Solventia
II(1), 2025, pp. 128-153

The Reciprocity and COMI Conundrum in Draft Z: A Comparative Analysis with the USA and Brazil

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ABSTRACT

This article analyses India's proposed policy for cross-border insolvency, wherein it is said to adopt the UNCITRAL Model Law in the form of Draft Z. Since the current Insolvency and Bankruptcy Act, 2016 lacks provisions fostering the growth of cross-border insolvency in India, there is a need to implement the Draft Z. However, the said provision is not without its flaws. Therefore, to understand its limitations thoroughly, it becomes imperative that experiences of other nations are critically studied to conclude the length of their successes and failures. This article presents a comparative analysis of the cross-border insolvency provisions in the USA's Chapter 15 and Brazil's Chapter VI-A, particularly concerning the rule of reciprocity and the Centre of Main Interest (COMI).

After examining the same, this article highlights drawbacks in the current proposed Draft Z and recommends changes regarding the status of the current IBC provisions dealing with cross-border insolvency, public policy exception and interpretation of key provisions under Draft Z. These suggestions may be incorporated to be more in

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tune with the international standard and provide a level-playing field for all stakeholders in such cases.

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I. INTRODUCTION

The rise in global trade and investments has led to an increase in corporate entities having operations, assets, debtors, and creditors in multiple countries. Where insolvency proceedings are dictated by the many jurisdictions, issues pertaining to conflict of laws are bound to

arise.[1] A robust cross-border insolvency framework ensures that the creditors have access to the debtor's assets situated overseas and bring these assets under the purview of the insolvency resolution proceeding.

The introduction of the Insolvency and Bankruptcy Code, 2016 (IBC) has brought about a paradigm shift in the country's business environment.[2] However, India's existing regime on cross-border insolvency assistance is still mired in uncertainty. The lack of explicit provisions in the IBC for handling cross-border insolvency has resulted in disputes over jurisdiction and other legal issues between Indian and foreign courts.[3]

Section 234 of the IBC empowers the Central Government to enter into bilateral agreements with foreign jurisdictions to resolve insolvency issues.[4] Section 235 of the IBC allows the Adjudicating Authority to issue letters of request to courts in countries with which bilateral agreements exist, addressing the corporate debtors' assets outside India.[5] Furthermore, Section 44-A of the Code of Civil Procedure, 1908 (CPC)[6] provides for the enforcement of foreign judgments issued by competent courts in reciprocating (i.e. notified) foreign territories, subject to exceptions in Section 13 of the CPC.[7] However, these provisions present

[1] S. Chandra Mohan, 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 (3) YPHSL <https://ink.library.smu.edu.sg/sol_research/1145> accessed 1 September 2024.
[2] Insolvency and Bankruptcy Code, 2016.
[3] Andrew Godwin, 'Cross-border insolvency law in India: Are the principles of comity of courts and inherent common law jurisdiction relevant?' (2023) 32 (2) Int. Insolv. Rev. <https://onlinelibrary.wiley.com/doi/10.1002/iir.1500> accessed 4 September 2024.
[4] Insolvency and Bankruptcy Code, 2016, s 234.
[5] Insolvency and Bankruptcy Code, 2016, s 234.
[6] Code of Civil Procedure, 1908, s 44A.
[7] Code of Civil Procedure, 1908, s 13.

several difficulties, including the impracticality of establishing multiple bilateral agreements, the potential for inconsistencies, and the risk of multiple lawsuits from foreign countries.[8]

To address the limitations of the present framework, Draft Z was conceived by the Insolvency Law Committee on Cross-Border Insolvency (ILC) in 2018.[9] Draft Z is based on The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997 (Model Law). The foundation of Model Law stands on four pillars, namely, access, recognition, cooperation, and coordination.[10] Moreover, to resolve the defect in the proposed draft, the Cross-Border Insolvency Rules Regulation Committee (CBIRC) was constituted. However, the suggestions given were never implemented.[11]

The Delhi High Court, in *Toshiaki Aiba v Vipan Kumar Sharma,* recognized the bankruptcy proceedings commenced in the courts of Japan. The court observed that the Japanese Courts followed due process in passing the order. Hence, these proceedings should be given appropriate weightage.[12] The Indian Courts have found a way to adjudicate cross-border proceedings even without a uniform framework,

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[8] Poorva Sharma, 'Crossing Borders in Bankruptcy: India's leap into Global Insolvency Law' (CCL Blog, 21 May 2023) <https://www.ccl.nluo.ac.in/post/crossing-borders-in-bankruptcy-india-s-leap-into-global-insolvency-law> accessed 5 September 2024.

[9] 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).

[10] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency, 1997.

[11] Ministry of Corporate Affairs, Cross Border Insolvency Rules/ Regulations Committee, Report on the rules and regulations for cross-border insolvency resolution, (2020).

[12] *Toshiaki Aiba v Vipan Kumar Sharma*, [2022] DHC 1682.

as evident from multiple cases like this. However, this underscores the ever-pressing need for a codified framework. The *Jet Airways Case* emerged as a groundbreaking precedent where the urgent need for the codification of substantive and procedural principles governing cross-border insolvency cases was highlighted.[13]

Since India is at its initial stage of adopting a full-fledged cross-border insolvency regime, it is prudent to learn from the experiences of countries that have successfully incorporated Model Law into their legal framework. To examine the success of Model Law, the United States of America (US) becomes an important example since it adopted a virtually unamended Model Law into its Bankruptcy Code. Brazil, similar to India, is an emerging economy on the global stage and a founding member of BRICS. It adopted the Model Law into its framework in 2020, with several modifications tailored to its needs. Hence, analyzing the tryst of Brazil with the Model Law helps us analyze the implications of the flexible adoption of the Model Law in developing countries.

This article has been divided into four parts. The first part, titled '*The Rule of Reciprocity Under Model Law*', examines application of the principle of reciprocity in the USA and Brazil. The second part, '*The Concept of Centre of Main Interest (COMI) Under Model Law*', discusses the study and interpretation of the COMI in both jurisdictions. The third part, '*Analyzing India's Draft Z Provisions*', provides an analysis of how Draft Z applies the principle of Reciprocity and COMI in relation to the

[13] *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Moulder) v State Bank of India & Anr.*, [2019] AT 707.

approaches adopted by the US and Brazil. Finally, the fourth part concludes the article by suggesting relevant amendments to Draft Z.

II. THE RULE OF RECIPROCITY UNDER MODEL LAW

When it comes to adopting Model Law, a significant issue that the adopting countries wrestle with is whether to imbibe a provision for reciprocity in their law or not. The term 'reciprocity' does not have a universal meaning.[14] The concept of reciprocity is interlinked with the concept of recognition. Recognition under the Model Law ensures that insolvency proceedings initiated in one country receive recognition in another country where the debtor's assets and obligations are situated. The principle of reciprocity, also known as comity, leads to an equitable disposition of estate because all assets and creditors are brought before one Tribunal. It also leads to increased efficiency because multiple adjudications in several countries are avoided.[15]

The ILC, 2018 report, recommended legislative reciprocity as a requirement for the enforcement and recognition of foreign judgments.[16] Legislative reciprocity indicates that a foreign court's rulings can only be enforced or recognized by a domestic court if the foreign jurisdiction has also passed equivalent legislation. Model Law provides considerable flexibility to its signatories when it comes to modifying the provision per

[14] Keith D. Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 (1) INT. INSOLV. REV <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.151> accessed 30 August 2024.
[15] Barbara K. Unger, 'United States Recognition of Foreign Bankruptcies' (1985) 19 (4) INT'L L. <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.151> accessed 6 September 2024.
[16] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, (2018).

the needs of the country's legal regime. Hence several countries like Mexico, South Africa, and Mauritius have incorporated reciprocity requirements in their laws implementing the Model Law.

If the ILC's recommendation in paragraph 1.8, read alongside Section 1(4) of Draft Z, is accepted, the recognition of foreign proceedings from a country that has not adopted the Model Law becomes untenable. The time limit for the initial adoption reciprocity is not specified, leaving the door open to more ambiguities. The feasibility of the ILC's recommendation falters when it is pitted against the fact that the Model Law has only been adopted by 60 states so far.[17] Some of India's biggest trade partners like China, Russia, Bangladesh, etc., are yet to adopt Model Law. Hence, this requirement would create hindrances when dealing with insolvency proceedings involving such countries.

The recognition under these sections depends on reciprocal agreements between India and the other country. The Legislative Body still has not clarified the position of these sections after the implementation of Draft Z.

A. Reciprocity in the US Jurisprudence

The concept of reciprocity/comity found prominence in the US law before including Chapter 15 in the US Bankruptcy Code (Chapter 15). Initially, the US Courts had more hostile perspective in recognizing foreign judgments. This can be adduced from the case of *Harrison v Sterry*, wherein the court held that the bankruptcy law of a foreign

[17] United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' (United Nations) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 4 September 2024.

country cannot operate a legal transfer of property in the US.[18] Subsequently, this view was liberalized by the US Courts, which held that foreign insolvency proceedings would be recognised in the US provided that the same do not violate the rights of the creditors and are not against the public policy of the States.

Unlike other states, the US, while adopting the Model Law as Chapter 15, did not make a condition of its application on the reciprocity or comity by other states.[19] Comity has been applied and interpreted as "reciprocity"[20]. Since the concept of comity had long been followed in the US Courts, it found its way into the now-repealed Section 304 of the Bankruptcy Code. This Section determined procedures in the US, involving accredited representatives of foreign debtors that were ancillary to bankruptcy or insolvency matters filed abroad.[21] Section 1508 of the US Bankruptcy Code provides a disclaimer that "while interpreting Chapter 15, US Courts shall take into consideration the international origin of the proceeding, as well as the need to promote an application of Chapter 15 which is consistent with similar statutes that foreign jurisdictions". [22] Moreover, Section 1509 of the US Bankruptcy

[18] *Harrison v Sterry* [1908] 9 U.S. 289.
[19] Sefa M. Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34 (1) OXF. J. LEG. STUD. <https://www.jstor.org/stable/pdf/24562810.pdf> accessed 4 September 2024.
[20] Thomson Reuters, 'Glossary Comity' (Thomson Reuters) <https://anzlaw.thomsonreuters.com/w-005-4969?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 August 2024.
[21] Dan T. Moss, 'Cross-Border Bankruptcy Battleground: The Importance of Comity (Part II)' (*Jones Day Publications*, June 2010) <https://www.jonesday.com/en/insights/2010/05/crossborder-bankruptcy-battleground-the-importance-of-comity-part-ii> accessed 10 September 2024.
[22] United States Code, Title 11 – BANKRUPTCY, 2011, s 1508.

Code states that "once a foreign representative gets recognition, then subject to certain limitations under Chapter 15, the US Courts shall grant comity or cooperation to the foreign representative."[23] This further empowers the Courts to apply comity in cases involving cross-border insolvency.

B. Reciprocity Requirement under Brazilian Law

In January 2021, Brazil adopted the Model Law, by amending the country's insolvency law, also known as Brazilian Judicial Recovery and Bankruptcy Law (Law No. 11,101/2005). A new chapter was added, named Chapter VI-A through Law no. 14,112/2020. Brazil has not included any explicit reciprocity requirement in its cross-border insolvency law based on the Model Law. The preamble of Chapter VI-A postulates the objective of providing effective cooperation mechanisms between judges and other competent authorities in Brazil and other countries in cases of transnational insolvency. To access comity and cooperation from the Brazilian Courts, Chapter VI-A provides that the foreign representative can apply directly to the Brazilian Judge. The criterion for getting a foreign insolvency action recognized is outlined in the new statute. The request is a simple document with attachments proving the existence of an international proceeding, the foreign representative's appointment, and, in actuality, information adequate to give the background required to offer the requested relief.

There is no differential treatment, based on direct or indirect implementation of the Model Law, given to the countries in Brazil's cross-border insolvency framework. The rationale behind the same is in

[23] United States Code, Title 11 – BANKRUPTCY, 2011, s 1509.

line with one of the objectives of Model Law that envisions creating streamlined procedures for the recognition of eligible foreign proceedings, which will minimize time-consuming legislation and give clarity on the recognition decision.[24]

Earlier, foreign decisions were recognized by the President of the Superior Tribunal de Justiqa's (STJ) single order, granting the execution of foreign acts. The Brazilian lawmakers and commentators don't see any conflict in the STJ's exequatur jurisdiction, and the procedure established by the new law. Under the new provisions, bankruptcy courts, which are the courts of first instance, can recognize foreign proceedings. Meanwhile, the STJ's jurisdiction is wider and centralized, above the State and Federal Court of Appeals.

III. THE CONCEPT OF CENTRE OF MAIN INTEREST UNDER MODEL LAW

One of the main issues that arise during the insolvency process of a company in a foreign territory is the determination of jurisdiction. Usually, the debtor's place of business is where the insolvency process gets initiated. However, determining the place of business can be a herculean task because the debtor might not have its main establishment in the country of its origin and may have assets in many states. This causes additional issues because the creditor's country may not recognise insolvency proceedings that are initiated in another jurisdiction. To streamline this problem, the Model Law divided such proceedings into two broad categories: "*foreign main proceedings with the debtor's*

[24] United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, (2014).

centre of main interest and foreign non-main proceedings where the debtor has an establishment."[25] In the absence of a definition for COMI, "the debtor's registered office, or habitual location for individuals, is presumed to be the centre of the debtor's main interests".[26] In cases when the debtor's COMI is unrecognisable, other factors such as the location of the debtor's central administration, which creditors may easily determine, are also considered.[27] The Model Law does not limit the Court's jurisdiction and stipulates that, notwithstanding identifying the foreign main proceeding, the courts of the enacting states have the jurisdiction to file for an insolvency proceeding if the debtor's assets are also located in the enacting states.[28]

A. Decoding the Concept of COMI in the US

Prior to the enactment of Chapter 15, two key sections of the US Bankruptcy Code, Section 109 and Section 304, dealt with cross-border insolvency in the United States.[29] However, these provisions had a limited scope and only addressed cases ancillary to foreign proceedings and the eligibility of the debtor to initiate a lawsuit in the US Courts.[30] The addition of Chapter 15 entirely repealed Section 304 while Section

[25] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency, 1997, Art 2.
[26] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency, 1997, Art 16.
[27] ibid.
[28] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency, 1997, Art 28.
[29] Maja Zerjal, 'The Chapter 15 'Centre of Main Interest': Filling in the Blanks' (2012) 9 (3) ICR <https://www.chasecambria.com/site/journal/article.php?id=639> accessed 6 September 2024.
[30] United States Code, Title 11 – BANKRUPTCY, 2011, s 1509.

109 has not been removed.[31] Chapter 15, which is virtually identical to the Model Law, was added to harmonise the insolvency laws of the US with international trends and simplify the insolvency process for other countries.

Over the years, this Chapter has proven effective in adjudicating cross-border insolvency cases.[32] Similar to the Model Law, Chapter 15 also recognises foreign main and non-main proceedings consisting of debtor's COMI and debtor's establishment respectively.[33] Only cases filed under Chapter 15 of the US Bankruptcy Code that seek recognition and relief for a foreign proceeding in another jurisdiction attract the concept of COMI. It is assumed that the COMI of a corporation is located where it has a statutory seat.[34] However, the provisions of the statute do not delimit the Court's jurisdiction in recognising where such proceedings must be initiated. *In Re Catalyst Paper Corp*., the US Bankruptcy Court, Delaware determined that the bankrupt company's registered office, despite being in the USA, was not its COMI and was located in Canada instead.[35]

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[31] Roxane DeLaurell, 'Accessing the Effects of Chapter 15: Cross-Border Insolvency Cases in US Bankruptcy Courts from 1995-2006' (2008) 4 (2) SCJILB <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1054&context=scjilb> accessed 28 August 2024.

[32] In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. 2007 WL 2683661 (USA).

[33] United States Code, Title 11 – BANKRUPTCY, 2011, s 1517.

[34] Oliver Sutter, 'The centre of main interest is in the eye of the beholder: The perspective from Europe' (Norton Rose Fulbright, June 2020) <https://www.nortonrosefulbright.com/en/knowledge/publications/8f6190bb/irnw-germany> accessed 5 September 2024.

[35] *In re Catalyst Paper Corporation* [2017] LEXIS 4673 .

Courts in the USA have laid down several factors to determine the COMI of a foreign corporation. These factors as reiterated in *In Re ABC Learning Centres Ltd.* include the location of the headquarters of the debtor, the location of the managers of the corporation, the location of the primary assets of the debtor, the location of the debtor's majority of creditors or wherein the majority of the debtor's creditors would be affected by the proceeding and/or jurisdiction as to whose law would be applied to most disputes.[36] In *Morning Mist Holdings Ltd. v Krys (In re Fairfield Sentry Ltd.)*, the court held that any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis.[37] All of these cases establish means and approaches for determining and identifying a foreign debtor's COMI, and US courts continue to interpret the Model Law according to the facts and circumstances of each case.

B. Unravelling the COMI Concept in Brazil

The foremost Section of Chapter VI-A lays down that "in interpreting the provisions of this Chapter, its objective of international cooperation, the need for uniformity in its application and the observance of good faith must be taken into account."[38] This step is one of the most significant reforms in the last 15 years of Brazil's insolvency regime and is expected to address the needs of both creditors and debtors, which have been left unaddressed for a while now. Courts also possess the authority to utilize a broad spectrum of discretion in cases.

[36] *In re ABC Learning Centres Limited* [2010] 445 B.R. 318.
[37] *Morning Mist Holdings Ltd. v Krys* [2013] 11-4376 2d Cir.
[38] Brazilian Judicial Recovery and Bankruptcy Law, 2020.

Earlier, the Brazilian legislation followed the territoriality approach instead of the universalism approach. Thus, the courts only considered the assets that were situated in Brazil during the insolvency proceeding, and these proceedings were distinct from similar proceedings in other countries.[39] Indeed, there is a procedure to grant execution of foreign decisions through the exequatur power exercised by the STJ, but this mechanism has failed to deliver effective coordination of decisions between two jurisdictions.[40] Hence, the old regime proved to be confusing and inadequate for cases involving cross-border insolvencies.

According to Brazil's new framework, after the first recognition step is successful, the court then determines the COMI of the proceedings. These proceedings must be collective to be recognized in Brazil. Similar to the Model Law, Chapter VI-A also recognises foreign main and non-main proceedings consisting of debtor's COMI and debtor's establishment respectively, under Article 167-J, §1.

The *Re Prosafe* case became the first ever case after adopting Model Law, wherein Brazil recognized a foreign insolvency proceeding. Two entities of the Prosafe group, one in Norway and one in Singapore, applied to recognize two distinct moratorium proceedings. The 3rd Bankruptcy Court of Rio de Janeiro quickly recognized Singapore as the COMI and thus the proceedings there as the main proceedings, because "the economic-business group, that is, the place where it enters into most of

[39] Paulo Campana Filho, 'The Legal Framework for Cross-Border Insolvency in Brazil' (2009) 32 *Houston Journal of International Law* 97.
[40] Fernando Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil - An Economic Analysis of Its Benefits on International Trade' (2008) 14 (1) Law & Bus. Rev. Am. <https://scholar.smu.edu/lbra/vol14/iss2/5/> accessed on 3 September 2024.

its contracts and where it is recognized by its creditors is located in Singapore."[41]

The British Virgin Island (BVI) Liquidation Case is another example of the successful implementation of the new Brazilian insolvency law. The joint liquidators and BVI applied for recognition of their liquidation proceedings under Law 14,112/2020.[42] The District Court in Brazil recognized BVI as the centre of main interest and place for main proceedings and further observed that this recognition in no way is against the public policy of Brazil.[43] Thus, the swift and efficient resolution of this transnational bankruptcy case is likely to encourage the filing of similar cases before Brazilian courts as well as encourage other foreign companies to invest in the nation.

IV. ANALYSING INDIA'S DRAFT Z PROVISIONS

While the current IBC contains provisions governing cross-border insolvency under Section 234 and Section 235, these provisions have not been implemented in practice.[44] Section 234 requires bilateral treaty

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[41] Re Prosafe SE (Case No 0129945-03.2021.8.19.0001, 3ª Vara Empresarial, Tribunal de Justiça do Estado do Rio de Janeiro – Comarca da Capital, 5 July 2021).

[42] Grant Thornton, 'Grant Thornton Obtains First Brazilian Recognition of a BVI Insolvency Proceeding' (Grant Thornton, 28 January 2022) <https://www.grantthornton.vg/insights/grant-thornton-obtains-first-brazilian-recognition-of-a-bvi-insolvency-proceeding/> accessed 8 April 2025.

[43] Nyana Abreu Miller, 'Cross-Border Insolvency In Brazil: The UNCITRAL Model Law Dances to A Samba Beat' (*Sequor Law*, 15 June 2021) <https://www.sequorlaw.com/news-release-es-2/cross-border-insolvency-in-brazil-the-uncitral-model-law-dances-to-a-samba-beat> accessed 11 September 2024.

[44] Harshith Sai Boddu, 'Need for International Harmonisation of Cross-Border Insolvency Laws: Challenges and Prospects' (SCC Times, 19 April 2024) <https://www.scconline.com/blog/post/2024/04/19/need-for-international-harmonisation-of-cross-border-insolvency-laws/> accessed 7 April 2025.

between countries to initiate insolvency proceeding.[45] However, till date, no such agreement has been signed.[46] On the other hand, Section 235 provides for the Indian Courts to send letters of requests to foreign courts for their assistance in insolvency matters.[47] However, the same provision has been scarcely used by the Indian Courts because the foreign courts are not bound to comply with such requests. Therefore, it becomes imperative that a comprehensive framework guiding cross-border proceeding be implemented due to the inadequacy of the existing provisions to effectively address the budding needs and complexities of cross-border insolvency cases.[48] Draft Z presents a solution to these growing concerns. However, any legislation before implementation needs thorough scrutiny, which should be assisted with a comprehensive understanding of the experiences of other countries. Although Draft Z is a well-drafted piece of legislation, its provisions need a close analysis to understand the extent of its viability. This part of the paper provides a framework wherein provisions of the said draft are examined.

A. Draft Z Vis-À-Vis Reciprocity Model in the US And Brazil

It has been suggested that Model Law would initially be adopted based on reciprocity, however, on analyzing the Indian experience in Model Law implementation and infrastructural development in the Insolvency

[45] Insolvency and Bankruptcy Code, 2016, s 234.
[46] S. Jalan Advocates and Co., 'Cross Border and Insolvency and Bankruptcy and Corporate Restructuring' (LiveLaw, 6 February 2025) <https://www.livelaw.in/law-firms/law-firm-articles-/cross-border-insolvency-and-bankruptcy-corporate-restructuring-ibc-uncitral-model-law-cirp-283128?fromIpLogin=23925.122517676322#footnote-2> accessed 7 April 2025.
[47] Insolvency and Bankruptcy Code, 2016, s 235.
[48] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, (2018).

system, the same requirement may be diluted.[49] Moreover, the cooperation between domestic and foreign courts has been subjected to guidelines that the Central Government would notify.[50] This provision highlights the deficiency in an effective insolvency mechanism that is cognizant of the Model Law principle of international comity and uniformity. An absence of provisions concerning the same could impede India's efficient participation in such cases and potentially disinterest foreign investors.

This lacuna could be filled by adopting the three-pronged test highlighted in the US case of Vertiv. [51] In *Vertiv, Inc. v Wayne Burt PTE, Ltd.*, the Court laid down grounds that must be fulfilled to apply comity. These included firstly, proving that the foreign proceeding and the US Civil action are parallel, secondly, there exists prima facie a case of comity, and thirdly, the foreign proceeding is consistent with US public policy and protective of the rights of the parties. [52] This judgment could become a benchmark for Courts worldwide in applying comity under the Model Law.

The legal position of foreign creditors and foreign representatives in Brazil contrasts with the one in India under Draft Z. In Draft Z, two separate categories are made for the application of the provisions of the draft, namely, those states that have adopted the Model Law and those that have not. The CBIRC Report, 2020, has been silent on the suggestion

[49] Insolvency Law Committee, 'Report of the Insolvency Law Committee on Cross Border Insolvency' (October 2018) accessed April 8, 2025 (ILC).
[50] Ministry of Corporate Affairs, Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016 (2018).
[51] *Lehman Bros. Special Fin. Inc. v BNY Corporate Tr. Servs.* [2010] 422 B.R. 407.
[52] *Vertiv, Inc. v Wayne Burt PTE, Ltd.* [2024] 92 F.4th 169.

of legislative reciprocity by the ILC and further has not made any comments. This indicates that CBIRC might concur with the suggestion of the ILC.

India may limit its engagement in cross-border insolvency matters to around 60 countries by enforcing the principle of legislative reciprocity — meaning it will only cooperate with countries that offer similar legal recognition in return. However, this raises a significant concern. In the Jet Airways insolvency case, the National Company Law Appellate Tribunal (NCLAT) acknowledged the legal proceedings initiated by a Dutch court, even though the Netherlands has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency. If India had already been applying the legislative reciprocity requirement at that time, the NCLAT would not have had the legal basis to recognize or cooperate with the Dutch proceedings, since reciprocity would not have existed.[53]

The second prong of the legislative reciprocity as given in Draft Z and further contemplated by the ILC would necessarily mean resorting to already existing and heavily controversial Sections 234 and 235 in the IBC, 2016. Draft Z and IBC's provisions both discuss reciprocal agreements that the Government of India may enter into with other countries. This leaves the countries which have not adopted the Model Law in a position of uncertainty as once the Draft Z gets adopted, it will primarily govern insolvency proceedings between those countries that have adopted the Model Law. However, there is also a need to cater to

[53] Pranav M. Khatavkar, 'Proposed Tenet of Legislative Reciprocity under the Draft Indian Cross-Border Insolvency Statute: An Antithesis of Effective Cross-Border Insolvency Resolution' (2022) 5 Int'l JL Mgmt & Human <file:///D:/5Issue3IntlJLMgmtHuman.pdf> accessed 6 September 2024.

countries that have not adopted it yet. Therefore, while adjudicating cases between such countries, India can either fall back on the existing framework under S.234 and S.235 of the IBC or incorporate these sections within the Draft Z as subsidiary or transitional provisions. Alternatively, Indian courts may rely on international comity principles wherein they may take into consideration foreign judgments. Such flexible legislation with comprehensive coverage will secure the interests of countries worldwide and thus, would lead to effective adjudication.

B. Analysis of Draft Z Vis-À-Vis COMI Model in the US and Brazil

While India has yet to adopt the Model Law, provisions in Draft Z, as released by the Ministry of Corporate Affairs (MCA) in 2019, echo the provisions of the Model Law, the USA's Chapter 15 and Brazil VI-A.[54] However, there are certain manifest errors in the proposed statute. Section 14(1) of Draft Z categorically omits 'habitual residence' from the meaning of COMI, a concept that the USA retained in Chapter 15 from the original Model Law[55]. Brazil takes a similar yet distinct approach. It is similar in the sense that it also provides a presumption in favour of the registered office unless proven otherwise, in the case of companies.[56] Yet it follows a distinct approach when it comes to individual entrepreneurs.

The COMI in these cases is presumed to be in their domicile, which the US Courts have interpreted to be habitual residence.[57] The rationale behind the inclusion of habitual residence, as can be interpreted from the

[54] Ministry of Corporate Affairs, Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016 (2018).
[55] Ministry of Corporate Affairs, Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016 (2018).
[56] Brazilian Judicial Recovery and Bankruptcy Law, 2020.
[57] *Lavie v Ran* [2010] 607 F.3d.

case of *Rozhkov v Pirogova (In re Pirogova)*[58], is that a country cannot be called a debtor's COMI when the debtor merely conducts business there but has minimal contact or connections and has not resided there for an extended period. Therefore, its omission from Draft Z appears to be arbitrary and lacking justification.

In the 2018 report on the implementation of Model Law in India, submitted by the ILC constituted under the MCA, the provisions of the Code were recommended to apply to only corporate debtors. Subsequently, Part III of the IBC, 2016 was notified by the Central Government, which concluded that its application would also be extended to personal guarantors to corporate debtors. In a notice dated 24th November 2021, the Joint Director of the MCA recommended that the habitual place of residence may be presumed to be the COMI for Part III debtors.[59] However, habitual place of residence has not been defined in Draft Z. Therefore, its interpretation can be taken from the US and Brazil where the Courts, in the absence of a definition under Chapter 15 and VI-A respectively, have interpreted habitual residence as the domicile of the debtor.[60] This can assist the Indian Courts in streamlining the provisions of the Model Law and endorsing its universality.

Draft Z under Section 14(2) provides that the COMI of the corporate debtor is presumed to be the registered office if the same has not been moved to another state within 3 months prior to the commencement of insolvency proceedings in that state.[61] This provision has not been found

[58] *Rozhkov v. Pirogova* [2020] 612 B.R. 475, 479.
[59] Ministry of Corporate Affairs, *Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016* (2018).
[60] *Lavie v. Ran (In re Ran)* 607 F.3d 1017 (5th Cir. 2010).
[61] Draft Z, 2018, s 14.

either in the Model Law, the US's Chapter 15, or Brazil's VI-A. To deal with the menace of 'forum shopping', Brazil has added a new provision to deal with this problem. As per Section 2 of Article 167-J of Brazilian Judicial Recovery and Bankruptcy Law, "*foreign proceedings shall be recognized as non-main foreign proceedings if the debtor's centre of main interests has been transferred or otherwise manipulated to transfer jurisdictional competence to open the proceedings to another State.*"[62] This approach, compared to the look-back period approach, seems more practical and empowers the court to look at the debtor's intent to transfer the office while considering multiple factors.

The addition of these three months is not only arbitrary, but it will also result in significant shortcomings in insolvency proceedings. If, for instance, the registered office of the corporate debtor is changed from State A to State B in April 2024, but all of the debtor's interests remain in State A, adjudicating that the debtor's COMI is in State B as of September 2024 would pose several practical and legal issues, as well as potentially impeding the rights of creditors. In the CBIRC Report, 2020, it was suggested that the Adjudicating Authority, to determine the COMI of the corporate debtor, would look into other factors including the location of assets of the corporate debtor, the location of the book of accounts of the corporate debtor, the location of directors and senior management of the corporate debtor, the location of creditors of the corporate debtor, etc.[63] This provision, which mirrors the factors

[62] Brazilian Judicial Recovery and Bankruptcy Law (Law No 11.101 of 2005, as amended by Law No 14.112 of 2020), art 167-J § 2.
[63] Ministry of Corporate Affairs, Cross Border Insolvency Rules/ Regulations Committee, Report on the rules and regulations for cross-border insolvency resolution, (2020).

adjudicated by the US Courts, would aid the Indian Courts in determining the debtor's COMI more objectively and consistently. However, this recommendation fails to clarify its applicability in either the absence or presence of the debtor's registered office. Consequently, it is suggested that instead of an arbitrary period of three months in Section 14(2), the factors outlined in the 2020 report should be extended to instances involving changes in the registered office of the debtor. Conversely, Brazil's intent approach can also be adopted, which includes factual analysis to determining the COMI, focusing on where the debtor actually conducts business and is perceived by creditors to operate, rather than relying solely on formal registration or place of incorporation. This flexible, case-by-case method prioritizes substance over form and aligns with the UNCITRAL Model Law, which Brazil adopted in 2020. This case-to-case basis approach might be more fruitful in deciding cases of alleged forum shopping instead of an arbitrary and specific period formula. This would improve adjudication while also protecting creditors' interests. Furthermore, not all forum shopping can be inherently bad, so a company indulges in it to support its business strategy and interest. Hence, a three-month waiting period leads to a company bearing additional costs in cases of financial distress.[64]

In foreign non-main proceedings, the presence of the debtor's establishment in a location plays a conclusive role in India, the USA and Brazil. Unlike the US, India and Brazil have taken a narrow approach to defining jurisdiction due to a lack of jurisprudence. The definition of

[64] Amir Adl Rudbordeh, 'A Theory on Abusive Forum Shopping in Insolvency Law' (2016) 4(1) NIBLeJ <https://www4.ntu.ac.uk/nls/document_uploads/191380.pdf> accessed 6 September 2024.

'establishment' in both jurisdictions included the use of human means as a requirement, which is specifically omitted under US law. In the age of the internet, there is a growing emergence of business activities such as e-commerce companies that do not necessarily involve the use of human means.[65] For internet-based businesses, the complexity of cross-border insolvency extends beyond establishment concerns. The COMI is difficult to locate since it lacks a clear physical location or a central administrative centre. Therefore, excluding human means from the definition of establishment would allow the Indian Courts to widen the ambit of application of foreign non-main proceedings to include e-commerce businesses, too.

V. CONCLUSION

Irrespective of the time and effort invested, crafting impeccable legislation is nearly impossible. This is because laws are a creation of human beings, who are inherently fallible and subject to the ever-changing dynamics of the world. The global arena cannot afford stagnancy or regression; therefore, a good legislation is flexible and farsighted to accommodate amendments to it. Unless proposed legislation is fundamentally riddled with unaddressed problems, any legislation that can benefit the community should be adopted. Interpretation of such laws resides in the hands of the courts, which must ensure that fairness and justice triumph in such cases.

[65] Nishit Desai Associates, 'Introduction to Cross-Border Insolvency' (Nishit Desai Associates, April 2020) <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf> accessed 9 September 2024.

There is a pressing need for legislation dealing with cross-border insolvency immediately. Model Law, in the form of Draft Z, has been tailored suitably within the Indian framework. It is pertinent that the same be implemented promptly to acquire uniformity, coordination and cooperation within the global community. However, certain issues need to be addressed to cater to the present needs and grievances of the world. This includes the adoption of provisions such as factors determining the comity of courts, factors to be considered while determining COMI, extending its application to transfer of registered office, recognising habitual residence as a key factor for determining COMI, expanding upon the definition of establishment to include e-commerce businesses, etc.

While these errors must be addressed immediately, certain issues remain unresolved. Firstly, post Draft Z implementation, the status of the existing sections dealing with cross-border insolvency in the IBC, 2016 i.e., Sections 234 and 235 is undetermined. Article 7 of the Model Law does not restrict additional assistance to be granted during insolvency proceedings[66]. The courts are presented with the discretion of finding relief outside the Model Law. India also retains this principle under Section 5 of Draft Z.[67] Therefore, former legislation can also provide relief in such instances. Unlike the US, which repealed its old cross-border insolvency provision entirely, countries like the UK and Australia

[66] United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency, 1997, Art 7.
[67] Draft Z, 2018, s 5.

retained their old laws.[68] India accordingly can adopt this measure to provide a more comprehensive relief mechanism.

However, this leads to the second issue. Retention of old provisions and introduction of Draft Z in the IBC, 2016 would create a conflict between laws. Proceedings under Sections 234 and 235 can only be initiated when there exists a bilateral agreement between India and the foreign country.[69] Therefore, it excludes those countries with whom India does not have a bilateral agreement and who have not adopted the Model Law, assuming India does not change its reciprocity requirement. In such a scenario, those countries would not be able to seek relief in any of the provisions. Thus, amendments to the existing provisions and Draft Z are pertinent to provide an equitable ground to all countries in such cases.

Lastly, Section 4 of Draft Z states that the Adjudicating Authority would refrain from taking actions contrary to the public policy of India. This provision is also one of the requirements to fulfil before applying for comity. The term 'public policy' has not been defined. While Section 4 states that the Central Government would notify factors for the same, none of the reports and the recommendations have specified it yet. In the absence of the same, Section 44A CPC read with Section 13 CPC provides the factors to be adduced while considering public policy exception. This would enable the Adjudicating Authority to seek alternative remedies

[68] Andrew Godwin, 'Cross-border insolvency law in India: Are the principles of comity of courts and inherent common law jurisdiction relevant?' (2023) 32 (2) Int. Insolv. Rev. <https://onlinelibrary.wiley.com/doi/10.1002/iir.1500> accessed 4 September 2024.
[69] Insolvency and Bankruptcy Code, 2016, s 234 & s 235.

consistent with Section 5 of the Draft Z to ensure that parties are not disadvantaged due to a lacuna in law.

As evident from the experiences of the U.S. and Brazil, issues with the implementation of the Model Law will persist. However, adopting a comprehensive framework is the first step towards ensuring uniformity and coordination in the global world and providing a level playing field for domestic and foreign actors.