Himachal Pradesh National Law University, Shimla (India)

JOURNAL OF LAW, BUSINESS AND ECONOMICS (JLBE)

JOURNAL ARTICLES *ISSN: 2584-0436* JLBE

Volume I (2022)

CROSS BORDER INSOLVENCY REGIME IN INDIA: DRAFT PART-Z VIS-À-VIS THE UNCITRAL MODEL LAW

Divyanshu Kumar

CONTENTS

CROSS-BORDER INSOLVENCY REGIME IN INDIA: DRAFT PART-Z VIS-À-VIS THE UNCITRAL MODEL LAW

Divyanshu Kumar*

[*Abstract:* *When an entity owns assets or have liabilities in a foreign territory and undergoes insolvency, then the laws of the country may apply to such entity (to some extent) undergoing insolvency, where the said assets or liabilities exist alongside the applicability of domestic laws. This constitutes the gist of cross-border insolvency. The United Nations Commission on International Trade Law (UNCITRAL) has made remarkable efforts to promote uniformity of state legislations dealing with cross-border insolvencies by formulating a Model Law. India has also, after years of efforts, come up with its proposed version of the legislation concerning cross-border insolvency. The final output of various government appointed committees is the draft of the proposed national legislation concerning cross-border insolvency. The draft (referred as Draft Part-Z) was prepared by keeping in account, the provisions of the Model Law. Now, the government seems ready to introduce the bill to the parliament. This paper seeks to revisit the journey to Draft Part-Z and analyse its key provisions vis-à-vis the UNCITRAL Model Law alongside identifying the practical challenges that remain ahead for India to tackle to effectuate a robust and effective insolvency regime from a cursory analysis of the Draft Part-Z.***]**

* Divyanshu Kumar is a student at Chanakya National Law University, Patna, India. *Email*: 2325@cnlu.ac.in.

I

INTRODUCTION

The term 'Insolvency' has nowhere been defined in the Insolvency and Bankruptcy Code, 2016 (IBC). However, Black's Law Dictionary, defines insolvency as *"the condition of being unable to pay debts as they fall due or in the usual course of business or the inability to pay debts as they mature. Also termed failure to meet obligations; failing circumstances."*[1]

Cross-border insolvency implies a scenario where the insolvent debtor owns assets in multiple countries and covers the situation in which some of the creditors are from a different country than the one where the proceedings for insolvency have been filed.[2]

In common law courts, cross-border insolvency has frequent historical presence. In *Solomons v. Ross*,[3] an English creditor moved to an English court for seeking attachment of certain sums he lent to a Dutch firm that went bankrupt. The court ruling disappointed the English creditor as he was asked to approach the Dutch court. Moreover, in *Galbraith v. Grimshaw*,[4] the English court's ruling was an extended version of *Solomon* as they ruled in favour of a single universal proceeding for bankruptcy and observed the need of the English courts to ensure the non-interference in the domestic proceeding of some other state by its subjects.

Bankruptcy laws are generally territorial in their scope i.e., their applicability is limited to assets located within the domestic borders.[5] A foreign forum is deprived of the rights of seizure or freezing of assets without the assent of the local forum.[6]

---

[1] 'Insolvency', *Black's Law Dictionary* (9th edn, West 2009).

[2] Halliday et.al., (eds.) THE RECURSIVITY OF LAW: GLOBAL NORM MAKING AND NATIONAL LAWMAKING IN THE GLOBALIZATION OF CORPORATE INSOLVENCY REGIMES, 1135 (2007). According to the global leading figure on corporate insolvency Prof. Ian Fletcher, cross-border insolvency refers to a circumstance where the insolvency travels beyond a particular jurisdictional boundary, in such a way that the insolvency proceedings cannot be dealt immediately and exclusively under the domestic legal system by disregarding the international element of the case, *See* Michael Bogdan, INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES 527 (2000).

[3] *Solomons v. Ross* (1764) 1 Hy Bl 131n: 126 ER 79.

[4] *Galbraith v. Grimshaw* (1910) AC 508.

[5] UNCITRAL, (GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW), ISBN 978-92-1-133819-5 (2014).

[6] Sumant Batra, *Corporate Insolvency: Law and Practice,* 1st ed. Eastern Book Company 574 (2017).

Even though the UNCITRAL Model Law or any other international framework dealing with cross-border insolvency had not attracted many subscribers in the near past (and arguably, even in the present), the states have adopted several practices for handling of cross-border insolvency matters in the vacuum of such a framework like we have today. The most notable of these, as listed by the UNCITRAL Guide includes: *"application of the doctrine of comity by courts in common-law jurisdictions; issuance for equivalent purposes of enabling orders (exequatur) in civil-law jurisdictions; enforcement of foreign insolvency orders relying on legislation for enforcement of foreign judgements; and techniques such as letters rogatory for transmitting requests for judicial assistance."*[7]

The current Insolvency regime must be changed as the same is based onto two cardinal notions of reciprocal agreements as provided under Section 234 and letter of request from an Indian Court to a foreign Court under Section 235, wherein the absence of such agreement with another country would lead to a vacuum of guiding legislation.

India do not have a legislation dealing with cross-border insolvency. However, now the government of India seems to be ready to introduce the bill concerning cross-border insolvency.[8] The bill is most likely to be the duplication of the cardinal document to this article: draft Part-Z. It is only a matter of days that India will be a nation with a cross-border insolvency regime, an accomplishment that only a few countries on the face of this planet have managed to achieve yet. In this article, we will try to analyze some key provisions within the draft Part-Z.

II

PRE-DRAFT INDIAN DEVELOPMENTS

Provisions within IBC

Initially the proposed draft for IBC failed to include even a single provision for cross-border insolvency. The Bankruptcy Law Reforms Committee (BLRC), the body which was appointed with the mandate of creating a new Bankruptcy legal framework, in its November 2015 report mentioned about the omission to include cross-border provisions[9]:

---

[7] *Supra* note 6.

[8] Banikinkar Pattanayak, *Government may introduce Bill on cross-border insolvency in monsoon session,* FINANCIAL EXPRESS (Jun. 29, 2022) *available at-* https://www.financialexpress.com/industry/government-may-introduce-bill-on-cross-border-insolvency-in-monsoon-session/2575955/ (last visited 26 Jul., 2022).

[9] Bankruptcy Law Reforms Committee, *The report of the Bankruptcy Law Reforms Committee,* Volume I: Rationale and Design, ch. 2 (2015).

"The Committee has taken up, and attempted to comprehensively solve, the question of bankruptcy and insolvency insofar as it is a purely domestic question. This is an important first milestone for India.

The next frontier lies in addressing cross-border issues. This includes Indian financial firms having claims upon defaulting firms which are global, or global financial persons having claims upon Indian defaulting firms.

Some important elements of internationalisation – foreign holders of corporate bonds issued in India, or borrowing abroad by an Indian firm – are dealt with by the present report. However, there are many other elements of cross-border insolvency which are not addressed by this report. Examples of these problems include thousands of Indian firms have become multinational, and Indian financial investors that lend to overseas persons.

The Committee proposes to take up this work in the next stage of its deliberations."

However, even with the acknowledgement of cross-border insolvency as a future goal, the code would have been incomplete and obsolete both practically and politically in a state where there was a visible desperation in the nation considering the inadequacy of concrete cross-border economic recovery mechanism.[10] It was probably the reason that the Joint Parliamentary Committee (JPC) made some last-minute changes to the draft bill forwarded to it by BLRC. The JPC added sections 234[11] and 235[12]. Both these additions dealt with some aspects of cross-border insolvency; in essence proposing bilateral agreements[13]. Even though these additions were inadequate to the needs of a

[10] During the time, a lot of political as well as institutional focus was devoted on the sudden visible surge in economic offenders on the run in several foreign states. *See* Press Trust of India, *27 economic offenders fled India in last 5 yrs* FINANCIAL EXPRESS (Jan. 4, 2019, New Delhi) *available at* - https://www.financialexpress.com/economy/27-economic-offenders-fled-india-in-last-5-yrs/1433559/ (last visited 24 Nov., 2022).

[11] Clause 1 of Section 234 empowers the Central Government to conclude agreements with governments of other nations with the mandate of enforcing the provisions of the code. Clause 2 of Section 234 further expands the scope of the provision by also incorporating, other than a corporate debtor, his personal guarantor within the ambits of the section.

[12] Section 235 accords the Adjudicating Authority (NCLT) the power to issue a letter of request to a court in a country with which the Central Government has entered into an agreement by virtue of Section 234, to deal with assets located in that country.

[13] Bilateral Agreements were first formulated by courts based on specific cases when the domestic legislations did not provide for the means and methodology to deal with cross border insolvency. Their modern origin can be traced to 1991 between the courts of UK and US when they laid out provisions of insolvency proceedings for Maxwell Communications Corporation *See* re Maxwell Communications Corporation plc, 170 BR 802, 802 (Banker SDNY 1994).

nation awaiting an updated insolvency framework, these were without a doubt, vital additions to the IBC as the JPC itself acknowledged that it took into consideration the ubiquity of cross-border elements within corporate transactions and businesses in the present times.[14]

The 2016 code does not differentiate between an Indian and a foreign creditor.[15] The same position is followed in the Companies Act, 2013 in relation to winding-up of companies.[16]

Jet Airways Insolvency Proceedings

Legislation concerning cross-border insolvency is one thing, but its application is another. This is where seeking the court's perspective becomes relevant. Unfortunately, there has only been a handful of occasions till date dealing with aspects of cross-border insolvency where the Indian courts have been given the centre stage to set-up judicial precedents in and around such an issue. The insolvency proceedings of Jet Airways have probably been the only one comprehensive judgement in India with its core focus on the issue of insolvency of firm attracting international interests. This judgement can informally be termed as the *Maxwell Judgement*[17] of India as similar approach was being adopted.

Jet Airways, a leading and globally recognized airline business was undergoing financial turbulence since 2018. The company went on to default its financial obligations which included employee salaries[18] alongside aircraft leasing charges[19]. After its failure to procure any new cash inflow, the company

---

[14] Lok Sabha Secretariat, REPORT OF THE JOINT COMMITTEE - THE INSOLVENCY AND BANKRUPTCY CODE, 2015 para 62 (2016).

[15] The Supreme Court of India went to the extent of applying Article 14 of the Constitution to grant this status to foreign creditors. *See Macquarie Bank Limited v. Shilpi Cable Technologies Limited*, (2018) 2 S.C.C. 674.

[16] The Supreme Court of India has long ago settled the law equating the foreign creditors with their India counterparts when it comes to winding up of companies. *See The Rajah of Vizianagaram v. Official Receiver, Vizianagaram*, AIR 1962 S.C. 500.

[17] *Supra* note 13.

[18] Pankaj Upadhyay, *With no update on salary, Jet Airways pilots to go on strike from April 1* INDIA TODAY (Mar. 30, 2019, New Delhi) *available at*- https://www.indiatoday.in/business/story/with-no-update-on-salary-jet-airways-pilots-to-go-on-strike-from-april-1-1489865-2019-03-29 (last visited 25 Nov., 2022).

[19] *More trouble for Jet Airways! Airline defaults on lease rentals, gets notice form AAI,* BUSINESSTODAY.IN (Oct. 29, 2018, New Delhi) *available at*- https://www.businesstoday.in/industry/aviation/story/jet-airways-trouble-defaults-on-lease-rentals-gets-notice-form-aai-150056-2018-10-29 (last visited 25 Nov., 2022).

was finally dragged to NCLT (Mumbai Bench) for insolvency proceedings.[20] Simultaneously, the aviation giants were also facing bankruptcy in Netherlands, which were initiated only a month before the insolvency application before the NCLT was filed.

The NCLT made the remark on the incompetency of the IBC to deal with the situation that arose when the NOORD- Holland District Court initiated a separate insolvency proceeding in Netherlands against certain assets of Jet Airways located within the Dutch borders (triggered by two European Creditors) by stating that *"there is no provision and mechanism in the I&B Code, at this moment, to recognize the judgment of an insolvency court of any Foreign Nation. Thus, even if the judgment of Foreign Court is verified and found to be true, still, sans the relevant provision in the I&B Code, we cannot take this order on record."*[21]

However, in an appeal before the NCLAT, the appellate body asked the Indian committee of creditors of Jet Airways if they were ready to collaborate with the Dutch Administrator and enable the foreign creditors to have an equivalent status to them, who upon decline of such cooperation were anyway qualified to present their claims before the Indian resolution professional.[22]

The Jet Airways insolvency proceedings witnessed an exceptionally fine balance between cross-border insolvency proceedings and protection of jurisdiction of the courts of the sovereigns of India and Netherlands. The mutually agreed protocol empowered the state parties to appear or to represent, in person or duly get represented in the proceedings. However, the same did not meant that any of the state parties had submitted to the jurisdiction of another or substituted its own domestic proceedings with that of the other state.[23] The tribunal gave the 'Dutch Trustee' and the 'Resolution Professional' equivalent status, the premise helped the tribunal to hold that the Dutch Trustee was allowed to attend the meetings of the CoC, but he was not entitled to vote.[24]

---

[20] All the relevant documents pertaining to the insolvency proceedings can be accessed at the website of Jet Airways. *See* Jet Airways, INSOLVENCY PROCEEDINGS *available at-* https://www.jetairways.com/insolvencyproceedings/ (last visited 25 Nov., 2022).

[21] *State Bank of India v. Jet Airways (India) Limited*, 2019, S.C.C. Online, N.C.L.T., 7875.

[22] Press Trust of India, *NCLAT asks Jet lenders if they would cooperate with Dutch administrator* BUSINESS STANDARD (Aug. 21, 2019, New Delhi) *available at:* https://www.business-standard.com/article/pti-stories/nclat-asks-jet-lenders-if-they-would-cooperate-with-dutch-court-administrator-119082100608_1.html (last visited 9 Jul., 2022).

[23] *Jet Airways v. State Bank of India*, 2019, S.C.C. Online, N.C.L.A.T., 1216.

[24] *Supra* note 6.

Also, the powers of the Committee of Creditors, which is generally construed as more or less unfettered, was restricted by the NCLAT as they held that the CoC had no saying in the agreement between the RP and Dutch Administrator and the same (agreement) was based on the directions of the Tribunal and not the CoC.[25]

Dutch Assistance to the Indian CIRP

The proceedings of two states had different objectives. Where on one hand the Indian objective was to revive the company on the lines of the legislative intent behind enactment of the IBC; the Dutch proceedings, on the other hand, sought liquidation of the airline company.[26] The cooperation was achieved when the Dutch Trustee undertook that he will not undertake any steps that would be detrimental to the interests of the company or the CoC during his own proceedings. The Dutch Trustee also stipulated to give advanced notice to the Resolution Professional, of any decision he might undertake under an obligation of the Dutch laws or domestic courts of Netherlands which may turn out to be against the interest of the company or the creditors in India. The Dutch Trustee undertook the facilitation of the submission of any resolution plan in India by submitting a consistent reorganization plan, incorporating the payout mechanism under resolution plan submitted before the NCLT to the Dutch Proceedings in conformity with the Dutch laws.[27]

The Dutch Trustee was also supposed to seek inputs, notify and consult the Resolution Professional and was required to be mindful of the Proceedings in India before taking any material decision under the Dutch proceedings in relation to certain matters of:

a.) *"Any proposal, or approval of a plan of reorganization or a resolution plan or plan of compromise or any other similar arrangement; or*
b.) *causing material impact on assets, operations, obligations, rights, property or business of the Company through executory contracts; or*
c.) *proceedings in Netherlands where subject-matter violates moratorium (under Section 14 of the IB Code)".*[28]

---

[25] *Supra* note 13, at 4.

[26] This was ultimately achieved when the Dutch Administrator recovered the sum by selling off a Boeing 777 belonging to Jet Airways. *See* Press Trust of India, 'Boeing 777 held by Dutch sold; insolvency process to close now: Jet Airways, BUSINESS STANDARD (Sep. 4, 2021, New Delhi) *available at-* https://www.business-standard.com/article/companies/boeing-777-held-by-dutch-sold-insolvency-process-to-close-now-jet-airways-121090401089_1.html (last visited 25 Nov., 2022).

[27] *Supra* note 7.

[28] *Supra* note 7.

The Dutch Party offered cooperation to the Indian side by agreeing to preserve the value of assets of Jet Airways located in Netherlands, which included a Boeing 777 Aircraft, spare parts, office inventory etc., by mutual cooperation.[29]

The NCLAT set aside a couple of points from the NCLT judgement:

1.) The NCLAT disagreed with the proposition that the Dutch court had no say to CIRP proceedings in India; and
2.) Consequential instructions issued to the RP regarding the "Offshore Proceedings".

The NCLT judgement is a vantage point to the Indian insolvency regime that introduced cross-border insolvency mechanism in India.

Mutual Cooperation

Both the parties (The RP and the Dutch Trustee) were to consider all of the claims that they received and were required to redirect those claims to their respected counterparts, after receiving of which the Resolution Professional and the Dutch Trustee were to verify and admit the same in conformity with their domestic laws.[30]

Since, the Resolution Professional and the Dutch Trustee are equivalent positions, the CoC offered to bear any costs of fee or other related payments of the Dutch Trustee including any advisor or professional of his, all this as a portion of the insolvency resolution process costs (provided that the same had not been recovered by the Dutch Administrator through selling off the Netherlands based assets of Jet Airways).[31]

The COMI for Jet Airways insolvency proceedings was agreed as India. This owed to the fact that the company is incorporated in India.

Impact on foreign assets

An Indian company, when it operates in a foreign jurisdiction by the help of local subsidiaries of that foreign jurisdiction, each subsidiary will be considered to incorporate a distinct legal personality and the winding up/insolvency of the parent would not lead to the winding up/insolvency of the subsidiary.[32]

III

[29] *Supra* note 8.
[30] *Supra* note 9.
[31] *Supra* note 10.
[32] *Vodafone v. Union of India*, (2012) 6 S.C.C. 613.

STEPS FOR INCLUSION OF CROSS BORDER INSOLVENCY REGIME IN INDIA

The Bankruptcy Law Reforms Committee, which was responsible for setting the foundations of the IBC, had in its report mentioned that once the IBC is in place, the next thing on the agenda should be the assessment regarding cross-border insolvency cases.[33]

Later, in November 2017, the Ministry of Corporate Affairs instituted The Insolvency Law Committee (ILC) to consider upon the idea of adopting the UNCITRAL Model Law in India. The ILC report, submitted to the Ministry of Corporate Affairs in October 2018, advocated for adoption of the Model Law (with certain modifications) as it found sections 234 and 235 of IBC to be susceptible to delay and uncertainty for creditors, debtors and even the courts.[34] The report also pointed towards the incapability of mechanism of enforcement of foreign judgements in the Code of Civil Procedure, 1908, which it argued wasn't wide enough to include within its ambit all insolvency orders of different kinds.[35]

The ILC also included the proposed draft (Draft part Z) of the cross-border legislation (intended to be incorporated in the IBC) to its report.[36]

The ILC Report and Draft Part-Z have left numerous features of the cross-border insolvency framework to be formulated by the Central Government and IBBI.

In January 2020, MCA constituted The Cross Border Insolvency Rules/Regulations Committee (CBIRC) with the mandate of proposing rules and regulatory framework for the successful implementation of the Draft Part-Z.[37] In June 2020, the CBIRC submitted its report titled: *"Report on the rules and regulations for cross-border insolvency resolution"* making recommendations on the primary mandate it was constituted for.[38]

IV

[33] *Supra* note 9.

[34] Insolvency Law Committee, REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY (2018).

[35] *Id*.

[36] *Id.*, Annexure II.

[37] Cross Border Insolvency Rules/Regulations Committee, REPORT ON THE RULES AND REGULATIONS FOR CROSS-BORDER INSOLVENCY RESOLUTION ch. 1 (2020).

[38] *Id*.

UNCITRAL MODEL LAW'S INCORPORATION IN INDIA'S DRAFT PART-Z: THE KEY OVERLAPPING PROVISIONS

A brief overview of UNCITRAL Model Law on Cross Border Insolvency

Inspired from the progressions made on the international stage regarding the identification of the need to have a global cross-border insolvency framework,[39] the UNCITRAL began drafting the Model Law. The working group found it more feasible, the idea of drafting a Model Law than a convention.[40] The Model Law was authorized by the General Assembly (UNGA) in December 1997.[41] 72 states, 7 inter-governmental organisations and 10 non-governmental organisations constituted the working group who underwent multiple debates and discussions between 1995 and 1997 for the formulation of a draft model law.[42] However, the working group never had the opportunity to review the draft. In its January 1997 report, the working committee expressed its disappointment for the same.[43]

The Model Law comprises of 32 Articles and is supplemented by an explanatory *Guide to enactment*. It is founded upon four cardinal principles: access, recognition, relief and cooperation.[44]

The Model Law by and large is premised upon three fundamental elements[45]:

a) Allowing of quick administration over the assets of the debtor situated locally and shielding of those controlled assets from creditors acting unilaterally.
b) The local court is provided with a such great deal of freedom that it is empowered to grant an administrator any type of relief out of a foreign main proceeding.
c) Along with the freedom enjoyed by the local court, there is a statutory obligation to cooperate i.e., sufficient safeguarding of the debtor and its creditors.

---

[39] UNGA, REPORT ON UNCITRAL-INSOL JUDICIAL COLLOQUIUM ON CROSS-BORDER INSOLVENCY, UN GAOR 28th session, U.N. Doc. A/CN.9/413 (1995).

[40] Andre J. Berends, *'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview'* 6 Tul J Int'l & Comp L, 309 (1998).

[41] UNGA Res. 52/158 U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

[42] Jenny Clift, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law,* Global Business Publishing Ltd, (2006).

[43] UNGA, REPORT OF THE WORKING GROUP ON ITS WORK AT ITS 21ST SESSION, U.N. Doc. A/CN.9/435 (1997).

[44] Ian F Fletcher, *Insolvency in Private International Law, National and International Approaches,* 2nd ed., Oxford University Press, 453 (2005).

[45] Rosa M Lastra, *Cross-Border Bank Insolvency,* Oxford University Press, 189 (2011).

The states are free to choose the extent to which the Model Law applies in their territory. Professor Fletcher highlights the scholarly dissent on this position, it gets reflected through his statement: *"however, the fact that a Model Law is only a legislative guide enabling a State to decide how much or how little of the Model Law it wishes to accept is likely to be viewed by some as the Achilles' heel of this form of international harmonization."*[46]

Owing to the fact that the Model Law is formulated to supplement a state's domestic legal system, Article 3 permits the enacting state to adhere to any other obligation that may emerge out of some treaty or some other sort of agreement where such obligation arises from a provision (of that treaty or agreement) which does not comply with the Model Law.[47]

The UNCITRAL Model law recognizes two types of foreign insolvency proceedings.

i. *"**Foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests"*[48]
ii. *"**Foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article"*[49]

The Model Law doesn't offer a meaning to the notion of "centre of main interests". However, The Virgos-Schmit Report[50] which provides an insight to the concept of "main insolvency proceedings" and was prepared to serve the European Convention has been construed as a legitimate supplement to the concept of "centre of main interests".[51] This supplementary usage of the European concept to the UNCITRAL context draws its legitimacy from the mutual correspondence between the Model Law and EC Regulations.[52]

The UNCITRAL Guide is considered as 'less specific' and 'less binding' than the Model Law.[53] It serves the function of providing simplified insights to the Model Law, primarily for the legislature and the government; it is also a

---

[46] *Supra* note 9, Bankruptcy Law Reforms Committee, at 486.
[47] Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law*, Springer, 76 (2017).
[48] The UNCITRAL Model Law, Art. 2(b).
[49] The UNCITRAL Model Law, Art. 2(c).
[50] Miguel Virgos and others, *Report on the Convention on Insolvency Proceedings*, EU Council of the EU Document (1996).
[51] *Zvonko Stojevic v. Komercni Banka* AS [2006] E.W.H.C. 3447 (Ch).
[52] Reinhard Bork, *The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency*, 26(3) Int. Insolv. Rev. 246 (2017).
[53] Susan Block-Lieb and Terence C Halliday, *Incrementalisms in Global Lawmaking*, 32 Brooklyn Journal of International Law, 851-886 (2007).

helpful document for any other stakeholder who is willing to develop a general understanding of the Model Law.[54] In accordance with Article 8, the Guide may be used as an extrinsic source to interpret any part of the Model Law.[55]

The Model Law is an excellent document that has been praised worldwide and attracts a very insignificant substantive criticism.[56]

Dr. Sumant Batra considers the adoption of the Model Law for India not merely as an option but as a necessity, which upon adoption would position India amongst the nations with most sophisticated insolvency laws.[57]

Key concepts of Model Law and their adoption in Draft Part-Z

The Model Law have several key concepts. The prominent ones of them are Centre of Main Interest (COMI), Reciprocity and Relief. These are the ones that are dealt with in the present article. The Draft Part-Z has taken into account these concepts, the relevant provisions concerning the same has also been discussed.

Centre of Main Interest (COMI)

The Model Law doesn't define COMI. However, the EC Regulation defines it in its preamble as: *"the place where the debtor conducts the administration of his interests on a regular basis and there is therefore ascertainable by third parties"*.[58]

As per Article 3.2 of the EC Regulations, normally the state to have the power to initiate insolvency proceedings is the one having the COMI within its territory; however, when the debtor's assets also lie in some other member state, it stretches the power to that member state also to initiate the insolvency proceedings.[59]

It is worth noting that the Model Law preceded by the EC Regulation is drafted by taking into consideration the specific provisions of the former.[60] However, the ground for certain inconsistencies between the two when it comes to their co-existence still exists. One such inconsistency is about the understanding of COMI. In *Re Stanford International Bank*, Justice Lewison made an inference that the meaning of COMI under the EC Regulation and Model Law is ought to be

---

[54] UNCITRAL, Legislative Guide on Insolvency Law, (2005).
[55] *Supra* note 36, at 11.
[56] R.W.Harmer, *The UNCITRAL Model Law on Cross-Border Insolvency*, 6(2) Int. Insolv. Rev., 153 (1997).
[57] *Supra* note 7, at 590.
[58] Regulation E.C. No. 1346/2000 of the European Council on Insolvency Proceedings, OJ L 160/1 (2000).
[59] *Id*.
[60] *Supra*, note 6, Sumant Batra, at 10.

the same as the Model Law was framed to offer an additional regulatory framework to the pre-existing EC Regulation.[61]

Justice Lewison was of the opinion that he wasn't required to adhere to the ruling made in *Re Eurofood IFSC Ltd* (Eurofood)[62] and consequently, didn't took into consideration Article 2 of the Model Law, which upon applying would have made the domestic law, which was the EC Regulation, prevail over the Model Law. In an appeal, the court of appeal pointed out the applicability of both the EC Regulation as well as the Model Law in England and Wales, therefore, a consistency between both was termed essential. [63] It can be observed that the English court made the co-existence scenario to look slightly complex than it really is. It becomes obvious from what has been provided under the *Guide to Enactment* that the Model Law provides a complimentary regime to the EC Regulation and co-existence between the two implies the applicability of Model Law to the non-EU members.[64]

In Australia, in *Ackers v. Saad Investments Co. Ltd.*, the Federal Court of Australia also endorsed the English approach.[65] In New Zealand too, the courts have agreed upon the rationale presented by the English Court including the decision of the New Zealand High Court in *Williams v Simpson*.[66]

This, however, is not really a challenge for India (or its Asian counterparts) as there is no such cross-border framework for insolvency till date observed by India other than the Model Law. But this surely could aid in resolving the conundrum that may arise when the government may enter agreements with a substantial number of foreign countries under Section 234 of IBC and thereby create, for itself of its own, an ecosystem administering cross-border insolvency.

Determination of COMI beforehand is crucial from the creditor's point of view as it helps them in clarifying the rights they will be entitled to. For corporate rescue, it will be imperative to distinguish the applicable law so that the legal possibilities can be worked out.[67]

---

[61] Re Stanford International Bank, BPIR 1157, [2009] E.W.H.C. 1441 (Ch) (May 3, 2009).
[62] Re Eurofood IFSC Ltd, (2006).
[63] Re Stanford International Bank Ltd., 67 (2011).
[64] *Supra* note 6, Sumant Batra, at 11.
[65] *Ackers v. Saad Investments Company Ltd.*, 190 F.C.R. 285, 291–292 (2010).
[66] *Williams v. Simpson*, [2011] 2 N.Z.L.R. 380.
[67] Amir Adl Rudbordeh, *An Analysis and Hypothesis on Forum Shopping in Insolvency Law: From the European Insolvency Regulation to its Recast*, 25(5) Norton J. Bankr. L. & Prac. 413 (2016).

COMI is designed to thwart the possibility of forum shopping and to make sure that the debtor and the court have established amongst them a necessary nexus.[68]

The conundrum of ascertainment of the COMI is tackled under Clause 14 of the proposed Draft Part-Z. Under the proposed draft, COMI is the corporate debtor's registered office, unless proven contrary.[69] The Adjudicating Authority is made responsible to carry an assessment of the place where the central administration of the corporate debtor occurs, the site should be one that can easily be identified by the third parties including the creditors.[70] In case, the Adjudicating Authority fails to determine the COMI as per the factors under Clause 14(3), they are supposed to determine the COMI on new factors which are to be set by the Central Government.[71] However, through its June 2020 report, the CBIRC has recommended for the deletion of Clause 14(4).[72] The CBIRC has also recommended the following factors that the Adjudicating Authority is supposed to examine for ascertaining the COMI of a cross-border insolvency proceeding: "*(a) location of corporate debtor' assets; (b) location of the corporate debtor's books of account; (c) location of the corporate debtor's directors and senior management; (d) location of the corporate debtor's creditors; (e) location of the execution of contracts and applicable law to key contracts and disputes; (f) location where financing was organized or authorized, or from where the cash management system was run; (g) location of the corporate debtor's primary bank account; and (h) location from which the corporate debtor's purchasing and sales policy, staff, accounts payable and computer systems were managed*".[73]

Reciprocity

Legislative reciprocity is the implication of the recognition of judgements pronounced by foreign courts along with the power to enforce such judgements within a domestic court when the states concerned have adopted same or similar legislation.[74]

---

[68] Alexandra C.C. Ragan, *COMI Strikes a Discordant Note: Why US Courts are not in Complete Harmony Despite Chapter 15 Directives*, 27 (2010) Emori Bankr Dev J 117, 118, 132 citing Philip R. Wood, *Principles of International Insolvency* 291 (1995).

[69] Clause 14(1), Draft Part-Z.

[70] Clause 14(3), Draft Part-Z.

[71] Clause 14(4), Draft Part-Z.

[72] *Supra* note 26, Press Trust of India, at 54-55.

[73] *Supra* note 26, Press Trust of India, at 55.

[74] Keith D.Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?*, Int. Insolv. Rev. 149, 16 (2007) *available at*- https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.151 (last visite 11 Jul., 2022).

The working group briefly discussed the matter of reciprocity in relation to the Model Law, it could be read as follows[75]:

"As regards the question of reciprocity, it was pointed out that national laws often contemplated different notions of reciprocity so that no single solution could be easily provided, even in the form of a convention. In the case of model legislation, on the other hand, it would still be possible for those States which wished to do so, to subject its application to the rule of reciprocity, by listing those jurisdictions with regard to which the requirements of reciprocity had been fulfilled."

Based on the abovementioned statement, it appears that the intent of the working group while drafting the Model Law was not an outright rejection of the idea of applicability of reciprocity. Therefore, it can be argued that the states are free to incorporate reciprocity provisions within their versions of enactment of the Model Law.

The ILC through its report have suggested that the initial adoption the Model Law should be on the basis of reciprocity which can later be diluted when the conditions become conducive for such dilution.[76] The rationale behind such mode of adoption on the basis of reciprocity, as cited by the ILC, is the nascent stage of the Indian insolvency infrastructure coupled with the overall economic development alongside our global positioning.[77] The ILC has proposed that the application of the rule of reciprocity should be limited to the confines of Draft part Z.[78] Therefore, foreign creditors will not be barred from initiation, participation and filing of claims under IBC proceedings irrespective of reciprocity.[79]

Relief

The Model Law offers two types of relief; they are Interim relief and Judicial relief[80]:

i. *Interim Relief*: Can be provided by the court until a decision is made on an application seeking recognition of foreign proceedings.

   Model Law, by virtue of Article 19, provides for urgent relief which may be granted, at the discretion of the court, after an application

---

[75] UNGA, *Report of the Working Group on its work at its 20th Session,* U.N. Doc. A/CN.9/433 (October 1996).

[76] *Supra* note 23, *Jet Airways v. State Bank of India,* at 18-19.

[77] *Id*.

[78] *Supra* note 76.

[79] *Supra* note 76.

[80] *Supra* note 23, *Jet Airways v. State Bank of India,* at 35.

for recognition is filed.[81] However, it is to be noted that this relief is not exhaustive and it may include: *"(a) staying of the execution of debtor's assets; (b) staying transfer and disposal of debtor's assets; (c) entrusting of administration of debtor's assets to the foreign representative or other designated person; (d) providing for the examination of witnesses and taking of evidence related to the debtor's property; (e) any additional relief available to an insolvency professional in the enacting country"*.[82]

The Adjudicating Authority is not empowered by any provision within the IBC to grant interim relief to a foreign creditor. In light of the same observation, the proposed Draft Part Z does not include any provision that empowers the NCLT to grant interim relief.[83] However, a subsequent report submitted in February 2020 by the ILC seems to over-ride this recommendation by urging the MCA to take into account the possibility of the scenario of granting interim relief, in the form of interim moratorium, for domestic proceeding.[84] The CBIRC despite finding merit in the 2020 ILC recommendation, has proposed not to make any amendments to the proposed Draft Part-Z or any other delegated legislation concerning interim reliefs as the proposed rules are compatible with IBC.[85]

ii. *Relief on Recognition*: To be granted if a foreign proceeding is recognized. This relief may either be mandatory or discretionary. The same is provided through Clause 18 of the proposed Draft Part-Z.

Upon recognition of foreign main proceedings, an automatic moratorium gets applicable.[86] This automatic moratorium is similar to the moratorium imposed under the domestic CIRP of the enacting country.[87] Clause 17(1) of the Draft Part-Z imposes a moratorium on the lines of section 14 of the IBC.

The Model Law, by virtue of Article 21, confers the court with discretionary powers to dispense relief in reference to foreign main or non-main proceedings. A list under Article 21(1) has been provided for the same. However, the list is not exhaustive but

[81] UNCITRAL, *Model Law on Cross-Border Insolvency: The Judicial Perspective,* 150 (2013).
[82] The UNCITRAL Model Law, Article 19.
[83] *Supra* note 23, *Jet Airways v. State Bank of India,* at 36.
[84] Insolvency Law Committee, *Report of the Insolvency Law Committee,* (2020).
[85] *Supra* note 26, Press Trust of India, at 56.
[86] The UNCITRAL Model Law, Art. 20.
[87] *Supra* note 6, Sumant Batra, at 183.

inclusive in nature.[88] Article 21 of the Model Law is subsumed within Clause 18 of the proposed Draft Part-Z. The CBIRC has offered valuable insight on this point by providing a list of discretionary reliefs.[89] The CBIRC in its report has recommended that the Adjudicating Authority may pass an order by exercising its authority under Clause 18(1) of the proposed Draft Part-Z, making the foreign representative eligible for taking one or more of certain types of actions against the corporate debtor, the list of the actions have been listed under Box 12 i.e., 'Recommendations on discretionary reliefs'.[90]

The court must be satisfied with the preservation of the interests of the stakeholders like the creditors and the corporate debtor before the foreign creditor is granted any relief under the Model Law.[91]

Feasibility of Adoption

The feasibility of adoption must be assessed through various parameters, the prominent ones being the concern that adoption of the Model Law will undermine the Sovereignty of India[92] and also the questions in regard to the extent of liberty that the implementing state can exercise to shape up the draft in accordance with its own National interests and priorities[93].

The Sovereignty Issue

The Model Law does contain ample provisions that protects the sovereignty of the enacting state. If a foreign proceeding seems to be at odds with the public policy of the enacting state, the state, in such a scenario is not bound to

[88] *Supra* note 6, Sumant Batra, at 186.
[89] *Supra* note 26, Press Trust of India, at 57.
[90] *Supra* note 26, Press Trust of India, at 62.
[91] The UNCITRAL Model Law, Article 22.
[92] The perception of adaption of international customs, treaties and Model Laws as an impediment to the sovereignty of the state is a very common one throughout the world. However, more often than not, the perception lacks merit. *See* Wellman, Carl, *International Rights versus National Sovereignty*, *The Moral Dimensions of Human Rights,* online ed., Oxford Academic, (Jan. 1, 2011).
[93] The UNCITRAL through its 'Guide to Enactment of the UNCITRAL Model Law on Enterprise Group Insolvency' has recognized that certain entities like banks, financial institutions, insurance companies etc. can form a part of some enterprise group(s) and therefore, grants the state autonomy to decide upon the applicability of the Model Law on such institutions. *See* para 37 of *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (2020).

recognize such proceeding.[94] However, the UNCITRAL Guide fetters the possibility of state willingly dodging foreign proceedings by requiring that the term 'public policy' must have a wide connotation and should be within the confines of the fundamental principles of law.[95] India is yet to clarify upon the meaning of 'public-policy' that it is willing to construe within the intended cross-border insolvency legislation. Moreover, the definition of public policy, as provided by the Apex Court in *Renusagar Power Co. Ltd. v. General Electric Co.*,[96] is supposed to have a very narrow meaning. The SCI held that the exception of public policy can only be invoked on three grounds:

1. Against the fundamental policy of Indian law; or
2. Against the interests of the nation; or
3. Against the notion of justice and morality[97]

In order to effectuate an effective cross-border regime, India must give public policy a broad meaning instead of the currently followed narrow-scope definitions like the above.

Liberty to exclude certain entities

The Model Law is flexible enough that it even grants the enacting state the liberty to discount the inclusion of certain entities from the ambit of the Model Law.[98] These excluded entities may be banks, insurance companies or other entities.[99] The *raison d'etre* of such exclusions may be inspired from reasons like the involvement substantial interests of a vast majority of people or the fact that the insolvency of such entities may require special legislations.[100]

V

CONCLUSION

International insolvencies are a common scenario given the fact that large corporations are present in multiple countries which imply involvement of multiple jurisdictions.[101] When we try to look for a remedy for this 'common' scenario relating to the corporate setups, the IBC has been disappointing us by not providing adequate provisions to deal with this issue except for a couple

---

[94] The UNCITRAL Model Law, Art. 6.

[95] *Supra* note 6, Sumant Batra, at 102.

[96] *Renusagar Power Co. Ltd v. General Electric Co.*, 1994 A.I.R. 860.

[97] *Id*.

[98] The UNCITRAL Model Law, Article 1.

[99] The UNCITRAL Model Law, Article 1(2).

[100] *Supra* note 36, at 173-176.

[101] B.S. Masoud, *The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa,* 181-200 (2014).

of basic clauses. The NCLT has therefore, up until now, been left with limited flexibility to handle such situations on a case-to-case basis.

The adoption of the UNCITRAL Model Law is an effective and sufficient measure that the government of India is taking.

COMI is a fundamental concept for the operation of Model Law. India, while adopting has to *inter alia* address the issue of COMI. India's voyage to a cross-border powerhouse jurisdiction is not easy. India would also need to address issues under the Foreign Exchange Management Act, 1999 (FEMA) which is the legislation that deals with the financial dealings concerning subjects making investment in and out of India and includes issues of security interest and reparation of monies by them.[102]

Regardless of the sea of suggestions, agreements and disagreements, one thing that can clearly be asserted is that the incorporation of cross-border insolvency provisions in India, will add with its advent, a new pillar of global advancement and jurisdictional inter-dependence by promoting global ease of doing business and economic safety to the world as whole given the fact that India is constantly emerging as a global economy.

[102] *Supra* note 7, at 590.