

CALL FOR CONSISTENCY: THE FUTURE OF CROSS-BORDER INSOLVENCY

CASE FOR INDIA

Sumant Batra

Past President, INSOL International
Chairman, Kesar Dass B. & Associates



There is no framework to deal with cross border insolvency.

In civil law, recognition of decisions of a superior foreign court is possible but is a long drawn process and has impractical pre-conditions (such as, should not be an interim or ex-parte judgement, should be by a competent court, should not be against international policy or Indian law).

Various insolvency law reform committees (Eradi Committee, J J Irani Committee, BLR Committee) have recommended adoption of cross –border insolvency framework.

Insolvency and Bankruptcy Code 2016 contains the following two provisions:

S234. The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of IBC in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India subject to such conditions as may be specified.

S235. If the resolution professional, liquidator or bankruptcy trustee is of opinion that assets of the corporate debtor or debtor, personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

The Adjudicating Authority, on being satisfied that evidence or action relating to such assets is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

These are inadequate and insufficient and offer following challenges:

What about assets/creditors in countries with which there is no reciprocal agreement?

What if assets are in jurisdictions where a reciprocal arrangement exist with one country and absent in another.

How will bi-lateral arrangements work in cases involving assets, proceedings and creditors in multiple jurisdictions where conflicting provisions exist in different bi-lateral agreements.



How to resolve insolvency with assets, proceedings and creditors in multiple jurisdictions in 180 days, extendable by 90 days in the absence of a cross border framework or reciprocal treaty?

Obtaining letter of authority S235 could cause delay, and may not have sanctity, unless routed through diplomatic channels.

Inconsistent with international best practices.

Fails to meet the objectives outlined in the UNCITRAL Model Law of Cross Border Insolvency.

Absence creates un-level playing field.



Absence of fair, transparent, certain and predictable process.

Standard jurisprudence may not apply as the decisions will have to be agreement specific and not based on global standards.

India's FDI flow and Doing Business ranking likely to be adversely impacted.

Without a cross border insolvency framework, IBC will remain akin to a half baked cake. Requires prompt action.



Thank you

Sumant Batra

Sumant.batra@kesardass.org

