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DEVISING A LEGAL MECHANISM IN INDIA FOR RESOLVING CROSS-BORDER INSOLVENCY

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Abstract

The volume of transnational business transactions has increased exponentially, and along with it, so has the need for consonance on cross-border insolvency laws across different jurisdictions. Not only does a strong framework addressing multinational default aid the economy of a country, it also aligns the country's laws with the international consensus. India has emerged as an important economy to the world. However, the legal framework for cross-border insolvency has been inadequate. Moreover, the pandemic has imposed a mandatory pause and left businesses in an unprecedented situation. Appropriate measures for the future are crucial to safeguard the interests of businesses as well as of their creditors.

This article aims to make a comprehensive study of the cross-border insolvency regime of India to recognize the needs of the law required in the Indian, particularly in reference to adoption of the UNCITRAL Model Law for cross-border insolvency as it is the most significant and comparatively widely accepted piece of law for the subject. The article studies the existing legal regime and the need for law specific to cross-border insolvency. It examines the workability of incorporation of the UNCITRAL Model Law in India with a cross-jurisdictional analysis of various states which have adopted the law with or without variations to it. Finally, the article critically analyzes the draft law proposed for India in light of the objectives it aims to achieve and contemporary trends emerging in this area.

Keywords: Cross border insolvency, Insolvency and Bankruptcy Code, Insolvency Law, UNCITRAL Model Law on Cross Border Insolvency, Transnational Default

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Introduction

Cross-border insolvency refers to insolvency proceedings for a situation in which the debtor has creditors, assets or both, in more than one jurisdiction. It can be understood as a situation "…in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."[2]

The objective of creating a legal framework for cross-border insolvency is to promote efficiency by allowing a single consolidated proceeding for insolvency rather than necessitating multiple disconnected proceedings in each jurisdiction within which the corporate debtor has debts or assets. Due to globalization, businesses have transcended past national boundaries. India's economy has grown rapidly, emerging as among the top economies in the world and a much sought-after destination as far as ease of doing business is concerned.[3] It is important to accord protection and procedural fairness to all stakeholders involved in situations of cross-border insolvency so as to incentivize and encourage promotion of business in India.

The benefits to enacting legislation on this subject are manifold and range from promoting cooperation between courts situated in different jurisdictions to providing legal certainty for trade and investment.[4] On the other hand, inconsistencies in cross-border insolvency create instability in international transactions.[5] Uncertainty as such adversely affects transnational lending transactions. Conflict and inconsistencies in the insolvency laws of different jurisdictions impact liquidation and reorganization of the company as well.[6]

[2] M. Bogdan, *Insolvency in Private International Law: National and International Approaches*, 69(4) NORD J. LAW 527, 527-528 (2000).
[3] The World Bank, *GDP Rankings, World Bank Development Indicators*, THE WORLD BANK DATA CATALOG (March 14, 2020, 10:08 AM), https://datacatalog.worldbank.org/dataset/gdp-ranking.
[4] Victor Nayak & Ishita Pal, *Analysis of Cross Border Insolvency Issues in India: A Regulatory Conundrum,* SSRN (March 20, 2020, 2:14 AM), https://ssrn.com/abstract=3501468.
[5] Rona R. Mears, *Cross-Border Insolvencies in the 21st Century: A Proposal for International Cooperation,* 1INT. INSOLV. REV. 23, 23-24 (1991).
[6] RICHARD A. GITLIN, INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES, (Rona M. Mears ed., Lexis Pub 1989).

In the present situation, the economies around the world and inevitably, a multitude of businesses have been left to suffer due to a global pandemic and its aftermath. Numerous people have been left stranded with little to no recourse at this time. On March 4, 2020, the Standing Committee on Finance emphasized the need of a legal framework for cross-border insolvency in India.[7] This article studies the existing legal framework in India for resolving cross-border insolvency in relation to the proposed law for the adoption of the UNCITRAL Model Law recommended by the Insolvency Law Committee. It also aims to highlight the implications of the proposed law and expected modifications in this behalf, if any.

The Extant Legal Framework For Cross-Border Insolvency

As of now, the legal framework is simply not equipped to manage cross-border insolvency. The law on the matter is scarce, lacks clarity and is inadequate. Ultimately, the National Company Law Tribunal (NCLT) is left to proceed on a case-by-case basis for insolvency proceedings as has been seen.[8] Creditors, whether foreign or domestic, cannot rely on a systematic approach to assert claims relating to transnational default. The Insolvency and Bankruptcy Code, 2016 ("the IBC") is the primary authority on cross-border insolvency for corporate persons, supplemented by the provisions of the Civil Procedure Code.

Section 234 in and section 235 of the IBC address situations of cross-border insolvency. By virtue of section 234,[9] the central government of India may enter into bilateral agreements with the government of any country outside India to enforce the provisions of the IBC. These include agreements to apply the IBC to assets and property of the corporate debtor, which include personal guarantors located in foreign countries.

[7] Standing Committee on Finance, Ministry of Corporate Affairs, *The Insolvency and Bankruptcy (Second Amendment) Bill, 2019,* THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (March 6, 2020, 6:18 PM) https://www.ibbi.gov.in/uploads/whatsnew/20ef77b3a1200f12ad19cee1c2c3dba9.pdf.
[8] State Bank of India v Jet Airways (India) Ltd., 2019 SCC OnLine NCLAT 385; State Bank of India v Videocon Industries Limited, 2018 C.A. 1022 (PB).
[9] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 234.

If a resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that property or assets of the debtor are situated in a foreign country with which reciprocal agreements under section 234 of the IBC[10] exist, he may make an application to the adjudicating authority, i.e., the NCLT with respect to body corporates, that evidence or action relating to such assets is required in connection with the proceedings. This is provided by section 235 of the IBC.[11] A similar application lies before the Debt Recovery Tribunal for individuals or unlimited lability partnerships, though the provisions relating to these entities have not been notified yet.

The framework contained under section 234 and 235 of the IBC essentially provides for an arrangement to be created per case, between countries or the adjudicating authorities, subject to satisfying that a cause exists in this behalf. Such a transaction-specific tailor-made approach would reasonably require time and resources. Although intended to facilitate the resolution process, no steps have been taken towards implementing inter-governmental agreements till date. Currently, an order of the NCLT pertaining to cross-border insolvency would not find recognition and enforcement in a foreign jurisdiction.

Recognition of foreign insolvency proceedings is crucial to any legal regime pertaining to cross-border insolvency. While the Civil Procedure Code provides for recognition of the judgments and decrees of certain reciprocating territories, such as the United Kingdom and Singapore, a gap arises in the system for the lack of recognition accorded to insolvency-related proceedings such as proceedings for reorganizations which is not clearly implicit in the law.[12] In light of the abovementioned shortfalls, the Insolvency Law recommended the adoption of the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") in its Report.[13] Certain provisions in the IBC imply a foresight to extend the law to deal with cross-border insolvency, though it doesn't set out a mechanism to deal with all cases pertaining to cross-border insolvency. Foreign creditors can file an application for insolvency of an Indian corporate debtor and participate in proceedings initiated under the IBC. It also treats domestic and foreign creditors equally on par with the other.[14]

[10] Id.
[11] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 235.
[12] The Code of Civil Procedure, 1908, § 13; The Code of Civil Procedure, 1908, § 44A.
[13] Insolvency Law Committee, Ministry of Corporate Affairs, *Report of the Insolvency Law Committee on Cross Border Insolvency,* MINISTRY OF CORPORATE AFFAIRS (March 18, 2020, 6:08 PM) https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
[14] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 3(23).

For the purpose of insolvency proceedings, the IBC authorizes an interim resolution professional to take custody of assets of the debtor located in foreign countries into his control. It is worth noting that under section 35(1)(b)[15] and section 35(1)(f)[16] of the IBC, the liquidator is empowered to take into his custody or control the assets and property of the corporate debtor, including those situated outside India, and may make sale of the same. If the recommendation of the Insolvency Law Committee is heeded and the law proposed by it is adopted, it would be in line with the anticipations of the IBC.

Cross-Jurisdictional Analysis of Cross-Border Insolvency Laws Vis-à-vis the Adoption of the Model Law

The International Bar Association has referred to the Model Law as "rapidly becoming the de facto statutory mechanism for cross-border recognition of insolvency decrees and coordination of cross-border insolvency cases."[17] The UNCITRAL Model Law is the most accepted law in this sphere of private international law and came into existence as a result of widespread agreement that judicial cooperation could use a legislative framework for resolution of cross-border insolvency matters.[18]

Cooperation here meant granting recognition to orders of foreign courts, granting access to local courts by the foreign insolvency representatives and granting relief for the assistance of foreign insolvency proceedings.[19] These are, therefore, core principles reflected in the Model Law. It was issued by the secretariat of the United Nations on 30 May, 1997 and has been adopted substantially by 44 countries. Therefore, when it comes to dealing with cross-border insolvency issues, the Model Law forms part of international best practices.

[15] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 35(1)(b).
[16] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 35(1)(f).
[17] International Bar Association, *SIRC Project: The UNCITRAL Model Law on Cross-Border Insolvency*, INTERNATIONAL BAR ASSOCIATION, (March 11, 2020, 1:43PM), http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/SIRC_ProjectCrossBorderInsolvency.aspx.
[18] Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV., 2543, 2543 (1996).
[19] LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, Look Chan Ho, 1 (4th ed. 2017).

Singapore adopted the Model Law via amendments introduced to its erstwhile Companies Act.[20] The amendments effectively permit the recognition of foreign proceedings and insolvency representations in Singapore. The Singaporean courts may intervene when the public policy of Singapore is expected to be affected. It is also worth noting that while adopting this provision from the Model Law, the legislation omitted the word "manifestly" which had characterized the actions that were opposed to public policy.

Recently, the Singapore High Court held that this omission lowers the threshold for determining when an action is contrary to public policy.[21] This is distinct from countries such as United Kingdom or United States of America which chose to adopt the provision as it was. The Singaporean adoption of the Model Law is substantially in line with the UNCITRAL Model Law in respect of imposing and respecting moratoriums, and stresses the importance of the UNCITRAL Model Law in interpretation of its provisions as well as when it comes to alternative reliefs.

Towards furthering its commitment to facilitating cross-border insolvency, Singapore established the Judicial Insolvency Network to form a network of insolvency judges from varying jurisdictions like Australia, United States of America, etc. so as to encourage cooperation among national courts.[22] The Network issued a set of guidelines to supplement all legislation, rules and procedure concerning insolvency, which are to be considered in cases of insolvency proceedings or adjustment of debt initiated in more than one country.[23]

These guidelines were put to use in the US Bankruptcy Court and Singapore High Court's joint handling of the case of Ezra Holdings Ltd.[24] The set of cross-border insolvency laws incorporated into the IBC would need to be mindful of and capable of operating in harmony with the corresponding laws of different jurisdictions since the cross-border nature of such insolvency proceedings inherently requires transnational interaction and cooperation. The Model Law is a viable option to achieve this objective.

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[20] Singapore Companies (Amendment) Act, 2017, § 354B and Sch X.
[21] *Re:* Zetta Jet Pte Ltd and others (2018) S.G.H.C. 16.
[22] Judicial Insolvency Network, *JIN Guidelines,* JUDICIAL INSOLVENCY NETWORK, (April 1, 2020, 2:31 PM) http://www.jin-global.org/about-us.html.
[23] Id.
[24] Insolvency proceedings against Ezra Holdings Ltd.

When compared with the recast EU Regulations ("Recast Regulations"), the Recast Regulation differs in that it does not provide a substantive base for member states to adopt. The Recast Regulations created a framework applicable to all member states except Denmark, which facilitates situations of cross-border insolvency by assisting in the determination of the jurisdiction and applicable law for that case.[25]

It provides for automatic recognition of insolvency proceedings commenced across member states of the EU and recognizes the concept of foreign main proceedings and non-proceedings in a manner. Main proceedings are determined on the basis of the centre of main interest (COMI) of the debtor, and have universal scope, encompassing all assets of the debtor.[26] Secondary proceedings can be commenced where the debtor has an establishment and tertiary proceedings when the debtor has an establishment but main proceedings have not yet commenced.

In this manner, the Recast Regulation makes a greater contribution to the unification of laws and is more precise, if less flexible.[27] However, unlike the Model Law, it does not provide the substantive base which can be incorporated by numerous countries. Another advantage of the Model Law is the preference it gives to the domestic law and proceedings of the country as well as the protection of public interest. The flexibility accorded while adopting the Model Law may be viewed as attractive, but it may also be a cause for differing takes on the same subject which ultimately makes the process for resolving the cross-border insolvency less efficient and more arduous.

A notable adoption of the Model Law is found in Chapter 15 of the Bankruptcy Code of the United States added by the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005, replacing section 304 of the Bankruptcy Code.[28] To promote a uniform and coordinated approach between different countries, the interpretation of the USA has to be coordinated with interpretations given by other countries which have adopted the Model Law. Another example of such variance may be found in exemptions or exclusions from purview of the legislative framework in adoption of the Model Law.

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[25] Regulation (EU) 2015/848 of the European Parliament and of the Council, (2015).
[26] Preamble, ¶ 12, Regulation (EU) 2015/848 of the European Parliament and of the Council, (2015).
[27] Reinhard Bork, *The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency: EU and UNCITRAL Cross-Border Insolvency*, 26(3) INT. INSOLV. REV., 12, 10-17 (2018).
[28] United States Bankruptcy Code, 11 U.S.C, Chapter 15.

The Model Law contemplates exclusion of certain entities from the proceedings who may be subject to special insolvency law.[29] New Zealand has followed on the example of the Model Law in excluding banks from the operation of the Model Law provisions. Romanian law allows for exclusion of all financial institutions which provide credit or investment services, brokers, stock exchanges and insurance companies and agents.[30] Functioning along the same footing, Great Britain has excluded not only UK insurance companies and credit institutions, but also the EEA (European Economic Area) as well as third-country credit institutions and insurers.

The US has afforded the same exclusion to stock exchanges, investment institutions, insurance undertakings, brokers and traders, clearing houses, banks, railroads, commodity brokers and stockbrokers, but not to foreign insurance companies.[31] Mexico excludes surety companies, insurance companies and "unincorporated government enterprises" similarly. Therefore, this flexibility has led to inconsistencies in the law.

The adoption of the Model Law is the best option for India. While the benefits of adopting the Model Law cannot be ignored or underplayed, a closer scrutiny of data relating to the adoption of the Model Law reveals that 175 of the 193 members of the United Nations have not adopted it.[32] The corresponding data of the UNCITRAL for adoption by its member states reveals 49 of 60 such states have not adopted the Model Law.[33] Several commercially important countries like Germany, Brazil and China have yet to adopt the Model Law.

The success of the Model Law is "heavily dependent upon whether, and in what manner, countries choose to enact" the law,[34] and thus, the failure to adopt the law by a multitude of states mentioned above acts as an immense drawback, less likely to persuade countries to adopt the law.

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[29] UNCITRAL Model Law on Cross-Border Insolvency, art. 1(2), May, 30, 1997, E.99.V.3.
[30] Insolvency Law Committee, Ministry of Corporate Affairs, *Report of the Insolvency Law Committee on Cross Border Insolvency,* MINISTRY OF CORPORATE AFFAIRS (March 18, 2020, 6:58 PM) https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
[31] § United States Bankruptcy Code, 11 U.S.C, §1501.
[32] MOHAN, S. Chandra. *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*. 21(2) INT. INSOLV. REV. 220, 199-223 (2012).
[33] Id.
[34] Bob Wessels, *Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will*, 3 INT. CORP. RESC., 20, 18-29 (2006).

The Draft Law for Cross-border Insolvency in India

The Model Law was not recommended to be adopted as it is but Draft Part Z ("the Draft Law") is substantially formulated on the core principles of the Model Law. While the Draft Law was imagined in relation to corporate debtors, the Insolvency Law Committee recommended that section 234 and 234 of the IBC be applied for partnerships and individuals when notified for such.[35] Foreign creditors have already been included as creditors and can initiate the insolvency process.[36]

The Draft Law bridges the gap for other situations of cross-border insolvency. It recognizes the need for cooperation and coordination among domestic and foreign courts and representatives. Further, it lays the basis for recognition of foreign proceedings once the reciprocity requirement is met, subsequent to which a foreign representative can participate in the insolvency proceedings at the NCLT.

A. Recognition to Foreign Proceedings

A foreign proceeding refers to a judicial or administrative proceeding taking place in a foreign country in relation to reorganization or liquidation of the corporate debtor whose assets and affairs fall into the jurisdiction of the foreign court adjudicating on the matter. Foreign proceedings are distinguished into main proceedings where the debtor's center of main interest ("COMI") lies and non-main proceedings where an establishment of the debtor is located. This distinction helps identify the control that jurisdiction has on the insolvency resolution process and helps determine the type and extent of the relief which can be granted.

The recognition of main proceedings on the basis of COMI is an important aspect of the Model Law. The Draft Law prescribes that COMI can be presumed to be located where the debtor's registered office is located so long as the debtor has not relocated to a different country three months prior to filing of the application for insolvency.

[35] Insolvency Law Committee, Ministry of Corporate Affairs, *Report of the Insolvency Law Committee on Cross Border Insolvency,* MINISTRY OF CORPORATE AFFAIRS (March 18, 2020, 9:47 PM) https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
[36] Macquarie Bank Limited v Shilpi Cable Technologies Ltd, Civil Appeal No. 15135 of 2017

The NCLT will investigate to determine the location of the debtor's central administration or if the COMI cannot be determined as abovementioned, the NCLT can conduct an assessment as provided by the Central Government through subordinate legislation. The NCLT should determine the COMI against the presumption by the three-month look-back period as advocated by the EU Regulation (Recast)[37], and in consonance with the UNCITRAL Guide to Enactment[38] and international case law.[39]

On the other hand, for the purpose of a foreign non-main proceeding, the Draft Law defined an establishment to be a place of operations where non-transitory economic activity of the debtor is carried out with human means and assets or services. This differs from the US-definition which recognizes an establishment operating over the internet without human means.[40]

B. Mandatory and Non-Mandatory Reliefs

The NCLT has been empowered to grant mandatory relief for main proceedings and non-mandatory relief for non-main proceedings. The relief shall be granted mandatorily or at its discretion for foreign main proceedings and foreign non-main proceedings respectively, by declaring a moratorium on a suit, on execution of a judgment, decree or award, or on an action which purports to affect the assets of the debtor or any legal right or beneficial interest therein, including a security interest created by the debtor under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest At, 2002.

This would be in relation to any action that would transfer, alienate, dispose, recover, etc. the assets or security interests of the debtor. A moratorium imposed hereunder would be similar to section 14 of the IBC.[41] The NCLT may also trust a foreign representative upon their application with the distribution of the debtor's assets, subject to being satisfied that the Indian creditors of the debtor would receive adequate protection.

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[37] Recital 30 of the EU Insolvency Regulation (Recast), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[38] The UNCITRAL Model Law on Cross Border Insolvency and Guide to Enactment and Interpretation, ¶ 143.
[39] UNCITRAL Judicial Perspective, ¶ 81; LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, Look Chan Ho, 616-618 (4th ed. 2017).
[40] United States Bankruptcy Code, 11 U.S.C, §1502(2).
[41] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 14.

C. Concurrent proceedings

The Draft Law provides for concurrent proceedings which necessitates cooperation between courts and representatives. A non-main proceeding under the IBC for debtor's assets in India can be commenced if a foreign main proceeding has commenced elsewhere. If a proceeding has commenced under the IBC when an application for a foreign proceeding is received, the relief granted by the NCLT must be consistent with the IBC.

If the foreign proceeding is determined to be the main proceeding, the mandatory relief cannot be granted by the NCLT. Coordination and cooperation is expected of the NCLT with other jurisdictions if the corporate debtor has more than one foreign proceeding. It may grant, terminate or modify any relief to ensure the coordination among the proceedings.

D. Foreign Representatives

The term "foreign representative" was given a broad purview and includes a person or body authorized in a foreign proceeding to manage the resolution process or to act in a representative capacity for the foreign proceedings even if appointed on an interim basis. Thus, foreign creditors with a claim on the debtor have access to its assets in India even through a foreign proceeding. If the reciprocity requirement with the other concerned country is met, the resolution professional or liquidator would be authorized to act in representation of a proceeding under the IBC.

The Draft Law empowers the Central Government to prescribe a code of conduct applicable to foreign representatives. The contravention of the Draft Law or any rules or regulations made under it would attract a penalty from the Insolvency and Bankruptcy Board of India (IBBI), or any other direction that the IBBI is authorized to grant under the IBC.[42]

[42] Insolvency Law Committee, Ministry of Corporate Affairs, *Report of the Insolvency Law Committee on Cross Border Insolvency,* MINISTRY OF CORPORATE AFFAIRS (April 4, 2020, 4:20 PM) https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

E. Public Policy Exception

Article 6 of the Model Law allows states to refuse to take action covered under Model Law, including recognition or relief, if such action would be contrary to the public policy of the receiving country.[43] Much like USA and UK, the Draft Law intends for a narrow interpretation of the public policy exception.[44] The Insolvency Law Committee recommended inserting provisions similar to section 241(2) of the Companies Act to enable the Central Government to suo moto apply to the NCLT if it is of the opinion that an action would be manifestly contrary to public policy and if the notice has not been issued by the NCLT previously. It will have to be seen how the use of this provision pans out.

F. Reciprocity Requirement

Most notably, the Draft Law incorporates the reciprocity requirement of the Model Law which essentially provides that the applicability of the Draft Law would be towards those countries which have adopted the Model Law and only those countries which the Central Government, in this behalf, notifies. In proposing reciprocity requirement, the rationale of the Insolvency Law Committee was that it would benefit the resolution professional and thus, the creditors of Indian businesses by enhancing their capability to assert claims and seek assistance in other jurisdictions.

However, given that 44 countries have adopted the Model Law with variations, leaving many countries without any such legislation, and the prevalent Recast Regulations for the EU, the reciprocity requirement would negate the efficiency sought by the Draft Law.[45] It does little to ease the extant procedural barriers between countries, if it does not exacerbate the same. In this light, the responsibility to harmonize the country-specific legislations for cross-border insolvency would likely fall on Indian courts.

[43] UNCITRAL Model Law on Cross-Border Insolvency, art. 6, May, 30, 1997, E.99.V.3; Mirrored in the Report of the Insolvency Law Committee on Cross Border Insolvency, Ministry of Corporate Affairs, Government of India, Annexure II, Draft Z, ¶ 53, cl.4.
[44] The UNCITRAL Model Law on Cross Border Insolvency and Guide to Enactment and Interpretation, ¶ 103.
[45] Sean E. Story, *Cross-Border Insolvency: A Comparative Analysis*, ARIZ. J. INTL. & COMP. LAW 21, 1-31 (2015).

Conclusion

The Model Law is the most viable option at this time for India, especially as it encapsulates the major principles commonly emulated by several countries. The increase of cross-border trade and use of technology is a reasonably anticipated. Giving effect to the Draft Law is thus an extremely important step forward at this time and definitely the way forward. Although there are some issues in the Draft Law, these will likely be ironed out over time.

Coordinated proceedings for enterprise groups are in the works and will be a much needed addition to the Draft Law. It would have to be seen how the reciprocity requirement serves the Draft Law but it can be expected that this will be modified or relaxed in time. A network similar to the Judicial Insolvency Network introduced by Singapore would greatly help ease procedural hindrances.

The creditor-friendly nature of the IBC has been affirmed by the Apex Court,[46] and while the rights and remedies of the creditors is vital to strong insolvency laws, the reorganization of the debtor and revival of non-performing assets should be a more significant consideration of the IBC. The option to file for insolvency or a palpable risk of insolvency at an earlier time can be left to the corporate debtor as a preventive measure.

Another concept which may be examined in this respect is that of pre-packaged insolvency optionally, though it does not come without criticism and concern for bias in favour of managers and secured creditors during planning.[47] For the purpose of prioritizing the interest of the debtor, a distinction between bona fide applicants and willful defaulters would need to be created. Lastly, the Draft Law will need to consider the less prevalent, yet existing threat of forum shopping without severely inconveniencing the stakeholders involved in the proceedings.

[46] Innoventive Industries Ltd. v ICICI Bank, (2018) 1 S.C.C. 407.
[47] Wellard, Mark; Walton, Peter, *A Comparative Analysis of Anglo-Australian Pre-packs: Can the Means Be Made to Justify the Ends?*, 21(3) INT. INSOLV. REV., 143-181 (2012).