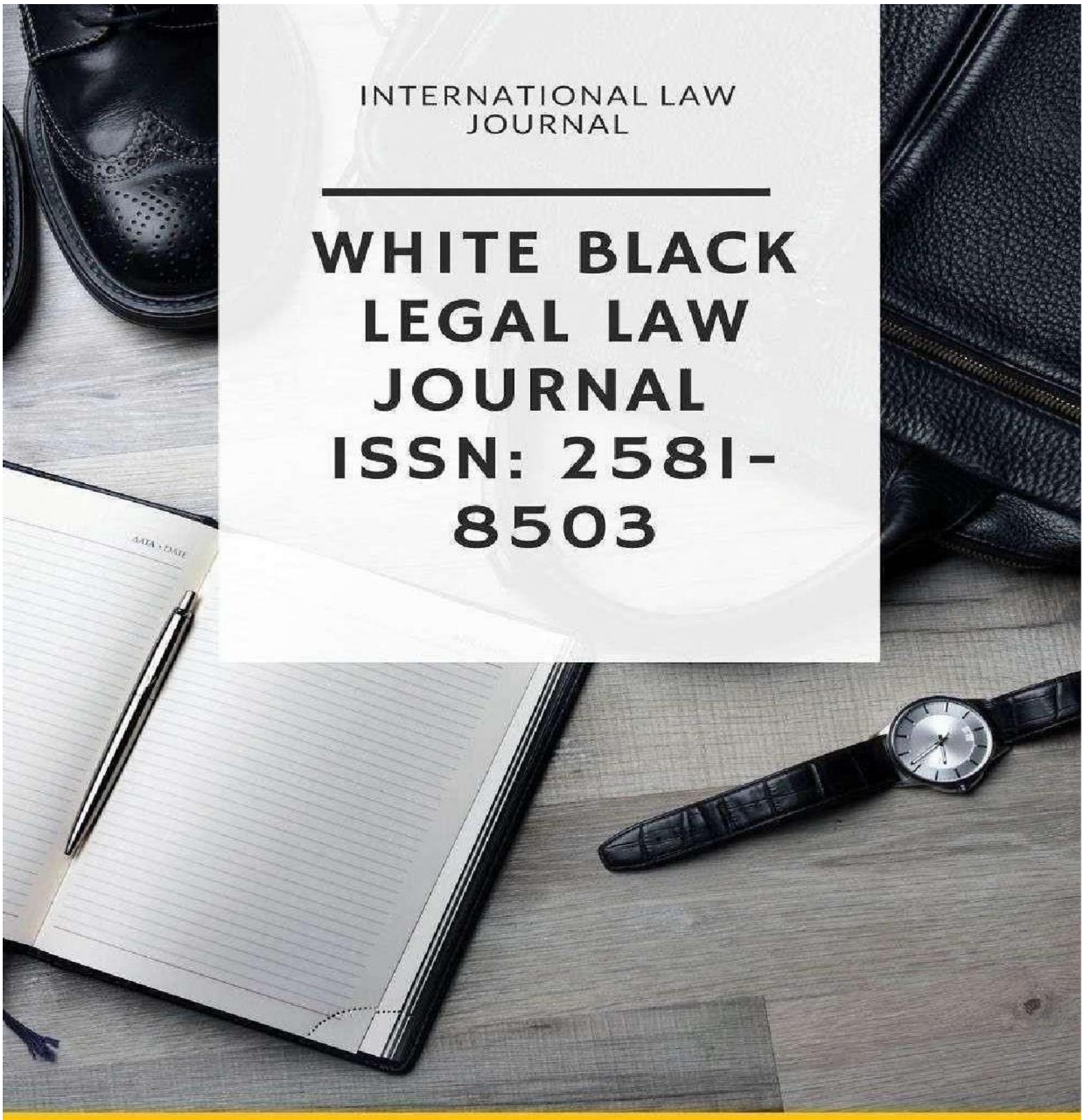

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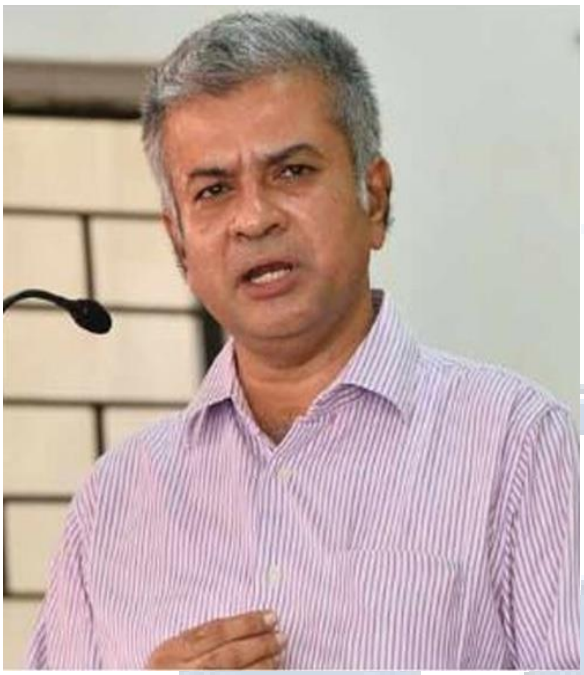

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

GLOBALISING DISTRESS: UNDERSTANDING CROSS BORDER INSOLVENCY, PROSPECTS AND CHALLENGES

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016, has been nothing short of transformative in the domain of insolvency resolution in India. This legislation has not only changed the landscape but has profoundly modified the outlines of insolvency procedures, resulting in a new era of efficiency and effectiveness. The code consolidated various scattered laws relating to insolvency resolution and introduced efficient mechanisms, adjudicating and regulatory authority, and insolvency professionals to address the growing non-performing assets crises. However, in recent times, in the age of globalisation where economies of various nations are ever so interconnected, cross-border trade is inevitable. Considering the substantial expansion of Indian companies operating overseas and the presence of multinational enterprises in India, a bankruptcy code in the absence of a cross-border insolvency framework is a job half done. Following the enactment of the Code's provisions, within a year, the Ministry of Corporate Affairs constituted the Insolvency Law Committee to identify implantation issues of the Code and recommend amendments for the Code. After this, the committee in October 2018 submitted its second report recommending a comprehensive framework for cross-border insolvency under the code, based on the UNCITRAL Model Law for Cross-Border Insolvency, 1997. In light of these recommendations, this essay

examines India's cross-border regime, identifies implementation challenges, and advocates for a modified adoption of the Model Law. The essay is divided into IV parts. Part I highlights the impact of the code on India's NPA problem and examines the need for a Cross-border framework. Part II explains the theoretical approaches to cross-border insolvency and conceptualises the Model Law. Part III examines the current Indian legal framework for cross-border insolvency, reviews the code's provisions and identifies key issues in implementing a comprehensive cross-border framework. Finally, Part IV argues for the adoption of the Model Law with recommendations for the same.

I. THE DAWN OF A NEW ERA: THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016[1] **("IBC")** was enacted with a view to harmonise and consolidate the overlapping and fragmented provisions of several laws relating to reorganisation and insolvency resolution for corporates and non-corporates in a time-bound manner for the maximisation of values of assets of such persons[2]. Before 2016, there was no comprehensive and consistent legislation in India for resolving stressed enterprises, therefore it concentrated on holistic resolution rather than recovery.[3] Following its enactment, IBC has been considered transformative in addressing various complexities that arose under the previous framework. To understand the transformative nature of the law and effectively contextualise the gaps in the code, it is essential to study the factors that drove the efforts to consolidate fragmented insolvency laws. These factors, to state a few, include the non-performing assets **("NPAs")** crises that plagued the Indian economy for nearly two decades[4], immense confusion under previously fragmented frameworks and exploitation of these inadequate laws by debtors.

A. THE NPA CRISIS

The banking sector is the backbone of any financial system and is essential to preserve the general well-being of an economy. By taking deposits and granting loans, banks create credit. The money collected from debtors in the form of principal and interest payments is subsequently put back into

[1] The Insolvency and Bankruptcy Code, 2016 (Act No. 31 of 2016)
[2] Ibid, object.
[3] Gautam Bhatikar and Neha Naik, 'Cross-Border Insolvency: A Way Forward for the Indian Framework' (2022) 16.
[4] Meenakshi Kurpad, 'Formulating an Effective Cross-Border Insolvency Framework under the Indian Insolvency and Bankruptcy Code' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3614044>.

the development of resources. Cash reserves, balances with other financial institutions, investments, loans and advances, fixed assets, and other miscellaneous assets are just a few of the varied portfolios of assets that banks keep on file. Of these, the only ones that can be classified into the category of a NPA are loans, advances, and investments. As long as an asset generates the expected income and shows no signs of unusual risk above and beyond typical commercial risk, it is considered to be "performing." Conversely, an asset that fails to generate the expected income is termed an NPA. This terminology is used to denote assets that have ceased to be productive or profitable for the bank.

The rise of NPAs in India's banking sector can be traced back to the Asian financial crisis of 1997[5]. This crisis was characterized by financial contagion, which resulted in a significant increase in non-performing loans in several East Asian countries[6]. In India, the crisis coincided with a period of growing loan failures, resulting in a significant increase in the ratio of NPAs in the banking sector. This problem was compounded by the Indian banking sector's emphasis on lending based on government policies, a practice that grew increasingly prevalent following bank nationalization in 1969[7]. Inefficient lending procedures, along with a lack of proper oversight and monitoring, as well as instances of corruption over the years, posed significant hurdles to the banking sector's financial stability and integrity. Especially, to public sector banks.[8] NPAs of domestic commercial banks in India increased significantly from 3.4% of gross advances in March 2013 to 9.9% in March 2017.[9] In monetary terms, Indian banks Gross Non-Performing Assets **("GNPAs")** increased from Rs 53,917 crore in September 2008 to Rs 3,41,641 crore in September 2015.[10] Various initiatives have been taken over the last decade to address the problem of non-performing assets in the Indian banking industry. These include establishing asset reconstruction businesses, actively developing the corporate bond market, and most importantly enhancing creditor rights through the enactment and implementation of the insolvency and bankruptcy code[11]. Following these initiatives, there has been a significant improvement in the NPA situation. In March 2023, the net NPA ratio for India's

[5] ANSHU SK PASRICHAT, 'On Financial Sector Reform in Emerging Markets: Enhancing Creditors' Rights and Securitizing Non-Performing Loans in the Indian Banking Sector-An Elephant's Tale' 55 BUFFALO LAW REVIEW.
[6] 'Asian Financial Crisis | Causes, Effects, & Facts | Britannica' (15 December 2023) <https://www.britannica.com/money/topic/Asian-financial-crisis>.
[7] 'The Regulations That Govern Banking in India' (*Investopedia*) <https://www.investopedia.com/articles/investing/112714/regulations-govern-banking-india.asp>.
[8] PASRICHAT (n 6) at 330.
[9] 'Reserve Bank of India - Database' <https://rbi.org.in/Scripts/bs_viewcontent.aspx?Id=3478>.
[10] 'Explained in 5 Charts: How Indian Banks' Big NPA Problem Evolved over Years-Business News , Firstpost' <https://www.firstpost.com/business/explained-in-5-charts-how-indian-banks-big-npa-problem-evolved-over-years-2620164.html>.
[11] Kurpad (n 5).

scheduled commercial banks had fallen to a 10-year low of 3.9%[12]. Furthermore, both the gross and net NPA ratios have dropped significantly from their highs of 11.5% and 6.1% in March 2018 to 3.9% and 1.0% in March 2023 respectively.[13]

B. THE GROWING NEED FOR A CROSS-BORDER FRAMEWORK

Even though India has made impressive progress in tackling the NPA crisis and has proven to be effective in dealing with domestic insolvencies, it falls short in dealing with cross-border insolvencies. The lack of a comprehensive cross-border bankruptcy framework raises significant issues in an increasingly globalized world where enterprises operate across numerous jurisdictions. This lacuna in insolvency law complicates the resolution of NPAs associated with international firms and impedes the efficient administration of cross-border insolvencies.

'**Cross-Border Insolvency**' refers to a situation where an insolvent debtor has assets across multiple jurisdictions, or when the debtor's creditors are not all based in the jurisdiction where the insolvency proceedings have been initiated. Businesses often rely on loans for growth. When a business's assets and creditors are primarily Indian, the Code governs insolvency proceedings, ensuring timely enforcement of creditor's rights. However, when a foreign business with most assets abroad operates in India, it presents unique challenges. These are managed through a cross-border insolvency framework. In recent times, a significant number of corporate failures have involved more than one jurisdiction. This makes international insolvencies a common occurrence, rather than an exceptional circumstance.[14] A leading example is the 2008 Lehman Brothers collapse, a multinational firm with over 650 entities worldwide, which exemplifies the complexity of cross-border insolvency.[15] Such situations can lead to conflicts between national laws regarding security interests, asset distribution, and creditor protection, resulting in disjointed legal proceedings across different jurisdictions.[16]

Under Indian law, Cross-border insolvency proceedings may be initiated in three scenarios:

1. When creditors wish to enforce their security interests over an Indian debtor's overseas assets.
2. When creditors want to enforce their rights over the debtor's Indian assets

[12] 'IBC Laws - Impact of Insolvency and Bankruptcy Code 2016 on Non-Performing Assets - By Meenakshi Rani Agarwal' <https://ibclaw.in/impact-of-insolvency-and-bankruptcy-code-2016-on-non-performing-assets/>.
[13] ibid.
[14] Masoud, B.S, The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa. International Insolvency Review (2014).
[15] Nishith Desai, 'Introduction to Cross-Border Insolvency', (2019).
[16] Buxbaum,H.L.,'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory.' Stan. J. Int'l L., 36, (2000)p.23.

3. When Indian creditors want to enforce their rights over a foreign debtor's overseas assets.[17]

While insolvency in the second case under the code is straightforward, it becomes complex for assets that are located abroad. Creditors aim to prevent foreign asset sales to maintain the foreign estate and ensure their legal remedies aren't subordinated to other creditor's interests.[18] Without a cross-border insolvency framework, uncertainties persist, as seen in the ***Jet Airways*** and ***Videocon*** cases. For instance, if a debtor with foreign assets faces insolvency proceedings in India, how can we prevent parallel proceedings abroad? What if multiple jurisdictions have concurrent insolvency proceedings for the same debtor? A potential solution is harmonizing insolvency laws across jurisdictions, despite the inherent differences in legal systems.[19]

II. UNDERSTANDING THE THEORETICAL APPROACHES TO CROSS-BORDER INSOLVENCY

The theories of cross-border insolvency provide a framework for analysing the effectiveness of current laws and forecasting the results of proposed changes. Understanding the theoretical framework is crucial for understanding the complexity of cross-border insolvency as they provide varying perspectives to cross-border insolvency which ultimately explain the stance of different jurisdictions and contextualise their respective legal decisions.

The theoretical approach can be viewed as a spectrum rather than separate theories[20]. The opposite ends of the spectrum involve two main approaches, the pure territorialist approach and the pure universalist approach. In the case of the pure territorialistic approach, each state applies its own substantive insolvency law to the assets of a multinational firm domiciled in its jurisdiction. In contrast, the universalist approach, substantive insolvency legislation of the jurisdiction in which a multinational corporation has its 'centre of main interests' applies to all global assets of this multinational firm. The fundamental difference between territorialism and universalism is that in territorialism, states are guaranteed to apply their own insolvency law to assets located only in their jurisdiction, whereas, in universalism, states must accept that foreign law should apply to assets

[17] 'India's Proposed Cross Border Insolvency Regime: Will It Trump The Gibbs Rule? - Insolvency/Bankruptcy - India' <https://www.mondaq.com/india/insolvencybankruptcy/721994/indias-proposed-cross-border-insolvency-regime-will-it-trump-the-gibbs-rule>.

[18] ibid.

[19] Donna McKenzie, 'International Solutions to International Insolvency: An Insoluble Problem?' 26.

[20] Meenakshi Kurpad, 'Formulating an Effective Cross-Border Insolvency Framework under the Indian Insolvency and Bankruptcy Code' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3614044>.

located in their jurisdiction as well.[21] Historically, states have adopted the territorialist approach where "the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules."[22] Whereas, pure universalism adopts the view that all of the debtor's cross-border assets should be subject to the proceedings of the debtor's home country and be subject to that respective jurisdiction.[23]

The flaws of both approaches are apparent and many critiques have pointed out their respective impracticalities. For instance, territorialism fails to address the fact that separate insolvency proceedings may be initiated in jurisdictions which hold the debtor's assets with the cost of such proceedings ultimately being borne by the creditors[24]. It has also been seen as a hindrance to globalisation because of increased transaction costs due to encouraging a territorial mindset among corporates and regulators.[25] On the other end, universalism has been criticised for being inconsistent in addressing cross-border cases in countries which have not adopted a universalised framework for cross-border insolvency leading to overlapping proceedings which results in multiple jurisdictions competing for the same assets.[26]

A. TERRITORIALISM

'Territorialism' is the idea that each country has the exclusive right to govern its affairs within its borders without any foreign interference[27]. In the context of the insolvency of a multinational corporation **("MNC")**, this approach holds that the Insolvency adjudicators have the authority to take jurisdiction of only those assets which are within its borders and not those assets which are in foreign nations. In response to territorial constraints, MNCs have strategically positioned their assets in each country by establishing separate business entities under local legislation. These entities can be categorised into three distinct forms:[28]

[21] SM Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34 Oxford Journal of Legal Studies 97.

[22] Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Michigan Law Review 2177.

[23] Edward Adams and Jason Fincke, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' 15.

[24] 'Approaches to the Cross-Border Insolvency | Treasury.Gov.Au' <https://treasury.gov.au/publication/clerp-paper-no-8-proposals-for-reform-cross-border-insolvency/approaches-to-the-cross-border-insolvency>.

[25] Pedro Jose F Bernardo, 'Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL model Law on Cross-Border Insolvency and the European Union Insolvency Regulation' 56.

[26] Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283.

[27] Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy'.

[28] ibid.

1. Autonomous and self-reliant businesses that can be restructured or liquidated as per the local legal framework.
2. Subsidiary companies that solely possess the local assets of a globally integrated business.
3. Foreign establishments that directly own local assets.

In the context of the latter two forms, international collaboration may be necessitated to restructure the business or to liquidate its assets optimally. This approach ensures the maximization of asset value during liquidation. This strategic positioning allows multinational corporations to navigate territorial restrictions effectively while ensuring compliance with local laws.[29]

Territorialists invoke a **'Cooperative territorialist'** approach that maintains that in cases where the transnational distribution of assets of a debtor exists, the necessary cooperation takes place. In the event of bankruptcy, the parent company or the relevant governmental authority initiates legal proceedings in each country where the corporate group possesses significant assets. A representative is appointed by each court for the estate of each entity filing within its jurisdiction. These representatives are tasked with negotiating a resolution to the financial difficulties faced by the debtor. Should the collective value of the estates surpass their worth, it would be advantageous for the representatives to amalgamate them. In the event of a failure to reach an agreement, the distribution of the asset and the proportion in which it is shared is determined by the conflict of laws rules and priority rules of the country where the asset is situated.[30] This approach ensures an equitable distribution of assets while adhering to the legal framework of the respective country. The proposition of a multilateral convention by cooperative territorialists overlooks the existing lack of multilateral collaboration[31]. Nevertheless, the approach of cooperative territorialism could be deemed pragmatic. It acknowledges the reality that in a global landscape still predominantly governed by sovereign nation-states, the standardization of bankruptcy laws is unlikely as a result, embraces the practicality of territorial cooperation in the face of the impracticality of law harmonization.[32] Adoption of this approach can be seen in countries like Russia, China and Brazil.[33]

B. UNIVERSALISM

The concept of '**Universalism**' holds that a single court of the insolvent entity's "home country"

[29] ibid.
[30] Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' [2000] SSRN Electronic Journal <http://www.ssrn.com/abstract=131401>.
[31] Jay Lawrence Westbrook, 'A Global Solution to International Default, 98 MKICH. L. Rev. 2276, 2292-93 (2000).
[32] Frederick Tung, '*Is International Bankruptcy Possible?',* 23 MICH. J. INT'L L. 31, 39-40 (2001)
[33] Kurpad (n 5).

should have jurisdiction over the debtor's cross-border assets[34] and distribute them as per the laws of the home country. The pure form of universalism assumes an idealistic system in which the courts and legal systems around the world are bound to enforce the judgements of the home country's authorities. In pursuit of this ideal, the universalist approach envisions the need for an obligation for domestic courts in affected countries by domestic law or international conventions to enforce the decree of the home country court. Thus, "Universalism is not a single-court system but a dominant-court system."[35] However, the proponents of universalism don't advance the pure form because of its impracticality and idealistic stance as well as the enforcement of those regimes. The modified version of universalism gathers more support as it provides a framework that acknowledges that transnational insolvencies involve intricate interactions of various domestic laws and expects international comity. In this legal framework, local judicial bodies possess a certain level of discretion in deciding the suitability of adhering to requests from the home country adjudicators. The prevalent legal criteria for assessing this suitability holds that adherence should neither modify the legal rights of the involved parties nor contravene the public policy of the country complying with the request.[36]

Hence, in essence, the **'Pure Universalism'** approach advocates for a system that treats multiple concurrent insolvency proceedings in the international system as one single proceeding.[37] In cases of transnational insolvency proceedings, local adjudicators that would normally have jurisdiction over specific assets renounce their authority, giving it to the "home country" dominant court in charge of overseeing the entire bankruptcy case. Advocates of the universalism approach argue that this strategy is more efficient because it reduces the transactional costs involved with multiple concurrent insolvency cases.[38] However, due to the views of pure universalism being so contrary to prevailing notions of the sovereignty of states in the international system failing the test of pragmatic application wherein no country will allow foreign adjudicators to pass and enforce orders within its borders.[39] In response, a hybrid approach between the two contrasting theories across the spectrum evolved as **'Modified universalism'** seeks to curb the impracticality of its respective 'pure' counterparts and combine the advantages of both.[40] The foundation of this approach lies in the idea of voluntary cooperation. Courts are urged to engage in cooperative efforts with judicial bodies

[34] LoPucki (n 28).
[35] ibid.
[36] Adams and Fincke (n 24).
[37] Sean E Story, 'CROSS-BORDER INSOLVENCY: A COMPARATIVE ANALYSIS'.
[38] ibid.
[39] LoPucki (n 28).
[40] Anne Nielsen, Mike Sigal and Karen Wagner, 'The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies', 70 AM. BANKR. L.J. 533,534 (1996).

from other jurisdictions, although they are not mandated to do so. The underpinning of the modified universalism concept is the acknowledgement of a foreign 'primary' proceeding, which serves as the central process in a cross-border insolvency issue, while simultaneously permitting subsidiary or 'non-primary' proceedings.

Modified universalism acknowledges the complexities of a global system in which debtors can readily select a substantive law to govern their insolvency, often in contradiction to the anticipations and interests of creditors. Consequently, it sanctions the initiation and pursuit of ancillary cases to liquidate local assets and safeguard local creditors within a specific nation. These ancillary cases are predominantly territorial, under both the EU Regulation and the UNCITRAL Model Law. This is the strategy that the United States has implemented in Chapter 15 of the Bankruptcy Code[41]. A variant of modified universalism has also been embraced by several other nations, including "Australia, Canada, England, Germany, India, Ireland, New Zealand, and arguably, Japan."[42] The endorsement of modified universalism's tenets by some of the world's most robust economies lends credence to assertions by the theory's proponents that modified universalism is the most prevalently employed approach to cross-border insolvency.

C. THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

To ensure smooth international cooperation in cross-border insolvency matters, the United Nations Commission on International Trade **("UNCITRAL")** formulated the Model Law on Cross-border Insolvency **("Model Law")** in 1997. It adopts the modified universalist approach aiming to rectify the disparities in acknowledging foreign proceedings. It was enacted on May 30, 1997, during the organization's thirteenth session in Vienna, and provides a framework for states to address complex issues related to cross-border insolvency. This tool, unlike a United Nations convention, does not necessitate formal notification to the United Nations or other states upon its adoption.[43] As of the present date, it has been integrated, to varying extents, into the domestic legal systems of 44 states. This adoption process underscores the model Law's role in fostering international cooperation and harmonization in the realm of insolvency law.

It is structured into five chapters, each addressing a specific aspect: general provisions; access to

[41] LoPucki (n 26).

[42] Kent Anderson, 'The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience' 21 U. PA. J. INT'L ECON. L. 679, 692 n.37 (2000)

[43] 'UNCITRAL model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation' (n 42).

courts for foreign representatives and creditors; recognition of foreign proceedings and relief; cooperation with foreign courts and representatives; and procedures for managing concurrent proceedings. Rather than mandating a uniform adoption of substantive domestic laws across states, introduces four key elements to streamline the process of cross-border insolvency resolution which is based on the model Law chapters:

1. Access
2. Recognition
3. Relief
4. Cooperation.[44]

The Model Law acknowledges two types of proceedings, 'foreign main proceedings' and 'foreign non-main proceedings'. The former occurs in the state where the debtor's 'Centre of main interests' **("COMI")** is located[45], while the latter refers to any foreign proceeding outside of the main one, where the debtor has an 'establishment'.[46] It offers guidelines for identifying the COMI and defines 'establishment' as "a location where the debtor conducts a non-transitory economic activity with human resources and goods or services".[47] The Model Law is specifically designed to expedite the recognition of foreign proceedings, thereby ensuring the swift protection of a debtor's assets across various jurisdictions. Moreover, the Model Law includes a public policy exception, allowing states to refuse actions under the Model Law if they are 'manifestly contrary' to the state's public policy. States have incorporated the model Law into their domestic legal systems with modifications suitable to their jurisdictions. For example, the term 'manifestly' in the public policy exception is omitted in Singapore's domestic legislation[48], while it is included in the legislation of countries like the United States[49] and the United Kingdom.[50]

III. UNDERSTANDING THE CURRENT INDIAN JURISDICTION

IBC has not remained entirely silent on the matter of cross-border insolvency. It acknowledges overseas creditors as "financial creditors", who are entitled to enforce their rights under the Code either by initiating a petition before the National Companies Law Tribunal **("NCLT")** or by lodging claims as a financial creditor subsequent to the appointment of a resolution professional

[44] 'UNCITRAL model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 30 December 2023.
[45] Article2(b), UNCITRAL model Law.

[46] Article 2(c), UNCITRAL model Law
[47] Article 2(f), UNCITRAL model Law
[48] Article 6, Tenth Schedule, Companies Act, 2006.
[49] Section1506, Chapter15, Title11, US Code.
[50] Article 6, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

for the corporate debtor. Currently, the code contains two provision that deal with cross-border insolvency resolution:

1. ***Section 234, Agreements with Foreign Countries***: Under Section 234 of the Code, the Central Government holds the authority to forge an agreement with the Government of a foreign country for the enforcement of the Code's provisions. Moreover, the Central Government can direct the application of the Code's provisions to assets or property of a corporate debtor or an individual, inclusive of a personal guarantor of a corporate debtor, located outside India via a reciprocal arrangement.
2. ***Section 235, Letter of Request***: In circumstances where evidence or action pertaining to assets of a corporate debtor situated outside India is necessitated in relation to an insolvency resolution process, the resolution professional, liquidator, or bankruptcy trustee can submit an application to the NCLT under Section 235 of the Code. If the NCLT considers it appropriate, it may issue a letter of request to a court or an authority of a country with which a reciprocal arrangement has been established under Section 234 of the Code.

Despite the incorporation of Sections 234 and 235 into the Code to facilitate the resolution of cross-border insolvencies, it has been noted that no effective measures have been undertaken to implement the intergovernmental agreements. An order issued by the NCLT in relation to a cross-border insolvency matter would not be directly acknowledged or enforced in any foreign jurisdiction. Furthermore, even if these provisions were to be notified, they do not sufficiently address the intricate issues that emerge in cross-border insolvency cases. This situation underscores the need for more comprehensive legislative measures to effectively tackle the complexities of cross-border insolvency. This essay examines two cases which highlight the issues that arise in adjudicating Cross-Border Insolvency cases in the absence of a comprehensive framework:

A. STATE BANK OF INDIA V. JET AIRWAYS (INDIA)

On April 17, 2019, Jet Airways ceased all flight operations following protracted negotiations with banks and operational creditors regarding restructuring efforts. Subsequently, on June 20, 2019, formal insolvency proceedings were initiated before NCLT in Mumbai.[51] It declared that IBC currently lacks provisions to recognize foreign insolvency court judgments. This statement was

[51] State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/ MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

made in response to the initiation of insolvency proceedings against Jet Airways in the NOORD, Holland District Court.

Earlier, a Jet Airways flight was grounded in Amsterdam due to unpaid dues to a European Cargo firm. Consequently, Jet Airways faced simultaneous insolvency proceedings in the Netherlands and India. The Dutch court-appointed administrator sought recognition of the Dutch proceedings from the NCLT, which was rejected. The Dutch administrator then appealed to the National Company Law Appellate Tribunal **("NCLAT")** for recognition. On August 21, 2019, the NCLAT directed Jet Airways creditors to file an affidavit expressing their willingness to cooperate with the Dutch Administrator, pay his fees, and accord foreign lenders the same status as Indian creditors.[52] Following the NCLAT's directions, the Dutch Court Administrator and the Resolution Professional agreed on a 'Cross Border Insolvency Protocol'. Under this protocol, India was recognized as the COMI and the Dutch proceedings were recognized as the 'non-main insolvency proceedings'.[53] The protocol outlined the terms of cooperation in the ongoing insolvency process, excluding the Dutch Administrator's involvement in Committee of Creditors meetings. The NCLAT permitted the Administrator to attend these meetings as an observer to prevent an overlap of powers. It also overturned the NCLT Mumbai bench's order, which had stated that the Dutch court administrator had no jurisdiction in India and could not participate in Jet Airways' CoC meetings or claim the airline's assets in India.

B. STATE BANK OF INDIA V. VIDEOCON INDUSTRIES (2018)

On January 1, 2018, NCLT admitted an insolvency petition filed by the State Bank of India **("SBI")** against Videocon, a multinational conglomerate to which it owes approximately ₹ 11,175.25 crores. Videocon, which operates in various countries including Brazil, Oman, Australia, the Cayman Islands, the Netherlands, China, and Indonesia, initially did not include its overseas subsidiaries holding significant oil assets in the petition[54]. However, when the committee of creditors began soliciting bids for these overseas oil and gas assets, Videocon requested the NCLT to incorporate assets owned by its Brazilian and Indonesian subsidiaries into the corporate insolvency resolution

[52] Jet Airways (India) Ltd v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 August 2019; NCLAT seeks Jet lenders' response on Dutch insolvency administrator's plea, Business Standard, available at: https://www.business-standard.com/article/companies/ nclat-seeks-jet-lenders-response-on-dutch-insolvency- administrator-s-plea-119082101584_1.html.

[53] Jet Airways (India) Ltd. (Offshore Regional Hub/Offices) v. State Bank of India Company Appeal (AT) (Insolvency) No. 707 of 2019, Order dated 26 September 2019.

[54] Videocon Annual Report 2017-18 http://www.videoconindustriesltd.com/Documents/Videocon%20Industries%20Ltd_2018.pdf

process.[55] This request was reported in the news, indicating Videocon's desire to include its foreign assets in the ongoing corporate insolvency resolution process. SBI has argued that incorporating overseas assets into domestic insolvency proceedings raises unresolved cross-border insolvency issues under the Code. In response to these concerns, the NCLT recently permitted the inclusion of Videocon's foreign businesses in the corporate insolvency resolution process in India.[56] However, due to the absence of a clear cross-border insolvency framework in India, tribunals are currently addressing these situations on a case-by-case basis.

The lack of a comprehensive framework for managing cross-border insolvency cases leaves several questions unresolved, as exemplified by the recent Jet Airways and Videocon cases. Consider a scenario where a debtor, against whom insolvency proceedings have been initiated in India, possesses assets overseas. What mechanisms are in place to prevent these assets from becoming the focus of simultaneous proceedings in the foreign jurisdiction? Furthermore, how should we address situations where multiple jurisdictions are concurrently conducting insolvency proceedings concerning the debtor and their assets? One potential strategy to tackle these challenges is to strive for a level of convergence in the insolvency laws across various jurisdictions. Given the significant disparities that exist among the legal systems of different countries, the pursuit of such statutory harmonisation is imperative.[57]

C. THE INSOLVENCY LAW COMMITTEE

To ensure the effective application of the Code, regular evaluations were deemed necessary. As a result, the Government formed the Insolvency Law Committee **("ILC")** within a year of implementing the Code's corporate insolvency provisions. The Committee's task was to review the Code's operation and suggest suitable recommendations for the effective implementation of the Corporate Insolvency Resolution Process **("CIRP")** and liquidation framework. After this, the committee on the 16th of October 2018 submitted its second report advocating for the integration of the Model Law into the Code.[58] The Insolvency Law Committee made a compelling argument for the approval of Model Law. In response, the Indian Ministry of Corporate Affairs, in June 2018,

[55] 'Videocon requests NCLT to include overseas oil assets in insolvency process', Economic Times, available at://economictimes.indiatimes.com/articleshow/70779728.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utmcampaign=cppst.

[56] Order dated February 12, 2020, in the matter of Videocon Industries Limited and Ors. [MA 2385-2019 in C.P.(IB)-02- MB-2018].

[57] McKenzie (n 20).

[58] Report of the Insolvency Law Committee on Cross-Border Insolvency MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA 16 October 2018 available at https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf

issued a public invitation for commentary on a draft chapter[59] dealing with cross-border insolvency, which will be known as "Part Z" upon its inclusion in the Code. However, it has not been officially enacted into law by the Indian Ministry. Despite its introduction as a legislative bill in mid-2018, there appears to have been no progress in its integration into the code.

IV. ROAD AHEAD: ADOPTING THE MODEL LAW

None of the BRIC countries, which include Brazil, Russia, India, and China, have implemented the Model Law. Specifically, Brazil, Russia, and China have openly embraced a territorialist strategy for handling cross-border insolvency cases. While a comprehensive examination of the elements that lead to the success or failure of a territorial framework is outside the purview of this paper, it can be reasonably inferred that such a framework has not demonstrated its effectiveness in countries like Brazil where it has been put to the test.[60]

The Indian framework for cross-border insolvency is not necessarily equivalent to the adoption of the Model Law. The Model Law does not mandate reciprocity, implying that as long as the Code's proceedings are acknowledged by a jurisdiction that follows the Model Law (and does not insist on reciprocity), there is no immediate need for India to adopt the Model Law. However, the adoption of the Model Law carries numerous benefits. It has been embraced by approximately 46 jurisdictions,[61] including major economies like the United States, which incorporates the Model Law in Chapter 15 of the U.S. Code, and the United Kingdom. Given that India is a common law jurisdiction, its courts frequently rely on U.S. and English case law when there is no existing Indian law precedent. By adopting the Model Law, Indian courts would have a wealth of precedent and guidance for resolving cross-border insolvencies.

The Model Law epitomizes modified universalism in its most effective form; it is a clear-cut regime that aims to boost cooperation and recognition by permitting ancillary proceedings in support of the

[59] Public Notice Suggestions invited on draft on cross-border insolvency MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA 20 June 2018 available at http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

[60] Foreign creditors of Brazilian conglomerates often file for reorganization in the United States to facilitate faster restructuring. *See In re Rede Energia SA* 515 B.R. 69 (Bkrtcy. S.D.N.Y. 2014).

[61] *Status UNCITRAL Model Law on Cross-Border Insolvency (1997)* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

"main" proceeding.[62] Moreover, the adoption of the Model Law would equip emerging common law jurisdictions like India with the capacity to manage complex cross-border insolvencies. The adoption of the Model Law would significantly contribute to the development of legal infrastructure dealing with cross-border insolvency and other complex commercial matters. Before the introduction of the Code, Indian courts had already adopted a form of modified universalism. As a common law jurisdiction, they emphasize the principle of comity and facilitate a cooperative approach. This was demonstrated in the recent case of State Bank of India v Jet Airways (India) Limited, where NCLAT recognized and allowed for concurrent insolvency proceedings in the Netherlands.

The Code should incorporate the principles of the model law, particularly the provision for interim relief in cross-border insolvencies. U.S. courts provide interim relief while recognition is pending, ensuring that the debtor's assets are preserved and creditors' interests are protected. The current draft of the Code only provides relief after recognition of a foreign proceeding, so it needs to be amended to allow for interim relief during the recognition process. This would enable Indian courts to provide timely relief. The implementation of a fully formalized cross-border insolvency regime largely hinges on the availability of the necessary infrastructure. The establishment of the NCLT and the NCLAT has facilitated the creation of a specialized court system for corporate law, enabling quicker and more effective resolution of complex corporate transactions. However, the NCLT and NCLAT are still navigating the intricacies of the Code and dealing with a growing number of domestic insolvency cases, leaving them little capacity to handle more complex cases.

CONCLUSION

While businesses operate on a global scale, financial distress is limited by jurisdictional boundaries. This is a drawback of the territorial approach to cross-border insolvencies. The Code, which has been instrumental in revamping bankruptcy laws and strengthening creditor rights in India, has overlooked the global nature of Indian conglomerates and multinational corporations. Therefore, the Code is incomplete without a framework for cross-border insolvency. It's crucial to understand that a cross-border insolvency framework cannot be fully realized by merely adopting the Model Law. It's just one component of an effective regime. Cross-border insolvency protocols play a vital role in expediting resolution and reducing the high transaction costs associated with cross-border litigation. The case of Jet Airways underscores the importance of cross-border protocols. Therefore,

[62] Morshed Mannan, *Are Bangladesh, India and Pakistan Ready to Adopt the UNCITRAL Model Law on Cross-Border Insolvency*, 25 INT'L INSOLVENCY REV. 195, 214 (2016).

it’s essential for the Code to incorporate the legal infrastructure that supports this role.