Solventia – Journal of Insolvency & Bankruptcy Laws
I(2), Jul – Dec 2024, pp. 48-86

Internationalising the IBC: Calibrating Indian Insolvency Landscape for Cross Border Insolvencies

Yash Arjariya & Aishwarya Tiwari[*]

ABSTRACT

Through the past three decades, the economic integration of India with the global value chain has drastically transformed. This surge has intricately woven domestic businesses into the global supply chain and thus exposed them to external influences. The Insolvency and Bankruptcy Code, 2016 (IBC) of India does not provide a comprehensive framework for effective cross-border bankruptcy administration, and the evolving jurisprudence has encountered difficulties, as demonstrated by the cases of Jet Airways, Bhushan Steel, and Go Airlines, highlighting the requirement for stronger cross-border procedures. The geopolitical factors, including the Russia-Ukraine conflict, the post-COVID recovery, and diminishing globalisation, have led to contemporary supply chain issues like increased freight prices, material scarcity, energy shortages, etc. Inevitably, insolvency cases with cross-border dimensions are bound to increasingly arise, necessitating a comprehensive framework to navigate these complexities under the IBC. The essay critically analyses the proposed addition of Draft Part Z to the IBC. The authors attempt a comparative

[*] Yash Arjariya and Aishwarya Tiwari are fourth-year students at Hidayatullah National Law University, Raipur.

study between the Draft Part Z and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency based on the four main pillars of cross-border insolvency, i.e., access, recognition, relief, and cooperation. The essay deals with each of these pillars in detail and identifies the issues arising and possible solutions to the same. First, the essay discusses the issue of temporality in cross-border insolvency and then the scope of public policy considerations to refuse recognition of foreign proceedings. Further, arguments are made for the incorporation of provisions for interim relief in cross-border insolvency cases. Finally, the authors analyse problems related to the enforcement of insolvency-related judgments in the proposed scheme, and after analysing the inherent powers of the NCLT, it is recommended that a specific provision enabling enforcement of insolvency-related judgments be incorporated into Draft Part Z.

TABLE OF CONTENT

I. INTRODUCTION

The idea of cross-border insolvency is premised on the principle of universalism. This principle suggests that there must be a single bankruptcy proceeding that applies universally to all the bankrupt's assets and receives worldwide recognition.[1] This principle is based upon the idea of equity that no creditor should be at an unfair advantage or disadvantage because of his domicile – be it concurrent with or different from that of the debtor's estate. Thus, the creditors are viewed as a single community, and the debtor's estate is administered in a way that is value-maximising and for the benefit of creditors as a whole. The UNCITRAL Model Law on Cross-Border Insolvency[2] ("**Model Law**") and the European Insolvency Regulation (Recast)[3] ("**EIR**") have been the two major international legal instruments codifying the procedures for the administration of cross-border insolvencies. These international legal instruments have also endorsed the 'collective' nature of cross-border insolvency, i.e., the rights and obligations of all the debtor's creditors must be considered in cross-border insolvency.[4]

The mechanism of administration of cross-border insolvency is based on the 'Centre of Main Interests' ("**COMI**") of the corporate debtor or the place of habitual residence in the case of an individual. COMI is the place where the debtor regularly administers its interest and is ascertainable

[1] *Re HIH Casualty and General Insurance ltd* (HIH Casualty) [2008] UKHL 21.
[2] UNCITRAL, 'UNCITRAL Model Law on Cross-Border Insolvency' (30 May 1997) (Model Law).
[3] Council Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141 (Council Regulation).
[4] Model Law (n 2), art 2(a); Council Regulation (n 3), art 1 read with art 2.

by third parties.[5] Such administration of interest for determining COMI may include the place from which the decisions on purchasing and sales policy, marketing, staff, and treasury management functions, including accounts payable, were directed[6] or the location of debtor's management[7] or the location of debtor's primary assets,[8] etc. There is a rebuttable presumption that a debtor's COMI is at the place of its registered office.[9] Thus, this COMI construct is the focal point to ascertain the court's jurisdiction to administer the debtor's estate distributed across countries, the kinds of reliefs that can be sought, and other corollary matters in cross-border insolvency proceedings. A more comprehensive discussion on COMI and its determinants is discussed in the later in this essay.

The Model Law primarily focuses on four necessary pillars for cross-border insolvency cases.[10] These are: (a) access, (b) recognition, (c) relief,

---

[5] Miguel Virgos and Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council of the EU Document 1996) para 75 (Virgos-Schmit report).

[6] *Re Angiotech Pharmaceuticals Ltd* [2011] BCSC 115.

[7] *Re Sphinx, Ltd* 351 B.R. 103 (Bankr. S.D.N.Y. 2006) 117; *Re Fairfield Sentry Ltd* (Fairfield) 714 F.3d 127 (2d Cir. 2013) 130; *Re Gerova Fin Grp, Ltd* 482 BR 86 (Bankr SDNY 2012) 91; *Re Millennium Global Emerging Credit Master Fund Ltd*, 474 BR 88 (SDNY 2012); United Nations Commission on International Trade Law, 'Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency', Chapter III para 21 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf> accessed December 29, 2023 (Digest).

[8] ibid.

[9] Model Law (n 2) art 16(3); *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2012] Bus LR 1582 [51]-[53] (Interedil).

[10] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (*UNCITRAL*, May 30, 1997) < https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed July 21, 2024.

and (d) cooperation.[11] These pillars fortify a sacrosanct framework enabling the foreign representative the right to access domestic courts to seek recognition of the foreign insolvency proceedings against the debtor, requesting appropriate reliefs to ensure a value-maximising insolvency process, while the idea of cooperation between courts of different jurisdictions underlines the whole framework.[12]

As we transition to discussing the practical challenges within the Indian insolvency landscape, including case studies like Jet Airways and Go Airlines Insolvency, the need for robust legal frameworks becomes evident. Each subsequent section will delve deeper into the intricacies of cross-border insolvency while charting the potential pathways for India's insolvency regime to evolve.

II. PRACTICAL PROBLEMS IN THE INDIAN INSOLVENCY LANDSCAPE

In India, the Insolvency and Bankruptcy Code 2016 ("**IBC**") does not contain an exclusive mechanism for the efficient administration of cross-border insolvencies. However, Section 234 empowers the central government to enter into bilateral agreements with foreign jurisdictions to address cross-border insolvency-related issues. Additionally, Section 235 empowers the adjudicating authority[13] to issue letters of request to the courts of the country with which a bilateral arrangement has been entered under Section 234. A letter of request is a document that may be

[11] ibid.
[12] Model Law (n 2) art. 19, art. 21, art. 22.
[13] As per the framework laid by the IBC, the National Company Law Tribunal is the adjudicating authority for the matters governed by the Code.

issued by the adjudicating authority to foreign courts or other relevant authorities in the context of cross-border insolvency. It can be sent for a various reason, including: gathering evidence, taking action on assets owned by a foreign entity, and locating debtors.

The implementation of the IBC, since its enactment in 2016, has been plagued by the lack of appropriate mechanisms for administering cross-border insolvency. The instance of the Jet Airways Insolvency may be useful to examine.

In *State Bank of India v. Jet Airways (India) Limited* (Jet Airways),[14] the National Company Law Tribunal ("**NCLT**") refused an application by a Dutch foreign representative[15] seeking recognition of the Dutch insolvency proceedings. It noted that there was no effective mechanism to administer concurrent proceedings under the IBC, thus refusing to recognize the Dutch insolvency proceedings.[16] On appeal, the National Company Law Appellate Tribunal ("**NCLAT**") set aside the NCLT order and directed the resolution professional, in India, and the Dutch foreign representative to observe the spirit of cooperation and not take any step that would prejudice the rights and interests of the creditors concerned.[17]

---

[14] *Jet Airways (India) Ltd v State Bank of India* [2019] IA No 3223 of 2019 in CA (AT) (Ins) No 707 of 2019.
[15] Model Law (n 2) art 2(d)- 'Foreign Representative' is defined as "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."
[16] Jet Airways (n 14) [21], [42].
[17] *Jet Airways (India) Ltd v State Bank of India and Anr*. [2019] SCC OnLine NCLAT 1216.

While this could be considered an instructive order by the NCLAT, neither could the Dutch foreign proceedings be recognised nor could any procedure for concurrent proceedings be devised. At best, what was achieved was a measure of good faith and protocol,[18] but in no way were the foreign proceedings administered in a strict 'collective' sense, as understood in the cross-border insolvency landscape. This may be attributed to the lack of a clear and definitive framework in the IBC for administering cross-border insolvencies, as the insolvency proceedings of two different jurisdictions (India and the Netherlands) were not governed by a robust statutory framework but by the mere virtue of an agreement entered into between the resolution professional in India and the Dutch insolvency administrator. A similar issue has been faced by the NCLT in the matter of ***Go Airlines Insolvency***.[19] In this backdrop, the authors examine the proposed Draft Part Z to the IBC,[20] Insolvency Law Committee ("**ILC**") October 2018 report on "*Cross Border Insolvency*"[21] and the Cross Border Insolvency Rules and Regulations Committee ("**CBIRC**") June 2020 "*Report on the rules and regulations for cross-*

[18] ibid.

[19] *Re Go Airlines (India) Ltd* [2023] SCC OnLine NCLT 197- The NCLT was burdened to sketch the first of its kind litmus test to administer insolvency against the airlines whose issues would require a pan-jurisdictional outlook and cooperation.

[20] Ministry of Corporate Affairs, 'Draft Part Z' (June 2018) <https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf> accessed December 29 2023 (Draft Part Z).

[21] Insolvency Law Committee, 'Report of the Insolvency Law Committee on Cross Border Insolvency' (October 2018) <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf> accessed December 29, 2023 (ILC).

border insolvency resolution"[22] to better calibrate India's insolvency landscape in administering cross-border insolvency.

III. RECOGNITION OF FOREIGN PROCEEDINGS

Under the Model Law, recognition of a foreign proceeding can be as a 'foreign main proceeding' or a 'foreign non-main proceeding'.[23] The former refers to a foreign proceeding pending in a jurisdiction in which the debtor has its COMI.[24] On the other hand, a foreign non-main proceeding refers to one pending in a jurisdiction in which the debtor has its establishment.[25] The difference between recognition of a proceeding as main or non-main lies in the reliefs available post-recognition, i.e., a foreign main proceeding enjoys a wider ambit of reliefs as compared to a foreign non-main proceeding.[26] A similar distinction has also been maintained in Draft Part Z.[27]

Thus, the recognition of foreign proceedings as 'foreign main proceeding' is dependent upon COMI determination. Both the Model Law and Draft Part Z provide for the rebuttable registered office presumption of COMI.[28] However, the Draft Part Z has made a significant deviation from

[22] Cross Border Insolvency Rules/Regulations Committee, 'Report on the rules and regulations for cross-border insolvency resolution' (June 2020) <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf> accessed December 29, 2023 (CBIRC).
[23] Model Law (n 2) art 17(20).
[24] Model Law (n 2) art 2(b).
[25] ibid art 2(c).
[26] ibid art 20.
[27] Draft Part Z (n 20) clause 2(e) and (f).
[28] ibid clause 14; Model Law (n 2) art 16(3).

the Model Law by incorporating a look-back period of three months for accepting registered office presumption, i.e., the registered office of the corporate debtor should not have changed within three months before the application for recognition.[29] This provision for the lookback period is similar to the one provided in the EIR. [30]

A. Registered Office Presumption of COMI

The evidentiary value of the registered office presumption can be examined from two standpoints. The first, under the Model Law and the second, under the EIR.

The position under the Model Law is best described by Lifland J. in *Re Bear Stearns Ltd.*,[31] who explained that the registered office presumption does not have any special evidentiary value and is just one of the factors for the assessment of COMI.[32] The EIR, in contrast, lays a very strong registered office presumption and there exists a very strict burden of proof for its rebuttal.[33] The approach under Draft Part Z appears to be more aligned with the approach followed by the Model Law as the adjudicating authority is required to carry out a proactive assessment of COMI.[34] Thus, it is envisaged that the functional realities

[29] ibid clause 14(2).
[30] Article 3 of the EIR provides, "That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."
[31] *Re Bear Stearns High-Grade Structured Credit* 374 BR 122 (Bankr SDNY 2007).
[32] ibid 127-128.
[33] Interedil (n 9).
[34] ILC (n 21) para11.4.

are capable of displacing purely formal criteria of registered office presumption.

Draft Part Z has made the location where the debtor's central administration takes place and which is readily ascertainable by third parties factors for assessing the debtor's COMI.[35] In global jurisprudence, rebutting the registered office presumption of COMI or establishing COMI at a place other than the registered office presumption has always been made on the yardstick of third-party ascertainability, i.e., where third parties, primarily creditors, think the COMI is.[36] Of all the factors considered for the assessment of the debtor's COMI, the 'nerve centre test', which refers to the location from which the debtor maintained its headquarters and performed the head office functions such as directing, controlling, and coordinating the corporation's activities, is the most crucial.[37]

B. Time of COMI Determination

Ascertainment of the time at which the COMI is to be determined with respect to a foreign proceeding is of utmost importance. The different dates and times of COMI determination may yield varied results to the

[35] Draft Part Z (n 20) clause 14(3).
[36] *Re Eurofood IFSC Ltd* [2006] Ch 508 [118]-[122]; Virgos-Schmit report (n 5); United Nations Commission On International Trade Law, 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency', para 145 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf > accessed December 29, 2023 (GEI).
[37] Sphinx (n 7); Gerova (n 7); Millenium (n 7); *Massachusetts Elephant & Castle Group, Inc.* 2011 ONSC 4201 (Ont. SCJ) [Commercial List]; Digest (n 7).

effect of recognising foreign proceedings as 'main proceeding' or 'non-main proceeding' or neither. For example, a receiving country may determine the COMI of an entity against which insolvency proceedings are pending at the date at which the proceedings were filed in a foreign country or at the date when ancillary proceedings seeking recognition are filed or while deciding ancillary proceedings and given the fact that an entity's COMI may change at any of these dates, may change the result of the ancillary proceeding seeking recognition.

The Model Law does not prescribe any specific time at which the determination of COMI with respect to foreign proceedings seeking recognition is to be carried out. There can be said to be three approaches that have developed with respect to the time of determination of COMI: the legal position in the United States of America, the legal position in the European Union, and the legal position in Australia, of which the positions in the United States of America and the European Union have received the most acceptance and are thus discussed herein in detail.

i. The Legal Position in the United States of America

The courts have interpreted the use of present tense 'is pending' in the definition of a foreign proceeding in the Model Law (enacted as 11 U.S.C. § 1501 et seq.) to mean that courts are required to view the COMI determination in the present, i.e., at the time when the petition seeking recognition of the foreign proceedings is filed.[38]

[38] *Lavie v Ran (Re Ran)* 607 F.3d 1017 (5th Cir. 2010) 1025; Fairfield (n 7) 134; *Re Betcorp Ltd* (Betcorp) 400 B.R. 266, 290-292; *Re British American Insurance Company Limited* 425 B.R. 884, 909-910; *Re Ocean Rig UDW Inc* 570 B.R. 687, 704; *Flynn v Wallace* 538 B.R. 692, 697.

However, this 'filing' based approach has attracted criticism on the aspect that it enables the debtor to engineer jurisdiction in the most favourable jurisdiction to defeat the claims of the creditors.[39] For example, a debtor may initiate voluntary insolvency proceedings in a jurisdiction that does not have its COMI at the date of filing of proceedings and subsequently engineer its operations to move its COMI to the jurisdiction and file ancillary proceedings seeking recognition of the proceeding as the main proceeding. Since the court will only determine COMI at the date of filing of ancillary proceeding, it will be satisfied with the existence of COMI in the jurisdiction at that relevant date of recognition.[40]

Thus, this problem of 'bad faith' in the COMI shift remains a major problem with the American approach. Tracing jurisprudential development in this regard, the federal circuit courts in *Re Ran*[41] and *re Fairfield Sentry*[42] have tried to address this problem albeit cursorily by reserving that while determining COMI, courts may take into account any recent shift of operations by the debtor to avoid insolvency proceedings yielding different results, in contrast to the approach taken in *Re Betcorp*[43] where the court rejected any analysis of any past operational history.

[39]*See Re Millenium Global Emerging Credit Master Fund Limited 458 B.R. 64, 75* (Bankr. S.D.N.Y. 2011); *See also Re Kemsley* 489 BR 346 (Bankr SDNY 2013) 359-360.
[40]*See* Bear Stearn (n 31); *Re Basis Yield Alpha Fund* 381 B.R. 37.
[41] Re Ran (n 38).
[42] Fairfield (n 7) 134.
[43] Betcorp (n 38) 290-292.

ii. The Legal Position in Australia

The approach adopted by the Australian courts is a modified version of the law followed in the USA. Unlike the US courts, which anchor the time of determination of COMI when the ancillary proceeding seeking recognition of foreign proceeding is filed, the Australian courts determine COMI when considering such application.[44] This approach ensures an accurate determination of the COMI, whose determination is not fixed at the time when the proceeding was filed but rather where the COMI is when the court is considering or deciding the ancillary proceeding seeking recognition of foreign proceedings.

iii. The Legal Position in the European Approach

The legal position in the European Union is aimed at preventing the problem which plagues the law developed in the United States of America, i.e., possibility of debtor engineering jurisdiction to some other jurisdiction so as to defeat the claims of creditors or get favourable insolvency proceeding. Thus, it lays that the COMI determination is to be made when the foreign insolvency proceedings were filed against the debtor.[45] English courts have adopted this 'commencement approach,' i.e., while deciding ancillary proceeding seeking recognition of foreign proceeding the court will look whether at the timing of filing of such

[44] *Kellow, in the matter of Advanced Building & Construction Limited (in liq) v Advanced Building & Construction Limited (in liq)* (No 2) [2022] FCA 781 [27]; *Re Legend International Holdings Inc.* [2016] VSC 308 [96].
[45] *Susanne Staubitz-Schreiber* [2006] ECR I-701 [25] – [26].

foreign proceeding, for which recognition is sought, the debtor had its COMI in the jurisdiction or not.[46]

This approach has also received some support in American jurisprudence.[47] Amongst all authorities voicing support for 'Commencement Approach' in USA, Gropper J. in *Re Millennium Global Emerging Credit Master Fund*[48] has articulated most cogent reasons for deviating from the generally accepted 'filing approach' in USA. He justifies it owing to two reasons. Firstly, that the 'filing approach' would lead to recognition being given to change of COMI between filing of foreign insolvency proceedings and then subsequent application seeking recognition of such foreign proceedings.[49]

Secondly, this change of COMI can also be made in bad faith to defeat claims of creditors by gaining recognition for proceedings started in the most favourable jurisdiction which though did not have debtor's COMI at the date of filing. Further, it is patently clear from Gerber J.'s analysis in *re Creative Finance Ltd*.[50] that the 'filing approach' leads to ready recognitions being given to foreign proceedings emanating from 'letterbox jurisdictions' – referring to countries which did not have debtor's COMI at the time of filing of insolvency but later the COMI was engineered to seek recognition of such proceedings.

---

[46] *Re Li Shu Chung* [2021] EWHC 3346 (Ch), [2021] 12 WLUK 158 [37] – [38]; *Stanford International Bank Ltd (In Receivership), Re* [2010] EWCA Civ 137, [2011] Ch. 33 [30]; *Re Videology Ltd,* [2018] EWHC 2186 (Ch).
[47] *Millenium (n 7)*; *Kemsley (n 114)*; *See also* Gerova (n 7) 92-93.
[48] ibid.
[49] *See Re Suntech Power Holdings Co*. 520 B.R. 399, 417.
[50] *Re Creative Finance Ltd* 543 B.R. 498, 518.

Through the 2013 amendment, this 'commencement approach' has also been incorporated and endorsed by the UNCITRAL Guide to Enactment and Interpretation on Model Law on Cross-Border Insolvency.[51] It can also be advanced that the Model Law does not intend COMI shift after the filing of a foreign insolvency proceeding,[52] and thus the 'commencement approach' is the most suited to the intent of Model Law as it forbids any consideration given to change of COMI after filing of the foreign insolvency proceeding.

However, Abdullah J. in *Re Zetta Jet Pte Ltd.*,[53] upon a comparative analysis of the 'filing approach' and 'commencement approach' has favoured the former majorly on the ground that an entity's discretion/autonomy to select the most favourable jurisdiction to achieve an effective restricting or insolvency cannot be objected to.[54] Furthermore, he adopted similar justifications to Markell J. in *Re Betcorp Ltd.*,[55] stating that considering the operational history of the debtor rather than contemporary realities will lead to conflicting COMI determinations as it would lead each jurisdiction to weigh various factors in the past differently, thus frustrating the goals of harmonisation and consistency in COMI determination. More problematic will be that such COMI determinations will lead to denial of the proceeding emanating

[51] GEI (n 36) para 30, 159.
[52] United Nations Commission on International Trade Law, 'Report of Working Group V (Insolvency Law) on the work of its forty-first session' para 60 (May 8, 2012) < https://documents.un.org/doc/undoc/gen/v12/534/46/pdf/v1253446.pdf?token=oqGuKDgnc3eS1zl1lp&fe=true > accessed December 29, 2024.
[53] *Re Zetta Jet Pte Ltd.* [2019] SGHC 53 [53].
[54] ibid [57].
[55] Betcorp (n 38) 291.

from the jurisdiction in which the debtor's interests are truly centred, keeping in view past considerations.[56]

iv. Indian Position: Decision with Limited Consideration

The ILC, in its report, chose not to specify any particular date for the determination of COMI for the purposes of deciding the ancillary proceeding seeking recognition of foreign proceedings.[57] It simply left the pertinent issue to be decided by the adjudicating authority. Thus, the ILC preferred not to decide on the issue, aware of the diverse international approaches in this regard.

The CBIRC, for better or worse, has chosen to address the issue and has recommended the adoption of the 'commencement approach', as followed in Europe.[58] However, CBIRC's reasoning for the same has simply been the incorporation of the same in the UNCITRAL Guide to Enactment and Interpretation, without an independent analysis of alternatives. As already explained earlier in this part, the 'commencement approach' as recommended by CBIRC is aimed at preventing the practice of forum shopping or engineering of jurisdiction by the debtor to avoid claims of the creditors. It has also been envisaged that the adjudicating authority undertakes proactive enquiry in the process of COMI determination.[59] Further, Clause 6 of Draft Part Z requires observance of good faith. Thus, the proposed scheme of Draft

[56] ibid; *See* Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm* (32 BROOK. J. INT'L 2007).
[57] ILC (n 21) clause 11.8.
[58] CBIRC (n 22) clause 4.6.
[59] ILC (n 21) clause 11.4.

Part Z currently can be said to have been calibrated to avoid the problem of forum shopping by the debtor made in bad faith. The authors suggest that a provision relating to the timing of determination of COMI of a debtor must be added in the Draft Part Z to maintain uniformity in the exercise of COMI determination by the adjudicating authority.

IV. PUBLIC POLICY

Article 6 of the Model Law empowers the receiving state to deny recognition of a foreign proceeding if it is 'manifestly contrary to its public policy'. The usage of the word 'manifestly' in Article 6 brings forth the intention of the law that the exception is to be invoked only in exceptional circumstances.[60] What constitutes public policy has, however, not been explained in the Model Law.[61]

The global jurisprudence on this point has borne out that the public policy exception can only be invoked in matters concerning 'fundamental principles' of the state.[62] The U.S. Bankruptcy Court in *Re Tri-continental Exchange Ltd.,*[63] explained the 'fundamental principles' of a state to cover procedural fairness, constitutional rights and liberties, and statutory rights of the state.

[60] GEI (n 36) para 21(e), 104.
[61] HIH Casualty (n 1) [30].
[62] Re Ran (n 38)1021; *Re Ernst Young, Inc*. 383 B.R. 773, 781; *Re ABC Learning Centres* (ABC Learning) 728 F.3d 301 (3d Cir. 2013), 309; *Re Ephedra Products Liability Litigation* (Ephedra) 349 B.R. 333, 336; *Ackermann v Levine* (Ackermann) 788 F.2d 830 (2d Cir.1986), 842; *Re Tri–Continental Exchange Ltd*. 349 B.R. 627, 633–34.
[63] *Re Tri-continental Exchange Ltd* 349 B.R. 627, 633–34.

The scope of public policy as explained in *Tri-continental Exchange* has been maintained in a catena of judgements.[64] However, a combined reading of the cases brings forth that the invocation of the public policy exception is primarily concerned with the question of whether the foreign proceeding seeking recognition has complied with the standards of procedural fairness of the receiving state, i.e., whether principles of natural justice have been followed, fair opportunity of participation to every creditor has been given or not, etc.[65]

There can thus be two general principles of law that can be ascertained from the scholarship of jurisprudence on public policy exception. First, that the exception is primarily concerned with procedural fairness. And second, that the exception needs to be invoked very restrictively, and rarely to refuse recognition.[66]

A. Indian Interpretation of the 'Public Policy' Exception: at Loggerheads with the Model Law

The ILC has provided that to determine what constitutes a public policy exception, the adjudicating authority may consider domestic interpretations of public policy.[67] Thus, it is relevant to account for major

[64] *See Re Toft* 453 B.R. 186, 194; *Re Gold & Honey* 410 B.R. 357, 371-372; *Jaffe v Samsung Elecs. Co.* 737 F.3d 14 (4th Cir. 2013), 18, 22-28; *Ad Hoc Group of Vitro Noteholders v Vitro S.A.B de C.V.* 701 F.3d 1031 (5th Cir. 2012), 1069.
[65] Ephedra (n 62); *Re Metcalfe & Mansfield Alternative Investments* 421 B.R. 685, 697; ABC Learning (n 62); *Cunard Steamship Co. v Salen Reefer Services* AB 773 F.2d 452 (2d Cir. 1985), 457; *Re Qimonda AG Bankruptcy Litigation* 433 B.R. 547, 568.
[66] GEI (n 36) para 21(e), 29, 30, 103 and 104.
[67] ILC (n 21) clause 3.5.

pronouncements by the Supreme Court of India (**SC**), which, while dealing with the enforcement of arbitral awards, have interpreted the principles of private international law and thus laid a general principle of law with respect to the application of the 'public policy' exception in India.

A full bench judgment of the SC in *Renusagar,*[68] though dealing with the scope of 'public policy' appearing in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, has generally interpreted the doctrine of public policy as applied in private international law. As per the court, the invocation of a public policy exception to refuse recognition can be justified in three scenarios: "if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."[69] The stance taken by the SC in *Shri Lal Mahal*[70] is more aligned with global jurisprudence in the aspect that the court entered the public policy inquiry around the procedural proprietary of the foreign proceeding; it explained the grounds for invoking the 'public policy exception' as "....so unfair and unreasonable that it shocks the conscience of the court."

However, the stance taken by the SC in *Saw Pipes*[71] implicated giving a wider import to public policy exception. In doing so, the rationale advanced was that if wide meaning is accorded to such an exception, the

[68] *Renusagar Power Co. Ltd. v General Electric Co*., [1994] Supp (1) SCC 644, [66].
[69] ibid.
[70] *Shri Lal Mahal Ltd. v Progetto Grano SpA*, [2014] 2 SCC 433, [25].
[71] *ONGC Ltd. v Saw Pipes Ltd.,* [2003] 5 SCC 705.

enforcement of *patently illegal awards* may be avoided.[72] It is curious to compare the word 'patently' as used by the SC to qualify 'illegal awards' and thus making a ground for refusal of recognition with 'manifestly' as appearing under Article 6 of the Model Law (which requires the foreign proceeding to be manifestly contrary to the public policy of a nation to deny recognition). It can be said that while Model law has qualified the invocation of the public policy exception when the foreign proceeding is 'manifestly' contrary to public policy and thus restricting its application in routine matters, the SC postulated a bigger import to the meaning of the exception (refusing to accept a narrow construct of the exception) and in turn refusal of recognition every time the provisions of the Arbitration act were violated. Thus, while the Model Law intends refusal of recognition in exceptional matters, the SC ruling warrants refusal of recognition every time a statutory provision is violated.

B. Call for Restrictive Application of the Exception

However, if the law laid in *Saw Pipes*[73] is imported into the terrain of cross-border insolvency in India, it would have the effect of frustrating the cooperation and harmony in administering cross-border insolvencies, as mere difference in laws would be sufficient to invoke the public policy exception.

This, the author submits, is against the spirit of the Model Law, as per which mere difference in the scheme of domestic insolvency laws does

[72] ibid [22].
[73] ibid.

not qualify as being 'manifestly' contrary to a nation's public policy.[74] The pronouncement by the House of Lords in *Re HIH Casualty & General Insurance ltd.*[75] indicates the general stance of global jurisprudence in this regard: that the spirit of universalism and cooperation needs to be always guarded in administering cross-border insolvencies, and thus, mere differences in the insolvency laws of the foreign country and those of the receiving country cannot become ground for refusal of recognition on the basis of public policy violation. Similarly, an instructive judgment by Cardozo J. in *Ackermann v. Levine*[76] while reaffirming the narrowness of the public policy exception, has perfectly summarised that courts must not have a provincial outlook to say that every solution to a problem is wrong because it is dealt with otherwise at home.

It needs to be underlined that the ILC has recommended an exact import of Article 6 of the Model Law into the Draft Part Z.[77] Thus, Article 4 of the Draft Part Z prescribes the refusal of foreign proceedings if they are 'manifestly' contrary to the public policy of India. Similarly, Guideline 4 of the CBIRC Report also postulates a refusal to take action when the effects would be manifestly contrary to the public policy of India. Hence, the intent of the ILC is clear: this exception is to be invoked exceptionally in line with global jurisprudence in this regard.[78]

[74] GEI (n 36) para 30.
[75] HIH Casualty (n 1).
[76] Ackermann (n 62).
[77] ILC (n 21) clause 3.4.
[78] CBIRC (n 22) clause 3.5 and 3.6.

V. ACCESS TO FOREIGN REPRESENTATIVES

The Model Law envisages the right of direct access to foreign representatives to courts in the enacting country.[79] In essence, it is intended that the formal requirements such as registration, licence etc. as required by domestic law to be dispensed for foreign representatives.[80] Thus, this right to direct access accorded to foreign representatives is to enable them to approach courts or appropriate fora, and to avail necessary remedies in relation to foreign proceedings. However, there are two crucial aspects to be dealt with respect to this right to access to the foreign representatives. First, whether foreign representatives will be able to overcome bar imposed on certain foreign professionals to practice in India? And second, what will be the extent of the right of direct access to the foreign representatives?

In India, as per the law laid down by the SC in *Bar Council of India v. A.K. Balaji*,[81] foreign lawyers and law firms are not allowed to participate in litigation and non-litigation matters, and, thus not allowed to practise. The 2023 Bar Council of India guidelines only allow limited exemptions to foreign lawyers based on the principle of reciprocity that the Indian lawyers enjoy same rights in their country.[82] Similarly, foreign chartered accountants are not allowed to practise in India.[83] Thus, it appears likely

[79] Model Law (n 2) art 9.
[80] GEI (n 36) para 108.
[81] *Bar Council of India v A.K. Balaji,* [2018] 5 SCC 379 [42]-[43].
[82] Bar Council of India, 'Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India' (March 2023) <https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf> accessed March 7, 2024.
[83] The Chartered Accountants Act 1949, s. 29.

that in line with such restrictions, foreign lawyers *qua* foreign representatives will not be permitted direct access to courts in India.[84]

However, this understanding is flawed owing to two reasons. First, the access to such foreign lawyers and professionals is in their capacity of a 'foreign representative', thus forming a distinct class. Second, the Draft Part Z deviates from the Model Law that it allows direct access to foreign representatives only with respect to proceedings under the IBC,[85] as against access given to foreign representative in any proceeding against the debtor by the latter.[86]

In light of foregoing considerations, it will be untenable to say that allowing a foreign professional to participate as foreign representative will amount to allowing them to practise in India. To arrive at this claim, the CBIRC report drew comparative analogy with the legal system of Bahrain and South Africa, which being similar to India, do not allow foreign lawyers to practise in their jurisdiction but have allowed them to access court as foreign representatives.[87] Additionally, the CBIRC also tried to justify the right to access on the basis that, in principle, the foreign professionals as foreign representatives will invariably depend upon local insolvency professionals, local counsels etc. and thus would result in increased co-operation between stakeholders.[88]

A. Extent of Right of Direct Access

[84] *See* ILC (n 21) clause 5.3.
[85] Draft Part Z (n 20) clause 7.
[86] Model Law (n 2) art 9.
[87] CBIRC (n 22) clause 4.3.1.
[88] ibid.

With respect to the extent of right to direct access to the foreign representatives, as noted earlier, Draft Part Z proposes to accord the right to access only with respect to proceedings under IBC,[89] clearly restricting the scope when compared to the Model Law which allows such right with respect to every proceeding against the debtor.[90] However, the ILC and CBIRC differ on the scope of right to access as given by Draft Z. The ILC has favoured a conservative approach, i.e., arguing that such rights only to be exercisable by the foreign representative through domestic insolvency representatives and also that the extent of such right to be decided.[91] However, the CBIRC has argued for a direct exercise of the right to access by the foreign representative including right to appear before NCLT.[92] The stance taken by CBIRC is more coherent with the Model Law, while the ILC has sought to restrict the right without an underlying reason, as there appears no reason that, even after restricting the right to direct access with respect to only proceedings under the Code, there needs to be further restriction on the foreign representative's right to access.

The ILC in its report has left the issue of access to foreign representative to be decided by the Central Government through subordinate legislation,[93] and thus has not conclusively recommended any regulation mechanism, penalty provisions etc., for the foreign representatives enjoying the right to direct access. The ILC could not agree on whether

[89] Draft Part Z (n 20) clause 7.
[90] Model Law (n 2) art 9.
[91] ILC (n 21) clause 5.4.
[92] CBIRC (n 22) clause 4.3.1.
[93] *See* ILC (n 21) clause 6.3.

registration recommended a code of conduct and a penalty provision similar to those applicable on insolvency professionals in India.

However, the CBIRC recommended a 'principle-based light-touch code of conduct' for foreign representatives. Two aspects of CBIRC's recommendations needs to be highlighted. First, that it deemed fit to extend the applicability of regulations contained in First Schedule of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 *mutatis mutandis* to the foreign representatives.[94] Second, it vouched for a 'deemed authorisation model' for foreign representatives, i.e., unless the application for authorisation to foreign representative to exercise their right of access is denied by Insolvency Board of India ("**IBBI**") within ten days, it will be deemed to be approved.[95]

B. Case of Misfeasance by Foreign Representative

It has been left to the IBBI to decide the cases of misfeasance by foreign representatives or actions in bad faith by foreign representatives etc.[96] Thus, Clause 8 of the Draft Part Z enables the board to impose penalties in this regard. The ILC report, though discussed a penalty provision as existent in U.K.[97] which provides for a similar penalty for misfeasance by foreign representatives as applicable to domestic professionals. However, the ILC has made a departure with respect to the position in

[94] CBIRC (n 22) clause 4.3.2.
[95] ibid clause 4.3.2.
[96] ibid clause 4.3.2; ILC (n 21) clause 6.3.
[97] Cross-Border Insolvency Regulations 2006, Schedule 2, reg 29.

the U.K. in the sense that in the U.K., courts are required to determine punishment/penalty for misfeasance, while in the Draft Part Z the Indian regulator (IBBI) has been entrusted with such functions.

Next, it needs to be ascertained as to what would be the impact on decision to recognise and enforce foreign proceeding in case of misfeasance by foreign representative. It can gainfully be referred to the position in the U.S. (which has enacted the Model Law as 11 U.S.C. § 1501 et seq.), where it appears to be settled after the ruling in *SNP Boat Services S.A. v. Hotel Le St. James*[98] that any action against the foreign representative for his misfeasance or actions taken in bad faith, cannot lead to de-recognition of the foreign proceeding, i.e., to let any action taken against the foreign representative have an impact on the status of recognition or enforcement of foreign proceeding is of extreme nature and appropriate only as a last resort.

Though, Draft Part Z does not conclusively provide for this issue, it is hoped that any decision on foreign representative to not have an impact on the recognition and enforcement of foreign proceeding not only on the lines of the settled position in U.S. but also on the basis of limited help that the CBIRC report provides in this regard[99], which has recommended to separate the IBBI's decision of authorisation of foreign representative and any consequential effect it may have on proceeding under the code.

[98] *SNP Boat Services S.A. v Hotel Le St. James* 483 B.R. 776, 787-788.
[99] CBIRC (n 22) clause 4.3.2.

VI. INTERIM RELIEF

Interim relief refers to any provisional relief that a domestic court may grant from the time of the filing of the application for recognition of foreign proceedings until this application is decided upon. Upon a comparative reading of Article 20 of the Model Law, which deals with relief upon recognition as a foreign main proceeding, and Article 19 of the Model Law, dealing with interim relief, it becomes manifestly clear that the relief available under Article 19 is at the total discretion of the domestic court which receives the application of recognition. The interim relief so granted by the domestic court may include staying execution against the debtor's assets, suspending the right to transfer or encumber the debtor's estate, entrusting the debtor's assets to a foreign representative to protect the value of the assets, etc. The ambit of interim reliefs post-recognition of foreign proceedings also includes a stay on litigation against the debtor.

The list of interim relief under the Model Law is a non-exhaustive one, and any additional relief compatible with the laws of the enacting state can also be granted. Heath J. in *Steven John Williams v. Alan Geraint Simpson*,[100] has elucidated the purpose of the usage of the word 'including' as appearing in Article 19 of the Model Law in the instant case that "it would be odd if the ability to grant such relief extended only to property known to exist and readily locatable", thus broadening the interpretative scope of the permissible reliefs available to a foreign representative.

[100] *Steven John Williams v Alan Geraint Simpson* CIV 2010-419-1174.

A. Draft Part Z and Interim Relief: A Skewed Approach?

Draft Part Z has only provisioned for reliefs post-recognition of a foreign proceeding.[101] Thus, it has made a conscious attempt to deviate from the two broad categories of reliefs available under the Model Law, omitting any scope for interim relief before recognition. The ILC has rationalized this omission as an attempt to limit the discretion available to the adjudicating authority.[102] Further, the existing framework under the IBC also does not provide for any interim relief in cases of domestic insolvency; this can better be understood as a reason for not creating a separate class of reliefs for cross-border insolvency that are not provided in the domestic framework.

It will be unreasonable to operationalise the administration of cross-border insolvency without provision for interim reliefs, as the debtor may dispose of the assets to the disadvantage of the community of creditors as a whole while the application for recognition of a foreign proceeding is pending before the adjudicating authority. A similar concern has also been voiced by the ILC in its February 2020 report,[103] albeit in a domestic framework. The ILC itself recommended incorporating a provision providing for an 'interim moratorium' heeding to the concern that creditors of the corporate debtor may race to enforce their debts in the

[101] Model Law (n 2) Art. 19, 20, 21- all provision the reliefs to be granted upon recognition of a foreign proceeding.
[102] ILC (n 21) clause 13.4.
[103] Ministry of Corporate Affairs, 'Report of the Insolvency Law Committee' (February 2020) <https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf>

period leading up to the commencement of the corporate insolvency resolution process.[104] It recommended the following:

> Requisite amendments should be made to introduce a provision allowing for an 'interim moratorium' to be put in place after an application for initiation of CIRP has been filed but before it has been admitted, in the interests of having a collective insolvency resolution process that is value-maximizing in the interests of all stakeholders.[105]

The CBIRC has limited itself on the issue under the pretext that since there is no provision for interim relief in cases of domestic insolvency, there can be none for cross-border insolvency cases as well. Similarly, it was of the view that it would require simultaneous and parallel amendments in the IBC along with Draft Part Z to incorporate such relief. However, even in the absence of a specific provision in Draft Part Z enabling the adjudicating authority to grant interim relief while administering cross-border insolvency, some scope for such relief can be carved out in the NCLT Rules, 2016. Rule 11 of the said rules provides for the inherent powers of the adjudicating authority, empowering it to "make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of process." Interestingly, in *NUI Pulp and Paper Industries Pvt. Ltd. v. Roxcel Trading GMBH*[106] the NCLAT had used this inherent power to prohibit the corporate debtor from alienating the

[104] ibid clause 5.3.
[105] ibid, Annexure II.
[106] *NUI Pulp and Paper Industries Pvt. Ltd. v Roxcel Trading GMBH* Company Appeal (AT) (Insolvency) No. 664 of 2019.

assets and had provided interim relief at the pre-admission stage. In light of the above order, the CBIRC report, which mentioned the lack of availability of such interim reliefs in cases of domestic proceedings as a reason for not making such a parallel provision in cases of cross-border proceedings, needs a revisit.[107]

However, the Draft Part Z is not wholly without substance in this regard. Clause 15(4) dealing with cross-border cases prescribes a maximum of fourteen (14) days from the day of application that may be taken for deciding on recognition. This departure from the Model Law seems to have been specifically incorporated to fill in the gaps created by the omission of interim relief as it endeavours for a decision upon the recognition at the earliest time possible, which then shall lead to the application of relief post-recognition reliefs. It is submitted that even after such a specified timeline, the process of law can be dodged before the decision is made. This may be understood with the following illustration.

Suppose there is a company named XYZ Pvt. Ltd. incorporated in Spain, which is also its COMI. It has business in several different countries, including India, and consequently, owns some assets in these countries. Then, XYZ Pvt. Ltd. becomes insolvent, and the Spanish bankruptcy court admits its insolvency application. The Spanish court then appoints a foreign representative who applies for recognition of the Spanish proceedings before the NCLT in India. The tribunal will now decide, as per Clause 15(4) of Draft Part Z, upon the recognition within fourteen

[107] CBIRC (n 22) clause 4.7.

days. It may be that between the date of application and the end of fourteen days, creditors in India may enforce their security against the company's assets based in India, or the company itself may sell off assets based in India, resulting in an overall diminution of the value that may be derived for all the creditors participating in the insolvency process.

Thus, a provision for interim relief can prevent the disposal of assets by the debtor while the application for recognition of foreign proceedings in India is pending and upholds the interests of having a collective insolvency resolution process that is value-maximizing in the interests of all stakeholders. In this backdrop it shall only be prudent to incorporate provisions relating to interim relief in the Draft Part Z to serve the interests of justice.

VII. RELIEF POST-RECOGNITION

Upon the decision to recognise a foreign proceeding, two types of relief become applicable: (a) mandatory relief[108] and (b) discretionary relief.[109] Mandatory relief becomes automatically applicable in cases where a foreign proceeding is recognised as the main proceeding, and such relief is not dependent upon the discretion of the court.[110] One issue which needs to be addressed specifically is the uncertainty concerning the

[108] See Draft Part Z (n 20) clause 17- It provides for mandatory reliefs post-recognition of foreign proceedings as foreign main proceedings. The mandatory relief provides for the prohibition on any commencement or continuance of suits against the debtor, prohibition on alienation or transfer of the debtor's estate, etc.
[109] ibid clause 18.
[110] ibid clause 17.

enforcement of the judgment of the foreign proceeding as 'appropriate relief' under Article 21 of Model Law (Clause 18 of Draft Part Z).

A. The 'Appropriate Relief' Under Discretionary Relief and the Enforcement of Judgement of Foreign Proceeding: the Looming Uncertainty

Recognition and enforcement, though usually understood as simulative terms, are two different processes. Recognition in effect creates a legal fiction of deeming the foreign judgment as a local judgment, which, later, following the procedures prescribed in the local law, may be enforced.[111] There might be some judgments that have their purpose served upon mere recognition, and enforcement may not be needed. An illustration of such a judgment may be that of a foreign court holding that the defendant did not owe any money to the plaintiff. Here, the domestic court may instead simply recognise that finding if the plaintiff were to sue the defendant again on the same claim before that court.

Article 21(1) of the Model Law (Clause 18(1) of Draft Part Z) enables the granting of any appropriate relief by the court based on the discretion of the court. It is interesting to note that there is no express provision entitling a court to enforce a judgment in the Model Law on cross-border insolvency, and thus, similar lacunae occur in Draft Part Z, which is primarily based on the Model Law. The enforcement of the foreign

[111] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment' para 26 < https://uncitral.un.org/sites/uncitral.un.org/files/ml_recognition-gte.pdf> accessed December 29, 2023.

judgments has been carried out by adopting a purposive interpretation of Article 21 of Model Law and the phrase *any appropriate relief* occurring thereunder.

This absence of an express provision in this regard creates uncertainty, which has been recently manifested by the English decision in the case of *Rubin v. Eurofinance* ("**Eurofinance**"),[112] where the UK Supreme Court, despite giving recognition to the foreign judgment, refused to enforce the same judgment since there is no express provision in this regard in Model Law. Similar was the problem in the case of *Azabu Tatemono*,[113] where the court recognized the foreign judgment but did not enforce it. This approach makes the Model Law (and Draft Part Z) a toothless tiger, which facilitates merely the recognition but not the enforcement of the judgment.

The UNCITRAL tried to remedy this shortcoming of uncertainty associated with the recognition and enforcement of insolvency-related judgments by adopting the Model Law on Recognition and Enforcement of Insolvency-Related ("**MLREIJ**"). Article X of MLREIJ provided a clarification that the language of Article 21 is broad enough to include enforcement of a judgment as a discretionary relief, thus putting to rest the havoc created by *Eurofinance*. However, MLREIJ is of a very nascent origin and has not been incorporated into the domestic statutory frameworks of countries including India. Thus, in the absence of specific

[112] *Rubin v Eurofinance* [2012] UKSC 46.
[113] *Azabu Tatemono*, *Tokyo District Court*, 3 February 2006; Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 Eur Bus Org L Rev 283, 292.

provisions contained in Draft Part Z providing for the enforcement of foreign judgments, the framework to enforce insolvency-related judgments in India will be solely based on the purposive interpretation of Clause 18(1) of Draft Part Z.

B. Enforcing Insolvency-Related Judgements

Under the common law, two schools of thought have emerged on the question of the enforcement of a foreign insolvency judgment. The first school of thought is led by Lord Hoffman, who in the cases of *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding PLC and others)*[114] and *Re HIH Casualty & General Insurance*[115] has emphasised the value of universalism in the administration of cross-border insolvency cases, and that comity must be granted to the proceedings pending or judgments delivered in other nations. The main rationale here is that creditors must not be at a disadvantage because of the difference in their place of residence and the location of the debtor's assets.

Whereas, the second school of thought, as vouched by Lord Collins in *Eurofinance*, has held that the Model Law is silent and not prescriptive upon enforcement of foreign judgments related to judgments. Per this view, courts cannot, on their motion, provide for universal operation of insolvency in the absence of a corresponding mandate in rules and regulations.

---

[114] *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding PLC and others* [2006] UKPC 26.
[115] HIH Casualty (n 1).

In India, the Draft Part Z contains no specific provision for enforcement of insolvency-related judgments; thus, the problem highlighted in *Eurofinance* may plague the Indian administration of cross-border insolvencies. It has already been noted in the earlier part that in absence of any specific provision for enforcing insolvency-related judgments in Draft Part Z, much will depend on the purposive interpretation of Clause 18(1). The authors in this part try to sketch a mechanism for enforcement of insolvency-related judgments and aid in the adoption of such purposive interpretation of Clause 18(1), thus enabling the enforcement of insolvency-related judgments. Though it is to be understood that such a mechanism doesn't necessarily bring uniformity among cases and thus the authors are of the opinion that a specific provision enabling enforcement of insolvency-related judgments be incorporated in the Draft Part Z.

The principle of comity of courts postulates that judicial acts are mutually recognized. This principle can be said to have been recently endorsed by the High Court of Delhi in *Toshiaki AIBA v. Vipan Kumar Sharma*,[116] where the court entertained an application filed by a Japanese bankruptcy trustee seeking an injunction based on Japanese judgment. The Court highlighted the need to treat foreign creditors at par with domestic ones given the increasingly globalized world and also stressed the importance of cooperating with foreign bankruptcy courts. The legitimacy of this power to grant comity to the proceedings and judgments of the foreign court stems from the common law doctrine that courts have inherent powers to assist other courts. Thus, there arise two

[116] *Toshiaki AIBA v Vipan Kumar Sharma* 2022 SCC OnLine Del 1260.

points of consideration: (a) what is the scope of this inherent power, and (b) does NCLT have this inherent power?

i. Scope of the Inherent Power

The scope of this power is best represented by the principle of modified universalism, which may be said to be an "abated form of universalism that tries to fit in with the current legal reality."[117] In this respect, the original insolvency proceeding does not have an automatic and direct effect in the ancillary countries, and the local courts are at their discretion to evaluate compliance with certain criteria (Daft Part Z in this case). Draft Part Z may be resorted to understand the Indian position, which provides for enforcement actions, only if they are not manifestly contrary to the public policy of India. Thus, given this, the scope of this inherent power in the Indian courts seems to be operational until the fundamental policies of the nation are not manifestly violated.

ii. Does NCLT have this Inherent Power?

It has been observed that the NCLT and the NCLAT have limited jurisdiction, cannot act as a court of equity,[118] and thus cannot do what the IBC expressly does not provide them to do. As a corollary, the NCLT has exclusive jurisdiction in matters that arise under the IBC. Since none of the provisions currently in the IBC deal with the power of adjudicating authority for recognition or assistance in cross-border insolvency cases, the NCLT is not an appropriate forum for the same. Therefore, the

[117] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98:7 Mich L Rev 2276, 2299 – 2302.
[118] *K. Sashidhar v Indian Overseas Bank & Ors* [2019] 12 SCC 150.

enforcement regime of the foreign judgments dealing with insolvency-related matters remains uncertain.

However, after the adoption of Draft Part Z, clause 18(1) may serve as the source of the inherent power of the NCLT to enforce insolvency-related judgments and also to render assistance. The intent of the ILC has also been the same, which has accepted that Article 21 of the Model Law may include enforcement of judgments as a relief if deemed fit by the Adjudicating Authority and therefore clause 18(1), which is the analogous provision in the Draft Part Z may be interpreted to include enforcement. However, as also advanced earlier, the enforcement of cross-border insolvency judgments should not be left to the mere purposive interpretation of clause 18(1) of Draft Part Z without any statutory prescription as this may yield the same result as in *Eurofinance*. Thus, an explicit statutory provision may be inserted in Draft Part Z to prescribe the enforcement of such judgments.

VIII. CONCLUSION

The authors have appreciated the recommendations and contributions of the ILC and the CBIRC reports while highlighting the gaps in the current proposed Draft Part Z framework and the possible solutions. The authors are of the suggestive stance that the following changes are required in Draft Part Z in its current form to harmonize it with the international practice and restrict potential loopholes: first, a case has been made out for the insertion of a provision for interim relief; second, a specific provision enabling enforcement of insolvency-related judgments is desirable to be incorporated; third, acting upon CBIRC's

stance, an explicit mention of the adoption of the 'commencement approach' with reference to the time of determination of COMI must be incorporated so as to curb forum shopping or engineering of jurisdiction.

The authors have also considered the policy question concerning the invocation of public policy exception to refuse the enforcement of foreign insolvency-related judgment ought to be considered. Authors have highlighted the divergent Indian jurisprudence with that of the global approach in this regard. Thus, as the time is trite and the adjudicating authority is deciding the matter, the adjudicating authority ought to take an independent approach (from the Indian jurisprudence) based on established international practices to invoke or not to invoke such exception for refusing the enforcement of insolvency-related judgments.