

Summary of Strategic Report (2022-23)

on

Cross-border Insolvency: Present Framework, Model Law & Emerging Issues from Banking Perspective

By:

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- The rapidly growing and globalising corporate world has given birth to Multinational Entities (MNEs) that surpass national boundaries, creating a nearly borderless relation among several businesses.
- Almost every country has commercial relations that extend beyond one or more jurisdictions and thus, economic entities consequently have debtors and creditors located at various such locations.
- Globalisation is multidimensional and includes international trade investments, bilateral tie-ups, technology transfer and human and cultural exchange and thus, the world is becoming borderless. As time passes and technology develops with each passing second, globalisation evolves in its meaning.
- India is now among the core economies of the world with global business and diplomatic relations, both of which have seen an enormous jump over the last two decades.
- The Indian banking and financial market has also witnessed borrowing-lending relationships, counterparty exposures, derivative contracts, collateral obligations, etc. across countries.
- The importance of Cross-border Insolvency now takes center stage. Cross-border insolvency deals with circumstances where the insolvent debtor has assets and creditors in multiple countries or when insolvency proceedings have been initiated against the insolvent debtor in multiple countries.
- In India, to review and assess the functioning and implementation of the Insolvency and Bankruptcy Code, 2016 (IBC), the Insolvency Law Committee (ILC) was constituted by the Ministry of Corporate Affairs. The ILC, in its report, proposed to re-evaluate the current insolvency framework and to bring it at par with the Global Standards and adopt the United Nations Commission on International Trade Law (UNCITRAL Model Law, which is hereon referred to as the “Model Law”) on Cross-Border Insolvency to resolve the concerns relating to cross-border insolvency in India.
- The existing Model Law on Cross-Border Insolvency (MLCBI), 1997, has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. The Model Law provides a legislative framework that can be adopted by countries with modifications to suit the domestic context of the enacting jurisdiction. It has been adopted by 49 States to date. This includes developed as well as developing countries such as Singapore, UK, US, South Africa, Republic of Korea, etc.
- The Government is working on assimilating the Model Law in the IBC. Enacting legislative provisions on cross-border insolvency is essential to address the emerging issues on cross-border insolvency.
- The Indian banking system has been dealing with a large number of such corporate debtors/promoters having assets/liabilities abroad and hence, the understanding and applicability

of cross-border insolvency has become unavoidable for Indian Banks/FIs to enforce insolvency for corporate debtors/guarantors with foreign assets. The Indian banking system needs to analyse the requirement of capacity building to deal with cross-border insolvency appropriately.

- The strategic report aims to bring out the emerging issues for Indian banking system in cross-border insolvency for both the scenarios - Indian company with foreign assets & liabilities and foreign company with Indian assets & liabilities.
- The cross-border insolvency requirement arises when an Indian company has foreign liabilities, assets or operations or when a foreign company has Indian liabilities, assets or operations. The term “foreign assets” generally indicates the presence of assets and operations in a foreign jurisdiction, for example – cash holdings in a bank account in a foreign country, a production facility or an office in a foreign country and so on, including intangible forms, not always to be in the form of physical presence or human interventions. Such intangible assets will include investments in foreign securities, licenses, supply agreements etc. The notion of foreign operations, too, may or may not be linked to physical presence. For instance, operations with physical presence may include branches or offices in foreign jurisdictions. However, even without their physical presence, companies may have customers or may have dues to be recovered or paid in foreign jurisdictions. A foreign liability may exist as long as the creditor is a foreign person or entity depending upon whether it is in foreign/local currency or contracted in the debtor’s home jurisdiction or a foreign jurisdiction. A foreign liability can be financial as well as operational liability.
- The Indian banking system has been taking direct/indirect exposure by funding for foreign assets or wherein guarantors/corporate debtors have foreign assets or liabilities. Accordingly, with increase in Non-Performing Assets in the Indian banking system, it becomes more crucial to equip Indian Banks with the right protocols and prepare for enforcement under Cross-border Insolvency considering the increasing pace of globalisation in banking and lending.
- Likewise, the systematic development and learning under Insolvency and Bankruptcy Code (IBC) within the Indian banking system is prudent to gather a common understating of procedures, laws, rights and challenges pertaining to Cross-border Insolvency.
- The understanding and applicability of Cross-border Insolvency has become unavoidable for Indian Banks/FIs to enforce insolvency for corporate debtors/guarantors with foreign assets. The Indian banking system needs to analyse the requirement of capacity building in Indian banking system to deal with Cross-border Insolvency.
- Indian Banks will require to keep records of companies’ debts and defaults involving overseas insolvency and to consider challenges involved in enforcement of foreign assets along with the impact of foreign representative filings proceedings in the case of cross-border transactions and trade. It would be desirable to develop Standard of Procedures (SoPs) on how cross-border matters are to be handled under sole/multiple/consortium banking arrangements, the right policy to engage legal counsel, to bring understanding of its contents and cost involved in cross-border insolvency proceedings and to train staff in dealing with the wide range of issues & challenges.

