REDEFINING INDIA'S CROSS-BORDER INSOLVENCY FRAMEWORK: A COMPARATIVE ANALYSIS OF DRAFT PART Z AND UNCITRAL MODEL LAW

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India's economic integration into global value chains over the past three decades has profoundly transformed its business environment, making domestic companies key players in international supply chains. This integration has unlocked significant growth opportunities but has also exposed Indian businesses to global economic uncertainties, trade disruptions, and financial vulnerabilities. Despite these developments, the Insolvency and Bankruptcy Code ('IBC') of India does not adequately address the complexities of cross-border insolvency, leaving a critical gap in its regulatory framework. Prominent cases like Jet Airways and Go Airlines have highlighted the challenges of coordinating insolvency proceedings involving multinational creditors and assets across jurisdictions, underscoring the pressing need for a comprehensive framework to handle cross-border insolvency effectively. Moreover, recent geopolitical disruptions—such as the Russia-Ukraine conflict, the global recovery from COVID-19, and the shift towards deglobalization—have exacerbated supply chain challenges. These include rising freight costs, material shortages, and energy crises, which have strained businesses operating across borders. Such pressures increase the likelihood of insolvency cases with cross-border dimensions, emphasising the urgent need for a cohesive framework under the IBC to address these complexities effectively. The essay critically analyses the proposed addition of draft Part Z to the IBC. The authors attempt a comparative study between the draft Part Z to the IBC and the 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

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the enforcement of insolvency-related judgments in the proposed scheme, and after analysing the inherent powers of NCLT, it is recommended that a specific provision enabling enforcement of insolvency-related judgments be incorporated into draft Part Z of the IBC.

TABLE OF CONTENTS

I. INTRODUCTION 208
II. PRACTICAL PROBLEMS IN THE INDIAN INSOLVENCY LANDSCAPE 210
III. RECOGNITION OF FOREIGN PROCEEDING 211
A. MAIN AND NON-MAIN PROCEEDING 211
B. REGISTERED OFFICE PRESUMPTION OF COMI 212
C. TIME OF COMI DETERMINATION 213
1. The American Approach 213
2. The European Approach 214
3. Indian Position: Decision with Limited Consideration 216
IV. PUBLIC POLICY 217
A. INDIAN INTERPRETATION OF 'PUBLIC POLICY' EXCEPTION: LOGGERHEADS WITH MODEL LAW 218
B. CALL FOR RESTRICTIVE APPLICATION OF THE EXCEPTION 219
V. ACCESS TO FOREIGN REPRESENTATIVES 220
A. EXTENT OF THE RIGHT TO DIRECT ACCESS 221
B. CASE OF MISFEASANCE BY FOREIGN REPRESENTATIVE 222
VI. INTERIM RELIEF 223
A. DRAFT PART Z AND INTERIM RELIEF: A SKEWED APPROACH? 224
VII. RELIEF POST-RECOGNITION 226
A. THE 'APPROPRIATE RELIEF' UNDER DISCRETIONARY RELIEF AND THE ENFORCEMENT OF JUDGEMENT OF FOREIGN PROCEEDING: THE LOOMING UNCERTAINTY 226
B. ENFORCING INSOLVENCY-RELATED JUDGEMENTS 227
1. Scope of Inherent Power 228
2. Does NCLT Have this Inherent Power? 229
VIII. CONCLUSION 229

I. INTRODUCTION

The idea of cross-border insolvency is premised on the principle of universalism. This principle suggests that there must be a unitary 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 concurrent with or different from that of the debtor's estate. Thus, the creditors of the debtor 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 the community of creditors as a whole. UNCITRAL Model Law on Cross-Border Insolvency[2] ('Model Law') and 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 a cross-border insolvency.[4]

The mechanism of administration of cross-border insolvency is centred on the 'Centre of Main Interests' ('COMI') of the corporate debtor or the place of habitual residence in the case of an individual. Thus, the COMI construct is the focal point for ascertaining the court's jurisdiction to administer the debtor's estate distributed across countries, the types of relief that can be sought in cross-border insolvency proceedings, and other corollary matters. The meaning of COMI and its determinants are discussed in the later part of this essay.

The Model Law primarily focuses on four necessary pillars for cross-border insolvency cases. These are (a) access, (b) recognition, (c) relief, and (d) cooperation. These pillars fortify a sacrosanct framework enabling the foreign representative the right to access domestic courts to seek recognition of the foreign insolvency proceeding against the debtor and requesting appropriate reliefs to ensure a value-maximising insolvency process while the idea of cooperation between courts of different jurisdictions underlines the whole framework.

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[1] *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21.

[2] UNCITRAL Model Law on Cross-Border Insolvency 1997.

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141 ('EU Regulation 2015/848').

[4] UNCITRAL Model Law (n 2), art 2(a); EU Regulation 2015/848 (n 3), (Article 1 read with Article 2).

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 of the IBC empowers the Central Government to enter into bilateral agreements with foreign jurisdictions to address cross-border insolvency-related issues. Also, Section 235 of the IBC empowers the Adjudicating Authority to issue letters of request to the courts of the country with which a bilateral arrangement has been entered under Section 234 of the IBC. The nascent evolution of the IBC, since its enactment in 2016, has been plagued by the lack of appropriate mechanisms for administering cross-border insolvency. Some of the major instances are discussed below.

Jet Airways Insolvency:[5] The National Company Law Tribunal ('NCLT') refused an application by a Dutch foreign representative seeking recognition of the Dutch Insolvency proceedings on the ground that the intent of the Dutch Insolvency Law was to liquidate corporate debtors, while the intent of the IBC in India was to manage corporate debtors as a going concern. Though, on appeal, the National Company Law Appellate Tribunal ('NCLAT') did set aside NCLT's order, and in one of its kind orders, it directed the Resolution Professional in Indian and Dutch Foreign Representatives to observe the spirit of cooperation and not take any step prejudicing the rights and interests of the creditors. This can be said to be an instructive order by the NCLAT, but the Dutch Foreign Proceedings could not be recognized or no procedure for concurrent proceedings in both jurisdictions could be devised. What was achieved can be at best said to be a measure of good faith and protocol, but in no way were the foreign proceedings administered in a strict 'collective' sense, as understood in the Cross-Border Insolvency Landscape. This is directly attributable to the absence of definite legal provisions in the IBC for administering cross-border insolvencies.

Similarly, in the case of Bhushan Steel,[6] NCLT initially ordered that the company's US-based assets be seized; however, the order could not be sustained owing to a lack of coordination with the US government. A similar issue was

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[5] *Jet Airways (India) Ltd (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v State Bank of India and Anr* 2019 633 NCLAT.

[6] *State Bank of India v Bhushan Steel Limited* 2018 274 NCLT.

faced by the NCLT in the matter of Go Airlines Insolvency,[7] where the NCLT is 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.

In this backdrop, the authors examine the proposed draft Part Z to the IBC[8], Insolvency Law Committee ('ILC') October 2018 report on Cross Border Insolvency[9] and Cross Border Insolvency Rules and Regulations Committee ('CBIRC') June 2020 Report on the rules and regulations for cross-border insolvency resolution[10] to better calibrate India's insolvency landscape in administering cross-border insolvency.

III. RECOGNITION OF FOREIGN PROCEEDING

A. Main and Non-Main Proceeding

Under the Model Law, recognition of a foreign proceeding can be as a foreign main proceeding or a foreign non-main proceeding. Foreign main proceeding means a foreign proceeding that is pending in a jurisdiction in which the debtor has its COMI,[11] while a foreign non-main proceeding, other than a foreign main proceeding, is pending in a jurisdiction in which the debtor has its establishment.[12] The difference between recognition of a proceeding as main and 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.[13]A similar distinction has also been maintained in draft Part Z to the IBC.[14]

Thus, the recognition of foreign proceedings as 'foreign main proceedings' is dependent upon COMI determination. Both Model Law and draft Part Z to the IBC provide for the rebuttable registered office presumption of COMI.[15] However, the draft Part Z to the IBC has made a significant deviation from the

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[7] *Go Airlines (India) Ltd* 2023 SCC OnLine NCLT 197.
[8] Ministry of Corporate Affairs, *Draft Part Z* (2018).
[9] Insolvency Law Committee, *Report of the Insolvency Law Committee on Cross Border Insolvency* (2018).
[10] Cross Border Insolvency Rules/Regulations Committee, *Report on the rules and regulations for cross-border insolvency resolution* (2020).
[11] UNCITRAL Model Law (n 2), art 2(b).
[12] UNCITRAL Model Law (n 2), art 2(c).
[13] UNCITRAL Model Law (n 2), art 20.
[14] Draft Part Z (n 8), cl 2(e) & (f).
[15] Draft Part Z (n 8), cl 14; UNCITRAL Model Law (n 2), art 16(3).

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. This provision for the lookback period is similar to the one provided in the EIR (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.')

B. Registered office presumption of COMI

There exist two standpoints with respect to the evidentiary value of the registered office presumption (a) under Model Law and (b) under EIR. The position under Model Law is best described by Lifkind J in re Bear Stearns Ltd.,[16] who has explained that the registered office presumption does not have any special evidentiary value and is just one of the factors for assessment of COMI. The EIR, in contrast, lays a very strong registered office presumption and there exists a very strict burden of proof for its rebuttable.[17] The approach under draft Part Z to the IBC appears to be more aligned with the approach followed by Model Law as the Adjudicating Authority is required to carry proactive assessment of COMI.[18] Thus, it is envisaged that the functional realities are capable of displacing purely formal criteria of registered office presumption.

The draft Part Z to the IBC has made the location where central administration of the debtor takes place and which is readily ascertainable by third parties as factors for assessment of the debtor's COMI.[19] 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.[20] Of all the factors considered for the assessment of the debtor's COMI, the 'nerve centre test' (location from which the debtor maintained its headquarters and performed the

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[16] *Re Bear Stearns High-Grade Structured Credit* 374 BR 122 (2007).

[17] Case C-396/09 *Interedil Srl* [2011] EUECJ 51-53; Case C-341/04 *Eurofood IFSC* [2006] Ch 508 (ECJ) 34.

[18] Report of the Insolvency Law Committee (n 9), cl 11.4.

[19] Draft Part Z (n 8), cl 14(3).

[20] Miguel Virgos and Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council of the EU Document 1996), para 75; Eurofoods IFSC (n 17), 118-122; UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, para 145.

head office functions such as directing, controlling, and coordinating the corporation's activities) is the most crucial.[21]

C. 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 effect of recognising foreign proceedings as 'main proceeding' or 'non-main proceeding' or none. 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 should be carried out. There can be said to be two major approaches that have developed with respect to the time of determination of COMI (and that have also been considered in ILC and CBIRC reports): the American Approach and the European Approach, which are discussed herein.

1. The American Approach

The courts have interpreted the use of present tense 'is pending' in the definition of foreign proceeding in the Model Law (enacted as Chapter 15 of US Bankruptcy Code) 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.[22] However, this 'filing' based approach has attracted criticism in the aspect that it enables the debtor to engineer jurisdiction in the most favourable jurisdiction to defeat the claims of

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[21] Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, para 21; *In re Sphinx Ltd.* 351 BR 103 (2007), 117; *In re Gerova Fin. Grp., Ltd.* 482 BR 86 (2012), 91; *re Millenium* 474 BR 88 (2012), 92; *Massachusetts Elephant & Castle Group, Inc.* ONSC 4201 (2011).

[22] *Lavie v Ran (In re Ran)* 607 F.3d 1017 (5th Cir) (2010), 1025; *Morning Mist Holdings Ltd. v Krys (In re Fairfield Sentry)* 714 F.3d 127 (2nd Cir) (2013), 134; *In re Betcorp Ltd.* 400 BR 266 (2009), 290-292; *In re British American Insurance Company Limited* 425 BR 884 (2010), 909-910; *In re Ocean Rig UDW Inc* 570 BR 687 (2017), 704; *Flynn v. Wallace (In re Irish Bank Resolution Corp)* 538 BR 692 (2015), 697.

the creditors.[23] 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.[24]

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[25]and Morning Mist[26] 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 proceeding yielding different results, in contrast to the approach taken in re Betcorp[27] where the court rejected any analysis of any past operational history.

2. The European Approach

The European is aimed at preventing the problem which plagues the American approach, i.e., the possibility of debtor engineering jurisdiction to some other jurisdiction so as to defeat the claims of creditors or get favourable insolvency proceedings. Thus, the European approach warrants the COMI determination be made when the foreign insolvency proceedings are filed against the debtor.[28] The English Courts have also adopted this 'Commencement Approach', i.e., while deciding ancillary proceeding seeking recognition of a foreign proceeding, the court will look at whether at the timing of the filing of such foreign proceeding, for which recognition is sought, the debtor had its COMI in the jurisdiction or not.[29]

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[23] *In re Millennium Global Emerging Credit Master Fund Limited* 458 BR 64 (2011), 75; *In re Kemsley* 489 BR 346 (2013), 359-360.

[24] *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* 374 BR 122 (2008); *In Re Basis Yield Alpha Fund* 381 BR 37 (2007).

[25] In re Ran (n 22), 1025.

[26] In re Fairfield Sentry (n 22), 134.

[27] *Re Betcorp Ltd.* 400 BR 266 (2009), 290-292.

[28] *Susanne Staubitz-Schreiber* [2006] ECR I-701 25-26.

[29] *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; *Videology Ltd, Re* [2018] EWHC 2186 (Ch); [2018] 8 WLUK 157, 49.

This approach has also received some support in American Jurisprudence.[30] Amongst all authorities voicing support for the 'Commencement Approach' in the United State of America ('U.S.A.'), Gropper J in re Millennium Global Emerging Credit Master Fund[31] has articulated cogent reasons for deviating from the generally accepted 'Filing Approach' in U.S.A. He justifies it owing to two reasons, first that the 'Filing Approach' would lead to recognition being given to the change of COMI between the filing of foreign insolvency proceedings and then subsequent application seeking recognition of such foreign proceedings.[32] 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.[33] that the 'Filing Approach' leads to ready recognitions being given to foreign proceedings emanating from 'letterbox jurisdictions' (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).

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.[34] It can also be advanced that the Model Law does not intend COMI shift after the filing of a foreign insolvency proceeding,[35] and thus the 'Commencement Approach' is the most suited with the intent of Model Law as it forbids any consideration given to change of COMI after filing of a foreign insolvency proceeding.

However, Abdullah J in Zetta Jet Ltd.,[36] 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

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[30] *Re Millennium Global Emerging Credit Master Fund Limited* 458 BR 64 (2011), 72; *In re Kemsley* 489 BR 346 (2013), 354; In re Gerova Finance Group, Ltd. 482 BR 86 (2012), 92-93.

[31] ibid.

[32] *In re Suntech Power Holdings Co* 520 BR 399, 417.

[33] 543 BR 498, 518.

[34] Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras 30, 159.

[35] UNCITRAL Report of Working Group V (Insolvency Law) on the work of its forty-first session, para 60.

[36] *Re Zetta Jet Pte Ltd* [2019] SGHC 53.

be objected.[37] Also, he adopted justification on the lines as also enunciated by Markell J in re Betcorp Ltd.[38]that giving consideration to 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 the fact that such COMI determination keeping in view the past consideration will lead to denial of the proceeding emanating from the jurisdiction in which the debtor's interests are truly centred.[39]

3. Indian Position: Decision with Limited Consideration

ILC has chosen not to specify any particular date for the determination of COMI for the purposes of deciding the ancillary proceeding seeking recognition of foreign proceeding.[40] It has simply left the pertinent issue to be decided by the Adjudicating Authority without any material guidelines. Thus, the ILC, being aware of the multiple diverse and distinct international approaches in this regard, has chosen to prefer ignorance by not deciding on the issue. CBIRC, for better or worse, has chosen to address the issue and has recommended the adoption of the 'Commencement Approach', as followed in Europe.[41] However, CBIRC's rationale has simply been the incorporation of such an approach in the UNCITRAL Guide to Enactment and Interpretation, without taking an independent analysis of each approach.

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 pro-active enquiry in the process of COMI determination.[42] Further, Clause 6 of draft Part Z requires observance of good faith. Thus, the proposed scheme of draft Part Z as it stands currently is calibrated to avoid the problem of forum-shopping by the debtor made in bad faith.

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[37] Zetta Jet (n 36), 57.

[38] 400 BR 266, 291.

[39] ibid; Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' (2007) 32(3) Brooklyn Journal of International Law 1019.

[40] Report of the Insolvency Law Committee (n 9), cl 11.8.

[41] Report on the Rules and Regulations (n 10), cl 4.6.

[42] Report of the Insolvency Law Committee (n 9), cl 11.4.

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 of the model law brings forth the intention of the law that the exception is to be invoked only in exceptional circumstances.[43] What constitutes public policy has, however, not been explained in the Model Law.[44]

The jurisprudence on this matter has laid that the public policy exception can only be invoked in matters concerning 'fundamental principles' of the state.[45] The U.S. Bankruptcy Court in Tri-continental Exchange Ltd.[46] explained the 'fundamental principles' of a state to cover procedural fairness, constitutional rights and liberties, and statutory rights of the state. The scope of public policy as explained in Tri-continental Exchange has been maintained in a catena of judgements.[47] 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,[48] i.e., where principles of natural justice have been followed, a fair opportunity of participation to every creditor has been given or not, etc. There can thus be, two general principles of law that can be ascertained from the scholarship of jurisprudence on public policy exception which is, first, that the exception is primarily concerned with procedural fairness, and second, that it needs to be invoked very restrictively and rarely to refuse recognition.[49]

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[43] UNCITRAL Guide (n 34), paras 21(e), 104.

[44] Re HIH Casualty & General Insurance Ltd (n 1), para 30.

[45] In re Ran (n 22), 1021; *In re Ernst Young, Inc.* 383 BR 773, 781; *In re ABC Learning Centres* 728 F.3d 301 (3d Cir 2013), 309; *In re Ephedra Products Liability Litigation* 349 BR 333, 336; *Ackermann v Levine* 788 F.2d 830 (2d Cir 1986), 842; *In re Tri–Continental Exchange Ltd* 349 BR 627, 633–34

[46] In re Tri–Continental Exchange Ltd (n 45), 633–34.

[47] *In re Toft* 453 BR 186, 194; *In re Gold & Honey* 410 BR 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.

[48] *In re Ephedra Products Liability Litigation* 349 BR 333, 336; *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685, 697; *In re ABC Learning Centres* 728 F.3d 301 (3d Cir 2013), 309; *Cunard Steamship Co. v Salen Reefer Services* AB 773 F.2d 452 (2nd Cir 1985), 457; *In re Qimonda AG Bankruptcy Litigation* 433 BR 547, 568.

[49] UNCITRAL Guide (n 34), paras 21(e), 29, 30, 103 and 104.

A. Indian Interpretation of 'Public Policy' Exception: Loggerheads with 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.[50] Thus, it is relevant to account for major 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 Power Co. Ltd. v. General Electric Co.,[51] 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 laws. As per the SC, 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.'[52] The stance taken by the SC in Shri Lal Mahal Ltd. v. Progetto Grano SpA[53] 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 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 ONGC Ltd. v. Saw Pipes Ltd.[54] 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 enforcement of 'patently illegal awards' may be avoided.[55] 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

[50] Report of the Insolvency Law Committee (n 9), cl 3.5.
[51] 1994 Supp (1) SCC 644.
[52] ibid.
[53] (2014) 2 SCC 433.
[54] (2003) 5 SCC 705.
[55] ibid.

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 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 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 ONGC Ltd. v. Saw Pipes Ltd.[56] 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 a mere difference in laws would be sufficient to invoke the public policy exception. This, the author submits, would not only be against the spirit of Model Law, as per which mere difference in the scheme of domestic insolvency laws does not qualify as being 'manifestly' contrary to a nation's public policy.[57] The pronouncement by the House of Lords in Re HIH Casualty & General Insurance Ltd.[58] 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[59] while reaffirming the narrowness of the public policy exception, has perfectly summed up that the 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.[60] 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. Thus, the intent of the ILC is clear: this

[56] ibid.
[57] UNCITRAL Guide (n 34), para 30
[58] [2008] UKHL 21.
[59] 788 F.2d 830.
[60] Report of the Insolvency Law Committee (n 9), cl 3.4.

exception is to be invoked exceptionally in line with global jurisprudence in this regard.[61]

V. ACCESS TO FOREIGN REPRESENTATIVES

Model Law envisages the right of direct access to foreign representatives to courts in the enacting country.[62] In essence, it is intended that the formal requirements such as registration, licence etc. as required by domestic law be dispensed for foreign representatives.[63] Thus, this right to direct access accorded to foreign representatives is to facilitate them to approach courts or appropriate forums to seek/avail necessary remedies in relation to foreign proceedings. However, there are two crucial aspects to be dealt with, with respect to this right to access to foreign representatives. First, will foreign representatives be able to overcome the 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 Supreme Court in Union of India vs. A.K. Balaji,[64] foreign lawyers and law firms are not allowed to participate in litigation and non-litigation matters, thus not allowed to practise. The recent BCI guidelines only allow limited exemptions to foreign lawyers based on the principle of reciprocity that the Indian lawyers enjoy the same rights in their country.[65] Similarly, foreign chartered accountants are not allowed to practise in India.[66] Thus, it appears likely that in such restrictions, foreign lawyers as foreign representatives will not be allowed direct access to courts in India.[67]

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 Z deviates from the Model Law in that it only allows direct access to foreign representatives with respect to proceedings under the code[68], as against access given to foreign

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[61] Report on the Rules and Regulations (n 10), cl 3.5 and 3.6.
[62] UNCITRAL Model Law (n 2), art 9.
[63] UNCITRAL Guide (n 34), para 108.
[64] *Bar Council of India v AK Balaji* (2018) 5 SCC 379, 42-43.
[65] 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.
[66] Chartered Accountants Act 1949, s 29.
[67] Report of the Insolvency Law Committee (n 9), cl 5.3.
[68] Draft Part Z (n 8), cl 7.

representatives in any proceeding against the debtor by the latter. Thus, in light of the foregoing considerations it will be untenable to say that allowing a foreign professional to participate as a foreign representative will amount to allowing them to practise in India. The CBIRC report, to arrive at this claim, draws a comparative analogy with the legal system of Bahrain and South Africa, which similar to India do not allow foreign lawyers to practise in their jurisdiction but have allowed them to access court as foreign representatives.[69] Alternatively, 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 this would result in increased co-operation and synergy between stakeholders.[70]

A. Extent of the Right to Direct Access

With respect to the extent of the right to direct access to the foreign representatives, as noted earlier, draft Part Z only proposes to accord the right to access with respect only to proceedings under the code, clearly restricting the scope when compared to Model Law which allows such right with respect to every proceeding against the debtor. However, there appear two contradicting standpoints of ILC and CBIRC on the scope of the right to access as given by Draft Z. ILC has favoured a conservative approach, i.e., arguing that such rights only to be exercisable by the foreign representatives through domestic insolvency representatives and also that the extent of such right to be decided.[71] However, the CBIRC has argued for a direct exercising of the right to access by the foreign representative including right to appear before NCLT as well.[72] It is submitted that the stance taken by CBIRC is more coherent with the UNCITRAL Model Law while the ILC has sought to restrict the right without an underlying rationale as there seems 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,[73] and thus has not conclusively recommended any regulation mechanism, penalty

[69] Report on the Rules and Regulations (n 10), cl 4.3.1.
[70] ibid.
[71] Report of the Insolvency Law Committee (n 9), cl 5.4.
[72] Report on the Rules and Regulations (n 10), cl 4.3.1.
[73] Report of the Insolvency Law Committee (n 9), cl 6.3.

provisions etc. for the foreign representatives enjoying the right to direct access under the code. However, ILC could not agree on whether registration recommended a code of conduct and a penalty provision similar to as applicable to Insolvency professionals in India. However, CBIRC recommended a 'principle-based light-touch code of conduct' for foreign representatives. Two aspects of CBIRC's recommendation need 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 representative.[74] Second, it vouched for a 'deemed authorisation model' for foreign representatives, i.e., unless the application for authorisation to a 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.[75]

B. Case of Misfeasance by Foreign Representative

It has been left to the IBBI to decide in the cases of misfeasance by foreign representatives, actions in bad faith by foreign representatives, etc.[76] Thus, Clause 8 of the draft Part Z enables the board to impose penalty in this regard. The ILC report, though discussed a penalty provision as existent in the U.K.[77] which provides for a similar penalty for misfeasance by foreign representatives as applicable to Domestic Professionals. However, ILC has made a departure with respect to its position in the U.K. In the sense, 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 the decision to recognise and enforce foreign proceedings in case of misfeasance by foreign representatives. It can gainfully be referred to the position in the U.S.A. (which has incorporated Model Law as Part 15 of the US Bankruptcy Code), where it appears to be settled after the ruling in SNP Boat Services S.A. v. Hotel Le St. James[78] 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 foreign representative

[74] Report on the Rules and Regulations (n 10), cl 4.3.2.
[75] Report on the Rules and Regulations (n 10), cl 4.3.2.
[76] Report on the Rules and Regulations (n 10), cl 4.3.2; Report of the Insolvency Law Committee (n 9), cl 6.3.
[77] Cross-Border Insolvency Regulations 2006, sch 2, reg 29.
[78] 483 BR 776, 787-788 (2012).

have an impact on 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 representatives to not have an impact on the recognition and enforcement of foreign proceedings not only on the lines of the settled position in U.S.A. but also on the basis of limited help that CBIRC report provides in this regard,[79] 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.

VI. INTERIM RELIEF

Interim relief relates to a provisional relief that the 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, i.e., provisional relief, is at the total discretion of the domestic court that 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 expand to also include 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 given. Heath J. in Steven John Williams v. Alan Geraint Simpson,[80] has in much detail elucidated the purpose of the usage of the word 'including' as appearing in Article 19 of the Model Law while ruling in the case at hand 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.

[79] Report on the Rules and Regulations (n 10), cl 4.3.2.
[80] 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. Thus, it has made a deliberate attempt to deviate from the two broad categories of reliefs available under the Model Law, only providing for reliefs post-recognition while omitting any scope for interim relief. The ILC has rationalized this omission as an attempt to limit the discretion available to the Adjudicating Authority (as already explained earlier in this part, the grant of interim reliefs is primarily dependent on the satisfaction of the domestic courts).[81] Further, the existing framework under the code 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 which are not provided in the domestic framework.

It will be unreasonable to operationalize 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,[82] albeit in a domestic framework, wherein the ILC has itself recommended incorporating a provision providing for an 'interim moratorium' owing to the concern that creditors of the corporate debtor may race to enforce their debts in the periods leading up to the commencement of Corporate Insolvency Resolution Process.[83] It recommended, '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-maximising in the interests of all stakeholders.'

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 cases of cross-border insolvency as well. Similarly, it was of the view that it would require simultaneous and parallel amendments in the code along with draft Part Z to incorporate such relief. However, even in the absence of a specific

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[81] Report of the Insolvency Law Committee (n 9), cl 13.4.

[82] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (February 2020) <https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf> accessed 29 December 2023.

[83] Report of the Insolvency Law Committee (n 82), cl 5.3.

provision in draft Part Z enabling 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,[84] the NCLAT had used this inherent power to prohibit the corporate debtor from alienating the 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.[85]

However, the draft Part Z is not wholly without substance in this regard. Clause 15(4) of the draft Part Z dealing with cross-border cases prescribes a maximum of fourteen days from the day of application that may be taken for the decision 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, it owns some assets in these countries. Now XYZ Pvt. Ltd. has become insolvent, and the Spanish bankruptcy court has admitted its insolvency application. The Spanish court appoints a foreign representative who applies for recognition of the Spanish proceedings before the NCLT in India. Now the tribunal will decide, as per Clause 15(4) of draft Part Z, upon the recognition within 14 days. It may happen that between the date of application and the end of 14 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.

[84] Company Appeal (AT) (Insolvency) No 664 of 2019.
[85] Report on the Rules and Regulations (n 10), cl 4.7.

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-maximising in the interests of all stakeholders.

VII. RELIEF POST-RECOGNITION

Upon the decision to recognize a foreign proceeding, two types of relief become applicable: (a) mandatory relief and (b) discretionary relief. Mandatory relief becomes automatically applicable in cases where a foreign proceeding is recognized as the main proceeding, and such relief is not dependent upon the discretion of the court. Clause 17 of the draft Part Z 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. Discretionary relief, as stated in Clause 18 of the draft Part Z, is dependent on the discretion of the Adjudicating Authority. One issue which needs to be addressed specifically is the uncertainty concerning the 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. 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 a judgment of the foreign court determining that the defendant did not owe any money to the plaintiff; here, the domestic court may simply recognize 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) under 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 judgments has been carried out by adopting a purposive interpretation of Article 21 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[86] ('Eurofinance'), 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,[87] 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.

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 the Eurofinance judgement. 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 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[88] and Re HIH Casualty & General Insurance[89] has emphasized 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

[86] [2012] UKSC 46.

[87] Azabu Tatemono, Tokyo District Court, 3 February 2006; Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283, 292.

[88] [2006] UKPC 26.

[89] [2008] UKHL 21.

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 the case of Eurofinance, has held that the Model Law is silent and not prescriptive upon enforcement of foreign judgments related to judgments and that the courts cannot, on their motion, provide for universal operation of insolvency in the absence of a corresponding mandate in rules and regulations. In India, the draft Part Z contains no specific provision for enforcement of insolvency-related judgments; thus, the problem highlighted in the Eurofinance judgement may plague the Indian administration of cross-border insolvencies. It has already been noted in the earlier part that, in the 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) of the draft Part Z. 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.

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 Delhi High Court in Toshiaki AIBA vs. Vipan Kumar Sharma[90], 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 points of consideration: (a) what is the scope of this inherent power, and (b) does NCLT have this inherent power?

1. Scope of 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.'[91] To this respect, the original insolvency proceeding does not have an automatic and direct effect in the ancillary

[90] 2022 SCC OnLine Del 1260.

[91] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) Michigan Law Review 2276, 2299-2302.

countries, and the local courts are at their discretion to evaluate compliance with certain criteria (draft Part Z in this case). The 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. Similar seems to be the position in the common law. Thus, given all 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.

2. Does NCLT Have this Inherent Power?

It has been observed that since NCLT and NCLAT have limited jurisdiction, cannot act as a court of equity,[92] and thus cannot do what the IBC expressly does not provide them to do. On the 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, NCLT is not an appropriate forum for the same. Therefore, the enforcement regime of the foreign judgments dealing with insolvency-related matters remains uncertain.

However, after the adoption of draft Part Z, clause 18(1) of the draft Part Z 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.

VIII. CONCLUSION

The authors made an attempt to appreciate the recommendations and contributions of both the ILC and CBIRC reports while also highlighting the gaps in the current proposed draft Part Z framework. It needs to be noted that the proposed draft Part Z will only be applicable to corporate debtors, whereas the Model Law is applicable both to corporate debtors and to individuals. Since the IBC is currently not applicable to individuals, it can be suggested that the Debt Recovery Tribunal be made the Adjudicating Authority for administering cross-border insolvencies of individuals, while the operative part of the law remains the same as in draft Part Z.

[92] *K. Sashidhar v Indian Overseas Bank &Ors* 2019 12 SCC 150.

Further, the authors are of the suggestive stance that three changes are required in the draft Part Z in its current form: first, a provision for interim relief needs to be inserted; second, a specific provision enabling enforcement of insolvency-related judgments; and since the ILC formulated the draft Part Z before the incorporation of the pre-packaged insolvency process under the IBC, the said scheme remains outside the scope of the draft Part Z. Thus, the third amendment on this line can be adopted.