

# THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY: SHOULD INDIA ADOPT IT?

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## CHAPTER 1

### INTRODUCTION

In this era of globalization, the entire world has transformed into a global village wherein there is widespread international trade across countries. With the emergence of the WTO, free trade has been conceptualized and universally accepted by most nations.<sup>1</sup> However, with this rampant increase in trade and development of an almost ‘borderless world’, new legal issues and challenges have emerged. One of such major challenges is the manner of dealing with cross-border insolvency issues.

The UNCITRAL Model Law on Cross Border Insolvency defines the term cross-border insolvency as “one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.”<sup>2</sup> Such a scenario where the debtor has assets in multiple jurisdictions or has creditors from other jurisdiction(s) is very common because of the large number of MNCs in today’s world.

Considering the need of certainty and uniformity in the international insolvency law, the UNCITRAL Model Law on Cross Border Insolvency (“Model Law”) was formulated in 1997. At

<sup>1</sup> ‘Understanding the WTO: Basics, Principles of the trading system’, (*World Trade Organization*) <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)> accessed October 3, 2019.

<sup>2</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999).

present, 44 countries<sup>3</sup>, excluding India, have adopted the Model Law in their respective domestic legislation governing insolvency. It is pertinent to note that the Model Law does not aim to unify the substantive or procedural insolvency laws of all countries<sup>4</sup>, but instead attempts to prescribe a set of rules that assist in dealing with cross-border insolvency issues effectively<sup>5</sup>. The Model Law has four objectives- improving *access* to foreign courts, *recognizing* foreign proceedings (main or non-main), obtaining *reliefs* from foreign courts and enhancing *co-operation and co-ordination* among courts of different countries.<sup>6</sup> Despite its widespread acceptance and numerous advantages, India has not adopted its provisions even in the new Insolvency and Bankruptcy Code, 2016 (“Code”).

At present, the Code comprises two provisions that seek to address cross-border insolvency issues, namely, Sections 234 and 235.<sup>7</sup> Both these provisions are merely enabling in nature and their applicability is dependent on the Central Government notifying countries with whom they have entered into reciprocal agreements for cross-border insolvency resolution purposes.<sup>8</sup> Not only is the process of entering into such separate bilateral agreements time-consuming and costly, it would inadvertently lead to inconsistency in the cross-border insolvency law across countries. The recent case regarding the insolvency of Jet Airways illustrates the significance of dealing with cross-border insolvency matters in an efficient manner for enabling the smooth functioning of insolvency procedures in all related jurisdictions.<sup>9</sup>

Realizing these shortcomings in the existing law and in an effort to bring India at par with the international community, the Insolvency Committee on Cross Border Insolvency (2018)

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<sup>3</sup> K.R. Srivats, Panel recommends UNCITRAL Model Law for Cross Border Insolvency issues, (*The Hindu Business Line*, October 22, 2018) < <https://www.thehindubusinessline.com/economy/cross-border-insolvency-insolvency-law-committee-submits-second-report/article25286085.ece>> accessed October 3, 2019.

<sup>4</sup> Jon Pottow, ‘Procedural Incrementalism: A Model for International Bankruptcy’, (2005) *Virginia Journal of International Law* 936, 970.

<sup>5</sup> *Ibid.*

<sup>6</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999).

<sup>7</sup> Insolvency and Bankruptcy Code 2016, s. 234 and s.235

<sup>8</sup> Bornali Roy, ‘Cross Border Insolvency: A New Regime’, (*Mondaq*, 29 June 2017), < <http://www.mondaq.com/india/x/606446/Insolvency+Bankruptcy/CROSS+BORDER+INSOLVENCY+A+NEW+REGIME>> accessed October 3, 2019

<sup>9</sup> Symantak Sen and Vivek Badkur, ‘Dutch Order on Jet Airways: UNCITRAL Model Law the Need of the Hour?’ (*IndiaCorpLaw*, July 3, 2019) <<https://indiacorplaw.in/2019/07/dutch-order-jet-airways-uncitral-model-law-need-hour.html>> accessed October 3, 2019

recommended the adoption of the Model Law for dealing with cross-border insolvency issues in its report.<sup>10</sup> However, till date, the suggestions of the report have not been incorporated by the legislature. This research paper makes a case for India to adopt the UNCITRAL Model Law on Cross Border Insolvency. It also discusses the challenges India would face despite such an adoption. There would be some challenges that are common to all countries, such as difficulties in interpretation of centre of main interests (COMI) and there would be some challenges that would be unique to India, like issues arising due to broad interpretation of public policy, reluctance of judiciary to forego jurisdiction etc. Nevertheless, adopting the Model Law is the foremost step that India has to take in order to enhance ease of doing business and attract foreign investments.

This research paper is divided into 5 parts. **Part I** expounds the law related to cross-border insolvency in India post the enactment of the Insolvency and Bankruptcy Code, 2016. **Part II** provides a detailed description of the UNCITRAL Model Law on Cross-Border Insolvency and elaborates on the need of its formulation and the manner of its implementation. Thereafter, **Part III** gives details of the Report of the Insolvency Law Committee on Cross-Border Insolvency released in October 2018 with a view to adopt the Model Law into the Indian insolvency law. **Part IV** provides an analysis about the advantages of adopting the Model Law while also discussing the problems that might arise or continue to persist in the Indian insolvency regime. Lastly, **Part V** provides the conclusion of the research paper.

## CHAPTER 2

### THE INDIAN LAW ON CROSS-BORDER INSOLVENCY

Prior to the implementation of the Code, the Indian insolvency regime was governed by a plethora of legislations. As all the statutes were territorial in nature and seldom acknowledged the international character of insolvency matters, none of them dealt with the cross-border insolvency issues.<sup>11</sup> Realizing the significance and need of a comprehensive law addressing cross-border insolvency matters, the High Level Committee on Law relating to Insolvency and Winding Up of

<sup>10</sup> Insolvency Law Committee, Report on Cross-Border Insolvency (2018).

<sup>11</sup> Nidhi Shetye, 'International Insolvency: An Indian Perspective on Cross-Border Treatment of Cases' (2016), Fordham International Law Journal 39.

Companies (2000)<sup>12</sup> and the JJ Irani Expert Committee on Company Law (2005)<sup>13</sup> proposed the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Nevertheless, the recommendations of these committees were not taken into consideration by the legislature.

It was believed that as the Insolvency and Bankruptcy Code, 2016 was enacted with the objective of consolidating the insolvency law and improving ease of doing business in India, it would necessarily comprise of a framework of dealing with cross-border insolvency. However, the Bankruptcy Law Committee Report (2015), which formed the basis for the IBC<sup>14</sup>, acknowledged the relevance of incorporating cross-border elements in the Code, but proposed to deal with the same in the future deliberations.<sup>15</sup>

Thus, the Bill on Insolvency and Bankruptcy Code [Bill No. 349 of 2015], introduced on December 21, 2015 in the Indian Parliament was devoid of any provisions relating to cross-border insolvency and thus, only dealt comprehensively with the domestic insolvency regime.<sup>16</sup> However, the Lok Sabha Report of the Joint Committee on Insolvency and Bankruptcy Code, 2015 proposed the insertion of two provisions i.e. Section 233A and Section 233B for dealing with cross-border insolvency matters.<sup>17</sup>

Thereafter, at the time of enactment of the Code, these two provisions were incorporated under Sections 234 and 235 of the present Code. These provisions were inserted because it was felt that not incorporating the international element of cross-border insolvency in today's globalized world would render the Code to be 'incomplete'.<sup>18</sup> It is pertinent to note that both these provisions are merely enabling sections and are yet to be notified by the Government.<sup>19</sup>

While Section 234 provides the Central Government with the authority to enter into bilateral agreements with countries for enforcing the provisions of the Code, Section 235 authorizes the issuance of a 'letter of request' for seeking the assistance of a foreign court or tribunal of a when

<sup>12</sup> High Level Committee, Law relating to Insolvency and Winding Up of Companies (2000)

<sup>13</sup> Expert Committee, JJ Irani Expert Committee on Company Law (2005)

<sup>14</sup> Bankruptcy Law Committee Report, Volume I: Rationale and Design (2015)

<sup>15</sup> Bankruptcy Law Committee Report, Volume I: Rationale and Design (2015) ¶¶16

<sup>16</sup> Bill on Insolvency and Bankruptcy Code [Bill No. 349 of 2015]

<sup>17</sup> Lok Sabha Joint Committee, Joint Committee on Insolvency and Bankruptcy Code, 2015 ¶¶45

<sup>18</sup> *Ibid* at 44.

<sup>19</sup> Veena Mani, Govt likely to tweak IBC for cross-border cases, Bill after elections, (*Business Standard*, March 5, 2019) <[https://www.business-standard.com/article/companies/govt-likely-to-tweak-ibc-for-cross-border-cases-bill-after-elections-119030400870\\_1.html](https://www.business-standard.com/article/companies/govt-likely-to-tweak-ibc-for-cross-border-cases-bill-after-elections-119030400870_1.html)> accessed October 3, 2019

the assets of the debtor are located in another country. The authorization under Section 235 is provided to the relevant domestic court or tribunal only when the assets are located in a country with whom India has entered into a bilateral agreement.<sup>20</sup> As these provisions have not been brought into effect, at present, India does not have a reciprocal agreement with any other country.<sup>21</sup>

This legislative framework has some obvious drawbacks that eventually hamper the ease of doing business in India. Some of these are:

- a. *Lack of uniformity*: India would be required to enter into a separate bilateral treaty with each country and thus, each treaty would be different depending on the negotiations between the countries.
- b. *Administrative burden*: Each reciprocal agreement would be preceded by a series of negotiations between diplomats and thus, each agreement would be distinct. These negotiations result in excessive administrative burden.
- c. *Uncertainty and ambiguity*: Owing to a plethora of distinct agreements being entered, there would exist an uncertainty and ambiguity among the investors and the adjudicating authorities.<sup>22</sup>
- d. *Procedural delays*: Entering into a different bilateral agreement with each country is an extremely lengthy and time-consuming process. Ultimately, it would result in unnecessary delay in dealing with cross-border issues.<sup>23</sup>
- e. *Multiple jurisdictions*: When an insolvency proceeding involves more than one foreign proceeding, it would be difficult to ascertain which bilateral treaty is to be invoked for which transaction.
- f. *No bilateral agreement*: With countries with which India has not entered into a bilateral agreement, the manner of dealing with the cross-border insolvency will be uncertain.<sup>24</sup>

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<sup>20</sup> Manoj K. Singh, India: Cross Border Insolvency: Catching Up With The World (*Mondaq*, August 6, 2018) <<http://www.mondaq.com/india/x/725580/Insolvency+Bankruptcy/Cross+Border+Insolvency+Catching+Up+With+The+World>> accessed October 3, 2019

<sup>21</sup> *Ibid.*

<sup>22</sup> Ministry of Corporate Affairs, Government of India, Insolvency Section File No. 30/27/2018, Public Notice (June 20, 2018)

<sup>23</sup> Ishita Das, 'Cross-Border Insolvency under the Insolvency and Bankruptcy Code 2016: Opportunities and Challenges' (*CBCL Blog*, June 4, 2018) <<https://cbcl.nliu.ac.in/insolvency-law/cross-border-insolvency-under-the-insolvency-and-bankruptcy-code-2016-opportunities-and-challenges/>> accessed October 3, 2019

<sup>24</sup> Ministry of Corporate Affairs, Government of India, Insolvency Section File No. 30/27/2018, Public Notice (June 20, 2018)

- g. *Content of the agreement*: In case, the bilateral or reciprocal agreement fails to provide for important matters such as applicability of interim orders, powers of foreign professionals etc., it would lead to ambiguity.

Thus, scholars have unanimously agreed that these two provisions do not comprehensively deal with matters relating to cross-border insolvency. At present, the Indian international insolvency regime is being tested in the insolvency resolution process of Jet Airways (India) Limited. When State Bank of India initiated insolvency proceedings against Jet Airways (India) Limited, the Dutch Court appointed Administrator in Bankruptcy ('Dutch Administrator') stated that insolvency proceedings have already been initiated against the corporate debtor in Netherlands.<sup>25</sup> The NCLT in this case held that the Dutch proceedings were a nullity in India because the Dutch courts cannot have jurisdiction over a company registered in India.<sup>26</sup> It is pertinent to note that the NCLT took a decision that was within its powers and in the absence of any provision in law, it could not recognize the Dutch proceedings. Legal scholars, all over the country, highlighted the need of the implementation of the UNCITRAL Model Law on Insolvency in such situations and the loss of productivity India was facing owing to the absence of its adoption.<sup>27</sup>

Thereafter, the Dutch Administrator filed an appeal before the NCLAT and the Appellate Authority directed the resolution professional and the Committee of Creditors to cooperate with the Dutch Administrator in order to have a 'joint corporate insolvency resolution' of the corporate debtor.<sup>28</sup> On September 4, 2019, the NCLAT also directed the resolution professional to enter into an agreement for laying down the framework for the cooperation between the Dutch Administrator and the domestic counterparts, in manner that upholds the best interests of Jet Airways (India) Limited.<sup>29</sup>

<sup>25</sup> *State Bank of India v. Jet Airways (India) Limited* NCLT Mumbai, CP 2205 (IB)/MB/2019 (June 20, 2019) ¶ 21

<sup>26</sup> *State Bank of India v. Jet Airways (India) Limited* NCLT Mumbai, CP 2205 (IB)/MB/2019 (June 20, 2019) ¶ 28

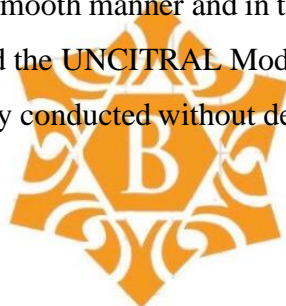
<sup>27</sup> Symantak Sen and Vivek Badkur, 'Dutch Order on Jet Airways: UNCITRAL Model Law the Need of the Hour?' (*IndiaCorpLaw*, July 3, 2019) <<https://indiacorplaw.in/2019/07/dutch-order-jet-airways-uncitral-model-law-need-hour.html>> accessed October 3, 2019

<sup>28</sup> *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India* 2019 SCC OnLine NCLAT 385 ¶ 1

<sup>29</sup> *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India* 2019 SCC OnLine NCLAT 385 ¶ 1

In compliance of the said order, the parties entered into a Cross Border Insolvency Protocol specifying the costs, assets, claims, stay of proceedings relating to the insolvency.<sup>30</sup> The said Protocol recognizes India to be the ‘center of main interests’, thus making the Indian proceedings the ‘main proceedings’ and the Dutch proceedings as the ‘foreign non-main proceedings’.<sup>31</sup> of the Recently, in the landmark judgment of *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India*, the NCLAT held that the Dutch Administrator was equivalent to the Indian resolution professional and thus had the right to attend the meeting of the Committee of Creditors.<sup>32</sup>

Thus, owing to the active role played by the NCLAT, the Jet Airways insolvency resolution proceedings are being conducted in a smooth manner and in the interests of the stakeholders of the company. However, had India adopted the UNCITRAL Model Law on Cross-Border Insolvency, the process would have been efficiently conducted without delays and hurdles, considering time is the essence in insolvency matters.



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## CHAPTER 3

### **THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: WHAT, WHY AND HOW?**

The growth of international trade and the emergence of MNCs led to new challenges in the insolvency regime. In the absence of uniformity between substantive insolvency laws of countries and the resultant lack of coordination, there existed uncertainty with respect to applicable laws leading to delays and procedural complexities.<sup>33</sup>

Thus, in 1997, the UNCITRAL Model Law on Cross-Border Insolvency was enacted with the aim of effectively dealing with cross-border insolvency issues without interfering with the individual

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<sup>30</sup> *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India* 2019 SCC OnLine NCLAT 385 ¶ 1

<sup>31</sup> *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India* 2019 SCC OnLine NCLAT 385 ¶ 1


<sup>32</sup> *Jet Airways (India) Limited (Offshore regional offices through its Administrator Mr. Rocco Mulder) v. State Bank of India* 2019 SCC OnLine NCLAT 385 ¶ 5

<sup>33</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999).

sovereignty of nations. In order to encourage countries to adopt it, the Model Law lays down guidelines for cooperation and coordination between countries instead of attempting to unify their substantive and procedural laws.<sup>34</sup>

According to the preamble of the Model Law, it was promulgated for achieving the following five objectives, namely, *firstly*, achieving cooperation between the competent authorities of different jurisdictions dealing with insolvency matters; *secondly*, ensuring certainty in the law relating to trade and investment; *thirdly*, securing administration of cross-border insolvency matters in a fair and efficient manner; *fourthly*, protecting and maximizing the value of the assets of the debtor and *lastly*, protecting investments and employments by providing for effective resolution of businesses.<sup>35</sup>

The manner in which the Model Law seeks to achieve its objectives is very unique and interesting. The procedure envisaged under the it comprises the following features:

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- a. Access:* In the landmark judgment of *Bar Council of India v. A.K. Balaji*, the Hon'ble Supreme Court restricted foreign law firms from practicing in India and limited their role to participating only in international commercial arbitrations being conducted in India.<sup>36</sup> However, deviating from this view, the Model Law provides for direct access to foreign insolvency professionals and creditors of the domestic proceedings.<sup>37</sup>
- b. Recognition:* The Model Law classifies all proceedings related to a debtor as 'main' or 'non-main' proceedings and provides for relief depending on such classification. The factor which determines whether a proceeding is a main or non-main proceeding is the 'centre of main interests' (COMI) of the debtor.<sup>38</sup> Thus, the jurisdiction wherein the debtor has its COMI would be recognized as the main proceeding, while all other jurisdictions where the

<sup>34</sup> Fernando Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil?' (2008), *Law and Business Review of the Americas* 314.

<sup>35</sup> Preamble, United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999).

<sup>36</sup> *Bar Council of India v. A.K. Balaji*, AIR 2018 SC 1382

<sup>37</sup> Ministry of Corporate Affairs, Government of India, Insolvency Section File No. 30/27/2018, Public Notice (June 20, 2018)

<sup>38</sup> P. Bernardo, 'Cross Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Shareholder Predictability through the UNCITRAL Model Law on Cross Border Insolvency and the European Union Insolvency Regulation' (2012) *Atteneo LJ* 399.



debtor has merely an ‘establishment’ would be recognized as non-main proceedings. This classification assumes significance as while recognition as a main proceeding would result in provision of automatic relief and greater powers to the representative, relief in case non-main proceedings would be at the discretion of the domestic court.<sup>39</sup>

- c. The term COMI has not been defined under the Model Law; but there exists a presumption that the proceedings in the jurisdiction having the registered office of the corporate debtor would be the main proceedings.<sup>40</sup>
- d. *Cooperation:* The Model Law provides a framework for cooperation and direct communication between domestic courts and domestic insolvency professionals with foreign courts and foreign representatives.<sup>41</sup> This framework aids in sharing of information between various jurisdictions and promotes efficiency of the insolvency resolution process.
- e. *Coordination:* There is no bar on commencing domestic insolvency resolution proceedings even when foreign proceedings have been initiated.<sup>42</sup> In other words, concurrent proceedings regarding the insolvency of the same debtor are permitted under the Model Law. However, there should be cooperation and coordination between the different jurisdictions where the proceedings have been commenced.

These four core principles form the backbone of the Model Law. The uniqueness of these principles is that they seek to achieve the objectives of the Model Law without interfering with the sovereign rights of countries of applying their own insolvency law in their jurisdiction. Owing to its flexibility and clarity, it has successfully been adopted in 44 countries till date.<sup>43</sup>

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<sup>39</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999).

<sup>40</sup> Bob Wessels, ‘COMI under European and American Insolvency Law’ (*Oxford Business Law Blog*, February 5, 2019) <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law>> accessed October 3, 2019

<sup>41</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999) arts. 25 and 26

<sup>42</sup> United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, (adopted May 30 1997) U.N. Sales No. E.99.V.3 (1999) art 27

<sup>43</sup> K.R. Srivats, Panel recommends UNCITRAL Model Law for Cross Border Insolvency issues, (*The Hindu Business Line*, October 22, 2018) < <https://www.thehindubusinessline.com/economy/cross-border-insolvency-insolvency-law-committee-submits-second-report/article25286085.ece>> accessed October 3, 2019.

## CHAPTER 4

### THE ROAD AHEAD FOR INDIA

Despite the innumerable advantages of the UNCITRAL Model Law, as mentioned earlier, India has not implemented the same even though several Committee reports have recommended its adoption. On March 26, 2018, the Insolvency Law Committee published a report specifically dealing with the issue of cross-border insolvency.<sup>44</sup> The said report recognizes the insufficiency of the current provisions governing cross-border insolvency and lays down the framework for adoption of the Model Law. Based on the report, the Government also released a Draft Chapter on Cross-Border Insolvency on June 20, 2018 and asked for suggestions on the same.<sup>45</sup> According to newspaper reports, the amendment in the IBC introducing the chapter on Cross Border Insolvency shall be passed in the upcoming 2019 winter session of the Parliament.<sup>46</sup>

At this juncture, a question that arises is whether adoption of the UNCITRAL Model Law as envisaged under the Report of the Insolvency Law Committee would be devoid of any shortcomings. The answer to this question is in the negative owing to the following issues:

- a. *Limited applicability*: The Report envisages adoption of the Model Law only for corporate debtors and not for individuals and partnership firms.<sup>47</sup> Therefore, the problems associated with the current insolvency regime would continue to exist for insolvency proceedings related to non-corporate entities.
- b. *Reciprocity requirement*: The requirement of reciprocity indicates that in order for the Model Law to be applicable, the foreign jurisdiction in which the insolvency proceeding might commence should also have adopted the Model Law. Studies have showed that the reciprocity requirement can be detrimental to the functioning of the Model Law.<sup>48</sup> This is primarily because it limits the applicability of the Model Law and domestic proceedings,

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<sup>44</sup> Insolvency Law Committee, Report on Cross-Border Insolvency (2018).

<sup>45</sup> Ministry of Corporate Affairs, Government of India, Insolvency Section File No. 30/27/2018, Public Notice (June 20, 2018)

<sup>46</sup> K.R. Srivats, Cross-border insolvency framework-related amendments likely in Winter session, (*The Hindu Business Line*, September 24, 2019) <<https://www.thehindubusinessline.com/money-and-banking/cross-border-insolvency-framework-related-amendments-likely-in-winter-session/article29502104.ece>> accessed October 3, 2019

<sup>47</sup> Insolvency Law Committee, Report on Cross-Border Insolvency (2018).

<sup>48</sup> Keith D. Yamauchi, 'Should reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?', (2007) *International Insolvency Review* 234.

creditors and resolution professionals as they cannot cooperate and coordinate with the countries who have not adopted the Model Law. Moreover, it creates uncertainty as to the manner of dealing with such countries.

Thus, even the adoption of the UNCITRAL Model Law would not have served the interests of the stakeholders in the insolvency resolution process of Jet Airways (India) Limited as Netherlands has not adopted the Model Law.

- c. *Presence of multiple laws*: Although the objective of the implementation of the Code was to consolidate the multiple laws governing the insolvency regime, it has not completely achieved the same. Banks and financial institutions still have recourse to the SARFAESI Act, 2002 for enforcement of their security interests. Thus, the rights of the foreign stakeholders might be restricted due to the operation of this legislation.<sup>49</sup>
- d. *Determination of COMI*: As COMI has not been explicitly defined in the Model Law, countries have often faced difficulties in determining its meaning. Although guidance has been provided in the Virgos-Schmidt Report<sup>50</sup> and various international cases including the UK landmark judgments of *In the Matter of Videology Limited v. In the Matter of Cross Border Insolvency Regulations 2006*<sup>51</sup> and *In re Eurofood IFSC Ltd.*<sup>52</sup>, ambiguities in determining COMI still exist. Moreover, as foreign judgments only have a persuasive value, Indian judicial authorities would have to carve out their own definition of COMI.

Thus, the adoption of the UNCITRAL Model Law in the form provided in the Report of the Insolvency Law Committee would not completely eliminate the problems related to cross-border insolvency. Nevertheless, it would solve certain basic procedural issues and bring in greater clarity.

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<sup>49</sup> Raghav Pandey, International insolvency in India has a long way to go, (*Money Control*, June 9, 2019) <<https://www.moneycontrol.com/news/economy/policy/international-insolvency-in-india-has-a-long-way-to-go-4184921.html>> accessed October 3, 2019

<sup>50</sup> M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996

<sup>51</sup> *In the Matter of Videology Limited v. In the Matter of Cross Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch)

<sup>52</sup> *In re Eurofood IFSC Ltd* [2006] 3 W.L.R. 309

## CHAPTER 5

### CONCLUSION

The UNCITRAL Model Law on Cross-Border Insolvency is a widely accepted framework dealing with the various issues relating to cross-border insolvency. It does not aim at providing a uniform substantive law governing insolvency, but instead focusses on harmonizing the differences between the different jurisdictions. The implementation of the Model Law assumes significance in this era of globalization because of the increasing amount of international trade between countries.

Although the Model Law might not provide a comprehensive solution to all problems, it certainly provides a starting point for dealing with cross-border insolvency matters. Moreover, adopting the Model Law would not only increase the ease of doing business in India due to greater transparency and increased clarity in law, but would also bring India at par with the international practices. Thus, the Model Law should be adopted as a founding step towards advancement of India's cross-border insolvency law.



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