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CROSS-BORDER INSOLVENCY UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 A FRAMEWORK IN PRACTICE OR A VACUUM IN DISGUISE? LESSONS FROM JET AIRWAYS

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I. ABSTRACT

In an increasingly globalised economy, corporate entities operate across multiple jurisdictions, rendering traditional territorial approaches to insolvency inadequate. This paper critically examines the cross-border insolvency framework—or the lack thereof—under the Insolvency and Bankruptcy Code, 2016 ("Code" or "IBC"), with particular reference to Sections 234 and 235, which remain the sole statutory provisions addressing transnational insolvency coordination in India. Through a detailed analysis of Jet Airways (India) Ltd. v. State Bank of India, this paper demonstrates how Indian courts have attempted to bridge legislative gaps through judicial innovation, facilitating cross-border coordination in the absence of a comprehensive statutory mechanism. The case serves as both a proof of concept for informal cooperation and a cautionary illustration of the fragility inherent in ad hoc arrangements. The paper further situates India's position within the broader international framework by examining the UNCITRAL Model Law on Cross-Border Insolvency, highlighting the divergence between India's current approach and established global best practices. Drawing on comparative analysis, supporting jurisprudence, and the recommendations of the Insolvency Law Committee, it argues that India must transition from judicial improvisation to statutory certainty.

II. KEYWORDS

Cross-border insolvency, Insolvency and Bankruptcy Code, 2016, Jet Airways, UNCITRAL Model Law, Modified universalism, NCLAT, COMI, Judicial innovation, Sections 234–235.

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III. INTRODUCTION

"Insolvency law, unlike commerce, has never truly globalised; it merely reacts to globalisation—often too late, and often inadequately."

As Nani Palkhivala observed, "law must evolve with life; if it does not, it ceases to be relevant." This observation assumes particular significance in the context of cross-border insolvency—a domain where the pace of commercial globalisation has far outstripped the development of legal infrastructure. The increasing interconnectedness of global markets has rendered it commonplace for corporate entities to maintain operations, assets, and creditor relationships across multiple sovereign jurisdictions. Yet, the legal mechanisms designed to address the insolvency of such entities remain, in many jurisdictions, territorially bounded and procedurally fragmented.

When Jet Airways (India) Ltd. collapsed in 2019, its failure did not merely mark the end of India's oldest private airline—it exposed a structural inadequacy within Indian insolvency law. With assets distributed across India and the Netherlands, and creditors spanning multiple jurisdictions, insolvency proceedings were commenced in parallel before the National Company Law Tribunal ("NCLT") in Mumbai and the Noord-Holland District Court in the Netherlands. The resulting jurisdictional tensions illustrated, in stark terms, the inadequacy of India's existing statutory framework to manage transnational insolvency situations.

The Insolvency and Bankruptcy Code, 2016, though transformative in its overhaul of the domestic insolvency regime, offered no comprehensive mechanism to coordinate such parallel proceedings. Sections 234 and 235, the only provisions addressing cross-border insolvency, contemplate bilateral agreements with foreign governments and letters of request to foreign courts—mechanisms that remain unimplemented and untested to date. In *Jet Airways (India) Ltd. v. State Bank of India*, the National Company Law Appellate Tribunal ("NCLAT") was compelled to fashion a cross-border insolvency protocol through judicial innovation—a pragmatic but inherently fragile solution to a systemic problem.

The limitations of this framework are not merely procedural—they are structural. As M.C. Chagla emphasised, "certainty is the foundation of justice." In its absence, predictability—the cornerstone of commercial confidence—remains elusive. Investors, creditors, and foreign courts are left without reliable principles to guide their engagement with the Indian insolvency regime in cross-border contexts.

This paper critically examines whether India's approach to cross-border insolvency constitutes a functional framework or a legislative vacuum sustained by judicial intervention. It argues that while the Jet Airways protocol demonstrated the capacity of Indian courts to respond to transnational insolvency challenges, the absence of a statutory foundation renders such responses inherently inconsistent, unreplicable, and vulnerable to challenge.

A. Research Objectives

This paper aims to critically evaluate the adequacy of India's cross-border insolvency framework under the Insolvency and Bankruptcy Code, 2016. It seeks to analyse the practical and legal limitations of Sections 234 and 235, assess the role of judicial innovation in addressing transnational insolvency issues, and examine the effectiveness of the framework through the case study of Jet Airways (India) Ltd. The paper further aims to situate India's position within the broader international insolvency regime and to evaluate the need for adopting a comprehensive statutory mechanism based on the UNCITRAL Model Law.

B. Research Questions

This paper aims to critically evaluate the adequacy of India's cross-border insolvency framework under the Insolvency and Bankruptcy Code, 2016. It seeks to analyse the practical and legal limitations of Sections 234 and 235, assess the role of judicial innovation in addressing transnational insolvency issues, and examine the effectiveness of the framework through the case study of Jet Airways (India) Ltd. The paper further aims to situate India's position within the broader international insolvency regime and

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to evaluate the need for adopting a comprehensive statutory mechanism based on the UNCITRAL Model Law.

C. Research Methodology

This paper adopts a doctrinal and analytical research methodology. It relies on a detailed examination of statutory provisions, particularly the Insolvency and Bankruptcy Code, 2016, and relevant case law, including Jet Airways (India) Ltd. v. State Bank of India. The study further incorporates a comparative analysis of international frameworks, with specific reference to the UNCITRAL Model Law on Cross-Border Insolvency and its adoption in jurisdictions such as the United States and the United Kingdom. Secondary sources, including reports of the Insolvency Law Committee and academic commentary, are also utilised to support the analysis.

IV. CONCEPTUAL FRAMEWORK: CROSS-BORDER INSOLVENCY

Cross-border insolvency arises where a debtor's assets, operations, or creditors span multiple jurisdictions, giving rise to concurrent or competing claims under distinct legal systems. The legal and practical challenges this creates have been the subject of extensive scholarly attention and sustained efforts at international harmonisation.

Traditionally, two competing theoretical models have dominated the discourse. Territorialism confines insolvency proceedings to the jurisdiction in which the debtor's assets are physically located, treating each jurisdiction's proceedings as self-contained. While this approach offers the advantage of sovereignty-preserving simplicity, it produces fragmented and frequently inequitable outcomes—particularly where assets are unevenly distributed across borders.

Universalism, by contrast, advocates for a single, coordinated proceeding in the debtor's home jurisdiction, binding on all other jurisdictions. Though theoretically elegant, pure universalism demands a degree of mutual trust and legal harmonisation that has proven elusive in practice.

Modern international practice has gravitated towards a pragmatic middle ground: modified universalism. This approach acknowledges the primacy of a principal insolvency proceeding—typically in the jurisdiction of the debtor's centre of main interests ("COMI")—while permitting ancillary proceedings in other jurisdictions, subject to principles of cooperation and coordination. As observed by the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors*, the purpose of cross-border insolvency law is 'to ensure that the creditors of an insolvent company are treated equally, wherever they may be situated.' However, this proposition must be read with caution, as the UK Supreme Court in *Rubin v Eurofinance SA* subsequently held that *Cambridge Gas* was wrongly decided. Notwithstanding this, the underlying principle of modified universalism continues to find support in subsequent jurisprudence, including *Re HIH Casualty and General Insurance Ltd*, and has been given statutory recognition through the Cross-Border Insolvency Regulations 2006.

V. COMPARATIVE OVERVIEW OF INSOLVENCY APPROACHES

Approach	**Principle**	**Limitation**
Territorialism	Proceedings confined to jurisdiction where assets are located; each jurisdiction acts independently.	Fragmented outcomes; inequitable distribution; no coordination across borders.
Universalism	Single coordinated proceeding in debtor's home jurisdiction, binding on all others.	Requires mutual trust and harmonisation rarely achievable in practice.
Modified Universalism	Principal proceeding at COMI with ancillary proceedings permitted; emphasis on cooperation.	Depends on legislative adoption (e.g., UNCITRAL Model Law) for effectiveness.

The UNCITRAL Model Law on Cross-Border Insolvency represents the most widely adopted legislative expression of modified universalism. Promulgated in 1997, it provides a standardised framework for recognition of foreign insolvency proceedings, access by foreign representatives to domestic courts, cooperation between courts, and coordination of concurrent proceedings. Adopted by over 62 States across 65 jurisdictions—including the United States and the United Kingdom—the Model Law has emerged as the international benchmark against which domestic frameworks are assessed.

India, despite the comprehensiveness of the IBC in the domestic context, has not adopted the UNCITRAL Model Law. This omission places India outside the mainstream of international insolvency cooperation and creates significant uncertainty for foreign creditors, investors, and insolvency practitioners engaging with Indian proceedings.

VI. LEGAL FRAMEWORK UNDER THE IBC, 2016

The IBC, enacted in 2016, consolidated India's fragmented insolvency regime into a unified, time-bound framework. However, its provisions for cross-border insolvency are confined to Sections 234 and 235, which represent the entirety of the statutory engagement with transnational insolvency coordination.

Section 234 empowers the Central Government to enter into bilateral agreements with foreign governments for the purpose of enforcing the provisions of the Code. Section 235 permits the Adjudicating Authority, in cases where the Code applies to assets or proceedings in a country with which India has entered into such an agreement, to issue a letter of request to the court of that country for cooperation.

A. These provisions suffer from several critical deficiencies:

1. They are contingent upon bilateral agreements—none of which have been concluded to date;

2. They provide no framework for the recognition of foreign insolvency proceedings or foreign representative access to Indian courts;
3. They contemplate no mechanism for cooperation between Indian and foreign courts or insolvency professionals;
4. They offer no guidance on the treatment of concurrent proceedings, jurisdictional conflicts, or the determination of COMI.

The Insolvency Law Committee, in its October 2018 report, acknowledged these deficiencies and recommended the adoption of the UNCITRAL Model Law, adapted to Indian conditions, as a comprehensive replacement for the existing bilateral framework. The Committee specifically noted that the bilateral approach was "inherently slow, cumbersome, and inadequate to address the growing volume and complexity of cross-border insolvency cases." To date, however, the recommendations remain unimplemented. It is, however, pertinent to note that subsequent to the Insolvency Law Committee's 2018 Report, the Ministry of Corporate Affairs has undertaken further deliberations on cross-border insolvency reform and has circulated draft provisions incorporating elements of the UNCITRAL Model Law framework. Notwithstanding these developments, no statutory amendments have yet been enacted, and the absence of a binding legislative framework continues to define India's position.

VII. CASE STUDY: JET AIRWAYS (INDIA) LTD.

The insolvency of Jet Airways provides the most significant—and, to date, the only substantial—instance in which Indian courts have been required to engage with cross-border insolvency coordination in a contested, multi-jurisdictional context.

Jet Airways ceased operations in April 2019, following which the NCLT, Mumbai, admitted the corporate insolvency resolution process ("CIRP") under Section 7 of the IBC on the application of the State Bank of India. Concurrently, insolvency proceedings were initiated before the Noord-Holland District Court in the Netherlands, where Jet Airways maintained operational assets and faced claims from European creditors.

The initial response of the Indian insolvency apparatus was jurisdictionally protective. The NCLT adopted a territorial stance, asserting exclusive jurisdiction and directing that no parallel proceedings be permitted to interfere with the domestic process. However, the practical impossibility of ignoring the Dutch proceedings—given the location of significant assets within the Netherlands—compelled a reconsideration.

On appeal, the NCLAT in *Jet Airways (India) Ltd. v. State Bank of India* approved a cross-border insolvency protocol—an informal but structured agreement between the Indian and Dutch insolvency professionals establishing mechanisms for information-sharing, asset preservation, and procedural coordination. The protocol recognised the primacy of the Indian CIRP as the principal proceeding while enabling the Dutch administrator to participate in and cooperate with the Indian process.

A. However, the protocol also exposed the inherent fragility of judicial improvisation:

1. The protocol lacked statutory authority, rendering its enforceability uncertain and subject to challenge;
2. Its terms were negotiated ad hoc without the guidance of established legal principles or procedural norms;
3. The precedential value remains unclear, fashioned for specific circumstances rather than general application;
4. Foreign courts and creditors had no assurance that similar cooperation would be forthcoming in future cases.

"What worked here may not replicate elsewhere, and the absence of a statutory foundation means each future case will require the reinvention of cooperative mechanisms from first principles."

VIII. SUPPORTING JURISPRUDENCE

While the Jet Airways decision remains the primary authority on cross-border insolvency coordination under the IBC, broader principles supportive of a purposive and

cooperation-oriented interpretation of the Code can be discerned from related jurisprudence.

In *Innoventive Industries Ltd v ICICI Bank*, the Supreme Court of India emphasised the centrality of timely resolution to the objectives of the IBC, holding that the Code was designed to serve the interests of the corporate debtor as a going concern, the maximisation of value for creditors, and the promotion of entrepreneurship. This purposive interpretation supports the argument that cross-border cooperation—where it serves value maximisation—is not merely permissible but mandated by the spirit of the legislation.

Similarly, in *Macquarie Bank Ltd v Shilpi Cable Technologies Ltd*, the Supreme Court adopted a purposive interpretation of the Code's procedural provisions in the context of operational creditors under Section 9, holding that the requirement under Section 9(3)(c) is directory rather than mandatory, and that a demand notice under Section 8 may be issued through an authorised representative.

These decisions establish a jurisprudential foundation conducive to the recognition of foreign proceedings, the facilitation of cross-border cooperation, and the adoption of flexible, outcome-oriented approaches to insolvency administration. They suggest that Indian courts, when confronted with cross-border complexities, are likely to favour cooperative engagement over jurisdictional insularity.

IX. COMPARATIVE PERSPECTIVE

The limitations of India's framework become particularly apparent when examined against jurisdictions that have adopted the UNCITRAL Model Law.

The United States, through Chapter 15 of the Bankruptcy Code, provides a comprehensive mechanism for the recognition of foreign main and non-main proceedings, automatic relief upon recognition, and structured cooperation between U.S. and foreign courts. The framework has been extensively tested in complex multi-

jurisdictional insolvencies and has proven effective in facilitating coordination while preserving domestic creditor protections.

The United Kingdom, through the Cross-Border Insolvency Regulations 2006, similarly adopted the Model Law framework. The UK experience demonstrates that the Model Law can be effectively integrated into a common law legal system—a consideration of direct relevance to India, which shares the common law tradition.

X. CRITICAL ANALYSIS

India's cross-border insolvency framework—such as it is—reflects a fundamental tension between legislative intent and practical necessity. The IBC was conceived as a comprehensive insolvency code, yet its treatment of cross-border insolvency is confined to two provisions of such generality as to be, in practice, inoperative.

This approach, while demonstrating laudable judicial creativity, suffers from inherent and irremediable deficiencies. First, judicial innovation is, by its nature, reactive rather than prospective—it responds to problems as they arise rather than anticipating and preventing them. Second, ad hoc protocols lack the normative authority of statutory provisions, rendering their enforceability uncertain and their precedential value questionable. Third, the absence of a legislative framework creates asymmetry in India's relationships with foreign jurisdictions—India benefits from the structured cooperation frameworks of Model Law jurisdictions without offering reciprocal assurances.

From a commercial perspective, the consequences are significant. Creditor confidence in cross-border transactions involving Indian entities is undermined by the unpredictability of the insolvency regime. Foreign investment decisions are complicated by the absence of reliable principles governing the treatment of cross-border insolvency. And the efficiency gains achieved by the IBC in the domestic context are partially eroded by the inefficiencies and uncertainties that characterise its cross-border dimension.

XI. RECOMMENDATIONS

On the basis of the analysis presented in this paper, the following recommendations are advanced:

- **Adoption of the UNCITRAL Model Law.** India should enact legislation adopting the UNCITRAL Model Law on Cross-Border Insolvency, adapted where necessary to Indian conditions, as the primary statutory framework for cross-border insolvency. This would provide structured mechanisms for the recognition of foreign proceedings, access by foreign representatives, judicial cooperation, and coordination of concurrent proceedings.
- **Establishment of COMI principles.** Legislation should incorporate clear principles for the determination of a debtor's centre of main interests, providing certainty as to the jurisdiction of the principal insolvency proceeding and reducing the scope for jurisdictional disputes.
- **Creation of institutional mechanisms.** The NCLT and NCLAT should be equipped with specialised mechanisms—including designated cross-border insolvency benches and protocols for judicial communication with foreign courts—to facilitate efficient and consistent management of cross-border cases.
- **Codification of the cross-border protocol framework.** The principles established in the Jet Airways protocol should be codified and generalised, providing a statutory basis for future cooperation agreements while preserving sufficient flexibility to accommodate individual cases.
- **Capacity building.** Investment in training for insolvency professionals, judges, and legal practitioners in cross-border insolvency principles and practices, ensuring the institutional capacity exists to implement a reformed framework effectively.

XII. CONCLUSION

The evolution of insolvency law in India reflects substantial progress, yet the treatment of cross-border insolvency remains a conspicuous lacuna. The IBC transformed the

domestic insolvency landscape; its failure to engage meaningfully with the transnational dimension represents an incomplete revolution.

The experience of *Jet Airways (India) Ltd. v. State Bank of India* demonstrates that Indian courts possess both the institutional capacity and the willingness to facilitate cross-border cooperation. But it equally demonstrates the fragility and limitations of judicial improvisation as a substitute for legislative design. A framework dependent on judicial creativity risks inconsistency, unpredictability, and the progressive erosion of international confidence in the Indian insolvency regime.

The path forward requires legislative action. The adoption of the UNCITRAL Model Law, suitably adapted, would provide India with a comprehensive, internationally recognised framework for cross-border insolvency—one that ensures the predictability essential to commercial confidence, the cooperation necessary for efficient resolution, and the consistency demanded by the rule of law. Until such legislative coherence is achieved, India's cross-border insolvency regime will continue to operate in the space between innovation and inadequacy—a space that, in an era of accelerating globalisation, is becoming increasingly untenable.

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