THE NEED FOR A ROBUST LEGAL FRAMEWORK FOR CROSS BORDER INSOLVENCIES IN INDIA

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ABSTRACT

With the advancement of commercial technology, cross-border trade is no longer the exclusive realm of large multinational corporations. Economic growth has compelled businesses to extend outside their native jurisdictions and to coordinate their activities across national borders. As a result of the increasing globalization of business practices, organizations are exposed to a diverse range of legal frameworks. The true problem arises when a business that taps the worldwide market and has assets and creditors scattered across numerous international regions becomes insolvent. In such circumstances, governments must have well-structured legislation and a proper procedural framework in place to manage international insolvency.

This paper examines the current laws in India that govern "Cross-Border Insolvency", as well as its flaws, and then explores the development of historic cases such as Videocon[i] and Jet Airways,[ii] which suggests that provisions relating to international insolvency, if adopted in due time will be a roaring success for the Code and the tribunal.

Keywords: Cross Border Insolvency, Draft Part Z, UNCITRAL Model Law, NCLT

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INTRODUCTION

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the Recovery of Debt Due to Banks and Financial Institutions Act of 1993 (RDBIA), the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and the Companies Act, 2013 (CA) were all laws in India that dealt with the Insolvency and Bankruptcy of businesses and other legal entities in India. The result was a systemic delay and complexity in the liquidation process, which is handled by the High Courts, District Courts, the Company Law Board, the Board for Industrial and Financial Reconstruction (BIFR) and the Debt Recovery Tribunals (DRTs).

While the High Court's handle company liquidation, individual cases were handled under the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act. Credit institutions in India were under too much stress because of the current regulatory structure, which made it difficult for them to get their money back when loans go bad.

As a result, the Eradi Committee recommended the establishment of the National Company Law Tribunal (NCLT) in 1999, with the goal of streamlining Indian insolvency laws, speeding up the revival / rehabilitation of sick companies, and protecting the interests of workers, all of which were incorporated into the Companies (Amendment) Act, 2002. Finally, the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) were established on June 1, 2016, with powers provided by Sections 408 and 410 of the revised Company Act, 2013. The NCLT is responsible for reviewing company winding-up and insolvency legislation, among other things.

Hereafter, the Insolvency and Bankruptcy Code was enacted in 2016. The goal of the Code is to streamline and update the laws governing the reorganisation and insolvency of corporations, partnerships, and individuals in a timely manner in order to maximise the value of these individuals' assets, promote entrepreneurship, increase access to credit, and balance the interests of all parties involved. Credit markets and entrepreneurship would benefit from a well-functioning bankruptcy and insolvency legislative system. Increasing the ease of doing business would also lead to greater investment, which in turn would lead to increased economic growth and development. [iii]

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Thus, in order to ensure and protect the rights of domestic and foreign creditors concurrently and to standardize the insolvency proceedings across jurisdictions, the concept of Cross Border Insolvency was introduced.

LITERATURE REVIEW

1. ***"International Insolvency: An Indian Perspective on Cross-Border Treatment of Cases"***[iv]

   - Nidhi Shetye

This article examines the current Law, its scope, and its shortcomings in the Indian pretext of Cross Border Insolvency. It highlights that these issues are relatively new and thus are ill-defined, obscure, vague, unclear. It actively demonstrates that not only are these issues but also that their depth is not well defined. Additionally, it demonstrates judicial activism and judges' inventiveness in combining disparate legal rules while dealing with Cross Border Insolvency in India. This article falls short in emphasizing UNCITRAL's influence on the Indian framework and neglects to address the shortcomings of the Indian Draft Part Z based on the UNCITRAL model.

2. ***"Cross Border Insolvency Framework in India"***[v]

   - Dr. Binoy J. Kattadiyil & CS Nitika Manchanda

This article discusses India's Cross Border Insolvency Framework and the impact of the IBC, the Company Law Act, 2013, and the Civil Procedure Code, 1908 on the cross-border procedure followed in India. It then discusses the UNCITRAL model, which aims to harmonize the laws governing cross-border insolvency, and the importance of adopting the Model Law. This article fails to analyse the impact of the NCLT on the idea of cross-border bankruptcy and does not delve into the critical nature of the draft Z in India at the moment.

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RESEARCH QUESTION

- Whether NCLT is equipped to efficiently adjudicate cross-border insolvency cases?

OBJECTIVES OF THE RESEARCH STUDY

The objectives of the current paper are as follows:

- To get a holistic idea of Cross Border Insolvency.
- To gain a better understanding of India's current Insolvency regime in accordance with the UNCITRAL Model Law.
- To determine whether Draft Z is suitable for India.

RESEARCH METHODOLOGY

The research is exploratory in nature and will focus on an in-depth analysis of secondary source data and statistics. It incorporates data from the MCA, the Ministry of Trade and Commerce, the IBBI, various technical institutes' reports, journal/articles written, corporate law reference books, bare acts, state publications, and the central government of India's website.

ANALYSIS

➢ PART 1 :- CONCEPT OF CROSS BORDER INSOLVENCY

What is cross-border insolvency?

It is a method for resolving the insolvency of financially challenged businesses with assets or creditors located in multiple foreign jurisdictions. The system is more concerned with guiding the insolvency of multinational organizations than with individual bankruptcy.[vi]

The purpose of the Cross Border Insolvency regime is:

1. To ensure and protect the rights of domestic and foreign creditors concurrently.
2. To preserve the debtor's asset worth located in more than one region.

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3. To coordinate and collaborate with various foreign laws and their judicial procedures.
4. To harmonize and standardize insolvency proceedings across jurisdictions.

➢ PART 2:- GLOBAL LEGISLATION GOVERNING CROSS BORDER INSOLVENCY

The UNCITRAL Model Law & EC Regulations

Cross-border insolvency procedures can be ineffectual, time-consuming, and costly. This is largely due to the fact that Laws vary across various jurisdictions. As a result, they are not always consistent or uniform; inevitably leading to numerous conflicts, particularly concerning the recognition of judgments, foreign jurisdictional regulations, and compliance with foreign judicial proceedings, recognition of claims by foreign creditors, and discrepancies between the applicable laws.[vii]

Thus, to provide a degree of harmonization of insolvency legislation across countries and to develop an appropriate strategy for resolving cross-border insolvency cases, the United Nations Commission on International Trade Law enacted the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (Model Law) on 30 May 1997, and the European Commission (EC) enacted the cross-border insolvency legislation on May 29, 2000, providing a system for the European Union's Member States.

A. UNCITRAL Model Law

- The *"UNCITRAL Model Law on Cross-Border Insolvency (Model Law)"*[viii] was adopted by the UNGA in 1997 and is currently incorporated into the domestic legislation of 46 nations.
- It was particularly established as a Model Law to provide Nation-States greater flexibility in implementing the same rules in their domestic legislation. It enables countries to modify, remove or add particular sections as necessary, allowing them to enact model legislation in the manner that is most convenient for their domestic circumstances.
- This law is founded on the idea and notion of the Centre of Main Interest (COMI) and establishes a distinction between "Main Proceedings" and "Non-Main Proceedings."

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- Main proceedings occur in jurisdictions in which the debtor possesses COMI, whereas non-main proceedings happen in jurisdictions in which the debtors have some sort of a commercial establishment.[ix]
- It enables insolvency practitioners involved in international insolvency proceedings to recognize foreign court orders, gain access to the courts of the enacting country and vice versa, cooperate with the other countries' courts where assets of debtors and creditors are situated, and assist in obtaining relief from foreign proceedings.[x]

B. European Community Regulations

- The EC Regulation permits its Member States to determine the jurisdiction and appropriate legislation in Cross Border Insolvency procedures and mandates the recognition of such insolvency proceedings in all EU Member States.
- Similar to the UNCITRAL, the EC Regulations are based upon the COMI principle, with the European Union's members entitled to designate the scope of COMI.

➢ PART 3:- LEGISLATIONS PREVALENT IN INDIA

NCLT and IBC

The NCLT has been authorized to implement winding-up orders and also serves as an Adjudicating Authority for IBC, allowing for the settlement of insolvency, liquidation, and bankruptcy of partnership firms, individuals, and corporate entities. The NCLT, aided and assisted by Insolvency Professional Agencies and Insolvency Practitioners, plays a critical role in the IBC's operation.[xi]

The operationalization of NCLTs in India and the implementation of IBC in 2016 has aided in the acceleration of Liquidation, Insolvency Resolutions, and other processes by centralizing them. These changes have significantly benefited the corporate world. Nevertheless, despite these developments, concerns such as Cross-Border Insolvencies remain unaddressed.

Cross Border Insolvency Under Different Statutes

In order to evaluate the rights and duties of international creditors and to execute judgments issued by foreign courts, certain provisions of Indian law aid the Indian courts in their deliberations and decisions. These provisions are further explained in detail below:

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

Under the CPC, Section 44A,[xii] mandates Indian courts to enforce orders entered by foreign courts in 'Reciprocating Territories.'[xiii] Sections 13[xiv] and 44A of the CPC allow for the conclusive nature of foreign decisions in reciprocating nations, with the exception of situations involving fraud, unjust rulings, and lacking jurisdiction. The CPC establishes procedures for the general recognition of judgments but does not explicitly address the recognition and enforcement of decisions in cross-border bankruptcy proceedings.

2. Winding up procedures pursuant to the Companies Act, 2013

In bankruptcy proceedings, the Companies Act, 2013 establishes a structure for creditors or debtors located outside India and also sets a method for winding up insolvent Indian companies. Section 588[xv] of the Companies Act, 1956 (now Section 375[xvi] of the Companies Act, 2013) expressly provides that a competent court may wind up a foreign corporation that is not established in India but operates in India as an unregistered company. A foreign company's winding up or dissolution under the laws of the nation in which it was created will have no effect on its winding up or dissolution. However, the Act makes no explicit provision for Indian companies with foreign debtors.

3. Cross Border Insolvency under IBC, 2016

Sections 234[xvii] and 235[xviii] of the Code authorize the Government to enter into reciprocal agreements with other countries to resolve Cross Border Insolvency. It's possible that a foreign court or tribunal will help an insolvent debtor whose assets are located in another country by sending a letter of request to the relevant NCLT.[xix] This request may be made only to nations with which India has reciprocal agreements. However, Sections 234 and 235 of the IBC have not yet been proclaimed.

➢ PART 4:- PROBLEMS ARISING IN INDIA DUE TO LACK OF PROPER LEGISLATION

Issues due to Lack of Legislation

Due to significant latencies in the Indian Legal System, complications frequently occur when foreign insolvency procedures are involved. Some of the paramount issues are reiterated below:

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1. Recognition of Foreign Judgments

Acceptance of foreign judgments is one of the most significant impediments to efficient cross-border insolvency cooperation. Section 13 of the CPC will affect Cross Border Insolvency proceedings, as international pronouncements from non-reciprocating territories are seldom enforced in India, and from reciprocal territories are subject to stringent scrutiny prior to being enforced in India.[xx]

2. Decrease foreign investment inflows

Indian courts, in general, make no distinction between domestic and international creditors. While courts safeguard the rights of international secured creditors, they disregard the exchange rate risk that foreign lenders face and this may have a detrimental influence on India's growth by reducing the flow of foreign investment to India.[xxi]

3. Absence of Extraterritorial jurisdiction

Jurisdiction is presumptively territorial, which implies it cannot be extended beyond India's geographical borders. Additionally, Indian courts have the authority to deny recognition to foreign courts i.e., the Indian branch of a foreign bankrupt corporation must submit a new petition to avoid the courts viewing it as a distinct affair.[xxii]

➢ PART 5:- DRAFT Z: A WAY AHEAD

Draft Z

A. SALIENT FEATURES

On 16 October 2018, the Insolvency Law Committee published a report suggesting that the Model Law be included in the Code in the form of Draft Provisions. The Draft Provisions incorporate various amendments and adaptations to the Model Law that the Committee determined were necessary for the Indian context. The essential characteristics of the proposed provisions are further explained below:

1. Foreign Creditors' and Representatives' Rights

The draft's sections 7, 8, 9, 10, and 11[xxiii] concern assisting foreign creditors and representatives. Thus, a foreign/international creditor or representative would be considered a domestic creditor for the purposes of initiating and participating in a proceeding under the Code, and would not be required to obtain authorization or acknowledgment from any authority in order to bring proceedings before the NCLT.[xxiv]

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2. Recognition of a Foreign Proceeding

A foreign representative may ask the NCLT to approve the foreign procedure through which he or she was appointed by petitioning. Section 12(2)[xxv] of the Draft Chapter states that the foreign representative is required to submit this paperwork in order to file the application. As long as the application complies with Article 15(1)[xxvi] of UNCITRAL Model Law, the NCLT will recognize the proceedings as given under Article 17[xxvii] either as a foreign non-main proceeding or a foreign main proceeding within 14 days of their filing, depending on where the corporate debtor conducts business.[xxviii]

3. Reciprocity

Previously, the adjudicating authority's order would have been applicable only if India had signed a bilateral agreement with the other country. This shortcoming is addressed in the draft. Following the UNCITRAL Model Law, any order from an Indian court will be recognized in a foreign country. The Draft provides for cooperation, help, proper redress, and recognition in connection with foreign-country-initiated insolvency procedures in India.[xxix]

4. Cooperation with Foreign Courts

The Model Law allows direct contact between courts with different jurisdictions in cross-border insolvency cases. According to the Draft Chapter's Section 21,[xxx] the Central Government must, after consulting the NCLT, notify any changes to the rules governing contact and collaboration between the NCLT and foreign courts. There may also be joint hearings between the NCLT and another international court. The NCLT is also allowed to speak directly with foreign representatives and to ask for information or assistance from them.[xxxi]

5. Concurrent Proceedings

The draft stipulates those international proceedings and those governed by the Code may be commenced or conducted concurrently against the same Corporate Debtor. The concurrent procedures are subject to two criteria. Firstly, the NCLT must accept the international main proceedings and secondly, that the Corporate Debtor has assets in India.[xxxii] When international proceedings and Code proceedings are brought against the same Corporate Debtor concurrently, the NCLT will collaborate with foreign courts or representatives in accordance with Sections 21,22, and 23[xxxiii] of the Draft.

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B. LACUNAE IN THE PROPOSED DRAFT

- The draft gives the NCLT power to decline to act if it believes that doing so would be plainly averse to public policy. Currently enacted legislation employs the term "manifestly" to limit the scope of "public policy." Without any regulations governing the exercise of this discretion, it becomes extremely vague and provides the authority considerable discretion over the necessity to control the NCLT's implementation.[xxxiv]
- The draft's section 17 requires the Tribunal to declare a moratorium. However, there is still a debate concerning the applicability of Section 17 of the current draft to non-main procedures in other countries. Additionally, if not applicable, the committee failed to provide an adequate justification for the same.
- Section 375(3) (b) of the Companies Act, 2013, governs the insolvency of unregistered companies, that might include international corporations. Unregistered companies that are unable to pay their debts may be wound up under this clause. In the United States, Section 220 of the Companies Act of 2006 (US) governs the insolvency of all sorts of businesses. However, there is no similar provision in the UK, and insolvency of all types of businesses is regulated solely by Insolvency Law. This multitude of provisions results in duplicity of regimes, which breeds confusion. It is required to integrate these provisions by adopting appropriate modifications to put all insolvency procedures under a unified framework.
- The Committee has proposed enacting a Model Law based on the reciprocity principle which means that a foreign courts judgment is recognizable only if they have a bilateral agreement. However, with future economic changes and the Model Law's successful implementation, this provision may be eliminated.
- The draft omitted any explanation of the criterion for determining a company's COMI other than the location of the registered office. However, corporations such as MNCs may have multiple registered offices, which is decided by the court. Additionally, there is no time limit for appealing the COMI as provided under the US Bankruptcy Code.[xxxv]
- The draft offers to grant direct access of domestic courts to international representatives. A significant difficulty here is that India prohibits foreign attorneys and legal firms from practising in the country.

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- The draft does not incorporate additional provisions found in the US Bankruptcy Code, such as the authority to grant equal relief or the authority to grant protection or a bond in connection with a foreign non-main proceeding, thereby enhancing creditors' confidence through the provision of guarantees.[xxxvi]

➢ PART 6:- THE CASES THAT HIGHLIGHTED THE NEED FOR IMPLEMENTATION OF DRAFT Z

Judicial Interpretation

The following cases helped set precedent for cross-border insolvency in India. Cases include accepting foreign judgments, choosing a tribunal for litigation, vexatious liquidation, representing international creditors against Indian creditors. The following incidents illustrate the necessity to reform the rules on cross-border insolvency:

1. "Rajah of Vizianagaram v. Official Receiver"[xxxvii]

Issue: The Supreme Court had to decide whether foreign creditors of a firm incorporated outside India and subject to an Indian winding up procedure might appeal to the Official Liquidator.

Held: The SC found that overseas creditors of a foreign firm doing business in India may exercise their claims in the company's winding up procedures as an unregistered entity in India. But the court did not consider the issue of recognizing international rulings.

2. "Sumikin Bussan International (HK) Ltd. v. King Shing Enterprises and Anr."[xxxviii]

Issue: The question was whether the Hong Kong order could be enforced in India and if the Singapore court could intervene in the defendants' execution against Mumbai property.

Held: The Hong Kong judgment was accepted as it was a "reciprocating territory" under Sec.44A of the CPC but since Singapore did not have a reciprocal arrangement, that order wasn't recognized.

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Importance: This case showcases the inadequate framework in India for dealing with cross-border bankruptcy matters since the present system does not effectively facilitate the prompt and equitable adjudication of a complex insolvency action.

3. "Reserve Bank of India v. BCCI"[xxxix]

Issue: The question was regarding the appointment of Official Liquidator in a suit initiated by RBI.

Held: Indian courts have demonstrated competence and effectiveness in resolving the Bank of Credit & Commerce International's (BCCI) cross-border bankruptcy and liquidation of its Indian businesses. The court appointed the SBI as Official Liquidator of the RBI's suit and also approved a scheme of arrangements under which the SBI would assume control of the BCCI branch in Mumbai.

Importance: In this case, given the lack of proper regulation, the court made the correct decision by reorganising the BCCI branch in Mumbai.

4. "Jet Airways (India) Ltd. v. State Bank of India & Anr."[xl]

Issue: This is a cross-border bankruptcy case involving distressed debtors who have assets and/or creditors in numerous countries and are subject to insolvency procedures across different jurisdictions. Since these businesses failed and insolvency procedures have been commenced, it is critical that these geographically dispersed assets are preserved and that the claims of creditors from several countries are aggregated and settled.

Held: To facilitate cross-border insolvency cooperation between the Indian Resolution Professional and Dutch Administrator, the NCLAT has enabled the Dutch administrator to attend the Jet Airways Creditor meetings. For the first time, NCLAT reviewed multiple insolvency actions against the same corporation. Jet is also facing insolvency procedures in the UK and the Netherlands. The Dutch court-appointed administrator asked the NCLAT for help from an Indian mediator. The NCLAT asked the Dutch administrator and the Indian RP to work together. An agreement between the Dutch administrator and the Indian RP was accepted by the NCLAT.

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Importance: This is significant since Indian law lacks a mechanism that recognizes or addresses cross-border bankruptcy situations such as the one at hand. The Appellate Tribunal deemed the said Dutch administrator "equivalent" to the Indian RP and allowed him to attend Creditor Committee sessions.

5. "State Bank of India v Videocon Industries Limited"[xli]

Issue: Videocon's 15 companies underwent insolvency against one common creditor, SBI. 13 out of the 15 were combined and the remaining two companies had no operational dependency hence their consolidation was under question.

Held: The NCLT adopted the Doctrine of Substantial Consolidation test wherein the criteria were two-fold; A Prima facie existence of elementary governing factors (such as common control, directors, assets, liabilities, etc) and categorization based on governing factors (wherein the companies whose asset-liability is intermingling, when segregated, would still provide for viable profitable restructuring)

The companies' functions are so interlinked that they were difficult to separate and therefore, the NCLT had ordered Videocon Industries' foreign oil and gas industry to be included in the ongoing corporate insolvency procedure. As a result, any attempt to bring the two overseas companies under the IBC would raise cross-border issues of applicability. The NCLT recently authorized Videocon's international subsidiaries to participate in the IRPs in India.

Importance: This is one of the instances wherein the Courts harmoniously addressed the lacunae in the present Insolvency Law.

RESEARCHER'S OPINION BASED ON ABOVE ANALYSIS

The Indian government has urged that the UNCITRAL Model Law on Cross Border Insolvency be adopted with certain adjustments to provide NCLT access to CIRP in foreign courts, lowering the burden on the Indian courts and improving the asset worth of Corporate Debtors.

However, as previously analysed, India currently lacks a robust legal framework for resolving cross-border bankruptcy issues. Even if Section 234 & 235 of the Code are notified and implemented, they have a number of problems and would be incapable of providing a

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comprehensive structure for cross-border bankruptcy procedures. As such, the Committee's proposed draft would eventually have to be altered and included in the Code, necessitating the adoption of several revisions and provisions to fit the proposed chapter. However, despite the establishment of a special committee to study and suggest a regulatory framework for cross-border insolvency provisions in the Code, there have been no recent updates on the committee's progress on the same. This shows the laid-back approach and callousness of the law-making authorities for not incorporating the Draft Law even when push comes to shove.

Notwithstanding that, it must not be overlooked that several administrative and legal hurdles would need to be resolved in order for the proposed draft to be effectively adapted and implemented. However, with sufficient effort and persistence, the legal structure might facilitate collaboration and communication across different jurisdictions, as well as successfully handle cross-border conflicts involving India.

For example, consider the emergence of international commercial arbitration as a method of resolving international conflicts. Its success is due to the New York Convention. It has been ratified by 167 nations, which means that an arbitral award rendered in one of the signatory countries is immediately enforceable in the other signatory country without the need for further processes. If a unified set of rules can be effective in arbitration, there is no reason to suppose it cannot be effective in insolvency.

To sum it up, the draft framework does have its heart in the right place but needs to be incorporated at the earliest for streamlining the process of cross-border insolvency in India. As we have seen in the cases of Jet Airways and Videocon, it is the Judicial activism that was put into force for settling the disputes. In hindsight, for a country like India where the courts are already overburdened with cases, it becomes extremely difficult for the courts to dispose of the matter in a time-barred manner.

In addition to this, it is the duty of the Legislature to make laws and for the Judiciary to interpret them. In the current scenario, the lack of a proper framework makes the Judiciary both a lawmaker and the implementer. Thus, creating a thin line between Judicial Activism and Judicial Overreach. It is quintessential to address this before the lines are blurred.

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CONCLUSION

By incorporating a cross-border insolvency framework into the existing Insolvency and Bankruptcy Code, the law will be strengthened by enhancing its effectiveness as a one-stop-shop for all insolvency-related issues. Adopting the Draft legislation will be critical in restoring creditors' trust in effectively recovering their dues, consequently altering the landscape of domestic lending. By introducing cross-border insolvency measures, India's bankruptcy system would achieve worldwide respect and recognition as firms increasingly operate on a global scale. Having a legislation based on the UNCITRAL Model Law in place reassures international investors' interests in India, since unfamiliarity and unpredictability of the law are eliminated, and as a consequence, foreign financing increases due to the law's clarity and consistency.

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