31, 2025).

¹¹ Soumya Jan & Sidh Baunthiyal, *Resolving India's Cross Border Insolvency Concerns: A Comparative Jurisdictional Analysis*, 14 NLIU L. REV. 121 (2024).

¹² Editor, *India's Tryst with Cross-Border Insolvency Law: How Series of Judicial Pronouncements Pave the Way?*, SCC TIMES (Apr. 16, 2021), <https://www.sconline.com/blog/post/2021/04/16/cross-border-insolvency-law/>.

¹³ Adam Feibelman & Priya Misra, *The Institutional Challenges of a Cross-Border Insolvency Regime* (July 25, 2021), <https://papers.ssrn.com/abstract=3893126>.

includes employment and stability in the overall scenario. This is considered a ‘public policy’ exception for the general rule, as also stated by the authors in this paper further. While the 2025 amendment encourages the government to make rules pursuant to it, it does not specify the public policy exceptions in the practical state of affairs.

Lastly, the issue of reciprocity combined with foreign creditor treatment also poses a significant legal concern. Political concern may arise over priority given to foreign investors and recognition of proceedings in India or abroad depending on whether the countries are reciprocative or not.¹⁴ In many insolvency cases, often public sector institutions are the largest stakeholders, and any move to prioritise or even equitably align foreign creditors with them could provoke resistance. If recoveries for Indian banks are perceived as being diluted in favour of international investors, the framework may face backlash both politically and institutionally. At the same time, recognition of foreign insolvency proceedings in India will be meaningful only if Indian proceedings are similarly acknowledged abroad. Unless India negotiates reciprocal arrangements or aligns itself with widely adopted frameworks, there is no guarantee that Indian resolutions will carry weight outside its borders. The 2025 amendment¹⁵ empowers the government to notify conditions for recognition, but without clarity on reciprocity and creditor hierarchies, India risks creating a one-sided regime, allowing foreign creditors to benefit from recognition in India while Indian creditors may remain disadvantaged overseas.

2 CROSS-BORDER INSOLVENCY: THE UNRESOLVED GAP UNDER IBC

Cross-border insolvency has emerged to be one of the most critical lacunae in India’s insolvency regime. As globalisation enhances the movement of capital and multinational arrangements, the lack of a definite regime in India under the Insolvency and Bankruptcy Code, 2016 (IBC), has created uncertainty in handling foreign creditors, abroad-located assets, and proceedings launched across various jurisdictions. While the IBC has transformed domestic insolvency practice, its bare-bones provisions on cross-border insolvency, namely Sections 234 and 235, are inactive, leaving a grave lacuna in the system. These only make provision for reciprocal arrangements with foreign nations and permit letters of request to be issued from Indian tribunals, but India has not signed any bilateral treaties and has not operationalised these mechanisms.¹⁶ Across the world, the most widely embraced model is the *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, which offers four central pillars:

¹⁴ Amol Baxi, *Insolvency Laws and International Trade: A Perspective*.

¹⁵ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

¹⁶ Dr Parineeta Goswami & Aarushi Goswami, *Global Economic Interdependence: Evaluating the UNCITRAL Model Law and Adaptive Frameworks for Cross Border Bankruptcy* (Jan. 15, 2025), <https://papers.ssrn.com/abstract=5121549>.

- i. The first pillar is access and equal treatment, wherein insolvency legislation has to provide for the proceedings to be made available to all eligible debtors, whether persons or corporate entities, of all sizes. Debtors and creditors ought to have the ability to file for insolvency proceedings, subject to the nature of default or insolvency. Once proceedings have been initiated, the legislation has to provide that creditors who belong to the same class are treated equally, without prejudice or preference.¹⁷ This is to prevent any creditor from gaining an unfair benefit via strong-arm recovery methods or insider trades, thus ensuring collective resolution over fragmented enforcement. Equality among creditors can be ensured by transparency of disclosure of assets, prevention against fraudulent transfers, and safeguarding against preferential claims.
- ii. Maximisation of the value of assets is the second pillar which puts forth the overarching purpose of any insolvency system, which is to maintain and maximise the value of the debtor's estate. Legislation should deter premature liquidation of healthy companies and promote reorganisation or restructuring whenever possible. This concept acknowledges that maintaining going-concern value will, in many cases, result in a greater return for creditors than a prompt sale of assets.¹⁸ Devices like moratorium on enforcement, restructuring regimes, and debtor-in-possession facilities give businesses some leeway to reorganise. Even in liquidation, insolvency law has to ensure fair processes, maximising returns via fair valuation and effective asset realisation.
- iii. The third pillar is fairness and efficiency in the process. Insolvency proceedings should be carried out in a timely, predictable, and transparent manner. Delays tend to destroy asset value and limit creditor recovery, and hence the law has to set clear timelines and streamlined procedures to prevent lengthy litigation. Fairness means that each and every stakeholder, including workers, small creditors, and minority shareholders, should receive appropriate consideration, although balanced with the requirement for economic efficiency.¹⁹ Efficient processes also necessitate specialist courts, expert insolvency professionals, and simple rules of jurisdiction. By promoting both efficiency and fairness, insolvency law can instil confidence in domestic and cross-border investors.
- iv. The fourth pillar is cross-border cooperation and coordination. Under a globalised economy, insolvency often involves assets, creditors, or proceedings that are located in

¹⁷ ARBITRATION AND INSOLVENCY, GOOGLE BOOKS, https://books.google.co.in/books?hl=en&lr=&id=98AHEQAAQBAJ&oi=fnd&pg=PR1&dq=devas+multimedia+insolvency&ots=qC_J3SavnF&sig=yPxM5NV6pkcdRnZev2uxs1DkuoY&redir_esc=y#v=onepage&q=devas%20multimedia%20insolvency&f=false (last visited Aug. 30, 2025).

¹⁸ Peter Ashford, *Chapter 3: Effect of Insolvency on the Arbitration Agreement* (2024), <https://www.elgaronline.com/edcollchap/book/9781800887398/book-part-9781800887398-10.xml>.

¹⁹ Farid Nasirli, *Balancing Investor Protection and Sovereignty: The Evolution of BITs and ISDS in International Public Investment Law* (Apr. 14, 2025), <https://papers.ssrn.com/abstract=5228487>.

several states. UNCITRAL guidelines emphasise that local insolvency law has to ensure that courts and insolvency practitioners have mechanisms to cooperate across borders.²⁰ These mechanisms consist of recognition of foreign insolvency proceedings, aid to foreign representatives, and coordination between parallel proceedings in different states. The Model Law on Cross-Border Insolvency, agreed in 1997, realises this pillar by providing states with a harmonised legal framework for recognition, cooperation, and coordination. This minimises conflicts of laws, avoids duplicative proceedings, and ensures that all creditors across the world are treated equitably.

Together, these four pillars of access and equal treatment, maximisation of value, efficiency and fairness, and cross-border cooperation form a balanced insolvency regime that promotes economic stability, ensures the protection of creditor rights, and stimulates entrepreneurship by providing a consistent framework for addressing financial failure. The lack of statutory cross-border framework in India generates several problems. Foreign creditors are uncertain regarding whether they can join Indian proceedings, denting the confidence of India as an investment hub.²¹ Resolution professionals are unable to retrieve foreign assets or engage with foreign courts, resulting in value deterioration. In addition, without certainty of recognition of foreign proceedings, international insolvencies have the potential to be splintered, with cross-claims and overlapping litigation. This includes the very purpose of the IBC, which is to realise value in a time-sensitive way. The legal principles and laws hereinabove stated were reiterated in the leading decisions of the NCLT and NCLAT:

2.1 State Bank of India v. Jet Airways (India) Ltd.²²

The landmark case in India's insolvency history is the Jet Airways (India) Ltd case since it represented India's first foray into cross-border coordination of insolvency, even prior to the advent of a formal mechanism. Jet Airways, India's former top private airline, was admitted to corporate insolvency proceedings by the Mumbai NCLT in 2019 when it defaulted on over ₹8,000 crore of loans.²³ The peculiarity of this situation was that, in addition to the Indian proceedings, the Amsterdam Bankruptcy Court had also initiated insolvency proceedings against the company concerning its assets and creditors in the Netherlands. This set the question of how to handle concurrent proceedings in two jurisdictions in the absence of a clear statutory framework in India. The NCLT in Mumbai was initially hesitant to accept the Dutch proceedings, referring to the lack of a legal process under Sections 234

²⁰ Amol Baxi, *Insolvency Laws and International Trade: A Perspective*.

²¹ Dr Mohammed Younus, *India's Insolvency Code (IBC 2016): Cross-Border Perspectives*.

²² SBI v. Jet Airways (India) Ltd., 2021 SCC OnLine NCLT 11967.

²³ John F. O'Connell & George Williams, *Transformation of India's Domestic Airlines: A Case Study of Indian Airlines, Jet Airways, Air Sahara and Air Deccan*, 12 J. AIR TRANSP. MGMT. 358 (2006).

and 235 of the Insolvency and Bankruptcy Code, 2016, which demanded bilateral agreements for recognition. But things became practical once again with the Dutch administrator and the Indian Resolution Professional under the IBC coming to a decision to work together. In what was considered a first-of-its-kind move, they entered a cross-border insolvency protocol, which was sanctioned by the NCLAT in September 2019.²⁴ This protocol stipulated mutual assistance, recognition of claims, exchange of information, and coordination of proceedings in a way that was mindful of both Indian and Dutch processes.

This case is very prominent, as it demonstrated the adaptability and pragmatism of Indian practitioners and courts in filling the lacuna in legislation.²⁵ The protocol enabled creditors in the Netherlands to join in the Indian insolvency proceedings without undermining the role of the Dutch court in respect of assets within its jurisdiction. It also prevented duplicative suits and minimised asset value erosion risk. The Jet Airways case therefore proved that without a statutory regime, cooperative arrangements could provide fairness, creditor involvement, and value maximisation in cross-border insolvency proceedings.²⁶ On a wider level, the Jet Airways precedent drew attention to the imperative for a formal cross-border insolvency regime in India since dependence on ad hoc procedures is neither stable nor certain for investors. The case had a direct bearing on deliberations regarding the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997, which emphasises recognition, cooperation, and coordination among jurisdictions. The 2025 IBC Amendment Bill seems to have taken cues from Jet Airways by suggesting a structured mechanism for recognition and cooperation, going beyond treaty-based enforcement to a contemporary, rule-based regime.

Essentially, the Jet Airways case is not just a corporate failure but a watershed in India's insolvency jurisprudence which demonstrates that cross-border insolvency cannot be wished away in an economy which is increasingly globalised. It emphasises the need for harmonising India's laws with international best practices in order to offer certainty to the creditors, make the proceedings efficient, and foster investor confidence in the Indian market.

²⁴ Jashim Uddin Ahmed et al., *The Bankruptcy of Jet Airways in India*, 11 IIUM J. CASE STUD. MGMT. 23 (2020).

²⁵ *Supreme Court Orders Liquidation of Jet Airways*, <https://foxmandal.in/News/supreme-court-orders-liquidation-of-jet-airways/> (last visited Aug. 31, 2025).

²⁶ Editor, *Collapsed Resolutions of Aircraft Insolvencies, End of an Icon: An In-Depth Analysis of the Jet Airways Case*, SCC TIMES (May 6, 2025), <https://www.sconline.com/blog/post/2025/05/06/collapsed-resolutions-of-aircraft-insolvencies-end-of-an-icon-an-in-depth-analysis-of-the-jet-airways-case/>.

2.2 State Bank of India v. Videocon Industries Limited²⁷

The Videocon Industries Ltd. insolvency case is another landmark moment in the development of India's insolvency regime, and though it was not a cross-border protocol case such as Jet Airways, it raised significant questions that bear directly on the necessity of a structured regime of cross-border insolvency. Videocon, an Indian conglomerate with diversified interests in consumer electronics, oil and gas, and telecommunications, was admitted into insolvency in 2018 for defaulting on over ₹90,000 crore of loans.²⁸ This case was special in that it had an enormous asset spread and subsidiaries, of which the majority were overseas, mostly in the oil and gas business in Brazil and Mozambique. This immediately raised questions of how to handle foreign assets within an Indian insolvency resolution process. The NCLT admitted insolvency proceedings against Videocon and subsequently permitted consolidation of 13 group companies into one corporate insolvency resolution process (CIRP).²⁹ This was a rare measure under the IBC and was meant to achieve maximum value by renouncing dismembered proceedings across multiple entities. Yet, with regard to Videocon's foreign assets, the Resolution Professional (RP) encountered great challenges, as India did not have any statute governing the recognition or interaction with foreign proceedings; the RP was limited in making claims or pursuing recognition overseas. Sections 234 and 235 of the IBC, theoretically allowing for bilateral treaties and letters of request to foreign courts, were useless in practice since India did not have any treaties. This underscored the gap in India's legal system regarding cross-border insolvency.

At last, the winning bidder of Videocon, Twin Star Technologies (Vedanta Group entity), encountered challenges in taking control of foreign assets, as there was no organised cross-border framework. Creditors were also dissatisfied with recovery rates that were too low, and banks recovered merely about 4% of admitted claims.³⁰ One of the key reasons for this dismal outcome was the failure to integrate and utilise Videocon's overseas assets properly into the Indian resolution process. As compared to Jet Airways, where at least a protocol was agreed upon, the Videocon case demonstrated how the absence of any mechanism of international cooperation could materially decrease recoveries and investor confidence.

The Videocon insolvency thus turned into a case study of the economic price of being without a cross-border insolvency law. It made fresh sense for India to implement the

²⁷ State Bank of India v. Videocon Indus. Limited, 2019 SCC OnLine NCLT 745.

²⁸ *Resolution of Insolvency of Videocon Industries Limited [A]*, SAGE BUSINESS CASES, <https://sk.sagepub.com/cases/embed/resolution-of-insolvency-of-videocon-industries-limited-a> (last visited Aug. 31, 2025).

²⁹ Jessica E. Salisbury-Copper, Scott A. King & Joe Barton, *Eleventh Circuit Deepens Split on Standing in FDCPA Cases*, 17 PRATT'S J. BANKR. L. 36 (2021).

³⁰ Vivek Saurav & Dr Bhanu Saxena, *Navigating Group Insolvency in India: Analyzing Implementation Challenges and Enterprise Dynamics for Modern Day Business Structure* (Jan. 17, 2024), <https://papers.ssrn.com/abstract=4698201>.

UNCITRAL Model Law on Cross-Border Insolvency or an equivalent domestic version in order to ensure that foreign assets and foreign creditors could be appropriately reflected in Indian insolvency proceedings.³¹ Videocon lessons directly impacted policy discussions and helped spur the inclusion. Together, Jet Airways and Videocon demonstrate 2 contrasting pathways: a pragmatic cooperation in the absence of law versus systematic value destruction where foreign assets remain outside the control of India. The lessons learnt underline the urgency of a statutory cross-border insolvency framework that attempts to ensure recognition and predictable creditor treatment.

3 IBC AMENDMENT BILL, 2025: A STEP TOWARDS CROSS-BORDER INSOLVENCY REFORM

The recent bill that was proposed was the Insolvency and Bankruptcy Code (Amendment) Bill, 2025,³² which stated the intervention by directly tackling the pending issue of cross-border insolvency. So far, India's insolvency system handled such cases under Sections 234 and 235 of the IBC that depended upon bilateral agreements and letters of request. Such provisions were sluggish, discretionary, and mainly ineffective in obtaining recognition of Indian proceedings overseas or enforcement of foreign insolvency procedures in India. The 2025 bill breaks away from such a fragmented structure and puts in place a methodical, rule-based model for dealing with cross-border cases, bringing India closer to international best practices.³³

The Bill authorises the Central Government to make comprehensive rules governing cross-border insolvency. It adds a new provision, i.e., Section 240C, which empowers the government to formulate rules on recognition of foreign proceedings, assistance to foreign courts, and cooperation in parallel proceedings. This will provide a dynamic yet complete system which can evolve in accordance with the intricacies of cross-border disputes. The system is not only likely to enable faster recovery of foreign assets but also increase the predictability for foreign investors who engage with India's insolvency proceedings. Institutionally, the bill also allows for the setting up of special NCLT benches to hear only cross-border insolvency cases. Such specialised infrastructure is expected to bring efficiency, avoid delays, and promote judicial specialisation in taking care of cases involving more than one jurisdiction. Through this, the law gives assurance and confidence to foreign as well as

³¹ Anjali Dixit, *Group Insolvency Under IBC*, 6 INT'L J.L. MGMT. & HUMAN. 1926 (2023).

³² The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

³³ *ISDS Regimes and Democratic Practice: Creating Conflict of Interests Between Governments, Investors and Local Populations*, <https://hrcaak.srce.hr/clanak/319663> (last visited Aug. 30, 2025).

domestic creditors, debtors, and insolvency professionals that India is capable of resolving transnational insolvency disputes well.³⁴

The larger intent of this reform is to increase investor confidence and bring India at par with international insolvency norms. Currently, India has not yet enacted the UNCITRAL Model Law on Cross-Border Insolvency (1997), which is the foundation of most contemporary insolvency regimes. Yet, the 2025 Bill strongly mirrors the intent of recognition, cooperation, and coordination which the UNCITRAL framework advocates.³⁵ By so doing, it ensures equitable treatment of creditors regardless of nationality, reduces multiplicity of proceedings, and maximises value by ensuring assets are handled in a holistic manner. In a way, the 2025 Amendment Bill is a clear departure from the treaty-based provisions and establishes a contemporary, rule-based regime for cross-border insolvency. This marks India's willingness to open up to the global economy, safeguard the interests of creditors across frontiers, and offer certainty to foreign investors dealing with Indian businesses. The reform is thus not just a legal milestone but an economic one as well and is expected to reinforce India as a creditor-friendly and investor-reliable jurisdiction.

Moreover, implementing a strong cross-border insolvency system would place India among international best practices and increase its credibility in international capital markets. For international investors, legal certainty of treatment in insolvency is a key determinant of risk.³⁶ For Indian companies operating overseas, such a system would avoid fragmentation and optimise recoveries. The Ministry of Corporate Affairs and the Insolvency and Bankruptcy Board of India (IBBI) have also consistently recognised this requirement, and recent policy debates indicate that legislative intervention may be imminent. Yet political reservations about sovereignty, protection of creditors, and potential misuse by multinationals have held back enactment.³⁷

4 CRITICAL ANALYSIS OF THE CONFLICTING INTERNATIONAL PRINCIPLES

The cross-border insolvency disputes have been treated in the past by two competing doctrines: the Gibbs Rule and the doctrine of modernised universalism. Both methods try to deal with the conflicts resulting from a debtor with assets, creditors, and proceedings in

³⁴ Mahir Khanna, *Comprehensive Examination of the Constitutionality of the Insolvency and Bankruptcy Laws*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

³⁵ Gerard McCormack & Wan Wai Yee, *The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms*, 54 TEX. INT'L L.J. 273 (2018).

³⁶ Reinhard Bork, *The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency*, 26 INT'L INSOLVENCY REV. 246 (2017).

³⁷ Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 517 (2011).

multiple jurisdictions but do so with utterly different mindsets, and each has been intensely criticised in recent literature.

The Gibbs Rule, named after the English case *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890)³⁸, is that a contract subject to English law cannot be released or varied by a foreign insolvency proceeding unless discharge thereunder is effective under English law. Essentially, the law of the contract prevails over any foreign restructuring or insolvency settlement.³⁹ This doctrine provides certainty to creditors who enter into contracts under English law, but at the cost of frustrating collective insolvency procedures overseas. The rule permits English law contract creditors to exclude themselves from foreign restructuring processes, thus undermining the principle of equal treatment of creditors that is central to insolvency law.⁴⁰ The Gibbs Rule, in this view, is excessively territorial and outdated for a globalised world where corporate structures and debts frequently cross borders. In addition, it promotes forum shopping since creditors can opt for English law in contracts precisely to avoid the worst foreign insolvency regimes. This discourages international cooperation and comity and reinforces a parochial mind-set no longer suitable for the needs of interdependent financial systems.

Modernised universalism, by contrast, is an effort to marry universalist principles to the imperatives of national sovereignty.⁴¹ Insolvency proceedings should be held in a single jurisdiction, traditionally the debtor's Centre of Main Interests (COMI), and universally recognised elsewhere. Modernised universalism lessens this inflexibility by permitting ancillary or secondary proceedings elsewhere while placing primacy on the principal proceeding in COMI.⁴² This philosophy has expressed itself in the UNCITRAL Model Law on Cross-Border Insolvency, which encourages recognition of foreign proceedings, cooperation between courts, and coordination of multi-jurisdictional cases. In contrast to the Gibbs Rule, it prefers collective resolution of insolvency with a simultaneous protection of local creditors and interests.

Nevertheless, modernised universalism has its limitations. Its dependence on judicial assistance and mutual recognition among states is a restriction on its efficacy, since not all

³⁸ *Antony Gibbs & Sons v. La Société Industrielle et Commerciale Des Métaux*, <https://www.uniset.ca/lloyddata/25QBD399.html> (last visited Aug. 31, 2025).

³⁹ Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 AM. BANKR. L.J. 343 (2019).

⁴⁰ *Antony Gibbs & Sons v. La Société Industrielle et Commerciale Des Métaux*, <https://www.uniset.ca/lloyddata/25QBD399.html> (last visited Aug. 31, 2025).

⁴¹ Fabio Trevisan & Carolina Vasselli, *Modernisation of Luxembourg's Insolvency Law*, 17 INSOLVENCY & RESTRUCTURING INT'L 32 (2023).

⁴² Epp Asar, *The Desirability of 'Centre of Main Interests' as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law*, 22 EUR. BUS. L. REV. (2011), <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EULR\EULR2011017.pdf>.

jurisdictions have enacted or strictly adhered to the Model Law.⁴³ The identification of COMI, while being the key to the system, is generally imprecise and open to abuse by debtors in search of more attractive jurisdictions, resulting in the phenomenon of “COMI shopping”. Domestic courts also have a tendency to invoke overly broad public policy exceptions or prefer local creditors, diluting the system’s intended universality. The outcome is an incoherent patchwork of incomplete harmonisation and not a uniform global system. Modernised universalism, though more forward-looking, falls short in practice due to patchy adoption, judicial discretion, and internal imprecision. Comparing the two doctrines, the Gibbs Rule is a vestige of nineteenth-century jurisprudence that prioritises sanctity of contract over collective solution of insolvency, while modernised universalism is an imperfect attempt at international cooperation. The Gibbs Rule remains under attack as archaic, creditor-prejudiced, and contrary to contemporary insolvency goals. Both doctrines thus demonstrate the balance between safeguarding creditor entitlements, deferring to state sovereignty, and facilitating efficiency in international markets. The future of cross-border insolvency law is in developing a modernised universalism rather than continuing with the Gibbs Rule.⁴⁴ In this scenario India risks being caught between 2 extremes: sovereign control that deters foreign creditors and universal recognition that undermines domestic creditor priority regimes. A hybrid framework that is contextualised is the Model Law, incorporating reciprocity, disclosure obligations and public policy overrides, offering the only viable middle path. In the Indian context this means adopting a hybrid approach, one that respects sovereignty and public policy concerns while enabling predictable recognition of foreign proceedings.⁴⁵ Wholesale universalism may not be politically feasible, but a contextualised adoption of the model law, with reciprocity and systemic safeguards, can balance domestic and international interests. Refining the Model Law by having clearer standards, more international adoption, and independent oversight mechanisms could slowly offset its deficiencies. The Gibbs Rule, on the other hand, is the approach to harmonise and equalise treatment of creditors, and its continued use threatens the global insolvency regimes. While both approaches expose limitations, it is the modernised universalist framework that offers a workable path toward balancing efficiency, fairness, and cooperation in an increasingly interconnected financial world.⁴⁶

⁴³ Johan Althini, *The Centre of Main Interests*.

⁴⁴ Bianca Nalbandian, ‘Sovereign Investors INC.’, or *Sovereign Wealth Funds in Investment Arbitration and in Award Enforcement Proceedings*.

⁴⁵ Helen Canton, *United Nations Conference on Trade and Development—UNCTAD*, in *THE EUROPA DIRECTORY OF INTERNATIONAL ORGANIZATIONS 2021* (23d ed. 2021).

⁴⁶ Aparna Ravi, *Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings*, 50 *ECON. & POL. WKLY.* 46 (2015).

5 WAY FORWARD

The 2025 amendment⁴⁷ seems to be a step in the right direction; however, thorough and true enforcement of the amended provisions and the formation of rules therein are of prime importance. At the present stage, the evolution of India's insolvency regime has been gradual and still at the earlier stages, most notably through periodic amendments to the Insolvency and Bankruptcy Code and policy insights that were derived from expert committees. However, due to lack of rules, a structural gap occurs. The only viable path forward lies in the formulation and implementation of detailed rules under the act, capable of addressing the practical, political, and legal challenges that arise in cross-border insolvency proceedings. A comparative experience demonstrates that Singapore⁴⁸, the UK and the US each customised the model law to domestic realities. India must similarly adopt a tailored approach, neither a wholesale transplant of international law nor an isolationist territorial regime.⁴⁹

The authors, therefore, suggest a set of draft rules, framed in line with India's institutional realities, international obligations, and policy concerns, to operationalise the cross-border insolvency framework under the IBC Amendment Act, 2025. The rules proposed are as follows:

5.1 Cross-Border Insolvency Bankruptcy Rules, 2025

5.1.1 Rule 1: Registration of Foreign Investor Engagement Agreements

- (1) All agreements involving foreign investment, merger, or financial involvement in India must be registered with the National Company Law Tribunal (NCLT) as a condition precedent for recognition in insolvency.
- (2) The NCLT registry shall maintain these agreements for resolution professionals and resolution plan formation, as per the domestic act, to ensure transparency and reduce jurisdictional disputes.

Provided that it is below a certain limit, as set by the central government, the foreign investors may not need to register but disclose to the NCLT.

The intent is to allow recognition of agreements by the NCLT so as to avoid any further disputes in relation to jurisdiction and agreements entered into. This acts as a pre-engagement check and prior permission of the requisite authorities. While that is the case, the

⁴⁷ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

⁴⁸ Jared Foong, *Recognising Foreign Solvent Proceedings Under the UNCITRAL Model Law on Cross-Border Insolvency: The Singaporean Approach in Ascentra Holdings, Inc v SPGK Pte Ltd [2023] 2 SLR 421*, 45 LEGAL STUD. 309 (2025).

⁴⁹ Yeejin Jang, Jenny Jihyun Tak & Wei Wang, *Global Insolvency and Cross-Border Capital Flows* (Aug. 6, 2024), <https://papers.ssrn.com/abstract=4936763>.

authors also suggest that the central government, according to statistics, set a cap/limit beyond which registration may be necessary. This cap may be 10 to 15% of equity or credit value to the Indian company; that means a minimum limit is to be set below which registration may not be compulsory; however, disclosure would be. The same ensures that domestic remedies are consented to and no overlap in jurisdictions takes place. The NCLT is able to then keep track of agreements, and there is transparency in the process. This rationale is derived from the example of merger approvals under the competition law, and in company law, it ensures safeguards against hidden contractual clauses that may later cause conflicts in insolvency proceedings. This increases creditor and investor confidence that the agreements will receive formal recognition.⁵⁰

5.1.2 Rule 2: Dedicated NCLT Bench for Cross-Border Insolvency

- (1) The government shall establish a special NCLT bench for the purpose of resolution of cross-border insolvency cases. This bench shall include members specialising in insolvency and investment law.
- (2) The bench shall have exclusive authority over the proceedings, and it shall be recognised if the agreement is registered with NCLT.

The rationale for this rule to be added is to ensure the current benches of the NCLT do not get overburdened and there is no further backlog of cases.⁵¹ The current scenario showcases that this overburdening may cause effects on the current domestic insolvency cases. This also ensures that the parties to the agreement are surrendering themselves to the jurisdiction of the NCLT, further avoiding jurisdictional overlaps.⁵²

5.1.3 Rule 3: CIRP Framework for Cross-Border Insolvency Cases

- (1) Cross-border insolvency cases shall proceed through the corporate insolvency resolution process, which is the domestic process modified to cater to the foreign creditor claims and asset coordination.
- (2) The resolution professional shall be appointed to prepare a consolidated plan under the CIRP, ensuring fair treatment of foreign and domestic stakeholders.

⁵⁰ *Cross-Border Mergers and Amalgamations: An Update on Rule 25a of the Companies Merger Rules*, <https://www.mondaq.com/india/maprivate-equity/1516984/cross-border-mergers-and-amalgamations-an-update-on-rule-25a-of-the-companies-merger-rules> (last visited Aug. 31, 2025).

⁵¹ Banshidhar Dharshani, *Analysis of NCLT's Role in Resolving Corporate Disputes*, 7 INT'L J.L. MGMT. & HUMAN. 917 (2024).

⁵² *India's Approach Towards Cross-Border Insolvency Law: The Way Forward*, TAXMANN.COM, <https://www.taxmann.com/research/ibc/top-story/10501000000026523/indias-approach-towards-cross-border-insolvency-law-the-way-forward-experts-opinion> (last visited Aug. 31, 2025).

- (3) The plan must be approved by both the Committee of Creditors (CoC) and the Special NCLT Bench.

The CIRP framework allows for a set procedure to be used as an adaptation of the domestic procedure to allow insolvency and liquidation proceedings to take place smoothly.⁵³ This ensures a hierarchy and stabilised format that has checks in place. Initially the plan is made by the resolution professional, and the same is approved by the CoC. Therefore visible fair treatment is meted out to the foreign investors. This shall ensure collective treatment of creditors and avoid fragmentation of proceedings. This also considers that the corporate insolvency resolution process is a predictable and consistent procedure well established in India.

5.1.4 Rule 4: Reciprocity in Recognition of Foreign Proceedings

- (1) India shall recognise foreign insolvency proceedings only when reciprocal recognition of Indian proceedings is confirmed in the foreign jurisdiction.
- (2) The ministry shall publish a list of jurisdictions offering reciprocal treatment.
- (3) Recognition may be denied for non-reciprocal jurisdictions unless exceptional approval is granted by the Special Bench in terms of the agreement between the parties.

The reciprocity principle is a safeguard provided for symmetry in cross-border insolvency. The recognition of foreign proceedings in India holds practical value in the situation the proceedings receive equivalent recognition abroad; without this reciprocity, India would establish only a one-sided framework, and the benefits would not be borne to foreign creditors.⁵⁴ This causes Indian creditors to be at a disadvantage in the event they want to pursue claims overseas. Domestic stakeholders, especially in the public sector and financial institutions, are unlikely to support a regime that dilutes their recovery prospects in favour of a foreign creditor unless assured that Indian claims will be treated with equal respect internationally.⁵⁵ Therefore, this rule attempts to balance sovereign interests with international co-operation and acts as a strategic tool for international engagement.

5.1.5 Rule 5: Exhaustion of Domestic Remedies Before ISDS Invocation

- (1) Foreign investors may only initiate Investor–State Dispute Settlement (ISDS) after exhausting all available remedies before the Special NCLT Bench.

⁵³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/en/legal-framework> (last visited Aug. 31, 2025).

⁵⁴ Vijay Kumar Singh, *Internationalization of Cross Border Insolvency Regime – Pondering upon a G20 Model*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5393945 (last visited Aug. 31, 2025).

⁵⁵ Shannu Narayan & Aryaman Sinha, *Exit Strategy for Solvent Companies Under Indian Insolvency Law* (2024), <https://journals.sagepub.com/doi/abs/10.1177/14737795241250358> (last visited Aug. 31, 2025).

- (2) The NCLT must certify such exhaustion as a prerequisite for admissibility of any ISDS claim.

By allowing investors to bypass Indian courts in favour of international arbitration, it will undermine the sovereignty of Indian courts and the authority of NCLT.⁵⁶ The exhaustion of domestic remedies is not a rule; however, it is a suggestion that strikes a balance between investor claims and Indian courts.⁵⁷ It strengthens domestic institutions while maintaining India's credibility under international treaties, therefore also following treaty obligations. The intent is to renegotiate BIT agreements between nations that include domestic remedies to be pursued before ISDS is invoked.

5.1.6 Rule 6: ISDS Mechanism for Insolvency-Related Disputes

- (1) ISDS may be invoked under applicable treaties (e.g., BITs or FTAs), subject to certification from the NCLT.
- (2) Any ISDS award must not conflict with Indian public policy or disrupt the insolvency process.
- (3) Awards shall be integrated into CIRP as admitted claims to preserve insolvency collectivity and fairness.

Insolvency often intersects with foreign investment protections under bilateral investment treaties and free trade agreements. This provides a structured pathway for ISDS and ensures that investors are not left without recourse while simultaneously integrating ISDS outcomes into CIRP to maintain the principle of collective treatment.⁵⁸ It also ensures avoiding conflicting parallel proceedings⁵⁹ and ensures that investor protection does not override insolvency resolution.⁶⁰

5.1.7 Rule 7: Public Policy Override

- (1) The NCLT retains the discretion to reject recognition of foreign agreements, proceedings, or ISDS awards if they contravene India's public policy, public interest, or systemic integrity.

⁵⁶ Divesh Kaul, *A Fundamental Approach to Local Exhaustion of Remedies in International Law*, 24 WASH. U. GLOB. STUD. L. REV. 151 (2024).

⁵⁷ *Domestic Insolvency Proceedings Before Investment Treaty Arbitration*, ARB. INT'L (Oxford Academic), <https://academic.oup.com/arbitration/article/41/2/349/8058781> (last visited Aug. 31, 2025).

⁵⁸ *ISDS Regimes and Democratic Practice: Creating Conflict of Interests Between Governments, Investors and Local Populations*, <https://hrcak.srce.hr/clanak/319663> (last visited Aug. 30, 2025).

⁵⁹ Yaiphabhi Rajkumari, *Navigating Cross-Border Insolvencies: Unraveling Centre of Main Interest Role and Imperative International Cooperation*, 7 INT'L J.L. MGMT. & HUMAN. 1283 (2024).

⁶⁰ Vivek Saurav & Dr Bhanu Saxena, *Navigating Group Insolvency in India: Analyzing Implementation Challenges and Enterprise Dynamics for Modern Day Business Structure* (Jan. 17, 2024), <https://papers.ssrn.com/abstract=4698201>.

- (2) Grounds include threats to financial stability, fraud, imperatives of sovereignty, or other strategic concerns.

The insolvency system shall require a safeguard against recognition that threatens national interests; therefore, this rule provides the NCLT with a discretion to deny any recognition of foreign proceedings or ISDS awards as well as agreements that contravene India's public policy. This shall also include fraud, systemic financial stability, and strategic sectors such as defence and infrastructure.⁶¹ The override attempts to maintain sovereign control while ensuring India remains in line with global best practices where public policy exceptions are narrow but firm.⁶²

6 CONCLUSION

As the economy grows and more investment and capital enter India, the need for regulations in cross-border insolvency also grows. This paper has attempted to cover major lacunas in the law in contrast with case studies and the 2025 Insolvency and Bankruptcy Code amendment while highlighting the global position in the present scenario.⁶³ The study identifies the main concern of enforcement and formulations of rules under the code and suggests a set of rules that include registration of foreign investor agreements prior to investment, designated benches for cross-border insolvency⁶⁴, usage of the CIRP framework for cross-border cases, fair and equitable treatment of domestic and foreign creditors, recognition of foreign proceedings and reciprocity principle, exhaustion of domestic remedies before ISDS, ISDS mechanism⁶⁵ as a recourse and public policy override system. Each rule caters to gaps found by the authors in the paper and attempts to bridge the same via the formulation of set rules.

The 2025 amendment is a significant step forward for India's evolving approach but, as aforementioned, is a partial measure; India must strike a balance between openness to global capital and protection of domestic financial stability as well. A rules-based approach offers the flexibility to adapt to these changes and challenges while also embedding safeguards against asymmetry and policy risk.⁶⁶ If implemented with institutional capacity building and

⁶¹ J. Tseng, *Insolvency of a Party in International Arbitration: Considerations on Staying Arbitration Proceedings*, 16 J. INT'L DISP. SETTLEMENT idaf027 (2025).

⁶² Vijay Kumar Singh, *Internationalization of Cross Border Insolvency Regime – Pondering upon a G20 Model* (Jan. 26, 2025), <https://papers.ssrn.com/abstract=5393945>.

⁶³ Dr Mohammed Younus, *India's Insolvency Code (IBC 2016): Cross-Border Perspectives*.

⁶⁴ Aurelio Gurrea-Martínez, *The Implementation of the Model Law on Cross-Border Insolvency: International Divergences and Challenges Ahead* (May 23, 2024), <https://papers.ssrn.com/abstract=4839163>.

⁶⁵ *Id.*

⁶⁶ Joseph Cyriac & Elizabeth P Mathai, *Arbitration and Insolvency in India: Legal Conflicts and Practical Guidance* (May 7, 2025), <https://papers.ssrn.com/abstract=5247862>.

international cooperation such a framework can position India as a credible jurisdiction for cross-border insolvency. The broader challenge is to bridge the doctrinal rigidity of Gibbs with the aspirational universalism of the UNCITRAL framework.⁶⁷ A carefully calibrated hybrid model grounded in reciprocity, transparency, creditor equality and institutional capacity building will determine whether India can move beyond ad hoc judicial improvisation to become a credible global restructuring hub.

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⁶⁷ Dr. Hari Krishna Karri, Nithya Ramachandran & Dr. P. Siva Reddy, *Global Financial Resilience: Assessing Opportunities and Challenges in Cross-Border Insolvency Under the Paradigms of Universalism and Territorialism*, 11 IJIREM 60 (2024).