

COMMENTS

Cross-Border Insolvency in India: A Resistance to Change

Gabriela Roca-Fernandez*

I. INTRODUCTION	99
II. INDIA’S HISTORY	101
III. INSOLVENCY	103
A. <i>Approaches to Cross-Border Insolvency</i>	104
B. <i>UNCITRAL Model Law on Cross-Border Insolvency</i>	106
IV. INDIA’S INSOLVENCY AND BANKRUPTCY CODE 2016	109
V. INDIA’S HESITATION OF THE ADOPTION OF UNCITRAL MODEL LAW OF CROSS-BORDER INSOLVENCY.....	111

I. INTRODUCTION

On April 17, 2019, Jet Airways, an Indian airlines company, provided its last day of air travel services to the public.¹ Shortly thereafter, Jet Airways filed for insolvency pursuant to the Indian and Bankruptcy Code, enacted in 2016.² The company had been struggling to scrap together assets to repay its creditors.³ Although Jet Airways is an Indian company, it also conducts operations in the Netherlands.⁴ The Jet

* © 2021 Gabriela Roca-Fernandez. J.D. Candidate, Tulane University School of Law 2021. I would like to thank my family for their support and Adam Feibelman for his guidance.

1. *Jet Airways to Become First Indian Company to Undergo Cross Border Insolvency Proceedings*, LIVE MINT (Oct. 18, 2019), <https://www.livemint.com/companies/news/jet-airways-to-become-first-indian-company-to-undergo-cross-border-insolvency-proceedings-11571371382030.html> [<https://perma.cc/F68W-VW8F>] [hereinafter *Jet Airways*].

2. *Id.*; Maggie Teneva, *Jet Airways Insolvency: The Story Behind the Crisis*, SKY REFUND, (Aug. 5, 2019) <https://skyrefund.com/en/blog/jet-airways-insolvency> [<https://perma.cc/TJJ7-X8V5>].

3. *Jet Airways*, *supra* note 1; Teneva, *supra* note 2.

4. *Jet Airways*, *supra* note 1; Sumant Batra, *Cross Border Insolvency Protocol Fills a Gap, But Is not a Comprehensive Law*. FIN. EXPRESS (2019), <https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/> [<https://perma.cc/VT6E-CGUE>] [hereinafter Batra].

Airways bankruptcy proceeding poses larger questions to the Indian government and policymakers of how to address future similar cross-border insolvency cases.⁵ With discrepancies in how it solves the issues that have emerged with these proceedings, India's current legal framework is not well suited to allow for a formal and uniformed proceeding.⁶ Jet Airways is just one example of the ongoing situation that India will face with companies that are insolvent with assets or creditors found outside of their jurisdiction.⁷

The Insolvency and Bankruptcy Code includes provisions for companies, partnerships, and individuals facing financial distress in India.⁸ Although the drafters included provisions that address cross-border insolvency, the provisions do not address some of the issues that arise in these proceedings.⁹ This Comment defines cross-border insolvency and discusses its different approaches. It then describes the UNCITRAL model law of cross-border insolvency and explains why it has become the most adopted legal framework for such proceedings. Finally, it contextualizes India's hesitations in adopting UNCITRAL Model Law given India's economic history and political factors.

5. See *Jet Airways First Indian Company to Face Cross-Border Insolvency: Report*, NDTV PROFIT (Oct. 17, 2019), <https://www.ndtv.com/business/jet-airways-first-indian-company-to-face-cross-border-insolvency-report-2118571> [<https://perma.cc/AB7Y-C4HN>]; Teneva, *supra* note 2; Megha Bahree, *With No Buyer in Sight, Jet Airways Lands in Bankruptcy Court*, FORBES (June 18, 2019), <https://www.forbes.com/sites/meghabahree/2019/06/18/with-no-buyer-in-sight-jet-airways-lands-in-bankruptcy-court/#31ea710e5954> [<https://perma.cc/8YCX-Y8XZ>]; Batra, *supra* note 4; *Multinational Companies and Cross-Border Insolvency in India*, ETCFO (Oct. 21, 2019), <https://cfo.economictimes.indiatimes.com/news/multinational-companies-and-cross-border-insolvency-in-india/71688339>. [<https://perma.cc/MF9X-64GT>] [hereinafter *Multinational Companies*].

6. *Multinational Companies*, *supra* note 5.

7. See SUMANT BATRA, CORPORATE INSOLVENCY: LAW AND PRACTICE 580, 586 (2017) [hereinafter LAW AND PRACTICE]; see Batra *supra* note 4.

8. See *Jet Airways*, *supra* note 1; Batra, *supra* note 4; *Multinational Companies*, *supra* note 5.

9. Remya Nair, *India Has a New Law on Bankruptcy*, LIVE MINT (May 12, 2016), <https://www.livemint.com/Politics/mQNm3XHXSqFVfoSCGsn3bO/Parliament-clears-Insolvency-and-Bankruptcy-Code-2016.html> [<https://perma.cc/37H5-YGRM>]; Abhishek Saxena, *India: Cross-Border Insolvency: Breaking Down the Indian Insolvency and Bankruptcy Code*, PHOENIX LEGAL (July 5, 2016), <https://www.mondaq.com/india/InsolvencyBankruptcyRestructuring/506600/Cross-Border-Insolvency-Breaking-Down-The-Indian-Insolvency-And-Bankruptcy-Code-2016> [<https://perma.cc/RF8R-X7XY>]; see The Insolvency and Bankruptcy Code, 2016, No. 31 of 2016, (May 28, 2016), <http://egazette.nic.in/WriteReadData/2016/169882.pdf>.

II. INDIA'S HISTORY

The year 1947 was monumental for India,¹⁰ as it became independent after 200 years of British control.¹¹ In an attempt to protect its boundaries, India underwent major political, social, and financial reforms.¹² The government gained control of a majority of the sectors, ranging from transportation to education, while the private sector composed a small portion of the economy.¹³ During this time, the government of India implemented “five-year development plans,” each aimed at expanding different parts of the economy, from the agricultural sector to the industrialization of India.¹⁴ The industries that developed during this time were categorized as either solely in the public sector, state-owned, or privately owned.¹⁵ The government would also indirectly control sectors such as manufacturing by requiring them to have licenses, which were difficult to obtain and limited in number.¹⁶ Overall, India was adopting an economic framework that made the government the controlling figure.¹⁷

By the 1970s, most sectors of the economy were government controlled, and banks were nationalized.¹⁸ The government enacted legislation that increased its power and control over most sectors of the economy.¹⁹ It also passed legislation such as the Foreign Exchange Regulation Act, which “regulate[d] certain dealings in foreign exchange, impose[d] restrictions on certain kinds of payments and monitor[ed] transactions impinging the foreign exchange and the import and export

10. Dushyant Gosal, *History of Economic Growth in India*, INT'L POL'Y DIG. (Apr. 24, 2013), <https://intpolicydigest.org/2013/04/24/history-of-economic-growth-in-india/> [<https://perma.cc/UML7-D2DL>].

11. *Id.*

12. *Id.*

13. *See id.*; Swaminathan S. Anklesaria Aiyar, *Twenty-Five Years of Indian Economic Reform*, CATO (Oct. 26, 2016), <https://www.cato.org/publications/policy-analysis/twenty-five-years-indian-economic-reform> [<https://perma.cc/6UPK-FK8N>].

14. *See* Aiyar, *supra* note 13; Gosal, *supra* note 10.

15. Aiyar, *supra* note 13; *A Short History of Indian Economy 1947-2019: Tryst with Destiny and Other Stories*, LIVE MINT [hereinafter *A Short History*], <https://www.livemint.com/news/india/a-short-history-of-indian-economy-1947-2019-tryst-with-destiny-other-stories-1565801528109.html> [<https://perma.cc/2ME9-2BFC>] (last visited March 24, 2020).

16. *A Short History*, *supra* note 15; Aiyar, *supra* note 13.

17. *See A Short History supra* note 15.

18. Aiyar, *supra* note 13.

19. *See id.*

of currency.”²⁰ This act also restricted foreign companies from owning more than 40% of businesses in India.²¹

In the 1980s²² and 1990s, the government initiated policies that promoted businesses and protected consumers.²³ Some of those reforms included eliminating the licensing requirement, allowing businesses to expand to sectors of the economy that were previously government owned, and altering Foreign Direct Investment policies.²⁴ Foreign Direct Investment (FDI) began to increase in the country, which greatly benefitted the country’s economy.²⁵ Foreign Direct Investment is “an investment made by a firm or individual in one country into business interests located in another country.”²⁶ In the past, for an FDI to be approved in India, it had to go through an approval process where the Foreign Investment Promotion Board (FIPB) evaluated the FDI submissions and gave recommendations to the ultimate decision maker, the government.²⁷ This created various layers of scrutiny before foreign investment could be made in India.²⁸ However, in 2017, the government abolished the FIPB, dismissed the approval process, and for the most part turned process into an “automatic approval” system.²⁹ These changes have eliminated obstacles for companies and facilitated investment in

20. Shephali Kappor, *What Is Foreign Exchange Regulation Act?*, 99 ACRES (Aug. 7, 2018), <https://www.99acres.com/articles/what-is-foreign-exchange-regulation-act.html> [<https://perma.cc/VC9F-X2RN>].

21. *A Short History*, *supra* note 15.

22. *Id.*

23. See GAUTAM CHIKERMANE, 70 POLICIES THAT SHAPED INDIA: 1947 TO 2017, INDEPENDENCE TO \$2.5 TRILLION 49-63 (2018) (discussing acts such as the Consumer Protection Act, 1986, and the Sick Industrial Companies Act, 1985, which aimed to protect consumers from false information disseminated by companies and help companies that were financially in turmoil).

24. See Aiyar *supra* note 13; see Short History *supra* note 15.

25. *What Is Foreign Direct Investment (FDI)*, BUS. STANDARD, <https://www.business-standard.com/about/what-is-fdi> [<https://perma.cc/5CSU-B5ZP>] (last visited Nov. 12, 2020).

26. James Chen, *Foreign Direct Investment (FDI)*, INVESTOPEDIA (Feb. 24, 2020), <https://www.investopedia.com/terms/f/fdi.asp>.

27. Bhargavi Zaveri & Radhika Pandey, *Half-Hearted FDI Reform*, BUS. STANDARD (Feb. 16, 2017), https://www.business-standard.com/article/opinion/bhargavi-zaveri-radhika-pandey-half-hearted-fdi-reform-117021601279_1.html, [<https://perma.cc/U5VP-F2GK>].

28. *See id.*

29. *FIPB Abolished: What Happens to Foreign Investors Now?*, LIVE MINT (May 25, 2017) [hereinafter *FIPB Abolished*], <https://www.livemint.com/Politics/Cs8tkz7CqpiTGx4qnoDBQP/FIPB-abolished-What-happens-to-foreign-investors-now.html> [<https://perma.cc/C36U-C57M>]; *India Bound FDI May Face Thorough Frisking*, ECON. TIMES (Oct. 19, 2019) [hereinafter *India Bound FDI*], <https://economictimes.indiatimes.com/news/economy/policy/india-bound-fdi-may-face-thorough-frisking/articleshow/71623838.cms?from=mdr>.

Indian companies.³⁰ Over recent decades, the country has enacted different policies that have encouraged trade and foreign investment; arguably one of these is India's insolvency law.³¹

III. INSOLVENCY

Insolvency law is directed to circumstances where a debtor cannot repay its loans to its creditors.³² When a corporation or an individual becomes insolvent, parties usually resort to legal action.³³ During insolvency proceedings, courts allocate the debtor's property according to creditors' claims against the debtor.³⁴ When the debtor, creditor, and assets are found in the confinements of the one jurisdiction, that jurisdiction's law governs.³⁵ However, with the rise in globalization, insolvency has become inherently more complex as different parties are often located in foreign jurisdictions governed by competing legal systems and proceedings.³⁶

Therefore, cross-border insolvency proceedings and laws have expanded as a result.³⁷ Cross-border insolvency is defined as “[a] situation where a single debtor company has entered formal insolvency proceedings in more than one jurisdiction and there is, at least, potentially a conflict of laws affecting the conduct of the debtor's

30. See *FIPB Abolished*, *supra* note 29; see *India Bound FDI*, *supra* note 29; see Bhargavi & Pandey *supra* note 27; *Govt Abolishes 25-year-old FIPB, New Mechanism for FDI Approval on Anvil*, BUS. STANDARD (May 24, 2017), https://www.business-standard.com/article/economy-policy/govt-abolishes-25-year-old-fipb-new-mechanism-for-fdi-approval-on-anvil-117052401253_1.html, [https://perma.cc/Q336-7BX2].

31. See Aiyar, *supra* note 13; Batra, *supra* note 4.

32. *Insolvency*, *The Free Dictionary*, <https://legal-dictionary.thefreedictionary.com/insolvency> (last visited Mar. 25, 2020), [https://perma.cc/YV75-SN8P]; *Insolvency*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/insolvency.asp>, [https://perma.cc/H47N-4QWM] (last visited Mar. 25, 2020).

33. See ELINA MOUSTAIRA, *INSOLVENCY LAW: NATIONAL AND INTERNATIONAL TEXTS* 10 (2019).

34. *Id.*

35. See *id.*; see Mark Homan, *An Insolvency Practitioner's Perspective*, in *CROSS-BORDER SECURITY AND INSOLVENCY* 243 (Bridge & Stevens, eds., 2001).

36. See generally Homan, *supra* note 35, Saxena, *supra* note 9; MOUSTAIRA, *supra* note 33, at 10.

37. See Homan, *supra* note 35; Saxena, *supra* note 9; MOUSTAIRA, *supra* note 33; MARCELA OUATU, *MODIFIED UNIVERSALISM FOR CROSS-BORDER INSOLVENCY: DOES IT WORK?* 27 (Univ. of B.C. 2014); see Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, U. PA. J. INT'L ECON. L. 679, 682 (2000).

affairs.”³⁸ There are three major circumstances where the cross-border insolvency laws are involved: when the dispute is between a debtor and foreign creditor, when the debtor’s assets are located in another jurisdiction, or when there are multiple concurrent proceedings occurring against a debtor in different jurisdictions.³⁹ Factors involved in such proceedings include choice of law, choice of forum, and how and where the judgment will be enforced, which may heavily dictate a proceeding’s outcome.⁴⁰ The intricacies and complexities of cross-border insolvency birthed different approaches to resolving insolvency issues.⁴¹

A. *Approaches to Cross-Border Insolvency*

Territorialism and universalism are the two most popular approaches to cross-border insolvency.⁴² Other alternatives have emerged over the years to attempt to address the shortcomings of the aforementioned theories.⁴³

Under the territorial approach, the jurisdiction where the assets are located is where the proceeding will take place, and the laws of that jurisdiction will govern.⁴⁴ In other words, the proceedings would solely focus on the assets located in that jurisdiction.⁴⁵ Throughout history, territorialism has been the preferred approach by many countries because it promotes respect for “local interest” and “sovereignty.”⁴⁶ Jurisdictions have sole control over the assets, proceedings, and outcomes without interference from other countries’ laws.⁴⁷ The territorialist approach has

38. Homan, *supra* note 33, at 243.

39. Sarthak Jain & Anushka Sheth, *Cross Border Insolvency: Why India Should Adopt Uncitral Model Law*, INDIA L.J., 2020, at 2, <https://www.indialawjournal.org/cross-border-insolvency.php> [<https://perma.cc/A37Y-278D>]; Saxena, *supra* note 9.

40. See MOUSTAIRA, *supra* note 33, at 10.

41. OUATU, *supra* note 37; see Anderson, *supra* note 37.

42. MOUSTAIRA *supra* note 33, at 13-14; OUATU, *supra* note 37, at 27; see Anderson, *supra* note 37.

43. See MOUSTAIRA, *supra* note 33, at 13-14; OUATU, *supra* note 41; see Anderson, *supra* note 37.

44. See Anderson, *supra* note 37, at 681; BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 40-41 (2009).

45. WESSELS, *supra* note 44.

46. See Anderson, *supra* note 37, at 681; see WESSELS, *supra* note 44; OUATU, *supra* note 37, at 1-2.

47. See BENHAJ SHAABAN MASOUD, THEORETICAL ASPECTS OF THE CROSS-BORDER INSOLVENCY LANDSCAPE: ISSUES AND PERSPECTIVES FOR SUB-SAHARAN AFRICA 10 (2010), <https://www.iiiglobal.org/sites/default/files/theoreticalaspectsofthecrossborderinsolvencylandscap eissuesandperspectivesofsubaharaafrica.pdf>; see WESSELS, *supra* note 44, at 40-41; OUATU, *supra* note 37, at 1-2; Anderson, *supra* note 37, at 682.

some drawbacks.⁴⁸ Separate proceedings are held in each jurisdiction where the debtor has assets, which increases the cost and unnecessarily elongates a process that could have been resolved in one court.⁴⁹ Thus, territorialism often creates a tedious, more expensive, and more uncertain proceeding.⁵⁰

On the other hand, under universalism,⁵¹ the proceeding takes place in the jurisdiction where the debtor is located regardless of where the creditors or assets are found.⁵² Therefore, one court and one law govern the whole proceeding against the debtor.⁵³ Furthermore, the judgment that results from such proceedings is ideally recognized and enforced in all the jurisdictions where the assets and creditors are located.⁵⁴ This approach provides a faster, more cost-effective, and uniform process for all the parties.⁵⁵ Although universalism lays out a more stable and cohesive approach, it is legally impractical because it assumes that every country would surrender its judicial sovereignty and subject themselves to another country's laws and legal decisions.⁵⁶

Territorialism and universalism fall on opposite extremes of the spectrum, which naturally led to the development of a third, more centrist theory.⁵⁷ Modified universalism is a hybrid approach that aims to combine universalism and territorialism to reach a middle ground.⁵⁸ Under this theory, an insolvency proceeding would occur in one jurisdiction.⁵⁹ All parties located in different jurisdictions who may be involved in such proceedings generally would abide by the laws of the

48. Anderson, *supra* note 37, at 679-80; WESSELS, *supra* note 44, at 41.

49. MOUSTAIRA, *supra* note 33, at 11-12; WESSELS, *supra* note 44; OUATU, *supra* note 37, at 19.

50. Anderson, *supra* note 37.

51. Anderson, *supra* note 37; OUATU, *supra* note 37, at 1-2; Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil*, 32 HOUS. J. INT'L L. 97, 103 (2009).

52. Anderson, *supra* note 37; OUATU, *supra* note 37, at 1-2; Campana Filho, *supra* note 51.

53. Anderson *supra* note 37; OUATU *supra* note 37, at 1-2; Campana Filho, *supra* note 51, at 103.

54. OUATU, *supra* note 37, at 21.

55. MOUSTAIRA, *supra* note 33; *see* Anderson *supra* note 37, at 682; Campana Filho, *supra* note 51, at 103.

56. *See* Anderson, *supra* note 37, at 682.

57. *See* Anderson *supra* note 37; WESSELS, *supra* note 44, at 49; *see* Campana Filho, *supra* note 51, at 106.

58. *See* Campana Filho, *supra* note 51, at 106; *see also* WESSELS, *supra* note 44, at 49; Moustaira, *supra* note 33, at 10-12.

59. MOUSTAIRA, *supra* note 33, at 13.

jurisdiction conducting the proceedings.⁶⁰ However, under this approach, “judicial sovereignty” is still valued and jurisdictions that may have to implement the outcome of the proceeding have the ability to weigh the “local interests” and, if the proceeding impedes with the jurisdiction’s interests, the jurisdiction could refrain from recognizing the proceeding.⁶¹ Many jurisdictions have adopted this alternative approach, which provides a more equitable and fair process.⁶² Nongovernmental agencies have developed legal frameworks based on the modified universalism theory that countries could adopt to foster fairness at the international level.⁶³ As a result, the United Nations Commission on International Trade Law (UNCITRAL) developed a Model Law on Cross-Border Insolvency.⁶⁴

B. *UNCITRAL Model Law on Cross-Border Insolvency*

The United Nations Commission on International Trade Law is a branch of the United Nations with a mission to promote trade and investment.⁶⁵ It achieves its mission by developing model laws to guide countries on trade at the international level.⁶⁶ The UNCITRAL Model Law on Cross-Border Insolvency was drafted in the 1990s as a response to the rise in technology and globalization, which consequently contributed to the increase of international trade.⁶⁷ The Model Law was developed and adopted in May 1997 to provide an efficient framework to facilitate cross-border insolvency proceedings across multiple jurisdictions.⁶⁸ It focuses on four major components of cross-border insolvency proceedings: “access of foreign representatives and creditors

60. OUATU, *supra* note 37, at ii.

61. *Id.*; Anderson, *supra* note 37, at 691.

62. OUATU, *supra* note 37 at ii; Anderson, *supra* note 37, at 691.

63. OUATU, *supra* note 37, at ii; Anderson, *supra* note 37, at 691.

64. OUATU, *supra* note 37, at ii; Anderson, *supra* note 37 at 691.

65. UNITED NATIONS, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2013), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf>, [<https://perma.cc/2P7K-X3P9>].

66. *Id.*

67. WESSELS, *supra* note 44, at 200; Lia Metreveli, *Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL’s Recent Amendment to Its Model Law on Cross-Border Insolvency*, COLUM. J. LAW & SOC. PROBS. 2017-2018, at 316-17.

68. WESSELS, *supra* note 44 at 200; Metreveli, *supra* note 67; Morshd Manna, *Are Bangladesh, India and Pakistan Ready to Adopt the UNCITRAL Model Law on Cross-Border Insolvency?*, 25 INT’L INSOLVENCY REV. 195, 196-97 (2016).

to courts in this state,”⁶⁹ “recognition of certain orders issued by foreign courts,”⁷⁰ “relief to assist foreign proceedings,”⁷¹ and “cooperation and coordination with foreign courts and foreign representatives.”⁷²

The Model Law grants access to “foreign representatives.”⁷³ This provision allows the representative of a foreign party to represent their client in the jurisdiction where the proceeding is taking place.⁷⁴ The “foreign representative” has right to attend and participate in court hearings as well as initiate the proceedings in that jurisdiction.⁷⁵ Foreign representatives are also notified of any information about the proceedings, which creates an equal playing field for both domestic and foreign parties.⁷⁶

Recognition of “foreign orders” is a second element found in the Model Law.⁷⁷ First, it identifies where the primary proceedings and any secondary proceedings will take place.⁷⁸ The main proceedings occur where the debtor “has its center of main interest,” also known as “COMI.”⁷⁹ COMI is intended to refer to where the debtor has its registered offices or habitual residences, regardless of where the assets are located.⁸⁰ The secondary proceedings, referred as the “non-main proceeding,”⁸¹ is where the debtor’s “establishment” is located, which is defined as “any place of operation where the debtor carries out non-transitory economic activity with human means and good or services.”⁸²

69. See UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, ch. 2, <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [<https://perma.cc/AJN8-LMTD>] [hereinafter GUIDE TO ENACTMENT].

70. *Id.* at ch. III.

71. *Id.* at ch. IV, sec. C.

72. *Id.* at Part I, ch. IV and Part II, sec. D.

73. *Id.* at ch. III. (Under the Model Law, “foreign representative” is defined as a “a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.”)

74. *Id.*

75. *Id.* at art. 2.

76. *Id.* at ch. III, art. 14.

77. *Id.* at 28.

78. Gerard McCormack & Wan Wai Yee, *The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms?* 54 TAX. INT’L L.J. 273, 283 (2019).

79. *Id.*

80. *Id.* at 285-87; see Sean E. Story, *Cross-Border Insolvency: A Comparative Analysis*, 32 ARIZ. J. INT’L & COMP. L. 431, 438 (2015).

81. *Guide to Enactment*, supra note 69.

82. McCormack & Yee, supra note 78, at 276-79.

Overall, the objective of this procedural aspect is to lessen the burden of the validity and recognition of a foreign proceeding in other countries.⁸³

The third principal is relief.⁸⁴ The Model Law provides three types of relief: “interim relief,” “discretionary relief,” and “automatic relief.”⁸⁵ Provided recognition of the proceeding is granted, one or multiple types of relief may be given to the foreign proceeding in the jurisdiction.⁸⁶ The resulting types of relief range from the debtor being prohibited from transferring its assets to receiving a “stay of action.”⁸⁷ Lastly, the Model Law places large emphasis on the jurisdictions cooperating and coordinating with each other when there are ongoing proceedings.⁸⁸ It outlines how foreign representatives and states should constantly communicate and seek information so that proceedings run as seamlessly as possible.⁸⁹

The Model Law aims to reduce costs while also respecting the laws of the different jurisdictions.⁹⁰ This framework is an attempt to increase predictability and stability to all parties involved.⁹¹ Furthermore, the

83. *See id.*

84. GUIDE TO ENACTMENT, *supra* note 69.

85. *Id.*

86. *Id.* (“Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings (article 20); and relief at the discretion of the court is available for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition.”)

87. *See id.*; OUARTU *supra* note 37, at 55-63.

88. *See id.*; OUARTU *supra* note 37, at 55-63.

89. GUIDE TO ENACTMENT, *supra* note 69, at 30-31 (“The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is not dependent upon recognition and may thus occur at an early stage and before Part two. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets.”)

90. *See* McCormack & Yee *supra* note 78; GUIDE TO ENACTMENT, *supra* note 69; Metreveli, *supra* note 67, at 327.

91. *See* McCormack & Yee *supra* note 78; GUIDE TO ENACTMENT, *supra* note 69; Metreveli, *supra* note 67, at 327; Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross Border Insolvency in India*, IBC LAWS (July 24, 2020), <https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-makharia/> [https://perma.cc/TM4M-QL4G].

Model Law offers flexibility because countries may adopt and modify the provisions to align with their country's objectives.⁹² However, despite being the third largest economy by purchasing power,⁹³ India is one of the few countries that has refrained from adopting the Model Law.⁹⁴ India passed the Insolvency and Bankruptcy Code in 2016, which, although it did not incorporate the Model Laws, explicitly enacted two provisions that govern cross-border insolvency.⁹⁵

IV. INDIA'S INSOLVENCY AND BANKRUPTCY CODE 2016

Prior to 2016, India lacked an adequate legal infrastructure to conduct an efficient and cohesive bankruptcy proceeding.⁹⁶ A bankruptcy-type proceeding in India would last about three times as long as a bankruptcy proceeding in the United States.⁹⁷ The laws did not cater to the needs of the debtors or creditors; therefore, revamping these was well overdue.⁹⁸ In 2016, India reformed its insolvency and bankruptcy laws and codified them into a single body of law called Insolvency and Bankruptcy Code 2016 (IBC).⁹⁹

Corporations, partnerships, and individuals undergoing bankruptcy or insolvency proceedings are subject to the Code.¹⁰⁰ An important change from the old regime to the IBC is that the judge plays a pivotal role in the insolvency and bankruptcy cases.¹⁰¹ The judge overseeing the

92. Makharia, *supra* note 91.

93. Prableen Bajpai, *The 5 Largest Economies in the World and Their Growth In 2020*, NASDAQ, Jan. 22, 2020, <https://www.nasdaq.com/articles/the-5-largest-economies-in-the-world-and-their-growth-in-2020-2020-01-22> [<https://perma.cc/LG6A-8BQH>].

94. Saxena, *supra* note 9.

95. *Id.*

96. See Rohini Mohan, *India's New Bankruptcy Policy Sweeps in Big Bucks*, THE STRAITS TIMES, Dec. 31, 2019, <https://www.straitstimes.com/asia/south-asia/indias-new-bankruptcy-policy-sweeps-in-big-bucks>, [<https://perma.cc/7SS4-BQF8>].

97. *Id.*

98. *Id.*

99. The Insolvency and Bankruptcy Code No. 31 (2016) [hereinafter IBC] ("An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all stakeholders including alternation in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connector therewith or incidental thereto").

100. IBC, § 2(a)-(e) (2016); see Mohan, *supra* note 96.

101. Sameer Sharma, *How Do We Ensure India's Insolvency and Bankruptcy Code Keeps Working Well?*, THE WIRE, Nov. 25, 2019, <https://thewire.in/banking/india-ibc-solvency-bankruptcy>.

insolvency case is authorized to interrogate parties, gather evidence, and control which witnesses testify.¹⁰² The Code has also replaced the “debtor in possession” framework, which is when the debtor would retain control over their business while the case is being resolved,¹⁰³ with the “creditor in control” approach, where creditors have more say during the proceeding.¹⁰⁴ This change provides for a more equitable proceeding for the creditors.¹⁰⁵ Furthermore, the Code includes a 180-day period with the possibility of a 90-day extension to ensure cases are resolved within a reasonable time period.¹⁰⁶

Although the Code has helped streamline the bankruptcy process in India, cross-border insolvency is one area the Code lacks addressing in a more detailed and structured way.¹⁰⁷ There are two provisions in the Code that address cross-border insolvency: Sections 234¹⁰⁸ and 235.¹⁰⁹

102. *Id.*

103. *Decoding the Code: Survey on Twenty-One Months of IBC In India*, (Aug. 2018), <https://www.pwc.in/assets/pdfs/publications/2018/decoding-the-code-survey-on-twenty-one-months-of-ibc-in-india.pdf> [<https://perma.cc/SH7D-PQFZ>].

104. *Id.*; Enakshi Jha, *The Costs and Benefits of Creditor Control under Insolvency Law*, INDIA CORPLAW, Sep. 2, 2017, <https://indiacorplaw.in/2017/09/costs-benefits-creditor-control-insolvency-law.html> [<https://perma.cc/685N-HXLR>].

105. *Id.*; *Decoding the Code*, supra note 103.

106. See IBC, § 12 Part 3 (2016); see *Decoding the Code*, supra note 103.

107. See Saxena supra note 9; see Sumant Batra, *Corporate Insolvency: Law and Practice*, 586; *Jet Airways Fallout: Cross-Border Insolvency Norms to be Amended*, FIN. EXPRESS, June 9, 2019, <https://www.financialexpress.com/industry/jet-airways-fallout-cross-border-insolvency-norms-to-be-amended/1602000/>, [<https://perma.cc/2D9T-6MRW>].

108. IBC (2016); The Gazette of India Extraordinary, New Delhi, No. 37, Sect. 234, (May 28, 2018) (“Agreements with foreign countries. – (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. (2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which India reciprocal arrangements have been made, shall be subject to such conditions as may be specified.”).

109. IBC (2016); The Gazette of India Extraordinary, New Delhi, No. 37, Sect. 235 (May 28, 2018) (“*Letter of request to a country outside India in certain cases.*— (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under Section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. (2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.”).

Section 234 permits India to enter into “reciprocity agreements” with other countries.¹¹⁰ With such an agreement, jurisdiction over the assets could be governed by the IBC provisions even if they are located elsewhere.¹¹¹

On the other hand, it lacks the framework to maintain consistency and efficiency because the government decides whether to make such an agreement on a case-by-case basis.¹¹² Section 235 allows the NCLT to request information from other countries about an insolvency case given that a reciprocity agreement has been agreed on under Section 234.¹¹³

Under this regime, India has given some rights to foreign parties and has partially opened the door to cross-border insolvency, but it remains an unreliable legal framework.¹¹⁴ The fact that India has had opportunities to adopt the UNICTRAL Cross-Border Insolvency framework yet has resisted incorporating it into their insolvency laws likely demonstrates there are some hesitations to this approach.¹¹⁵

V. INDIA’S HESITATION OF THE ADOPTION OF UNCITRAL MODEL LAW OF CROSS-BORDER INSOLVENCY

India has effectively adopted a territorial approach to cross-border insolvency.¹¹⁶ Although India had several opportunities to adopt the modified universalism approach embodied by the UNCITRAL Model Law on Cross-Border Insolvency, it instead adopted two provisions addressing cross-border insolvency proceedings.¹¹⁷ The absence of uniformity has raised questions and concerns about the current

110. See The Gazette of India Extraordinary, New Delhi, No. 37, Sect. 234 (May 28, 2018).

111. LAW AND PRACTICE, *supra* note 7, at 581.

112. See Sneha Singh, *Duality of Regime to Handle Insolvency of Foreign Companies in India*, 10 INDIAN J.L. & JUST. 155, 156-59 (2019); see Batra, *supra* note 4, Law and Practice, *supra* note 7.

113. See Singh, *supra* note 112, at 157-58; see also IBC, § 235 (2016).

114. See IBC, § 235 (2016); LAW AND PRACTICE, *supra* note 7, at 580.

115. See Singh *supra* note 112, at 158.

116. Morshed Mannan, *Are Bangladesh, India, and Pakistan Ready to Adopt the UNCITRAL Model Law on Cross-Border Insolvency*, 25 INT’L INSOLVENCY REV. 195, 207 (2016); Anderson *supra* note 37, at 679-80; WESSELS, *supra* note 44, at 41.

117. See *Parliament Passes Amendment to IBC*, ECON. TIMES, Mar. 12, 2020 <https://economictimes.indiatimes.com/news/economy/policy/parliament-passes-amendments-to-ibc/articleshow/74591495.cms?from=mdr>; see Remya Nair, *IBC Amendment Bill Cleared by the Parliament*, LIVE MINT, Jan. 2, 2018, <https://www.livemint.com/Politics/OxeO3yke5QpVI4VpG18xTN/IBC-Amendment-Bill-cleared-by-the-Parliament.html>, [<https://perma.cc/KBE3-ULYN>]; Insolvency and Bankruptcy Code, Act, No. 31 of 2016, § 234-35 INDIA CODE (2016).

provisions.¹¹⁸ Jet Airways is the prime example of the complexities of a cross-border insolvency case when a framework, like the Model Law, is not adopted.¹¹⁹ Jet Airways has assets and creditors in both India and the Netherlands, and insolvency proceedings began in both countries.¹²⁰ The court in India, however, was unwilling to recognize the Netherlands insolvency proceeding and did not want to provide information to the Netherlands's court.¹²¹ Eventually, both countries adopted "A Cross Border Insolvency Protocol" based on the UNCITRAL Model Law for Cross-Border Insolvency.¹²² In order to maintain a streamlined process that protects the interests of the parties and the laws of each jurisdiction, the protocol recognizes India as the "main proceeding" and the Netherlands proceeding as a "secondary proceeding."¹²³ Although neither country has adopted the Model Law, the inability to have a cohesive framework to rule on these proceedings essentially forced the countries to adopt a similar framework to the Model Law for this particular case for purposes of uniformity.¹²⁴ India's failure to initially recognize the Netherlands's court order likely shows its apprehensiveness to share legal control with other jurisdictions.¹²⁵ Overall, Jet Airways exemplifies the nuances and challenges of cross-border insolvency proceedings when countries do not adopt the Model Law.¹²⁶

In October 2018, the Insolvency Law Committee recommended that India adopt the UNCITRAL Model Law on Cross-Border

118. See Vishal Vyas, *Jet Airways Cross Border Insolvency Proceedings*, M&A CRITIQUE, Nov. 1, 2019, <https://www.magzter.com/article/Business/M-A-Critique/Jet-Airways-Cross-Border-Insolvency-Proceedings>, [https://perma.cc/UN4X-DYXR]; see Batra, *supra* note 4.

119. See Vishal *supra* note 118; see Batra *supra* note 4; see *Jet Airways to Become First Indian Company to Undergo Cross Border Insolvency Proceedings*, *supra* note 1.

120. *Jet Airways to Become First Indian Company to Undergo Cross Border Insolvency Proceedings*, *supra* note 1; Batra, *supra* note 4.

121. Batra, *supra* note 4; see Vishal, *supra* note 118.

122. Batra, *supra* note 4; see Vishal, *supra* note 118.

123. Batra, *supra* note 4; see Vishal, *supra* note 118; *India Court Finalizes Cross-Border Insolvency Protocol for Jet*, BLOOMBERG, Sept. 26, 2019, <https://news.bloomberglaw.com/bankruptcy-law/india-court-finalizes-cross-border-insolvency-protocol-for-jet> [https://perma.cc/9F22-UN9Q].

124. Batra, *supra* note 4; see Vishal, *supra* note 118.

125. See Batra *supra* note 4; see Vishal *supra* note 118; see Aashish Aryan, Dutch Court Administrator, *Jet Airways' RP Agree to Cooperate in Insolvency*, BUS. STANDARD, Sept. 20, 2019, https://www.business-standard.com/article/companies/dutch-court-administrator-jet-airways-rp-agree-to-cooperate-in-insolvency-119092001518_1.html [https://perma.cc/YN48-JEV9].

126. See Batra, *supra* note 4; see Vishal, *supra* note 118.

Insolvency.¹²⁷ Part of their recommendations was to adopt the model with a “reciprocity” clause.¹²⁸ The Committee explained that the reciprocity clause provides that India would “recognize and enforce” judgment and proceedings from other jurisdictions if those jurisdictions have adopted the Model Law or a similar framework.¹²⁹ Although the Committee suggested this provision be temporary, it shows India’s caution toward incorporating this framework because adding this clause creates a limitation to the recognition of foreign proceedings and judgments.¹³⁰ Furthermore, adopting this clause could likely be operating as a way for India to maintain more oversight and control over proceedings taking place in jurisdictions that have not adopted the Model Law.¹³¹

In addition, India’s current cross-border insolvency framework allows for the country to preserve its power over the proceedings unless it has explicitly entered into an agreement with a foreign nation.¹³² The IBC gives the courts and the government the authority to permit the interference of foreign parties into their legal system.¹³³ The Model Law, which focuses on four principals—access, recognition, relief, and coordination¹³⁴—would alter India’s current framework because if India were to adopt it, the framework would allow, from the inception of an insolvency proceeding, for jurisdictions to cooperate without need of

127. Himanshu Handa, *Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India*, 1 INT’L J.L. MGMT. & HUMANS. 3 (2018-19).

128. *Id.*; Roshina Sinha, *Insolvency Law Committee on Cross-Border Insolvency*, PRSINDIA (Nov. 1, 2018), <https://www.prsindia.org/content/insolvency-law-committee-cross-border-insolvency> [<https://perma.cc/7N3J-QAMY>]; REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY 18-19 (Oct. 2018), https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

129. REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY, *supra* note 128.

130. *See id.*; Astha Kaushal & Saurav Gurjer, *Implications of India Adopting the UNCITRAL Model Law on Cross-Border Insolvency*, INDIA CORPLAW, Sept. 2, 2018, <https://indiacorplaw.in/2018/09/implications-india-adopting-uncitral-model-law-cross-border-insolvency.html> [<https://perma.cc/FP7P-GWGK>].

131. REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY, *supra* note 128; Kaushal & Gurjer, *supra* note 130.

132. *See* Insolvency and Bankruptcy Code, Act, No. 31 of 2016, § 234, INDIA CODE (2016).

133. Makharia, *supra* note 91.

134. GUIDE TO ENACTMENT, *supra* note 69.

case-by-case agreement.¹³⁵ Although India could adopt the framework and amend it as it sees fit for its needs, perhaps India is reluctant to surrender their current control of overseeing the insolvency process on an individual level to a more uniformed process.¹³⁶

India's resistance to adopting the Model Law could also be a way to indirectly limit international investment.¹³⁷ India's political and economic history after obtaining independence from the British hints toward a more conservative approach to international trade.¹³⁸ The most recent decades are known as the period of India's "liberalized" economy.¹³⁹ Given that the Code does not provide a uniformed framework for cross-border insolvency, this could cause a sense of unease for investors, and some may resist either loaning money or investing in Indian companies because the outcome of an insolvency proceeding is more unpredictable under sections 234 and 235.¹⁴⁰

On the other hand, India, over the years, has eased the foreign direct investment (FDI) process, and there has been an increase in the country's foreign direct investment, which has positively contributed to their economy.¹⁴¹ The Model Law framework, which derives from the modified universalism approach, is driven by principals of fairness and consistency.¹⁴² Two indicators that strengthen the relationship between FDI and the Model Law are "predictability" and "efficiency," which directly align with the goals of the Model Laws.¹⁴³ Thus, one major benefit to adopting the Model Law is that it helps maintain or increase

135. See Makharia, *supra* note 91; see Sneha Singh, *Duality of Regime to Handle Insolvency of Foreign Companies in India*, 10 INDIAN J.L. & JUST. 155, 156-59 (2019); see Batra, *supra* note 4.

136. See Batra, *supra* note 4.

137. *The Symbiosis between IBC and UNCITRAL*, LEGAL SERVICE INDIA, July 14, 2019, <http://www.legalservicesindia.com/law/article/1248/29/The-Symbiosis-between-IBC-UNCITRAL-Model-Law-in-Cross-Border-Insolvency#:~:text=The%20national%20interest%20of%20India,insolvency%20would%20not%20be%20recoverable>.

138. See *A Short History*, *supra* note 15.

139. See *id.*; see Swaminathan, *supra* note 13.

140. See Binoy J. Kattadiyil & Nitika Manchanda, *Cross Border Insolvency Framework in India*, INT'L J. MULTIDISCIPLINARY EDU. RESEARCH, Vol. 9, Iss. 4(7), April 2020 at 6; 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*, 14 LAW & BUS. REV. AMS. 313, 328 (2008).

141. See Zaveri & Pandey, *supra* note 27; *FIPB Abolished*, *supra* note 29; see *India Bound FDI May Face thorough Frisking*, *supra* note 29.

142. GUIDE TO ENACTMENT, *supra* note 69; see OUATU, *supra* note 37.

143. See Jason Jack, *A Missing Variable: The Impact of Cross-Border Insolvency Laws on Foreign Direct Investment*, 27 MINN. J. INT'L L., 313, 323 (2018).

foreign direct investment.¹⁴⁴ In 2018, the Insolvency Law Committee also emphasized how adopting this framework would help increase foreign investment in the country.¹⁴⁵ While there are aspects of the UNICTRAL Model Law that might be causing India to be reluctant to adopting this framework, there are also benefits to adopting it.¹⁴⁶

The push for India to adopt UNCITRAL Model Law on cross-border insolvency is widespread.¹⁴⁷ However, whether and when India will join the other jurisdictions in creating uniformed proceedings for insolvent debtors remains uncertain.¹⁴⁸ However, with an increase in foreign direct investment¹⁴⁹ and the Committee's UNCITRAL recommendations,¹⁵⁰ amongst other factors, it seems highly likely that it is less a question of if the UNCITRAL Model Law of Cross-Border Insolvency will be implemented and more a question of when.

144. Gosal *supra* note 10; *see* Jack, *supra* note 143; Kaushal & Gurjer, *supra* note 130.

145. Handa, *supra* note 127.

146. *See* Jack, *supra* note 143; Kaushal & Gurjer, *supra* note 130.

147. *See* BATRA, *supra* note 7; Jain & Sheth, *supra* note 39; Saxena, *supra* note 9.

148. *See* *India's Bankruptcy Code Collides with Reality*, *ECONOMIST*, Apr. 17, 2019, <https://www.economist.com/business/2019/04/17/indias-bankruptcy-code-collides-with-reality>, [<https://perma.cc/WNG9-P9UK>]; *see* Gosal, *supra* note 10; *see* Aiyar, *supra* note 14.

149. *See* *FIPB Abolished*, *supra* note 29; *India Bound FDI*, *supra* note 29; *India 9th Largest Recipient of FDI in 2019, will Continue to Attract Investments: UN*, *THE ECON. TIMES*, June 16, 2020, https://economictimes.indiatimes.com/news/economy/indicators/india-9th-largest-recipient-of-fdi-in-2019-will-continue-to-attract-investments_un/articleshow/76400055.cms?from=mdr.

150. *See* Handa, *supra* note 127.