

Global Financial Resilience: Assessing Opportunities and Challenges in Cross-Border Insolvency under the Paradigms of Universalism and Territorialism

Dr. Hari Krishna Karri¹, Nithya Ramachandran², and *Dr. P. Siva Reddy³

¹ College of Economics and Business Administration, University of Technology and Applied Sciences, Muscat, Oman

² College of Economics and Business Administration, University of Technology and Applied Sciences, Ibra, Oman

³ SoBE, Regent College, London

*Correspondence should be addressed to Dr. P. Siva Reddy siva.podapala@gmail.com

Received: 4 May 2024

Revised: 22 May 2024

Accepted: 6 June 2024

Copyright © 2024 Made Dr P. Siva Reddy et al. This is an open-access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

ABSTRACT- As global financial interconnectedness continues to evolve, the complexities of cross-border insolvency pose significant challenges for international finance. This research delves into the paradigms of universalism and territorialism, examining their roles in addressing financial distress across borders. While universalism prioritizes efficiency and fairness, it faces challenges in coordinating across jurisdictions. Territorialism, on the other hand, respects national sovereignty but risks fragmentation and unfair treatment of creditors. The study argues for a pragmatic approach that combines the strengths of both, emphasizing harmonization, cooperation, and streamlined processes for effective cross-border insolvency resolution. This research contributes to building global financial resilience by advocating for a balance between national interests and international collaboration.

KEYWORDS- Cross-border Insolvency, Universalism, Territorialism, Financial Resilience

I. INTRODUCTION

The complexities of cross-border insolvency are becoming a major issue for scholars, regulators, and legal practitioners in the quickly changing world of global finance. The relationship between territorialism and universalism in dealing with financial hardship crosses national borders, therefore a thorough comprehension of the current dynamics is necessary. The effectiveness of bankruptcy frameworks in aiding the settlement of financial crises becomes critical as economies get more interconnected. In order to better understand the complex aspects of global financial resilience in the context of cross-border insolvency, this study will look at the fundamental territorialism and universalism ideas that underpin international financial architecture.

II. OBJECTIVES OF THE STUDY

- Describe the fundamental concepts of territorialism, universalism, and cross-border insolvency and explain how they have developed historically and theoretically.

- Assess critically how these ideas are now applied in global insolvency systems.
- Evaluate the prospects and difficulties brought about by the dynamic interplay of territorialism, universalism, and cross-border insolvency.

III. LITERATURE REVIEW

A. Overview of Cross-Border Insolvency

The “Insolvency and Bankruptcy Code” (IBC) was introduced in India in the year 2016, to overcome the increase in number of non-performing loans and issues based on insolvency. The primary motto of IBC was to provide a framework for resolving insolvency disputes of corporations, partnership businesses and individuals. When an insolvent firm has credit or debtors in more than one geographical jurisdiction, that case is termed as “cross-border insolvency” [4]. To understand the usage of IBC the Ministry of Corporate Affairs (MCA) established the “Insolvency Law Committee” (ILC) on 16th November, 2017. The committee projected various amendments of IBC 2016.

B. Four pillars of IBC ecosystem in India

The four pillars of the Insolvency and Bankruptcy Code (IBC) ecosystem in India are (see the below figure 1):

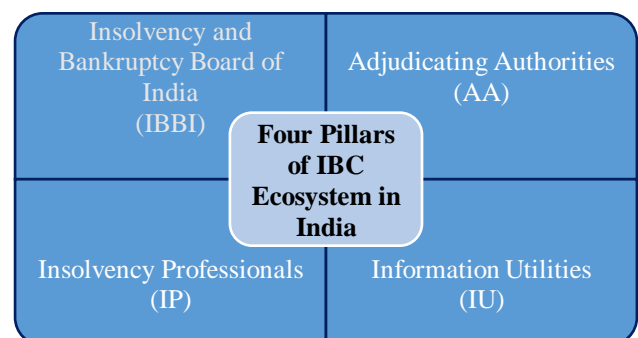


Figure 1: Four pillars of IBC ecosystem in India

The cross-border insolvency recommendations were given based on the detailed research on The United Nations Commission on International Trade Law (UNCITRAL).

The legal body of UNCITRAL has a rigorous role in the establishment and maintenance of cross-border legal framework. It is done by preparing and adopting legislative and non-legislative instruments in the areas of commercial law. The regulation of UNCITRAL Model Law on cross-border insolvency has been designed to assist cross-border disputes. The basic elements of the law are access, recognition, assistance and cooperation (see the below figure 2):

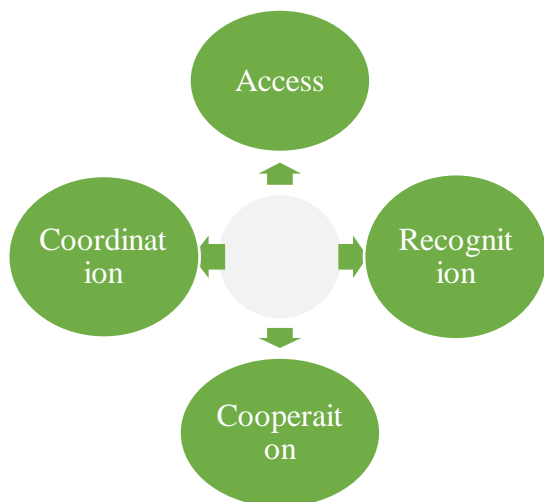


Figure 2: Basic Elements

Cross border insolvency highlights two concepts, universalism and territorialism in its theoretical approach. Universalism applies to all assets of the debtors irrespective of the location of assets. Territorialism is based on cross-border insolvency law if the country where the business is grounded [2]. The social and political obstacles of cross border insolvency in the principles of private international law was on argument agenda in early 2000s. The theory of Universalism and Territorialism gained importance which reflected in doctrine of unity.

C. Universalism

Theory of universalism offers the “Home Court” to exercise laws over the proceedings. Other countries are supposed to follow the judgment issued by the home court irrespective of difference in opinion. The case is conducted in one country and assessments are done in a possible time frame. There are high chances of friction in the diplomatic ties but this theory ensures equitable distribution of resources to creditors located at different geographical locations. In the modern universalism concept, not only home court but other countries also could carry out bankruptcy proceedings and first level distribution would be done to local creditors and the balance is distributed without affecting the interest of the stakeholders [6]. Envision a global bankruptcy system governed by a single set of regulations. This represents the aspiration of "pure universalism." Based on the primary activities of the company, a single court would manage all aspects of the caseload, including asset collection, corporate reorganization, and equitable debt distribution to all creditors. For international businesses, it's like having one traffic signal that serves the entire globe.

D. Territorialism

"Territorialism" asserts that each nation manages its own portion of the pie when a multinational corporation declares bankruptcy. Each state's courts administer assets in accordance with local legislation, with little regard for the firm as a whole. Local creditors profit from this, but other parties may find it messy [1]. Businesses attempt to get around this by setting up distinct corporations in each nation, but it's like a free-for-all where every nation takes all it can. This method, known as the "Grab Rule," puts national sovereignty and interests ahead of international collaboration when it comes to settling cross-border bankruptcies[5].

IV. EQUILIBRATING OPPORTUNITIES AND CHALLENGES: ANALYSING UNIVERSALISM IN CROSS-BORDER INSOLVENCY

A. Opportunities of Universalism in Cross-Border Insolvency (see the below figure 3):



Figure 3: Opportunities of Universalism

- **Efficiency**
Universalism streamlines insolvency cases by avoiding multiple proceedings across countries. This saves time and money for everyone involved, single process with clear rules. Standardized procedures also make things more predictable and efficient, reducing confusion and delays. See the above figure 3.
- **Maximizing Asset Value**
For bankruptcy situations, a single central administrator can increase value and resolve conflicts amicably. They have a comprehensive view, effectively manage resources, and strategically sell them for higher returns.
- **Fair Treatment of Creditors**
Universalism is the idea that treating all debtors equally, regardless of their location, is just and transparent. Everyone is more inclined to play ball because they have greater faith in the process. Clear guidelines and a single

point of contact also reduces number of disputes and court appearances, which saves money and hassles for all.

• **Encouraging Cross-Border Investment**

Investing in foreign businesses becomes less risky when clear regulations, such as universalism, are in place to handle firm failures across boundaries. This draws in further investment and maintains the smooth operation of the world economy [3]. Consider it as an international traffic light system that is predictable and efficient, as everyone knows what to expect, resulting in speedier and more efficient transactions.

• **Harmonization of Laws**

Due to varying legal systems, issues involving insolvency across borders can get complicated. Universalism provides an answer by establishing uniform guidelines and practices

that facilitate collaboration and communication. As a result, disagreements are resolved more quickly and at a lesser expense. In the end, a more reliable and effective system is advantageous to all parties.

• **Preservation of Going Concerns**

For struggling organizations, a uniform set of laws for cross-border corporate restructuring facilitates smoother navigation and may even save jobs and businesses. This "universal" strategy seeks to maximize value through restructuring rather than liquidation, which will benefit all parties such as creditors, employees, and others.

B. Challenges of Achieving True Universalism in Cross-Border Insolvency (see the below figure 4):



Figure 4: Challenges of Achieving True Universalism

• **Balancing Competing Interests:**

It might be challenging to give local creditors' claims with social and economic ties to the debtor priority over those of foreign investors who took calculated risks.

• **Secured vs. Unsecured Creditors:**

A universal strategy that pools and distributes funds proportionately may be opposed by secured creditors with unique asset claims, thereby jeopardizing their secured position.

• **Coordination Complexity:**

It takes a lot of work and resources to manage several legal systems, jurisdictions, and stakeholders with different languages, customs, and interests.

• **Timeliness:**

Overcoming communication obstacles and navigating a variety of legal requirements might cause delays in the insolvency process, which will eventually be detrimental to all parties.

• **National Identity & Legal Autonomy:**

Diverse legal systems that is influenced by particular customs, values, and cultural norms may be reluctant to cede authority to a centralized organization for fear of losing their sense of national identity and accountability.

V. TERRITORIALISM IN CROSS-BORDER INSOLVENCY: OPPORTUNITIES AND CHALLENGES

A. Opportunities of Territorialism in Cross-Border Insolvency (see the below figure 5):



Figure 5: Opportunities of Territorialism

• **Respect for National Sovereignty**

Proponents of territorialism in bankruptcy proceedings contend that it maintains legal autonomy by allowing each country to use its own set of rules and guidelines that are specific to its own circumstances. By refusing to impose foreign rules, it avoids possible disputes and respects legal distinctions. It also gives governments the authority to put their own interests first, particularly in times of economic distress, by safeguarding domestic jobs and economic activity.

• **Protection of Local Creditors**

Beyond maintaining national authority and averting confrontation, territorialism in bankruptcy provides local stakeholders with a number of benefits. Local claims are given priority, which could increase domestic creditors' chances of recovery when compared to a worldwide pool.

• **Preservation of Legal Diversity**

Territorialism in insolvency embraces diversity and adaptability in addition to the short-term gains for local stakeholders. It prevents a standardized approach and promotes an environment that is open to experimentation and creativity by enabling each jurisdiction to preserve its own legal traditions.

• **Promotion of Competition among Jurisdictions**

Territorialism can promote growth and competition on a global scale. Encouraging international trade and investment requires providing effective, dependable, and creditor friendly insolvency regimes.

• **Adaptability to Local Conditions**

Another important benefit of territorialism is its flexibility in responding to local conditions. It makes it possible to customize bankruptcy procedures to particular economic, social, and cultural aspects, which may result in solutions that are more successful than those that follow a universal strategy.

• **Clarity and Predictability**

Territorialism provides stakeholders within a single jurisdiction with practical benefits that go beyond cultural considerations and customized solutions. Processes are streamlined and ambiguity and potential disruptions are decreased when established legal concepts and processes are clarified.

B. Challenges of Territorialism in Cross-Border Insolvency (see the below figure 6):



Figure 6: Challenges of Territorialism

• **Fragmentation and Inefficiency**

The concurrent proceedings in various countries might lead to inefficiencies and chaos in cross-border insolvency cases. This can eventually hurt creditors and debtors by producing inconsistent results, redundant costs, and resource waste. For just and efficient decisions, international cooperation, standardized frameworks, and streamlined processes are essential.

• **Preference for Local Creditors**

Due to their knowledge and connections, local creditors may be given preference during bankruptcy procedures. This can disadvantage their overseas competitors, posing moral questions, impeding justice, and possibly discouraging cross-border investment. The prestige of the bankruptcy system as a whole, global integration, and economic progress are all at danger due to these unequal playing fields.

• **Lack of Coordination**

Efficient asset realization is hampered by a lack of access to full data on the debtor's worldwide financial picture across jurisdictions. Courts that don't work together can make conflicting decisions about asset sales, reorganization plans, and creditor claims, which can prolong court cases and cause delays in their resolution.

• **Uncertainty and Complexity**

The complicated legal environment makes handling cross-border insolvency an intimidating undertaking. The problem is exacerbated by these systems' lack of harmonization, which greatly increases uncertainty and makes outcome prediction challenging.

• **Risk of Forum Shopping**

The issue of forum shopping poses a serious danger to cross-border insolvency, since debtors and creditors deliberately select jurisdictions with advantageous legal or procedural frameworks. Coordinated restructuring or liquidation is difficult to accomplish when jurisdictions are chosen "cherry-picking" for asset sales or creditor claims.

• **Lack of Universal Recognition**

There are major legal obstacles and delays since there is no uniform recognition and enforcement across jurisdictions. This makes it more difficult to retrieve assets, deters foreign creditors from participating, and ultimately less successful in settling complicated disputes with assets dispersed over several legal systems.

VI. EXAMINING CROSS-BORDER INSOLVENCY CASES IN INDIA

A. Kingfisher Airlines

The 2012 bankruptcy of Kingfisher Airlines, which was once the second-biggest airline in India, revealed the intricate nature of cross-border insolvency. Its debts went beyond India; they included overseas suppliers, international creditors, and Aeroplanes that were leased in the United Kingdom. A complex web was produced by conflicting legal systems, varying creditor priorities, dispersed assets, and communication barriers between jurisdictions, which delayed settlement and reduced recoveries. The case serves as a warning, emphasizing the need for improved communication, harmonized insolvency

rules, and improved international cooperation to handle the difficulties associated with global financial crises.

B. Essar Steel

In India, the Essar Steel bankruptcy case is a complicated illustration of the difficulties associated with cross-border insolvency. The process encountered challenges in managing conflicting claims, coordinating international interests, and navigating parallel foreign actions amid a changing legal framework due to the dispersed assets and creditors across several jurisdictions. Despite these obstacles, the lawsuit finally resulted in the acquisition of ArcelorMittal when the Supreme Court upheld the Committee of Creditors' ruling. This case established precedents for future cross-border cases and brought attention to the need for better international collaboration and more transparent legal frameworks.

C. Videocon Group

The collapse of the multinational business Videocon brought to light the difficulties associated with cross-border insolvency. Legal fights and delays were caused by its complex assets, competing creditor claims in different jurisdictions, and different insolvency regimes. The case made evident the necessity for more precise regulations on foreign assets and a thorough legal framework for group insolvency, even while the "single economic entity" approach opened the door for the consolidation of some firms. This encouraged India to create a stronger system that complies with international norms and promotes international collaboration for the easier settlement of such complex disputes in the future.

D. Jet Airways

The 2019 bankruptcy of Jet Airways, which involved creditors and assets from several nations, established a precedent for cross-border bankruptcy in India. There were several obstacles to overcome, including navigating competing authorities, coordinating numerous parties, and harmonizing procedures. Nonetheless, the collaboration between India and the Netherlands was made possible by a cross-border protocol and a first-of-its-kind "Joint Corporate Insolvency Resolution Process". Despite ongoing difficulties, the case established guidelines for similar cases in the future and brought attention to the need for stronger international cooperation and structures.

VII. CONCLUSION

Despite sovereignty issues, difficult implementation, and balancing local interests, universalism's promise of speed, fairness, and value maximization is obscured. Territorialism, on the other hand, encourages national freedom, defends local creditors, and adjusts to economic circumstances. However, it suffers from fragmentation, local bias, and potential forum shopping, which makes it more difficult to find fair and effective solutions in cross-border circumstances. While there is appeal to both strategies, it is still important to balance their advantages and disadvantages.

Cross-border insolvency is likely to be resolved by a practical strategy that minimizes the drawbacks of both paradigms while maximizing their advantages. It will be essential to strike a balance between respect for national sovereignty, international cooperation, and efficient

coordination. Positive strides towards harmonization and streamlined processes can be seen in initiatives such as the UNCITRAL Model Law and regional legislation. It is critical to keep up efforts to promote global cooperation, improve information exchange, and cross technological and cultural barriers.

CONFLICTS OF INTEREST

The authors declare that they have no conflicts of interest between them and with any third party.

REFERENCES

- 1) T. Guzman, "International Bankruptcy: In Defense of Universalism," *Mich. L. Rev.*, 2000.
- 2) R. Halimi, "An Analysis of the Three Major Cross-Border Insolvency Regimes," *International Program Papers*, 2017.
- 3) M. Kurpad, "Formulating an Effective Cross-Border Insolvency Framework under the Indian Insolvency and Bankruptcy Code," *SSRN*, 2020.
- 4) M. Lad-Gudhate, "Cross-Border Insolvency," *Chartered Secretary*, 2023.
- 5) L. M. LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy," *Michigan Law Review*, 2000.
- 6) Rout, "Universalism v. Territorialism: A Plethora of Issues in Cross Border Insolvency across Jurisdictions and Local Laws," *Indian Journal of Law and Legal Research*, 2021.