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International Insolvency: An Indian Perspective on Cross-Border Treatment of Cases

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NOTE

INTERNATIONAL INSOLVENCY: AN INDIAN PERSPECTIVE ON CROSS-BORDER TREATMENT OF CASES

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INTRODUCTION

Despite India's status as a sovereign nation, permanent remnants of its former colonial rule are still visible throughout the country.[1] Victorian architecture dots the city landscape and railroads built when India was under British rule snake their way through the countryside.[2] More importantly, however, is what is invisible to the naked eye.[3] The common law system put in place by the British during their two-

1. Taru Dalmia & David M. Malone, *Historical Influences on India's Foreign Policy*, 67 INT'L J. 1029, 1040 (2012) (commenting on the Indian parliamentary system and judiciary put in place by the British); *see also* Stephen McClarence, *India: All the Raj*, THE TELEGRAPH (Oct. 24, 2008), http://www.telegraph.co.uk/travel/3247067/India-All-the-Raj.html (highlighting some buildings built by the British and used as hotels and other tourist attractions today).

2. *See* McClarence, *supra* note 1.

3. Atul M. Setalvad & H. Jayesh, *India*, *in* SET-OFF LAW AND PRACTICE 233, 233 (William Johnston & Thomas Werlen eds., 2010) (stating that any situation covered by a statute is governed by English common law); *see also* S. Gupta & M. A. Batki, *India*, *in* INTERNATIONAL BANK INSOLVENCIES: A CENTRAL BANK PERSPECTIVE 95, 95 (Mario Giovanoli & Gregor Heirich eds., 1999) (asserting the use of common law principles by the Indian Judiciary).

hundred year rule of the sub-continent still affects both individuals and businesses in their daily routines.[4]

Post-independence, Indian foreign policy was largely based on the practice of import substitution: the Indian economy closed its doors to international investment.[5] Indian laws—including insolvency laws—followed British antecedents.[6] Finally, in 1956, the Indian Legislature enacted its own corporate statute, the Indian Companies Act.[7] The purpose of this act was to consolidate legislation regarding corporations.[8] It provided for the winding-up of insolvent companies.[9] However, Indian jurisprudence was still in its nascent stages and relied heavily on the English principles of justice, equity, and good conscience to resolve matters that were not covered by statutory law.[10]

It was not until the 1990s that the government liberalized the Indian economy, leading to an inflow of foreign direct investment ("FDI").[11] Multinational companies began looking at India as a viable market for their goods and international investors began lending to Indian corporations.[12] The economic prosperity was ubiquitous and

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4. Setalvad & Jayesh, *supra* note 3; *see also* Gupta & Batki, *supra* note 3.

5. Arvind Panagariya, *India's Trade Reform: Progress, Impact and Future Strategy*, COLUM. INDIA F., 1, 18 (Mar. 4, 2004), http://www.columbia.edu/~ap2231/Policy%20Papers/IPF_India.pdf (asserting that the policy of import substitution negatively affected trade); *see also* Sophia N. Johnson, Emerging Norms in Economic Governance: An Examination of Authority Structures & The Growing Importance of New Forms of Governance in Liberalized India 31 (May 2010) (unpublished Ph.D. Dissertation, Rutgers University) (commenting on the transition from the import substitution policy to an export oriented policy).

6. *See* Gupta & Batki, *supra* note 3, at 96.

7. *See generally* Companies Act, No. 1 of 1956, INDIA CODE (2002), pmbl. (stating that the Act received the assent of the President of India on January 18, 1956).

8. *See id.* (declaring that the Act consolidates and amends the laws relating to companies in India).

9. Companies Act, No. 1 of 1956, INDIA CODE (2002), § 433 (using the term "winding-up" as a step in the liquidation process of a company where the court appoints a receiver (trustee) to settle outstanding accounts and liquidate assets of the company).

10. *See* Setalvad & Jayesh, *supra* note 3.

11. Johnson, *supra* note 5, at ii (stating that India implemented an economic liberalization policy starting in 1991); *see also* Peter Lamb, *The Indian Electricity Market: Country Study and Investment Context* 2 (Stan. U. Program on Energy & Sustainable Dev., Working Paper No. 48, 2005) (recognizing an improvement in the Indian Economy due to FDI).

12. Paresh Somalkar, *Impact of Globalization on the Indian Economy*, ABHINAV NAT'L J. OF RES. IN ARTS & EDUC. 5, 8 (Aug. 2012) (discussing the entrance of multinational corporations and FDI in India); *see also* Johnson, *supra* note 5, at 16 (highlighting the importance of non-state actors such as multinational corporations in the economic development of India).

prompted calls for reform to the legal framework.[13] One of the areas still in need of change was corporate insolvency.[14]

This Note analyzes the existing law, shortcomings, and their resolutions within the realm of cross-border insolvency in India. Not only are such matters relatively new, but also their scope is not well defined. Indian jurisprudence, being an offshoot of the British common law system, often turns to British law when a court is faced with cases with which it is unfamiliar, such as matters of cross-border insolvency.[15] The judges use innovative techniques and incorporate English common law when adjudicating winding-up petitions of overseas components.[16] But this innovation is neither uniform nor predictable due to the overlap in domestic laws.[17] In the absence of positive enactment of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on Cross-Border Insolvency ("Model Law") or any other statute consolidating the Indian insolvency regime, the current judicial approach of dealing with cross-border insolvencies in India is disorderly, chaotic, and leads to forum shopping.[18] This Note highlights judicial activism and the judges' creativity of merging the separate provisions of law while dealing with cross-border insolvencies. The result of this process is less predictable than it would be had the Model Law been enacted.

This Note is divided into three sections: applicable laws, issues, and resolution. Part I provides the legal framework for resolving

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13. *See* Charan Wadhwa, *India Trying to Liberalize: Economic Reforms Since 1991*, *in* THE ASIA PACIFIC: A REGION IN TRANSITION 259, 280 (Jim Rolfe ed., 2004) (maintaining that efficient and speedy implementation of economic reforms depended on legal reforms); *see also* Montek Singh Ahluwalia, *Economic Reforms in India since 1991: Has Gradualism Worked?*, J. OF ECON. PERSPECTIVES 67, 82 (Summer 2012) (asserting that efficiency of banks is limited by the legal framework which needs to be reformed.)

14. *See infra* Part I (discussing the laws applicable to cross-border insolvency situation and their shortcomings).

15. *See* Setalvad & Jayesh, *supra* note 3.

16. *See infra* Part I.C.

17. *See infra* Part I.B.

18. Mithilesh Kumar, *Cross Border Insolvency: Indian Law Vis A Vis International Law: UNCITRAL Model*, MONDAQ: INDIAN LEGAL IMPETUS (Aug. 12, 2013), http://www.mondaq.com/india/x/257314/international+trade+investment/Cross+Border+Insolvency+Indian+Law+Vis+A+Vis+International+Law+UNCITRAL+Model (expressing that Indian common law is inadequate when enforcing foreign judgments, and rights and relief to creditors); *see also* Nimrit Kang & Nitin Nayar, *The Evolution of Corporate Bankruptcy Law in India*, ICRA BULL.: MONEY AND FIN. 37, 38 (Oct. 2003) (commenting on the lag in the current legal system in providing the appropriate forum or policy framework for efficient and equitable resolution of insolvency cases).

cross-border insolvency disputes and includes references to statutes and case law, including project finance restructuring. Part II examines issues arising out of the legal framework. Finally, Part III provides solutions for the issues.

I. *LAWS APPLICABLE TO CROSS-BORDER INSOLVENCY CASES*

The insolvency laws in present-day India are a result of judicial impetus of its former British colonizers.[19] Insolvency laws governing individuals are the Provincial Insolvency Act of 1920 and the Presidency Towns Insolvency Act of 1909.[20] These statutes, put in place in the early twentieth century, still occupy the domain for dealing with individual insolvencies.[21] Although they are similar to British proceedings, some critics believe them to be archaic and in desperate need of modernization.[22] These statutes have a narrow local focus and do not address emerging issues in cross-border insolvency involving corporations and other business forms.[23]

The narrow local focus of the statutes places an excessive burden on courts. Thus, the government established specialized tribunals such as the Debt Recovery Tribunals under the Recovery of Debts Due to Banks and Financial Institutions Act of 1993.[24] This statute, however, was narrow in its reach as it applied to only banks and financial institutions as opposed to individuals and corporations.[25] Another drawback of this statute was that applications could only be made by

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19. *See* Setalvad & Jayesh, *supra* note 3; *see also* Kang & Nayar, *supra* note 18, at 39 (claiming that the Indian Companies Act was modeled after the British Companies Act).

20. Gupta & Batki, *supra* note 3, at 95 (emphasizing that the Provincial Insolvency Act of 1920 and Presidency Town Insolvency Act applied to individual insolvencies); *see also* Setalvad & Jayesh, *supra* note 3, at 237 (recognizing that the above statutes apply to individual insolvencies).

21. *See* Gupta & Batki, *supra* note 3, at 95; *see also* Setalvad & Jayesh, *supra* note 3, at 237.

22. Kumar, *supra* note 18, at 24 (acknowledging that the statutes are outdated); *see also* Adam Feibelman, *Consumer Finance & Insolvency Law in India: A Case Study*, 36 BROOK INT. L. J. 75, 107 (2010) (explaining that India's consumer insolvency regime has not been meaningfully altered since it was adopted at the beginning of the last century).

23. Feibelman, *supra* note 22, at 112 (referring to evidence that the Indian consumer bankruptcy laws are dysfunctional in the contemporary context and fail to provide benefits to consumers or to the broader society); *see also* Kumar, s*upra* note 18, at 24.

24. Feibelman, *supra* note 22, at 92 (stating the efforts of the Indian Parliament enacting the legislation creating Debt Recovery Tribunals); *see also* Kang & Nayar, *supra* note 18, at 41 (conceding that banks and financial institutions may approach the Debt Recovery Tribunals to recover outstanding debts).

25. Feibelman, *supra* note 22, at 92; *see* Kang & Nayar, *supra* note 18, at 41.

creditors and not by securitization special purpose vehicles, designed to save the corporation through additional investments, thus resulting in traditional but time-consuming methods of foreclosure being applied to these entities.[26]

In 2002, the legislature codified for the first time regulations for the securitization industry under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 ("SARFAESI").[27] Under SARFAESI, a secured creditor could enforce security over both movable and immovable property without court intervention.[28] Again, the scope of this Act was limited, as secured creditors were narrowly defined to include banks and financial institutions.[29]

Neither of the new insolvency laws delves into the realm of cross-border insolvency.[30] Nor do they discuss the ramifications of the issues relating to cross-border insolvency as contemplated by the Model Law such as Centre of Main Interests of the debtor.[31] Therefore, the new laws do not address issues that arise in cases concerning cross-border insolvency.

A. *Overview of the Model Law*

The Model Law is based on respecting the differences of the legal systems of Member States and a non-insistence on substantive

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26. Tessa Hoser & Ruth Wang, *The Future of Indian Bank Securitization*, 25 INT. FIN. L. REV. 48, 48 (2006) (asserting that securitization special purpose vehicles could not make recovery applications to the Debt Recovery Tribunals); *see also* Feibelman, *supra* note 22, at 92 (stating that only domestic banks and non-bank financial institutions can make applications under the Act).

27. Hoser & Wang, *supra* note 26, at 48 (recognizing the creation of the SARFAESI to allow creditors to enforce securities without court intervention); *see also* Padmanabhan Iyer, *India: The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – An Overview of the Provisions*, MONDAQ (Jul. 23, 2003), http://www.mondaq.com/india/x/22031/securitization+structured+finance/The+Securitisation+and+Reconstruction+of+Financial+Assets+and+Enforcement+of+Security+Interest+Act+2002+An+Overview+of+the+Provisions (acknowledging that the SARFAESI was enacted to fill the gaps created by the Debts Due to Banks and Financial Institutions Act).

28. *See supra* note 27 and accompanying text.

29. Hoser & Wang, *supra* note 26, at 48 (identifying only banks and financial institutions as secured creditors under the Act); *see also* Iyer, *supra* note 27 (stating that only banks and financial institutions can securitize their financial assets).

30. *See supra* notes 22–27 and accompanying text.

31. *See supra* notes 22–27 and accompanying text.

unification of insolvency law.[32] It is a response to the need for uniformity and certainty in the outcomes of cross-border insolvency proceedings.[33] It can provide the courts with discretion enabling them to arrive at pragmatic solutions to issues regarding cross-border insolvency.[34]

The main objectives of the Model Law are mentioned in its Preamble.[35] The first objective is to promote cooperation between the courts and other authorities of countries involved in cross-border insolvency proceedings.[36] Additionally, the Model Law provides "greater legal certainty for trade and investment."[37] Further, it administers a "fair and efficient system" that "protects the interests of all creditors and other interested persons, including the debtor" in

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32. UNCITRAL, UNCITRAL MODEL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION 10 (2005), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf [hereinafter UNCITRAL MODEL PRACTICE GUIDE] (noting that the UN General Assembly respected differences in the procedural and judicial systems of States and that the differences would only contribute to the development of international trade); *see also* The UNCITRAL Model Insolvency Law vis-à-vis Indian Insolvency Regime, 3, http://indiancaselaws.files.wordpress.com/2014/04/the-uncitral-model-insolvency-law-vis-c3a0-vis-indian-insolvency-regime.pdf [hereinafter UNCITRAL Model Insolvency Law vis-à-vis India] (asserting that Model Law is based is respect to the differences among national laws and non-insistence on substantive unification of insolvency law).

33. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 14 (affirming that the Model Law focuses on facilitating the administration of cross-border insolvency cases and providing an interface between jurisdictions); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32 (recognizing that the Model Law addresses the need for certainty in determining cross-border insolvency proceedings).

34. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 14 (declaring that the Model Law allows the courts to determine what relief is warranted for optimal disposition of the insolvency proceedings); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 3 (identifying the broad discretion vested in the courts enabling them to derive practical solutions to cross-border insolvency issues).

35. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 12 (highlighting that the preamble states the main focus of the Model Law); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 3 (discussing the key objectives of the Model Law as are mentioned in the Preamble).

36. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 12 (citing cooperation as the first objective of the preamble); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 3 (recognizing cooperation between courts as the first objective).

37. UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: A JUDICIAL PERSPECTIVE 6 (2013), https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf [hereinafter UNCITRAL, A JUDICIAL PERSPECTIVE] (affirming that the Model Law is designed to meet the needs of "greater legal certainty for trade and investment"); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 3 (asserting that the need for "greater legal certainty for trade and investment" is an objective of the Model Law provided in its Preamble).

cross-border insolvency proceedings.[38] The Model Law also seeks to "protect and maximize the value of the debtor's assets."[39] Finally, it aims to "facilitate the rescue, restructure, and reorganization of financially troubled businesses," thereby protecting investment and preserving employment.[40]

The Model Law provides four main principles for the achievement of the above-mentioned objectives.[41] Firstly, the "access" principle allows foreign representatives to initiate insolvency proceedings in a different State (receiving court).[42] Secondly, the "recognition" principle provides the receiving court with the authority to make an order recognizing the foreign proceeding, either as a foreign "main" or "non-main" proceeding.[43] Thirdly, the "relief" principle grants "interim," "automatic," and "discretionary" relief.[44] Automatic relief is the result when a proceeding is recognized as a

38. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (discussing the need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (referring to the UNCITRAL JUDICIAL PERSPECTIVE).

39. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (asserting that the Model Law implements measures for the protection and maximization of the value of the debtor's assets for distribution to creditors, whether by reorganization or liquidation); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (citing the UNCITRAL JUDICIAL PERSPECTIVE).

40. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (stating that the Model Law facilitates the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (quoting the UNCITRAL JUDICIAL PERSPECTIVE).

41. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5 (affirming that there are four principles on which the Model Law is built); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (discussing that the Model Law relies on four key principles).

42. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 14 (recognizing that the "access" principle allows the foreign representative to initiate proceedings in different States); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (referring to art. 2(d) of the UNCITRAL Model Law on Cross-Border Insolvency).

43. UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation art. 15, http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf [hereinafter UNCITRAL Model Law] (defining the recognition principle); *see also* UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 14 (differentiating main or primary proceedings as those that originate where the debtor has its centre of main interests from non-main or secondary proceedings which deal with the liquidation of debtor's assets elsewhere).

44. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5 (distinguishing three distinct situations which require courts to grant different kinds of relief); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (asserting that the relief principle seeks to provide possible avenues for granting relief).

"main" proceeding.[45] Automatic relief is usually a stay or suspension of proceedings against the debtor.[46] Interim relief may be granted where an application for recognition is pending, for the protection of assets within the jurisdiction of the receiving court.[47] Discretionary relief may be awarded if the judge feels the situation demands it, and is available in both "main" and "non-main" proceedings.[48] Finally, the "cooperation" and "coordination" principle requires both courts and insolvency representatives (similar to the trustees in US liquidation proceedings), in different States to cooperate to the maximum extent possible.[49] This can help lead to a more fair and efficient administration of the debtor's estate.[50] Moreover, it ensures that the creditors have the maximum benefits.[51] Several countries (such as the United States and the United Kingdom) have, since its inception, adopted the Model Law and enjoy the foregoing benefits.[52]

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45. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5 (defining automatic relief); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (asserting that automatic relief follows main proceedings and referring to art. 21 of the Model Law).

46. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5; UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4.

47. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5 (explaining interim relief, including when it may be granted); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (stating that interim relief may be granted where an application for recognition is pending).

48. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 5-6 (characterizing discretionary relief as relief granted when a court determines the case calls for it); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 4 (asserting that discretionary relief may be granted in "main" and "non-main" proceedings).

49. UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (defining the scope of the coordination principle); *see also* UNCITRAL Model Insolvency Law vis-à-vis India, *supra* note 32, at 5 (explaining the meaning of the coordination principle).

50. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 13 (stating that lack of cooperation and coordination would impede fair and efficient administration of the debtor's estate) *see also* UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (referring to the UNCITRAL MODEL PRACTICE GUIDE).

51. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 13 (affirming that the Model Law would be the most advantageous for creditors); *see also* UNCITRAL, A JUDICIAL PERSPECTIVE, *supra* note 37, at 6 (discussing that the Model Law operates to maximize the returns to the creditor).

52. UNCITRAL, Status UNCITRAL Model Law on Cross-Border Insolvency (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [Status UNCITRAL Model Law on Cross-Border Insolvency] (providing a list of countries that have adopted the Model Law).

B. *Statutes Governing Cross-Border Insolvency in India*

Like the United States, India is a federal country.[53] The Indian Constitution lists separate categories of issues over which the states and the Central Government may legislate.[54] However, a unique aspect of the Indian Constitution is that it allows both states and the Central Government to enact laws on specific subjects enlisted therein.[55] Particularly, bankruptcy and insolvency are specified areas where both levels of governments may formulate law.[56] In addition, through various provisions, the Indian common law regime enables the Indian courts to recognize the rights and claims of international creditors and enforce the judgments passed by the courts of foreign jurisdictions.[57] These provisions are further explained below.

1. Foreign Judgments Under the Code of Civil Procedure, 1908

Indian laws recognize the principle of comity.[58] This principle is embodied in Section 44A of The Code of Civil Procedure of 1908 ("CPC").[59] Section 44A allows Indian courts to enforce orders passed by non-Indian courts in "Reciprocating Territories."[60] A country would be considered a reciprocating territory if it were declared one by the Government of India through publication in the Official Gazette.[61] However, Section 44A is limited by Section 13 of the

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53. Baogang He, *The Federal Solution to Ethnic Conflicts*, 7 GEO. J. INT'L AFF. 29, 30 (2006) (affirming that India is a federal jurisdiction); *see also* Malcolm MacLaren, *"Thank You India." Reflections on the 4th International Conference on Federalism, New Delhi, 5-7 November 2007*, 9 GER. L.J. 367, 368 (2008) (stating that India is the world's largest federation).

54. INDIA CONST. art. 246, Lists I & II (distinguishing areas where only the states or Central Government may formulate laws).

55. INDIA CONST. art. 246, List III (providing areas where both the national and state governments may formulate laws).

56. INDIA CONST. art. 246, List III, cl. 9 (specifying bankruptcy and insolvency as one of the areas where the central and state government may legislate).

57. *See supra* Introduction (discussing the application of British common law in India).

58. INDIA CODE CIV. PROC. (1908), §§ 13, 44A (determining the conclusiveness of a judgment under Section 13 and recognizing the ability of Indian courts to execute judgments passed in foreign courts of reciprocating territories under Section 44A; the recognition of judgments of a court in one jurisdiction by a court in another jurisdiction is known as comity).

59. INDIA CODE CIV. PROC. (1908), § 44A.

60. *Id.*

61. *Id.*

CPC.[62] According to Section 13, a non-Indian judgment cannot be enforced if:

(a) the court issuing the judgment does not have competent jurisdiction;

(b) the judgment was not passed on the merits of the case;

(c) it appears that the proceedings are founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;

(d) the judgment was a result of proceedings opposed to public order;

(e) the judgment has been obtained by fraud; and

(f) where the judgment sustains a claim founded on a breach of any law in force in India.[63]

The Government of India has declared the Commonwealth of Nations and a few other territories to be reciprocating territories.[64] In cases where the international creditor has obtained a judgment from a court not located in a reciprocating territory, the creditor must bring a suit to enforce the decree in an Indian court.[65] The CPC provides methods for the general recognition of judgments but does not refer to recognizing and enforcing judgments specifically in cross-border insolvency proceedings.[66]

2. Winding-Up Procedures under The Companies Act, 1956

The provisions of the Companies Act of 1956 ("Companies Act") provide the framework for dealing with insolvency proceedings where creditors or debtors are located in jurisdictions outside India.[67] The Companies Act also prescribes a procedure for winding-up

62. *See supra* note 58 and accompanying text (together, Section 13 defines the characteristics of a valid foreign judgment and Section 44A provides for execution only of those judgments that fit the criteria laid down in Section 13).

63. INDIA CODE CIV. PROC. (1908), § 13.

64. Gupta & Batki, *supra* note 3, at 98 (identifying courts in the Commonwealth of Nations and some other States as reciprocating territories in India); *see also* Sumikin Bussan Int'l (HK) Ltd. v. King Shing Enterprises and Anr., (2008) 5 Bom. C. R. 464, ¶ 7(B) (defining Hong Kong to be a reciprocating territory).

65. Gupta & Batki, *supra* note 3, at 98 (stating that decrees passed by reciprocating territories may be executed in India); *see also* Sumikin Bussan Int'l (HK), 5 Bom. C. R. at ¶ 21 (explaining that foreign law is a question of fact that must be proved in execution proceedings).

66. *See supra* notes 58–65 and accompanying parenthetical explanations.

67. Companies Act, No. 1 of 1956, INDIA CODE (1956), §§ 484-520.

insolvent companies incorporated in India.[68] Section 584 of the Companies Act specifically prescribes that an international (non-Indian) company incorporated outside India, but carrying business in India, may be wound-up as an unregistered company by a competent high court.[69] The winding-up of an international (non-Indian) company is not affected by the winding-up or dissolution of that company under the laws of the country in which it was incorporated.[70] However, the Act does not provide explicit relief to international (non-Indian) creditors of Indian companies.[71]

3. Other Laws Assisting the Present Legal Framework

In 1999, the Government of India appointed the Justice V.B. Balakrishna Eradi Committee to make recommendations on streamlining Indian insolvency laws.[72] The Committee suggested the creation of a National Company Law Tribunal ("NCLT").[73] Some of the Committee's recommendations have been adopted, but not all, with uneven results.[74]

The Government of India also enacted The Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"), to detect sick companies, meaning companies that have suffered losses greater than their net worth, and to revive such companies in a timely fashion.[75] The primary organ of the SICA is the Board of Industrial and

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68. *Id.*

69. *See id.* § 584.

70. *Id.*

71. *Id.*

72. Press Release, Government of India, Justice Eradi Committee on Law Relating to Insolvency of Companies ¶1, http://pib.nic.in/focus/foyr2000/foaug2000/eradi2000.html, [hereinafter Government of India Press Release, Justice Eradi Committee] (stating that the Government of India had constituted a committee of experts to examine the existing law relating to winding-up of companies); *see also* Sumant Batra, *Address at the Second Forum for Asian Insolvency Reform, Proposals for Reforms – the Indian Position*, FAIR 2 (Dec. 16-17, 2004) http://www.sumantbatra.com/pdf/papers/2nd_forum.pdf (commenting that the government of India set up the Eradi Committee in 1999 to remodel the existing insolvency framework).

73. Government of India Press Release, Justice Eradi Committee, *supra* note 72, ¶ 2 (listing the functions the Committee was set up to perform); *see also* Batra, *supra* note 72, at 13 (recording that national tribunals in the Companies (Bill) 2001 were formed as a result of the Eradi Committee's recommendations).

74. *See infra* Part III.B.

75. Sick Industrial Companies Act, No. 1 of 1986, INDIA CODE (1985), § 15 (1) (outlining the functions of the SICA); *see also* Press Release, The Government of India, Brief Introduction to the BIFR, "http://bifr.nic.in/introduction.html (stating that the BIFR was established to rehabilitate sick companies).

Financial Reconstruction ("BIFR").[76] The Calcutta High Court has held, however, that SICA does not apply to non-Indian companies, because "company" under SICA is strictly defined to exclude non-Indian companies.[77] However, SICA was sought to be repealed in 2004.[78] Further, the Court acknowledged that, although Legislators sought to repeal the Act in 2004, it continues to have effect as no Act has been legislated to replace it.[79]

The NCLT, as contemplated by the Eradi Committee, has powers ranging from the rehabilitation and revival of companies under the SICA to the winding-up of companies under the Companies Act.[80] The Indian legislature adopted the Committee's suggestion to repeal SICA, but the legislature did not implement the Committee's recommendations regarding its replacement.[81] Though in theory SICA stands repealed, due to legislative lags it is still practically in force.[82] The major provisions of SICA have been incorporated in the Companies (Amendment) Act of 2002, but a company may still apply to the BIFR under SICA to restructure its debts.[83]

The Committee further recommended that liquidation should be streamlined and, specifically, that the liquidators should be provided

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76. Sick Industrial Companies Act, No. 1 of 1986, INDIA CODE (1985), § 15 (outlining the process to be followed for relief to sick companies).

77. Yashdeep Trexim v. BIFR 106 S.C.L. 530 (Cal. 2011) ¶¶ 65, 68 (recognizing that the word "company" has been restrictively defined in the SICA and that it does not include foreign companies). It is pertinent to note here that High Courts are the highest appellate state courts and also have original jurisdiction regarding certain matters outlined in their rules.

78. Sick Industrial Companies (Special Provisions) Repeal Act, No. 1 of 2004, INDIA CODE (2003), Preamble; *see also* Batra, *supra* note 72, at 2 (affirming the recommendations of the committee have since been adopted as the Sick Industrial Companies (Special Provisions) Repeal Bill, 2001).

79. Yashdeep Trexim, 106 S.C.L. ¶ 55 (commenting that the repeal has not been enforced).

80. Government of India Press Release, Justice Eradi Committee, *supra* note 72, ¶ 7(i) (defining the jurisdiction and powers of the NCLT); *see also* Batra, *supra* note 72, at 13 (recognizing the jurisdiction and powers of the NCLT).

81. *See* LEXUNIVERSE, *Abolition of Sick Industrial Companies Act*, (Dec. 3, 2014), http://www.lexuniverse.com/industrial-policy/india/Abolition-of-Sick-Industrial-Companies-Act.html (stating that the SICA Repeal Bill lapsed without being passed by the Parliament and as a result the corresponding provisions introduced in the Companies Act has not yet come into effect); *see also* Yashdeep Trexim, 106 S.C.L. 530 ¶ 55 (holding that though SICA was sought to be repealed, that is yet to be enforced).

82. *See* LEXUNIVERSE, *supra* note 81; *see also* Yashdeep Trexim, 106 S.C.L. ¶ 55 (holding that though SICA was sought to be repealed, that is yet to be enforced).

83. *See supra* notes 72–82 and accompanying parentheticals (explaining why a company may apply to BIFR under SICA even though it was sought to be repealed).

with a greater amount of autonomy.[84] In this regard, the Committee suggested that only two main aspects of liquidation should require court approval, namely the sale of assets and the distribution of their proceeds.[85] The Committee also recommended that Part VII of the Companies Act should incorporate substantial portions of the Model Law.[86] In addition to incorporating the Model Law, the Committee recommended that the Companies Act of 1956 should adopt the principles laid down by the International Monetary Fund's Legal Department on "Orderly and Effective Insolvency Procedures – Key Issues."[87] The Government of India took these recommendations into account and enacted the Companies (Amendment) Act of 2002.[88]

C. *Cross-border Insolvency Cases*

The following are cases that have built the body of the common law regarding cross-border insolvency. The cases discuss the issues of recognition of international judgments, choice of venue for commencement of proceedings, vexatious winding-up, treatment of international creditors vis-à-vis Indian creditors, and restructuring. The methods employed in the following cases vary, thus causing confusion and the need for reforms in laws regarding cross-border insolvency.[89]

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84. Government of India Press Release, Justice Eradi Committee, *supra* note 72, ¶ 7(xiv) (recommending that the liquidator should not seek the sanction of the court except for important matters such as confirmation of sale of assets and distribution of proceeds realized).

85. *Id.* (limiting the role of the court to supervision of the sale of a debtor's assets and distribution of their proceeds among creditors).

86. *Id.* (advising the incorporation of the Model Law into the Companies Act); *see also* Batra, *supra* note 72, at 13 (recognizing that the committee sought guidance from the "UNCITRAL Model Law on Cross-Border Insolvency").

87. Government of India Press Release, Justice Eradi Committee, *supra* note 72, ¶ 7(v) (recommending the Companies Act incorporate the necessary principles of commencement and the venue of the insolvency proceedings; who may request commencement; and whether the nature of the commencement criterion should differ depending on who is requesting commencement [i.e., the debtor or the creditor] enunciated under the heading "Legal Framework," "Orderly and Effective Insolvency Procedures – Key Issues" on page 9 of the publication of the Legal Department of International Monetary Fund); *see also* Batra, *supra* note 72, at 13 (acknowledging that the committee sought to incorporate the views expressed by the International Monetary Fund on key issues relating to "Orderly and Effective Insolvency Procedures").

88. *See infra* Part III.B.

89. *See infra* Part II.

1. The Rajah of Vizianagaram v. Official Liquidator

The Companies Act of 1956 does not provide explicit relief to international (non-Indian) creditors for their claims or causes of action.[90] As early as 1962, however, the Supreme Court of India held in *Rajah of Vizianagaram v. Official Receiver* that international creditors and contributories can bring an action and file a claim under the Companies Act.[91] Through this case, the Supreme Court of India established the law governing international insolvencies in India.[92]

In this case, the debtor company was incorporated in England under the English Companies Act in force at the time.[93] The object of the debtor company was the mining of manganese in Kodur, Vizagapatnam District in India.[94] As the company proved to be unprofitable, it was unable to pay its debts, including rent due to the Rajah of Vizianagaram.[95] The Rajah subsequently filed winding-up proceedings that resulted in the appointment of an Official Liquidator.[96] International creditors of the company filed proofs of debts owed to them by the debtor company but the Rajah objected to their claims, contending that the liquidation proceedings were exclusively for the benefit of Indian creditors.[97]

The question before the Supreme Court was whether international creditors of a company not incorporated in India and subject to a winding-up proceeding initiated in India, with respect to the business of the debtor company in India, could prove their claim before the Official Liquidator.[98] The Supreme Court, after examining various English precedents, held that under the provisions of the Companies Act and general principles of comity, international creditors could prove their claims in the winding-up of unregistered

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90. *See generally* Companies Act, No. 1 of 1956, INDIA CODE (1956), §§ 484-520.

91. Rajah of Vizianagaram v. Official Receiver, AIR. 1962 S.C. 500, ¶¶ 6, 27 (holding that foreign creditors can prove their claims in winding-up proceedings).

92. *See infra* Introduction (explaining that since India is a common law jurisdiction, therefore judgments of the Supreme Court add to the general body of law).

93. Rajah of Vizianagaram, AIR. 1962 S.C. 500, ¶ 2 (stating that the Company was incorporated in English under the English Companies Act).

94. *Id.* (affirming that the object of the debtor company was the mining of manganese in Kodur, Vizagapatnam District).

95. *Id.* ¶ 3 (declaring that being unprofitable, the company was unable to pay its debts, including rent due to the Rajah of Vizianagaram).

96. *Id.* (summarizing the procedural history of the case).

97. *Id.* (outlining the procedural history of the case).

98. *Id.* ¶ 4 (formulating the issue in the present case).

companies in India.[99] However, the Court did not answer questions regarding recognition of international judgments.[100] Therefore, loopholes in the law with respect to cross-border insolvency proceedings remained.

2. Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises and Anr.

This case spans three jurisdictions: India, Hong Kong and Singapore.[101] However, this Note focuses on the Indian proceedings, i.e. *Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises and Anr*., which were ongoing as of January 2016.[102] The petitioner was a creditor to Defendant King Shing Enterprises Private Limited ("King Shing") regarding a loan made in Hong Kong.[103] Defendant T. K. Mody ("Mody") was a guarantor for the loan.[104] Although Mody is an Indian national, he is a permanent resident of Singapore, while King Shing is a company incorporated under the laws of Hong Kong.[105] Both King Shing and Mody were unable to pay the Hong Kong debt, and the petitioner commenced proceedings in Hong Kong for recovery of its dues.[106] The petitioner was successful in Hong Kong and received an order ("Hong Kong Order") entitling him to relief against Mody's personal property.[107] Unfortunately, Mody's property in Hong Kong was insufficient to pay off the debt he

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99. *Id.* ¶ 27 (holding after thorough analysis of English judgments that foreign creditors can prove their claims in winding-up proceedings).

100. *See generally supra* notes 91-99 and accompanying parentheticals (explaining the only issue resolved in this case).

101. *See* M. T. Mody & Anr. v. Sumikin Bussan International (HK) Limited [2014] S.G.H.C 123, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15606-manharlal-trikamdas-mody-and-another-v-sumikin-bussan-international-hk-limited-2014-sghc-123 (providing the background facts to the case).

102. Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises & Anr. (2005) 6 Bom C. R. 240; *see* Sumikin Bussan Int'l. (HK) Ltd. v. M. T. Mody & Ors., Supreme Court Case Special Leave Petition (Civil) 26680 OF 2010 connected with Special Leave Petition (Civil) 3752 OF 2006 status as on Supreme Court Website, www.supremecourt.nic.in (last visited Jan. 2, 2016) [hereinafter *Sumikin Bussan* Case Status].

103. M. T. Mody & Anr. v. Sumikin Bussan International (HK) Limited [2014] S.G.H.C 123 ¶ 2 (stating the facts of the case).

104. *Id.*

105. *Id.* ¶ 1 (outlining the case facts).

106. *Id.* ¶ 4 (summarizing the case history).

107. *Id.* ¶ 4 (highlighting relevant portions of the case history).

guaranteed.[108] Therefore, the petitioner sought execution of the Hong Kong Order in Mumbai, where Mody owned another property.[109]

During the pendency of the proceedings to enforce the Hong Kong Order in Mumbai, Mody filed for bankruptcy in Singapore.[110] The order declaring him insolvent was subsequent to an order of the Bombay High Court attaching his Mumbai property pursuant to the Hong Kong Order.[111] The Official Assignee was the Insolvency Representative of his estate under the laws of Singapore.[112]

While deciding the merits of the case, the Bombay High Court noted that this was a case of comity between States and that municipal bankruptcy laws had no role to play in such a case.[113] The Court further relied on an English case, *Galbraith v. Grimshaw*, which provided that a diligent creditor cannot be divested of an order for attachment of the debtor's property.[114] In this case, the order for attachment was delivered before Mody filed for bankruptcy in Singapore.[115] The dispute over whether to grant a stay of the execution proceedings is still ongoing in a complicated labyrinth as the case is still bouncing back and forth between the Bombay High Court to the Supreme Court of India.[116]

Currently, under Section 44A of the CPC, Hong Kong is a reciprocating territory but Singapore is not.[117] Therefore, the Hong Kong Order in favor of the petitioner was recognized while the

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108. *Id.* ¶¶ 5, 7 (stating that the sale of Mody's property in Hong Kong resulted to a partial satisfaction of the judgment debt leading to the initiation of proceedings in India).

109. *Id.* (affirming that the sale of Mody's property in Hong Kong resulted to a partial satisfaction of the judgment debt leading to the initiation of proceedings in India).

110. *Id.* ¶ 21 (recognizing the commencement date of the Singapore proceedings).

111. *Id.* ¶ 8 (formulating the procedural history of the case).

112. *Id.* ¶ 2 (outlining the procedural history of the case).

113. *Id.* ¶ 4 (recognizing the role of comity and private international law in the present case).

114. *Id.* ¶ 4 (relying on the English precedent in Galbraith v. Grimshaw [1910] AC 508, recognizing the importance of comity and private international law).

115. *Id.* ¶ 8 (affirming that the attachment was levied much prior to the order of the High Court of Singapore adjudicating Mody insolvent).

116. *Sumikin Bussan* Case Status, *supra* note 102; *see also* Chamber Order 1325 of 2010 status as on Bombay High Court Website, www.bombayhighcourt.nic.in (last visited Jan. 2, 2016) (showing the matter is pending before the Bombay High Court).

117. Sumikin Bussan Int'l. (HK) Ltd. v. King Shing Enter. Ltd. & Anr. & ING Bank NV, (2008) 5 Bom. C. R. 464, ¶ 9 (stating that Hong Kong is a reciprocating territory under Section 44-A of the CPC).

Singapore insolvency order was not recognized.[118] As shown in the case here, the English Common Law was insufficient with respect to helping resolve this case efficiently for the debtor and all the creditors.[119] This case highlights the lack of framework for dealing with cross-border insolvency cases in India, as the current framework does not completely provide for a quick and fair adjudication of a complicated bankruptcy proceeding.[120]

3. Intesa Sanpaulo S.P.A v. Videocon Industries Limited

The following case involved the insolvency of an Italian company, VDC, which had a registered office in Italy and was incorporated under Italian law.[121] VDC was a wholly owned subsidiary of Eagle, a company incorporated in Mauritius, which in turn was a wholly owned subsidiary of the Indian parent company, Videocon.[122] VDC took a loan from an Italian bank for which Videocon was a guarantor.[123] Under the terms of the Guarantee Agreement, the guarantor would not only be liable for the debt in case VDC defaulted on the loan, but it would also become liable for the debt if VDC's shares in Eagle changed or if Eagle's shares in VDC changed.[124]

Subsequently, all the eventualities contemplated under the Guarantee Agreement occurred, which are, inter alia, VDC defaulted on the loan and Videocon's shareholdings in Eagle diminished, and Eagle's shareholdings in VDC changed, therefore the Italian bank, in the hope of collecting its debt, filed a petition for winding-up against Videocon.[125] Videocon was a company carrying on a successful business of consumer durables in India at the time the petition was filed.[126] Nevertheless, the Bombay High Court granted the petition in favor of the Italian bank.[127]

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118. *See supra* notes 113-17 and accompanying parentheticals (explaining the issues arising from the conflict of laws and lack of legal framework to efficiently adjudicate this case).

119. *See supra* note 114 (discussing the use of English precedents).

120. *See infra* Part II.

121. Intesa Sanpaulo S.P.A v. Videocon Industries Limited [2014] 183 Comp. Cas. 395 (Bom), ¶ 1 (introducing the parties in the suit).

122. *Id.* ¶ 4 (providing details of the corporate structure of the respondents).

123. *Id.* ¶¶ 5-6 (discussing the transaction leading to the suit).

124. Id. ¶ 7 (providing details leading of the transaction leading to the suit).

125. *Id.* ¶ 19 (stating the details of the default on the transaction).

126. *Id.* ¶ 20 (discussing the business concerns of the respondent).

127. *Id.* ¶ 68 (delineating the holding of the Bombay High Court).

In his rationale, Judge Jamdar stated that any statutory creditor may bring an action for winding-up.[128] The Judge further stated that this matter involved commercial morality, as it pertains to international commercial transactions and upholding national prestige in such transactions.[129] He then clarified that depriving the petitioner, the Italian bank, of its dues would encourage Indian companies to be dishonest in their international dealings.[130] Finally, he added that the court needed to play an active role in changing the commercial and economic realities in the face of the globalization of trade and investments, cross-border flow of capital, and the dependence of the country's economy on international commerce.[131]

The Videocon case showcases a cross-border claim involving a winding-up petition.[132] Furthermore, the case is notable because a creditor filed a winding-up petition in India even though the respondent company was not insolvent.[133] Therefore, under Indian jurisprudence, creditors may file winding-up petitions against debtors even though they may not be insolvent.[134]

D. *Restructuring Cases*

Restructuring, also referred to as reorganization, is from the rehabilitation and revival of companies unable to pay debts.[135] The following section highlights some cases where the courts have successfully saved insolvent companies from liquidation.[136] It also discusses how judges have adjudicated cases on international levels, and thus, introduced an international standard of adjudication to Indian common law.[137]

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128. *Id.* ¶ 42 (recognizing that the law allows any statutory creditors to bring winding-up suits).

129. *Id.* ¶ 65 (viewing the case with commercial morality).

130. *Id.* ¶ 66. (ruling in favor of the petitioner).

131. *Id.* ¶ 66. (concluding the order in favor of the petitioner).

132. *See supra* notes 121-31 and accompanying parentheticals (discussing the case history and its issues and outcome).

133. *See supra* notes 121-31 and accompanying parentheticals (discussing the case history and its issues and outcome).

134. *See supra* notes 121-31 and accompanying parentheticals (discussing the case history and its issues and outcome).

135. *See supra* Part I.B.3.

136. *See infra* Part I.D.1.

137. *See infra* Part I.D.2.

1. Reserve Bank of India v. BCCI

The Indian courts demonstrated a skilled and efficient approach when handling the cross-border insolvency and liquidation of the Indian operations of the Bank of Credit & Commerce International (Overseas) ("BCCI").[138] In this case, the Reserve Bank of India ("RBI"), the federal bank of India, filed a petition for winding-up BCCI.[139] BCCI was incorporated in the Cayman Islands and thus considered an unregistered company even though it had a branch in Mumbai.[140] The Governor of the Cayman Islands determined that BCCI was unable to meet its debt obligations.[141] On this basis, insolvency proceedings were first commenced in the Cayman Islands, and a Receiver was appointed there.[142] RBI initiated a petition in India on the basis of a faxed version of the order appointing the Receiver, along with information received from the Provisional Liquidator appointed for the UK branches of BCCI.[143]

The Bombay High Court appointed the State Bank of India ("SBI") as the Official Liquidator on the petition filed by RBI.[144] In the same order, the Court also provided for a "scheme of arrangement" under which the SBI would take over the Mumbai Branch of BCCI.[145] The scheme proved to be a blessing in disguise as the depositors, creditors, and employees of BCCI benefited from it.[146] Here, despite the lack of appropriate legislation, the court took the correct approach by restructuring the Mumbai Branch of BCCI.[147]

2. In Re: Arvind Mills Ltd.

In this case, the debtor company, Arvind Mills Ltd., was unable to pay its debts due to a change in market conditions.[148] Arvind Mills

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138. *See infra* Part I.D.1.

139. Reserve Bank of India v. Bank of Credit & Commerce International, AIR 1994 BOM. 177, ¶ 1 (stating the cause of action in the suit).

140. *Id.* ¶ 3 (providing incorporation details of the debtor company).

141. *Id.* ¶ 4 (reproducing the facts in brief, which led to the filing of the present case).

142. *Id.* (summarizing the history of the proceedings).

143. *Id.* (discussing the facts leading to the present suit).

144. *Id.* (providing the history of the case).

145. *Id.* (delineating the details of the take-over circumstances).

146. *See supra* notes 139-45 and accompanying parentheticals (explaining the actions of the Bombay High Court despite appropriate legal framework).

147. *See supra* notes 139-45 and accompanying parentheticals.

148. *In Re:* Arvind Mills Ltd., [2002] 111 Comp. Cas. 118 (Guj.) ¶ 1 (summarizing the events leading to the bankruptcy).

was a public company registered in India and was in the business of manufacturing and dealing with cotton textiles, among other things.[149] The company experienced severe losses between 1997 and 2000 due to a decrease in the price of denim and increases in manufacturing costs.[150] Further, around March of 2000, thirty-six percent of the total debt of the company was owed to international lenders.[151] Arvind Mills was not able to generate enough revenue to satisfy its debt obligations and filed a petition asking the Court to restructure its debts under the relevant provisions of the Companies Act.[152]

Under the Companies Act, the members and creditors of the company must approve a scheme for debt restructuring.[153] Accordingly, the court ordered the company to schedule meetings for all classes of its creditors to seek their approval for the scheme.[154] At the meeting, the company obtained majority votes from working capital lenders, secured creditors, and unsecured creditors as required under the Companies Act.[155] However, the international creditors, who were secured creditors, voted against the scheme, as they felt it was prejudicial to their interests.[156]

As the minority, the international secured creditors filed their objections with the Court.[157] The main contentions of these creditors were that the scheme was prejudicial to some creditors because it sought to "confiscate the legitimate rights and securities of the objectors" and that, in granting approval of the scheme, the Court would be "cloaking the fraud" perpetrated by the company.[158] The international secured creditors further claimed that their debt was different from the debt of the other secured creditors because it was foreign currency debt.[159]

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149. *Id.* (providing the debtors' business details).

150. *Id.* (pointing out the specific reasons to the bankruptcy of the company).

151. *See id.* ¶ 1 (stating sixty-four percent of loans were from on-shore lenders, and the remainder was from foreign creditors).

152. *See id.* ¶ 9(e) (explaining how the debtor failed to generate revenue to meet its debt obligations).

153. *See id.* ¶ 2 (stating the requirements for restructuring under the Companies' Act).

154. *See id.* (recognizing that the court acted in accordance with the provisions of the Companies Act).

155. *See id.* (summarizing the details of the meeting and types of creditors).

156. *See id.* ¶ 4 (discussing the election choices of the foreign creditors).

157. *See id*. (providing the foundation for the present case).

158. *Id*. (stating the contentions of the foreign creditors before the court).

159. *See id.* (delineating details of the claims of the foreign creditors).

In its analysis of the contentions of the international secured creditors, the Court looked to an English treatise on the Companies Act for the definition of "class of creditors."[160] First, the Court concluded that the international creditors could not seek preferential treatment because the secured creditors all had commonality in interest.[161] The Court further held that the existence of a class within a class of secured creditors was not possible, as all the secured creditors have similar rights in the company.[162] In conclusion, the court held that, in the absence of a conflict of commercial interest amongst the secured creditors, the international secured creditors were not entitled to be treated as a different class of secured creditors.[163] Here, the Court adjudicated the matter on international standards. [164]

E. *Restructuring Project Finance Debts*

For developing countries such as India, building infrastructure is as imperative a task as liberalizing the economy.[165] Developing countries are unable to raise the capital required to meet their infrastructure needs without the assistance and support of foreign capital such as FDI.[166] In India, one such project was the Dabhol Power Project ("Dabhol").[167] In the early 1990s, in addition to its economic liberalization, India sought to build power plants financed by private sector companies to address the country's power needs.[168]

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160. *See id.* ¶ 14 (outlining the precedents used by the court).

161. *Id.* ¶ 15 (recognizing that the commonality of interest amongst all creditors is repayment of the monies loaned).

162. *Id.* (formulating the law and viewing all secured creditors equally).

163. *See id.* ¶ 15 (discussing the outcome of the suit).

164. *See* THE WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS ¶ 12 (April 2001), http://www.worldbank.org/ifa/ipg_eng.pdf (delineating international standards); *see also* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 708 (explaining that within a class of creditors the fairest basis for distribution is pro rata).

165. *See supra* Introduction (providing an explanation of the state of the Indian economy in the 1990s, when the Dabhol project was initiated).

166. *See supra* Introduction.

167. *See* Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons*, 41 VAND. J. TRANSNAT'L L. 907, 908 (2008) (introducing Dhabol as India's largest FDI project to date); *see also* Deeptha Mathavan, *From Dabhol to Ratnagiri: The Electricity Act of 2003 and Reform of India's Power Sector*, 47 COLUM. J. TRANSNAT'L L. 387, 388-89 (2008-2009) (describing Dabhol as India's most written-about international energy project).

168. *See* Kundra, *supra* note 167, at 912 (discussing India's electricity needs in the 1990s); Lamb, *supra* note 11, at 41 (recognizing the growth in the demand for electricity in India).

The Indian Government, aware of its weak negotiating position, gave this project "fast track" status.[169] This move by the Indian Government attracted international power producers such as Enron, General Electric ("GE") and Bechtel Enterprises.[170] The three companies formed a company incorporated under the Companies Act called the Dabhol Power Company ("DPC"), which was named after the town in the State of Maharashtra where the power plant was to be located.[171] The main function of DPC was to generate electricity, which would be bought by the Maharashtra State Electricity Board ("MSEB") as per the terms laid out in the Power Purchase Agreement ("PPA").[172] The PPA contained an international arbitration clause in case either party defaulted.[173]

Issues regarding Dabhol first emerged even before construction of DPC plant was complete, when the government of Maharashtra changed and a new government came into power; the new government promised to reduce the costs of electricity.[174] This led to a renegotiation of the PPA, which reduced the cost of electricity by twenty-two and one half percent per kilowatt hour.[175] Construction

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169. *See* Kundra, *supra* note 167, at 912 (stating that the Indian government gave the project a "fast-track"); *see also* Lamb, *supra* note 11, at 36 (explaining how lending "fast-track" status allowed the project to go ahead with minimal bureaucracy involved).

170. Kundra, *supra* note 167, at 908 (commenting on the attractiveness of the Indian electricity market to foreign investors); see also Mathavan, *supra* note 167, at 390 (asserting that the laws encouraged foreign investors to invest in India).

171. *See* Mathavan, *supra* note 167, at 393 (discussing the birth of the DPC); *see also* Kundra, *supra* note 167, at 914 (summarizing the creation of the DPC).

172. Mathavan, *supra* note 167, at 393 (providing the functions of the DPC); *see also* Lamb, *supra* note 11, at 39 (stating that the MSEB did not hold any stake in the project).

173. Kundra, *supra* note 167, at 908 (affirming that the United States initiated arbitration under the contract); *see also* Kenneth Hansen, Robert C. O'Sullivan, &W. Geoffrey Anderson, *The Dabhol Power Project Settlement: What Happened? and How?*, INFRASTRUCTUREJOURNAL.COM 5 (2005), http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf (specifying that the United States initiated arbitration against the Government of India).

174. Mathavan, *supra* note 167, at 393 (discussing the change of government and the promises of the new government); *see also* Lamb, *supra* note 11, at 39-40 (stating the appearance of government impropriety as a reason for the failure of the project).

175. Mathavan, *supra* note 167, at 394 (noting the renegotiation of the PPA); *see also* Lamb, *supra* note 11, at 40 (affirming that an unusually high return on equity guaranteed under the PPA was a reason for the failure of the project).

was completed by 1999, and for eighteen months thereafter DPC produced electricity bought by MSEB.[176]

However, in October 2000, MSEB failed to make scheduled payments and despite renegotiation of the PPA, MSEB considered the price of power too high as the demand for electricity had not grown as expected.[177] In response to the non-payment of its dues, DPC invoked the arbitration clause set forth in the PPA.[178] MSEB initiated proceedings in the Bombay High Court to declare the PPA void and the Bombay High Court granted an interim injunction against DPC and enjoined it from invoking an arbitration case under the contract.[179] DPC appealed to the Supreme Court.[180]

In the meantime, Enron filed for bankruptcy and sold its stake of DPC to GE and Bechtel.[181] The continuation of legal proceedings effectively prevented DPC from pursuing relief under the arbitration clause of the PPA.[182] As a result of this blockage, both GE and Bechtel sought to recover their investment by seeking insurance payment from the Overseas Private Investment Corporation ("OPIC"), a US government corporation that provides political-risk insurance to companies seeking to invest in emerging markets.[183] When OPIC refused to make payments, GE and Bechtel initiated

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176. Kundra, *supra* note 167, at 919 (commenting on the commencement of financial problems eighteen months after completion); *see also* Mathavan, *supra* note 167, at 394 (declaring that Phase I was implemented in 1999).

177. Kundra, *supra* note 167, at 919 (recognizing that MSEB was unable to meet its obligations under the PPA and proposed renegotiation); *see also* Mathavan, *supra* note 167, at 394 (stating parties agreed to renegotiate the contract).

178. Kundra, *supra* note 167, at 917 (asserting that DPC commenced international arbitration in London); *see also* Mathavan, *supra* note 167, at 390 (expressing that international arbitration was commenced when MSEB defaulted on the renegotiated contract).

179. Dabhol Power Co. v. Maharashtra State Elec. Bd. & Ors. AIR 2004 Bom 38 ¶ 1 (providing the procedural history of the suit).

180. *Id.* ¶ 3 (outlining the contentions of MSEB in the suit).

181. Mathavan, *supra* note 167, at 395 (recognizing that Enron sold its stake in DPC pursuant to its bankruptcy); *see also* Lamb, *supra* note 11, at 923 (asserting that GE and Bechtel were the remaining equity owners in DPC).

182. *Dabhol Power Co.*, AIR 2004 Bom 38, ¶ 77 (issuing order in favor of MSEB dismissing DPC's claim for arbitration); *see also* Kundra, *supra* note 167, at 922 (maintaining that the Bombay High Court subsequently granted an injunction against DPC pursuing arbitration).

183. Bechtel Enters. Int'l v. Overseas Private Inv. Corp., AAA Case No. 50 T195 00509 02, at 13 (2003), https://www.opic.gov/sites/default/files/docs/GOI110804.pdf (recognizing that Indian courts undermined DPC's right to fair and impartial administration of justice).

arbitration proceedings as laid out in the insurance agreements.[184] The arbitral award declared that the Government of India had engaged in an act of expropriation.[185] Some authors have labeled these events the "Dabhol Debacle," as they were complicated and resulted in massive amounts of international chaos.[186]

The cases referenced in this Part of the Note explain and further elaborate on how complicated and dysfunctional bankruptcy proceedings can become with respect to cross-border insolvency and restructuring issues in India.[187] These prolonged and complex proceedings could possibly deter investors from looking at India as a promising place to invest.[188] Based on the foregoing, the Indian Legislature should consider enacting a statute that specifically deals with the rights of international investors in cross-border insolvency proceedings.[189]

II. *THE RESULT OF LEGAL DISORGANIZATION IN THE REALM OF CROSS-BORDER INSOLVENCY PROCEEDINGS: HIGHLIGHTING THE MAIN ISSUES*

Due to several lags in the Indian legal process, as illustrated in Part I, issues often arise around cases of international insolvency proceedings. The following Section highlights some of the issues. The issues are recognition of judgments, discrimination between Indian and international creditors, forum shopping, and lack of extraterritorial jurisdiction.

A. *Recognition of Judgments*

One of the biggest challenges to smooth coordination among cross-border insolvency proceedings is the recognition of foreign

184. *Id.* at 14 (establishing that OPIC delayed paying these claims until GE and Bechtel had obtained a decision from the American Arbitration Association).

185. *Id.* at 11 (holding that the government of India breached contractual duties to guarantee MSEB payments, and these actions amounted to expropriation). *See generally* Kundra, *supra* note 167, at 928 (recognizing that judicial actions constituted "total expropriation" and violations of international law).

186. *See generally* Kundra, *supra note* 167, at 907 (titling the note "The Dabhol Debacle"). *See also* Mathavan, *supra note* 167, at 393 (using "Dabhol Debacle" as the heading of a subsection").

187. *See supra* Part I.

188. *See infra* Part II.B.

189. *See infra* Part III.A.

judgments.[190] For example, under the Model Law, an order for the winding-up of a company automatically stays other creditors from filing legal proceedings against the debtor.[191] In cases where insolvency proceedings are commenced in one jurisdiction and assets are located in another jurisdiction, sometimes a creditor may apply directly to the second jurisdiction to attach the international assets in question.[192] Although the administrator of the bankruptcy proceedings can try to initiate proceedings to set aside the order entitling the creditor to the property located abroad, this creates problems and is not always successful.[193] The stringent requirements of section 13 of the CPC impact cross-border insolvency proceedings as foreign judgments from non-reciprocating territories are rarely enforced, whereas those from reciprocating territories undergo a strict re-examination process before they are enforced in India.[194] For instance, in *Sumikin*, the Indian courts did not stay the execution proceedings when the administrator filed suit.[195]

In one of the *Sumikin* proceedings, the Court discussed the ramifications of the reciprocity provisions of the CPC.[196] In *Sumikin*, the debtor argued that the attachment of property pursuant to an order of the Hong Kong Court was invalid, as Hong Kong ceased to be a reciprocating territory once it was handed over to China.[197] The Court pointed out that in the absence of a notification in the Official Gazette, Hong Kong was still a reciprocating territory, even though mainland China is not.[198]

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190. *See supra* discussion of the case of Sumikin Busan Int'l, Part I.C.2 (highlighting the chaos caused in the case when the Hong Kong Order was recognized and the Singapore Order declaring Mody insolvent was not).

191. UNCITRAL Model Law, *supra* note 43, art. 19 ¶ 1 (discussing relief to be provided).

192. *See supra* Part I.C.2 (discussing the case of Sumikin Busan Int'l and recognizing that the petitioner initiated execution proceedings in India and Mody filed for insolvency in Singapore).

193. *See supra* Part I.C.2, (discussing the case of Sumikin Busan Int'l and explaining the inefficiency in the adjudication of the case due to non-recognition of the Singapore insolvency order).

194. CODE CIV. PROC. (1908) § 13 (laying down the thresholds foreign judgments are required to meet before they can be recognized or executed in India).

195. *See supra* Part I.C.2 (discussing the case of Sumikin Busan Int'l).

196. Sumikin Bussan Int'l. (H.K.) Ltd. v. King Shing Ent. & Ors., (2008) 5 Bom C. R. 464 ¶ 7 (explaining the application of section 44 of the CPC).

197. *Id.* ¶ 11 (outlining the arguments set forward).

198. *Id.* ¶ 9 (formulating common law and establishing Hong Kong as a reciprocating territory).

With respect to the Singapore proceedings, the Court noted that there was no treaty between the Government of India and Singapore.[199] Further, the Court determined that the Model Law did not apply because it is a Model Law, not a treaty.[200] Since there was no legal framework that allowed the Court to recognize a judgment of a non-reciprocating territory, the Court held that the attachment was invalid.[201] In its reasoning the Court stated that, because the attachment was levied prior to Mody filing for bankruptcy in Singapore, the Singaporean bankruptcy proceeding had no effect on the petitioner's right of attachment.[202] Therefore, *Sumikin* is evidence of how the present law with respect to recognition of foreign (non-Indian) judgments in India is a major issue in India's treatment of cross-border insolvency cases.

B. *Discrimination Between International and Local Creditors*

Indian courts generally do not differentiate between domestic and international creditors.[203] International creditors may initiate insolvency proceedings against a domestic debtor company, may prove their claims in domestic receivership proceedings, and may participate in domestic schemes of arrangement.[204] In sum, international creditors are treated on par with domestic creditors in all cases and are vested with the same rights.[205] Likewise, in *Arvind Mills*, the Court held that the international secured creditors fell within the same class as other secured creditors.[206] In making this determination, however, the courts did not consider the exchange rate risk or investment risk that foreign currency lenders experience.[207] Such judgments could harm India's progress as they would likely reduce the flow of foreign investment into India because despite equal

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199. *Id.* ¶ 2 (holding that Singapore is not a reciprocating territory as contemplated under the CPC nor by the operation of international law through a treaty).

200. *Id.* (recognizing Model Law is not a treaty).

201. *Id.* ¶ 8 (determining that the attachment was invalid).

202. *Id.* (stating that the Singapore order cannot affect the right of the attaching creditor).

203. *See supra* notes 93-99 and accompanying text (allowing foreign creditors to state their claims in Indian insolvency proceedings).

204. *See supra* notes 93-99 and accompanying text.

205. *See supra* notes 149-64 and accompanying text (treating foreign currency secured creditors on par with their Indian counterparts).

206. *See supra* notes 149-64 and accompanying text (holding common law does not discriminate between creditors in the same class).

207. *See supra* notes 149-64 and accompanying text.

treatment, international investors may perceive themselves exposed to many unnecessary risks.[208]

International investors in the Dabhol Debacle similarly found themselves in a spider web of contradicting political agendas and unfavorable judicial actions.[209] Superficially there was no prejudice toward the international investors.[210] However, a truly non-prejudiced judiciary would rule prudently in a manner such that they could recover their investment.[211] This matter brought international attention to the delays in the Indian judiciary and corrupt political practices.[212] The ultimate outcome of Dabhol is the worst case for any emerging economy because it set precedent to deter future investors, thereby preventing future investment in infrastructure, which is desperately needed in India.[213]

C. *Forum Shopping*

Forum shopping occurs when a litigant files a case in a court or jurisdictions where he feels he will be most successful.[214] Forum shopping in the Indian treatment of cross-border insolvency cases involves filing vexatious winding-up petitions.[215] Vexatious winding-up petitions are winding-up petitions where the respondent company is not insolvent; the petitions stem from a bad debt and threaten the company with liquidation should it not pay off the debt.[216] In *Intesa,* the court allowed a winding-up petition filed by an Italian bank even though the respondent company was a well-functioning, solvent corporate group.[217]

However, in *Marine Geotechnics LLC v. Coastal Marine Construction & Engineering Ltd.,* a recent judgment of the Bombay

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208. *See supra* Introduction and accompanying text (stating the need for FDI); *supra* notes 149-64 and accompanying text (holding that foreign secured creditors were treated on par with their Indian counterparts).

209. *See supra* Part I.E (highlighting the plight of DPC when MSEB prevented it from initiating arbitration proceedings contemplated under the PPA).

210. See *supra* Part I.E.

211. *See supra* Part I.E (delineating the complicated legal process leading to the ultimate success of the foreign investors).

212. *See supra* Part I.E (discussing the negative attention the Dabhol project received).

213. *See supra* Part I.E.

214. *Forum Shopping*, BLACK'S LAW DICTIONARY (9th ed. 2009).

215. *See supra* notes 121-34 and accompanying text (explaining that a winding-up petition may be initiated even though the respondent company is not insolvent).

216. *See supra* notes 121-34 and accompanying text.

217. *See supra* notes 121-34 and accompanying text.

High Court, the Court follows a different view from its earlier holding in *Intesa*.[218] The court previously held that the winding-up petition in *Intesa* stemmed from collection on an underlying guarantee, unlike in *Marine Geotechnics*.[219] In *Marine Geotechnics*, the winding-up action was based on a judgment entered by the US District Court for the Southern District of Texas, Houston Division.[220] Moreover, no execution proceedings of *Marine Geotechnics* had been filed in India.[221] The Court further stated that winding-up petitions must not be misused or used as a legitimate method for recovery of a debt; here—the judgment of the US District Court—whether or not the debt is bona fide.[222] In this case, the Court prevented the abuse of the judicial process, by not allowing the petitioner to succeed on a vexatious winding-up petition.[223]

D. *Lack of Extraterritorial Jurisdiction*

Indian insolvency law is more territorial than most.[224] It is subject to a presumption against extraterritoriality, meaning it cannot be applied beyond the geographic borders of India.[225] Moreover, Indian courts may refuse to recognize the jurisdiction of courts established in other countries.[226] This means that the Indian branch of an international insolvent company would have to file a new winding-up petition in order to prevent the courts from treating it as a separate matter.[227]

Although Indian courts have the jurisdiction to wind-up companies incorporated outside India under section 584 of the

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218. *Compare* Intesa Sanpaulo S.P.A v. Videocon Indus. Ltd. (2014) 183 Comp. Cas. 395 (Bom.), *with* Marine Geotechnics LLC v. Coastal Marine Constr. & Eng'g Ltd., (2014) 183 Comp. Cas. 438 (Bom.).

219. Marine Geotechnics (2014) 183 Comp. Cas. 438 (Bom.) ¶ 1 (providing the background history of the case).

220. *Id.* (outlining the procedural history of the case).

221. *Id.* (establishing that the cause of action arose from an order of the US District Court).

222. *Id.* ¶ 21 (holding that a winding-up petition is not a legitimate means of enforcing recovery of a debt).

223. *See supra* notes 215-22 and accompanying parentheticals (comparing two vexatious winding-up cross-border petitions with uneven results).

224. *See supra* Part I.B (discussing Indian statutes governing bankruptcy).

225. *See supra* Part I.B.

226. *See supra* Part I. B.1 (explaining CPC §§ 44A and 13).

227. Marine Geotechnics (2014) 183 Comp. Cas. 438 (Bom.) ¶ 20 (providing the method for foreign decree holder to enforce the decree in India).

Companies Act, and Indian common law provides for equal treatment of international creditors, there is a discrepancy in the case law on the grounds for this type of winding-up proceeding.[228] Some cases dictate that a company having outstanding debts with an international creditor may initiate winding-up proceedings against the company, even though the company is not insolvent.[229] Meanwhile, others prevent creditors from filing winding-up proceedings when the respondent company is not insolvent.[230] However, the courts are uniform in holding that in order for an Indian court to exercise jurisdiction, the debtor company must have carried on business or must have assets situated in India.[231]

Alternatively, Indian courts have the discretion to refuse to exercise their jurisdiction in winding-up a company incorporated abroad if proceedings are already underway in its place of incorporation or the proceedings would be more appropriately held in another jurisdiction.[232] The courts in India have previously exercised their discretion and subjected an international debtor company to a winding-up procedure in India in *Rajah*.[233] In *Rajah*, the Court noted that the Indian proceeding was an ancillary one, as the non-Indian company was already subject to a liquidation proceeding in its country of incorporation.[234] This fact limited the function and power of the Indian liquidators.[235] The only two functions of the Indian court were to realize the assets of the company in India, and make a list of Indian creditors who have lodged claims against the debtor company in India.[236]

As India is not a signatory to any international conventions on insolvency, its laws do not provide for coordination with other

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228. *See supra* Part II.C. (comparing two similar cases with different outcomes).

229. *See supra* Part I.C.3 (discussing the case of *Intesa*).

230. *See supra* note 222 and accompanying text.

231. *In Re:* Girish Bank, AIR 1959 Cal. 762 ¶ 19 (defining the law of venue or "lex-situs," with respect to international insolvency proceedings).

232. *See supra* note 99.

233. *See supra* Part I.C.1 (discussing the case of *Rajah*).

234. *See* Rajah of Vizianagaram vs. Official Receiver, AIR. 1962 S.C. 500 ¶ 15 (holding that the proceedings in India were ancillary).

235. *Id.* ¶ 17 (stating that all foreign creditors should be able to do the same thing Indian creditors can do and therefore adding more creditors to share the debtor's limited pool of assets).

236. *Id.* ¶ 20 (referring to English precedent).

insolvency proceedings pending outside India.[237] Further, the doctrine of reciprocity is limited in its application and does not effectuate the judgments of foreign jurisdictions even under orders of other courts.[238] As was seen in *Sumikin*, the Bombay High Court recognized the judgment of the Hong Kong court and did not recognize the judgment of the Singapore High court.[239] Instead, the Indian court favored the Hong Kong judgment and placed the judgment debtor in an unfavorable situation, which could have been avoided if there were a statute addressing cross-border insolvency.[240]

III. *METHODS FOR THE RESOLUTION OF POTENTIAL ISSUES IN CROSS-BORDER INSOLVENCY PROCEEDINGS*

This Section discusses possible solutions to the problems that may arise in cases involving cross-border insolvency. First, India should apply the Model Law discussed in Part I.A.[241] Then, efforts should be made by the Indian legislature to streamline the statutes in force with provisions specifically dealing with matters of cross-border insolvency.[242] Statutes could also provide a method of monitoring cash flow in the debtor's operations with respect to restructuring proceedings.[243] Finally, a regional insolvency pact would facilitate smoother and quicker processing of cross-border insolvency cases.[244]

A. *Applying the Model Law to Provide Parties to Cross-Border Insolvencies with Uniform Relief as Recognized by Developed Nations*

If India were to enact legislation applying the principles underlying UNCITRAL's Model Law, this legislation would constitute an important benefit.[245] The objectives and principles of the Model Law have been drafted liberally and provide for discretion in

237. *See supra* Part II.A (highlighting issues arising due to the lack of legal framework providing for recognition of non-Indian judgments).

238. *See supra* Part II.A.

239. *See supra* Part II.A (delineating the issues caused by the present legal framework).

240. *See supra* Part II.A.

241. *See supra* Part I.A (Discussing the main aspects of the Model Law).

242. *See infra* Part III.A (expressing that streamlining can be achieved with the application of the model law).

243. *See infra* Part III.B.

244. *See infra* Part III.C.

245. *See supra* Part I.A (explaining the principles, objectives and functionality of the Model Law).

almost every aspect.[246] Moreover, they provide for coordination and cooperation between States, which in turn would lead to harmony in the international legal arena with respect to cross-border insolvency proceedings.[247] If India indeed wants to be considered a key player in the international business arena it needs to enact legislation that effectively deals with cases of cross-border insolvency.[248]

In a case like *Sumikin*, a law providing cooperation and coordination between courts of different countries would have led to an equitable disposal of the debtor's assets.[249] Under such a law, the Indian courts could have recognized the commencement of insolvency proceedings in Singapore and granted an automatic stay of the execution proceedings.[250] The stay could have helped to protect the debtor's property and litigation expenses, leading to a larger pool of assets that could be used to satisfy the creditors' claims.[251]

In addition to maximizing the creditors' returns, the legislature should also enact laws that invite non-Indian creditors to India. In *Arvind Mills*, the non-Indian currency lenders complained because they felt that it was more appropriate that they were placed in a separate class of creditors due to their varying interests from secured Indian creditors.[252] Though the case was decided on international standards, the Court failed to notice that such creditors bear greater risk than that borne by the local creditors due to fluctuations in exchange rates and government policies that could affect their loans.[253] Therefore, the new law should also contain provisions that provide further protections to foreign (non-Indian) currency lenders as this will encourage them to direct more FDI into India.

International (non-Indian) creditors would invest in Indian companies more confidently as a result of reassurance stemming from the cross-border insolvency laws.[254] To the creditors, these laws

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246. *See supra* Part I.A.

247. *See supra* Part I.A.

248. *See infra* Part I.A (listing the need for FDI to enable economic growth).

249. *See supra* Part I.C.2 (discussing the case of Sumikin and highlighting chaos caused due to non-recognition of non-Indian judgments).

250. *See supra* Part I.C.2 (discussing the outcome of Sumikin within the framework of the Model Law explained in Part I.A).

251. *See supra* Part I.C.2.

252. *See supra* Part I.D.2 (discussing the case of Arvind Mills, portraying the chagrin of the non-Indian currency lenders when they were not compensated for the currency risk).

253. *See supra* Part I.D.2 (discussing the case of Arvind Mills).

254. *See supra* Introduction (stating the need for FDI); *see also supra* Part I.B (highlighting discrepancies in the Indian insolvency framework).

would provide for a "level playing field" and encourage them to invest in India.[255] This in turn would result in an overall boom to Indian businesses and industries.[256]

B. *Streamlining Indian Law: The Eradi Committee Analyzed*

The recommendations of the Eradi Committee resulted in the enactment of the Companies (Amendment) Act of 2002 ("Amendment Act").[257] Under the Amendment Act, "sickness" is redefined in a manner that provides for early identification of distressed companies, which further provides for quicker and more efficient liquidation or restructuring of the debtor's assets.[258] The Amendment Act also provides for the establishment of the NCLT.[259] Before the effect of the Companies Amendment Act of 2002 had an opportunity to surface, the legislature enacted the Companies Act of 2013, which contained similar provisions.[260] As a result, the Indian legislature's over-eagerness to modernize insolvency laws complicates the assessment of the impact of the new legislation. By constantly legislating new laws, the legislature adds uncertainty and unpredictability to the future of cross-border insolvency proceedings in India.[261]

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255. Steve Kargman, *Opportunities and Pitfalls in Emerging Market Restructurings: A Strategic Perspective*, 8.2 THE J. OF PRIV. EQUITY 89, 91 (2005) (stating that creditors may feel that the local insolvency laws put them at a serious disadvantage); *see also* Alice Gledhill, *Mismatching Insolvency Laws Spell Trouble for Resolution*, REUTERS (July 16, 2015), http://www.reuters.com/article/2015/07/16/banks-regulations-idUSL8N0ZQ16120150716 (recognizing that national discrepancies compromise a level playing field).

256. *See supra* Introduction (stating that liberalization of the economy and the introduction of FDI led to economic growth).

257. Kang & Nayar, *supra* note 18, at 47 (affirming that the Amendment Act followed the recommendations of the Eradi Committee); Companies (Amendment) Act, 2003, No. 11 § 2, Acts of Parliament, 2003 (expressing that the 1956 Act is the principle Act).

258. Companies (Amendment) Act, 2003, No. 11 § 47, Acts of Parliament, 2003 (establishing a mechanism for revival of sick companies).

259. Companies Act, 1956, No. 1 § IB, Acts of Parliament, 1956 (providing for tribunals and delineating their functions).

260. Companies Act, No. 8 of 2013, INDIA CODE (2013), Preamble (stating it is an Act to consolidate the existing laws regarding companies in India).

261. *See id.*; Companies (Amendment) Act, 2003, No. 11 §2; Companies (Amendment) Act, 2003, No. 11 §47; Companies Act, No. 8; Kang & Nayar, *supra* note 18 (explaining the difficulty behind assessing the impact of the recent insolvency legislations).

C. *Cash Monitoring the Debtor's Operations*

In the short term, where the changes in the law may not be evident or effective, it would greatly benefit the creditors to institute a system of monitoring the business activities of a debtor in restructuring proceedings.[262] According to Steven Kargman, an expert in the field of restructuring debts in emerging markets, though a system of cash monitoring would reduce the autonomy of an insolvent debtor, it would provide for transparency of the liquidation and restructuring process.[263] This may better enable the creditors' returns on their investments.[264] Further, it would place the creditors in a position of power, where they could report any asset-shifting or otherwise fraudulent activity to the authorities in due time.[265]

D. *Regional Insolvency Pact*

In any case, India should enter into an agreement in the form of a treaty with its neighbors with respect to cross-border insolvency and recognition of judgments.[266] A regional treaty of this nature would provide for smoother cross-border proceedings in Asia and further extend an invitation to investors.[267] It would also lead to an increase in overall trade and prosperity to the region.[268]

A regional insolvency treaty would lead to smoother adjudication of cases like *Sumikin*.[269] In *Sumikin*, there were proceedings in Hong Kong, Singapore, and India.[270] The Singapore

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262. Kargman, *supra* note 255, at 90 (recognizing that restructurings can remain unresolved for several years, during which creditors want to ensure their interests are protected); *see also* Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 51, (1982-1983) (establishing the need to monitor the debtor).

263. Kargman, *supra* note 255, at 91 (noting that the independence of the debtor would be reduced).

264. *See generally id.* at 90-91 (providing methods for the creditors to exercise control over the debtor).

265. *Id.*

266. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 12 (noting that regional treaties may prove to be a useful starting point for broader cooperation)*; see also supra* Part I.C.2 (highlighting the chaos caused in adjudicating a case without appropriate legal framework).

267. UNCITRAL MODEL PRACTICE GUIDE, *supra* note 32, at 12.

268. *Id.* at 15 (stating such treaties would improve the situations in the contracting states); *see also supra* Part I.C.3 (highlighting the abuse of the winding-up process due to lack of legal or contractual framework).

269. *See supra* Part I.C.2 (discussing issues arising without the appropriate legal framework).

270. *See supra* Part I.C.2 (outlining the procedural history of the case).

proceedings, not recognized in India, adjudicated the debtor insolvent.[271] This lack of recognition led to a complicated series of cases and appeals filed with the Bombay High Court as well as with the Supreme Court of India.[272] By adopting a regional treaty, the parties involved in cross-border insolvency proceedings could better avoid the hardship faced by the parties in *Sumikin*.[273]

CONCLUSION

The optimistic observer sees opportunities for change. The process of consolidating laws in the realm of cross-border insolvency is not a simple one. Simplifying steps sometimes backfires and simplification of insolvency law in India is especially hard due to the delays within the judiciary and legislature.[274] By adopting the UNCITRAL Model Law, Indian insolvency proceedings would have international standards.[275] Unfortunately, in a country where traditions are gold and procedure is valued more highly than justice, any type of change favoring an international (non-Indian) party will be resisted.

To pursue its development goals, the Government of India should work harmoniously and as an integrated country.[276] The state governments and the Central Government must work hand-in-hand and consolidate both cross-border and domestic insolvency laws.[277] The goal must be unified enacting legislation that provides for a cross-border insolvency regime while liberalizing FDI regulations.[278] Due to the transnational nature of business today, it is common for Indian companies to have assets located in other jurisdictions.[279] It is possible that these other jurisdictions provide for different degrees of

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271. *See supra* Part I.C.2.

272. *See supra* Part I.C.2.

273. *See supra* notes 261-67 and accompanying parentheticals (explaining the ramifications of a regional insolvency pact and its application to a pending case in India).

274. *See supra* Part III.B (highlighting the failure of the Indian legislature to frame and consolidate laws governing cross-border insolvency issues).

275. *See supra* Part III.A (suggesting that the adoption of Model Law would be an improvement in cross-border insolvency law in India).

276. *See supra* Part I.E (highlighting issues in project finance cases due to clashes between the government of the state of Maharashtra and the central government).

277. *See supra* Part I.E (highlighting issues in project finance cases due to clashes within the Indian state and central government).

278. *See supra* Part III.B.

279. *See supra* Part I.C.3 (discussing the ramifications of Indian companies with assets in debt abroad).

recognition.[280] In order to compete with these jurisdictions and provide for a speedy and expeditious gathering, liquidation, or restructuring of such assets India must modernize its insolvency regime. Such definite steps would drive India toward development.

280. Status UNCITRAL Model Law on Cross-Border Insolvency, *supra* note 52 (providing a list of countries that have adopted the Model Law including the United States and United Kingdom).