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The Insolvency Shuffle: Forum Shopping and the Global Bypass of Indian Tribunal

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ABSTRACT

*Forum shopping in international insolvency is an emerging challenge that has a destabilising impact on the Indian legal system. It allows debtors to exploit jurisdictional differences by litigating in countries that provide lenient insolvency statutes, distorting the values of fairness and equal treatment. This paper critically examines the structural gaps in the Insolvency and Bankruptcy Code, 2016 (**IBC**), focusing especially on the ones arising from its non-operational provisions. Key case studies including Jet Airways, GLAS Trust, and GCX demonstrate how Indian companies increasingly avoid the IBC by transferring the process to foreign jurisdictions. Furthermore, the paper compares India's Insolvency regime with global standards, focusing on the United States (**US**), the United Kingdom (**UK**), Singapore and Canada, which have adopted more debtor-sensitive frameworks. Special emphasis is placed on the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law and its implementation through India's proposed Draft Part Z. Though it is promising,*

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*the strict reciprocity requirement, vague public policy exception and ambiguous standards for ascertaining the debtor's centre of main interests, could replicate prevailing inefficiencies. The paper finally presents a progressive legislative roadmap based on modified universalism. Recommendations include eliminating strict reciprocity provisions, perfecting the public policy test, clarifying the Centre of Main Interest (**COMI**) standard and broadening stakeholder participation.*

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I. INTRODUCTION

'Forum shopping' refers to the deliberate selection of a judicial forum by a party, where legal proceedings are likely to yield a more favourable outcome, often due to the presence of less stringent laws or more lenient courts, especially in cases involving multiple legal avenues.[1] Forum shopping can be categorised into two classes: domestic forum shopping and international forum shopping. While the former remains confined within a country's judicial framework, the latter is a more complicated strategic exercise involving legal systems of different nations that can significantly influence the outcome of cross-border disputes.

However, the deployment of such a strategy within the fabric of insolvency law raises complex legal concerns. Forum shopping in cross-border insolvency typically entails choosing a jurisdiction that has more advantageous provisions of law, typically by relocating a debtor's assets or legal seat to that jurisdiction in order to obtain more favourable insolvency outcomes, such as favourable restructuring plans, enhanced bargaining power through schemes of arrangement, or to delay the proceedings.[2] The jurisdiction acquires more significance in the case of insolvency law as it is governed by the principle of lex fori, which states that the law of the forum governs the proceedings; thus, jurisdiction plays a more determinative role.[3]

[1] Tamar Mskhvilidze, 'The Legal Nature of Forum Shopping in International Civil Procedure Law' (2023) 9 L&W 93.
[2] Wolf-Georg Ringe, 'Insolvency Forum Shopping, Revisited' (2017) 17 HLR 38.
[3] Vladimir Čolović, 'Lex Fori Concursus as the Basic Rule in The International Bankruptcy' (2016) 4 SPZ 85.

Moreover, Recital 4 of the European Union's Insolvency Regulation,[4] states that the global trend of forum shopping in the context of insolvency law involves debtors transferring assets or proceedings to a different jurisdiction altogether in order to 'obtain a more favourable legal position', often marking a shift from the debtor's 'centre of main interests', i.e., the location where a company is based or operates. This is a step crafted to exploit jurisdictions with more lenient restructuring laws to bypass the domestic insolvency process altogether.

This dynamic becomes even more pronounced in the 21st century, where the world is witnessing more cross-border transactions and disputes pertaining to insolvency than ever. A striking illustration from the UK, the *Gibbs principle*, a classic legal barrier that aggravates the fragmentation posed by forum shopping. While the principle is uniquely entrenched in English jurisprudence, its influence has waned globally. Articulated by an English Court in the landmark case of *Anthony Gibbs v La Société Industrielle*,[5] the rule states that discharge of a debt under an insolvency proceeding initiated overseas is not recognised by English law unless that debt is subject to the law of a foreign jurisdiction.

While this principle has been criticised for undermining the collective and universal character of insolvency and treating insolvency like a contractual issue, its endurance continues within the system. The persistence of the *Gibbs principle* poses a significant obstacle to the efficacy of India's insolvency regime, especially in an era of global finance where numerous Indian debtors hold foreign currency-denominated

[4] Council Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings [2015] OJ L 141/19.
[5] *Anthony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux* [1890] 25 QBD 399.

debt. Resultantly, even if a debtor undergoes a successful resolution process under the IBC[6] in India, the creditors governed by English law may still take up their claims abroad.[7] The *Gibbs principle* not only complicates the enforcement of Indian resolution, but also incentivises forum shopping by encouraging creditors to litigate in jurisdictions which are more likely to support their claims.

Against this backdrop, foreign insolvency regimes, most notably the United States' Chapter 11 framework, have emerged as lucrative alternatives for distressed companies with global operations. Chapter 11 with debtor friendly provisions including continuation of operation of existing management as debtor-in-possession, global moratoriums and flexible restructuring laws, makes the US a preferred jurisdiction for large-scale reorganisations.

In the post-IBC world, high-profile cases involving business giants like *Jet Airways*,[8] *Byju's*,[9] etc, have brought the phenomenon of forum shopping to the forefront. This paper delves into four key aspects of India's cross-border insolvency regime that present obstacles to the objectives of predictability, creditor protection and international cooperation which play a vital role in shaping the efficiency and integrity of India's cross-border insolvency system. To examine these issues systematically, the paper is structured as follows. Part II explores the dynamics of regulatory arbitrage by assessing why Indian companies

[6] Insolvency and Bankruptcy Code 2016 (**IBC**).
[7] Sayak Banerjee and Akash Mukherjee, 'Examining India's new cross-border insolvency regime and its potential challenges' (2020) 14 IRI 25.
[8] *Jet Airways (India) Ltd v SBI* [2019] SCC Online NCLAT 385.
[9] *GLAS Trust Company LLC v Byju Raveendran & Ors* [2024] SCC Online SC 3032.

prefer debtor-friendly foreign regimes, underscoring how global moratoria make these jurisdictions more attractive than the IBC's creditor-centric model. Part III outlines the phenomenon of jurisdiction hopping done by Indian companies by choosing foreign insolvency regimes such as US and UK. Part IV presents a detailed case law analysis wherein Indian entities bypassed the IBC by shifting proceedings abroad. Part V offers a comparative analysis of cross-border insolvency laws in a multiplicity of jurisdictions such as Canada, Singapore etc., highlighting their debtor-sensitive approaches and integration of international standards into their domestic laws. Part VI critically evaluates India's Draft Part Z, identifying the lacunas which include strict reciprocity requirement, non-recognition of foreign proceedings and ambiguous public policy exceptions, to name a few. Part VII, proposes a forward-looking roadmap for reform with the agenda of alleviating the challenges posed by Draft Part Z. Finally, Part VIII culminates in an urgent call for reform arguing that without reimagining Draft Part Z grounded in principles of modified universalism, the problem of forum shopping would persist and the promise of IBC's equitable resolution will remain unfulfilled.

II. REGULATORY ARBITRAGE: WHY INDIAN COMPANIES LOOK TO THE WEST?

Insolvency jurisdictions can be broadly demarcated as either creditor-friendly or debtor-friendly. While creditor-friendly jurisdictions prioritise the entitlements and concerns of creditors, a debtor-friendly regime focuses on supporting defaulters during restructuring. India falls into the former category, where the IBC regime is widely perceived as

creditor-driven and rigid compared to other foreign jurisdictions.[10] The case of *Innoventive Industries Limited v ICICI Bank*,[11] is the first substantive ruling rendered by the Apex Court after the introduction of the IBC, wherein the Court emphasised the creditor-friendly nature of India's insolvency law.[12] Under the IBC, as soon as the Corporate Insolvency Resolution Process (**CIRP**) is initiated, the control shifts to the Resolution Professional (**RP**) and the Committee of Creditors (**CoC**).

A. International Approaches to Corporate Rescue

Under regimes like the US Bankruptcy Code chapter 11, the debtor is allowed to remain a 'Debtor-In-Possession' (**DIP**) and they can keep possession and control of the assets during the reorganisation process under Chapter 11. The debtor retains their status as a DIP until their reorganisation plan is confirmed. Furthermore, Section 1107 of the Code designates the DIP as a fiduciary, vested with the powers and rights of a trustee. The DIP becomes obligated to carry out all the responsibilities of a trustee, save the investigative functions.[13]

The US model is largely beneficial to the debtors in a number of ways. Firstly, the creditors get an automatic stay on their claims, ie, a global moratorium, which saves the company from being harassed by creditor lawsuits during restructuring, protects its assets and provides the debtor

[10] Shivangi Agarwal and Bhavya Singhvi, 'Creditor-controlled insolvency and firm financing– Evidence from India' (2023) 54 FRL <https://doi.org/10.1016/j.frl.2023.103813> accessed 12 June 2025.
[11] *Innoventive Industries Limited v ICICI Bank* [2017] (11) SCALE 4.
[12] Sakshi Dhapodkar, 'Innoventive Industries v ICICI Bank: A Creditor-Friendly Approach in Insolvency Law' (*Centre for Business & Commercial Laws*, 12 October 2017) <https://cbcl.nliu.ac.in/insolvency-law/innoventive-industries-v-icici-bank-a-creditor-friendly-approach-in-insolvency-law/> accessed 12 June 2025.
[13] 11 USC ss 1101(1), 1107, 1108 (2018).

time to propose an efficient plan.[14] Secondly, it allows the debtor to reject or renegotiate executory contracts to unburden the company.[15] Lastly, the US model seeks to avoid creditor holdouts of resolution plans. Under the Code, if a reorganisation plan is ratified by a majority of creditors, the Court is empowered by Chapter 11 to impose or 'cram down' the plan on the dissenting minority creditors, given the plan is *fair and equitable*.[16]

Similarly, while the UK's bankruptcy law initially favoured the interest of the creditor over the debtor, however, the changes incorporated through the Corporate Insolvency and Governance Act, 2020[17] has significantly changed that position. These alterations include the introduction of the RP under Part 26A of the Companies Act, 2006 of the UK.[18] This provision has allowed cross-class cramdowns and granted companies breathing space to negotiate with creditors, aligning its policies more closely with the US debtor-in-possession model.[19] The Cayman schemes

[14] Rachel Albanese and Dienna Corrado, 'US: Chapter 11' (*Global Restructuring Review*, 20 November 2017) <https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2018/article/us-chapter-11#:~:text=a%20trustee%20is%20appointed%20to,creditors%2C%20not%20just%20the%20shareholders> accessed 15 June 2025.
[15] ibid.
[16] ibid.
[17] Corporate Insolvency and Governance Act 2020.
[18] Companies Act 2006, pt 26A.
[19] Ana Maria Fagetan, 'Corporate Insolvency Laws in Selected Jurisdictions: US, England, France, and Germany—A Comparative Perspective' (2025) 14 Laws <https://www.mdpi.com/2075-471X/14/2/21#:~:text=Meanwhile%2C%20the%20UK's%20bankruptcy%20law%20%E2%80%9Csets%20the,the%20debtor%20was%20unable%20to%20pay%20its> accessed 12 June 2025.

also provide similar court-sanctioned global moratorium and flexibility in terms of compromise.[20]

B. India's Creditors-in-Control Model

India takes a contrasting approach through IBC, with its structure and timeline being less hospitable to debtors. The IBC permits insolvency applications once a default occurs, but from the very outset, the CoC pushes all the buttons. The operational control of the company immediately transfers to the Resolution Professional or the Interim Resolution Professional, with its existing board of management and directors standing suspended. While the directors can participate in the meetings of the CoC, no voting rights are conferred on them. Furthermore, India's moratorium under Section 14[21] only protects the debtors against actions in India; it does not extinguish the claims which could potentially be initiated worldwide. Therefore, the overseas assets of an Indian company remain vulnerable to other legal enforcement abroad, diminishing the effectiveness of the IBC moratorium.

Therefore, one can say that the IBC is more concerned with rescuing the legal entity rather than preserving the business. This ideological tilt often manifests itself in the form of asset auctions. After the resolution process has failed and liquidation under Section 33[22] has been initiated, the sale of a corporate debtor as a going concern means that the corporation

[20] Jonathan Milne and Alex Davies, 'Schemes of Arrangement: Restructuring in the Cayman Islands' (Conyers, June 2023)<https://www.conyers.com/publications/view/schemes-of-arrangement-restructuring-in-the-cayman-islands/#:~:text=In%20short%2C%20a%20scheme%20of,private%20transactions.%20Helpfully%2C%20a> accessed 13 June 2025.
[21] IBC, s 14.
[22] IBC, s 33.

would not be dissolved and will continue its business under its name and preserve its corporate entity.[23]

These differences motivate Indian debtors to bypass the IBC's creditor-driven nature. Foreign regimes allow a global moratorium and allow entrepreneurs to implement consent-based restructuring. From the IBC's auction-oriented framework, where debtors fear giving up control to an outsider, the RP, a foreign jurisdiction with a DIP model, is a far cry and a much better option.

III. TACTICAL JURISDICTIONS: FORUM SHOPPING AND ITS IMPACT ON INDIA'S INSOLVENCY REGIME

The practice of bad forum shopping, already a subject of considerable debate in the insolvency discourse, has become increasingly apparent in the realm of cross-border insolvency involving Indian-linked entities. This section explores several illustrative cases of forum shopping in both the domestic and international domains, which demonstrate tactical jurisdictional manoeuvring, judicial responses, and implications for the Indian insolvency landscape.[24]

[23] S Sidharth, 'Sale as a going concern: A Double-Edged Sword' (*The Resolution Professional*, January 2025) <https://www.iiipicai.in/wp-content/uploads/2025/01/29-34-Article.pdf> accessed 17 June 2025.

[24] Kumar K, 'Forum Shopping In Insolvency Law: Comparative Insights And India's Potential' (*Mondaq,* 14 August 2024) <www.mondaq.com/india/insolvencybankruptcy/1505782/forum-shopping-in-insolvency-law-comparative-insights-and-indias-potential> accessed 13 June 2025.

A. The Partha Paul Case: Multiplicity as a Weapon

The case of *Partha Paul v Kotak Mahindra Bank Ltd*[25] is a textbook example of forum shopping occurring in India's domestic insolvency framework. After making loan advances to Camellia Group entities, Kotak Mahindra Bank initiated numerous recovery proceedings under various laws, including a demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (**SARFAESI**)[26] and an application under Section 7 of the IBC.[27] Furthermore, they filed simultaneous petitions for multiple proceedings at multiple legal forums despite the borrowers making continuous payments and offering a one-time settlement.

The guarantor, Partha Paul, challenged the bank's request for an ex parte remedy based on procedural unfairness and multiplicity of litigation. The National Company Law Appellate Tribunal (**NCLAT**) found that the bank had engaged in 'classic forum shopping' with parallel redressals with the intent to harass the debtor and abuse the legal process. The tribunal set aside the National Company Law Tribunal's (**NCLT**) ex parte order and remitted the matter but emphasised the need for judicial discipline and anti-abuse mechanisms in insolvency proceedings and reinforced the principle that litigants must approach insolvency forums with clean hands and in good faith.[28]

This case, therefore, reflects the challenges that can manifest due to forum shopping within domestic insolvency mechanisms. However,

[25] *Partha Paul v Kotak Mahindra Bank Ltd* [2022] SCC Online NCLAT 3923.
[26] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, s 13(2).
[27] IBC, s 7.
[28] *Partha Paul* (n 25).

these challenges become even more compounded when the disputes span over multiple jurisdictions.

B. Jet Airways: India vs Netherlands and the COMI Conundrum

The *Jet Airways (India) Ltd v State Bank of India & Anr*[29] case is a landmark in the development of cross-border insolvency jurisprudence in India, particularly in light of the challenges in international forum shopping. In this case, parallel insolvency proceedings were instituted in India and the Netherlands. The Dutch court appointed a trustee to take charge of Jet's overseas assets while NCLT Mumbai was in the middle of resolving Jet's domestic insolvency in India under Section 7 the IBC. The Dutch trustees subsequently requested recognition of the Dutch process, demanding a stay on the IBC proceedings in India. However, the NCLT refused this request, citing the absence of bilateral agreements under Section 234,[30] which allows cross-border cooperation agreements and Section 235,[31] which empowers Indian authorities to request assistance from the foreign courts under the IBC.

While the NCLT declined to recognise the Dutch insolvency process, the NCLAT took a more progressive approach by developing a cross-border protocol based on the UNCITRAL Model Law on Cross-Border Insolvency.[32] The Appellate Tribunal, applying the principle of *lex loci incorporationis,* recognised that India was Jet's COMI[33] noting that the

[29] *Jet Airways* (n 8).
[30] IBC, s 234.
[31] IBC, s 235.
[32] UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (Model Law).
[33] Apoorv Sarvaria and Sanyam Mehdiratta, 'Cross-Border Insolvency: Understanding Centre Of Main Interest (COMI)' (*Mondaq*, 30 May 2022)<www.mondaq.com/india/insolvencybankruptcy/1197432/cross-

company was incorporated in India and its most significant domestic presence also exists in India.[34] However, this case again exposed major legislative gaps in the law, mainly the absence of a unified framework to handle transnational insolvency disputes. The ad hoc nature of the protocol established the risks of judicial inconsistency and forum shopping in jurisdictions that do not have harmonised laws.

Furthermore, these jurisdictional conflicts resurface even more prominently in the most recent dispute of *Byju's* which pitted Indian and US courts against each other in a transnational insolvency tussle.

C. Byju's Case: A Transcontinental Tug-of-War

The latest *GLAS Trust v Byju's*[35] insolvency situation is a further reflection of cross-jurisdictional forum shopping. While NCLT Bengaluru admitted the petition filed for an insolvency proceeding by Board of Control for Cricket in India (**BCCI**), the US-based creditors GLAS Trust operated simultaneously and went to the Bankruptcy Court in Delaware, alleging Byju's of financial malpractice, seeking repayment of $533 million.

The accusations of forum shopping were exchanged when Rule 11 of the NCLAT Rules, 2016,[36] was invoked by the court to approve the settlement with BCCI. Meanwhile, the Delaware court remained active, imposing

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border-insolvency-understanding-centre-of-main-interest-comi> accessed 13 June 2025.

[34] Sourav Ghosh and Samrat Sengupta, 'Cross Border Insolvency And Bankruptcy & Corporate Restructuring' (*LiveLaw*, 6 February 2025) <www.livelaw.in/law-firms/law-firm-articles-/cross-border-insolvency-and-bankruptcy-corporate-restructuring-ibc-uncitral-model-law-cirp-283128> accessed 17 June 2025.

[35] *GLAS Trust* (n 9).

[36] National Company Law Appellate Tribunal Rules 2016, r 11.

fines on Byju's representatives.[37] This jurisdictional tug of war and the refusal of the US court to defer entirely to an Indian process underscore how forum shopping erodes comity and multiplies procedural barriers and uncertainty.[38]

Similarly, the misuse of overlapping legal remedies can be observed when multiple statutes related to arbitration and criminal laws operate parallelly, making the situation progressively more complex.

D. Intec Capital: The Overlap between Arbitration, Criminal Law and IBC

The case of *M/s Intec Capital Ltd v Parul Upadhyay*[39] is an example of forum shopping in personal guarantor bankruptcy. The financial creditor started arbitration proceedings under the Arbitration and Conciliation Act 1996[40] and criminal proceedings under Section 138 of the Negotiable Instruments Act 1881,[41] along with an insolvency action under Section 95 of the IBC,[42] even though they already had an arbitral award. The NCLT turned down the application under Section 95(1)[43] because the creditor

[37] Peerzada Abrar, 'US court finds Riju Ravindran, Camshaft, Think & Learn guilty of fraud' *Business Standard* (28 February 2025) <www.business-standard.com/companies/start-ups/us-court-finds-riju-ravindran-camshaft-think-learn-guilty-of-fraud-125022801414_1.html> accessed 14 June 2025.
[38] Bloomberg, 'Byju's Bankruptcy: Byju's Bankruptcy Ruling in US Catches Indian Official off Guard' *The Economic Times* (New Delhi, 14 September 2024) <https://economictimes.indiatimes.com/tech/startups/byjus-bankruptcy-ruling-in-us-catches-indian-official-off-guard/articleshow/113341494.cms?from=mdr> accessed 14 June 2025.
[39] *Intec Capital Ltd v Parul Upadhyay and Mr Manoj Kumar Anand* [2024] (7) TMI 15.
[40] Arbitration and Conciliation Act 1996.
[41] Negotiable Instruments Act 1881.
[42] IBC, s 95.
[43] ibid.

had approached all the available forums without disclosure and did not come to the tribunal with clean hands.

The court's decision elucidated that insolvency proceedings cannot be used as a coercive tool for debt recovery, particularly after parallel remedies have already been pursued in other legal forums. It reaffirmed that IBC is not a fallback mechanism to enforce claims when arbitration and criminal law avenues have been exhausted, thereby reinforcing the principle that forum shopping through multi-forum litigation will not be condoned.

Continuing the trend, the cases of Indian conglomerates like Firestar and GCX can further demonstrate that forum shopping often acquires a transnational dimension, with corporations strategically selecting foreign jurisdiction to gain procedural or substantive advantages during insolvency.

E. Firestar & GCX's Strategic Escapes

Several high-profile cross-border insolvencies involving Indian conglomerates like Firestar International (Nirav Modi group), and GCX Ltd, illustrate the pattern of filing for insolvency abroad while avoiding proceedings in India. These companies typically initiate Chapter 11[44] or similar processes in the US or other creditor-friendly jurisdictions to ringfence foreign assets, limit creditor enforcement, and control resolution outcomes. Some common features across these cases include the deliberate exclusion of Indian creditors from key proceedings, delays in enforcement in India due to inadequate recognition mechanisms, and

[44] 11 USC ch 11.

the undermining of Indian insolvency forums through alternative filings abroad.

The *GCX* case,[45] for instance, involved a pre-packaged bankruptcy in the US, that did not account for Indian creditor claims, raising serious questions about equitable treatment and sovereignty. Similarly, Firestar Diamond has also filed for bankruptcy in New York while suspected of colluding with bank officials at the Punjab National Bank to obtain unauthorised loans for a period of six (6) years.[46]

These cases collectively reveal how forum shopping distorts insolvency outcomes and how various jurisdiction techniques are being used to determine the insolvency outcome, minimise resistance, and sideline incompatible creditors. While strategic jurisdictional selection may be legal, it often undermines creditor confidence, burdens the judiciary, and leads to fragmented asset control. Indian creditors, especially operational ones, are frequently marginalised in foreign insolvency proceedings. Moreover, the lack of codified cross-border rules in India fosters interpretive inconsistency, delaying resolution timelines and increasing transactional uncertainty.[47]

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[45] Devina Sengupta, 'Reliance Communications: Global Cloud Xchange-a Reliance Communications unit files for bankruptcy' (*The Economic Times*, 16 September 2019) <https://economictimes.indiatimes.com/industry/telecom/telecom-news/global-cloud-xchange-a-reliance-communications-unit-files-for-bankruptcy/articleshow/71145029.cms?from=mdr> accessed 15 June 2025.

[46] Sudarshan Varadhan and Abhirup Roy, 'Firestar Diamond, company owned by Nirav Modi, files for bankruptcy' (*Reuters*, 27 February 2018) <www.reuters.com/article/world/firestar-diamond-company-owned-by-nirav-modi-files-for-bankruptcy-idUSKCN1GB1AW/> accessed 15 June 2025.

[47] Harshith Boddu, 'Need for International Harmonisation of Cross-Border Insolvency Laws: Challenges and Prospects' (*SCC Times,* 19 April 2024*)*

Although the Indian situation is quite exemplary, the phenomenon is not specific to India. In an empirical study by Professor Samir D Parikh, 159 large corporate bankruptcy filings in the United States between 2007 and 2012 during the Great Recession were examined, and it was found that almost 69% involved intentional forum shopping.[48]

The study reveals that over 83% lawsuits were filed in Delaware or the Southern District of New York, often based on tenuous links such as affiliate entities or place of incorporation.[49] These filings were not arbitrary, and debtors made calculated choices to file in these selective jurisdictions for management-friendly jurisprudence and greater control over judicial movement. Parikh characterises this as an emergence of a "marketplace of the bankruptcy courts", in which there is a jurisdictional competition to secure big-name insolvencies that could lead to systemic bias, impairment of creditor rights, and potentially distort patterns of procedure.[50]

The resemblance between these findings and Indian experiences is striking. In the *Jet Airways* or *GCX* cases, the Indian creditors had minimal remedy in a foreign proceeding that was not directly related to the main operations of the debtors. Accordingly, the study stresses the points that forum shopping is not a random phenomenon, but a system of actions based on structural gaps in the insolvency legislation.[51] With

<www.scconline.com/blog/post/2024/04/19/need-for-international-harmonisation-of-cross-border-insolvency-laws/> accessed 15 June 2025.

[48] Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46 Connecticut Law Review 159, 165 <https://opencommons.uconn.edu/law_review/218> accessed 15 June 2025.

[49] ibid 166-168.

[50] ibid 170-172.

[51] ibid 180.

India evolving its cross-border regime into a codified regime, the international experience outlined in the present chapter underlines the importance of active legislative design.

IV. INDIA'S DOMESTIC FRAMEWORK: BETWEEN PROGRESS AND PROCEDURAL GAPS

The emergence of the IBC, can be described as one of the game changers in the corporate legal framework in this country. It aimed at doing away with traditional inefficiency in the recovery of debts and liquidity in cases by establishing a time-limited, centralised system. With India slowly getting assimilated into the international economy, the IBC has become a representation of its effort to adopt an open and welcoming approach, particularly to foreign creditors. Nonetheless, the framework would be found wanting as far as the perspective of cross-border insolvency is concerned, as one would find major gaps perpetrating methodological discrepancies and forum shopping.

A. Stuck in Territoriality: The Dormancy of IBC Sections

Firstly, the provisions of the IBC on cross-border insolvency, Sections 234 and 235, are still largely ineffective. Section 234 enables the Central Government to sign bilateral agreements with other countries to enforce the Code across borders with respect to foreign assets or foreign creditors. In practice, however, no such bilateral agreements have been concluded, and the machinery which these provisions contemplated has never been put into practice. Consequently, the framework is territorial in nature, which poses extreme limitations on stakeholders that are interested in a harmonised solution over interjurisdictional lines. This territorial approach restricts cross-border cooperation and incentivises

debtors to relocate proceedings to jurisdictions with more accommodating frameworks.

The case of *Jet Airways (India) Ltd v State Bank of India,*[52] as discussed previously, was a landmark case which illustrated these shortcomings. At the time of initiation of the insolvency proceedings under Section 7 of the IBC, before the NCLT Mumbai, parallel proceedings were already being carried out in the Netherlands. The Dutch trustee asked that those proceedings should be recognised and the Indian actions stayed. Nonetheless, without the functioning of Sections 234 and 235, the NCLT has declared the Dutch proceeding as void. It was left upon the NCLAT then to plug the gap by developing an ad hoc cross-border protocol to coordinate the parallel proceedings. The tribunal subsequently declared India to be the COMI of Jet Airways as it was incorporated and operated in India. This ad-hoc remedy is admirable, but it is just an indication of the lack of a statutory regime.[53]

B. Judicial Innovations in the Absence of Law

Despite these gaps in structure, Indian courts have gone a long way in dealing with foreign creditors fairly. In the *Macquarie Bank v Shilpi Cable Technologies Ltd*,[54] the Supreme Court did not adhere to the strict construction of procedural formalities of foreign creditors of commencing CIRP under Section 7 of the IBC. It held that the lack of a certificate by a financial institution, as earlier required, did not act as a

[52] *Jet Airways* (n 8).
[53] Gaisia Shaik, 'The Jet Airways' Cross Border Insolvency Protocol: A Success Story' (*Centre for Commercial Law in Asia,* 26 January 2021*)* <https://ccla.smu.edu.sg/sgri/blog/2021/01/26/jet-airways-cross-border-insolvency-protocol-success-story> accessed 16 June 2025.
[54] *Macquarie Bank Limited v Shilpi Cable Technologies Ltd* [2017] INSC 1241.

bar to proceedings. The tendency towards 'substance over form' advanced by the Court favoured the allowing of foreign petitioners under the spirit of the IBC.

The same spirit continued in the case of *Stanbic Bank Ghana v Rajkumar Impex Pvt Ltd*,[55] where the NCLT permitted the initiation of CIRP by a foreign creditor under a guarantee that the Indian corporate debtor had offered to its Ghanaian subsidiary. The ruling confirmed the cross-border financial structure to be governed by the Code, and an indication that India was open to welcome the forces of international finance.

Nevertheless, the system still lacks predictability and coherence. In *State Bank of India v SEL Manufacturing Co Ltd*,[56] the NCLT encountered the complex question of how foreign creditors should be treated within the CIRP framework. The tribunal was guided by the principle of *Nemo debet esse judex in propria causa* (No one should be a judge in their cause) to ensure that decisions regarding the foreign creditors' claims were subject to independent adjudication rather than being left solely to the discretion of a potentially biased CoC. The tribunal also embraced the *maxim fiat justitia ruat caelum* (Let justice be done though the heavens fall) to insist on equal treatment for foreign creditors in the absence of clear statutory guidance. However, these equitable principles could not fully offset the systemic delays caused by the absence of specific statutory guidance on

[55] *Stanbic Bank Ghana Ltd v Rajkumar Impex Private Limited* [2018] SCC Online NCLT 1106.
[56] *State Bank of India v SEL Manufacturing Co Ltd* [2019] SCC Online NCLT 567.

cross-border claims. Such uncertainty often drives debtors to relocate proceedings to foreign jurisdictions with more predictable outcome.

Similarly, the *Kingfisher Airlines*[57] bankruptcy laid bare the difficulties that international creditors face in India. While the CIRP addressed domestic liabilities, foreign creditors could not assert claims due to procedural hurdles. Although the Court attempted to prevent injustice by invoking *actus curiae neminem gravabit* (the act of the Court shall prejudice no one), this could not compensate for the inability to consolidate cross-border claims. As a result, the insolvency process remained fragmented, undermining efficiency and diminishing the prospects for comprehensive recovery.[58] This indirectly encouraged debtors to migrate to jurisdictions with established mechanisms for recognition for foreign insolvency proceedings.

C. Strengths in Design, Shortcomings in Cross-Border Execution

To India's credit, the IBC, compares favourably with other domestic recovery laws such as the Recovery of Debts Due to Banks and Financial Institutions Act 1993[59] and the Civil Procedure Code 1908,[60] both of which are slower and more creditor-restrictive. The IBC's institutional strength lies in its procedural clarity, committee-based resolution model, and creditor inclusiveness factors that enhance its appeal to both domestic and international stakeholders.

[57] *United Bank of India v Kingfisher Airlines Limited & Vijay Mallya* [2016] SCC Online SC 103.
[58] Ghosh and Sengupta (n 34).
[59] Recovery of Debts Due to Banks and Financial Institutions Act 1993.
[60] Civil Procedure Code 1908.

However, in the context of cross-border insolvency, these strengths are diluted by the lack of a codified recognition mechanism. While the courts have commendably filled some of these gaps through progressive interpretation and pragmatic accommodation, they cannot substitute for legislation. The increasing incidence of forum shopping, particularly in cases where Indian debtors shift proceedings abroad to exploit more favourable regimes, highlights a growing concern within the insolvency framework. This trend underscores the urgent need for a robust, predictable legal structure grounded in internationally accepted principles.[61]

V. COMITY AND COOPERATION: UNCITRAL MODEL LAW AND BEST GLOBAL PRACTICES

The UNCITRAL Model Law on Cross-Border Insolvency (1997) (**Model Law**) is a landmark instrument for administering insolvency cases among multiple nations. The cornerstone of this law rests on applying the rule of judicial comity or mutual assistance between courts across borders, particularly in matters where the debtor has assets and creditors in multiple jurisdictions, unless this assistance is manifestly incompatible with the forum state's public policy.[62]

[61] Ghosh and Sengupta (n 34).
[62] Dwayne Leonardo Fernandes and Devahuti Pathak, 'Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law' (2018) 24 Asian Yearbook of Intl Law, 80 <https://www.jstor.org/stable/10.1163/j.ctv1sr6j7f.8> accessed 17 June 2025.

A. From Sovereignty to Solidarity: The Model Law's Philosophy of Mutual Assistance

Article 25[63] of the Model Law contains a provision on judicial comity, which requires the courts of the adopting State to cooperate with foreign courts or representatives to 'cooperate to the maximum extent possible'. The model law also details the types of cooperation in Article 27,[64] covering the coordination of proceedings, the exchange of information, and the acceptance of court-sanctioned protocols. These are all expressions of a move towards non-territorialism and cooperation to simplify insolvency processes by reducing duplicative litigation and preserving the value of the assets concerned.

The Model Law adopts a framework guided by the principle of modified universalism. This legal theory argues for having the primary insolvency proceeding in the jurisdiction where the debtor's COMI is situated and having other jurisdictions as an aid to the main proceedings, with the power to protect local interests if required.[65] A 'foreign main proceeding' is defined in Article 2(b)[66] as occurring in a State where the debtor has its COMI, and Article 17[67] sets out the conditions for the recognition of such proceedings. The registered office of the debtor, further, is presumed to be the COMI, again rebuttable by evidence to the contrary enshrined under Article 16(3).[68] Moreover, if a foreign main proceeding

[63] Model Law, art 25.
[64] Model Law, art 27.
[65] Boddu (n 47).
[66] Model Law, art 2(b).
[67] Model Law, art 17.
[68] Model Law, art 16(3).

is recognised under Article 17(2)(a),[69] then Article 20[70] requires an automatic stay on individual actions and enforcement against the assets of the debtor. Furthermore, Article 21[71] permits discretionary relief to safeguard the rights and interests of the creditors and ensure the orderly conduct of proceedings. These provisions do not just promote comity, but also permit the courts to weigh foreign deference against domestic creditor protections under Article 22.[72]

B. Success Stories of Abroad: Singapore's Discretion and Canada's Joint Hearings

The examples of Singapore and Canada show remarkable ways in which the application of the UNCITRAL Model Law on Cross-Border Insolvency is a successful mechanism to prevent jurisdiction shopping and discourage forums shopping in multi-national cross-border insolvency rules.

A landmark ruling by the High Court *in Re Taisoo Suk*[73] was a giant leap in continuing Singapore as a nation interested in cooperating with the courts of other nations. It concerned the recognition of South Korean rehabilitation processes with respect to Hanjin Shipping. The Singapore court recognised the international main proceedings and granted a block of local assets, and followed the principles of modified universalism. Although at the time of this ruling, the Insolvency, Restructuring and Dissolution Act 2018[74] had yet to receive Royal Assent, the willingness of

[69] Model Law, art 17(2)(a).
[70] Model Law, art 20.
[71] Model Law, art 21.
[72] Model Law, art 22.
[73] *Re Taisoo Suk* [2016] SGHC 195.
[74] Restructuring and Dissolution Act 2018 (**RDA**).

the court to acquiesce to an otherwise solid process in an overseas jurisdiction served, at least, to keep potential bivalent filings and jurisdictional shopping down to a minimum.[75]

The case of *Re Ascentra Holdings, Inc*[76] is another landmark case that saw the Singapore High Court adopt a holistic and practical perspective of its Model Law approach. The court also agreed to the cooperation with a foreign liquidation even though the Singaporean law stated that the company was still operating. The court affirmed that cooperation need not be limited to the insolvency proceedings in the official sense by granting a declaration in aid of foreign procedures. This ruled out the possibility of parties initiating proceedings in such jurisdictions that had limited relief regimes.[77]

The Singapore Court of Appeal made it clear in *Re Fullerton Capital Ltd (in liquidation)*[78] the evidentiary threshold required to dispute the presumption of **COMI** under Article 16(3) of the Model Law. The court said that ambiguous or self-serving words were not enough to indicate an alternate COMI. This judgment highlighted how seriously Singapore regards COMI decisions. It made it clear that the jurisdiction will not accept tactical changes in registered office or procedural venue that are aimed at circumventing creditor scrutiny.

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[75] Bethel Chan and Lee Jin Loong, 'The Singapore Court's Treatment of Foreign Solvent Liquidations Under the UNCITRAL Model Law on Cross-Border Insolvency' (*Chambers and Partners*, 15 May 2023) <https://chambers.com/legal-trends/foreign-solvent-liquidations-in-singapore> accessed 20 June 2025.
[76] *Re Ascentra Holdings Inc* [2023] SGHC 82.
[77] Chan and Loong (n 75).
[78] *Re Fullerton Capital Ltd (in liquidation)* [2025] SGCA 11.

The Bankruptcy and Insolvency Act has made the Model Law part of Canadian law. The theory behind modified universalism has been put into effect in court decisions. The Supreme Court's opinion in *Century Services Inc v Canada (Attorney General)*[79] underlined the significance of preserving a single, centralised restructuring process. The court was not pleased with the fragmented proceedings and supported judicial power to make complex insolvencies fairer and more efficient. This strategy makes it tougher for persons who owe money to manipulate the system by starting conflicting or duplicate cases in more than one place.

The *Nortel Networks*[80] instance is possibly the best example of how cross-border collaboration may operate. In that case, courts in Canada and the United States performed combined hearings, issued coordinated rulings, and made it simpler for assets to be divided up in a fashion that worked for both countries. This cooperation was feasible because of laws comparable to Articles 25 to 27 of the Model Law, which foster as much communication and coordination as possible between courts and insolvency representatives in different nations. The outcome was a smooth and equitable arrangement that preserved creditors in both countries and eliminated opportunities for jurisdictional arbitrage.

These cases illustrate that a well-designed Model Law framework, together with a willingness by courts to interpret it in a flexible and honest fashion, can considerably limit the potential for forum shopping. Singapore's judicial discretion in implementing COMI rules and offering supplementary relief, together with Canada's extensive history of collaborative restructuring, presents valuable precedents. India has

[79] *Century Services Inc v Canada (Attorney General)* [2010] SCC 60.
[80] *Re Nortel Networks Inc* 469 BR 478 (Bankr Del 2012).

suggested adopting a similar approach under the draft Part Z of the IBC. These cases highlight how crucial it is to lay down recognition protocols, make it easy for judges to work together, and only offer discretion to the judges when it is needed to stop misuse. This will assist in developing a cross-border insolvency system that is strong, trustworthy, and works effectively with other countries.

C. Reciprocity Roadblocks: India's Draft Clause vs Model Law Ideals

One of the most debated sides on cross-border insolvency at the national level has been the question of reciprocity. The Draft Part Z of the IBC of India suggests a model where recognition of foreign proceedings is made subject to the existence of reciprocal arrangements with the relevant foreign country.[81] However, legislation based on the Model Law has been enacted in 60 out of 193 countries that are members of the United Nations. Countries such as Russia, UAE, China, Germany, and the Netherlands, which are the largest trading partners of India,[82] are yet to adopt the Model Law; thus, the reciprocity clause would arise as a roadblock in recognising foreign insolvency proceedings in these countries.[83]

[81]Ministry of Corporate Affairs, 'Public Notice' (2018) 30/27/2018 <https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf > accessed 18 June 2025 (Draft Part Z).

[82] Observatory of Economic Complexity, 'India Country Profile' (2025) <https://oec.world/en/profile/country/ind> accessed 18 June, 2025.

[83] Soham Chakraborty, 'Reciprocity Requirements in India's Adoption of the UNCITRAL Model Law on Cross Border Insolvency' (*India Corp Law,* 17 February 2020) <https://indiacorplaw.in/2020/02/17/reciprocity-requirements-in-indias-adoption-of-the-uncitral-model-law-on-cross-border-insolvency> accessed 18 June 2025.

Ultimately, the Model Law seeks not to harmonise substantive insolvency laws but to create a procedural framework that fosters predictability, streamlines access, and improves international cooperation. As India is heading towards having a cross-border framework, it must balance its demand for sovereignty, efficiency, and inclusiveness. Thus, having a discretionary framework for recognition instead of strict reciprocity and narrowing the public policy exception under Article 6, and endowing local courts with interpretational flexibility would be necessary measures towards reconciling the Indian insolvency regime with best practice embedded in the Model Law.

VI. DRAFT Z CROSS-BORDER INSOLVENCY FRAMEWORK: A STEP IN THE RIGHT DIRECTION?

In 2018, the Insolvency Law Committee constituted by the government of India opined that Sections 234[84] and 235[85] of the IBC are insufficient to regulate cross-border disputes and recommended the incorporation of the UNCITRAL Model Law[86] into the IBC.[87] In response to the report, the IBC's cross-border insolvency Draft Framework (Part Z)[88] was proposed largely paralleling the UNCITRAL Model Law with certain alterations in 2021.

Currently, the draft chapter containing twenty-nine (29) sections only applies to corporate debtors considering the IBC itself is inapplicable to

[84] IBC, s 234.
[85] IBC, s 235.
[86] Model Law.
[87] Ministry of Corporate Affairs, Government of India, *Report of the Insolvency Law Committee* (March 2018) <http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf> accessed 19 June 2025.
[88] Draft Part Z.

partnerships and individuals, mimicking the phased approach taken by Singapore while enforcing its cross-border insolvency law.[89] The key features of the framework are summarised hereunder:

A. COMI Presumptions (Clauses 14-16)

The draft adopts the Model Law's concept of Centre of Main Interest of the insolvent body. Although not expressly defined, but it is commonly understood as the site of an insolvent entity's assets and operations. The proceedings are classified as *foreign main* if they occur where the debtor's COMI is located and as *foreign non-main* if held in a jurisdiction where the debtor merely has an establishment. Clause 15 of Draft Part Z[90] builds on this Model Law formulation by relying on Article 17[91] and empowers the NCLT to ascertain whether the foreign insolvency proceedings should be categorised as main or non-main.

However, an ambiguity persists under Clause 14 of Draft Z – the date for ascertaining COMI.[92] Whether it is the date of filing for recognition before the NCLT or the beginning of foreign insolvency proceedings, remained unaddressed by the ILC. However, the Cross-Border Insolvency Rules/Regulations Committee (**CBIRC**) highlighted the risk of conflicting judgments and has recommended adopting the date of the foreign proceedings. It further criticised ILC's undue emphasis on the COMI, placing more importance on factors such as debtor's operational headquarters, posting of senior management, etc.[93]

[89] Boddu (n 48).
[90] Draft Part Z, cl 15.
[91] Model Law, art 17.
[92] Draft Part Z, cl 14.
[93] Ministry of Corporate Affairs, Government of India, *Report on the rules and regulations for cross-border insolvency regulation* (June 2020)

B. Recognition of Foreign Proceedings (Clauses 17-18)

Under Clause 17 of Draft Z, once a foreign proceeding is recognised, a moratorium can be imposed on acts against the debtor's property in India. If classified as a *foreign main proceeding*, an automatic moratorium is conferred on the debtor's asset as a mandatory relief, while for *foreign non-main proceedings*, such relief is discretionary under Clause 18. This closely reflects the stance of Model law on reliefs. In this context Clause 18 also empowers the NCLT to grant discretionary reliefs aimed at facilitating administration and realisation of the debtor's estate as guided by the rules to be framed by the CBIRC.[94]

C. Public Policy Considerations (Clause 23)

Draft Z allows the denial of recognition if the foreign proceeding is 'manifestly' contrary to the public policy in India through clause 23.[95] This is a broad exception. Perhaps broader than Article 6 of Model Law which allows the refusal of recognition in situations clearly contrary to fundamental principles.[96] Many critics argue that without meticulous standards as to what constitutes a manifest contravention of public policy, every uncomfortable foreign order might be labelled *against public policy of India*.

D. Requirement of Reciprocity (Clause 1)

It was the recommendation of the ILC that the Model Law should only be adopted in adherence to the principle of reciprocity, and so is reflected

<https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd01382116409941 27c27.pdf> accessed 15 June 2025.

[94] ibid.

[95] Draft Part Z, cl 23.

[96] Model Law, art 6.

in Draft Z which enshrines an explicit requirement in its provision for scope of application.[97] While intended as a safeguard, stringent reciprocity could severely limit the reach of Draft Z, which might result in strained cooperation among nations.

The complexities associated with legislative reciprocity can be further elucidated through the peculiar South African model. Under its cross-border insolvency framework, South Africa extends recognition to only those countries which have been designated by the Minister of Justice. Shockingly, till date, no country has been designated under this regime since its introduction in the year 2000.[98] Essentially, this implies that South African courts are bound to refuse recognition of foreign insolvency proceedings without weighing their merits. Resultantly, despite South Africa having formally adopted UNCITRAL Model Law into its domestic legislation, in effect it serves no purpose.

E. Exclusions

The ILC stated that Foreign Service Providers (**FSPs**) with critical finance and infrastructure could be excused from the application of Model Law. Furthermore, the ILC also recommended to define the term *foreign companies* in the Draft aiming to clarify whether such FSPs are unregistered companies under the Companies Act 2013.[99]

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[97] Draft Part Z, cl 1.

[98] S Chandra Mohan, 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 ILR 3.

[99] Aman Gupta, 'India's Cross-border Conundrum: An Urgent Need for Insolvency Reform' (*Taxmann*, 26 September 2024) <https://www.taxmann.com/research/ibc/top-story/105010000000024576/indias-cross-border-conundrum-an-urgent-need-for-insolvency-reform-experts-opinion> accessed 18 June 2025.

In summary, Draft Z is a significant step towards achieving a holistic cross-border insolvency regime. It adopts Model Law style principles of access, recognition, relief, etc. However, its loopholes regarding strict reciprocity, undefined public policy contravention, confusion on date of determining COMI introduce fear of new ambiguities. The Draft still echoes overtones of territoriality and if left unmodified, could leave bad forum-shopping opportunities intact.

VII. RECOMMENDATIONS: A ROADMAP FOR THE FUTURE

Based on the foregoing analysis, a framework that combines the efficiency of universal cooperation with safeguards for Indian interests, would be most beneficial. Key recommendations include the following:

A. Adoption of a modified universalist approach:

India should fully enforce Draft Part Z, but remove or relax the stringent requirements of reciprocity. Instead of curbing recognition to specific jurisdictions, the law could empower the courts with discretion to recognise any foreign proceeding that sufficiently protects Indian creditors. This could be implemented in a phased manner, beginning with the reciprocal Model Law countries and then expanding to other countries as well.

B. Incorporation of a well-defined and unambiguous public policy exception:

To prevent opening a pandora's box of public policy defences, India's "manifestly contrary" test enshrined in Clause 23 of Draft Z should be confined to core principles only with an exhaustive definition through illustrative standards or judicial guidelines. Drawing inspiration from

the Model Law's Article 6 which restricts the exception to fundamental principles only and from the US Chapter 11 which refuses recognition solely in cases of clear fraud, procedural unfairness or violation of fundamental rights, the broad ambit under the definition of "manifest contravention of public policy" should be narrowed down. Without well-defined standards and clarity, this clause could potentially become a tool for judicial manipulation and unpredictability, encouraging forum shopping.

C. Allow partial recognition of overseas insolvency proceedings:

A provision which allows courts to recognise a foreign proceeding only for the purpose of realising the assets of an Indian debtor, while excluding the enforcement of foreign awards to local laws, could be adopted. This would ensure that India's domestic assets are well protected under the IBC. Additionally, carve-outs can be used to protect domestic rights. To exemplify, Indian creditors with secured loans would be protected unless the foreign plan specifically accounts for their claim.

The Australian model which enshrines strict standards for eligibility for foreign representatives seeking recognition has proven to effective in maintaining transparency, safeguarding the rights of creditors and ensure that both domestic and global creditors receive fair treatment. Drawing inspiration from Australia's Cross-Border Insolvency Act[100] would ensure India's cohesion with foreign proceedings while safeguarding its own legal system and domestic rights of the citizens.

[100] Cross-Border Insolvency Act 2008 (Australia).

D. Clarify the Determination of COMI:

A crucial ambiguity lies in the date for determining a debtor's COMI. Adopting the date of commencement of foreign proceedings, as per the recommendation of the CBIRC, would reduce jurisdictional gamesmanship such as artificially shifting the COMI, creating shell companies in favourable jurisdictions, racing to court in the preferred jurisdiction, etc. Furthermore, a statutory checklist of COMI indicators which could include operation control, location of main assets, location of administrative headquarters etc., should be codified to prevent artificial COMI shifts aimed at forum shopping.

E. Establishing a Central Insolvency Database:

India would greatly benefit from setting up of a digital, centralised cross-border insolvency database akin to the European Union's Insolvency Register. This would enhance transparency and help courts, creditors and insolvency professionals alike to quickly assess overlapping proceedings. A streamlined record system would also act as a deterrent against duplicative filings meant for harassment and hidden foreign claims.

F. Integration of the 'Commitment Rule':

A structured solution to reduce uncertainty in forum selection is the 'Commitment Rule', which proposes that a debtor company may make a binding and advance commitment to a particular forum for insolvency by incorporating these terms into its constitutional documents (eg, Articles of Association). This choice must be made publicly and well in advance of the onset of financial distress, in order to make it conspicuous and credible to creditors and the regulators alike. The incorporation of

this principle would ensure that insolvency forum selection remains transparent and predictable, rather than being subject to last-minute manipulation aimed at accessing debtor-friendly jurisdictions. This would allow Indian companies with international operations to pre-designate a forum for insolvency resolution subject to oversight and standards of reasonableness.

G. Broaden Stakeholder Participation:

Indian creditors, especially operational creditors, are very frequently marginalised in foreign proceedings. To effectively combat this, Draft Z should include provisions mandating the representation of Indian stakeholders in recognised foreign main proceedings where significant assets or liabilities are involved.

The rationale for this inclusion finds support in the approach adopted by Singapore in *RBG Resources v Banque Cantonale Vaudoise,*[101] wherein the court clarified that the term 'local creditors' within the meaning of Section 340 of the Act[102] includes debts incurred within Singapore, irrespective of the nationality of the creditor. This interpretation effectively eradicates any discriminatory treatment between domestic and foreign creditors, while promoting a fair and inclusive regime. Therefore, Draft Z should also incorporate such protections to ensure that Indian creditors are not excluded merely due to their territorial distinctions.

[101] *RBG Resources v Banque Cantonale Vaudoise* [2004] SGHC 123.
[102] RDA, s 340.

VIII. CONCLUSION

Forum shopping in cross-border insolvency is not an incidental procedural flaw but a persistent structural challenge that weakens the credibility of insolvency frameworks. In the Indian context, it has become increasingly visible through cases like Jet Airways, Byju's, and *SBI v SEL Manufacturing Co. Ltd.*, where debtors have strategically leveraged foreign jurisdictions to bypass Indian proceedings, exclude domestic creditors, and delay outcomes. These examples highlight how India's insolvency regime remains incomplete in addressing global insolvency dynamics.

The IBC, while progressive in many respects, lacks an operational mechanism for managing cross-border insolvency. Sections 234 and 235 remain unimplemented due to the absence of bilateral agreements, leaving tribunals to rely on equitable principles or ad hoc arrangements. In *Jet Airways*,[103] this gap forced the NCLAT to coordinate informally with Dutch courts through an ad hoc protocol arrangement that worked only because both parties were cooperative, not because the law provided for it. The *Byju's* case further demonstrated the consequences of uncoordinated parallel proceedings. Even as the NCLAT resolved disputes between the company and its Indian creditors, a Delaware Bankruptcy Court independently imposed penalties and proceeded with its insolvency action. This fragmentation exposes the procedural inefficiencies and risks to creditor protection when judicial systems act in isolation.

[103] *Jet Airways* (n 9).

Similarly, the NCLT in *SBI v SEL Manufacturing Co Ltd*[104] attempted to uphold fairness by invoking the maxims *fiat justitia ruat caelum* and *nemo debet esse* judex in propria causa to justify equal treatment of foreign creditors. While the tribunal's approach was equitable, the absence of a legislative framework made enforcement difficult and unpredictable. Offshore proceedings in cases like *GCX* and *Firestar* illustrate how foreign filings can be used to exclude Indian stakeholders altogether, often by manipulating COMI and foreign court timelines.[105]

The issue is not confined to India. In a large-scale study of 159 US bankruptcy filings during the Great Recession, Professor Samir D Parikh found that 69% involved deliberate forum shopping. More than 83% of those were concentrated in two districts, Delaware and the Southern District of New York, which were selected for their favourable case law and debtor-friendly practices. This *marketplace of bankruptcy courts* model demonstrates that forum shopping becomes systemic wherever legal design permits it.[106]

To address this growing problem, India's Draft Part Z, based on the UNCITRAL Model Law on Cross-Border Insolvency, proposes a structured solution. However, several aspects require urgent revision. The COMI test must be codified with objective, rebuttable standards to prevent opportunistic jurisdictional shifts. Reliance solely on the place of incorporation or registered office cannot suffice. The public policy exception must be narrowly tailored so that recognition is refused only

[104] *State Bank of India* (n 56).
[105] Sengupta (n 45).
[106] Parikh (n 48).

in cases of manifest and fundamental incompatibility with Indian legal values, not procedural differences.

Additionally, the draft's reciprocity clause should be removed or relaxed. Recognition should not be made conditional on formal bilateral treaties, especially when many advanced jurisdictions already operate under comity-based recognition. Further, the current exclusion of financial service providers and MSMEs creates a significant vacuum. These entities often operate transnationally and must be brought within the regime to ensure comprehensive coverage.

Finally, the Model Law's provisions on judicial cooperation must be supported by concrete procedural mechanisms. Courts should be empowered and guided to communicate directly with foreign tribunals, conduct joint hearings where needed, and extend interim relief in aid of foreign proceedings. Without such operational clarity, the promise of international cooperation will remain largely theoretical. The examples from Singapore and Canada offer proven models. Singapore's adoption of the Model Law through the Insolvency, Restructuring and Dissolution Act 2018, has enabled flexible COMI determinations and regular recognition of foreign proceedings. In Canada, joint hearings and synchronised rulings in the *Nortel Networks* case ensured efficiency and fairness for creditors across borders.[107]

As India continues to integrate into the global economy, the need for a predictable, fair, and coordinated cross-border insolvency framework is immediate. Forum shopping flourishes in ambiguity. If India fails to legislate against it through a harmonised and well-enforced legal

[107] *Nortel Networks* (n 80).

structure, the IBC's authority will erode, and its goal of equitable resolution will remain unfulfilled.