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UNIVERSALISM V. TERRITORIALISM: A PLETHORA OF ISSUES IN CROSS BORDER INSOLVENCY ACROSS JURISDICTIONS AND LOCAL LAWS

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ABSTRACT

India opened its economy to the world in the year 1992 and this process of globalization has benefited India in numerous ways. Many multinational companies opened their branches in various parts of the country. This resulted in increased foreign reserves as well foreign investment. It has also been observed that the decisions taken regarding cross border investment directly affects the insolvency and bankruptcy law of the country. Since Indian economy is a developing one there is a lot of scope in making the business environment friendly. Also, the Indian Laws are not adequately equipped in dealing with cross border insolvency complexities. Hence the Government of India has set up a committee to address the issue of cross border insolvency after a comprehensive analysis of UNCITRAL Model Law and European Regulation. Therefore, this research paper will consider how India can incorporate cross border insolvency law by analysing UNCITRAL Model law on cross border insolvency and EC regulation.

The first part of the paper introduces cross border insolvency - the means and provisions prescribed to deal with cross border insolvency under Insolvency and Bankruptcy Code, 2016. The second part examines different theories of cross border insolvency and analyses the legal framework of those countries which have adopted the UNCITRAL Model law on cross border insolvencies. Further this part investigates jurisprudence of cross border insolvency by analysing various case law in different jurisdiction. The recommendation of Insolvency Law Committee report on cross border insolvency has been discussed in at last. Finally, the projects recommend as to why India needs to incorporate cross border insolvency in the code and its benefits in dealing with cross border insolvency.

KEYWORDS- Cross border Insolvency, UNCITRAL, Insolvency and Bankruptcy Code 2016.

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LITERATURE REVIEW

Recognition and reinforcement are the two obstacles rather solution that every state seeks when we address cross border insolvency. However, there is a contrast between the **Westbrook (2000)** model of modified universalism and counter arguments **by Judge Samuel L. Bufford (2005)**, who states three substantial reasons for why universalism is not the way to go, which we shall investigate in the subsequent understanding of theories of cross border insolvency. Further, we shall investigate these arguments in the theories of cross border and try to channelize whether universalism is still the way to go for India? While there have been informal workouts and settlements regarding cross border insolvency in China and other countries, can the similar method be used for India and if yes, then how can the concept be improved and implemented? How treaties shaped the framework for cross border insolvencies and terms required in them? We shall answer questions like, what are the other jurisdictions protocol for Cross border Insolvency, models, why are cross border insolvency laws still struggling in their augment to IBC and what exactly are the laws in other jurisdictions and revisit their local laws? Given the economic regime of India today, whether India should adopt the Model Law with certain modifications to decide the jurisdiction to6 initiate insolvency proceedings? This paper also tries to analyse the various recommendation and their benefit in dealing with cross border insolvency. We shall answer questions like, what are the other jurisdictions protocol for Cross border Insolvency, models, why are cross border insolvency laws still struggling in their augment to IBC and what exactly are the laws in other jurisdictions and revisit their local laws. Namely Section 234 and 235 of **Insolvency and Bankruptcy code (2016) [India]**, **Enterprise Bankruptcy Law (2006). [China], 10th Schedule, Companies Act, (Singapore Model Law) 2017. [Singapore], Corporate Insolvency and Governance Act (CIGA), 2020. [UK], Chapter 15, the bankruptcy Abuse Prevention and Consumer Protection Act, 2005 (US Code). [USA], Hasan Ho [Bankruptcy Law], Law No. 71 of 1922, arts. 1, 126, 127, 132. (Japan), Bankruptcy and Insolvency Act, (BIA) and Companies Creditors Arrangement Act (CCCA). [Canada], Restructuring & Insolvency Laws and Regulation, 2020. [France]**

1. THEORIES AND ADOPTION

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In the current section, the author aims to explore the depths of existing literature on the theories of Cross-border Insolvency, which scrutinize the paths taken up by various jurisdictions across the globe to derive a contrast to the existing utilisation of the theory of Universalism and Territorialism and how it has evolved to a hybrid framework in certain regions. For the purposes of an effortless understanding, this section is divided into two parts.

The first part conceptualizes the theories and digs into their existence and understanding. Whereas the second part deals with the adoption of the theories as functional framework highlighting the existing cross border regimes or a parallel situation across Singapore, UK, USA, Japan, Canada, and France.

1.1. THEORIES

Through the vociferous arguments in the early 2000s, which demonstrated multifarious attempts to accommodate the principles of private international law with the agenda to eradicate the social and political obstacles of cross border insolvency, only two theories stood out the test of utility in the real world. The first was theory of Universalism which has gained a new channel of momentum as Modified Universalism and its adversary, theory of territorialism which harnessed a geo-political division across the landscape of pre-requisite obstacles around different jurisdictions. The spirit of the theory was highly reflected as the doctrine of unity, whereby foreign insolvency proceedings were recognised regardless of variation in the domestic laws.

1.1.1. UNIVERSALISM

The theory of universalism is exactly like its core word “universal” in terms of its applicability. It propounds the “HOME COURT” (of the corporate debtor) to exercise unabridged jurisdiction over the proceeding, also called as the main proceeding. This meant that other countries had to follow the verdict of the home court irrespective of any controversy or difference of opinion. On one hand, all the decisions are run by one country, which meant the case could be disposed with scrutiny in the best time frame possible. But, on the other hand, this theory hampered diplomatic ties and created friction in the minds of the management at question and yet still managed to survive for one single fulfilment. The prime motive of this theory was to ensure **equitable distribution of resources to all creditors** regardless of where they were located.

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Despite many organised and structured results, universalism could not stand the test of time and shape shifted into **Modified Universalism** concept, as a living torch for the Principle of International Comity. This term gained momentum and was fathered by Professor Jay Westbrook. The idea was simple and was born to protect international business and for the protection of the local creditors. Under the former, all asset distribution was done by the court of main proceeding. But, in the contemporary scenario, the courts of other countries apart from the home court's state could carry out a "secondary bankruptcy proceeding" whereby, the primary distribution was done for the local creditors and the rest was returned to the main proceeding to ensure there is no disturbance in the channel of distribution and everyone's interest is protected. This theory is backed by the simple application of the 'Choice of Law' of jurisdictions wherein, the former theory created plenty gaps. (Guzman, 2000)[1]. This modified or hybrid form latter gave birth to the 'COMI' and Model law structurization to conduct things in an accord that gives recognition with certain compromises made in term of the traditional Universalists proposition.

1.1.2. TERRITORIALISM

The debtor's resources are physically available in each country and subsequently subject to supervision and distribution by municipal courts under the local laws of that jurisdiction under this method.(LoPucki, 2000)[2] This conclusion gained popularity after Westbrook's Multidimensional test that determined choice of law to be the pillar in situations where the principle business is country A and the incorporation of the same company is at country B.[3] In the subsequent sections where we learn about the EC Regulation which is based on the Universalist approach, we shall feel the vociferated argument in the of the obviousness of home jurisdiction. But even with cases of COMI, we shall notice the early 2000s are proof to show that the incorporation, business, and the location of assets is in different places of location even by the EU states.[4]

[1]Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2179-80 (2000).
[2]Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000).
[3] Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2311-12 (2000); *Id*.
[4]Lynn M. LoPucki, Courting Failure: How competition for big cases is corrupting the bankruptcy courts, 223-25 (2005).

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There are more issues with Universalism internally then what meets the eye. Envision the mitochondria of the cell (metaphor for the Main Proceedings in the Home Court), which essentially is the powerhouse of the cell; However, there were cases where the rights and equal distribution processed by the mitochondria caused due to complications and unprecedented and insinuating circumstances which leads the core function of the mitochondria to dysfunction, which meant the creditors rights have been curtailed in the universalist approach to some extent as well.[5]

Judge Bufford even criticised Professor Jay Westbrook's findings and raised three viable and sound questions.[6] He said that the COMI regulations do not states anything about the code of conduct wherein the parties have right to be heard. Secondly, does the reorganisation and liquidation of the corporate debtor's insolvent corporation across multiple jurisdictions not involve all the courts to simultaneously walk in the same page with the main proceedings ergo, defeating the purpose of a single hearing which is the essence of universalism, to protect creditor's time, interest and take the burden from the courts in other states under a singular court? And lastly, if there was a change/split of or from home country, where would such scenarios be dealt, which court shall be addressed as the Home Court?

The universalist approach both old and modified is like a dark sky with a multitude of shiny promises, an abyss that does not address the multinational debtor's crisis across borders, and creates a perpetual need for newer obstacles, makes one question whether biasness is a product of economic integration and results in untimely disposal of cases, causing a lofty strain on corporate debtor, who has to still struggle with the reputation of his/her corporation losing its market value meanwhile losing money over daily and bound payments to outside liquidation or insolvency channels like property lease brokers, office space payments, landlords, storage charges, staff who sweep and keep the company intact whilst the insolvency verdict is pending and other many small yet significant payments.

The question of gravity that one must ask is given the risk involved, are these glimpses of light worth incorporating in terms of time, capital, and coordination? To answer all the above questions,

[5]*Supra note* at 3, 2323.
[6] Samuel L. Bufford, Global Venue Controls Are Coming: A Reply to Professor LoPucki, Am. Bankr. L.J. (2005).

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the author encourages a simple experiment. There are a million things to gamble on in every industry or the business in terms of the economics, however, when we talk about the giant successful companies, MNCs, or organisations that involve a seed funding or a residual need of direction and core to have a future, you always account on a plan. A plan that is so beautifully crafted that, the company falls into the hands of the situation that are uncomfortable, yet the company is not based on any gamble, rather a well calculated and strategic risk or prospect; one that gets the green light of the investors and financial auditors alongside managerial executives. The fate of every economic transaction is based on what, where and how of that risk calculated by the person who decides to spend it. When we bring a single channel that addresses the fate of all the people involved in cross border situation, we need to maintain the equilibrium or homeostasis to track the effects and without concrete answers and the inability of fathom such repercussions cause the trust involved cease to exist and breaks internal harmony of incorporations involved worldwide.

1.2. ADOPTION OF CROSS BORDER FRAMEWORK ACROSS DIFFERENT JURISDICTION

1.2.1. SINGAPORE

1. Previously - The old Territoriality approach was working fine for a small country like Singapore, which protected the financial creditors by incorporating its bankruptcy laws in the cross-border scenario, however pragmatically it bestowed modified Universalist approach, due to the effects on loans that Singaporean businesses which could accelerate the recognition of any residual or pending claims in the international stage. The Grab rule reflected benefits for the local creditors and helped in terms of any discrepancy.[7]
2. Hitherto & Contemporarily[8] - Though this may have been valid when Singapore became a nation in 1962, the city-status state's as one of the world's major financial markets indicates that transnational insolvency cases now attract funding from foreign organizations. Singapore's decision to abandon its territoriality policy in favour of the **UNCITRAL Model Law** on Cross-Border Insolvency ("Model Law") was based on several factors, according to

[7] Ryan Halimi, *An Analysis of the Three Major Cross-Border Insolvency Regimes*, International Immersion Paper, University of Chicago Law School (2017).
[8] 10th Schedule, Companies Act, (Singapore Model Law) 2017.

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the government. The Companies Amendment Bill, which modified Singapore's territoriality regime to universalism, became law on March 30, 2017.[9]

2.2.2. UNITED KINGDOM

1. Shockwaves of Brexit - The European Regulation on Insolvency Proceedings (the "EIR") no longer applies in the United Kingdom as of December 31, 2020. Post December 31, 2020, English insolvency cases will no longer be immediately recognized in the EU. The immediate effect of the lack of automatic recognition is that an English officeholder can need to have English proceedings recognized in the EU and/or open parallel local insolvency proceedings in the EU. If there could be paths to acceptance, each EU member state's national laws would have to be decided.
2. Behind the Scenes- The UK Insolvency (Amendment) (EU Exit) Regulations 2019 (the "Retained EIR") retained a slightly downsized version of the EIR (European Insolvency Regulation) in English law from 31 December 2020. The Preserved EIR keeps sections of the EIR, such as the English courts' ability to open insolvency proceedings against debtors that have their COMI in England. This ensures that insolvency proceedings will still be started in England if the claimant has a COMI there, but such proceedings would not be automatically recognized in the EU since the Retained EIR has no effect there.[10]
3. Signification[11] - This has direct and serious ramifications. For e.g., the English law moratorium prohibiting the commencement of new civil proceedings against a debtor would no longer apply automatically in the EU, and creditors in the EU can rush to enforce against any assets located in the EU, or even open key proceedings in the EU, if they can convince an EU state court that the debtor's COMI is in that state. Aspects of the Retained EIR that are derived from EU statute, such as COMI, will not always be construed in the same manner that they will be construed by EU courts in the future. The English courts should consider recommendations of the European Court of Justice on these issues taken before January 1, 2021, although there is **no guarantee that they can do so after that date.** Divergence of

[9] *Id.*
[10] **Kai Zhang, Philip J. Morgan, Judith E. Rinearson**, *Post-Brexit: Significant Changes to UK Cross-Border Payments Regulation*, Vol. XI The National Review 122 (2021).
[11] Corporate Insolvency and Governance Act (CIGA), 2020.

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approaches to COMI and other established terms between the English and EU approaches may create problems in future cross-border prosecutions. This is also the finalization of CBPR (Cross-Border Payment Regulations) or EU Cross-Border Payments Regulation 924/2009. And entails proof that UK is creating a new codification towards **Territorialism**.

1.2.3. UNITED STATES OF AMERICA

1. Adoption[12]: The United states of America adopted the **UNCITRAL Model law** in October 2005. It is vital to know that US recognises any substantial court hearing to be ancillary, which means building onto the main rather than a secondary proceeding. Also, the cross-border insolvency laws are enshrined in Chapter 15, of the US bankruptcy code which facilitate US and foreign courts and their representatives to have co-operation and help the debtors maximize the value of their assets.
2. Exception: With the passage of Chapter 15, the scope of international cases eligible for recognition in the United States was broadened to cover interim and non-judicial proceedings authorized by a court. This essentially means, the cases by administers of foreign countries where there is an absence of cross border systems, can also get recognition in US. But US does treat discriminatory treatment to its creditors with no reciprocal recognition, thereby maintaining a public policy also codified under Chapter 15.[13]

1.2.4. JAPAN

1. Introduction**:** The Bankruptcy Law and Corporate Reorganization Law in Japan have strict **territoriality**, which means that the consequences of bankruptcy or corporate reorganization proceedings started in Japan do not apply to properties in other countries, and vice versa. In response to criticism, the Civil Rehabilitation Law ("CRL"), which was passed in 1999 and has been in force since April 1, 2000, introduced the universality principle for the outbound effect of CRL trials while the territoriality principle was retained for the inward effect. (Sections 4, 38.1 of the CRL).

[12] Chapter 15, the bankruptcy Abuse Prevention and Consumer Protection Act, 2005 (US Code).
[13] John J. Chung, The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law 17 Duke J. Comp. & Int'l L. 262-263 (2007).

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2. Applicability[14]: The LRAF (The Law on Recognition of and Assistance in Foreign Insolvency Proceedings) and LACR (Law to Amend a Portion of Civil Rehabilitation Law) were adopted to eliminate rigid territoriality and to provide protocols for recognizing international insolvency proceedings based on UNCITRAL's Model Law. It is widely anticipated that, because of these changes, Japan's insolvency cases will be able to coexist and harmonize with those of other countries. And before the formal start of the international case, the foreign agent will file a motion for approval of the foreign insolvency proceeding as well as a court ruling for assistance. (Section 17.2 of the LRAF). Unsecured creditors are barred from selling the debtor's properties until the bankruptcy case has been filed. Secured creditors' interests, on the other hand, are unaffected by the proceedings.[15] The proviso to Bankruptcy Code Section 2 that applied the mutuality requirement was removed by LACR. By excluding the proviso, the current bankruptcy statute ensures that overseas persons are treated equally regardless of whether their home country gives national care to them. Resources distributed under foreign insolvency proceedings will not necessarily be distributed in the same order as assets distributed under Japanese insolvency proceedings.[16] As a result, in order to protect local creditors, the court can order that the DIP seek court permission before disposing of or delivering the debtor's properties within Japan. (Section 31 of the LRAF). A recognised trustee, on the other hand, must seek court permission to do the same thing (Section 35 of the LRAF).

1.2.5 CANADA

1. Approach: The Model Law was adopted into Canada's Companies' Creditors Arrangement Act, Part IV (CCAA). Its adoption is based on a **Universalist modified** viewpoint. Considering this, an examination of how courts have applied the applicable provisions of the CCAA, and BIA would only offer useful insight into the issue of the Model Law's legal

[14] Hasan Ho [Bankruptcy Law], Law No. 71 of 1922, arts. 1, 126, 127, 132.
[15] Art. 92, 95 Bankruptcy Law.
[16] Hideo Horikoshi, *Corporate Reorganization Law Revisions in Japan*, in KAISHA KOSEI TETSUDUKI NO SUBETE (2003).

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framework's viability if such provisions, even if not implemented verbatim, produce consequences that are consistent with the Model Law's purpose. (Bélenger, 2005).[17]

2. Alterations in The Adoption of Model Law: The international non-main proceeding is described in the Canadian acts as "a foreign proceeding other than the foreign main proceeding."[18] As a result, the Canadian laws do not include the existence of an establishment in the foreign proceeding's domain to identify it as a foreign non-main proceeding. Because of this, Canadian courts can accept international proceedings filed in jurisdictions where the debtor has no assets or no place of business. As read in the light of the whole Canadian legal system, these sections provide procedures for resolving cross-border insolvency situations that are comparable to those applicable in the Model Legislation.
3. Both the CCAA and the BIA demand that any motion, execution, or proceeding against the debtor be stayed, and the debtor is barred from disposing of its properties outside of the usual course of business until the recognition of an international key proceeding. The Model Law's automatic relief is reflected in this stay and ban. In addition, the Canadian regulations note that the extent of this stay and ban will be defined by Canadian insolvency statute, in compliance with the Model Law. [19]
4. In addition to the automatic relief, the Canadian variants of the Model Law, which is inspired by the original Model Law, allows the courts to award discretionary relief. It allows courts to make any order they deem reasonable if they are convinced that it is necessary for the protection of the debtor's property or the creditors' interests. It is like the Model Law in that it allows courts to make any order they deem appropriate if they are satisfied that it is necessary for the protection of the debtor's property or the creditors' interests. In comparison to the Model Law, the Canadian laws provide for a smaller list of illustrative orders that a court can make. They specifically leave out the Model Law clause allowing courts to remit local properties for

[17]Bélenger, Philippe H. & Neil A. Peden "The Changing Framework Relating to the Recognition of Cross-Border Insolvencies in Canada and the United States" Annual Review of Insolvency Law 203 p.223 – 225 (2005).

[18] Companies' Creditors Arrangement Act, RSC 1985, c. C-36 [CCAA], s 48(1); Marcela Ouatu, *Modified Universalism for cross-border insolvencies: does it work in practice?*, Thesis for masters, British Columbia University (2014).

[19] Bankruptcy and Insolvency Act, (BIA) and Companies Creditors Arrangement Act (CCCA).

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distribution in a foreign proceeding. They expressly exclude the Model Law provision that allows courts to remit local property for distribution in an international proceeding.

1.2.6. FRANCE

1. History: In the event of insolvency, a judge has authority over a company whose headquarters are within the court's local jurisdiction. When a seat does not exist on French soil, the site of its 'centre principal de sesintérêts' (principal centre of interests) in France is used as a criterion.[20]In the case of incorporated bodies, the courts are mindful of corporations' right to decide the site of their incorporation and will look to see if the registered office is in the same location as the place where business is carried out. Furthermore, the fact that the overseas seat is a figment of the imagination since the management functions within the jurisdiction gives the court's jurisdiction. This was the case of a firm that appeared to be based in Monaco, but data was shown showing that its board of directors was based in Paris, as were its main commercial activities.[21]
2. Applicability[22]- When reasoning in a legal source is required for these declarations of authority, it is often found in the Civil Code's extravagant jurisdiction principles. These laws are of 'ordre public' status, which means they must be followed by French courts until another document of higher status (such as a constitution or an international convention) says otherwise. These laws enable a foreign national, whether resident or not in France, to be summoned before a French court to respond for any duties arising from a contract with a French citizen made in France.[23]
3. Conclusion- The law and procedure in France show a very **territorial approach** to insolvency, with the law's aim being to establish the conditions under which French courts must open proceedings. According to the Law of 1985, jurisdiction is determined in most cases by domicile or the existence of an institution. The priority placed on the protection of industry and jobs in the Law of 1985 gives the matter economic and political weight, and the law itself is regarded as having public order status, making it a law whose terms are considered

[20] Article 1, Decree no. 85-1388 of 27 December 1985.
[21] Ulrik Rammeskow Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 AM. BANKR. L.J. 385, 418 (1999).
[22] Restructuring & Insolvency Laws and Regulation, 2020.
[23] Paul J. Omar, *Cross-Border Insolvency Law and Practice in France,* Int'l Insolvency Statute (2002).

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obligatory and from which courts are not able to deviate. The logical implementation of the territorial rules is contingent on the absence of an international decision requiring obligatory approval under French conflict of laws rules. However, acknowledgment is contingent on the international judgment being considered as usual and no domestic judgment being contradictory. In fact, despite the recent curial versatility observed by observers, often international decisions are denied approval because they fell short of the recognition threshold or are merely too late, the diligent creditor having entered the French courts first. The sovereign character of this territory can seem to run contrary to international efforts to reach an agreement about how to deal with cross-border issues. Nonetheless, observers claim that awareness of clear national interests of this nature has affected approaches to developing instruments aimed at reconciling seemingly opposing opinions on territoriality and universalism, especially at the European level. This may be encapsulated in the conceptual frameworks of the Council of Europe Convention of 1990 and the European Regulation on Insolvency Proceedings of 2000, which all work on a strictly territorial basis. This style of proceeding is structured in a way that is reminiscent of French tradition.

From the above study of laws across different jurisdictions, we learnt the applicability of laws in co-relation with the existing domestic laws. Art 6 of the Model Law demarcates for situations where Public policy is the issue with the country who is non-enacting. However, shall this be a sufficient reason for adopting UNCITRAL law? In the subsequent sections we will learn about UNICTRAL and EC Regulation holistically and see the ramifications of the approach in Enacting states and Europe in COMI and its privilege-based system.

2. COUNTRIES THAT HAVE NOT ADOPTED THE UNCITRAL MODEL LAW

We now observe the trends followed by the countries which though are among the member states of the UNCITRAL, but still have not adopted its model on cross border insolvency in their domestic regime. These countries are namely as follows: China, Brazil, Russia and India.

2.1. CHINA

Though, there have been instances associated with issues of cross border insolvency in China and its economy, it continues to face a legal conundrum due to lack of a precise legislation at a national

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level. The Civil Procedure law of 1991 is not adequate to dispense the issues at hand and the Enterprises Bankruptcy Law only addresses the matters pertaining to SOEs.

When a submission is made with the China People's Court for insolvency application, the court has fifteen days to review it and decide whether to admit or deny it. And this automatically means payment to a single creditor is no longer possible.[24] The court shall name a receiver under the Corporate Bankruptcy Law; an administrator who is both competent and autonomous. This receiver has a wide range of capabilities like the authority to handle the debtor's property and commercial activities.[25]

There are two clauses of the Corporate Bankruptcy Law of China that deal with foreign or cross-border bankruptcies, which deal with both the enforcement of Chinese bankruptcy law outside of China and the acceptance of foreign bankruptcy legal proceedings in China. The Corporate Bankruptcy Law clearly states that bankruptcy proceedings begun in China are binding on the debtor's property and estate outside of China.[26]

The rule of foreign recognition was simple, any decision finalised shall not curtail the integrity or interest of the country and shall be limited to the debtor's property or estate both of which had to be recognised by the People's Court inconsonance with all international treaties to that specific subject matter. The recognition is neither direct nor applicable in a situation where the people's court does not recognise the debtor's property or estate. China follows a mixture of old and modified Universalist approach, given the treaties recognise them as enshrined in ARTICLE 5 of its Corporate Bankruptcy law and shares the same public policy concerns as India.[27]

The Corporate Bankruptcy Law of China includes two clauses under Article 5[28] pertaining to cross border dealing with both the implementation of China's domestic bankruptcy law beyond China and recognizing/addressing the foreign insolvency judgments within it. For applicability of Chinese law outside it specifies the extra territorial jurisdiction in a manner that matter proceeded

[24] [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), art. 10-11, 16.
[25] *Id*, art. 22,23.
[26] *Id*, art. 5.
[27] Steven J. Arsenault, *Leaping over the Great Wall: Examining Cross-Border Insolvency in China under the Chinese Corporate Bankruptcy Law*, 21 IND. INT'l& COMP. L. REV. 1, 20 (2011).
[28] Article 5, Enterprise Bankruptcy Law of the People's Republic of China.

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in China are conclusive and have binding effect on debtor's assets located outside China's boundaries.

While on the other hand, recognition of foreign judgments is rather contingent on People's Court satisfaction of the judgment not impairing the security and sovereignty of the country as well as the social and legitimate rights of the debtors within China.[29] Much ambiguity arises on impact of foreign judgments enforceability in China. However, this position remains clear so far as in China exercises its jurisdiction over debtor's assets and its dispersal universally for cases instituted in China with parties involved being in China, while where the entities involve are foreign with their assets present in China- it lets debtor's home country to take the primary jurisdiction.[30] They may further recognise foreign judgments in compliance to a treaty or compliance to which it is part of or in reference to exercising the principle of reciprocity.

Thus, so far there has not been any significant progress as it has neither adopted the UNCITRAL Model nor has entered into any treaty or convention. However, the principle of reciprocity has gained popularity for permitting the recognitions.

Though successful recognitions are rare, the Chinese court officially addressed for the first time, the bankruptcy order issued by a foreign court in the B & T Ceramic Group S.R.L case.[31] Herein, the applicant which was a company registered in Italy applied to the Foshan Intermediate People's Court of Guandong Province for recognition of a judgment and an adjudication order on bankruptcy issues made by an Italian court. These applications were granted by the Foshan Court mainly on the basis of Sino-Italian Bilateral Treaty on Civil Judicial Assistance 1991, but due to imprecise reasons, no further actions were taken about it. The court did not make any remarkable observation as to why it recognized the judgment but only stated that it did not go against the Chinese policy. However, principle of reciprocity did not play any role in this case.

The other case refers to the Hong Kong High Court's acknowledgement of GITIC bankruptcy

[29]*Ibid.*
[30]*See* [Enterprise Bankruptcy Law] (promulgated bythe Standing Comm. Nat'l People's Cong., Aug. 27, 2006,effective June 1, 2007) art. 5.
[31]The B&T Ceramic Group S.R.L. Case, the Foshan Intermediate People's Court of Guangdong Province (2000) Fo Zhong Fa Jing Chuzi No. **633.**

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proceedings which took place in the Mainland China.[32] The parties involved in the case were CCIC Finance Limited (CCIC, plaintiff) and GITIC (defendant) and GITIC Hong Kong (Holdings) Limited (GITIC HK, Garnishee). The subject matter was pertaining to effect of extraterritorial jurisdiction of GITIC proceedings that initiated in the Mainland and whether assets of GITIC in Hong Kong would come under its effect? The orders passed hinted towards the recognizing the GITIC proceeding. The primary reason for addressing the recognition was that the liquidation of GITIC was effective under the approach of universalism and hence the collection and distribution of whole assets of GITIC was taking place worldwide and all creditors in the same rank irrespective of being local or foreign, were rightful receivers. This was the first case recognizing the bankruptcy proceeding in the Mainland and seemed as a steppingstone for shaping the future judicial practice on cross-border insolvency issues in China.

2.2. INDIA

As for India, the Code of 2016 elucidates two provisions pertaining to cross border matters, which are yet to be implemented by the Central Government based on the suggestions of the Joint Committee on Insolvency and Bankruptcy Code, 2015.[33]

Section 234 vests the power in the Central Government to form bilateral agreements in order to enforce the provisions of IBC and administer cross-border ramifications. It may also direct the application when a reciprocal arrangement has been signed for assets of debtor that are placed in different jurisdiction. Similarly, under Section 235, it provides for application of principle of reciprocity to be made upon NCLT's satisfaction to the court of other jurisdiction with whom such arrangement has been made. However, so far India has not entered into any reciprocal arrangement with any country nor have any effective measures to execute the inter-government agreements.[34] With no instruction or guidelines in effect, we shed some light on the approach taken by the judiciary in paving the way.

In the above sections, we could study the multitude of approaches and technicality of the legal system and how it is still finding its way in developed nations. India codified the Insolvency and

[32] Hong Kong High Court Case No. HCA 15651/1999. Date of Judgment: 31 July 2001.
[33]HimansuHanda, Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India, 1 International Journal of Law Management & Humanities (2018).
[34] Nishith Desai Associates, Introduction to Cross-Border Insolvency.

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Bankruptcy Code in 2016, however it is still incomplete, as we still need a framework to deal with cross-border issues and sections 234 and 235 are alone not accommodating for the shortcomings faced by the cases cases of ***Amtek*** and ***Videocon***, which involved different manufacturing jurisdictions and oil corporations in different regions. The ***Jet Airways*** case is proof of the UNCITRAL model with modifications to address India- specific issues can accord for recognition and harmonization, which shall benefit the foreign-based Indian companies and subsidiaries. The plethora of miscommunications and concerns are normal in a case like India because our IBC is in itself very new and the recommendations of the ILC can usher a new age for the business based here and abroad.

Ever since the commencement of the 2016 code, the Jet Airways case of 2019 was the first case to raise cross border insolvency issues. The mentioned case of ***Jet Airways***, in which an Indian company underwent cross border insolvency after the National Company Law Appellate Tribunal ("NCLAT") directed a "Joint Corporate Insolvency Resolution Process" under the IBC[35]. The Indian-International airline was under a debt of Rs.36000 crores to its local and foreign creditors. While, the creditors in India approached the NCLT for initiation of CIRP proceedings under Section 14 of IBC[36], a bankruptcy petition has already been filed in Noord-Holland District Court of Netherlands by two of its European creditors. Their claim was worth of nearly Rs 280 crores besides seeking the capture of one of the Jet Airways' Boeing 777 aircraft that was then parked in Amsterdam's airport.

An administrator was appointed by the Dutch Court, who approached NCLT, Mumbai Bench to request them to recognize the proceedings in Netherlands and withhold the one continuing in India in order to avoid adverse consequences of parallel proceedings. However, the NCLT refused due to which the administrator proceeded to the Appellate Tribunal. The NCLAT set aside NCLT's order upon administrator's assurance to not alienate any offshore assets of the airline. It further allowed cooperation between the parties of the two jurisdictions to conclude a resolution plan in the best interest of creditors. The whole process was carried put following the protocol and principle of the Model Law recognizing India as centre of main interests.

[35] SBI v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019
[36] Section 14, Insolvency and Bankruptcy Code, 2016.

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In another case of August 2019, the NCLT recognized the principle of substantial consolidation for the first time and allowed group insolvency proceedings for Videocon Industries.[37] SBI had filed an insolvency application in 2017 against the Videocon Industries at Mumbai Bench of NCLT for initiation of CIRP proceedings. Further, it also moved an application seeking "substantial consolidation" of the 15 companies belonging to the corporate debtor for maximum realization of the value of the assets. However, separate CIRP proceedings were instituted against all the individual companies which failed to obtain any effective bid because of the inability of the companies to survive individually. The Tribunal then referred to the US and the UK bankruptcy jurisprudence due to lack of relating provisions in the Code. Subsequently the tribunal decided in favour of the consortium of creditors led by SBI using the equity jurisdiction.

Further, a second round of group insolvency of Videocon Industries with 4 foreign-based companies was allowed by the NCLT in February of 2020[38]. A plea was then filed by the managing director of the Videocon Group for extension of the moratorium to which the tribunal directed to club the overseas oil and gas businesses in the ongoing proceedings. The decision in this case again led us to ponder on the issues of cross border insolvency thereby questioning the extent of extraterritorial application of IBC and procedure involved in collation of foreign subsidiaries assets with the ones in India.

To that end, we observe for countries which do not follow or incorporate the UNCITRAL Model on cross border insolvency either lack in addressing the issue with no specific legislation in place or tend to act in accordance with the treaties, in case an issue so arises. We also find that the judicial decisions and the courts observations have been instrumental in advocating the adoption of the provisions of Model Law in their domestic insolvency law to better equip themselves for facing the challenges involved in cross border transactions.

3. INSOLVENCY LAW COMMITTEE REPORT

Due to an increase in globalization, cross border insolvency has become a very common phenomenon. The provision under IBC 2016 which deals with cross border insolvency are very

[37] State Bank of India v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745
[38]State Bank of India v. Videocon Industries Ltd., MA 2385/2019 in C.P.(IB)-02/MB/2018, decided on 12-2-2020.

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basic and are not sufficient to resolve the complexities arising out of the cross-border insolvency. Hence it was felt that a separate law and system was required to deal with the cross-border insolvency and keeping this point in mind an Insolvency Law Committee was created by Ministry of Corporate Affairs. The main purpose of the committee is to analyse the UNCITRAL Model law on cross border insolvency and to recommend the best international practices which could be adopted in Indian Law. The committee submitted its report in 2018 which also included the draft framework on cross border insolvency.

A. RECOMMENDATION OF THE COMMITTEE

For the convenience of our understanding, we further segregate the recommendations of the committee report into the following sub-headings:

1. APPLICABILITY OF THE PROVISION AND FOREIGN PROCEEDINGS

The provision of the draft would be applicable only to the corporate debtor and not to individual and partnership. For the applicability of the later the committee was of the opinion that §234 and §235 of the code is sufficient. It is also important to note that corporate debtor must have the asset in India then only proceedings will take place. Further the draft provision also provides that a foreign creditor can initiate and participate in an insolvency resolution process commenced in India. And in case the proceeding is commenced outside India then the principle of reciprocity is applied. This means that the applicability of foreign proceedings will be applicable to all those countries which are signatories to model law. Also the Central Government have been empowered to notify all such countries where the draft provision would be applied.

2. FOREIGN PROCEEDINGS AND ITS RECOGNITION

The definition of foreign proceedings has not been provided in the code or in the draft. But in general term the term foreign proceedings means either a judicial or quasi-judicial proceeding which is related to insolvency. This implies that the asset of the corporate debtor is in control of the foreign court for reorganization or liquidation.

The members of the committee knew dealing with the foreign proceedings would be difficult. Hence, they decided to classify the foreign proceedings into two types mainly:

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1. Foreign Main Proceedings.
2. Foreign Non-Main Proceedings.

Foreign Main Proceedings: These proceedings are initiated where the corporate debtor "*Centre of Main Interest"* (herein referred as COMI) is situated. Though the concept of COMI has not been dealt in code, so the draft provision provides as to determination of COMI:[39]

A. Unless there is proof to the contrary, there is a presumption that the jurisdiction where the corporate debtor's registered office is located is its COMI.

B. This presumption would apply only if the registered office of the corporate debtor has not moved to another country three months prior to the filing of an application for initiation of insolvency proceedings in that country.

C. The NCLT will conduct an assessment to determine where the corporate debtor's central administration takes place and whether such location is readily ascertainable by third parties, including the creditors of the corporate debtor.

D. If the COMI is not determined by the above factors, the NCLT may conduct an assessment using factors prescribed by the Central Government.

The factor for the determination of COMI has been inspired from the model law whereas the lock-in period of three months has been inspired from the regulation. Also the Central government has been powered to include any other factor required for the determination of COMI. If the proceeding is recognized as a main proceeding, then the code will be automatically applicable to all the asset of the corporate debtor situated in India.

Foreign Non-Main Proceedings: These proceedings are initiated where the corporate debtor have a place of establishment. The draft proceedings define place of establishment as *"a place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services".*[40]

[39] Section 14, Draft Part Z, Insolvency Law Committee Report.
[40] Introduction to Cross Border Insolvency, Nishith Desai Associates
Available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf.

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The definition of establishment provided in draft provision is similar to that of model law. Hence when a foreign proceeding is classified as non-main proceedings, the relief provided would be non-mandatory or mandatory depending upon the circumstances. Further NCLT has the power to terminate or modify with respect to proceeding if it is inconsistent with any of the code or draft provision.

3. COORDINATION AND COOPERATION

The draft provision also provides for the coordination and cooperation while initiating a foreign proceeding and enforcement of a foreign judgement in a local court. Further the report highlights the following points:[41]

1. Cooperation and communication between the NCLT and foreign courts or foreign representatives
2. Cooperation and direct communication between the resolution professional and liquidators of foreign courts or foreign representatives.

4. EXCEPTION TO THE FOREIGN PROCEEDINGS

The draft provision provides certain exception from initiation and recognition of the foreign proceedings which are:

1. Supremacy of the Local Law: Though the model law does not provide such exception but it has already been established that municipal law will be supreme then the international law. If any foreign proceeding is inconsistent with the code and draft provision, then NCLT has the power to modify or terminate such proceedings to the extent of such inconsistency.
2. Public Policy: If any foreign proceedings or enforcement of foreign judgement hampers or is in contradiction to the policies of the government then NCLT can refuse to take action on such policies. Most of the countries which has adopted the model law have defined the term public policy, but in draft provision there is no such clarity on public policy, and it is yet to be seen how Indian courts interpret it.

[41] *Ibid.*

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B. CONCLUSION

Cross-border insolvency is now addressed by two sections of the code (Sections 234 and 235). They envision diplomatic arrangements and adjudicating authority issuing letters of appeal to international courts for the purpose of applying the IBC's rules with respect to properties held by a corporate debtor residing overseas. The reason why the Model Law has not yet been implemented has more to do with the public policy hindrance than the practicality of its effect. However, recently, there have been recommendations to incorporate Model Law in India by Insolvency Law Committee. But this recommendation is subject to modifications in the modified and old Universalist system.

NEED FOR MODEL LAW?

About the likelihood that the Indian ILC has submitted draft provisions implementing the Model Law customized for India, they are yet to be adopted into domestic law. The adjudicating authorities have resorted to case-by-case resolution in the absence of a cross-border legislative system. Surprisingly, courts have scraped the Model Law structure's rules and adapted them when determining cross-border insolvency matters. In the case of ***Jet Airways***, the NCLAT overturned a lower adjudicating authority's decision to allow a Dutch administrator to participate in and attend a CoC's conference. The Indian Resolution Professional and the Foreign Administrator agreed to a 'Cross Border Insolvency Protocol' in compliance with the NCLAT's ruling. In accordance with the Model Law, India was designated as the "COMI," and international prosecutions were designated as "non-main insolvency proceedings." Furthermore, the NCLAT advised the Indian Resolution Professional, in collaboration with the committee of creditors, to entertain the application of cooperating with the international trustee in the best interests of the corporation and its stakeholders. The NCLAT took into consideration the principle of modified universalism, which is exemplified in the Model Law. Hence, there is a huge gap in the internalisation of which road the Central Government, courts and Cross-Border Insolvency Laws will take in the future.

Why are we concerned about cross border insolvency?

I. Increasing incidents of cross border insolvency proceedings.

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II. Numerous difficulties associated with those proceedings like delay, cost, cumbersome procedures and formal requirements, lack of authorisation to co-operate, conflicting court decisions on the same or similar matters uncertainty and unpredictability in legal and commercial areas.

III. Lack of national and international legal precedents providing solutions.

Why should an insolvency law address cross border insolvency?

I. Cooperation between courts and other competent authorities.

II. Provides greater legal certainty and predictability for trade and investment.

III. Protect the interest of all creditors and other persons interested in an insolvency.

IV. Protects and maximizes the value of the debtor's asset whenever located.

V. Can facilitate the rescue of financially troubled business is there by protecting investment and preserving employment.

Key aspects of Model Law in Cross border Insolvency-

I. It does not attempt on unification of substantive insolvency law.

II. It respects the differences in procedural law.

III. Framework is unilateral.

IV. Harmonization - model law v. convention.

V. Uniform interpretation. (Article 8)

Scope of the Model law:

In scenarios where-

I. Inbound requests- from foreign court for assistance from an enacting state.

II. Outbound requests-from enacting state to a foreign state.

III. Concurrent proceedings- in different states about the same debtor.

IV. Creditors or interested foreign states that have a interest in request in commencement of or participation in and insolvency proceeding under the law of the enacting state.

The model law applies to foreign proceedings relating to insolvency where-

- The purpose of the proceedings is the reorganization or liquidation of the debtor.

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- The proceedings are collective.
- Assets and affairs of debtors are in subject to court control or supervision (article 2).

From the above, we can conclude that the need for incorporating Insolvency and Bankruptcy code with an approach to Cross-border Insolvency shall eradicate a lot of issues of the future businesses and economy, and the Model law is a step forward. Today, we can also access CLOUT, a digest of case laws from 1996-today, wherein all model law cases are incorporated, so lack of functionality is not the issue that India shall have to face. This would further help in co-operation between the enacting state, i.e., ones who have adopted the model law and the non-enacting state, and the benefits are not just based on the reciprocity principle, rather harmonization.