

THE INSTITUTIONAL CHALLENGES OF A CROSS-BORDER INSOLVENCY
REGIME

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THE INSTITUTIONAL CHALLENGES OF A CROSS-BORDER INSOLVENCY REGIME

PRIYA MISRA* & ADAM FEIBELMAN†

INTRODUCTION

In April of 2019, the Indian airline firm Jet Airways suspended operations having failed to make payments due to its oil supplier, on its airplane leases, and to other creditors. Shortly thereafter, foreign creditors successfully petitioned a court in the Netherlands, where the airline operated a hub, to initiate insolvency proceedings and appoint an administrator under Dutch law. The European creditors were owed approximately \$10 million, a small proportion of the entire sum of the firm's total debt that amounted to many billions. The administrator quickly seized one of Jet Airway's planes that had been parked in the Netherlands. Other creditors, including the State Bank of India, subsequently initiated insolvency proceedings pursuant to India's Insolvency and Bankruptcy Code against the firm in India at the National Company Law Tribunal, the adjudicating authority for corporate insolvencies under the Code. The Dutch administrator sought recognition of the Netherlands proceedings by the Tribunal in Mumbai as well as financial information about the firm. The Mumbai Tribunal refused to recognize the Dutch proceeding or allow the Dutch administrator to participate in the insolvency proceeding in India because it found that the Insolvency and Bankruptcy Code did not formally allow for either action.¹

This overlapping of insolvency proceedings in different countries regarding a common debtor represents a recurring and seemingly intractable challenge of

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¹ See *State Bank of India v. Jet Airways (India) Ltd.*, CP 2205 (IB), CP 1968(IB), CP 1938, June, 20, 2019 (Mumbai Bench); see also, Vyapak Desai, Arjun Gupta, & Bhavana Sunder, *Introduction to Cross Border Insolvency*, NISHITH DESAI ASSOCIATES (Apr. 2020), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf.

transnational commercial law. Management of bankruptcy and insolvency cases with cross-border aspects has evolved – and improved – considerably over recent decades. But it remains a legal domain that is very much in flux, with a spectrum of institutional approaches and varying degrees of transnational cooperation and coordination. This Essay addresses the move in India to adopt one of these approaches. In brief, it argues that questions of design of such a regime may be of secondary importance to other institutional challenges, especially the capacity and inclination of judicial actors who will be responsible for operating the regime to cooperate and coordinate with foreign entities, courts, and institutions.

I. THE NEED

The need for an approach to managing cross-border insolvencies became a pressing matter of policy in India in 2016 when the country adopted a new Insolvency and Bankruptcy Code,² a comprehensive approach to insolvency and bankruptcy law in that country. Prior to that, the country had only a patchwork of laws for liquidation or revival of firms, which were cumbersome and thus underutilized.³ The Code was enacted for two primary reasons: to deal with an acute problem of non-performing assets in the country's banking system and to make the country more inviting for foreign investment.⁴ In particular, the government hoped that reforming the country's insolvency system would improve

² India, Insolvency and Bankruptcy Code, 2016 (“IBC”).

³ See, Report, *Volume I: Rationale and Design*, BANKRUPTCY LAW REFORMS COMMITTEE at 24-29 (Nov. 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf. For instance, the Sick Industrial Companies Act, 1985 (SICA), repealed in 2016, could resolve very few cases increasing the pendency before the Board and courts and most of the rehabilitation plans could not find acceptance among all stakeholders. Similarly, SARFAESI Act, 2002 ran into trouble because of its clashing non-obstante clause with SICA, on which different debt recovery tribunals and high courts had different point of views, resulting in chaos. SARFAESI Act provided a remedy only to banking companies and recognized financial institutions, leaving no quick solution for the other creditors. Meanwhile the pre-independence insolvency laws dealt with individual insolvencies while the Companies Act, 1956 and later Companies Act, 2013 provided for liquidation of companies. Except for SICA, there existed no other legislation to rehabilitate a company. Apart from the aforesaid drawbacks of SICA, the applicability of this legislation was a prime filter that prevented companies from opting for revival. The Act was only for ‘industrial company’ since it was enacted in the backdrop of socio-economic situation that involved corrosion of credit, sinking of banks and rise of trade unionism. SICA failed miserably and a repeal was recommended way back in the year 2000. However, due to a technical glitch involving a long pending litigation, the enactment continued.

⁴ See Adam Feibelman, *Legal Shock or False Start: The Uncertain Future of India's New Consumer Insolvency and Bankruptcy Regime*, 93 AM. BANKR. L.J. 429 (2019).

its ranking on the World Bank's Ease of Doing Business index, which it quickly did. Other motivations for adopting the Code included the perceived need to support the development of domestic credit markets generally and the domestic corporate bond market in particular.

As was intended, the advent of an insolvency and bankruptcy system quickly generated significantly more cases than usual under the previous regimes, and with some steering by the Reserve Bank of India, many large cases as well.⁵ The system has been a success in many respects, leading to an apparent increase in recoveries for some creditors and the rescue of numerous firms.⁶ Yet it continues to be a work in progress. Among other things, determining the role of judicial tribunals in various aspects of the system has been part of the ongoing project of implementing the Code and improving its operation.⁷

As India has been gradually integrating with the global economic and financial systems in recent decades, many firms in the country have assets and operations abroad, and many have foreign investors and creditors. It was inevitable,

⁵ See Press Release, Reserve Bank of India, RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC) (Jun. 13, 2017), <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR3363482A1FF9229F4B9A92EA0090D5D71518.PDF>; See Vastal Khullar, *The Rise of Non-Performing Assets in India*, THE PRS BLOG (May 11, 2016), <http://www.prsindia.org/theprsblog/rise-non-performing-assets-india>.

⁶ "The recovery rate for the 94 cases resolved through IBC by fiscal 2019 is 43%, compared with 26.5% through earlier mechanisms. What's more, the recovery rate is also twice the liquidation value for these 94 cases, which underscores the value maximisation possible through the IBC process." See, *In three years of IBC, more hits than misses*, CRISIL (May 14, 2019), <https://www.crisil.com/en/home/newsroom/press-releases/2019/05/in-three-years-of-ibc-more-hits-than-misses.html>. The enactment has helped in recovering money belonging to creditors, so much so that creditors have recovered 207% of the realizable value of the assets on the impugned companies. See also, *Recovery through insolvency process better compared to other options: IBBI chief M S Sahoo*, THE ECONOMIC TIMES (Mar. 20, 2020), <https://economictimes.indiatimes.com/news/economy/policy/recovery-through-insolvency-process-better-compared-to-other-options-ibbi-chief-m-s-sahoo/articleshow/74439865.cms?from=mdr>. Nearly 200 companies have been rescued since December, 2019, which is already half of those revived under SICA from 1987 through 2000. See Indian High Level Committee, *Law Relating to Insolvency and Winding Up of Companies*, ¶5.8.1, 34 (2000), <http://reports.mca.gov.in/Reports/24Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%20202000.pdf>. See also Priya Misra, *Cross-border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies—Determining Jurisdiction for Group Insolvencies*, 45(2) VIKALPA: THE JOURNAL FOR DECISION MAKERS (Apr.-June 2020) at 93-103 (attributing the success of the Code to its adopting best practices of the domestic insolvency laws of the U.S., the U.K., Singapore and the UNCITRAL model law on domestic insolvency).

⁷ See *infra* notes 86-95.

therefore, that the new insolvency and bankruptcy system would implicate these transnational relationships and create the potential for interaction of different national legal regimes, including the concurrent application of different domestic insolvency laws.

It was noteworthy and the subject of criticism and concern that India's new Insolvency and Bankruptcy Code did not include provisions to manage transnational aspects of cases that might arise under the Code.⁸ Even before the adoption of the IBC, the need for such a framework had long been recognized by policymakers there.⁹ An important advisory group on bankruptcy reform created by the Reserve Bank of India led by Dr. N.L. Mitra, a prominent legal scholar, had recommended twenty years ago that India adopt the model law on cross-border insolvencies promulgated by the United Nations Commission on International Trade Law ("UNCITRAL").¹⁰ The drafters of the new Code and the Indian parliament considered but decided against adopting the UNCITRAL model law.¹¹

II. OPTIONS AND REGIMES

The UNCITRAL model law on cross-border insolvency is designed to harmonize aspects of domestic insolvency law around the globe to effectively create an international regime for coordinating cross-border insolvencies. It aims to provide for "limited but effective cooperation" and compatibility with all existing legal systems.¹² The basic structure of the regime involves the designation of a principal jurisdiction, which is responsible for the main proceeding in a transnational insolvency, and which is determined by identifying the common

⁸ See, e.g., Sumant Batra, *Corporate Insolvency: Law and Practice*, 580 EBC LUCKNOW (2017) ("It was widely expected that India would adopt [a] framework to deal with cross-border insolvency issues as part of IBC. That did not happen.").

⁹ *Id.* at 586.

¹⁰ N.L.Mitra, *Report of The Advisory Group on Bankruptcy Laws*, RESERVE BANK OF INDIA (May 9, 2001). See also, UNCITRAL Model Law on Cross Border Insolvency, U. N. Comm'n on Int'l Trade (May 30, 1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

¹¹ *Report of the Joint Committee on the Insolvency and Bankruptcy Code*, LOK SABHA 43,44 (Apr. 28, 2016), https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf.

¹² *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Docs. 19 (Jan. 2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

debtor's "center of main interest." Pursuant to the model law, courts and official actors in other jurisdictions recognize the main proceeding, and parties and legal officials in these different jurisdictions cooperate and coordinate with each other as needed to fairly and efficiently resolve any cross-border issues. The model law has now been adopted by 48 countries and 51 jurisdictions.¹³

UNCITRAL's model law on cross border insolvencies did not include provisions specifically regarding recognition of foreign judgments, which has proved to be a troublesome omission.¹⁴ As a result, UNCITRAL promulgated a Model Law on Recognition and Enforcement of Insolvency-Related Judgments in 2018.¹⁵ The stated purpose of this new model law is to "provide countries with a simple, straightforward and harmonized procedure for recognition and enforcement of insolvency-related judgments, thus complementing the [model law on cross border insolvency] to further assist the conduct of cross-border insolvency proceedings."¹⁶

Instead of adopting the UNCITRAL model law or some other regime addressing cross border insolvencies, India's Insolvency and Bankruptcy Code included two authorizing provisions regarding cross-border matters, sections 234 and 235.¹⁷ Section 234 provides generally that "[t]he Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code."¹⁸ It also provides that the Central Government may specify conditions for the application of the Code "in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor ... situated at any place in a country outside India with which reciprocal arrangements have been made...."¹⁹ Section 235 provides that resolution professionals in India may apply to the domestic adjudicating tribunal in

¹³ See *Status: UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Docs. (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status. Singapore, Myanmar, Israel, Bahrain and Zimbabwe have most recently adopted the model law.

¹⁴ Irit Mevorach, *Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?*, *Eur. Bus. Org. L. Rev.* (2021), <https://doi.org/10.1007/s40804-021-00204-4>.

¹⁵ *Model Law on Recognition and Enforcement of Insolvency-Related Judgments*, U.N. Docs. (July 2, 2018), <https://uncitral.un.org/en/texts/insolvency/modellaw/mlj>.

¹⁶ *Id.*

¹⁷ See Batra, *supra* note 8; see also Gabriela Roca-Fernandez, *Cross-Border Insolvency in India: A Resistance to Change*, *TULANE J. OF INT'L & COMP. L.* (forthcoming).

¹⁸ The Insolvency and Bankruptcy Code, 2016, §234(1) (India).

¹⁹ *Id.* §234(2).

a particular case to seek evidence or action regarding assets in another country²⁰ and that the tribunal “may issue a letter of request to a court or an authority of such country competent to deal with such request.”²¹

These provisions reflect the modern approach to cross-border insolvency matters outside of the UNCITRAL model law regime or other frameworks for addressing cross-border insolvencies.²² That approach relies on ad hoc agreements or “protocols” between parties, courts, and governments of different countries regarding procedural and, less commonly, substantive aspects of particular cross-border cases as they arise.²³ The transnational bankruptcy of Maxwell Communication in the 1990s, which involved bankruptcy and insolvency proceedings in the US and the UK, is widely known as one of the first and most important uses of such a formal protocol.²⁴ Maxwell Communication was an English company with most of its assets in the US. It had filed for bankruptcy under Chapter 11 of the US Code and also applied to an English court for administration. Administrators for both courts developed a procedural protocol for coordinating these cases, which was then approved by the two courts. As a result of this cooperation between courts in the US and England, the case represented what Jay Westbrook has described as “[a] remarkable sequence of events leading to perhaps the first world-wide plan of orderly liquidation ever achieved.”²⁵

The *Maxwell Communication* protocol was successful because the parties and actors involved in the U.S. and England were able to effectively cooperate. This

²⁰ *Id.* §235(1).

²¹ *Id.* §235(2).

²² See BATRA, *supra* note 8, at 574-78.

²³ U.N. COMM’N ON INT’L TRADE L. (UNCITRAL), PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION, at 32, U.N. Sales No. E.10.V.6 (2009) (“Very often the negotiation of cross-border insolvency agreements is initiated by the parties to the proceedings, including the insolvency practitioners or insolvency representatives and, in some cases, the debtor (including a debtor in possession), or at the suggestion and with the encouragement of the court; some courts have explicitly encouraged the parties to negotiate an agreement and seek the courts’ approval. The early involvement of the courts may, in some cases, be a key factor in the success of the agreement.”); See Bruce Leonard, *Co-ordinating Cross-Border Insolvency Cases* (INT’L INSOLVENCY INST., Working Paper, 2001), https://www.iiiglobal.org/sites/default/files/media/Coordinating_Cross_Border_Insolvency_Leonard.pdf.

²⁴ See *In re Maxwell Commc’n Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995).

²⁵ Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2535 (1996).

is sometimes a challenge,²⁶ and the exclusive reliance on protocols for resolving cross-border insolvency issues generally involves significant uncertainty and additional administrative or legal costs.²⁷

The various parties involved in the Jet Airways case faced this state of uncertainty when bankruptcy and insolvency proceedings were initiated in both the Netherlands and India. In India, this was one of the first cases involving significant cross-border matters under the new Insolvency and Bankruptcy Code.²⁸ Among other things, it raised some important questions of first impression about the governing law on cross-border insolvencies in India. Most notably, it was uncertain whether section 234 effectively limits the authority of the Indian tribunal to recognize the Dutch proceedings and the Dutch administrator and to approve a cross-border agreement regarding the case. The Mumbai National Company Law Tribunal found that section 234 required the Central Government to have entered into an agreement with the Netherlands before the tribunal could recognize the foreign proceeding and its administrator.²⁹

The National Company Law Appellate Tribunal did not view section 234 as a bar to recognizing the Dutch proceeding or authorizing cooperation with Dutch parties and officials. It directed the Indian resolution professional handling the case, in consultation with Jet Airways' committee of creditors, to reach an agreement with the Dutch trustee to facilitate cooperation and coordination in the case.³⁰ The

²⁶ See, e.g., James Joseph Farley Jr., *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 AM. BANKR. INST. J. 12 (1998).

²⁷ See, e.g., BATRA, *supra* note 8, at 583 (citing UNCITRAL).

²⁸ *State Bank of India v. Jet Airways (India) Ltd.*, Unreported Judgments, No. 707 of 2019, decided on 26 Sept. (NCLT), 14; See, e.g., Niral Sharma, *10 Years of Lehman Brothers' Bankruptcy: Here's what it meant for India*, CNBC TV18 (Sept. 15, 2018, 11:02 AM), <https://www.cnbc18.com/economy/10-years-of-lehman-brothers-bankruptcy-heres-what-it-meant-for-india-788261.htm>. Lehman Brothers' insolvency was the first large scale international insolvency that India faced, it only affected three Indian banks. India's creditors' exposure was limited at that point of time and therefore immediate harm was mitigated.

²⁹ *Jet Airways (India) Ltd.*, Unreported Judgments, No. 707 Of 2019 at 10 ("It is also important to the point out that this matter is of National Importance. The Corporate Debtor company has more than 20,000 employees, and its revival at the earliest by a viable Resolution Plan is essential. Therefore, the proceeding of this court cannot be stayed or withhold even for a single day based on the order passed by any foreign court, which is a nullity in the eye of law.").

³⁰ *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices) v. State Bank of India Company*, Appeal (AT) (Insolvency) No. 707 of 2019, decided on 26 Sept. 2019 (NCLT), <https://nclat.nic.in/Useradmin/upload/14485121915d8df2bae7814.pdf>, (stating that the appellate

Indian resolution professional and the Dutch trustee negotiated a protocol for the case, which the appellate tribunal approved, effectively making it a binding framework for the case.³¹ The protocol set out a process for cooperation between the Indian and Dutch courts.³² Among other things, the protocol as approved allowed the Dutch administrator to attend meetings of the creditors' committee³³ in the Indian insolvency proceedings but not to vote as part of the committee.³⁴

Notably, the terms of the protocol in the *Jet Airways* case effectively adopted the approach of the UNCITRAL model law³⁵ though neither India nor Netherlands have formally adopted the model law. It identified five objectives: communication, comity, coordination, preservation through maximization of assets, and information and data sharing. It declared that India was the center of main interest (COMI) and that all proceedings in the case in India were to be considered main proceedings while the Dutch proceedings were non-main proceedings.³⁶ Representatives from both jurisdictions were also required to exchange a list of creditor claims from their respective jurisdictions.³⁷

Jet Airways ultimately found purchasers in a consortium consisting of UK-based Kalrock Capital and UAE-based Murari Lal Jalan, which bid an amount not much higher than the liquidation value of the company, allowing for some payment towards the Dutch creditors.³⁸ The experience in that case shows that it is possible to resolve particular cross-border insolvency cases without a formal standing

tribunal "directed the RP under the Indian Proceedings to reach an arrangement/agreement with the Dutch Trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch Trustee in the best interest of the Company and all its stakeholders.").

³¹ *Id.* at 1.

³² *Id.*

³³ *Id.* at 18.

³⁴ *Id.*

³⁵ *Id.* at 5-6.

³⁶ *Id.* But see Bob Wessels, *Jet Airways Insolvency Protocol* (July 5, 2020), <https://bobwessels.nl/blog/2020-07-doc1-jet-airways-insolvency-protocol/>, (raising a question as to how an agreement should decide on 'international jurisdiction' which is a matter of public law). The Code of Civil Procedure of India provides for such understandings to be developed, and Section 234 and 235 of IBC already in place that empowers the central government to enter into reciprocal arrangements to cooperate in insolvency cases, the issue of jurisdiction is very much in line with the intention of the Indian legislation.

³⁷ *Id.* at 11.

³⁸ See *Jet Airways' CoC Approves Resolution Plan of Kalrock-Murari Jalan*, BUSINESS STANDARD (October 17, 2020), https://www.business-standard.com/article/companies/jet-airways-coc-approves-resolution-plan-of-karlock-murari-jalan-120101700513_1.html.

regime through ad hoc cooperative arrangements between parties and courts in different jurisdictions. But it also shows how a formal regime can reduce a great deal of uncertainty, unnecessary work and process, and potential points of tension. After all, the Indian tribunal adjudicating *Jet Airways*' insolvency initially refused to acknowledge the Dutch proceeding and its administrative agent. The protocol was adopted and employed only after the adjudicating tribunal was required to do so by the appellate tribunal. A good deal of time and energy was apparently spent negotiating, drafting, and adopting the protocol.³⁹ And in that case, the conflict between the Dutch and Indian proceedings was a bit of a sideshow in the larger context of a large corporate insolvency. Transnational issues will inevitably be much more consequential for the overall resolution of firms in other subsequent cases. In other words, although *Jet Airways* illustrates the viability of an ad hoc bilateral protocol to manage a cross-border insolvency, it also illustrates some of the potential benefits of the model law or another systematic approach.⁴⁰ It also illustrates the central role that the National Company Law Tribunals will play in the current regime and under any other frameworks that may be adopted, a topic discussed in more detail below.

It is possible that such a systematic approach could arise organically through practice and precedent by the National Company Law Tribunals.⁴¹ If so, the protocol adopted in *Jet Airways* could serve as an important initial step. And the National Company Law Tribunals have taken other steps toward developing a general approach to cross-border insolvencies. In the case of *State Bank of India v.*

³⁹ Sumant Batra, *Cross Border Insolvency Protocol Fills a Gap, But is Not a Comprehensive Law*, FINANCIAL EXPRESS (Nov. 1, 2019), <https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/> (noting that the protocol was adopted "after extensive negotiations").

⁴⁰ See BATRA, *supra* note 8.

⁴¹ National Company Law Tribunals (NCLTs) have been built on a unique design that combines both technical and judicial roles. Tribunal benches consist of a judicial member who is well versed in the area of corporate and commercial law and an executive member who has more direct commercial experience. Also, unlike courts, the NCLTs have been entrusted with both executive and judicial functions. NCLTs have adopted the traits of an inquisitorial system instead of an adversarial system. For example, the Tribunals have been given broad discretion to decide what evidence will be admitted by the parties and the power to question witnesses themselves.

Videocon Industries Limited & Ors.,⁴² for example, the National Company Law Tribunal of Mumbai was faced with a question regarding group companies of Videocon,⁴³ which was subject to an insolvency proceeding. Some of Videocon's subsidiaries were insolvent, and some were located outside India and held foreign assets, including oil and gas fields in Brazil and Indonesia. A request was made by a guarantor and shareholder of the company to consolidate all the assets of the group for the benefit of the creditors of the parent companies that had gone insolvent. The Tribunal lifted the corporate veil, effectively consolidating the Videocon group, and allowed the foreign assets to be liquidated. It did so without much discussion about the cross-border insolvency issues raised by its action and without taking into account the domestic or cross-border insolvency laws prevailing in foreign jurisdictions affected by its decision.

It appears, however, that policymakers in India are committed to adopting a formal cross-border insolvency regime rather than letting one develop organically through practice. The government convened an Insolvency Law Committee in 2018, which recommended adopting the UNCITRAL model law with some specifications and modifications.⁴⁴ These modifications include, among other things, initially adopting the model law only on a reciprocal basis; allowing for a public policy exception to some applications of the model law; modifying the "hotchpot rule" of the model law; not giving the adjudicating authority power to modify or terminate moratoria;⁴⁵ not allowing interim relief until foreign proceedings are recognized;⁴⁶ not requiring individual notice to foreign creditors;⁴⁷

⁴² *State Bank of India v. Videocon Industries Limited & Ors.*, (2020) MA 2385/2019 in C.P.(IB)-02/MB/2018 (order dated February 12, 2020), https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/State%20Bank%20of%20India%20MA%202385%20of%202020%20in%20CP%28IB%29-02_2018%20NCLT%20ON%2012.02.2020%20FINAL.pdf.

⁴³ Videocon group was one of the 12 largest accounts that Reserve Bank of India referred for insolvency resolution in 2016. *See supra* note 5.

⁴⁴ India, Ministry of Corporate Affairs, *Report of Insolvency Law Committee on Cross Border Insolvency* (2018), available at https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf; *See also* Neeti Shikha, *India's Tryst with Cross Border Insolvency, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE* (Insolvency and Bankruptcy Board of India), 323-334 (2020), <https://vidhilegalpolicy.in/wp-content/uploads/2020/10/2020-10-01-210733-43cms-9224c9b668aac0d6149a5d866bfb4c79-1.pdf>.

⁴⁵ *Id.* at Article 20 of the model law grants allows for the modification or termination of a moratorium. The Committee suggested that no such power needs to be given to the AA.

⁴⁶ *Id.* at 35; cf. Article 19 of the Model Law.

⁴⁷ *Id.* at 28; cf. Article 14(2) of the Model Law.

and not granting foreign representatives the power to examine witnesses.⁴⁸ It recommended deferring adoption of the UNCITRAL model law on recognition of judgments at the present, based on concerns about the implication for that model law on other aspects of India's procedural laws.⁴⁹

There have been some indications that the Indian government is inclined to adopt the regime proposed by the Committee. The Ministry of Corporate Affairs ("MCA") created an advisory group to develop rules and regulations for the proposed regime, which the group submitted in May 2020. It remains a bit of a mystery why policymakers in India have not acted upon these recommendations. The MCA also charged the advisory group with drafting and incorporating a regulatory framework for enterprise groups, which may partly explain the ongoing delay.⁵⁰

It is also possible that there is substantive concern or disagreement among policymakers behind the scenes that is responsible for the delay in progress on India's adoption of a cross-border insolvency regime. There had been surprisingly little debate or discussion in India about the Insolvency Law Committee's proposed adoption of the UNCITRAL model law for the better part of two years. In recent months, however, such debate and discussion has emerged, and at least some writers have expressed thoughtful criticism of the model law and have questioned whether India should adopt it.⁵¹ All commentators seem to agree, however, that India should adopt some formal, systematic approach to cross border insolvency roughly along the lines of the model law, i.e., some version of a cooperative, universalist regime. In fact, those who are critical of the UNCITRAL model law

⁴⁸ *Id.* at 38; cf. Article 21(1)(d) of the Model Law.

⁴⁹ See *Report of Insolvency Law Committee on Cross Border Insolvency*, *supra* note 44, at 40.

⁵⁰ K.R. Srivats, *Cross border insolvency: Krishnan panel submits report to Ministry*, BUSINESS LINE (May 29, 2020), <https://www.thehindubusinessline.com/news/cross-border-insolvency-krishnan-panel-submits-report-to-ministry/article31704229.ece>.

⁵¹ See, e.g., Sudhaker Shukla & Kokila Jayaram, *Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL*, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE (Insolvency and Bankruptcy Board of India) at 318. ("If India is looking for a regime that is more workable and extends the objectives laid down for domestic insolvency resolution to cross border situations, then the Model Law is clearly inadequate). See also, Shikha, *supra* note 44 (discussing "challenges posed by the Model Law in the past"); Mamata Biswal, *UNCITRAL Model Law on Cross Border Insolvency in the Indian Legal Landscape*, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE (Insolvency and Bankruptcy Board of India) (examining "advantages and challenges with the adoption of the Model Law in the Indian context).

and how it has operated tend to argue in favor of even greater harmonization and cooperation and reciprocal deference among jurisdictions.

III. INSTITUTIONAL CHALLENGES

While various authors and policymakers have focused on the need for a cross-border insolvency regime in India and how to design such a regime, this Essay addresses a different and narrower set of institutional challenges for managing transnational insolvencies in India, especially for the NCLT. For any country that aims to join an effective international regime for cross-border insolvency, designing and adopting a substantive framework is just one initial step. Doing so also requires employing it consistently and expeditiously according to the internal logic of the regime and in the spirit of transnational and cross-institutional cooperation. In other words, a framework for fair, efficient, and predictable treatment of cross-border insolvencies depends ultimately upon the institutions that employ it in each jurisdiction.

A. *Developing Expertise*

All of the available options for an approach to cross-border insolvencies in India – including the *status quo* – depend on the NCLT for their operation. As an initial matter, the tribunals bear responsibility for developing expertise in the procedural and substantive machinery of any adopted approach. If India adopts the UNCITRAL model law as proposed by the Insolvency Law Committee, that regime will require the NCLT, among other things, to develop a set of practices and procedures for enabling foreign parties and officials to engage with the Indian IBC ecosystem as well as some practices and procedures for domestic parties and officials seeking to be involved in foreign procedures. Some of these practices and procedures will be analogous to already familiar features of the domestic legal system, but some will be less familiar, especially those that relate specifically to transnational engagement and interaction or those that relate to general aspects of the IBC that are still evolving or unsettled.

Furthermore, most of the crucial features of the regime are legal standards, not bright line rules, which depend on judicial interpretation and construction.⁵² The Model Law purposefully embraces flexibility and the likelihood of some variation in approaches across jurisdictions.⁵³ Yet the aim of the Model Law is to develop as much uniformity and predictability as a set of international standards can afford, and adopting states are encouraged to formally endorse an “international” approach to interpretation and implementation of the regime.⁵⁴ As UNCITRAL notes in its *Practice Guide* to the Model Law, regardless of the design of the regime in place, “the absence of predictability as to how [cross-border insolvency laws] will *be applied* and the potential cost and delay involved in application” adds “a further layer of uncertainty that can impact on capital flows and cross-border investment.”⁵⁵

It is therefore important for the international operation of the regime that domestic courts help develop an international jurisprudence that is as coherent and consistent as possible under the circumstances. If India adopts the UNCITRAL model law, the tribunals will need to develop expertise in the new and elaborate legal regime and develop a domestic jurisprudence construing the rules of that regime. They will presumably do so through caselaw and will be influenced by globally emerging jurisprudential approaches. In particular, the NCLT will be

⁵² U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE, at 1 (2013), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf> (“In each case, the judge will determine the case at hand on the basis of domestic law, including the terms of legislation enacting the Model Law.”).

⁵³ *Id.* at 1-2 (“The present text does not purport to instruct judges on how to deal with applications for recognition and relief under the legislation enacting the Model Law. As a matter of principle, such an approach would run counter to principles of judicial independence. In addition, in practical terms, no single approach is possible or desirable. Flexibility of approach is all important in an area where the economic dynamics of a situation may change suddenly. All that can be offered is general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.”).

⁵⁴ *Id.* at 7 (“While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins, the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the “international” approach in its own legislation. In any event, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.”).

⁵⁵ See UNCITRAL, PRACTICE GUIDE, *supra* note 23, at 9 (noting that the degree of specification of rules in legislation can help steer courts in their inclination to cooperate and coordinate with other jurisdictions) (emphasis added).

required to develop approaches to determining, for example, whether someone is a foreign representative;⁵⁶ whether to recognize a foreign proceeding;⁵⁷ whether a recognized foreign proceeding is a main proceeding or non-main, including how to determine the debtor's center of main interest;⁵⁸ how to define a "debtor;"⁵⁹ how to apply public policy exceptions;⁶⁰ and what discretionary relief is allowed and under what conditions.⁶¹

The NCLT's approach to determining the center of main interest, for example, can be important and consequential in particular cases, for the predictability of India's cross-border insolvency regime, and for the relationship of India's regime with the broader global framework. Analysis of that issue governs the critical question of which country's insolvency laws will apply in a particular case. Under the UNCITRAL Model Law, there is a presumption that a corporate debtor's state of registration is its center of main interest, but cases on the issue have recognized that this presumption is often rebuttable and thus requires a workable and predictable legal test.⁶²

Recognizing the centrality of the judicial role in adopting countries and the numerous challenges that poses, UNCITRAL has developed various guides for judicial actors. These include *The Judicial Perspective*, which focuses primarily on jurisprudential issues that judicial officers must navigate,⁶³ and a *Practice Guide*, which focuses on modes and procedures for cooperation and

⁵⁶ See UNCITRAL, THE JUDICIAL PERSPECTIVE, *supra* note 52, at 11-14.

⁵⁷ See *id.*

⁵⁸ See *id.* at 20-45.

⁵⁹ See *id.* at 12.

⁶⁰ See *id.* at 18-20.

⁶¹ See *id.* at 48-65.

⁶² See BATRA, *supra* note 8, at 588-90; Aparna Ravi, *Filling in the Gaps of the Insolvency and Bankruptcy Code – Cross Border Insolvency*, INDIA CORPLAW BLOG (2016), <https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html>; Alexandra C.C. Ragan, Comment, *COMI Strikes a Discordant Note: Why U.S. Courts are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117 (2010).

⁶³ See UNCITRAL, THE JUDICIAL PERSPECTIVE, *supra* note 52, at 9 ("Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver, Canada, in June 2009, expressed the view that consideration should be given to the provision of assistance to judges (subject to the overriding need to maintain judicial independence and the integrity of a particular State's judicial system) on ways to approach questions arising under the Model Law.").

communication among and between judicial actors in different jurisdictions.⁶⁴ The Model Law itself includes examples of such modes and procedures that have been profitably used in other circumstances.⁶⁵ Developing a reliable and responsive system of engagement is particularly important in an insolvency context, where the early stages of a case often pose very time sensitive issues.⁶⁶

In sum, the development and operation of the UNCITRAL Model Law or a similar regime in India will demand a great deal of the NCLT and its officials, including start-up efforts, a new area of doctrinal expertise, and development of processes for transnational cooperation and coordination. There is every reason to believe that the NCLT and its officials are up to the task, and its quick adoption and implementation of the IBC itself since 2016 is evidence of such capacity. But it is important for policymakers to be clear about what will be involved and the necessary institutional work should not be underestimated.

B. Beyond Rules

While the NCLT and its officials have the ability and capacity to implement an effective cross-border insolvency regime, it is still important that they have the inclination to do so. And the extent of the institution's inclination in this regard is more difficult to assess. Among other things, cooperation under such a regime will require the tribunals in some circumstances to cede authority over domestically significant relationships and interests, accord an uncommon degree of deference to foreign institutions and actors, and sometimes to avoid application of familiar

⁶⁴ See UNCITRAL, PRACTICE GUIDE, *supra* note 23, at 1 (“The purpose of the Practice Guide on Cross-Border Insolvency Cooperation is to provide information for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases ...”); *see also* UNCITRAL, THE JUDICIAL PERSPECTIVE, *supra* note 52, at 10. (“An essential element of cooperation is likely to be the encouragement of communication among the insolvency representatives and/or other administering authorities of the States involved.”)

⁶⁵ See UNCITRAL Model Law, Article 27 (“Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including: (a) Appointment of a person or body to act at the direction of the court; (b) Communication of information by any means considered appropriate by the court; (c) Coordination of the administration and supervision of the debtor’s assets and affairs; (d) Approval or implementation by courts of agreements concerning the coordination of proceedings; (e) Coordination of concurrent proceedings regarding the same debtor; (f) [The enacting State may wish to list additional forms or examples of cooperation].”)

⁶⁶ See UNCITRAL, THE JUDICIAL PERSPECTIVE, *supra* note 52, at 10-11. “As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.” *Id.* at 11.

domestic legal principles. In many cases such cooperation will work to the disadvantage of domestic interests in relation to foreign ones.⁶⁷ Thus, whatever design choices are made by Indian policymakers in adopting a cross-border insolvency regime, the success of that regime will depend on the NCLT and its judges to have a robust inclination and commitment to cooperate with foreign courts and their agents or administrators.⁶⁸

There are reasons to be concerned that the tribunals currently lack experience relevant to this type of transnational cooperation and, perhaps, that they may be hesitant to embrace it. As an initial matter, Indian courts and tribunals have some experience with this type of transnational institutional cooperation, but not much. The Code of Civil Procedure includes some provisions that can facilitate transnational judicial cooperation.⁶⁹ Yet, Indian courts have seldom used these provisions to coordinate or cooperate with foreign counterparts. The few instances of court-based cooperation with foreign counterparts have been in the context of criminal cases in areas such as money laundering and terrorism, civil cases involving familial disputes, and enforcement of arbitral awards.⁷⁰ In most cases where cooperation with foreign jurisdictions has been deemed useful, diplomatic routes involving Ministry of External Affairs have been utilized.⁷¹

⁶⁷ Imagine, for example, a case in which a company in California, operates in India through a branch office, through which it has acquired assets in India. If that company experiences financial distress, the COMI should presumably be in California. Yet, important domestic stakeholders in India, such as creditors, workers, state banks, and taxing authorities, may not fare as well under U.S. law as under Indian law.

⁶⁸ It will also depend on the Central Government's and the Insolvency and Bankruptcy Board of India's support and encouragement of the tribunals' efforts in that direction. This Essay focuses on the NCLT, which bears most responsibility for implementing and operating the cross-border insolvency regime.

⁶⁹ See India, Code of Civil Procedure, 1908, §§ 13, 14, 44A.

⁷⁰ Examples of this include the case of Kingfisher Airlines' promoter, Vijay Mallya and the UK courts. Mallya, owes 17 Indian banks an estimated Rs 9,000 crores and has been accused of fraud and money laundering in the country. India has worked with the UK government to secure extradition of Mallya. See *Who is Vijay Mallya*, BUSINESS STANDARD, <https://www.business-standard.com/about/who-is-vijay-mallya>; see also *What is PNB Scam*, BUSINESS STANDARD, <https://www.business-standard.com/about/what-is-pnb-scam>.

⁷¹ See, e.g., India, Ministry of External Affairs, Annual Report (2020-21), at p.27, available at http://www.mea.gov.in/Uploads/PublicationDocs/33569_MEA_annual_Report.pdf; 18 *Fugitives Brought Back to India in Five Years*, BUSINESS STANDARD (Mar. 20, 2019) https://www.business-standard.com/article/news-ians/18-fugitives-brought-back-to-india-in-five-years-119032001145_1.html.

The Code of Civil Procedure also governs the recognition and enforcement of foreign judgments and provides that a “decree” passed by the foreign court may be executed in Indian territory if: i) decree is passed by superior court; and ii) the court is situated in a “reciprocating territory.”⁷² In practice, the application of this provision has been limited by the fact that reciprocity has been confined to few countries.⁷³ Enforcement of foreign judgements from reciprocating states can be denied if they are found to have been obtained by fraud⁷⁴ or if it is inconsistent with India’s public policy.⁷⁵ To enforce a judgment from a non-reciprocating state, a new suit must be filed before an Indian court and such judgment will only have evidentiary value.⁷⁶ In general, however, it appears that Indian courts are now generally amenable and have substantial experience in enforcing foreign judgements and arbitral awards.⁷⁷ As the NCLT is not formally a court, however, there has been some uncertainty about the ability of its tribunals to recognize foreign judgments under the existing legal framework.⁷⁸

⁷² India, Code of Civil Procedure, 1908, § 44A. Currently, reciprocating territories include UK, Singapore, New Zealand, and Bangladesh, among others. Once recognized, foreign judgments become conclusive for the concerned parties, with few exceptions, which have been laid down in Section 13 of Code. It is noteworthy that these provisions of the Code of Civil Procedure could theoretically provide the same authority as the new sections 234 & 235 under the Insolvency & Bankruptcy Code.

⁷³ Unreported Judgements, *M/s. Stanbic Bank Ghana Limited v. Rajkumar Impex Pvt Ltd.*/670 of 2017, decided on Apr. 27, 2018 (NCLT), 28.

⁷⁴ See, e.g., *Satya v. Teja Singh*, AIR 1975 SC 105 (1974) (India).

⁷⁵ *Id.*; see also *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* (2003) 5 SCC 705.

⁷⁶ See, e.g., *Moloji Narsingh Rao v. Shankar Saran and Others*, AIR 1955 All 490.

⁷⁷ The Supreme Court has enunciated that “a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 CPC.”; See Unreported Judgements, *M/S Alcon Electronics Pvt. Ltd v. Celem S.A.of FOs 34320 Roujan, France & Anr./* 10106 of 2016, decided on Dec. 9 (SC), 6; See also Unreported Judgements, *Arvind Jeram Kotecha v. Prabhudas Damodar Kotecha*/37 2005 decided on Nov. 28, 2019 (BHC), 18-19 (where the court also emphasized “the necessity of maintaining foreign rights outweighs practical difficulties in applying the foreign remedy.”).

⁷⁸ See Unreported Judgements, *Usha Holdings LLC & Anr v. Francorp Advisors Pvt Ltd., Company Appeal (AT) (Insolvency)*. 44 of 2018, decided on Nov. 30, 2018 (NCLAT). (In *Usha Holdings*, the NCLT’s decision regarding a foreign decree was nullified by the NCLAT, which found that “Adjudicating Authority not being a ‘Court’ or ‘Tribunal’ and ‘Insolvency Resolution Process’ not being a litigation, it has no jurisdiction to decide whether a foreign decree is legal or illegal. Whatever findings the Adjudicating Authority has given with regard to legality and propriety of foreign decree in question being without jurisdiction is nullity in the eye of law.”)

It is also unclear what status these provisions have in cases arising under the Insolvency and Bankruptcy Code, or whether sections 234 and 235 preempt them to some extent. At least one tribunal has found, implicitly, that they are not preempted. That tribunal took cognizance of a foreign decree passed by a commercial court of London pursuant to Sections 13 and 44A of the Civil Procedure Code to establish the existence of debt towards the corporate debtor and admitted the claim of a foreign financial creditor under the Code.⁷⁹

If the UNCITRAL Model Law will require the NCLT to embrace a relatively new approach to transnational cooperation, there are reasons to believe that the NCLT may actually have some institutional ambivalence that may generate some resistance to doing so. In similar cases prior to the new Code, Indian courts and NCLT had consistently followed a “territorial” approach to cross-border matters and had not generally endeavored to cooperate or coordinate with foreign courts or governments, hallmarks of a “universalist” approach.⁸⁰ Consistent with a territorial approach, the Companies Act, 1956, does not discriminate between

⁷⁹ See *id.* (admitting the petition of a creditor whose ordinary place of residence was Ghana for initiation of CIRP against Indian debtor).

⁸⁰ These two approaches, and debate over them, have defined the field of cross border insolvency and its legal development around the globe. As one writer explains,

In simplified terms, two polar approaches to the adjudication of international insolvencies exist: universalism and territorialism. In its purest form, universalism would have all bankruptcy claims adjudicated within the debtor's "home country" and would apply the substantive laws of that country. Based on the law of that jurisdiction, the assets of the firm would be distributed to creditors around the world. The alternative to universalism is territorialism or, more pejoratively, the "grab rule." Under this rule, "the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules."

(quoting Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991) (advocating a modified universalist approach). See also generally Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) for a critique of universalist approaches.

domestic and foreign creditors,⁸¹ a posture extended under the IBC as well.⁸² It also provides that a foreign company could be wound up under Indian law if it had assets or an office in India⁸³ irrespective of whether or not a competent court in another jurisdiction had passed a winding up order.⁸⁴

Thus, employing a universalist-leaning cross-border insolvency regime such as the UNCITRAL model law will at times require the NCLT judges to embrace a role that is quite different than their role before the new regime and under it to date. In particular, it will require a shift to a type of cooperation and coordination that entails resisting inclinations to assert authority they currently enjoy, with significant and determinative impacts. The *Jet Airways* and *Videocon* cases, decided under the new Code, offer somewhat ambiguous and concerning indications of the NCLT's inclination to make this shift. The Mumbai NCLT initial order refusing to recognize the Dutch administrators in the *Jet Airways* case may simply reflect a conservative reading of the Tribunal's lack of authority under the Code, but it may also reflect an underlying lack of enthusiasm for recognizing the Dutch proceeding or cooperating with the Dutch administrator. On the other hand,

⁸¹ This principle has been recognized in two cases where the Supreme Court emphasized that no discrimination can be made between foreign creditors and domestic ones because it would violate Article 14 of the Constitution of India that promises right to equality to all 'persons' whether citizens or foreigners. *In re Travancore National and Quilon Bank, Ltd. L.Raghuraja Bharath and others*, AIR 1939 Mad 318 (1938) (India); see also *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.* (1962) 1 SCR Supl. 344. See also *Raja of Vizianagaram v. Official Receiver* AIR 1962 SC 500 (1961) (India) which also reiterated the same principle in the context of the winding up of a foreign company before Supreme Court. *Macquarie Bank Limited* involved a case of a foreign operational creditor who wanted to initiate insolvency against a company registered in India; Indian High Level Committee, *supra* note 6, at 4.33 (finding that under the pre-Code law "there is no need for making any special provision to protect the interest of foreign investors and they should be treated at par with the Indian creditors.").

⁸² See, *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.* (1962) 1 SCR Supl. 344, (establishing that foreign creditors have the same right as domestic creditors to initiate and participate in proceedings under IBC and defining 'person' under S. 3(23)(g) to include persons residing outside India).

⁸³ Companies Act, 1956, § 582, 584; see also *id.* § 588 (The Companies Act, 1956 empowered the Indian courts to consider winding up of a foreign company if it had a place of business in India).

⁸⁴ For example, in a pre-Independence case, *Travancore National Bank Ltd.*, Mad. HC, 318 (1939), the Madras High Court, a state high court, was faced with an application for restructuring after a final winding up order had been passed by the Travancore Court (the then princely state which was considered independent from India, though under British empire) and applications for winding up were pending before other foreign courts. The Madras High Court decided that an earlier version of the Companies Act gave it discretion to decide on the liquidation of an unregistered company (foreign company) independently of other foreign courts' decisions.

the appellate Tribunal's decision requiring the Mumbai Tribunal to engage with the Dutch proceedings does seem to reflect a broader and more general embrace of institutional cooperation. The Tribunal's unilateral treatment of foreign creditors in *Videocon* may reflect an inclination to assert authority over transnational relationships, but its stated commitment to treating foreign creditors equitably also reflects some capacity for avoiding local favoritism.

The National Company Law Tribunal's approach to implementing and employing the Insolvency and Bankruptcy Code in general may also provide some basis for anticipating how they would employ a formal cross-border insolvency regime. Here, the evidence suggests that the NCLT may hesitate to fully embrace a universalist and cooperative regime. Broadly speaking, the Code was expressly designed to reduce the judicial function in insolvency and bankruptcy cases.⁸⁵ Most important decisions under the Code were designed to be made by creditors or resolution professionals,⁸⁶ and these were subject to specific and strict time limits.⁸⁷ Furthermore, judicial approvals and other actions were also designed to be subject to rather rigid time limitations. This design almost certainly underestimated the judicial functions necessary to implement and operate the insolvency and bankruptcy system and the open questions left by the Code for the tribunals to interpret and construe. In any event, at various junctures over the years since the Code's inception tribunals and courts have interpreted or construed the Code to allow for a more active adjudicatory and judicial role than was intended by the drafters of the Code and the Parliament.

In fact, over a period of time, the enacted structure of the Code has been significantly transformed through legal precedent and judicial pronouncements by tribunals, appellate tribunals, and the Supreme Court. Among other things, these

⁸⁵ See Bankruptcy Law Reforms Committee, *Volume I: Rationale and Design*, supra note 3, at 3.4.3. See also *Report of Insolvency Law Committee on Cross Border Insolvency*, supra note 44, at 36 (noting and supporting the Code's limit on judicial discretion).

⁸⁶ "The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it." Bankruptcy Law Reforms Committee, *Volume I: Rationale and Design*, supra note 3, at Executive Summary.

⁸⁷ *Id.* at 3.4.2(III).

transformations have involved expanding the definition of financial creditors;⁸⁸ judicial intervention to affect which bidder's resolution plan is accepted;⁸⁹ and the relaxation of strict timelines for actions under the Code, often to extend the time available for the bidding process.⁹⁰ Tribunals of the NCLT have also caused some confusion regarding their role in the IBC system with recent decisions, including by declining to exercise its powers to determine whether particular transactions were preferential, referring the question to the Central Government.⁹¹ Similarly, the NCLT and the Supreme Court have also created some confusion under the Code by extending opportunities for debtor firms to be resolved rather than liquidated.⁹² The NCLT has not yet developed a consistent approach to letting bidders withdraw

⁸⁸ Chitra Sharma & Ors. v. Union of India (Writ Petition (Civil) No.744 of 2017). That decision was subsequently codified as an amendment to the IBC, at section 5(8)(f).

⁸⁹ Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors., Nov. 2019, Supreme Court.

⁹⁰ "So far, for example, there has been a final outcome in five of the 12 cases that the RBI required banks to refer to the IBC, and the average time to outcome has been 333 days. In the remaining seven, an average of more than 415 days have passed since these cases came to IBC. The timeline has far exceeded even the extended time of 270 days that the IBC prescribes. The IBC envisaged that at the end of this 270-day period, if creditors could not agree on a resolution plan, the company would enter liquidation." Varun Marwah & Anjali Sharma, *Watching the IBC Lessons from the RBI 12 Cases*, BloombergQuint, available at <https://www.bloombergquint.com/insolvency/watching-the-ibc-lessons-from-the-rbi-12-cases>.

⁹¹ That decision was reversed on appeal. See Mohan Lal Jain, Liquidator of Kaliber Associates Pvt. Ltd. v. Lalit Modi & Ors. NCLAT New Delhi (Dec. 16, 2020).

⁹² In a recent case, even post admission of a winding-up petition and after a company liquidator had also been appointed to take over the assets of the company, the Supreme Court declared that "discretion is vested in the Company Court to transfer such petition to the NCLT." Action Ispat And Power Pvt. Ltd. v. Shyam Metalics and Energy Ltd. Civil Appeal no. 4041 of 2020, Supreme Court, 15 December, 2020. Similarly, in the case of Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd, (2019) 4 SCC 227, the Supreme Court has held that "it was open to a financial creditor to any time before a winding up order is passed to apply under section 7 of the Code" for initiating resolution process. See also Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd. Tribunals and the Supreme Court have also found that the value of a bid for resolution of a firm does not need to be more than liquidation. See KT Jagannathan, *With Orchid Pharma Case, Supreme Court Removes an Important Roadblock in the IBC Process*, The Wire, Mar. 4, 2020, available at <https://thewire.in/law/with-orchid-pharma-case-supreme-court-removes-an-important-roadblock-in-the-ibc-process>. Requiring that creditors consider a bid lower than a debtor's liquidation value a significant deviation from the goal of the drafters of the IBC.

or modify their bids for insolvent debtors,⁹³ a process that was intended to be straightforward and limited under the Code.⁹⁴

Such decisions by the NCLT under the new Code were presumably based on pragmatic considerations by an institution vested with the responsibility for operating the new insolvency system. They were also based on general background legal principles or inherent powers of the NCLT. Many of these decisions have been controversial. Assuming that all of the tribunals' actions and decisions were justified as a matter of domestic insolvency law, they nonetheless suggest that the tribunals have been inclined to assert their adjudicatory authority and to wield background legal principles to construe and implement the statutory regime. It is fair to say that at least some of the tribunals' decisions under the Code have not been characterized as institutionally modest.

Again, while this institutional inclination may be appropriate and necessary to help develop a new and complex domestic legal regime, it is potentially in tension with the mode and posture expected of domestic courts and tribunals participating in a universalist cross-border insolvency regime like the UNCITRAL Model Law. We are confident that the NCLT can perform this role, but policymakers in India should be cognizant that this will be a somewhat new and unfamiliar one, with regard to both practical mechanics and the deeper institutional role. Therefore, if India aims to adopt the UNCITRAL Model Law or a similar

⁹³ Compare *Metalyst Forging Ltd. v. Deccan Value Investors LP*, Company Appeal (AT) (Insolvency) No. 1276 of 2019 and *Tarini Steel Company Pvt. Ltd. v. Trinity Auto Components Ltd. & anr.* Company Appeal (AT) (Insolvency) No. 75 of 2018 with *Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd. & Anr.*: NCLAT (July 29, 2020), and *Astonfield Solar (NCLT Delhi) Company Appeal (AT) (Insolvency) No. 653 of 2020* (Sept. 30, 2020).

⁹⁴ The Central Government has instituted numerous significant changes to the regime as enacted by Parliament. This includes, for example, dramatically limiting the circumstances in which shareholders can bid on their firms and exerting pressures to encourage tribunals and resolution professionals to prefer reorganizations over liquidations. Most dramatically, the Central Government passed an ordinance in March 2020 that suspended the right to file applications to initiate insolvency under Code during the current Covid-19 pandemic. However, the proviso to the section suggests that insolvency resolution proceedings can never be initiated for the defaults that have arisen during the pandemic. But this remains ambiguous and uncertain. Although the provision is intended to protect small enterprises (MSMEs), it negatively affects the interests of other stakeholders, including foreign creditors, who would otherwise be able to initiate insolvency proceedings against the defaulting Indian companies. See Priya Misra, *Challenges to Corporate Insolvency Law in the times of COVID 19*, 126 TAXMANN.COM 34 (Apr. 3, 2021), <https://www.taxmann.com/research/ibc/top-story/10501000000020294/challenges-to-corporate-insolvency-law-in-the-times-of-covid-19-experts-opinion>.

variant, it will be important for policymakers to help emphasize the fundamental cooperative vision underlying the UNCITRAL Model Law and its variants, and to help prepare the NCLT for this new and unique role in the Indian legal landscape.

CONCLUSION

Policymakers in India deferred including a regime for cross-border insolvencies in the otherwise comprehensive Insolvency and Bankruptcy Code of 2016. Since then, there has been within the country a growing interest in such a regime and understanding of the need for one. The government has proposed adopting the UNCITRAL model law on cross-border insolvencies with some modifications, spurring a flurry of discussion and debate about the design of that particular regime and other possible alternatives. It appears likely, although not certain, that the country will soon adopt the model law as proposed by the government.

What has been lost in much of the discussion and debate over the topic since the adoption of the Code, is that the effectiveness of any approach to cross-border insolvency depends not only on the design of the legal regime but also on other various institutional factors. Chief among these is the performance of the judicial officials of the National Company Law Tribunal who are charged with employing the regime to resolve cross-border insolvencies. As an initial matter, these tribunals will need to develop expertise in the growing jurisprudence related to the UNCITRAL model law or other approaches to cross-border insolvencies around the globe. Furthermore, any modern approach to cross-border insolvencies, and especially the UNCITRAL model law, is premised on a high degree of international cooperation, efficient communication and coordination, and, occasionally, the exercise of deference to foreign jurisdictions and judicial actors. The tribunals have limited experience with this kind of highly cooperative and deferential approach to cross-border commercial litigation, so the underlying institutional capacity to employ the regime as designed will need to be developed over time. Policymakers should anticipate that after the legal design of India's cross-border insolvency regime is settled, careful attention should be given to implementing it by, among other things, helping the NCLT develop the necessary expertise and an institutional commitment to the basic principles of the new regime.