NLUJ Law Review

Varnika Taya, *Cross-Border Insolvency: Analyzing the enforceability of UNCITRAL Model Law in India*, 8(2) NLUJ L. REV. 52 (2022).

CROSS-BORDER INSOLVENCY: ANALYZING THE ENFORCEABILITY OF UNCITRAL MODEL LAW IN INDIA

*~Varnika Taya**

ABSTRACT

The increase in investments and trade amongst corporate entities is accompanied by substantial growth in their creditors and debtors as well. As a rule of nature, these widespread businesses timely bear risks and failures, leading up to insolvencies in the worst of cases. The situation becomes all the more complex with the involvement of different sovereign states. UNCITRAL has adopted the Model Law on Cross Border Insolvency, 1997 to effectively handle such cases of cross-border insolvency for international entities, with many a country already interpreting and adopting it into their domestic legal systems. In India as well, the Insolvency Law Committee has submitted a report in October 2018 recommending the incorporation of the Model Law on Cross Border Insolvency as Draft Part Z into the Insolvency and Bankruptcy Code, 2016. With the Draft Part Z still in limbo, there have been speculations by different stakeholders on its viability in the Indian context, consequentially giving rise to the need for research on this issue. This paper is, thus, aimed to study the Model Law on Cross Border Insolvency in the form of Draft Part Z as recommended

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by the Insolvency Law Committee, and analyze its enforceability under the Indian legal regime.

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I. INTRODUCTION

The current times have conferred increasing recognition upon the concept of cross-border insolvency, especially in the context of rising transnational commercial transactions.[1] With the gradual increase in the number of corporate entities establishing bases in different jurisdictions, the foundations of some of the most complex network of entities is being laid down. While this wide web of presence is certainly vital for efficiency and quality of business, the transnational engagement of corporate entities is seen to further contribute to the compounding of insolvency proceedings during entities' financial distress.

Generally, states are regulated by their domestic insolvency legal framework, knowledge of which is often not possessed by the foreign stakeholders. While some states follow a similar legal process, foreign creditors have more difficulty in managing the proceedings initiated in countries with legal systems fundamentally different from their own. Under such circumstances, the general principles of private international law no longer suffice in settling the disputes between involved jurisdictions, thereby materially affecting the insolvency proceedings and the interests of the parties.

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[1] Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, 45 VIKALPA: THE J. FOR DECISION MAKERS, 104-114 (2020). ("**Ishita Das**")

A. UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law [*hereinafter* "**UNCITRAL**"] Model Law on Cross Border Insolvency, 1997 [*hereinafter* "**UNCITRAL Model Law**" or "**Model Law**"] addresses this issue and attempts to provide a uniform legal framework to deal with insolvency proceedings beyond the State boundaries. It aims to facilitate a cost-effective, fair, and efficient manner of managing transnational insolvency; subsequently filling a very evident void for a uniform legal framework to comprehensively deal with insolvency proceedings sprawling across States. Respecting the due differences between domestic laws, the Model Law emphasises encouragement and authorization of coordination and cooperation between States, rather than hauling for a blanket unification of their respective laws on cross-border insolvency. It refrains from establishing any mandatory mechanism and seeks to act as mere legislative guidance on the matter of cross-border insolvency. Since it does not entail a mandatory unification of domestic laws, the Model Law is adopted by different States albeit with subjection to modifications and alternations as deemed appropriate.[2]

B. INDIAN LEGAL REGIME ON CROSS-BORDER INSOLVENCY

In India, the laws relating to reorganisation and insolvency resolution of corporate persons are covered under the Insolvency and Bankruptcy Code, 2016 [*hereinafter* "**Code**"], wherein the aspect of cross-

[2] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at ¶ 20, U.N. Sales No. E.14.V.2 (2014). ("**UNCITRAL**").

border insolvency is provided under Section 234 and 235 of the Code.[3] These provisions dealing with "*Agreements with foreign countries*" and "*Letter of request to a country outside India in certain cases*", however, are currently proven less than efficient on the issue.[4] The requirement of reciprocity and a case-to-case basis approach for their application is perceived to defeat the very purpose of legislation in regard to cross-border insolvency and is observed leading to unnecessary complications witnessed in the recent matters of *Jet Airways (India) Ltd. v. State Bank of India & Ors.*[5] and *State Bank of India v. Videocon Industries Ltd. & Ors.*[6]

C. INSOLVENCY LAW COMMITTEE REPORT – DRAFT PART Z

Considering the given background, the Insolvency Law Committee [*hereinafter* "**Insolvency Law Committee**" or "**Committee**"] has, in its October 2018 report, recommended, *inter alia*, the inclusion of Draft Part Z [*hereinafter* "**Part Z"** or "**Draft**"], a set of provisions wholly dedicated to the regulation of cross-border insolvency proceedings.[7] This Draft Part Z, largely inspired from the Model Law, is introduced by the Committee with certain modifications in the Indian context, and is interpreted as a

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[3] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §§ 234-235 (India).
[4] *Id.*
[5] Jet Airways (India) Ltd. v. State Bank of India & Ors., [2019] 156 SCL 642 ("**Jet Airways**").
[6] State Bank of India v. Videocon Industries Ltd. & Ors., (2019) SCC OnLine NCLAT 964.
[7] INSOLVENCY LAW COMMITTEE, REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, (Ministry of Corporate Affairs, Government of India 2018), https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf ("**Insolvency Law Committee**").

momentous step reflecting India's approach towards global legal regime on cross-border insolvency.

Given the rapid growth in transnational business activities followed with an equally strong development in the instances of insolvency, the Draft, following the Model Law, is sought indispensable for arming the Indian legal regime for prospective cross-border insolvency proceedings. However, on the same plane, there still prevail certain looming apprehensions around its inspiration, which call upon the UNCITRAL legislative text for its inefficacy and poor adoption rate.

In this regard, it thus becomes imperative to study the Model Law in the form of Draft Part Z and analyse its enforceability in India, so as to facilitate the formulation of suggestions, if any, to enhance the efficiency and comprehensiveness of the concerned Draft.

II. UNCITRAL MODEL LAW

Conceived at the Congress of the United Nations Commission on International Trade Law, through a material proposal made to the UNCITRAL for work in the "*field of international bankruptcy or insolvency*",[8] the UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, aims to "*provide effective mechanisms for dealing with cases of cross-border insolvency*".

[8] Proceedings of the Congress of the United Nations Commission on International Trade Law, Uniform Commercial Law in the Twenty-First Century, 158 (1992), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Colloquia/uniform_commercial_law_congress_1992_e.pdf (last visited Nov 13, 2021).

For the Model Law, cross-border insolvency is "*one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place*".[9]

The Model Law propounds four main elements in relation to cross-border insolvency. They are: (i) access, (ii) recognition, (iii) relief (assistance), and (iii) cooperation and coordination. These elements are exhibited in the five chapters of the Model Law, namely, (i) General Provisions; (ii) Access of Foreign Representatives and Creditors in the State; (iii) Recognition of a Foreign Proceeding and Relief; (iv) Cooperation with Foreign Courts and Foreign Representatives; and, (v) Concurrent Proceedings.[10]

Currently, the Model Law is adopted by forty-nine States in fifty-three jurisdictions [*hereinafter* "**States**"] with Brazil and Myanmar as the latest additions in the year 2020. The enacting States of the Model Law represent an interesting mix with developed countries (such as, the United States of America [*hereinafter* "**USA**" or "**US**"], United Kingdom [*hereinafter* "**UK**"] and Canada) and developing countries (such as, Uganda, Chile and Chad) adopting it alike. However, the Model Law still awaits a positive response from major economies and some of the member states of BRICS (Brazil, Russia, India, China, and South Africa), the European Union, and ASEAN (Association of Southeast Asian Nations); the absence of which appears to undermine its utility. Even out of ones accepting the

[9] UNCITRAL, *supra* note 2.
[10] UNCITRAL, *supra* note 2, at ¶ 24.

UNCITRAL Model Law, it is noted that the Model Law instead of being adopted verbatim, is subjected by the States to "*tailor-made changes to foster their economic interests which may be difficult to comply at bi-lateral level.*"[11]

Understandably, UNCITRAL Model Law, like other international instruments, though presents a rather suitable framework, too bears certain drawbacks. Its concerns are observed to range from skewed relation between flexibility and uniformity of framework, unfettered powers of foreign representatives, discretion conferred upon States, and issue of conflict of laws.

III. CROSS-BORDER INSOLVENCY IN INDIA

Cross-border insolvency has been the centre of reorganization proceedings of corporate entities for long with the first recorded Indian case in 1908 in *Re P. Macfadyen & Company Ex parte Vizianagaram Company Limited.*[12] The matter of cross-border insolvency has since been raised for discussions. In 2000, the High Level Committee on Law relating to Insolvency of Companies was formed under the chairmanship of Justice V. Balakrishna Eradi;[13] in 2001, the Advisory Group on Bankruptcy Law was formed under the chairmanship of Dr. N. L. Mitra;[14]

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[11] Himanshu Handa, *Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India*, 1(5) INT'L J. L., MGMT. & HUMAN., 1, 8 (2018).

[12] Re P. Macfadyen & Company Ex parte Vizianagaram Company Limited, [1908] 1 KB 67.

[13] Ishita Das*, supra* note 1.

[14] Report of the High-Level Committee on Law relating to the Insolvency and Winding up of Companies, MINISTRY OF LAW, JUSTICE & COMPANY AFFAIRS, (2000), http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%

and in 2014, the Bankruptcy Law Reforms Committee was formed under the chairmanship of Dr. T. K. Viswanathan.[15]

Indian legislative approach thus has progressed with each round of recommendation as mentioned above, subsequently paving way for Draft Part Z by the Insolvency Law Committee.

A. PREVAILING LEGAL REGIME ON CROSS-BORDER INSOLVENCY

Currently, the aspect of cross-border insolvency is covered under two provisions of the Code, that is, Section 234 and 235, which were notified by Ministry of Corporate Affairs on April 1, 2017,[16] only for corporate persons as corporate debtors and are not applicable to partnerships and individuals at the moment.[17]

The marginal note of Section 234[18] reads, "*Agreements with foreign countries*", wherein it allows the Central Government to enter into an agreement with any foreign government for enforcement of the Code. Furthermore, the provision authorizes the Central Government to notify in the Official Gazette the conditions to which the application of the Code on "*the assets or property of a corporate debtor or a debtor including a personal guarantor*

20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf (last visited Nov 18, 2021).

[15] Morshed Mannan, *Are Bangladesh, India and Pakistan Ready to Adopt the UNCITRAL Model Law on Cross-Border Insolvency?*, 25 INT'L INSOLVENCY REV., 195, 224 (2016).

[16] *See* Notification, S.O. 1005(E), MINISTRY OF CORPORATE AFFAIRS (March 30, 2017), https://ibbi.gov.in//webadmin/pdf/legalframwork/2017/Jul/1Apr17_Provisions_of_Vol_Liquidation_IU_and_Cross_Border_Insolvency_came_into_force.pdf (last visited Nov 11, 2021).

[17] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, Preamble (India).

[18] *Id.* § 234.

of a corporate debtor" situated in a foreign country shall be subjected to. The provision therein, thus, stresses on the aspect of reciprocity. It requires an agreement between the Central Government and the foreign government for the enforcement of the Code, which in individual cases may be a long-drawn affair. The possible non-uniformity in the terms of the individual agreements stands to give rise to uncertain implementation with multiple proceedings involving countries falling back on their individual agreements with India to raise their claims.

Similarly, Section 235[19] deals with, "*Letter of request to a country outside India in certain cases*". This provision allows a Resolution Professional, liquidator or bankruptcy trustee to apply to National Company Law Tribunal [*hereinafter* "**NCLT**" or "**Tribunal**"], in the course of a Corporate Insolvency Resolution Process, liquidation or bankruptcy respectively, for the requirement of evidence or action in relation to "*the assets of the corporate debtor or debtor including a personal guarantor of a corporate debtor*" – if in their opinion, the concerned assets are situated in a foreign country with which reciprocal arrangements have been entered into under Section 234. The provision further enables the NCLT to accept or refuse the issuance of letter of request to a court or a competent authority depending on their satisfaction or dissatisfaction with the requirement of such evidence or action in the proceedings. Following Section 234, this provision, too, stresses the aspect of reciprocity. It does not mention any set mechanism of cooperation between the authorities, the absence of which may lead to

[19] *Id.* § 235.

confusion and disparity as regards the individual obligations and process. The provision requires communication of 'letters of request for cooperation' between the authorities of different countries involving the role of diplomatic relations which if not addressed effectively, stands to cause further delay and subsequent detriment of the interests of the parties involved.

It is noted that none of the provisions of the Code deals with foreign creditors and their rights to apply to NCLT for the initiation of the Corporate Insolvency Resolution Process. Although the Hon'ble Supreme Court of India in *Macquarie Bank Limited v. Shilpi Cable Technologies Limited,*[20] confers upon the foreign creditors the same rights as available to the domestic creditors for initiation and participation in insolvency proceedings, the Code, in this regard, does not provide any recourse.

B. JUDICIAL APPROACH ON CROSS-BORDER INSOLVENCY

Given the legislative inadequacies on the issue, the instances of cross-border insolvency have been dealt with in the recent past by the judiciary taking cognizance of individual matter. This judicial approach is well evident in this regard in recent cases.

1) Jet Airways

Jet Airways (India) Limited [*hereinafter* "**Jet Airways**"] is the first Indian company to have undergone the proceedings for cross-border insolvency in 2019, wherein an application under Section 7 of the Code was

[20] Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674.

filed by the State Bank of India [*hereinafter* "**SBI**"] in NCLT Mumbai, following which the Bench was apprised of a Dutch bankruptcy petition filed in the Noord-Holland District Court of Netherlands against Jet Airways by two European creditors for claims including a request to seize one of the airline's aircrafts parked at Schiphol airport in Amsterdam.

Subsequently, an application was filed by the Dutch administrator before NCLT Mumbai for recognition of Dutch insolvency proceedings and withholding of Indian proceedings, stating that insolvency proceedings in a competent Dutch court had already commenced and continuance of two parallel proceedings in different jurisdictions stood to vitiate the restructuring process of the entity and have an adverse impact on stakeholders.

On rejection of the recognition application, an appeal was then filed by the Dutch administrator before the National Company Law Appellate Tribunal [*hereinafter* "**NCLAT**" or "**Appellate Tribunal**"], where the impugned order was set aside by the Appellate Tribunal on the assurance that the Dutch administrator would not alienate any offshore assets of Jet Airways. The administrator was further empowered to cooperate with the Insolvency Professional appointed in India, and was encouraged to participate in the meetings of the Committee of Creditors (without any voting rights) for the prevention of any potential overlap of powers.[21]

A cross-border insolvency protocol was then entered into by both, the Insolvency Professional and the Dutch administrator on behalf of their

[21] Jet Airways, *supra* note 5.

respective side of creditors. This protocol was formulated on the principles of the Model Law, and recognised India as the centre of main interests [*hereinafter* "**COMI**"] and the Dutch proceedings as foreign non-main proceedings.[22]

Herein, though following the objectives of Model Law, a "*balance between the relief granted to the foreign representatives and the interests of those affected by such relief*" was established by the NCLAT; the case has certainly underlined the need to incorporate an effective cross-border insolvency framework in the existing Indian law.

2) <u>Videocon Industries (Videocon Group)</u>

In August 2019, the principle of 'substantial consolidation' was recognized by NCLT Mumbai in insolvency proceedings against the Videocon Industries [*hereinafter* "**Videocon**"], wherein the Tribunal allowed consolidation of 13 out of 15 group companies of Videocon. It was the first time when consolidation of group companies for insolvency proceedings was allowed for maximisation of the asset value of the debtor.[23]

In December 2017, an insolvency application was filed by SBI against Videocon at NCLT Mumbai. Once admitted, 'substantial consolidation' of 15 group companies of Videocon was applied for by SBI-

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[22] Varsha Aithala, *Report of the Cross-Border Insolvency Committee, June 2020: A Primer*, THE NLS BLOG (Jan. 17, 2022), https://www.nls.ac.in/blog/report-of-the-cross-border-insolvency-committee-june-2020-a-primer/ (last visited Apr 23, 2022).

[23] State Bank of India v. Videocon Industries Limited and Others, (2019) CP (IB)-02/MB/2018.

led consortium to cover the entities where the consortium members were common creditors. Acknowledging the absence of an express provision in the Code, the matter was decided by the Tribunal in favour of the consortium through the exercise of its equity jurisdiction.[24]

Notably, the second round of group insolvency of Videocon with 4 foreign-based companies was again allowed by the Tribunal in February 2020.[25]

The case has reflected the requirement of NCLT to step in for the legislature and decide the matter basis equity rather than law. This instance, too, like the one above, has sought attention to the concerns surrounding the necessity of coordination and uniformity; and expressed the urgent need for legislation governing the same.

3) SEL Manufacturing Company Limited

Chapter 15 of Title 11 of the US Code [*hereinafter* "**US Code**"] deals with the recognition of foreign insolvency proceedings by US bankruptcy courts. US had adopted the UNCITRAL Model Law in 2005 for the efficient administration of transnational insolvencies by formulating a framework that completely eliminates the possibility of initiating separate insolvency proceedings in different jurisdictions.

Pursuant to the current US cross-border insolvency mechanism, as devised based on Model Law, an Indian insolvency proceeding in the case

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[24] *See id.*

[25] State Bank of India v. Videocon Industries Limited and Others, (2020) CP (IB)-02/MB/2018.

of *State Bank of India v. SEL Manufacturing Company Limited*[26] was, for the first time in November 2019, recognized as 'foreign main proceeding' by US Bankruptcy Court under Section 1502(4) of the US Code.

The Indian insolvency proceedings were recognized by the US Bankruptcy Court as not contrary to the US public policy. It was further highlighted that entitlement of the foreign representative and debtor to all reliefs in conformity of Section 1520 was relevant to ensure "*maximisation of asset value without recklessly disregarding interests of the creditors.*"[27]

IV. DRAFT PART Z

The adoption of UNCITRAL Model Law along with necessary modifications has been recommended by the Insolvency Law Committee in its Report dated October 2018 [*hereinafter* "**Report**"].[28]

Basis a detailed study of the provisions of the Model Law, and multiple rounds of deliberation, the Committee has recommended for the adoption of the UNCITRAL Model Law with necessary modifications.

Pursuant to its recommendations, the Committee has prepared a draft, also known as Draft Part Z, which has been annexed along with the Report as its Annexure II.

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[26] State Bank of India v. SEL Manufacturing Company Limited, (2021) CP (IB) No. 114/Chd/Pb/2017 .

[27] Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXFORD J. L. STUD., 97, 131 (2014).

[28] Insolvency Law Committee**,** *supra* note 7.

Following the pattern of the Model Law, Draft Part Z is divided into six chapters, namely: (i) General Provisions; (ii) Access of Foreign Representatives and Creditors to the Adjudicating Authority; (iii) Recognition of a Foreign Proceeding and Relief; (iv) Cooperation with Foreign Courts and Foreign Representatives; (v) Concurrent Proceedings; and (vi) Miscellaneous.

Herein, Chapter I covers the general provisions of Part Z. Chapter II deals with foreign representatives and foreign creditors seeking assistance through access to the insolvency proceedings held in the State and aims to put them on the same pedestal as the local creditors. Chapter III covers the recognitional aspects of the foreign proceedings followed with reliefs that are accepted so as to save time and resources. Chapter IV empowers the NCLT and foreign representatives or foreign courts to cooperate and communicate with each other. Chapter V deals with concurrent proceedings, that is, insolvency proceedings that exist simultaneously as a local proceeding and a foreign proceeding or as multiple foreign proceedings. Chapter VI covers the remaining miscellaneous aspects of Part Z with the Draft finishing with a Schedule to the end. This Schedule emanates from Clause 1(4) of the Draft Part Z, wherein Part A enumerates the "*countries that have adopted the UNCITRAL Model Law*" and Part B enlists the "*countries with which agreements have been entered under Clause 1(5) of the Draft*".[29]

[29] *Id.* ¶ 69 (Part B, Schedule).

V. ANALYSIS OF DRAFT PART Z

Draft Part Z has been recommended by the Insolvency Law Committee to effectively deal with the issue of cross-border insolvency. The Draft has drawn its origin from the UNCITRAL Model Law which is a comprehensive framework on this aspect in the current times, however, the Draft still bears a few attention-worthy loopholes. These issues relate to – (i) the determination of COMI, (ii) the scope of establishment, (iii) the inclusion of public policy exception, (iv) inclusion of a provision for reciprocity, and (v) omission of provision for interim relief.

A. DETERMINATION OF COMI

A foreign main proceeding is defined under the Model Law[30] and the Draft[31] as a 'foreign proceeding conducted in the jurisdiction where COMI of the corporate debtor lies'. Recognition of a foreign proceeding as a foreign main proceeding empowers the NCLT to grant compulsory reliefs to the creditors and other interested parties in the form of moratorium prohibiting action as enumerated in Clause 17(1) of the Draft. Ascertainment of the COMI thus becomes important to determine a foreign main proceeding for subsequent actions.

Clause 14 of the Draft (corresponding to Article 16 of the Model Law) facilitates this ascertainment. It provides for a rebuttable presumption

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[30] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 2(b), U.N. Sales No. E.14.V.2 (2014).

[31] Insolvency Law Committee, *supra* note 7 at 61 (Clause 2(e)).

presuming the corporate debtor's registered office to be the COMI. This presumption, however, is applicable only if the registered office has not been moved to another country in a three-month window prior to the filing of the insolvency application. Herein, the NCLT is mandated to assess the corporate debtor's central place of administration and ensure its determinability by third parties. In case of any issue in the assessment of the COMI basis the abovementioned factors, NCLT is required to conduct the evaluation following the Central Government's prescribed factors.

1) Issues in ascertainment of COMI

It is observed that the factors so provided by the Central Government in the subordinate legislation are only indicative and non-exhaustive, conferring freedom upon the NCLT to consider other factors as well.[32]

Though this flexible approach is rightly adopted to avoid the "*exclusionary effect of a test based on a single factor*", however, the lack of any objective factors incidentally creates confusion regarding the ascertainment of the COMI and further leads to uncertain results.[33]

Registered office versus a place of central administration

Since the Model Law does not establish any mandatory mechanism and provides only legislative guidance to deal with cross-border insolvency, the States adopting it have the discretion to mould the provisions depending on their individual requirements. This results in non-uniformity

[32] *Id.* at 33 (Footnote 87).
[33] *Id.*

regarding a number of aspects, including the weightage of the rebuttable presumption about ascertainment of the registered office of the corporate debtor as the COMI.

It is observed that there appear two different European approaches on this issue – *first*, that strictly follows the presumption; and *second*, advocates for the factor of central administration in ascertaining the COMI.

Herein, the first approach firmly enforces the presumption that COMI of the corporate debtor lies in the place of its registered office. Although it acknowledges the rebuttable nature of the presumption, it does so reluctantly.[34] The application of this approach has been witnessed in a number of cases including *Me Hertsens v. SARL Bati-France*[35] and *Voorlopige Bewindvoerders van de SPRL C v. SPRL C*,[36] where it is observed that the courts hesitate in rebutting the presumption laid down under Article 16 of the Model Law (corresponding to Clause 14 of the Draft), unless the evidence shows the "*statutory seat to be wholly fictitious*".[37] Under this approach, courts tend to rebut the presumption only in instances of 'shell' or 'letterbox' companies that have no other presence in the concerned state apart from the fact of their incorporation in that jurisdiction. The second approach

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[34] *See* Me Hertsens v. SARL Bati-France, (2004) TBH, 811 and Voorlopige Bewindvoerders van de SPRL C v. SPRL C, (2004) TBH, 70.
[35] Me Hertsens v. SARL Bati-France, (2004) TBH, 811.
[36] Voorlopige Bewindvoerders van de SPRL C v. SPRL C, (2004) TBH, 70.
[37] Paul L.C Torremans, *Coming to terms with the COMI concept in the European Insolvency Regulation*, IN INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES 124 (Ashgate, 1st ed. 2008).

gives preference to the place of central administration over the registered office for ascertainment of the COMI, and thus is more open to rebuttal of the presumption. According to it, COMI of a corporate debtor lies in the place of the regular administration of debtor's interests and is ascertainable by other stakeholders as well.[38]

Place of central administration is specifically stated even in the UNCITRAL Guide to Enactment and Interpretation [*hereinafter* "**UNCITRAL Enactment Guide**"][39] as a relevant factor for ascertainment of COMI and is further reflected in Clause 14(3) of the Draft.

Application of this approach is seen in the landmark case of *in Re Eurofood IFSC Limited*,[40] where the European Court of Justice underlined the need to ensure foreseeability, certainty and objectivity in the ascertainment of COMI, observing the concerned presumption to be rebutted if there exists "*compelling objectives and ascertainable factors*" proving the contrary.

A similar test is also laid down in *Interdil Srl (in liquidation) v. Fallimento Interedil Srl,*[41] which states:

> "*Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a member State other than that in which the registered office is situated cannot be*

[38] *Id.*
[39] UNCITRAL, *supra* note 2, at ¶ 145.
[40] Re Case C-341/04, Eurofood IFSC Limited, 2006 E.C.R. I-3813.
[41] Interdil Srl v Fallimento Interedil Srl, 2011 E.C.R. I-9915.

> *regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors make it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member State.*"

Owing to this judgment, the legal position is considered to be more or less settled in Europe with the observation that if there are objective factors which are relevant for rebuttal of the presumption and are ascertainable by third parties, the presumption for registered office as COMI shall be rebutted. It is further held that in such a case, "*the onus of proof shall be borne by the person seeking to rebut the presumption*".[42]

Mala fide or malicious relocation of registered office

Article 16(3) of the Model Law, and Clause 14(1) of the Draft follow the rebuttable presumption holding the registered office of the corporate debtor to be its COMI.

However, this presumption, originally included for efficiency and convenience of all the parties, is often maliciously used by many corporate debtors to gain unjust benefit in the insolvency proceedings by way of forum shopping. The Model Law keeps quiet on this issue and fails to provide any statutory provision for its prevention. Although UNCITRAL Enactment Guide states its concern on "*movement of centre of main interests*",

[42] Re Stanford International Bank Limited, [2010] EWCA (Civ) 137 [2010] WLR 941.

however, it too avoids proper redressal by placing the onus on courts to detect such abuse.[43]

The Insolvency Law Committee acknowledges this issue and learning from the Model Law, has provided for a three-month long 'look back period' in the Draft for the NCLT to verify if the registered office has been relocated by the corporate debtor maliciously.[44] In case of any such relocation within the period of three months prior to the proceeding, the interpretation of the Draft is observed to lead to non-application of said presumption with conferment upon NCLT of the power (as mentioned in Clause 14(3) and 14(4)) to determine the COMI basis prescribed factors.

B. SCOPE OF ESTABLISHMENT

A foreign insolvency proceeding is recognized as a foreign non-main proceeding if it is "*a foreign proceeding, other than a foreign main proceeding, taking place in a country where the corporate debtor has an establishment*."[45] Thus, ascertainment of establishment is required for determination of a foreign non-main proceeding.

An establishment is defined under Clause 2(c) of the Draft as "*any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services*." This definition is taken from the

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[43] UNCITRAL, *supra* note 2, at ¶ 148.
[44] Insolvency Law Committee, *supra* note 7 at 58 (Clause 14(2)).
[45] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 2(c) and 2(f), U.N. Sales No. E.14.V.2 (2014).

corresponding Article 2(f) of the Model Law, only replacing the term 'goods' with the term 'assets'.

1) Elements of an establishment

It is observed that the definition of establishment as mentioned in both the Draft and the Model Law consist of two crucial elements of an establishment, namely, "*non-transitory economic activity*" and "*with human means and assets or services*".

According to the Report of the Insolvency Law Committee, the expression "*with human means*" has the potential to exclude from the scope of the definition those corporate debtors that may have a presence in a jurisdiction only through the internet. This expression, as stated by the Committee, curtails the extent of an establishment, and restricts it to debtors carrying activities only with human means.[46] Despite this observation, the Committee has retained the expression "*with human means*" considering the diverse range of international precedents on the issue which include jurisdictions like Singapore[47] and the UK[48] retaining the expression in their respective legislations, and countries like the USA[49] omitting it. The lack of substantial growth of the jurisprudence on interpretation of the term 'establishment' also contributes to the Committee's approach on this aspect as it discourages the omission of the concerned expression.

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[46] Insolvency Law Committee, *supra* note 7 at 20 ¶ 2.4.
[47] Insolvency, Restructuring and Dissolution Act, 2018, Third Schedule, Article 2(d). (Singapore).
[48] The Cross-Border Insolvency Regulations, 2006, Schedule 1, Article 2(e). (UK).
[49] US Code (2018) Chapter 15, Title 11, Section 1502(2) (USA).

2) <u>International jurisprudence on the definition of establishment</u>

As noted above, though there exist no major case-laws on the scope of the term 'establishment', there exist certain significant English and American judgments that lay down the criteria to be followed for ascertainment of a particular place as an establishment.

In this line, the English judiciary supports the interpretation of the term 'goods' as 'assets' so as to cover both intangible property and land.[50] It was observed in the decision of *Re Office Metro*,[51] where the court enumerated certain vital elements of concept while defining establishment as, "*(i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there*".

Similarly, in the case of *Olympic Airways SA*,[52] the England and Wales Court of Appeal held that the answer for establishment depends on "*whether the debtor has a 'place of operations' where 'non-transitory' economic activity is carried on with 'human means and goods', that is, with human and physical operations.*" The Court further clarified that, "*merely having a branch office or a place where the debtor is located is insufficient to classify an asset as an 'establishment'.*"

Basis above, on the question of recognition of a foreign non-main proceeding of a purely internet-based company, the English adjudicating

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[50] NEIL FRANCIS HANNAN, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW, 50 (Springer, 1st ed. 2017).
[51] Re Trillium (Nelson) Properties Ltd v Office Metro Limited [2012] EWHC 1191 (Ch).
[52] The Tr. of the Olympic Airline SA Pension & Life Ins. Scheme v. Olympic Airline SA [2013] EWCA (Civ) 643.

authorities are seen to be more inclined to not classify it as an establishment if the same lacks human resources factor.[53]

The US law on this issue paints a slightly different picture. As noted above, the US Code defines 'establishment' as "*any place of operations where the debtor carries out a non-transitory economic activity*".[54] Unlike the Model Law, it does not include the expression, "*with human means and goods or services*". The omission of this expression gives a wider connotation to the concept which has been reaffirmed by the US judiciary.

It has been noted in *Lavie v. Ran (In Re Ran)*,[55] that, "*the United States Congress has lowered the threshold to demonstrate the existence of an establishment of the debtor by deleting the phrase 'with human means and goods and services'*."

Thus, the US law has adopted a rather broad approach in defining 'establishment' so as to cover even those non-transitory economic activities that are conducted with non-human means and assets or services.

Given the jurisprudence, it is observed that the Insolvency Law Committee's decision to replace the term 'goods' (as given in the Model Law) with the term 'assets' exemplifies its foresightedness as the latter term being broader than the former one covers both intangible property and

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[53] RECOMMENDATIONS OF THE COMMITTEE ON ADOPTION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, MINISTRY OF CORPORATE AFFAIRS REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, at ¶ 2.4, https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf (last visited Nov 12, 2021) ("**COMMITTEE RECOMMENDATIONS**").
[54] US Code (2018) Chapter 15, Title 11, Section 1502(2) (USA).
[55] Lavie v. Ran (Re Ran), 607 F 3d 1017, 1028 (5th Cir, 2010).

land. Further, it is noted that the Committee's observation on the definition of term 'establishment' also stands proved; while the expression "*non-transitory economic activity*" defines the scope of an establishment, the expression "*with human means and assets or services*" works to limit it. However, it is simultaneously opined that the Committee's decision to retain the latter expression definitely results in a restrictive definition, as earlier apprehended by it, and there is a consequent need to expand the scope of the same by omitting the concerned expression of "*with human means and assets or services*".

Inclusion of public policy exception

Clause 4 of the Draft (corresponding to Article 6 of the Model Law) begins with a non-obstante clause and empowers the NCLT to refuse an action authorized under Part Z if it is opined that refusal of such an action is required on the grounds of it being manifestly contrary to the public policy of the country.

The term 'public policy' is not defined in the Draft or the Model Law as such, primarily because the concept of public policy is based in the domestic laws of a state and is likely to differ from jurisdiction to jurisdiction.

Public policy is interpreted by the States depending on the context of application.[56] It is mainly categorized under two instances – one that is

[56] UNCITRAL, *supra* note 2, at ¶ 30.

used in domestic affairs, and the other that is applied for recognition of foreign laws and international cooperation.

UNCITRAL Enactment Guide acknowledges this distinction between the two facets of the notion of public policy and notes that the term 'public policy' is interpreted more restrictively in international context as compared to the domestic one.[57]

The UNCITRAL Enactment Guide further rationalizes the existence of the term 'manifestly' in the definition of public policy in context of the Model Law. It states that the inclusion of the term 'manifestly' as a qualifier of public policy is done to "*emphasize that public policy exceptions should be interpreted restrictively and that Article 6 may be invoked only in exceptional circumstances concerning matters of fundamental importance to the enacting State.*"[58]

The public policy exception as under Article 6 of the Model Law is observed to be implemented by the States depending on their respective requirements. Majorly this exception is enforced in following three ways:[59]

(i) Adopting the language of Article 6 of the Model Law;[60]

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[57] *Id.* ¶ 103.
[58] *Id.* ¶ 104.
[59] Keith D. Yamauchi, *Should reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?*, 16 INT'L INSOLVENCY REV., 145-179 (2007).
[60] (Examples – Australia, England and now possibly India).

(ii) enacting a version of Article 6 that omitted the word 'manifestly' in their public policy exception;[61] or,

(iii) adopting a different, yet related, provision.[62]

3) Status of public policy exception in India

As noted above, Clause 4(1) begins with a non-obstante clause, that is, it holds Clause 4 applicable "*notwithstanding anything contained in Part Z*". The concerned sub-clause confers discretion upon the NCLT for refusal of any action so authorized by Part Z, if its enforcement, in the opinion of the NCLT, is "*manifestly contrary to the public policy*". Clause 4(2) then mandates the serving of a notice by the NCLT to the Central Government for the invitation of submissions before passing of any orders under Clause 4(1). Clause 4(3) provides for *suo moto* initiation by the Central Government and authorizes the Central Government to apply in itself to the NCLT if, in the opinion of the Government, enforcement of any action authorized by Part Z is "*manifestly contrary to the public policy*".

It is noted that following the Model Law, the term 'public policy' is not defined by the Draft, leaving it up to the NCLT to interpret the same on a case-to-case basis.

It observed that a wide scope of discretion is conferred upon the adjudicating authorities to give a way for efficacious administration of the case at hand; however, at the same time the provision is also made prone

[61] (Examples – Canada, Greece, Mexico).
[62] (Examples – Cayman Islands, Japan, Poland).

to inconsistency, uncertainty and unpredictability leading up to a state of utter confusion by the same free-hand approach.

Due to the very nascent stage of insolvency law in the Indian legal system, and the proposed Draft Part Z waiting to be formally passed by the legislature, there exists an impending dearth of available Indian jurisprudence on application of public policy exception in recognition and enforcement of foreign insolvency proceedings, for which it cannot be predicted as to how the exception of public policy would be interpreted by Indian courts in this field in time to come.

The lesson has already been learnt with the witness accounts of diverse and varied interpretations of public policy exception put forth by the Indian judiciary in arbitration law which has more often than not proven to be detrimental to the jurisprudential growth of the field, as they have required subsequent statutory amendments and judicial precedents for reversal of such varying interpretations and narrowing down of the scope of the exception.[63]

Given the context, one infers that it may not be as effective a strategy to leave the provision ambiguous with wide scope for its interpretation as it may open floodgates for varying and often contradicting range of judgments on the exception. Thus, there may be a clear

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[63] Manisha Singh & Varun Sharma, *India: Enforcement of Foreign Judgments Comparative Guide*, MONDAQ, (June 3, 2021), https://www.mondaq.com/india/litigation-mediation-arbitration/989134/enforcement-of-foreign-judgments-comparative-guide (last visited Nov 13, 2021).

requirement in Draft Part Z for better legislative input further strengthening the language of the provision so as to achieve a higher clarity.

Inclusion of provision for reciprocity

Reciprocity is a vital element in international relations. It arises from the notion of interdependency and provides that States should respond with same privileges, advantages or assistance to maintain diplomatic or commercial relations.

Reciprocity is largely used in two major forms, that is, substantive reciprocity and legislative reciprocity.[64]

Clause 1(4) of the Draft lays down legislative reciprocity as a prerequisite for applicability of Part Z on foreign states. It provides for the Part Z to be applicable only to (i) those countries that have adopted the Model Law and are enumerated in Part A of the Schedule, and (ii) any other country that is notified by the Central Government and is enumerated in Part B of the Schedule.

4) International stand on reciprocity

Model Law gives way for reciprocity. It is not a binding legal instrument[65] and thus, confers upon the States the freedom to adopt the

[64] COMMITTEE RECOMMENDATIONS, *Supra* note 53.
[65] Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission on International Trade Law UNCITRAL.UN.ORG, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Nov 20, 2021).

Model Law with provisions of legislative reciprocity or without any such requirement.[66]

The UNCITRAL Working Group V: Insolvency Law [*hereinafter* "**UNCITRAL Working Group**"], that worked on consideration of the formulation of a Model Law or a Draft Convention to deal with cross-border insolvency issues, has observed that complete rejection of the reciprocity requirement has never been contemplated by the UNCITRAL Working Group. The same is further evident in the form of formulation of a "Model Law" instead of a "Draft Convention", thereby conferring freedom upon the countries to incorporate or avoid the inclusion of any provisions for the requirement of reciprocity.[67]

It is observed that the global opinion is divided on the requirement of reciprocity provisions. Where on the one hand States such as Romania, Mexico and South Africa have incorporated provisions for reciprocity in their version of the Model Law, jurisdictions such as the USA, UK, Poland and Montenegro have elected to omit it. [68]

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[66] RECOMMENDATIONS OF THE COMMITTEE ON ADOPTION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, MINISTRY OF CORPORATE AFFAIRS REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, at ¶ 1.6, https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf. (Last visited Nov 12, 2021).

[67] *Id.* ¶ 1.7, 1.8.

[68] UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (United Nations Commission on International Trade Law 2013) 49, at ¶ 146, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf (last visited Nov 7, 2021).

5) Position of India with respect to reciprocity

As noted above, legislative reciprocity has been included in Draft Part Z under Clause 1(4). The Insolvency Law Committee has recommended the inclusion of reciprocity provision due to the given stage of infrastructure development, economic development, and the country's position globally.[69]

According to the Committee, the reciprocity provision is required only initially and can subsequently be diluted basis implementation experience and development of sufficient infrastructure.[70]

The Committee has further explained that no provisions of the Code other than the draft Part Z are affected by the requirement of the reciprocity, thereby maintaining that the foreign creditors are still to be eligible to be involved in insolvency proceedings regardless of reciprocity.[71]

However, notably, this requirement of reciprocity has an effect similar to Section 234 and 235 of the Code.[72] As the current framework, the reciprocity provision requires mutuality between India and the foreign state, which has the result of defeating the very purpose behind the adoption of the Model Law.

Indian approach in the form of inclusion of reciprocity provision raises doubts regarding its implications. The scale herein is observed to move between the two extremes of (i) fairness and predictability, and (ii)

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[69] Insolvency Law Committee, *supra* note 7 at 18, ¶ 1.8.
[70] *Id.*
[71] *Id.*
[72] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

protectionism and non-cooperation, either of which if not exercised appropriately stands to affect the domestic interests and international repute respectively. It is observed that there already exists a legislative text, *i.e.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 which has been ratified by India[73] with a reciprocity reservation.[74] However, it has been met with rather weak implementation, as evident in the grim figure of less than one-third of the ratified states that have been officially notified by the Central Government for the purposes of recognition and enforcement of foreign awards.[75]

A preliminary look shows more drawbacks in the inclusion of the reciprocity provision as compared to its omission, for the aspect of reciprocity, though initially attractive, has the potential to cause severe consequences. The Report also offers no help as it provides no clarification on the duration of the inclusion of the reciprocity which further adds to the ambiguity with only a statement that the provision shall be diluted with enforcement-related experience and insolvency system-related infrastructure development.

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[73] Contracting States – List of Contracting States, The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) | NEW YORK ARBITRATION CONVENTION, https://www.newyorkconvention.org/list+of+contracting+states (last visited Apr 23, 2022).

[74] The Arbitration and Conciliation Act, 1996, § 44, No. 26, Acts of Parliament, 2016 (India).

[75] ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention – India, Digital Library | INTERNATIONAL CHAMBER OF COMMERCE, https://library.iccwbo.org/content/dr/COUNTRY_ANSWERS/CA_3erEd_India.htm?l1=Country+Answers&l2=India (last visited Apr 23, 2022).

The aspect of reciprocity has implications on international trade as well. India shares trading relations with a number of countries. These relations stand to be adversely affected by the provision of reciprocity given that the Model Law is not yet adopted by a majority of India's trading counterparts including the Netherlands, Germany, Bangladesh and Nepal.[76]

The requirement of reciprocity further confines the scope of applicability of Part Z as it is made applicable only to the countries mentioned in the Schedule. This specification arises from reciprocity and seems to work against the Model Law objectives.

Considering all the factors mentioned above, it is noted that the Committee shall contemplate the adoption of the Model Law sans any reciprocity requirement. It should not concern itself with any lack of mechanism against contravention as there exist sufficient checks and balances for prevention of any abuse in Draft Part Z, thus making the requirement of reciprocity redundant with unnecessary implications in the form of restriction on the Draft leading up to its non-application even in cases where rest all requirements are satisfied.

Omission of provision for interim relief

The UNCITRAL Model Law provides for two major kinds of reliefs, that is, interim relief[77] and relief granted upon recognition of the foreign proceeding;[78] where, the former is granted under Article 19 on the

[76] UNCITRAL Model Law, *supra* note 66.
[77] U.N. COMM'N ON INT'L TRADE L.., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 19, U.N. Sales No. E.14.V.2 (2014).
[78] *Id.* at art. 21.

filing of an application for recognition of a foreign proceeding and the latter is granted under Article 21 only on recognition of a foreign proceeding as a foreign main proceeding or foreign non-main proceeding.

Under the Model Law, the adjudicating authorities are empowered to grant these reliefs, which are provisional in nature, for "*protection of the assets of the debtor or interests of the creditors.*"[79]

It is noted that Draft Part Z does not mention any provision for interim relief and seemingly keeps quiet on this aspect. The context for the rationale for this omission is traced by the Insolvency Law Committee in the Code, stating that even the Code does not authorise the NCLT to grant interim relief under the domestic insolvency proceedings.[80] This omission is further attributed to the required reduction of the unnecessary discretion available with the NCLT, even before the decision on the application. The reason for this non-inclusion of an interim relief provision by the Committee is also credited to the inefficacy of the provision and is termed as a lesson learnt from the poor example of misuse and delay in cases brought under Sick Industrial Companies (Special Provisions) Act, 1985.[81]

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[79] UNCITRAL Model Law, *supra* note 78.

[80] However, it is noteworthy that the NCLAT vide its judgment dated July 17,2019 in the matter of *NUI Pulp and Paper Industries Private Limited v. Ms. Roxcel Trading GMBH*, Company Appeal (AT) (Insolvency) No. 664 of 2019 has held that, *"an NCLT is empowered to pass the ad-interim order under Rule 11 of the National Company Law Tribunal Rules, 2016" ("**NCLT Rules, 2016**") before admitting any application filed under sections 7, 9 or 10 of the Code"*. Rule 11 of NCLT Rules, 2016, empowers an NCLT to pass any such orders as may be necessary for meeting the ends of justice.

[81] Insolvency Law Committee, *supra* note 7, at 36, ¶ 13.4.

This omission of interim relief in the Draft raises concerns regarding "*protection of the assets of the debtor or interests of the creditors*" which has been catered under the Model Law.[82] Under the current framework, one may apply for injunction order from courts if required,[83] but the NCLT does not have any corresponding power thus, requiring the parties to separately file for injunction resulting in the probable defeat of the very purpose of the interim relief.

Though there is no empirical evidence to show that the interests of stakeholders would necessarily be affected in the instance of such an omission, however, it is worth considering replacing the blanket omission with limited power of the NCLT to grant interim relief under extraordinary circumstances.

VI. CONCLUSION AND SUGGESTIONS

A. CONCLUSION

The instances of cross-border insolvency are on the rise with increasing transnational activities of business and commerce.

In the current times, UNCITRAL Model Law has emerged as the most comprehensive legislative text on cross-border insolvency. It complements the existing domestic legal frameworks of States and acts only as legislative guidance instead of working for a mandatory unification of substantive domestic laws.

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[82] UNCITRAL Model Law, *supra* note 78.

[83] CODE CIV. PROC. Order XXXIX, The Specific Relief Act, 1963, No. 47, Acts of Parliament, pt. III (India).

Based on the four elements of "*access, recognition, relief (assistance) and cooperation and coordination*", the Model Law is adopted by different States with modifications and alternations as deemed necessary in accordance with their respective legal systems. This incidentally has led to a lack of consistency on certain fronts like the ones discussed in the paper (determination of COMI, scope of establishment, inclusion of public policy exception, inclusion of provision for reciprocity, and omission of provision for interim relief), thereby causing apprehension about the legislative text in the legal minds of the remaining States.

Though bearing non-uniformity in certain provisions, it is noteworthy that acceptance of modified universalism is consistently achieved in the individual versions of the Model Law as adopted by the States, and thus despite reflecting a rather poor adoption rate, UNCITRAL Model Law is presented as a worthy alternative available on cross-border insolvency.

In this context, the Insolvency Law Committee appointed by the Ministry of Corporate Affairs has in its Report recommended the incorporation of the Model Law in the form of Draft Part Z of the Code.

It is observed that the Indian version of the Model Law, that is, Draft Part Z, has largely been drafted in consonance with the purpose and objectives of the legislative text, however, there are certain deviations that have been entertained bearing in mind the peculiarities of the Indian legal system.

B. SUGGESTIONS

The analysis of the Draft alongside the Model Law as conducted in the paper has brought forth a few attention-worthy aspects for due addressal for which following suggestions are made:

- Clause 14 of the Draft shall provide a clear approach (with objective criteria) for the determination of COMI in order to replace the ambiguous parameters as mentioned currently.

- The expression "*with human means and assets or services*" shall be removed from the definition of 'establishment' under Clause 2(c), as the concerned expression limits the extent of establishment only to the non-transitory economic activities involving human means and assets or services. The current definition gives a restrictive effect as it excludes a corporate debtor with a purely internet-based presence with no involvement of human or physical operations, and thus requires omission of the expression.

- The public policy exception as covered under Clause 4 of the Draft shall provide a list of factors defining 'public policy', as is done for this exception in other legislations.[84] While it may be difficult to prepare an exhaustive list, at least a list of indicative factors should be included under the clause for clarity and predictability of the exception.

[84] The Arbitration and Conciliation Act, 1996, § 34, 48, 57 No. 26, Acts of Parliament, 2016 (India).

- The provision for legislative reciprocity, as under Clause 1, shall be omitted from the Draft as it defeats the objectives of the Model Law. It limits the applicability of the Draft and restricts the power of the NCLT to evaluate a recognition application purely on the basis of merit. The reciprocity provision further negates the already existent checks for any abuse of law; and has grave implications on the country's international trade since the Model Law is not adopted by a majority of India's trading counterparts.

- Following the Model Law, the Draft shall provide for interim relief for the protection of the interests of the stakeholders. Instead of complete omission, the Committee should consider conferring limited power on the adjudicating authorities to grant interim relief only in extraordinary circumstances, as necessary for assets of the debtor or interests of the creditors.

Given above, the Draft, following the Model Law, is a fundamental legal advancement in the field of cross-border insolvency. Though there are certain deviations in the proposed Draft when compared to the Model Law, these modifications essentially are precautionary steps of prudence made considering the current Indian legal system and past experiences. Though largely positive in a theoretical sense, whether these alterations prove to be advantageous or otherwise, is a matter of practicality to be determined only after the incorporation of Draft Part Z in the Code and its application by the adjudicating authorities, as the decisions basis interpretation of the

Draft will pave way for the development of legal framework on cross-border insolvency.