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ARTICLE

India's Journey towards Cross-Border Insolvency Law Reform

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Abstract
This article examines India's journey towards a cross-border insolvency regime and its draft law on cross-border insolvency. The article analyses the areas of convergence and divergence between India's draft law and the *UNCITRAL Model Law on Cross-Border Insolvency* and identifies the factors behind the divergences. The article concludes that the implementation of a cross-border insolvency regime is crucial for India to ensure coordination in cross-border insolvency proceedings and thereby attract foreign investment. The analysis of the reasons behind the divergences suggests that four areas of divergence are particularly relevant: the structure of existing legal institutions; the reciprocity requirement; restrictions on the rights of access of foreign representatives; and the historical practice of the Indian courts to follow the principle of territorialism. The success of the Indian cross-border insolvency regime will very much depend on the ability of the adjudicating authorities to overcome territorialism and embrace the principle of modified universalism.

Introduction

The *Insolvency and Bankruptcy Code* (Code)[1] has brought about a paradigm shift in the insolvency regime in India.[2] The Code has adopted an institutional design that gives priority to the commercial wisdom of the Committee of Creditors and leaves room for minimum judicial intervention.[3] The National Company Law Tribunals (NCLTs), established at various places across India, are the Adjudicating Authority for all insolvency matters under the Insolvency and Bankruptcy Code in respect of resolution and liquidation.[4] An application for the commencement of insolvency proceedings against a corporate debtor can be filed before any of the NCLTs situated across the country, depending on the registered office of the corporate debtor.[5] Once the application is admitted, the

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[1]For the purposes of this paper, 'Code' refers to the Insolvency and Bankruptcy Code 2016, excluding the cross-border insolvency provisions (Part Z).

[2]Dhananjay Kumar, 'The New Corporate Insolvency Regime in India: A Paradigm Shift' (2019) 38(4) American Bankruptcy Institute Journal 38.

[3]*K Sashidhar v Indian Overseas Bank and Ors* (2019) 12 SCC 150.

[4]A National Company Law Tribunal and its appellate authority, the National Company Law Appellate Tribunal, are both tribunals of limited jurisdiction and cannot act as courts of equity and exercise plenary powers. NCLTs' residuary jurisdiction, though wide, is nonetheless defined and limited by the text of the Code. Importantly, an NCLT cannot do what the Code does not expressly empower it to do.

[5]Code, s 60(1).

process of insolvency resolution commences and a resolution professional is appointed to manage the affairs of the corporate debtor. The resolution professional invites potential resolution applicants[6] to submit resolution plans in respect of the corporate debtor. The resolution plans are then placed before the Committee of Creditors, which comprises solely the financial creditors of the corporate debtor. The Committee of Creditors is required to consider whether to approve a resolution plan, subject to certain criteria being satisfied under the Code. The resolution plan is then placed before the respective NCLT for its approval. In cases where there are no resolution applicants, or no resolution plan is approved by the Committee of Creditors, or the resolution plan approved by the Committee of Creditors is rejected by the NCLT and there are no competing resolution plans,[7] the corporate debtor will be subjected to liquidation proceedings.

India, however, still lacks a cross-border insolvency law regime. This article examines India's journey towards such a regime. The first part of this article considers India's journey to date with respect to cross-border insolvency proceedings. It then outlines India's draft law on cross-border insolvency and identifies the areas in which it converges with, and diverges from, the *UNCITRAL Model Law on Cross-Border Insolvency* (Model Law). Subsequently, the article examines the factors behind divergence. Finally, the article concludes by arguing that while the observed divergences in India's proposed cross-border insolvency law appear minimal, external factors could potentially amplify these minor divergences in legislative text into significant divergences in outcomes.

The Journey to Date

The Code has only two enabling provisions with respect to cross-border insolvency proceedings: a provision that allows the Central Government to enter into bilateral treaties with foreign countries to enforce the provisions of the Code,[8] and a provision that confers power on the appropriate Adjudicating Authority (NCLT) to issue a letter of request seeking aid and assistance in a foreign jurisdiction.[9] The insolvency of Jet Airways (India) Ltd (Jet) has triggered debates surrounding the proposed implementation of the Model Law in India. On the application of a financial creditor, NCLT Mumbai had initiated corporate insolvency resolution proceedings against Jet. When the resolution professional took over the management of the corporate debtor, it was found that a Dutch court had already appointed a bankruptcy trustee in the Netherlands in respect of the operations of the corporate debtor. The Dutch administrator's application for recognition before NCLT Mumbai was rejected.[10] On appeal, the National Company Law Appellate Tribunal (NCLAT) recognised the Dutch proceedings.[11] As a result, the Dutch administrator was allowed to attend the meetings of the committee of creditors of the corporate debtor in India without voting rights. The NCLAT further directed the Resolution Professional and the Committee of Creditors of Jet to consider the prospect of cooperating with the Dutch administrator to have a joint corporate insolvency resolution process and to facilitate a framework for cooperation with the Dutch trustee.[12] The Indian resolution professional and the Dutch administrator subsequently entered into a Cross-Border Insolvency Protocol,[13] which was approved by the NCLAT.[14] This

[6]Under section 5(25) of the Code, a 'resolution applicant' means any person (such as a creditor, promoter, or prospective investor) who submits a resolution plan to the resolution professional.

[7]*K Sashidhar* (n 3) [66].

[8]Code, s 234.

[9]ibid s 235.

[10]*State Bank of India and Ors v Jet Airways (India) Limited* (NCLT Mumbai) CP 2205 (IB)/MB/2019; CP 1968(IB)/MB/2019 & CP 1938(IB)/MB/2019.

[11]*Jet Airways (India) Ltd v State Bank of India and Ors* (NCLAT) Company Appeal (AT) (Insolvency) No 707 of 2019.

[12]ibid.

[13]An insolvency protocol is an agreement between the local insolvency resolution professional and the foreign representative that sets out the modes and methods of cooperation and communication. Such a protocol must ultimately be approved by the courts in accordance with the law and practice of each local jurisdiction, as it is unenforceable without judicial backing.

[14]*Jet Airways (India) Ltd v State Bank of India and Ors* (NCLAT) Company Appeal (AT) (Insolvency) No 707 of 2019.

enabled coordination between the Indian and Dutch insolvency proceedings and led to the successful resolution of the corporate debtor.[15] The experience of the Jet insolvency demonstrates that *ad hoc* cross-border arrangements are possible in the absence of a comprehensive cross-border insolvency law framework. However, if India had enacted the Model Law, the insolvency courts and foreign representatives of both jurisdictions would have had the benefit of a more structured framework to support communication and cooperation in this case.[16]

Another case that has also stimulated considerable debate on this issue is that of Videocon Industries Ltd (VIL). VIL was admitted into insolvency pursuant to an order of NCLT Mumbai dated 6 June 2018.[17] Thereafter, by order dated 8 August 2019, NCLT Mumbai consolidated the corporate insolvency resolution process of VIL and another twelve of its group companies.[18] However, four entities, which were foreign subsidiaries of the VIL group, were kept outside the consolidation order.

Under India's insolvency framework, the resolution professional is required to take custody and control of the assets of a corporate debtor on their admission to insolvency.[19] The Code explicitly clarifies that the assets of the Indian and foreign subsidiaries of the corporate debtor do not form a part of the assets of the corporate debtor.[20]

In VIL, one of the financial creditors, the State Bank of India, explored the possibility of selling the foreign assets of the corporate debtor that were owned by the four foreign subsidiaries.[21] This was resisted by the promoter of the corporate debtor on the ground that the assets of the four foreign subsidiaries should form part of the assets of the corporate debtor and be included in VIL's resolution process and the Information Memorandum representing the assets of the corporate debtor. NCLT Mumbai, by order dated 22 August 2019, upheld the request of the promoter.[22] The NCLT reasoned that the situation presented an ideal opportunity to lift the corporate veil, as the four excluded foreign subsidiaries were in reality special purpose vehicles to ring-fence VIL's assets and 'it was/is the intention and understanding of all parties that the said assets are being held by Respondent No.1/VIL.'[23] Subsequently, and without passing a reasoned order, the NCLAT, by order dated 19 February 2020, stayed the order of the NCLT. As a result, the corporate insolvency resolution process proceeded without including the foreign assets of the excluded entities in the assets of the corporate debtor. The resolution plan in respect of the thirteen corporate debtors was not upheld by the NCLAT as the resolution plan entailed an exorbitant haircut on the part of the lenders. As of May 2024, the matter is *sub judice* before the Supreme Court of India.

The NCLAT's stay order disallowing the inclusion of the assets of the foreign subsidiaries was consistent with the letter and spirit of the Code and respected the principle of separate corporate legal personality. It is equally true, however, that under the Code, the assets of a corporate debtor include its foreign shareholding in its subsidiaries.[24] Therefore, the resolution professional exercising management and control over the assets of the corporate debtor may indirectly manage the

[15] *State Bank of India v Jet Airways* (NCLT Mumbai) IA No 2081 of 2020 in CP (IB) No 2205/MB/2019.

[16] Debaranjan Goswami & Andrew Godwin, 'Evaluation of the Guidelines for Communication and Cooperation between the Adjudicating Authority in India and a Foreign Court in Cross-Border Insolvency Proceedings – A Comparative Perspective', in Insolvency and Bankruptcy Board of India, 'Navdrishti – Emerging Ideas on IBC' (Feb 2023).

[17] *State Bank of India v Videocon Industries Ltd* (NCLT Mumbai) CP(IB)-02(MB) of 2018.

[18] *State Bank of India v Videocon Industries Limited & Ors* MA-1306/2019.

[19] Code, s 18.

[20] ibid s 18 Explanation 2.

[21] *Bank of Maharashtra v Videocon Industries Limited* Company Appeal (AT) (Ins) No 503 of 2021 [18]. As per the NCLAT order dated 5 Jan 2022, the State Bank of India attempted to sell the foreign assets on the basis that they were not assets of VIL in its balance sheet, but were in fact assets of VOVL Limited, which is a group company of VIL also under CIRP.

[22] *State Bank of India v Videocon Industries Limited* MA No 2385 of 2019 in CP No 02/2018 [87]–[102].

[23] ibid [95].

[24] Code, s 18f(i).

affairs of a foreign wholly-owned subsidiary. The resolution professional may also liquidate the foreign company[25] and remit the assets to India with the permission of the foreign court. Neither the NCLT nor the NCLAT discussed this issue in detail and it is therefore unclear whether this could be the basis for including the assets of a foreign subsidiary in the pool of assets of a corporate debtor undergoing restructuring in the future.[26]

The NCLAT's ruling is not unexpected. It is ultimately for the foreign law (and the foreign court) to determine who can act on behalf of a foreign subsidiary, and in the absence of a statutory framework for requesting assistance from foreign courts, Indian courts are likely to adopt a conservative approach (as happened in this case).[27] In a similar context, the Hong Kong High Court has ruled that the fact that the majority of the directors of the insolvent corporate debtor are amenable to the *in personam* jurisdiction of the Hong Kong court is not a sufficient ground to compel such directors to execute documents to enable the resolution professional/liquidator of the Bermuda-based holding company to take control of its subsidiaries in mainland China.[28] The challenges associated with the insolvency of companies that form part of a corporate group illustrate the limited benefits of the Model Law to cases such as the Videocon case. However, even within corporate groups, the provisions on communication and cooperation between insolvency professionals and foreign insolvency courts can be utilised to coordinate insolvency proceedings,[29] provided that the entities in both jurisdictions (ie, the parent company and its foreign subsidiaries) have been admitted to insolvency proceedings in their respective jurisdictions. It is interesting to note that Videocon has foreign subsidiaries and assets in Brazil, which has recently adopted the Model Law. Even if courts are hesitant to communicate and cooperate in relation to group companies under the Model Law, there may be an innovative solution to this issue.[30] As discussed in a recent paper, in such circumstances the insolvency resolution professionals may agree on an insolvency protocol and have it approved by a jurisdictional court. Thereafter, the judicial ruling approving the protocol may be recognised as a foreign insolvency judgment in other jurisdictions.[31] As noted later in this article, however, the basis for recognition and enforcement of a foreign insolvency judgment under the Model Law remains controversial.

The legislature in India is alive to these teething issues and it is expected that India will soon have a law on cross-border insolvency in line with the Model Law. The Insolvency Law Committee has already published a report along with a draft law on cross-border insolvency in India, known as Part Z.[32] Draft rules and regulations on the cross-border insolvency framework have also been published.[33] The Ministry of Corporate Affairs has also suggested changes to draft law Part Z and invited comments from the public.[34]

[25]Devendra Mehta, 'View: Delay in implementing cross border insolvency law is detrimental to Indian creditors' (The Economic Times, 06 Sep 2022) <https://economictimes.indiatimes.com/news/company/corporate-trends/view-delay-in-implementing-cross-border-insolvency-law-is-detrimental-to-india-creditors/articleshow/94029391.cms> accessed 19 Mar 2023.

[26]Priya Misra & Adam Feibelman, 'The Institutional Challenges of a Cross-Border Insolvency Regime' (2021) 2 Corporate and Business Law Journal 339.

[27]For Hong Kong, which has no statutory cross-border insolvency law, see Andrew Godwin & Charles Zhen Qu, 'Cross-Border Insolvency Law in Hong Kong – Recognition of Foreign Schemes of Arrangement' (2021) International Insolvency Law Review 1.

[28]*Re Grand Peace Group Holdings Limited* [2021] HKCFI 2361.

[29]Ilya Kokorin & Bob Wessels, *Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups* (Edward Elgar Publishing 2021) 55.

[30]Goswami & Godwin (n 16).

[31]ibid.

[32]Government of India, Ministry of Corporate Affairs, 'Report of Insolvency Law Committee on Cross Border Insolvency' (Oct2018) <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf> accessed 7 Jun 2024.

[33]Cross Border Insolvency Rules/Regulations Committee (CBIRC), 'Report on the rules and regulations for cross-border insolvency resolution' (15 Jun 2020) <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf> accessed 7 Jun 2024.

[34]Government of India, Ministry of Corporate Affairs, 'Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016' (Notification, bearing File No 30/27/2018-Insolvency Section, 24 Nov 2021)

The adoption of the Model Law in India will provide a procedural framework to facilitate cross-border coordination and cooperation. Foreign companies looking to invest in India and their creditors will accordingly have a mechanism to obtain cross-border relief in India in the event of a cross-border insolvency proceeding. With increased economic growth, Indian companies will continue to expand their operations overseas, and with increased financial market linkages, financing needs will also be met around the world.[35] There is, therefore, a need to develop a cross-border insolvency regime in India that is internationally acceptable and capable of dealing with the complexities that will arise in cases of cross-border insolvencies. At the same time, the regime must also consider the interests of local creditors and the economic interests of the country.[36]

Part Z and the UNCITRAL Model Law

The Model Law is premised on the idea of modified universalism.[37] The doctrine of 'modified universalism' is the principle that insolvency proceedings should be dealt with under a single, unified system, with appropriate safeguards to avoid manifestly unfair outcomes. The oft-quoted passage from Lord Hoffmann in *Re HIH Casual and General Insurance Ltd* captures the essence of modified universalism:

> The primary rule of private international law … applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[38]

A number of jurisdictions have expressly endorsed modified universalism.[39] By contrast, courts in jurisdictions that adopt a territorialist approach usually disregard the impact of foreign proceedings in resolving the local affairs of an insolvent company.[40] It has been suggested that the traditional preference in many jurisdictions for a 'territorialist' approach stems from concerns that recognition of cross-border insolvency proceedings would undermine national sovereignty and erode a jurisdiction's ability to direct and administer its own affairs.[41]

A fundamental question arising from India's journey towards cross-border insolvency law reform is whether, after the adoption of the Model Law, territorialist tendencies will persist and be reinforced by the divergences discussed in this article. In particular, it is relevant to consider whether the NCLTs, as tribunals of limited jurisdiction, will tend to be inward-looking and territorialist in their approach to recognising cross-border insolvency proceedings.

<https://prsindia.org/files/parliamentry-announcement/2021-12-15/Cross-Border%20Insolvency%20under%20IBC.pdf> accessed 24 Jul 2023.

[35]Sudhakar Shukla & Kokila Jayaram, 'Cross Border Insolvency – A Case to Cross the Border Beyond the UNCITRAL', in Insolvency and Bankruptcy Board of India, 'Insolvency Bankruptcy Regime in India: A Narrative' (2020) 307, 311.

[36]ibid.

[37]See Tom Smith QC, 'Recognition of Foreign Corporate Insolvency Proceedings at Common Law', in Richard Sheldon QC (ed), *Cross-Border Insolvency* (4th edn, Bloomsbury Professional 2015) para 6.44, where the author notes that modified universalism is 'strongly embodied' in the UNCITRAL Model Law on Insolvency.

[38][2008] 1 WLR 852.

[39]See Andrew Godwin, Timothy Howse & Ian Ramsay, 'The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity' (2017) 26 International Insolvency Review 5, 15. For instance, jurisdictions like the United States, the United Kingdom, and Australia have endorsed the principle of modified universalism in their cross-border insolvency law regimes.

[40]ibid 14–15.

[41]ibid 15 (citations omitted).

The Model Law's Guide to Enactment recommends 'that States make as few changes as possible in incorporating the Model Law into their legal systems.'[42] Uniformity of interpretation of the Model law is underscored by Article 8 of the Model Law:

> In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.[43]

At the same time, the Model Law provides flexibility to adopt it with or without amendments.[44] In embracing unification of cross-border insolvency, the Model Law does not mandate substantive unification.[45] As a result, countries have made significant modifications to the Model Law when implementing it in their respective jurisdictions.[46] Divergence in law may not always be bad, particularly if it leads to convergence in outcomes. More precisely, divergence – or diversity – is positive when it achieves convergence in outcomes that could not otherwise be achieved because of fundamental differences between national legal systems.[47]

However, the divergences from the Model Law observed in Part Z are mostly in the nature of 'minor tweaks' made to accommodate cultural differences and differences in the domestic insolvency regime. The vision of India's draft law is similar to the approach taken in the United Kingdom, which has made only minor departures from the Model Law in its own version of the cross-border insolvency framework in order 'to try and ensure consistency, certainty and harmonisation with other States enacting the Model Law and to provide a guide for other States who are considering enacting the law'.[48] The Model Law has been envisaged as a framework for cross-border insolvency cooperation that can be moulded to give effect to India-specific considerations. Against this backdrop, it is important to explore the more significant divergences of the Indian cross-border insolvency regime from the Model Law. These areas of divergence are most relevant as they reflect issues and concerns that are distinctive in the context of India's insolvency law and practice.

First, the Model Law applies to creditors as well as 'all interested persons'. Under the Code, however, only the financial and operational creditors of a corporate debtor are allowed to initiate insolvency proceedings. The Code does not discriminate between domestic and foreign creditors and recognises the right of foreign creditors to initiate insolvency proceedings and submit their claims under the Code. Adopting the same principle, the conferral of rights under Part Z is limited to a duly appointed foreign representative and creditors, as distinct from 'all interested persons'.[49] As long as a duly appointed foreign representative petitions the Adjudicating Authority for recognition, and subject to other requirements, the foreign proceeding may be recognised. The Adjudicating

[42]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (Jan 2014) 25, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 27 Mar 2023.

[43]Andrew Godwin, 'Convergence, Divergence and Diversity in Financial Law: The Experience of the UNCITRAL Model Law and Cross-Border Insolvency', in Gary Low (ed), *Convergence and Divergence of Private Law in Asia* (Cambridge University Press 2022) 44.

[44]Neeti Shikha, 'Guest Editorial: Cross-border insolvency in India: What lies ahead?' (2021) 30(2) International Insolvency Review 164, 164.

[45]ibid.

[46]Neeti Shikha, 'India's tryst with cross border insolvency', in Insolvency and Bankruptcy Board of India, 'Insolvency Bankruptcy Regime in India: A Narrative' (2020) 323, 325.

[47]Godwin (n 43) 34.

[48]Gerard McCormack, 'US Exceptionalism and UK Localism? Cross-Border Insolvency Law in Comparative Perspective' (2016) 36(1) Legal Studies 136, 142.

[49]'Insolvency Law Committee Report' (n 32) 19. Article 1(1)(d) of the Model Law allows creditors as well as 'other interested persons' in foreign countries to commence and participate in domestic insolvency proceedings. The report of the Insolvency Law Committee on Cross Border Insolvency notes that 'since it is unclear who these parties would be and including such parties may make the right to commence and participate in insolvency proceedings under the Code too broad, the Committee recommended that such rights be restricted to creditors at present.'

Authority will not examine whether the foreign proceeding has been commenced by a creditor as defined under the Code. The exclusion of 'other interested persons' in Part Z is to clarify that the provisions of cross-border insolvency law cannot be used to initiate an insolvency proceeding in India by an 'interested person' other than foreign representatives and creditors. A foreign creditor intending to initiate insolvency proceedings against an Indian corporate debtor must do so under the domestic insolvency regime. A foreign representative seeking recognition of a foreign insolvency proceeding can have recourse to the proposed cross-border provisions.

Second, the Model Law allows countries to refuse recognition of a foreign insolvency proceeding on public policy grounds. True to the spirit of the Model Law, Part Z limits the exercise of such power to cases where recognition of the foreign insolvency is 'manifestly contrary to India's public policy'.[50] However, the provisions of the draft law diverge from the practice in other jurisdictions by casting a duty on the Adjudicating Authority to issue a notice to the Central Government, as soon as practicable, inviting its submissions before passing an order refusing recognition on the ground of public policy.[51] Power has also been conferred on the Central Government to file its submissions before the Adjudicating Authority when it feels that recognition of a foreign insolvency proceeding will be contrary to India's public policy.[52] Part Z does not make the submissions of the Central Government binding on the Adjudicating Authority, but mandates that the Central Government be heard before refusing recognition on the ground of Indian public policy. In addition, the Central Government may itself apply for an order refusing recognition if it considers the implementation of any measure under Part Z to be manifestly contrary to the public policy of India. It is possible that the NCLTs will be deferential to the views of the Central Government in opposing a plea for recognition, at least until there is judicial guidance from the Supreme Court. Therefore, cross-border insolvency cases may initially not be recognised in the face of opposition from the Central Government.

Third, one of the significant achievements of the Model Law has been the harmonisation of recognition standards and the streamlining of time-consuming local practices, such as exequatur and letters rogatory.[53] The Indian cross-border regime, while retaining the direct right of access on the part of foreign representatives, adopts a restrictive framework.[54] The draft law provides for foreign representatives to be regulated as a separate class by way of delegated legislation.[55] The draft regulations stipulate that a foreign representative must abide by the code of conduct formulated by the Indian insolvency regulator (ie, the Insolvency and Bankruptcy Board of India).[56] The insolvency regulator will be entitled to commence disciplinary proceedings against a foreign representative in accordance with the provisions of the *Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations* 2017.[57] In order to effectively regulate the foreign representatives, it has been proposed that the insolvency regulator adopt a robust registration process.[58] This is contrary to the UNCITRAL Guide to Enactment, which discourages formal requirements such as registration, license, or consular action that may be applicable domestically.[59] However, the draft

[50]Code, s 4(1).

[51]ibid s 4(2).

[52]ibid s 4(3).

[53]Adrian Walters, 'Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93(1) American Bankruptcy Law Journal 69. 'Exequatur' refers to written official recognition giving authorisation by a consular officer; 'letters rogatory' refers to a formal letter issued by a Court to a foreign Court requesting judicial assistance.

[54]'Insolvency Law Committee Report' (n 32) 26.

[55]ibid.

[56]ibid 54; Draft Part Z of the Insolvency and Bankruptcy Code 2016, s 7(2); 'Code of Conduct of Foreign Representatives', in Cross Border Insolvency Rules/Regulation Committee (n 33) 113, First Schedule.

[57]Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations (adopted 12 Jun 2017).

[58]Cross Border Insolvency Rules/Regulations Committee (n 33) 41.

[59]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) [108].

regulations have clarified that the rejection of an authorisation application by the insolvency regulator will not affect the recognition of a foreign proceeding. The insolvency regulator will convey its rejection decision to the foreign representative and the NCLT concerned. The NCLT would then take appropriate measures, including requiring the replacement of the foreign representative, for the purpose of the proceeding.[60]

Fourth, the Model Law mandates individual notices to be provided to a foreign creditor.[61] Under Part Z, individual notices to foreign creditors have been dispensed with.[62] The Insolvency Law Committee was of the opinion that there was no need to provide foreign creditors with special treatment as regards the manner in which notices are served under the cross-border insolvency framework. The Code already prescribes the manner in which notices are to be given to all creditors of a corporate debtor. The same practices should continue. However, the Insolvency Bankruptcy Board may be vested with powers to issue suitable regulations on the manner of providing notices under the Code. Serving individual notices to the foreign creditors of the corporate debtor may lead to a significant escalation of costs and compliance burdens. Under the current law, a resolution professional must, within three days of being appointed, make a public announcement in an English language newspaper and in a newspaper in a regional language with wide circulation in the place where the corporate debtor has its registered office or, if it has no registered office, in a place where, in the opinion of the resolution professional, the corporate debtor conducts material business.[63] Additionally, a public announcement will be published on the website of the corporate debtor and on the website of the Insolvency and Bankruptcy Board of India.[64] However, a foreign creditor is unlikely to have access to an Indian newspaper and is unlikely to regularly access the website of all its debtors.

Lastly, the Code does not provide for the grant of interim relief at the time of the application for recognition. The same approach has been retained in the proposed cross-border framework.[65] The intention was to preserve the existing legislative choices in the cross-border insolvency regime. The Insolvency Law Committee was also influenced by the fact that conferring discretion on the Adjudicating Authority in this respect could lead to unequal outcomes.[66] While the Adjudicating Authority could pass an order of interim relief in a cross-border insolvency proceeding, the same relief would not be available in a purely domestic proceeding.

Under the Model Law, interim relief may include a stay of execution against the debtor's assets, allowing the foreign representative to administer or realise perishing or devaluing assets; the suspension of the right to transfer, encumber, or otherwise dispose of the debtor's assets; and the examination of witnesses or the taking of evidence.[67] Such relief will not be available under the Indian cross-border insolvency regime.

The successful implementation of the proposed cross-border insolvency provisions will require not only legislative convergence, but also convergence in insolvency practice. Therefore, it is important to scrutinise whether India's domestic insolvency law will allow foreign representatives to effectively discharge their duties in India. It is also important to consider how the legal institutions, existing legislative architecture, and policy choices will shape the interpretation and application of the proposed cross-border insolvency provisions.

[60]Cross Border Insolvency Rules/Regulations Committee (n 33) 42.

[61]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) art 14.

[62]Draft Part Z (n 56) art 11.

[63]Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, regulation 6.

[64]ibid.

[65]'Insolvency Law Committee Report' (n 32) 36.

[66]ibid.

[67]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) art 19(1)(a)–(c).

Factors behind Convergence and Divergence[68]

The Model Law aspires for states to show fidelity to the text. However, experience in the United States and the United Kingdom has shown that there are significant differences in the structure, language, and normative underpinnings of the cross-border insolvency laws of the two jurisdictions, even though both are based on the Model Law.[69] Similarly, Japan and Korea have enacted cross-border insolvency legislation with substantial variations from the Model Law.[70] In the United Kingdom, divergences from the Model law are minimal; however, there are differences in the approach of the United Kingdom courts and the nature of relief available under United Kingdom insolvency law.[71] The following discussion will examine the factors behind such divergence in the Indian legislative text. Additionally, this section will assess how apparent convergence in the text may also lead to divergent outcomes in the interpretation and application of the law – in the Indian context in particular, limited divergences from the Model Law in the text do not necessarily equate to minimal divergence in outcomes when it comes to the application of the proposed cross-border insolvency provisions, as this section will demonstrate.

Legal institutions: the National Company Law Tribunal and its limited jurisdiction

Courts and judicial practice are usually one of the main reasons for divergence from the Model Law. For instance, it has been suggested that the civil law tradition and judicial practice in Japan militate against giving courts extensive discretionary powers under the Model Law.[72] This section will suggest that the judicial structure in India would also heavily influence the interpretation of the cross-border insolvency provisions in India.

Under the Model Law, there are two types of relief available upon recognition of a foreign proceeding: (i) mandatory relief (an automatic stay of individual actions and execution against the debtor's assets) upon recognition as a foreign main proceeding,[73] and (ii) discretionary relief upon recognition as either a foreign main proceeding or a foreign non-main proceeding.[74] Highlighting the importance of discretionary relief, it has been said that granting recognition or not is like pressing a 'yes' or 'no' button,[75] and that discretionary relief equips the insolvency courts with flexible mechanisms to tailor outcomes to the case at hand, based on whatever conditions they consider appropriate.[76] The public policy exception interferes with this process. The Model Law provides an alternative to achieve a balance between local policy and cooperation, namely discretionary relief.[77] It is suggested that many of the domestic public policy concerns can be ameliorated by effective discretionary relief.

From the Indian perspective, given the limited jurisdiction of the NCLTs, it will be interesting to see how the NCLTs exercise their discretionary powers in matters pertaining to cross-border insolvency. The Code was expressly designed to reduce the judicial functions in insolvency and bankruptcy cases.[78] Therefore, the NCLTs have limited discretion in performing their functions under the Code.

[68]For a discussion of these factors in a comparative context, see Godwin (n 39).

[69]Walters (n 53) 77.

[70]Godwin (n 43) 44.

[71]ibid.

[72]ibid 46.

[73]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 38) art 20.

[74]ibid art 21.

[75]Xinyi Gong, 'A Middle Way – Tailoring the Model Law and the Regulation into China's Context' (2014) 25 <https://www.iiiglobal.org/file.cfm/12/docs/2014_gold_x_gong_submission_a_middle_way.pdf> accessed 20 March 2023. See also John Townsend, 'International Co-operation in Cross-Border Insolvency' (2008) 71(5) Modern Law Review 801.

[76]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) para 191.

[77]ibid para 176.

[78]Misra & Feibelman (n 26).

The Indian Bankruptcy Law Reforms Committee, which had been tasked with the framing of the Code, opined in its report as follows:

> The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.[79]

The powers of the NCLTs in a domestic insolvency context are limited. However, the Indian Insolvency Law Committee has recommended that the NCLTs be vested with the power to grant discretionary relief in cross-border insolvency matters, but the Committee does not make any recommendation to extend their jurisdiction.

In its recommendations, the Insolvency Law Committee had consciously departed from the Model Law by recommending that the discretion conferred on the adjudicating authorities – including the power to examine witnesses and gather evidence relating to the debtor's affairs and assets – should not be made a part of India's cross-border insolvency provisions. However, such discretionary relief was retained in the subsequent draft by the Indian Ministry of Corporate Affairs.[80] This evidences the Indian Government's intention to provide NCLTs with a wide range of discretionary relief.

Under the Model Law, the list of discretionary relief is not exhaustive. The Model Law vests the competent court or authority with the discretion to grant additional relief as may be permitted under the laws of the State. Here, again, Part Z modifies this approach by restricting the additional relief to that available under the Code.[81] Therefore, it would appear that only the relief available to a domestic resolution professional under the Code would be available to a foreign representative. However, under section 5 of Part Z, the Adjudicating Authority has the power to grant the foreign representative additional assistance under other laws.[82] Therefore, the limitation on the power to grant discretionary relief upon recognition may be circumvented by having recourse to section 5 of Part Z.

Under this deviation from the Code, an NCLT can only exercise such powers within the contours of jurisdiction as prescribed by the statute.[83] The Code has been considered to be in the nature of a complete code, such that the Adjudicating Authority cannot look beyond the Code for the source of its powers.[84] It has been suggested that the objective of the Code was 'to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process'.[85] However, the jurisdiction of the NCLTs is limited to matters arising out of the insolvency of the corporate debtor. The Adjudicating Authorities have to 'ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor.'[86] It is settled that, for the purposes of the Code, a resolution professional must seek relief in each and every appropriate forum in order to preserve and take control of the assets of the corporate debtor.[87] In the United States, once a foreign

[79]Bankruptcy Law Reforms Committee, *Bankruptcy Law Committee Report* (1st vol, Nov 2015).
[80]Ministry of Corporate Affairs, 'Invitation of comments from public' (n 34).
[81]Draft Part Z (n 56) art 18(1)(f).
[82]ibid art 5.
[83]*Embassy Property Developments Pvt Ltd v State of Karnataka and Ors* (2020)13 SCC 308 [29].
[84]*Innoventive Industries Limited v ICICI Bank and Anr* (2018) 1 SCC 407; *Principal Commissioner of Income Tax v Monnet Ispat and Energy Limited* (2018) 18 SCC 786.
[85]*Innoventive Industries Ltd v ICICI Bank and Ors* (2018) 1 SCC 407 [13].
[86]*Gujarat Urja Vikas Nigam Limited v Amit Gupta and Ors* (2021) 7 SCC 209 [67].
[87]ibid [87], [165].

representative is recognised, the foreign representative may commence an action before any Court in the United States to preserve the assets of the corporate debtor.[88] The Bankruptcy Court does not serve as a single window for the adjudication of cross-border insolvency-related claims.

In India, the NCLTs do not have jurisdiction over matters not contemplated under the Code. As a result, for matters that fall outside the domain of insolvency courts, the parties must individually approach the relevant designated forums. This has been emphasised by the Indian Supreme Court in *Embassy Property Developments Pvt Ltd v State of Karnataka and Ors*:

> Therefore, in the light of the statutory scheme as culled out from various provisions of the [Code], it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the [Code], especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.[89]

It appears that Part Z, while adopting the Model Law, has deliberately chosen to make the NCLTs the single window for all matters pertaining to insolvency resolution by allowing them to grant insolvency relief under other laws. Therefore, it is reasonable to argue that the power of the NCLTs, in the cross-border insolvency context, is not prescribed by the Code. Part Z seems to suggest that the foreign representative need not approach the individual forums for relief and may approach the NCLT directly.

Under domestic insolvency law, the Indian Supreme Court, while deciding whether a resolution professional could directly approach the NCLT to direct the State Government to extend the lease of a corporate debtor under insolvency resolution proceedings, has emphasised that:

> NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non judice [ie, acting without jurisdiction].[90]

The Supreme Court has further clarified that 'disputes [revolving] around decisions of statutory or quasi-judicial authorities … can be corrected only by way of judicial review of administrative action' and not by way of approaching the NCLT.[91] When seeking approval of resolution plans under the Code, a resolution applicant often seeks various concessions from the Government and other administrative authorities. However, the NCLT refuses to grant concessions that are in the realm of public law or matters over which it does not exercise jurisdiction.[92] Part Z will not impose any such limitations on the powers of the NCLT, which will be free to provide additional assistance under any 'other laws in India'. The literal interpretation of 'any other laws' will mean that the jurisdiction of the NCLT to assist a foreign representative will not be limited to its powers relating to insolvency resolution or liquidation under the Code. In essence, this can be interpreted to mean a departure from the approach in the United Kingdom, where an insolvency court can only provide relief to a foreign representative that it can provide under its domestic laws.[93]

[88]Walters (n 53).

[89]*Embassy Property Developments Pvt Ltd* (n 83) [40].

[90]ibid [45].

[91]ibid [52].

[92]*Municipal Corporation of Greater Mumbai (MCGM) v Abhilash Lal and Ors* (2020) 13 SCC 234, *Jaypee Kensington Boulevard Apartments Welfare Association and Ors v NBCC (India) Ltd and Ors* (2022) 1 SCC 401 [78], [107]–[109].

[93]Walters (n 53); *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch).

However, given the way in which jurisprudence has evolved over the years in the domestic insolvency context, it is possible that the NCLTs will continue to adopt a conservative stance in cross-border insolvency matters, directing the parties to individual judicial forums where disputes arise outside of the insolvency context. If so, this suggests that the textual convergence of the draft cross-border insolvency provisions with the Model Law may ultimately lead to divergent outcomes in the light of the prevailing judicial attitudes in this field.

The priority accorded to domestic insolvency proceedings is seen by the Indian Government as one of the benefits of the Model Law.[94] Even after recognition of a foreign main proceeding in a country, the Model Law does not prevent the recognition of a subsequent non-main proceeding in the recognising country.[95] Upon the initiation of a domestic insolvency proceeding, the mandatory or discretionary relief, including the moratorium, may be terminated or modified.[96] The domestic creditors may decide to liquidate the assets of the corporate debtor and pay its creditors in accordance with the hotchpot rule under section 28 of draft Part Z.[97] However, there may be instances where the Adjudicating Authority may have to exercise its discretion to impose a moratorium on the domestic insolvency proceedings in order to facilitate the global reorganisation of the corporate debtor. Yet, the limited jurisdiction of the Adjudicating Authority may impede it from passing such orders as the statute does not provide for the exercise of discretionary relief. Therefore, the absence of an express provision vesting the NCLT with the power to grant a moratorium to facilitate global restructuring efforts may prove fatal in this context.

Policy choices in the adoption and interpretation of concepts and terminology: Sensitivities/wariness towards the concept of cross-border insolvency

This factor relates to differences in the ways in which concepts of the Model Law are incorporated into, and interpreted under, domestic law.[98] For example, various sensitivities can be observed with respect to the provisions mandating reciprocity in the recognition of foreign insolvency proceedings, excluding financial service providers and other entities from the ambit of the cross-border provisions, and limiting the recognition of foreign proceedings to those arising out of an inability to pay debts or pursuant to a state of insolvency of the corporate debtor.[99]

The Model Law is designed to minimise interference with domestic insolvency law and must be interpreted in the light of that objective.[100] The United Kingdom has taken the view that the Model Law appears to prescribe certain minimum standards of recognition and assistance only in relation to procedural matters.[101]

Four areas are particularly noteworthy. First, the Model Law allows countries to exclude certain entities from the scope of its application.[102] By way of an example, the Model Law provides that banks and insurance companies may be excluded from its application. However, this is not an exhaustive list.[103] The Code prescribes a different insolvency regime for financial service

[94]Ministry of Corporate Affairs, 'Invitation of comments from public' (n 34).

[95]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) art 20.

[96]ibid art 25(b).

[97]Allan L Gropper, 'The payment of priority claims in cross-border insolvency cases' (2010) 46(3) Texas International Law Journal 559, 566.

[98]Godwin (n 43) 49.

[99]'Insolvency Law Committee Report' (n 32); Draft Part Z (n 56) clarifies the presumption of insolvency for the purposes of cross-border insolvency provisions.

[100]Fernando Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of Its Benefits on International Trade)' (2008) 14(2) Law and Business Review of the Americas 313, 344.

[101]*Rubin v Eurofinance SA* [2012] UKSC 46.

[102]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) art 1.

[103]ibid [56]–[57].

providers.[104] In the same vein, Part Z prescribes that the Government may be empowered to declare certain entities to be excluded from the application of the cross-border framework. It is apparent that entities excluded or governed under a special regime under the Act are excluded from the scope of application of Part Z.

Second, the Indian insolvency regime does not allow proceedings against individual debtors (ie, natural persons). It does, however, allow proceedings against personal guarantors of corporate debtors. Accordingly, the Indian Government – especially India's insolvency regulator – is keen to make personal guarantors part of the cross-border insolvency framework.[105] However, it may be difficult to achieve such an outcome under the present insolvency regime. The present draft law makes no express provision for the pursuit of foreign assets of personal guarantors of corporate debtors.[106] Recognition by a jurisdiction under the Model Law can be sought when the corporate debtor has either its centre of main interest or an establishment in that jurisdiction.[107] As a *de minimis* threshold, the corporate debtor must have at least some assets in the jurisdiction where recognition is sought. Thus, if the personal guarantor has assets in a jurisdiction where the insolvency proceedings against the corporate debtor cannot be recognised, the personal guarantor's assets cannot be pursued. Furthermore, the Model Law only mandates cooperation in insolvency proceedings relating to the corporate debtor and does not extend to a personal guarantor. Therefore, it is unlikely that the adoption of the Model Law will open the doors to pursuing the overseas assets of personal guarantors of Indian corporate debtors.

Third, while the Model Law does not impose a requirement for reciprocity, 'a number of states have included a reciprocity clause into their international insolvency law, such as Mexico and Romania.'[108] Following the same path, Part Z also adopts the reciprocity requirement. Under Part Z, recognition of foreign proceedings is only possible in countries that have adopted the Model Law or in countries with which agreements have been entered under clause 1(5) of Part Z, and which have therefore met the reciprocity requirement.[109] Further, the law confers on the Government the power to exclude certain countries from the application of the cross-border insolvency provisions in the interest of the security of India or the public interest.[110] Additionally, the Government also has the power to limit the applicability of Part Z or make its application subject to certain conditions.[111] The Government is also empowered to extend the applicability of the law to countries that are yet to adopt the Model Law.

The reciprocity requirement is likely to be predicated on the fact that the Indian Government does not intend to recognise insolvencies from jurisdictions that do not accord a similar treatment to Indian insolvency proceedings. It is suggested that India should revisit the reciprocity requirement as none of the leading economies have adopted the Model Law with the reciprocity requirement. Moreover, given that businesses may be spread across multiple jurisdictions, retaining the reciprocity requirement may result in the recognition of proceedings from only certain jurisdictions that have adopted the Model Law, leading to piecemeal resolution or liquidation. However, in light of the limited discretionary powers of the NCLTs, the Government may be keen to retain reciprocity as a statutory requirement.

[104]Financial Service Providers and Application to Adjudicating Authority Rules (adopted 15 Nov 2019).

[105]Ministry of Corporate Affairs, 'Invitation of comments from public' (n 34); Manasa Tantravahi, 'Cross-border insolvency – The ever-evolving framework' (Lakshmikumaran Sridharan attorneys, 24 Mar 2022) <https://www.lakshmisri.com/insights/articles/cross-border-insolvency-the-ever-evolving-framework/#> accessed 20 Mar 2023.

[106]Shikha, 'India's tryst with cross border insolvency' (n 46) 332.

[107]'Insolvency Law Committee Report' (n 32) 20.

[108]Godwin (n 43) citing Barbara Pogacar, 'The 1997 UNCITRAL Model Law on Cross-border Insolvency – ten years after' (2008) 2 Insolvency and Restructuing International 49, 50.

[109]Draft Part Z (n 56) art 1(4).

[110]ibid art 1(6)(a).

[111]ibid art 1(6)(b).

Lastly, there is no guidance in Part Z on how to resolve issues arising out of conflict of laws, ie, which law should be applied to determine substantive issues. The issue of conflict of laws in cross-border insolvency proceedings has assumed importance in cases dealing with avoidance applications, where an insolvency professional such as an administrator seeks to overturn a transaction on the ground that it is voidable. The position in the United States has been to apply the law of the *situs* of the property in avoidance applications,[112] despite the Model Law being silent on the question of the applicable law. However, in matters outside of transaction avoidance, it is implied under prevailing United States law that courts, while applying the Model Law, will defer to the law in the main proceedings. Therefore, the law as applicable in the main proceedings will guide the interpretation and implementation of the Model Law.[113] At present, Indian law does not offer any guidance on this issue. This may be because the issue of conflict of laws is largely underdeveloped in Indian jurisprudence, which has not kept pace with global developments in this area.[114]

The existing legal architecture: legislation and other sources of law

The existing legal architecture in a country, including legislation and the general law in common law jurisdictions, has a bearing on the law pertaining to cross-border insolvency. This factor also relates to differences that exist between the enacting states as to the extent to which areas covered by the Model Law are governed by separate domestic laws and are therefore either superfluous or duplicative when viewed in the context of the Model Law.[115] An example is in the area of remedies: a court in a cross-border insolvency proceeding cannot grant remedies that are not available under the domestic regime. It may be apposite here to refer to the words of Lord Hoffmann in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*:

> At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.[116]

In the United Kingdom, only forms of relief that are part of the domestic law can be granted to a foreign representative. Thus, the pre-existing common law has effectively shaped the Model Law on cross-border insolvency.[117] In the Indian context, some examples of how the existing legal architecture has shaped divergence can be seen in the reluctance to grant an interim moratorium after the filing of an application for recognition and the decision to dispense with the requirement to provide individual notices to foreign creditors.

The existing legislative architecture in India has made the recognition of a scheme of arrangement outside of insolvency proceedings contentious. A scheme of arrangement allows a company to restructure its debts outside the insolvency resolution process. Therefore, it is regulated by the

[112]Walters (n 53).

[113]Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283. Modified universalism, as generally understood by US scholars, implies that judges should defer to the law of the foreign insolvency proceeding (the *lex concursus*) whenever possible, so as to mimic universalism's preferred 'one court, one law' approach.

[114]Saloni Khanderia, 'The ascertainment of the applicable law in the absence of choice in India and South Africa: a shared future in the BRICS' (2020) 20(1) Oxford University Commonwealth Law Journal 27.

[115]Godwin (n 43) 53.

[116][2006] UKPC 20.

[117]Walters (n 53) 99,104.

Companies Act 2013 as opposed to the Code. The Model Law acknowledges that the liquidation and/or reorganisation of a company may be conducted under a country's company law regime as opposed to its insolvency law.[118] Nevertheless, such liquidation and/or reorganisation may deal with or arise out of insolvency or severe financial distress.[119]

When the Code was enacted in India, apart from some minor changes in the rules relating to scheme of arrangement, the concept was left largely untouched, signifying its separate treatment as a corporate rescue mechanism in India.[120] Part Z muddies the waters by stating that a reorganisation under Part Z will be the same as a resolution under the Code.[121] The term 'resolution' is not defined in the Code. However, throughout the Code, the term 'resolution' has been used in the context of a corporate insolvency resolution process. Therefore, for all practical purposes, only a scheme of arrangement arising out of the insolvency of the corporate debtor can be recognised under Part Z. Insolvency and restructuring have followed different trajectories under Indian law. This is different from how the law governing schemes of arrangement has developed in other Commonwealth jurisdictions.[122] This may be the reason why a scheme of arrangement outside the context of corporate insolvency resolution, which is very popular globally, is not contemplated under Part Z.

The United Kingdom, as a part of its recent insolvency law reforms, has introduced the concept of 'restructuring plans'.[123] A restructuring plan is similar to a scheme of arrangement but allows for cross-class cram down.[124] It has been suggested that the restructuring plan's cross-class cram-down power has been used successfully in cases where a scheme alone would not have been effective.[125] There has been considerable confusion as to whether a restructuring plan can be characterised as an insolvency proceeding. The English High Court has recently characterised a restructuring plan proceeding as an insolvency proceeding for certain jurisdictional purposes,[126] but the position remains unsettled. The increasing popularity of pre-insolvency debtor-in-possession proceedings that affect only the interests of some creditors or classes of creditors is not yet reflected in the approach of Part Z.

With regard to the recognition of foreign insolvency-related judgments, the Insolvency Law Committee has stated that it will be possible to recognise insolvency-related judgments through the provisions that adopt the Model Law.[127] However, it is open to the NCLT to take a contrary view. Similar to other jurisdictions, the enforcement of an insolvency judgment in India will continue to be problematic as it is not explicitly mentioned in the Model Law and is only implied in the opening 'any appropriate relief' language and the availability of 'any additional relief' in the discretionary relief rule.[128]

Indian law already provides for the recognition of foreign judgments under the *Code of Civil Procedure*. It is not clear, however, whether the cross-border insolvency provisions would supersede the regime under the Code of Civil Procedure with respect to foreign insolvency-related judgments.

[118]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 38) para 73.

[119]ibid para 73.

[120]Umakanth Varottil, 'The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects' (NUS Law Working Paper 2017/005/NUS Centre for Law & Business Working Paper 17/02, Mar 2017) 4 <https://law.nus.edu.sg/wp-content/uploads/2020/04/005_2017_Umakanth.pdf> accessed 20 Mar 2023.

[121]Draft Part Z (n 56) Explanation art 2(g).

[122]Varottil (n 120).

[123]UK Corporate Insolvency and Governance Act (enacted 25 Jun 2020).

[124]Peter Walton & Lézelle Jacobs, 'Corporate Insolvency and Governance Act 2020 – Interim report March 2022' (United Kingdom Insolvency Service, 19 Dec 2022) <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-interim-report-march-2022> accessed 25 Jul 2023.

[125]ibid.

[126]*Re Gategroup Guarantee* Ltd 1 [2021] BCC 549.

[127]'Insolvency Law Committee Report' (n 32) 40.

[128]Mevorach (n 113) 300.

Considering the lack of certainty regarding the recognition and enforcement of foreign insolvency-related judgments and orders, the cross-border insolvency provisions may become the preferred mode for the enforcement of insolvency judgments in respect of those countries that meet the reciprocity threshold.[129] It is, however, possible that the NCLTs, while entertaining an application for recognition of a foreign judgment, may direct the parties to the appropriate civil court. If an NCLT assumes jurisdiction at all, it may only recognise insolvency-related judgments that are in accordance with the Code on Civil Procedure. Therefore, the lack of legislative clarity and the silence of the text may again prove fatal in this context.

Acknowledging this concern, the Indian Ministry of Corporate of Affairs has suggested that the Model Law, as adopted by India, could explicitly confer powers on the Adjudicating Authority to recognise foreign insolvency judgments, provided that such judgments relate to foreign proceedings that have been recognised under draft Part Z.[130]

The draft law imposes certain regulatory restrictions on a foreign representative's direct right of access to Adjudicatory Authorities in India. As is evident from the Insolvency Law Committee report, this is a result of the Indian legal position which restricts foreign lawyers from practising before the courts in India.[131] The Bar Council of India, a statutory body established to regulate the legal profession in India, has recently framed rules for the registration and regulation of foreign lawyers and law firms in India.[132] The rules do not bring about any significant changes to the existing law.[133] Moreover, the rules do not extend to foreign insolvency resolution professionals/foreign representatives. Apart from protectionism, policy imperatives may provide reason for such restrictions.[134] The policy could also be seen as giving Indian lawyers and insolvency professionals control over domestic insolvency proceedings, as a foreign representative is required to appear before an Adjudicatory Authority with the aid and support of an Indian legal professional.

Finally, the judicial backlog in the cases, coupled with the unavailability of any interim relief, can make the process of obtaining recognition under the Indian law a challenging experience. Under the Model Law, the court receiving an application for recognition must decide on the application at the 'earliest possible time'.[135] Under the draft law, an application for recognition must be decided within thirty days from the date of filing of the application, with a provision for extension for a further thirty days.[136] In the absence of specialised benches for cross-border insolvency, such an outcome seems difficult to achieve.[137]

[129]Dhananjay Kumar, 'Indian Insolvency Regime without Cross-border Recognition – A Task Half Done?' (Cyril Amarchand Mangaldas, 16 May 2017) <https://corporate.cyrilamarchandblogs.com/2017/05/indian-insolvency-regime-without-cross-border-recognition-task-half-done/> accessed 20 Mar 2023.

[130]Ministry of Corporate Affairs, 'Invitation of comments from public' (n 34) para 3.3.

[131]*Bar Council of India v AK Balaji* Civil Appeal Nos 7875-7879 of 2015 with Civil Appeal No 7170 of 2015 and Civil Appeal No 8028 of 2015.

[132]Bar Council of India, Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India 2022 (adopted 10 Mar 2023) <https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf> accessed 7 Jun 2024.

[133]The rules provide for foreign lawyers and foreign law firms to practise foreign law and diverse international law and international arbitration matters in India in accordance with the principle of reciprocity and in a well-defined, regulated, and controlled manner. According to the rules, foreign lawyers and foreign law firms are only allowed to operate in non-litigious areas. Foreign lawyers and foreign law firms are not allowed to appear before any court, tribunal, board, statutory or regulatory authority, or any forum legally entitled to take evidence on oath and/or having the trappings of a court.

[134]See Andrew Godwin, 'Barriers to practice by foreign lawyers in Asia: examining the role of lawyers in society' (2015) 22(3) International Journal of the Legal Profession 299.

[135]UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (n 42) art 17(1).

[136]Draft Part Z (n 56) art 15(4).

[137]While the Insolvency Law Committee had recommended for the constitution of special benches for deciding on cross-border insolvency disputes, the report on the rules and regulations for cross-border insolvency resolution has rejected such a recommendation.

Comparative analysis: to what extent is India's approach sui generis?

This section will discuss whether the divergences observed in the Indian regime give rise to an altogether *sui generis* regime, ie, a regime that is unique to India and where the divergences result in a framework that is significantly different from the framework established by the Model Law. There are four areas that may support the argument that the Indian regime is *sui generis*: the limited jurisdiction of the Adjudicating Authority (the NCLTs); the reciprocity requirement; the restrictions on the right of access of foreign representatives; and the desirability of extending the provisions pertaining to cross-border insolvency to personal guarantors.

It has been noted that the particularities of a country and its legal cultures will be reflected in its insolvency regime.[138] The Model Law is said to be flexible in taking into account a country's domestic interests. For instance, Singapore's adoption of the Model law has been said to represent an 'enhanced version of the Model law', drawing extensively on the experience of the United States and the United Kingdom.[139]

With respect to jurisdiction, it is important to note that the NCLTs are specialised tribunals dealing with company law, competition law, and insolvency matters, and have limited jurisdiction. This has a bearing on the nature of relief that will be available in the Indian cross-border insolvency regime.

The Model Law relies on the exercise of judicial discretion to apply it in a pragmatic and innovative manner. Issues that are not addressed in the Model Law, such as group insolvency, have been applied in the Model Law context.[140] In the *Videology* case, for example, the parent company was incorporated in the United States and the subsidiary was incorporated in the United Kingdom. There were reorganisation proceedings in the United States. The English High Court recognised the reorganisation proceedings against both the parent and subsidiary. The proceedings against the parent were recognised as foreign main proceedings and the proceedings against the subsidiary as foreign non-main proceedings. This allowed the Court to tailor the relief in a manner consistent with the principle of collective insolvency proceedings.[141]

The United Kingdom Supreme Court's decision in *Rubin* also creates uncertainty as to how matters not contemplated under the Model Law are to be regulated. In this context, the Supreme Court has concluded that the Model Law does not contemplate the recognition of insolvency-related judgments and that the Model Law principles are therefore inapplicable to their enforcement actions. To counter this legislative vacuum, the UK courts have applied the principles of private international law as applicable in the United Kingdom.[142] However, it is unclear how the NCLTs will approach such an issue. Under section 5 of Part Z, which provides that additional assistance may be provided to a foreign representative 'under any other law of India', an NCLT may either provide assistance or, in the absence of statutory enlargement of its jurisdiction in a cross-border context, refuse to exercise jurisdiction.

It is well accepted that even in the absence of textual divergence, divergence may emerge through court practices and judicial interpretation.[143] As noted by UNCITRAL, 'those courts which possess an inherent jurisdiction are likely to have greater flexibility in determining what steps can be taken between courts, in order to give effect to the Model Law's emphasis on cooperation and coordination.'[144] Given their limited jurisdiction, it is unlikely that the NCLTs will engage in much (if any) judicial innovation for the effective coordination of cross-border insolvency proceedings.

[138]Elina Moustaira, *International Insolvency Law: National Laws and International Texts* (Springer 2019).
[139]Godwin (n 43) 45.
[140]*Re Videology Ltd* [2018] EWHC 2186 (Ch).
[141]ibid.
[142]*Rubin v Eurofinance SA* (n 101).
[143]Godwin (n 43) 46.
[144]United Nations Commission on International Trade Law, 'UNCITRAL Model on Cross-Border Insolvency: The Judicial Perspective' (2013, updated 2022) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlcbi_judicial_perspective_en.pdf> accessed 27 Mar 2023.

Regarding reciprocity, Part Z's adoption of this principle may have been influenced by the perceived lack of harmonisation of the Model Law among jurisdictions that have adopted it. Looking at the different interpretations of the Model Law, some have questioned whether objective harmonisation of its interpretation has been achieved.[145] It is perceived that the fact that a country has adopted the Model Law is not in itself an indication of whether that country will be receptive to the principle of modified universalism. In this context, modified universalism refers to the principle that courts should cooperate as far as possible with the courts of the country of the main proceedings in order to achieve a single system of distribution. A country may adopt the Model Law with significant deviations, complicating the recognition of foreign insolvency proceedings.[146] Recognising such divergences, some have advocated the adoption of purpose-specific bilateral agreements with major trading partners, arguing that bilateral treaties can lead to uniformity in the interpretation of the interpretation of the text and greater predictability of insolvency outcomes.[147] The requirement of reciprocity may also encourage governments and courts to study the cross-border insolvency laws of other countries. However, given the limited jurisdiction of the Adjudicating Authority in India, it is uncertain whether the potential benefits in this regard will be realised.

While the reciprocity requirement limits the recognition of cross-border insolvency proceedings, it also raises potential difficulties in determining when the requirement of reciprocity has been satisfied (ie, determining the conditions that need to be met to establish reciprocity and the challenges of interpretation that this may raise).

The Insolvency Law Committee recommended that a conservative approach be taken in providing access to foreign representatives pending the development of infrastructure for cross-border insolvency in India.[148] Its report notes that the Government may consider the possibility of allowing foreign representatives to have access to courts, and to exercise their powers under draft Part Z through domestic insolvency representatives.[149] Such a framework was rejected by the Cross Border Insolvency Rules/Regulations Committee (CBIRC).[150] However, the CBIRC retained the regulation and authorisation requirements for foreign representatives as part of its recommendations. Noting that most other countries that have adopted the Model Law do not require separate registration of the foreign representative with an insolvency regulator or the government, the CBIRC suggested a principles-based, light-touch code of conduct for foreign representatives.[151]

Finally, the proposal to include personal guarantors under the ambit of cross-border insolvency provisions is motivated by the fact that personal guarantors of large corporate debtors often have assets abroad.[152] It has been held that the 'scheme of the Code always contemplated that overseas assets of a corporate debtor or its personal guarantor could be dealt with in an identical manner during insolvency proceedings, including by issuing letters of request to courts or authorities in other countries for the purpose of dealing with such assets located within their jurisdiction'.[153] It may be the intention of the Indian Government to streamline the process of dealing with personal guarantors through the cross-border insolvency framework. However, for the reasons discussed above, it may be difficult to achieve this objective.

[145]Shukla & Jayaram (n 35) 314.
[146]ibid 317.
[147]ibid 318.
[148]'Insolvency Law Committee Report' (n 32) para 5.4.
[149]ibid.
[150]Cross Border Insolvency Rules/Regulations Committee (n 33) 39.
[151]ibid 49.
[152]Ruchika Chitravanshi, 'Personal guarantors may be part of cross-border insolvency framework' (Business Standard, 19 Nov 2021) <https://www.business-standard.com/article/companies/personal-guarantors-may-be-part-of-cross-border-insolvency-framework-121111900034_1.html> accessed 27 Jul 2023.
[153]*Lalit Kumar Jain v Union of India and Ors* (2021) 9 SCC 321.

The Journey Ahead for Cross-Border Insolvency Law Reform in India

The adoption of the Model Law is likely to have an important signalling effect on potential foreign investors in India. By failing to adopt the Model Law, India has already missed opportunities to participate in coordinated cross-border insolvency proceedings, largely to the detriment of Indian creditors.[154] Therefore, the implementation of a cross-border insolvency regime in India is the need of the hour.

The divergences observed in India's proposed cross-border insolvency law appear to be minimal. However, as this article has demonstrated, there is a possibility that other external factors may play a significant role in translating minor divergences in legislative text into significant divergences in outcomes. The analysis of the reasons behind the divergences suggests that four areas of divergence are particularly relevant.

First, the structure of the existing legal institutions (ie, NCLTs) is critical. One way to overcome significant divergences in outcomes would be to enlarge the jurisdiction of the NCLTs in cross-border insolvency matters. This would equip the NCLTs with the necessary legislative support to fashion context-specific and needs-based discretionary remedies in cross-border insolvency disputes.

As specialised tribunals constituted to deal with certain specific laws, the NCLTs are ill-equipped to provide any additional assistance to the foreign representative under laws other than the Code. Therefore, a foreign representative may have to approach individual courts for appropriate relief under other laws. A single window in India for all cross-border relief may remain a distant reality.

Second, the reciprocity requirement appears to be a significant legislative divergence that may act as an impediment to the development of cross-border insolvency law and practice in India.

Third, placing restrictions on direct access rights of foreign representatives suggests a political reluctance to move away from the highly regulated Indian legal and insolvency professional services industry. It also means that foreign creditors will continue to rely on domestic legal and insolvency professionals to get access to the Indian cross-border insolvency regime.

Fourth and finally, while Part Z opens a gateway for cooperation and coordination in India, its success will depend on how well the NCLTs shed their historical practice of territorialism and embrace modified universalism, thereby becoming receptive to innovative solutions in the coordination of cross-border insolvency proceedings. Irrespective of the extent to which Part Z diverges from the Model Law and creates a cross-border insolvency law framework unique to India, its effectiveness will ultimately be measured by the practical outcomes it achieves. The willingness of the courts to embrace modified universalism, as reflected in cases such as the Jet Airways (India) Ltd insolvency, suggests that there is room for cautious optimism in this regard.

[154]Mehta (n 25).

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