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Title: Are Bangladesh, India and Pakistan ready to adopt the UNCITRAL Model Law on Cross-Border Insolvency?

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ABSTRACT

The development of business laws in key markets have not kept pace with the exponential growth of foreign investment they have experienced. Countries such as Brazil, Russia and China, either do not consider the issue of cross-border insolvency in their legislation or they explicitly provide for a 'territorialist' approach to cross-border insolvency proceedings, whereby each country grabs local assets for the benefit of local creditors, with little consideration of foreign proceedings. This has led to uncoordinated, expensive attempts at cross-border reorganisation.

The UNCITRAL Model Law on Cross-Border Insolvency (1997) was adopted with the objective of modernizing international insolvency regimes and enhancing cross-border cooperation. In its 19 years of existence, it has been adopted by 41 countries in a total of 43 jurisdictions but by none of the BRIC states or the 'Next-11' nations of Bangladesh and Pakistan. While it has entered into policy-level discussion in China, India and Russia, it would seem that there is still scepticism regarding the efficacy and suitability of the Model Law for adoption into their national systems. This paper seeks to establish whether the Model Law can adequately plug, what Steven Kargman calls, 'the glaring gap in the international insolvency architecture', looking particularly at the context of the South Asian states of India, Bangladesh and Pakistan. It will question whether its adoption will improve the ability of these jurisdictions to handle the challenges of cross-border insolvencies, especially in light of their existing legal landscape, their market policy objectives and the existing alternatives available to the Model Law.

Are Bangladesh, India and Pakistan ready to adopt the UNCITRAL Model Law on Cross-Border Insolvency?

1. Introduction

In 2015, the World Bank reported that South Asia is the geographical region experiencing the fastest economic growth rate in the world.[1] Bolstered by low oil prices, increased capital inflows and low rates of inflation, the economies of countries like India are booming. Along with the four other BRICS nations, they account for over 15% of world trade (US$ 5.9 trillion).[2] Corporations of Indian origin, like Tata and Reliance, now operate globally in the energy, mineral, oil, gas, manufacturing and agricultural sectors.[3] At the same time, India is a 9th largest recipient of foreign direct investment, amounting to US$ 34 billion in 2015.[4] Pakistan and Bangladesh are growing emerging markets for foreign investors and are significant participants in global trade.[5] This is evidenced by the fact that as of July 2016, Pakistan has a GDP of US$ 269.97 billion and Bangladesh of US$ 195.08 billion.[6] Even in the wake of the Rana Plaza disaster, Bangladesh continues to enjoy the status of being the 2nd largest

[1] The World Bank, *South Asia Economic Focus Spring 2015: Making the Most of Cheap Oil* (World Bank 2015) 9.

[2] Joseph Purugganan, Afsar Jafri & Pablo Solon, 'BRICS: A global trade power in a multi-polar world' (2014) Shifting Power: Critical Perspectives on Emerging Economies Working Paper Series, 2 <https://www.tni.org/files/download/shifting_power-trade.pdf> accessed 12 September 2016.

[3] Fortune, 'Global 500' (Fortune, 31 March 2016) <http://fortune.com/global500/> accessed 1 September 2016.

[4] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 3.

[5] Goldman Sachs categorized them as part of the 'Next 11' for their potential to rival G7 countries D. Wilson & A. Stupnytska, 'Beyond the BRICS: A Look at the Next 11', in Goldman Sachs, *BRICs and Beyond* (The Goldman Sachs Group, Inc. 2007) 161; UNCTAD reports that Bangladesh received US$ 1.5 billion and Pakistan US$ 1.7 billion in FDI as of 2015 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) A5.

[6] The World Bank, 'GDP Ranking' (The World Bank Data, 22 July 2016) <http://data.worldbank.org/data-catalog/GDP-ranking-table> accessed on 12 September 2016.

exporter of ready-made garments in the world[7] and is home to a 'surging consumer market'.[8]

Part of the reason behind this economic growth and integration into the global economy is a series of business and investment-oriented legal reforms undertaken by the governments of these countries. However, these recent reforms have not kept pace with international developments regarding cross-border insolvency, a phenomenon of great importance in the aftermath of the recent global recession and the collapse of multinational groups like Lehman Brothers.

When Lehman Brothers became bankrupt in 2008, its assets had to not only be liquidated in the USA and Europe but also as far afield as Singapore and Hong Kong. As a result of the global financial crisis, Brazil saw a drop of 32% in the value of its currency within one month,[9] Russia experienced a volatile housing market,[10] China required a US$ 586 billion fiscal stimulation package[11] and South Africa recorded a 47% rise in company failures.[12] More recently, in June 2015, stock markets in China

[7] Alissa Ayres, 'Bangladesh: Behemoth Garment Industry Weathers the Storm' *Forbes* (Singapore, 20 June 2014) <http://www.forbes.com/sites/alyssaayres/2014/06/20/274/> accessed 10 September 2016.
[8] Zarif Munir, Olivier Muehlstein and Vivek Nauhbar, 'Bangladesh: The Surging Consumer Market Nobody Saw Coming' *bcg-perspectives* (Boston, 22 October 2015) <https://www.bcgperspectives.com/content/articles/center-customer-insight-go-to-market-strategy-bangladesh-surging-consumer-market/> accessed 12 September 2016.
[9] John Williamson, 'The Impact of the Global Financial Crisis on Brazil' (Brazilian-American Chamber of Commerce Meeting, Washington DC, 13 October 2008); Jonathan Goodman and Andre Soliani, 'Brazil Emerges From Recession, Led by Domestic Demand', *Bloomberg* (New York City, 11 September 2009).
[10] Alexei Evgenev, Maxim Fangulov & Elena Tasturova, 'Russia: Emerging Playground for a Savvy Distressed Investor', in Lisa Paul (ed.) *Global Insolvency & Restructuring Review 2012/2013* (Euromoney Trading Ltd., 2012) 143.
[11] Frederik Balfour, 'The Global Recession Slams China' *Bloomberg Business* (New York City, 22 January 2009) <http://www.bloomberg.com/news/articles/2009-01-22/the-global-recession-slams-china> accessed 28 April 2016.
[12] Hein Marais, 'The Impact of the Global Recession on South Africa' (17 July 2009), Analyses of the Elcano Royal Institute (ARI) 115/2009,

lost roughly a third of their value in a matter of weeks[13] and in July 2015, Moscow reported that Russia's GDP had slumped by 4.6%, miring the country deeper in recession.[14] In September 2015, Standard and Poor's rating agency downgraded Brazil's sovereign debt to "junk" status, highlighting the extent of its ongoing recession.[15] The slowdown of these economies has adversely impacted countries around the world, from Germany to Kazakhstan to Peru, as their exports are reliant on demand from these major markets.[16] This is the natural result of an integrated world economy where there is increasing foreign investment in BRIC nations and emerging and frontier markets, increasing South-South trade and multi-nationalization of their companies.

It would have been expected that as a corollary to these contemporary economic developments, a transnational[17] insolvency law framework would emerge, in the event that some of these businesses or investments fail. This would, *inter alia*, address issues such as the recognition of foreign insolvency proceedings and coordination between courts. However, even a cursory analysis of the literature on cross-border insolvency in these countries reveals that they either do not consider the issue of cross-border

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<http://www.realinstitutoelcano.org/wps/portal/web/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/Elcano_in/Zonas_in/ARI115-2009> accessed 28 April 2016.

[13] Editorial, 'China Embraces The Markets' *The Economist* (London, 11 July 2015) <http://www.economist.com/news/leaders/21657395-panicked-response-tumbling-stocks-casts-doubt-pace-reform-china-embraces> accessed 11 September 2016.

[14] Anna Andrianova, 'Russian GDP Plunges 4.6%' *Bloomberg* (New York City, 10 August 2015) <http://www.bloomberg.com/news/articles/2015-08-10/russian-economy-shrinks-4-6-as-oil-slump-risks-deeper-recession> accessed 11September 2016.

[15] Editorial, 'Brazil's terrible fall from economic grace' *Financial Times* (London, 13 September 2015) <http://www.ft.com/intl/cms/s/0/fa56a932-5875-11e5-a28b-50226830d644.html#axzz3qhIKR1CH> accessed 10 September 2016.

[16] Roberto Bendini, 'Exceptional Measures: The Shanghai Stock Market Crash And The Future Of The Chinese Economy' (September 2015) Policy Department, Directorate General for External Policies, European Parliament, Doc. DGEXPO/B/PolDep/Note/2015_249, 12.

[17] In this paper, I use the term 'transnational' law as opposed to international law since it is wider in scope than public international law or state-centric private international law. It includes the growing corpus of decisions, rules and soft law instruments that are developing through the ongoing interaction of public & private actors (broadly defined) across states, such as the EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines [CoCo Guidelines].

insolvency in their national legislation at all or they explicitly provide for a 'territorialist' approach to cross-border insolvency proceedings, whereby each country grabs local assets for the benefit of local creditors, with little consideration of foreign proceedings. Conversely, some of these states claim extra-territorial effect for their own insolvency proceedings without according the same recognition to in-bound proceedings. This has led to inadequate and uncoordinated attempts at cross-border insolvency that are expensive and time-consuming.

The UNCITRAL Model Law on Cross-Border Insolvency (1997) (hereinafter 'UNCITRAL Model Law') was developed to address these procedural shortcomings in the international insolvency architecture and has emerged as the most widely used 'framework' to develop the cross-border aspects of national insolvency regimes. It was promulgated by UNCITRAL, the UN body tasked with the reform of international trade law, with the goals of enhancing cooperation between the actors in cross-border insolvency, promoting legal certainty in trade and investment, ensuring the fair and efficient administration of cross-border insolvencies, protecting debtors' assets and rescuing businesses. To that effect, the Model Law facilitates the recognition of foreign insolvency proceedings, the access of foreign representatives, the availability of relief for foreign parties and the creation of avenues of cooperation and coordination between courts and proceedings. It has been, as of writing, adopted in some form by 41 countries in a total of 43 jurisdictions, encompassing a wide spread of OECD, emerging and frontier markets.[18] In 2015 alone, the Members *of Organisation pour l' Harmonisation*

[18] UNCITRAL, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' (*UNCITRAL*, April 2016) <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> accessed on 12 September 2016.

en Afrique du Droit des Affaires (OHADA)[19] - representing a bloc of 17 West and Central African states – as well as Kenya [20] and Malawi [21] adopted legislation incorporating the Model Law. However, none of the key markets of Brazil, Russia, India and China or the Next-11 nations of Bangladesh and Pakistan have adopted the Model Law. This indicates that there is still scepticism regarding the efficacy of the Model Law and considerable weariness about adopting it, even though it has entered into policy-level discussion in countries like India and China.

This paper questions whether the UNCITRAL Model Law can adequately plug, what Steven Kargman calls, 'the glaring gap in the international insolvency architecture',[22] looking particularly at the context of the South Asian states of India, Bangladesh and Pakistan. It will interrogate the presumption that the UNCITRAL Model Law on Cross-Border Insolvency will improve the ability of emerging, common law jurisdictions, like Bangladesh, India and Pakistan, to handle the challenges of cross-border insolvencies, especially in light of these countries' existing legal landscape, their market policy objectives and the existing alternatives available to the Model Law.

The second section of this article will provide an overview of the motivations that exist for establishing a transnational insolvency law framework. The third section will analyse the problems that a lack of a solid cross-border insolvency regime has had on

[19] In English, this stands for the Organisation for the Harmonization of Business Law in Africa, created on October 17, 1993 in Port Louis, Mauritius.

[20] Insolvency Act, 2015 (Kenya), <http://www.industrialization.go.ke/images/downloads/policies/insolvency-bill-2015.pdf> accessed 17 November 2015.

[21] UNCITRAL, 'Malawi Enacts New Insolvency Legislation Implementing UNCITRAL Model Law on Cross-Border Insolvency' (20 November 2015), UNCITRAL Press Release UNIS/L/225.

[22] Stephen T Kargman, 'Emerging economies and cross-border insolvency regimes: missing BRICs in the international insolvency architecture (Part I)' (September 2012) 6 Insolvency and Restructuring International 8.

Brazil, Russia and China and how they have responded to such a challenge. These three countries have been selected for study because they represent a powerful geopolitical bloc that act as the 'voice' of emerging economies in international policy forums and are seen to act as a counterweight to the interests of OECD countries. The fourth section will outline the international insolvency regimes of India, Bangladesh and Pakistan, as of September 2016.

To establish whether adopting the Model law will be the best way to handle cross-border insolvencies, two older forms of cross-border insolvency regime will be surveyed in the fifth section: customised cross-border insolvency regimes (CBIAs)/protocols and regional cross-border insolvency agreements. The sixth section will be devoted to the drafting process of the Model Law and a summary of its final provisions. This will be followed in the seventh section with an analytical and empirical study of select common law jurisdictions that have incorporated the Model Law, namely, the UK, USA, Australia, Canada and South Africa. The final section will evaluate the prospects and challenges of adopting the Model Law in South Asia.

2. The Allure of a Solid, Transnational Insolvency Law Framework

There have long been attempts to develop norms for transnational insolvency – from multilateral agreements between Italian city states in the Middle Ages [23] to the enactment of bilateral treaties between European states for the reciprocal recognition of judgments, equal treatment of creditors and enforcement of bankruptcy decrees in the

[23] Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency*, vol. X of Wessels Insolvency Law (4th edn, Wolters Kluwer 2015) paragraph 10032.

1700s.[24] Outside of Europe, Argentina, Paraguay, Peru and Uruguay entered into the Treaty of Montevideo on 12 March 1889, which helped parties ascertain a debtor's domicile and entrenched the unitary nature of cross-border proceedings.

A solid, procedural framework is seen as being potentially invaluable as it can help lower transaction costs by allowing liquidators to efficiently reach assets, improve recovery rates, assist in the rescue of companies, enhance market confidence, stymie conflict between the parties involved and generally ensure efficiency and fairness in administering claims. This is particularly apparent during periods when global stock markets are in distress or amidst a recession.

These benefits have been touted by international financial institutions (IFIs) such as the World Bank, International Monetary Fund and the Asian Development Bank since the late 1990s following the onset of the Asian financial crisis. The recession caused developing countries like Indonesia to suffer a devaluation of their national currency and drainage of their foreign exchange reserve, thereby rendering them dependent on loans from IFIs. This, in turn, gave IFIs substantial influence over national policy on issues such as insolvency law reform.[25]

IFIs actively encouraged insolvency law reform and legal institution-building on a global scale, with the belief that tiding through such crises will require the creation of an 'international financial architecture that is fully grounded on globally authorized

[24] *See, e.g.* Article 13, the Treaty of Alliance of 9 May 1715 between France and the Catholic Swiss Cantons; the Helvetic Convention of 29 May 1777 ; Article 12, Treaty between France and the Helvetic Republic of 19 August 1798.

[25] Terence C. Halliday, 'Architects of the State: International Financial Institutions and the Reconstruction of States in East Asia', (2012) 37 Law & Social Inquiry 265, 289.

national legal systems'.[26] A G-22 report stressed the need for a strong insolvency regime to avert financial crises and a subsequent report by the World Bank added that courts will be central to a strong insolvency regime.[27] At the time, the ADB established a standard by which the insolvency regimes of 11 Asian countries could be compared and the World Bank developed 'principles and guidelines' for effective insolvency law regimes, which included assessing the cross-border aspects of individual legal systems. The economic rationale for developing a cross-border insolvency mechanism was emphasised, indicating how a collective, coordinated approach would help rescue struggling debtors, prevent discrimination among creditors and maximize creditor returns.[28]

These factors have generated political interest in the insolvency reform process, as demonstrated by the active participation of Asian governments in forums on insolvency law.[29] In a special session on cross-border insolvency in 2006, it was recognised that dealing with the insolvency of multinational corporate groups without an international insolvency law framework would be crippling, as debtors would gain possession of the group's assets in individual countries. While there was no consensus on the best way for incorporating these features into domestic law, especially given the fragility of the insolvency systems of respective jurisdictions, a strong case was made for initial action

[26] Halliday (n 25).
[27] G-22, *Report of the Working Group in International Financial Crises* (IMF October 1998); The World Bank, *East Asia: Recovery and Beyond* (The World Bank 2000).
[28] Michael Sloan, 'The Lack of Adequate Insolvency Frameworks for Major Corporate Collapses in Asia', in OECD (ed.), *Credit Risk and Credit Access in Asia* (OECD 2006) 95.
[29] The OECD, World Bank, Australian Treasury and the Australian Development Bank organised a Forum on Asian Insolvency Reform, on the topic of *Legal and Institutional Reforms of Asian Insolvency Systems* in Beijing, China in 2006. Australia, Bangladesh, Canada, China, India, Pakistan, Singapore, the UK and the USA, i.e. most of the countries surveyed in this article, participated in that Forum.

in this regard to be taken immediately.[30] Similarly, UNCITRAL Legal Committee members stressed the need to improve commercial laws for cross-border transactions but highlighted the need for technical assistance to do so.[31] In theory, this would seem to provide fertile ground for the establishment of an international insolvency architecture.

However, the construction of such architecture has not yet materialised and the cross-border insolvency regime of many countries remains inadequate.

3. Illustrative Examples of Gaps in the Transnational Insolvency Law Framework

Brazil, Russia and China have what can be broadly described as a territorial insolvency system, whereby their law seeks to limit the effect of a set of insolvency proceedings to its place of origin. This section analyses the problems that have manifested in these countries as a result of such an approach.

Russia's parent bankruptcy law is silent on the recognition of foreign proceedings[32] and only recognizes foreign judgments regarding insolvency where an international treaty exists in this regard between the foreign country and Russia or where there is a reciprocal relationship.[33] Russian courts have not demonstrated great willingness to

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[30] OECD, 'Executive Summary', in OECD (ed.) *Asian Insolvency Systems: Closing the Implementation Gap* (OECD 2007) 12.

[31] UN General Assembly, 'Legal Committee Members Stress Need to Upgrade Commercial Laws for Cross-Border Transactions; Review of Annual Report of UNCITRAL is Concluded' (4 October 2005) UN General Assembly Press Release GA/L/3274 <http://www.un.org/press/en/2005/gal3274.doc.htm> accessed 01 October 2016.

[32] Alexander Trunk, 'International Insolvency Law in Eastern Europe' , in Jens Lowitzsch (ed.) *The Insolvency Law of Central and Eastern Europe - Twelve Country Screenings of the New Member and Candidate Countries of the European Union and Russia: A Comparative Analysis* (INSOL EUROPE / Inter-University Centre at the Institute for East European Studies 2007) 97.

[33] Art 1(6) of the Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" of 26 October 2002.

recognize foreign judgments on a reciprocal basis but they have done so on occasion, for instance when a decision of a Copenhagen commercial court declaring a Danish company insolvent was recognized and enforced by the Russian Supreme Arbitrazh Court.[34] Even with states that Russia has a reciprocal or treaty relationship with, such recognition is only afforded to final judgments and interim decisions. Injunctions and proceedings are unlikely to be recognized, as evidenced in a Ukrainian bankruptcy case where claimants failed to gain recognition in Russia of a moratorium introduced by a Ukrainian court.[35] Russian procedural statues also clarify that public policy will be a consideration in recognising foreign judgments, even if a relevant Treaty is in force.[36]

While Brazil has entered into regional agreements with other Latin American countries that cover issues of cross-border insolvency, such as provisions for which state's court a creditor can file for bankruptcy[37] and the recognition of bankruptcy declarations from member states,[38] this has not alleviated the problems Brazil has encountered from the growing number of mergers and acquisitions between local and foreign companies originating from Europe and the USA. As a general rule, Brazilian courts do not recognise foreign insolvency proceedings and do not coordinate and cooperate with

[34] Referred to summarily in Baker & McKenzie, *Restructuring & Insolvency Guide for Europe and the Middle East* (Baker & McKenzie LLP 2011) 150.
[35] Baker & McKenzie (n 34) 149.
[36] *See* Art. 244(1)(7), Commercial Procedure Code of the Russian Federation 2002.
[37] Article 329, *Código de Derecho Internacional Privado (Convention on Private International Law)*, also known as the Bustamante Code, was signed on 20 February 1928 and has 15 state parties: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. Enacted in Brazil through Decree-Law No. 18,871/1929.
[38] The Montevideo Treaty (now Latin American Integration Association) was executed on 1 February, 1980, with Bolivia, Colombia, Chile, Cuba, Ecuador, Mexico, Peru, Brazil, Uruguay, Argentina, Venezuela and Paraguay as state parties, for the purpose of fostering economic cooperation and free trade. Brazil incorporated the Treaty into domestic law through Decree-Law No. 66/1981.

courts and insolvency administrators from these states.[39] This was evidenced in the *Parmalat Brasil* case, where simultaneous insolvency proceedings occurred in several jurisdictions including Italy, Ireland, Brazil and the USA. Brazilian courts were required to act in concert with foreign courts through an 'ad hoc coordination of litigation'.[40] However, they failed to do so by not recognising foreign ancillary proceedings and not enforcing the ECJ's *Eurofood IFSC* case.[41] More recently, in 2013, when the OGX Group entered insolvency, Brazilian courts allowed local entities to be reorganised but not its subsidiaries in Austria[42] or the Netherlands.[43] While Brazil treats domestic and foreign creditors equally[44] and conditionally allows for foreign bankruptcy judgments to be recognised through exequatur proceedings, this lack of recognition has enabled a series of debilitating and costly parallel proceedings.

Faced with these challenges, creditors have had to either file bankruptcy petitions in multiple countries or resort to arbitration or mediation.[45] A number of foreign creditors of Brazilian multinational companies have filed debt restructuring plans or recognition of ancillary proceedings in the USA. The most prominent example of the latter

[39] Fernando Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)' (2008) 14 Law & Business Review of the Americas 313, 338.
[40] The full, unreported decision in Portuguese can be found here: Parmalat Brasil S/A – Indústria de Alimentos, Consultor Jurídico, 3 February 2006 <http://www.conjur.com.br/2006-fev-03/justica_homologa_plano_recuperacao_parmalat> accessed 9 September 2016; Locatelli (n 37) 340.
[41] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR 1-03813.
[42] António Manuel França Aires & José Pedro Gevaerd, 'Brazilian Courts Awake To Multijurisdictional Insolvency - The OGX Case and Other Cases' *Mondaq* (London, 11 December 2013) <http://www.mondaq.com/brazil/x/280536/Insolvency+Bankruptcy/Brazilian+Courts+Awake+To+Multijurisdictional+Insolvency+The+OGX+Case+And+Other+Cases> accessed 9 September 2016.
[43] Luis Augusto Roux Azevedo and Leandro Araripe Fragoso Bauch, 'Limitations Of Brazilian Law Regarding Cross-Border Insolvency' *Financier Worldwide Magazine* (Birmingham, January 2014) <http://www.financierworldwide.com/limitations-of-brazilian-law-regarding-cross-border-insolvency/#.VjonCrerS73> accessed 1 September 2016.
[44] Bruno K de Oliveira and Joel LT Bastos, 'Brazil', in Bruce Leonard (ed.), *Getting the Deal Through: Restructuring & Insolvency* (Law Business Research Ltd 2015) 79.
[45] Ordélio A Sette and Juliano B Gotlib, 'Brazil: Bankruptcy and Insolvency Law and Policy', in James R Silkenat and Charles D Schmerler (eds), *The Law of International Insolvencies and Debt Restructurings* (OUP 2006) 69.

concerned the reorganisation of Brazil's largest airline, Varig S.A., in which a Brazilian reorganization was recognized and enforced by a New York court and made binding on all the creditors in the US and elsewhere.[46] In late 2014, another New York court has done the same *in re Rede Energia SA*.[47]

While China also maintains a territorial approach to cross-border insolvency, recent legislation and case law indicates a gradual opening up towards foreign insolvency proceedings and administrators. Following the enactment of the Law of the People's Republic of China on Enterprise Bankruptcy 2007 (EBL), China's insolvency proceedings have been given extra-territorial effect, as an acknowledgment of the global nature of Chinese business operations and the need to protect Chinese creditors.[48] There is already evidence from Hong Kong courts that some jurisdictions are willing to recognise the universal effect of Chinese liquidation proceedings.[49] However, there are considerable restrictions on the recognition of foreign insolvency proceedings in China. Under Article 5 of the EBL, a legally effective, final judgment from a foreign court will only be recognised and enforced in China if a number of criteria are satisfied, specifically (i) whether there are any international treaties between the foreign country and China or whether a relationship of reciprocity exists between them, (ii) whether it opposes the basic principles of Chinese law, prejudices state sovereignty, public interest or the lawful rights and interests of local creditors. In *Hua An Funds v Lehman Brothers*

[46] *In re Varig S.A. (Viacao Aerea Rio-Grandense)*, Case No. 05-14400 (Bankr. SDNY, Mar. 19, 2007); *also see* Otto Eduardo Fonseca Lobo et al., 'Varig Airlines: Flying the Friendly Skies of Brazil's New Bankruptcy Law with Help fromOld§304' (July/August 2007) 26(6) American Bankruptcy Institute (ABI) Journal <www.klgates.com/files/tempFiles/c3891c3b.../Article_McEvoy_VarigAirlines.pdf> accessed 12 September 2016; Locatelli (n 39) 331.
[47] *In re Rede Energia SA*, Case No. 14-10078 (Bankr. SDNY, August 27, 2014).
[48] Melvin Sng, 'Cross-border insolvency in the Middle Kingdom' (2007) 6 Journal of International Banking and Financial Law 348, 349.
[49] *CCIC Finance Limited v. Guangdong International Trust and Investment Corp* [2005] 2 HKC 589.

International Europe (LBIE), a Chinese court refused to recognize LBIE's insolvency proceedings that had been opened in the UK on the basis that no treaty or reciprocal treatment existed between the UK and China and the court sought to prevent the funnelling of assets to benefit off-shore creditors.[50] On the other hand, Chinese courts have accorded recognition to French and Italian proceedings on the basis that a bilateral judicial cooperation treaty existed between China and these states.[51] As of 2013, China has entered into civil and commercial judicial assistance treaties/agreements with 32 countries, often including provisions for cross-border insolvency, but has not recognised foreign bankruptcy judgments on the basis of the treaties or Article 5, EBL in recent years.[52]

Though the EBL has removed the distinction between domestic and foreign creditors,[53] this has not translated smoothly into practice. Foreign investment in China usually occurs through offshore holding companies, which remit the investment onshore through joint ventures or wholly-owned foreign enterprises in the form of equity. As the foreign investor does not take security onshore, the foreign creditor's rank effectively is that of an equity holder and is lower in priority than creditors. During the FerroChina reorganization, this discrepancy led a Chinese court to partially distribute FerroChina's

[50] Xinyi Gong, 'To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan' (2013) 10 International Corporate Rescue 240.
[51] *See* Gong (n 50) 241; John Marsden and Sally Mui, 'Local Concerns Outweigh Offshore Creditors' Interests in Chinese Restructurings' *Journal of Corporate Renewal* (Hong Kong, September 2014).
[52] France, Poland, Belgium, Mongolia, Romania, Italy, Spain, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Bulgaria, Thailand, Egypt, Greece, Cyprus, Hungary, Morocco, Kyrgyzstan, Tajikistan, Singapore, Uzbekistan, Vietnam, Laos, Tunisia, Lithuania, Argentina, Republic of Korea, Democratic People's Republic of Korea, United Arab Emirates, Kuwait, Peru, Brazil and Algeria, *see* Gong (n 48) 241.
[53] Article 13(1), Law of the PRC on Enterprise Bankruptcy 2007.

assets to domestic and foreign 'onshore' companies, while not allocating any proceeds to the offshore holding company or its foreign creditors.[54]

These problems are particularly acute for foreign companies with Chinese subsidiaries as, on the one hand, foreign bankruptcy judgments are not recognised, but on the other, the existence of an establishment in China has not generally been seen by Chinese courts as enough reason to open full insolvency proceedings. As a result of this Catch-22, foreign creditors and insolvency practitioners have experienced insurmountable difficulties in reaching assets located in China. However, there may be some changes to Chinese courts' approach towards foreign insolvency practitioners following a highly publicized decision of the Supreme People's Court of the People's Republic of China in June 2014. In their judgment in *Thumb Environmental Technology Group v. Sino-Environment Technology Group*,[55] a foreign insolvency practitioner was recognised on the basis that the internal affairs of a legal person and its wholly-owned branch should be determined by the law of the place where the entity is registered (in this case, Singapore). This includes the legal rights of the wholly-owned subsidiary and the legal capacity of the liquidator appointed by the parent entity.[56] While considerations of Chinese public policy - such as local avoidance rules - remain paramount, optimism has been expressed that this approach of 'bypassing' the EBL will be the benchmark in future cases and represents a mollified stance towards foreign bankruptcy administrators.

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[54] Laura Santini, 'FerroChina Deal Struck: Some Paid, Others Get None; Minemetals Takes Units', *The Wall Street Journal* (New York City, 3 September 2009) <http://www.wsj.com/articles/SB125191594720980439> accessed 28 April 2016.

[55] *Thumb Environmental Technology Group v. Sino-Environment Technology Group* [2014] No. 20 Final Judgment of the Fourth Civil Division of the Supreme People's Court.

[56] Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57, 60.

Whether these perceived 'flaws' in these countries' international insolvency regime are amended depends on the support such reforms generate among local stakeholders about its practical, commercial advantages.[57] Though professional organisations may call for the Model Law to be adopted,[58] countries like China may view its national interests better served by a broadly territorial stance.[59]

4. Cross-Border Insolvency in India, Bangladesh and Pakistan

> 'In a training course at the Federal Judicial Academy of Pakistan in 2002, the 48 participants, all of whom were judges of Banking Courts, were asked if they had "ever seen or read a balance sheet or annual report of any company". Only 2 said yes.'[60]

The above quotation reflects the poor state of insolvency law in South Asia. In fact, according to the World Bank's latest Doing Business report, Pakistan actually fares marginally better in resolving domestic insolvency than Bangladesh and India.[61] While the methodology used for these rankings do not explicitly assess the strength of a

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[57] Kargman (n 22) 11.

[58] Thomas B. Felsberg, 'Cross-Border Insolvency In Brazil: The Need For Rules', *International Insolvencies and Controversies: Chapter 15 and Beyond* (American College of Bankruptcy/ National Conference of Bankruptcy Judges 2015).

[59] Guo Guang Lee, *The Understanding and Application of the New Enterprise Bankruptcy Law* [in Chinese] (The People's Court Press 2006) 64 quoted in Emily Lee and Karen Ho, 'China's New Enterprise Bankruptcy Law – A Great Leap Forward, but Just How Far?'(2010) 19 International Insolvency Review 145, 171. Also see Section 7 below.

[60] Salman A. Shaikh, 'Risk Management, the Regulatory/Legal Environment and Insolvency Systems: Recent Trends and Developments in Pakistan', in OECD (ed.) *Credit Risk and Credit Access in Asia* (OECD 2006) 362.

[61] The World Bank's Doing Business 2016 ranked Bangladesh and India as being 155th and 136th respectively out of 189 countries in terms of resolving insolvency. Pakistan was ranked 94th. In assessing a country's insolvency system, the World Bank inter alia considered the time it takes for bankruptcy proceedings to reach completion, the average cost involved, the recovery rate of secured creditors and the strength of insolvency framework index. The World Bank, 'Measuring Regulatory Quality and Efficiency: Doing Business 2016' (The World Bank 2015) <http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf> accessed 9 September 2016.

country's cross-border insolvency regime, it is unsurprising that these low rankings correlate with a poor framework for cross-border insolvency. This is despite the fact that British India, composed of these three states, has a unique place in the history of international insolvency law.

At the beginning of the 20th century, courts in London and Madras saw perhaps the first cross-border insolvency protocol between insolvency administrations. The proceedings concerned the involuntary liquidation of an Anglo-Indian merchant and banking partnership, following the death of one of the partners. The insolvency administrators in London and Madras had to respectively collect, realize and distribute assets to English and Indian creditors respectively. To do this efficaciously, the London and Madras trustees came to an agreement on admitted claims and promised that surplus sums would be remitted to the other proceedings for a global distribution. This agreement was confirmed by both London and Madras courts and when one English creditor sought to challenge the arrangement, the English court stated that the agreement was 'clearly a proper and common-sense business arrangement' and that it was 'manifestly for the benefit of all parties interested.'[62]

Sadly, such a spirit of cross-border civil cooperation does not continue to prevail in India or its neighbouring states. Instead, a rudimentary framework for dealing with cross-border insolvency cases exists in all three countries which broadly reflect a territorial approach. Local courts can wind up[63] the subsidiaries of offshore companies incorporated within their jurisdiction or unregistered foreign companies which have

[62] *In re P. Macfadyen & Co. Ex parte Vizianagaram Co., Ltd.* [1908] 1 K.B. 675.
[63] Part VII, Companies Act (India) 1956 and Chapter XX, Companies Act (India) 2013; Part V, Companies Act (Bangladesh) 1994; Part XI, The Companies Ordinance (Pakistan) 1984.

places of business there.[64] This winding up process can occur in parallel to foreign insolvency proceedings or even after the parent company has been liquidated in another country.[65] Pakistan's law additionally requires written notice to be given in Pakistan if a foreign company is being liquidated at its registered seat.[66] Thus, as with many other developing countries, the effect of insolvency proceedings in these states extend only to foreign debtors who have some form of operation and assets within their jurisdiction.[67] Though none of the states draw a distinction between domestic and foreign creditors in their company law with regard to preferential payments, Bangladesh's bankruptcy law creates scope for local banks and financial institutions to be prioritised before foreign secured creditors in the event a corporation enters bankruptcy.[68] These countries have courts dedicated to corporate insolvency and Bangladesh has 'Speedy Money Loan Courts' (*Artha Rin Adalat*) but as such cases are generally treated with the same standards as other civil proceedings, these avenues are not cost-effective or efficient.

There is limited possibility for foreign bankruptcy judgments to be recognised in these jurisdictions - and for offshore parties to reach assets located in the countries - on the basis of legislative reciprocity[69] or comity.[70] The case law issuing from these provisions

[64] Section 583 Companies Act (India) 1956 and Sections 375-376, Companies Act (India), 2013; Sections 371, Companies Act (Bangladesh) 1994; Sections 443-444, Companies Ordinance (Pakistan) 1984. This occurred in India in the *Raja of Vizianagaram v. Official Receiver* AIR 1962 SC 500.
[65] Expressed in close to identical terms in Section 584, Companies Act (India) 1956 and Section 376, Companies Act (India) 2013; Section 371(3), Companies Act (Bangladesh) 1994; Section 444(3), Companies Ordinance (Pakistan) 1984.
[66] Section 465, Companies Ordinance (Pakistan) 1984.
[67] *See*, Ngaundje Doris Leno, 'Rwanda Legal Framework on Insolvency: Problems and Proposals for Reform' (2015) 24 International Insolvency Review 122, 124 and 131.
[68] Sections 75 and 2(37), Bankruptcy Act 1997 (Bangladesh) read with section 5(o), Banking Companies Act 1991 (Bangladesh) and section 2(j) Financial Institutions Act 1993 (Bangladesh).
[69] Section 44A, Civil Procedure Code 1908 of India, Bangladesh and Pakistan. India has reciprocal agreements with the United Kingdom, Fiji, Singapore, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands, Western Samoa, Hong Kong, Papua New Guinea, Bangladesh and the United Arab Emirates. Pakistan has reciprocal agreements with the UK, Fiji, Singapore, New Zealand, the Australian

is mixed, with there being evidence that Indian courts are willing to recognise and enforce foreign judgments, and even decline anti-suit injunctions if a foreign court is exercising proper jurisdiction, while Pakistani courts have more restrictively construed the jurisdiction of foreign courts.[71] Nonetheless, due to these partial, basic provisions, the Asian Development Bank found India and Pakistan to be 'partially compliant' with Good Practice Standard No. 16 in 2000.[72]

In line with such a territorial stance, the law in these countries has long been silent regarding the recognition of foreign insolvency proceedings and practitioners. No foreign court can declare companies registered in these jurisdictions as being liquidated abroad and on the same grounds, the insolvency law of India, Bangladesh and Pakistan is not usually given extraterritorial effect. This has not been helped by a requirement that the winding-up of foreign companies, that do not have local registered offices, have to be done through liquidators or receivers appointed by a local court or tribunal.[73]

Capital Territory and the Northern Territory of Australia. Bangladesh only has reciprocal agreements with India. Now also under section 234, Insolvency and Bankruptcy Code 2016 [India].

[70] Section 13 of the Civil Procedure Codes 1908 of India, Bangladesh and Pakistan. English courts have evinced a willingness to extend comity to Indian courts in *Airbus Industrie GIE v Patel* [1999] 1 AC 119, [1998] 2 All ER 257 (UK House of Lords) While section 45 of Bangladesh and Pakistan's Code has been repealed, in India, section 45 allows decrees from Indian courts to be executed in countries specified in the Official Gazette.

[71] *Munawar Ali Khan v Marfani and Co* PLD 2003 Kar 382, referred to in Law & Justice Commission of Pakistan, 'Execution Of Foreign Decrees', Law & Justice Commission of Pakistan Report No. 84 <http://ljcp.gov.pk/lfr/84/> accessed 16 November 2015.

[72] Good Practice Standard No. 16 states: "An insolvency law regime should include provisions relating to recognition, relief and cooperation in cases of cross-border insolvency, preferably by the adoption of the UNCITRAL model law on cross-border insolvency." quoted from ADB, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-Reg: Insolvency Law Reforms', *Law and Policy Reform at the Asian Development Bank*, vol. 1 (ADB April 2000) 10-86, 53.

[73] Section 255 and 169 of Companies Act 1994 (Bangladesh); section 583(3) and 584 read with section 448 of Companies Act, 1956 (India) and sections 271(1) and 375-376 read with section 275(1) of Companies Act 2013 (India); sections 444(1)(ii) and 444(3) read with section 321 of The Companies Ordinance 1984 (Pakistan).

The difficulties in organizing cross-border insolvency proceedings in these countries has been compounded by judicial inexperience and lack of training in handling complex corporate insolvencies, an absence of well-qualified insolvency practitioners, procedural encumbrances and regular adjournments, which has meant that it takes years to realize debts, sell assets and distribute proceeds to creditors. This is not only prejudicial to creditors, both domestic and foreign, but also stymies foreign direct investment and undermines companies that may have the possibility of being rehabilitated. These economic considerations influenced the passage of India's consolidated Insolvency and Bankruptcy Code 2016 but as elaborated in section 7.2.3. below, this has had a limited impact on facilitating the coordination of cross-border insolvency procedures and the country's legal regime remains territorial in scope. [74]

To address the challenges posed by territorial systems, a range of 'solutions' have been developed, from CBIAs/protocols to regional agreements to the UNCITRAL Model Law on Cross-Border Insolvency.

5. Patchwork of Approaches to Cross-Border Insolvency

5.1. Protocols

In the past, cross-border insolvency issues regarding mutual recognition, cooperation and assistance were addressed by applying the private international law principle of comity or through bilateral insolvency treaties between states. Given the discretionary

[74] *See*, Sumant Batra, 'India's New Bankruptcy Law is Welcome, but Falls Short of a Home Run' The Wire (New Delhi, 14 May 2016) <http://thewire.in/36159/indias-new-bankruptcy-law-is-welcome-but-falls-short-of-a-home-run/> accessed 12 September 2016.

nature of comity and the small number of countries that have entered into such treaties, this practice is considered to be outdated.[75]

Another practice involved setting out an agreement between insolvency administrators and/or courts on how certain procedural matters should be handled. These agreements, or 'protocols', as they have come to be known, can contain provisions on how hearings can be coordinated, how claim filing can be processed, how the sale and recovery of assets for creditors could be handled and even choice of law issues.

As the multi-state insolvency of, inter alia, *Maxwell Communications Corporation plc*[76], *Re EverFresh Beverages, Inc.*[77] and *In Re Joseph Nakash*[78] have demonstrated, protocols can help reduce the time it takes to complete insolvency proceedings and maximise returns to global creditors.[79] By focusing on how parties are to conduct insolvency proceedings in practice, certain conflict of law issues are side-stepped. As the emphasis is upon parties entering into an agreement, concerns about reciprocity, sovereignty and respect for comity are obviated.

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[75] Bob Wessels, 'Bilateral Bankruptcy Treaties: A Bygone Instrument?' in Bob Wessels (ed.) *Business and Bankruptcy Law in the Netherlands: Selected Essays* (Wolters Kluwer 1999) 247.

[76] *In Maxwell Communications Corporation plc*, 170 B.R 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (Bankr. S.D.N.Y. 1995).

[77] *In Re Everfresh Beverages, Inc.*, Case No. 95-B-45405-06 (Bankr. S.D.N.Y. 20 Dec. 1995); *In Re Everfresh Beverages, Inc*, Court File No. 32-077978, Ontario Court of Justice (General Division), 20 December 1995.

[78] *In Re Joseph Nakash*, Case No. 94-B-44840 (Bankr. S.D.N.Y. 12 January 1996); *In re Nakash*, Civil Case No. 1595/87 (Liquidation/95), District Court of Jerusalem.

[79] James Farley, 'Cross-Border Insolvencies Challenges of Litigation in a Global Economy' *Mondaq Business Briefing* (London, 26 September 2006) <http://www.mondaq.com/canada/x/42938/Public+Sector+Government/CrossBorder+Insolvencies+Challenges+Of+Litigation+In+A+Global+Economy> accessed 10 September 2016.

Additionally, this pragmatic approach allows protocols to be carefully calibrated to the complexity and circumstance of each individual proceeding. For instance, while subsidiaries are treated as distinct entities from parent companies in certain jurisdictions, entering into protocols helps ensure that one administrator is appointed for all entities of a corporate group. For those interested in entering into such agreements in the future, a corpus of soft law instruments and landmark protocols have emerged that can provide guidance on how such agreements can be negotiated.

Importantly, entering into a Protocol evinces the concerned parties' intent to cooperate – an intention that may not be present even if the Model Law is enacted and is most crucial in ensuring a successful insolvency proceeding.

As an overlapping development, regional blocs like the EU and OHADA have entered into multilateral legal frameworks that resolve many of the challenges of intra-regional insolvency proceedings. This issues from a 'mutual trust in each other's legal systems'.[80]

5.2. EU and OHADA

Within the European Union, the EC Regulation no. 1346/2000 on Insolvency Proceedings (EIR), in conjunction with the recently enacted EU Regulation 2015/848 on Insolvency Proceedings (recast) (hereinafter EIR (recast)),[81] ensures automatic recognition and enforcement of judgments concerning insolvency proceedings,[82] allows

[80] Christoph G Paulus, 'Future Developments in Cross-Border Insolvency Law', in OECD (ed.) *Asian Insolvency Systems: Closing the Implementation Gap* (OECD 2007) 255.
[81] The majority of the EIR (recast)'s provisions will only come into force on 26 June 2017.
[82] Article 16, EIR; Article 19, EIR (recast).

a recognised foreign insolvency administrator (liquidator) to open,[83] stay,[84] or access secondary proceedings and transfer assets out of the member state in favour of main proceedings,[85] generally embraces all the debtor's assets in the member states, assures coordination and communication between primary and secondary liquidators[86] and guarantees the individual notification of all known creditors.[87]

The EIR goes beyond procedural matters to providing a substantive framework for transnational insolvency. It defines which proceedings the regulation will be applicable to and who can commence it by including Annexes A to C.[88] While this has not entirely dispelled confusion over whether foreign insolvency proceedings exist,[89] especially due to differences in national language and law, it still gives informative guidance to national courts. The Regulation also contains 'uniform rules on conflict of law',[90] pursuant to which the European Court of Justice (CJEU) has developed a rich vein of case law. For instance, the Regulation defines the debtor's 'centre of main interests' (COMI) to be where he 'conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.[91] Ascertaining COMI allows the determination of where main insolvency proceedings are to be held and in turn pinpoints where all the debtor's assets should be coordinated from.[92]

[83] Article 29, EIR; Article 37, EIR (recast).
[84] Article 33(1), EIR; Article 38, EIR (recast).
[85] Article 18(1), EIR; Article 21, EIR (recast).
[86] Articles 31(1)-(2) and 32(2) EIR; Article 41 and 45, EIR (recast).
[87] Article 40(1)-(2), EIR; Article 54, EIR (recast).
[88] Article 1 read with Articles 2(a)-(c) of the EC Insolvency Regulation.
[89] For examples of cases in which confusion was created about whether a proceeding was an insolvency proceeding for the purposes of Article 1(1), *see, e.g.* Case C- 461/11, *Ulf Kazimierz Radziejewski v. Kronofogdemyndigheten i Stockholm* [2012] ECR -00000.
[90] Recital 23, EIR.
[91] Recital 13, EIR.
[92] *See, e.g.* Case C-396/09, *Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915.

When all of the provisions of the recast EIR come into force in 2017, it will improve the wording of the EIR, include pre-insolvency procedures in the definition of insolvency proceedings through a new Annex A, refine the definition of COMI to reduce the possibility of forum shopping,[93] tighten the scope for opening secondary insolvency proceedings, mandate cross-border judicial cooperation[94] and strengthen the capacity of the EIR to deal with the insolvencies of a group of companies by including the concept of 'group coordination proceedings'[95] that will give the court first seized of an insolvency application the right to accept jurisdiction and open proceedings.

The regulations do not govern how EU countries are to handle cross-border insolvency proceedings with non-EU states, which has led to certain countries like the UK, Romania, Slovenia, Greece and Poland to adopt the Model Law while others, like Germany, have chosen to reform their domestic legislation in a manner so as to extend the effect of the provisions related to the law applicable (articles 4-15 of the EIR) to 'any state of the world'.[96]

Reflecting, and perhaps extending on such developments, OHADA has promulgated a series of trans-national business laws to replace existing national laws, one of which is the Uniform Act Organising Collective Proceedings for Wiping Off Debts 1999.[97] The

[93] Article 3(1), EIR (recast)
[94] Recital 48, Articles 42 and 57, EIR (recast)
[95] Article 61, EIR (recast); B. Hess, P. Oberhammer & T. Pfeiffer, 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings', JUST/2011/JCIV/PR/0049/A4 (Heidelberg – Vienna, 2014) [Heidelberg Report].
[96] Wessels (n 23) paragraph 10363.
[97] Adopted on 10.04.1998 in Libreville, Gabon, entered into force in January 1999. Replaced by an eponymous Uniform Act that came into force on 24 December 2015. The full text of which is available in

Act includes many of the same provisions as the EIR regarding recognition and assistance but goes beyond the scope of the Regulation, with substantive provisions regarding types of collective insolvency proceedings, how they may be commenced and conducted, the duties of Official Receivers and Public Prosecutors, the composition of creditors, etc. The one feature that was missing from this regional arrangement was that the Uniform Act did not ensure that the cross-border aspects of the insolvency regime extended to non-Contracting States within and outside Africa. This gap was closed in September 2015 when all the OHADA states incorporated the Model Law through the 'recast' Uniform Act. The Act further clarifies certain insolvency concepts, creates pre-insolvency conciliation procedures, implements simplified bankruptcy procedures for smaller companies, clearly delineates creditors' rights, furnishes fresh cash contributions for companies facing financial difficulties and establishes a legal framework for insolvency practitioners.[98] In this way, OHADA has also complied with many of the guidelines of the UNCITRAL Legislative Guide on Insolvency Law. The more elaborate provisions were needed because of OHADA's underdeveloped cross-border insolvency regime and the 'many grey areas that need to be defined'[99] for there to be harmonisation and equal treatment of creditors. Admittedly, the fact that the 17 OHADA states are French speaking, share a legal heritage and can see the assistance of a common court in interpreting the Articles of the Act, provides fertile ground for cross-border judicial cooperation and harmonised interpretation of the law.

French here: < http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=16> accessed 28 April 2016.

[98] Louis Degos, James Green & Dara Akchoti, 'A New OHADA Uniform Act on Insolvency and Restructuring in Africa', *Klgates.com* (27 October 2015) <http://www.klgates.com/ohada_uniform_act-10-27-2015/> accessed 10 September 2016.

[99] J.A. Owusu-Ansah, 'The OHADA Treaty in the Context of International Insolvency Law Developments' (LLM Paper, University of Frankfurt 2004)<https://www.iiiglobal.org/sites/default/files/The_Ohada_Treaty.pdf> accessed 20 April 2016.

The liquidation of Air Afrique in 2002 demonstrates the strength of the OHADA regime. Air Afrique was an airlines owned by 11 of the OHADA states, Air France, the French Development Agency and three private stakeholders. From 1993 onwards, it began experiencing financial difficulties due to poor management and unfavourable airbus lease agreement. Though a deal was negotiated with Air France regarding restructuring its ownership, by 2002 the airline had 'zero aircraft, over 4000 staff on its payroll, had run out of cash and had no lines of credit available'.[100] On 7 February 2002 Air Afrique filed for bankruptcy in Abidjan, Cote d'Ivoire. It had outstanding claims of US$ 458 million. The Court in Abidjan decided to order the liquidation of the airlines and pursuant to Article 247 of the Uniform Act, it became binding on all contracting states and secondary liquidation proceedings were opened in all the states where Air Afrique had establishments.[101]

Generally, the need for such regional insolvency regimes is predicated on a high volume of regional business activity. For instance, is estimated that 200,000 EU businesses face insolvency each year, out of which 50,000 of them have creditors in other Member States.[102] Intra-regional trade in the South Asian Association for Regional Cooperation, stands at the disproportionately low figure of US$ 3 billion and efforts for achieving substantial economic cooperation between contracting states or harmonising commercial laws and procedures has not been successful.[103] However, inspiration, in

[100] Nick Fadugba, 'Air Afrique goes Bankrupt', *African Aviation* (Colchester, February 2002).
[101] Owusu-Ansah (n 99).
[102] European Commission, 'Justice Ministers agree on modern insolvency rules' European Commission Press Release IP/14/2322 (Brussels, 04 December 2014); European Commission, 'Impact Assessment accompanying the Commission Recommendation on a New Approach to Business Failure and Insolvency', European Commission Staff Working Document SWD (2014) 61 final (Brussels, 12 March 2014).
[103] Though there is potential for 'judicial comity' across South Asia due their shared legal history, common language in the higher judiciary (English) and willingness to refer to each other's appellate court

this regard, could be drawn from the OHADA states as low intra-regional trade and problems regarding corruption, judicial unpredictability, lengthy procedures and difficulties in enforcing judgments has not prevented them from arriving at a cutting-edge solution to cross-border insolvency that can attract foreign investors and stimulate the private sector.[104]

Some headway has been made in cooperation between central banks and finance ministries of contracting states and harmonizing banking legislation and procedures[105] but to date, the cooperation process has neglected the issue of cross-border insolvency, at a regional or international level, so it would seem that a regional arrangement would not be feasible in South Asia for the time being.

6. Towards a 'Model Law' on Cross-Border Insolvency

UNCITRAL turned its attention to cross-border insolvency in the early 1990s when its Secretariat cautiously expressed the view that issues such as assistance to foreign courts and administrators, cross-border co-operation between insolvency representatives and courts and equal treatment of creditors were integral to facilitating world trade and merited consideration as to whether it could be harmonised.[106] Through subsequent

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judgments. *See*, Ridwanul Hoque, 'Courts and Adjudication in Bangladesh', in Jiunn-rong Yeh and Wen-Chen Chang (eds.) *Asian Courts in Context* (CUP 2014) 472.

[104] For an overview in French, *see* OHADA, 'Présentation Générale' (2016) < http://www.ohada.org/index.php/fr/ohada-en-bref/ohada-presentation-generale > accessed 13 September 2016.

[105] SAARCFINANCE, 'Brief History, Objectives And Activities' (2011) <https://www.rbi.org.in/saarc/SaarcBriefHistory.html> accessed 30 August 2016; also *see, e.g.* State Bank of Pakistan 'Highlights Of SAARCFINANCE, SPC And IGEG Related Activities' *SAARC FINANCE E-Newsletter* <http://www.saarcfinance.org/download/july-december2014.pdf> accessed 10 September 2016.

[106] UNCITRAL Secretariat, 'Note by the Secretariat, Addendum on Cross-Border Insolvency to Report of Twenty Sixth Session of UNCITRAL', UN Doc. A/CN.9/378/Add.4 (UNCITRAL 1993).

working groups and colloquiums, it was agreed that the unification of insolvency law was not practicable but common rules on the above matters could be agreed upon.[107]

During its 28th session, UNCITRAL decided to develop a legal instrument on cross-border insolvency under the aegis of a Working Group. Working Group V was composed of all the then 36 Member States[108] and during its Eighteenth to Twenty-First sessions, where the Model Law was deliberated upon and drafted, the BRICS and a number of Asian, African and South American countries were represented. Notably, Bangladesh and Pakistan were observers in the Twenty First session, while India participated as a member state in all sessions.[109]

The Model Law was subsequently approved by the General Assembly on 15 December 1997[110] and it is clear from the summary records of the time that the delegations of India, Russia and China[111] were in favour of the spirit of the Model Law. Others, like Brazil, sponsored the Resolution outright. The Model Law was followed by a 'Guide to

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[107] UNCITRAL, 'Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency', UN Doc. A/CN.9/413,(UNCITRAL 1995) paragraph 15.

[108] The 36 Member States then were: Algeria, Argentina, Australia, Austria, Botswana, Brazil, Bulgaria, Cameroon, Chile, China, Ecuador, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay. UNCITRAL, 'Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session', UN Doc. A/50/17 (UNCITRAL 1995) paragraphs 382-393.

[109] *See* UNCITRAL Working Group V, 'Report of the Working Group on Insolvency Law on the Work of the Twenty-First Session' (New York, 20 – 31 January 1997),UN Doc. A/CN.9/435, at paragraph 8 on 5.

[110] UN, 'Draft Resolution on Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law', UN Doc. A/C.6/52/L.7 and A/C.6/52/L.7/Corr.1; The Sponsors of the Resolution were: Argentina, **Australia**, Austria, Belgium, Brazil, Bulgaria, **Canada**, **Chile**, Costa Rica, Croatia, Czech Republic, Denmark, Finland, Guatemala, Hungary, Israel, Italy, **Japan**, Luxembourg, **Mexico**, the Netherlands, Norway, Portugal, **Romania**, Slovakia**, South Africa**, Spain, Sweden, Thailand, **United States of America** and Venezuela. [Emphasis provided – countries listed in bold text have adopted the Model Law at the time of writing.]

[111] UN, 'Official Record of the General Assembly, Fifty Second Session: Summary Records of the 3rd and 4th Meetings of the Sixth Committee of 6 October 1997' A/C.6/52/SR.4 (UN 1 December 1997); UN, 'Official Record of the General Assembly, Fifty Second Session: Summary Records of the 3rd and 4th Meetings of the Sixth Committee of 7 October 1997' UN doc. A/C.6/52/SR.3 (UN 1 December 1997).

Enactment',[112] to assist the legislators of countries interested in adopting the Model Law to customise it for local conditions, and a 'Judicial Perspective'[113] to provide assistance to judges with questions arising from the application of the Model Law.

The Model Law itself is a short document, composed of only 32 articles. Its scope is limited to instances where assistance is sought by a foreign court or representative in connection with a foreign proceeding or where a foreign creditor or other stakeholder seeks to open local insolvency proceedings or where there are concurrent proceedings regarding the same debtor.[114] Unlike the EC Regulation and the Uniform Act, it does not address choice of law issues, but does assure a minimum level of protection to foreign creditors by requiring that they have a priority rank of at least a local general unsecured creditor[115] and receive notification of the commencement of insolvency proceedings.[116]

States that adopt the Model Law allow foreign representatives to directly access their courts to commence or join insolvency proceedings and empowers courts to grant recognition and relief to foreign insolvency proceedings, taking place at the debtor's COMI or place of establishment.[117] This is subject to jurisdictional and public policy requirements as well as a need for the court to protect the interests of 'creditors and

[112] UNCITRAL, 'UNCITRAL Model Law On Cross-Border Insolvency With Guide To Enactment And Interpretation' (UNCITRAL 2014) <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> accessed 17 November 2015.
[113] UNCITRAL, *UNCITRAL Model Law On Cross-Border Insolvency: The Judicial Perspective* (UNCITRAL 2011) <https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf> accessed 17 November 2015.
[114] Article 1(2), Model Law.
[115] Article 13(1)-(2), Model Law.
[116] Article 14, Model Law.
[117] Articles 9, 11, 15-17 and 21, Model Law.

other interested persons, including the debtor'.[118] If recognition is granted, there is a presumption that the debtor is insolvent and an immediate stay becomes effective against the commencement of individual creditor actions as well as transfer of, and execution against, debtors' assets.[119] The recognising court can additionally pass orders for the discovery of documents,[120] to allow foreign representatives to control local assets, to give effect to foreign restructuring plans[121] and even send assets overseas to distribute in the main proceedings.[122] While relief is granted on a discretionary basis,[123] recognition is routinely granted to proceedings and practitioners from enacting states. One of the key provisions of the Model Law is that courts and insolvency practitioners are required to cooperate to the 'maximum extent possible'[124] with their foreign counterparts through the appropriate communication of information, coordination of the administration of the debtors' assets and concurrent proceedings and through the implementation of protocols.[125] Guidance for such agreements may be gleaned from an array of resources, such as the ALI/III Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases and the UNCITRAL Practice Guide on Cross-Border Insolvency Agreements, which *inter alia* suggest communication through written correspondence, telephone exchanges, etc.

[118] Articles 4, 6 and 22, Model Law.
[119] Article 20(1)(a)-(c), Model Law.
[120] *See, e.g., In Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013).
[121] *See, e.g., In re Rede Energia S.A.*, No. 14-10078, (Bankr. SDNY 2014) and the Varig case mentioned above regarding US courts giving effect to Brazilian restructuring plans.
[122] *See, e g., Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711 where assets were entrusted by an Australian court to a US plaintiff and *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2009] EWHC 2009 (Ch), where assets were transferred from UK to Swiss liquidators.
[123] Articles 19 & 21, Model Law.
[124] Articles 25-26, Model Law.
[125] Article 27, Model Law.

However, it is important to note that the aforementioned sections do not preclude individual actions to be taken to 'preserve a claim against a debtor' or for concurrent insolvency proceedings to be commenced after recognition of foreign proceedings, if they are necessary to implement coordination and cooperation between courts and insolvency practitioners.[126]

It is therefore apparent that this Model Law, unlike the UNCITRAL Model Law on International Commercial Arbitration or the recently-adopted UNCITRAL Model Law on Secured Transactions, is primarily a procedural framework erected upon the substantive insolvency laws of enacting states. Moreover, to reach an arrangement acceptable to both territorial and universalist systems, enacting states have been given the choice to omit provisions of the Model Law. While the more recent UNCITRAL Legislative Guide (2004) provides recommendations and benchmarks for an effective national insolvency law, it cannot be directly incorporated, and till now, there is no uniform, substantive international insolvency law.

7. Prospects and Challenges of Adopting the Model Law

This section will, in two parts, highlight how its implementation has been chequered, with some countries utilising its provisions to great effect and others compromising its beneficial qualities through questionable amendments.

7.1. Prospects

[126] Articles 20(3)-(4) and 28, Model Law.

Countries like the USA and Australia incorporated the Model Law in its entirety and in some instances, went above and beyond the requirements of the Model Law.[127] For example, the definition of 'foreign proceeding' in the USA includes 'debt adjustment' of companies, not just formal insolvency procedures, and its courts can grant a greater variety of relief. The US version of the Model Law makes it possible for one examiner to act on behalf of the estate in foreign administrations, which may be crucial in the insolvencies of corporate groups with multiple main and non-main proceedings in different jurisdictions,[128] as well as incorporated elements of the ALI Guidelines. Its courts also embraced the Model Law. One empirical study found that there was a 96% rate of Chapter 15 cases being recognised (i.e. inbound recognition of foreign insolvency proceedings),[129] with public policy and jurisdictional grounds for refusal being construed very strictly.[130] In a similar vein, the Australian judicial system has been active in issuing practice notes concerning cross-border judicial cooperation[131] and has entered into Memorandums of Understanding with the courts of Singapore, New York State and the Dubai International Finance Centre Court regarding cooperation on interpreting foreign law.[132]

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[127] Chapter 15, US Bankruptcy Code; Cross-Border Insolvency Act, 2008 (Australia).
[128] Selinda A Melnik, 'United States', in Look Chan Ho (ed.) *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (3rd edn, Globe Law and Business 2012) 481.
[129] Jay L Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation* (2002) 76 The American Bankruptcy Law Journal 1, 17.
[130] *See*, 11 USC 1517. *In re Qimonda AG Bankruptcy Litigation*, 433 BR 547 (ED VA 2010) the court set out a three-part test that helps establish when recognition may be manifestly contrary to US public policy.
[131] *See, e.g.* Sheryl Jackson & Rosalind Mason, 'Developments in court to court communications in international insolvency cases' (2014) 37(2) University of New South Wales Law Journal 507; Supreme Court of New South Wales, 'Supreme Court Equity Division – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives', Practice Note SC Eq. 6 (Sydney, 11 March 2009).
[132] Supreme Court of New South Wales, 'Annual Review 2013'<http://www.supremecourt.justice.nsw.gov.au/Documents/Annual%20Reviews/ar_2013.pdf> accessed 10 September 2016.

One example of the beneficial qualities of implementing the Model Law can be seen with the rehabilitation proceedings of Samsun Logix Corporation, a South Korean shipping company with transnational operations that suffered sharp losses as a result of the 2008 Recession. On 6 February 2009, it filed for a rehabilitation order, which was granted on 6 March 2009. The Korean court also appointed a representative to manage the company's affairs and allowed them to carry out activities abroad in relation to the insolvency proceeding. Within 6 days, an English court recognised the Korean insolvency as the foreign main insolvency proceeding and granted additional relief (i.e. stay against enforcement of security) with Australia and the USA quickly following suit on 17 April 2009 and 21 April 2009 respectively. Similarly, in the recent case of *MtGox Co., Ltd (Re)*, the Japanese liquidator of the world's largest online bitcoin exchange successfully gained recognition in an Ontario court that the Japanese bankruptcy was the foreign main proceeding and this led to the stay of class-action suits filed in Canada.[133]

These cases demonstrate one of the strongest features of the Model Law: as a straight-forward scheme that allows ancillary proceedings to support one main proceeding by expeditiously recognising foreign representatives, granting ancillary relief and treating foreign creditors fairly and non-discriminatorily. At the same time, it highlights that the differences in substantive insolvency law between South Korea (or Japan) and common law countries is not an obstacle for recognition and cooperation, especially when all the concerned parties have enacted the Model Law. An empirical study from 2011 indicates that enacting states are highly willing to grant recognition (95% of 195 cases across 8

[133] *MtGox Co., Ltd (Re)*, [2014] O.J. No. 4719, 2014 ONSC 5811, 122 O.R. (3d) 465 (Commercial List).

countries) and grant ancillary relief (60% of 186 applications across 8 countries).[134] Recent case law also suggests that such courts are more open to recognising proceedings and giving access to representatives – even when they come from jurisdictions that have not adopted the Model Law.[135]

Many countries with territorialist regimes suffer from a 'race of the swiftest' when insolvency proceedings are commenced, by filing for provisional relief and seeking the attachment of the debtor's assets, a problem that is ameliorated by the Model Law. It protects a foreign creditor or representative from having to fully submit to the jurisdiction of the court in which it files for recognition while also protecting local parties through the safeguards in Articles 6, 21 and 22.

More generally, as the Model Law doesn't require considerable changes to the substantive law of a state, there is scope for wide global adoption. The versatility of the framework is reflected in the variety of economies, from the USA to Vanuatu, that have adopted the Law. For smaller or more economically fragile countries, the cross-border cooperation provisions of the Model Law may assist in dealing with international fraud and could place them in good standing with IFIs that have explicitly endorsed the Model Law.[136]

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[134] Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517, Table 1 at 534.

[135] *See, e.g., Re Chow Cho Poon (Private) Limited* (2011) 249 FLR 315 where a Singaporean liquidator was given access to an Australian court.

[136] International Monetary Fund, 'Orderly & Effective Insolvency Procedure: Key Issues' (IMF 1999) 81-82; The World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (World Bank 2001) Principle 24, 52-5.

It is for these reasons that countries like Kenya adopted the Model Law[137] and Singapore is actively considering it.[138] It has been argued that the absence of such a regime has made it difficult for Singaporean insolvency practitioners to carry out judicial management orders when the assets were located abroad.[139] Instead, in the event of large-scale transnational insolvencies like Lehman Brothers, a protocol needed to be drafted to coordinate proceedings so as to avoid litigation between affiliated entities.[140]

7.2. Drawbacks

Given the number of advantages of adopting the Model Law, it may reasonably be asked: why have countries like Brazil, China, India and Russia not embraced it?

7.2.1. Definitional Uncertainties and Gaps

Firstly, there are uncertainties that exist with regard to the definitions of the Model Law. One definition that has caused particular difficulty in interpretation is 'foreign proceeding'. The Model Law's rebuttable presumption that the debtor's COMI is at their registered office can lead to more than one court opening what, in their view, is a main proceeding and refusing to recognise the other proceedings. While cross-border cooperation is encouraged for just such an eventuality, by the time the foreign representatives and courts have coordinated the two proceedings, the domestic creditors

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[137] Christine Agimba, 'Global Trends in the Four Doing Business Indicators – Closing a Business: Kenya's reform experiences' (Doing Business 2011 in Africa: Sharing Reform Experiences conference, Kigali, 16 March 2011) <https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16716> accessed 28 April 2016.

[138] Insolvency Law Review Committee, 'Final Report of the Insolvency Review Committee' (Singapore, 2013) 235 and 238.

[139] *See*, *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] 2 SLR 320; Stephen T. Kargman, *Emerging Economies and Cross-Border Insolvency Regimes; Missing BRICs in the International Insolvency Architecture (Part II)* (April 2013) 7 Insolvency and Restructuring International 6, 7.

[140] *See* Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, at 2, <http://www.globalturnaround.com/cases/Lehman%20Protocol.pdf> accessed on 13 September 2016.

may have dissipated some of the debtor's assets.[141] As of now, there are two predominant schools of thought regarding COMI, with *Re Eurofood IFSC Ltd.* and *Stanford* suggesting that the presumption of a debtor's COMI of registered office will only be rebutted if there are factors, objective and ascertainable to third parties, that would establish a different situation exists.[142] On the other hand, it has been suggested that this is a misreading of Article 8 of the Model Law and the course that should be followed is the one adopted by the US in Chapter 15 proceedings like *Hertz* where the 'nerve center' test was used.[143] The nerve center is considered to be 'the place where a corporation's officers direct, control and coordinate the corporation's activities'.[144] This test shifts the burden of proof onto the foreign representative to prove COMI is at the debtor's registered office, if there is even some evidence that it is not.[145] Countries that seek to enact the Model Law will have to make a choice among the different approaches to follow.

The recent amendment of the Guide to Enactment of the Model Law has been criticised for muddying the water further. Its support for the registered office presumption does not clarify how factors such as 'location of the debtor's books and records' will help ascertain the location of COMI and creates confusion regarding the time at which COMI should be determined – at the time the foreign insolvency proceeding is recognised or when the insolvency proceeding was first opened.[146] Furthermore, the

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[141] Matthew T. Cronin, 'UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem' (1999) 24 Iowa Journal of Corporation Law 709, 723.
[142] Eurofood (n 41); *Re Stanford International Bank Ltd (In Liquidation)* [2010] EWCA Civ. 137.
[143] *Hertz Corp v. Friend*, 559 US 77 (2010); Look Chan Ho, 'Misunderstanding the Model Law; Re Stanford International Bank' (2011) 7 Journal of International Banking and Financial Law 395.
[144] *See, In re Think3 Inc*. (Bankr. WD Tex 12 September 2011).
[145] *In re Basis Yield Alpha Fund (Master)*, 381 BR 37 (Bankr. SDNY 2008) 52-53.
[146] Look Chan Ho, 'The Revised UNCITRAL Model Law Enactment Guide – A Welcome Product?' (2014) Journal of International Banking Law and Regulation 325, 337.

current definition is unhelpful in determining the COMI of corporate groups as each of its entities has a separate registered office and the possibility of forum-shopping remains alive.[147]

7.2.2. Questionable Modification of the Model Law

A closer look at enacting legislation reveals discrepancies that hamper the harmonised interpretation of the Model Law. Its scope has been limited in some countries to selected insolvency proceedings, like reorganisations in Canada,[148] or is exclusive of certain entities, like credit institutions in the UK. States such as Poland did not include the definitions set out in the Model Law, opting in favour of interpretations based on domestic insolvency law. This goes against the stipulation of the Legislative Guide that courts should not refer to any particular national system of law.

Countries like South Africa weakened the effect of the Model Law by including an additional provision that the Act only applies to states that accord reciprocal treatment to South African insolvency law and have been explicitly designated as such by their Minister of Justice.[149] To date, no country has been recognised and a procedural stalemate has been created, though this could potentially be overcome once a new

[147] *See*, the ongoing activities of the UNCITRAL Working Group V where the COMI of an enterprise group is still a subject of discussion: UNCITRAL Working Group V, 'Report of Working Group V (Insolvency Law) on the work of its forty-ninth session (New York, 2-6 May 2016)', UN Doc. A/CN.9/870; UNCITRAL Secretariat, 'Insolvency Law - Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Compilation of Principles and Draft Articles (19 February 2016)', UN Doc. A/CN.9/WG.V/WP.137/Add.1; *also see* Lynn M LoPucki, 'Universalism Unravels' (2005) 79 American Bankruptcy Law Journal 143, 147, 155-156.
[148] §45, Companies' Creditors Arrangement Act 1985.
[149] Paragraph 2, Cross-Border Insolvency Act 2000 (South Africa).

unified Insolvency Bill is passed.[150] Similar provisions regarding reciprocity exist in Mexico,[151] Romania,[152] New Zealand,[153] and the British Virgin Islands.[154]

The granting of relief pursuant to recognition may be pursuant to the furnishing of security, as in the USA, or may differ if the foreign insolvency proceeding is main or non-main.[155] A few states like Poland and the UK have also left open the door for concurrent proceedings to be commenced without the debtor's assets being present in that jurisdiction.[156]

While cross-border cooperation and coordination is an integral component of the Model Law, the UK has made it discretionary and Japan has omitted the provision entirely.[157] This has meant that courts have had to take ad hoc approaches to resolving issues like questions of foreign law by appointing foreign law experts, deferring to foreign courts for the resolution of a foreign law issue or requiring parties to submit to the jurisdiction of the foreign court pending determination of the foreign law issue.[158]

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[150] Department of Justice and Constitutional Development, 'Keynote Address by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery, MP', INSOL Africa Round Table, Cape Town, 12 October 2015 <http://www.justice.gov.za/m_speeches/2015/20151012_INSOL.html> accessed 12 September 2016.
[151] Title 12, Article 280, *Ley de Concursos Mercantiles* (Commercial Insolvency Law) 2000 (Mexico).
[152] Article 18(1), Law No. 637 of 7 December 2002 (Romania) on regulating private international law relations in the field of insolvency.
[153] Article 10, Insolvency (Cross-border) Act 2006 (New Zealand).
[154] Article 437, Insolvency Act 2003 (British Virgin Islands).
[155] §49(1), Companies' Creditors Arrangement Act 1985.
[156] *See, e.g. Stocznia Gdanska SA v Latreefers Inc. (No. 2)* [2001] 2 BCLC 116, 140 and Michał Barłowski, 'Poland', in Look Chan Ho (ed.), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (3rdedn, Globe Law and Business 2012).
[157] *See, e.g., Re T&N* [2004] EWHC 2878 (Ch); [2005] BCC 982 at paragraph 26 where a UK court refused to engage in cross-border cooperation on the basis that it touched upon a controversial matter between the parties.
[158] *See, e.g., In re Int'l Banking Corp BSC*, 439 BR 614 (Bankr. SDNY 2010)

Though courts are encouraged to narrowly read the safeguards of the Model Law,[159] significantly, courts in states like Canada and Serbia have been granted broader discretion regarding refusal of recognition of foreign insolvency proceedings on the grounds of public policy than envisioned under the Model Law.[160] While Canada may have a developed practice of cross-border insolvency, this provision may stultify the process in Serbia. Experience in other fields of international commercial law, such as investor-state arbitration, demonstrate that courts in developing countries often resort to public policy justifications to flout the enforcement of arbitration awards.[161]

Some authors have furthermore suggested that the Model Law suffers from not having a choice of law provision, as courts applying domestic conflict of law and choice of law provisions may favour local creditors.[162]

7.2.3. Addressing Legitimacy

Along with the substantive concerns regarding the Model Law, one of the criticisms targeted at the Model Law has been one of perceived 'legitimacy'. While UNCITRAL and the World Bank set the international standard for insolvency law, perceptions of

[159] UNCITRAL, 'Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (Revised)' (UNCITRAL 2014), paragraphs 21(e), 30, 101-104, 150 and 16; *See, e.g. Re Ephedra Products Liability Litigation* 349 BR 333, US Dist LEXIS 57595 (DC SDNY 2006) as an example of a public policy argument not being upheld, simply because foreign law differed from domestic law.
[160] §61(2), Companies' Creditors Arrangement Act 1985 and Article 179 of Serbia's Bankruptcy Law of 23 December 2009, Official Gazette of the Republic of Serbia 104/2009.
[161] *See, e.g.*, Christopher Dugan (et al.), 'Investor-State Arbitration' (OUP 2011) 642.
[162] Rachel Morrison, 'Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer?' (1999)15 Queensland University of Technology Law Journal 103, 124; M. Cameron Gilreath, 'Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporation Doing Business Abroad'(1999-2000)16 Emory Bankruptcy Developments Journal 399, 404.

their legitimacy turn on how representative they are, how procedurally fair their deliberations and how effective they are as an organisation.[163]

UNCITRAL's work is supposed to take into account the 'interests of all peoples…particularly those of the developing countries' and in some respects, it is a representative body.[164] While Bangladesh has yet to be elected as a member, India was one of the first members of UNCITRAL (since 1968) and was included in the consultation and drafting process for the Model Law, while Pakistan became a member in 2004. India was also involved in the working group that developed the UNCITRAL Legislative Guide and attended 6 out of 8 sessions.[165] Whether such attendance amounts to substantive representation is another matter.

It is unclear from the *travaux préparatoires* of those sessions the extent to which delegates from these countries contributed to the discussions and drafting process, however, the dominance of the US delegation is apparent. The US National Bankruptcy Review Commission itself stated that 'over the course of the project [Working Group Sessions] the text moved decisively in the directions sought by the United States and by the leading NGOs'.[166] This issue also arose during the drafting of the UNCITRAL Legislative Guide, with delegates from Brazil, China, India and Russia attending certain Working Group sessions but only 27 delegates attending more than five sessions. These 27 had a 'high impact' on the drafting process and unsurprisingly, they predominantly

[163] *See, e.g.* Terence C. Halliday, 'Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead' (2007) 32 Brooklyn Journal of International Law 1081, 1084.
[164] UN General Assembly, 'Resolution 2205 (XXI) of 17 December 1966', paragraph 9.
[165] Terence C Halliday, Josh Pacewicz and Susan Block-Lieb, 'Who Governs? Delegations and delegates in global trade lawmaking' (2013) 7 Regulation & Governance 279, Table 1 and 287.
[166] National Bankruptcy Review Commission, 'Bankruptcy: The Next Twenty Years; Final Report' (US National Bankruptcy Review Commission 1997) 356.

originate from OECD countries (particularly the USA) and international insolvency associations.[167]

The USA has an interest in moulding these instruments in its own image, as it would be beneficial to their investors and traders, while IFIs require such reforms to be addressed in national poverty reduction strategy papers for funding to be disbursed.[168] While some countries may be willing to compromise on their sovereign system's priority and distribution rights, if it would mean more trade with the USA or improved standing with IFIs, those in stronger bargaining positions, such as China and Russia, may not be.[169] The Chinese government, for instance, has introduced market access and anti-dumping restrictions that favour domestic companies – in stark contrast to prevalent international trade practices.[170] These countries may be more interested in robust changes to their domestic insolvency regimes than incorporating a Model Law simply to appear commercially attractive. They may also feel that they do not confront a sufficient number of cross-border cases that would 'require immediate, long-term legislative solutions of the nature envisioned by the Model Law'.[171] The Model Law is not, after all, a panacea to deficiencies in domestic insolvency law or court systems. It is notable that, as per the World Bank's Resolving Insolvency rankings, which assesses the

[167] Halliday (n 165) Table 2 and 291.
[168] Benhajj S Masoud, 'The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa' (2014) 23 International Insolvency Review 181, 198.
[169] Sefa M. Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34 Oxford Journal of Legal Studies 97, 130.
[170] John Gillespie & Randall Peerenboom, *Regulation in Asia: Pushing Back on Globalization* (Routledge 2009) 9-10.
[171] S Chandra Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 International Insolvency Review 199, 217.

strength of respective countries domestic insolvency law, only 13 of the top 40 countries have adopted the Model Law, while 4 enacting states jointly rank last.[172]

There may also be merit in the suggestion that attrition in enacting the Model Law is due to the 'distance' between the interests and needs of these states and the objects of the Model Law.[173] This could be exacerbated by cultural, historical and religious factors or an absence of support from key local players, such as the business community, leading lawyers, top government officials and the judiciary.[174]

7.2.4. The Road to Reform

It would be difficult to argue that such distance exists between the Model Law and the interests of Bangladesh, India and Pakistan, as they have market-oriented economies and many of their key local players were educated in the UK or the US. In Bangladesh, the support of the legal community facilitated the passage of the US Bankruptcy Code-inspired Bankruptcy Act as well as an Arbitration Act that is in line with the UNCITRAL Model Law on International Commercial Arbitration.[175]

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[172] *See,* The World Bank, 'Doing Business 2016: Measuring Regulatory Quality and Efficiency' (The World Bank 2016).

[173] Bruce G Carruthers and Terence C Halliday, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes' (2006) 31 Law & Social Inquiry 521, 526.

[174] *See, e.g.,* René M. Stulzand and Rohan Williamson, 'Culture, Openness and Finance', (2003) 70 Journal of Financial Economics 313, 346 for the influence of culture and religion on financial law. They use empirical evidence to assert that, for instance, Catholic countries have significantly weaker creditor rights than other countries.

[175] For examples of the role played by leading lawyers in Bangladesh in legal reform, *see, e.g.* Bangladesh Law Commission, 'Report on the Proposal for Amendment of the Arbitration Act, 2001, for Including a Provision Relating to Interim Measures by Court' <http://www.lc.gov.bd/reports/55.pdf> accessed on 21 June 2015.

Similar support hasn't been extended to the Model Law in Bangladesh, despite cross-border insolvency becoming a growing issue for Bangladeshi businesses[176] and foreign investors requiring the support of Bangladeshi courts in realising assets from foreign insolvency proceedings.[177] This reluctance may be attributed to Bangladesh's lack of engagement with UNCITRAL, limited awareness about the rising number of cross-border insolvencies and insufficient international trade law and private international law regimes. While there is no indication that the Model Law is under active consideration, incremental steps are being taken to professionalize the corporate culture in the country, including the introduction of the profession of 'Chartered Secretary' to perform services to reorganize and wind-up companies[178] and the digitalization of the winding up process.[179]

While there has been a spate of reforms in Pakistan's insolvency law over the past two decades, the onus has been on domestic corporate reorganisation or rehabilitation, largely because of an accumulation of non-performing loans over many years.[180] Inspiration for these reforms has been drawn from Chapter 11 of the US Bankruptcy Code and there has also been discussion of reforming the country's bankruptcy law in

[176] In 2008, Bangladesh's leading garments exporter, Sunman Group, had to wind up its business in Cambodia due to rising costs and diminishing profits. *See* M. Ahmed, *Sunman mulls winding down Cambodia operations, sets $150m export target*, Financial Express (Bangladesh) (10 October 2008).

[177] Lehman Brothers Securities Asia Limited (LBSAL) held shares in a Bangladeshi multinational, Beximco, on trust for Goddard Holdings Limited (Goddard). When LBSAL underwent liquidation, Goddard lodged an official claim in the relevant Hong Kong court for the shares to be returned. LBSAL's liquidators did not transfer the shares in fear of future claims and the costs involved in doing so. Apprehensive of the volatility of stock markets in Bangladesh at the time, Goddard filed a suit for Beximco's share register to be rectified, so that it reflected Goddard as the title-holder of the shares. The High Court Division of the Supreme Court of Bangladesh ordered such an amendment to recognise Goddard's ownership of the shares and to protect their interests as a foreign investor. *See, Goddard Holdings Limited vs. Registrar of Joint Stock Companies and Firms* 1 LCLR [2012] HCD 34, paragraph 19.

[178] AKA Muqtadir, 'Chartered Secretary in Practice', *Financial Express* (Dhaka, 25 June 2010).

[179] *See* Registrar of Joint Stock Companies and Firms (Bangladesh) website <http://www.roc.gov.bd/> accessed 28 April 2016.

[180] Shaikh (n 60) 364.

line with Mexico's insolvency law (2000), a country that has also incorporated the Model Law, thus raising the slim possibility that reform concerning cross-border insolvency will also be undertaken.[181]

In contrast, in India, a complex picture emerges as there appears to be a disconnect between the wishes of the legal community and the government. As early as 1995, a senior Indian judge at a Judicial Colloquium remarked that there was a consensus among all present that cross-border cooperation, access of foreign representatives and recognition of foreign insolvency proceedings was needed – even though he had personal reservations about *ex parte* communication with other judges.[182]

More recently, a series of recommendations from the specially-appointed Eradi Committee on Law Relating to Insolvency of Companies (2000), the Mitra Advisory Group on Bankruptcy (2001) and the Irani Committee on Company Law (2005), also called for such reforms and the Model Law to be enacted.[183] Curiously, there is even an example of an Indian lawyer introducing the Model Law as part of their submissions against a stay order granted against the execution of a money decree, even though the Model Law has not been enacted in India.

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[181] CKR ZIA, Structural Option for Developing Corporate Rehabilitation Law of Pakistan, Securities & Exchange Commission of Pakistan (21 May 2014) 3-4; NA Mangi, Pakistan to Introduce Insolvency Law amid 'National Emergency' *Bloomberg* (New York City, 30 April 2009).

[182] UNCITRAL-INSOL, 'Evaluation Session [Transcript]' (Multinational Judicial Colloquium - UNCITRAL-INSOL International, Toronto, 22-23 March, 1995) 12.

[183] V Balakrishna Eradi et al., 'Report on Law Relating to Insolvency of Companies' (2000), Recommendation IV; N.L. Mitra, 'Report of the Advisory Group on Bankruptcy Laws' (May 2001); Jamshed J Irani et al., 'Report on Company Law' (31 May 2005), Chapter XIII, paragraph 28.

The case of *Sumkin Bussan International vs. King Shing Enterprises Ltd*.[184] concerned recognition of a bankruptcy judgment issued by the High Court of Singapore, after an order of property attachment had already been granted in India, but the Bombay High Court ultimately held that such a judgment could not be recognized as the attachment had been ordered well before the bankruptcy judgment. In doing so, the High Court held in favour of the appellants and vacated the stay order. It was the successful counsel for the appellants who had sought to submit the Model Law but ultimately conceded that it is 'only model law [sic] and not a treaty and, therefore, it has no legal basis in India'.[185]

Despite the welcoming attitude of the legal community, the Indian Government has maintained a lukewarm stance. In the immediate lead-up to the Model Law being tabled before the UN General Assembly, India's head of delegation praised the Model Law as being the highlight of the 30th Session of UNCITRAL but added that 'his Government would have to closely examine the provisions of the Model Law in the light of its legislation and relevant jurisprudence in order to ensure compatibility with its domestic laws'.[186] It is significant that India eventually did not sponsor the Model Law when it was paced as a Draft Resolution before the General Assembly.

Since then, India's companies'[187] and insolvency legislation has undergone substantial reforms. Following Bankruptcy Law Reform Commission (BLRC) reports,[188] the

[184] *Sumkin Bussan International vs. King Shing Enterprises Ltd*. III (2006) BC 286, 2005 (6) BomCR 240.
[185] Sumkin Bussan (n 184) paragraph 2.
[186] UN General Assembly, Fifty Second Session, Summary Record of the 3rd Meeting of the Sixth Committee of 6 October 1997, UN doc. A/C.6/52/SR., paragraphs 19-20.
[187] Lawyers at Work, 'Highlights of the Companies (Amendment) Act, 2015', *Lexology* (26 May 2015) <http://www.lexology.com/library/detail.aspx?g=037a3d84-8e2b-4366-b3c8-4a6338a43df8> accessed 28 April 2016.

Insolvency and Bankruptcy Code 2016[189] was enacted. The Code consolidates the laws pertaining to corporate insolvencies and it, *inter alia*, provides improved regulations and guidelines for insolvency practitioners, the empowerment of the specialised National Company Law Tribunal to adjudicate corporate insolvency matters and a fast-track insolvency resolution process. While the reforms did not initially encompass cross-border issues, the Joint Parliamentary Committee on the Insolvency and Bankruptcy Code recommended insertion of provisions to reach the foreign assets of Indian firms like the now defunct Kingfisher airlines.[190] It gives insolvency resolution professionals nominated by financial creditors or liquidators appointed by the Tribunal the right to take control and custody of 'assets over which the corporate debtor has ownership rights which may be located in a foreign country', thus potentially empowering them to seek recognition of Indian insolvency proceedings abroad.[191] The Code envisions reaching the foreign assets of corporate debtors or their personal guarantors by entering into reciprocal agreements with other states[192] and subsequently issuing letters of requests to their courts and authorities for evidence of, or action against, assets located within their jurisdiction. This reciprocity requirement is in line with India's practice concerning foreign judgments and goes further towards coordinating cross-border proceedings than

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[188] The Bankruptcy Law Committee, 'Interim Report of the Bankruptcy Law Reform Committee' (February 2015) <http://finmin.nic.in/reports/Interim_Report_BLRC.pdf> accessed 18 January 2016; The Bankruptcy Law Reform Committee, 'The Report of the Bankruptcy Law Reforms Committee', Vol. 1: Rationale and Design <http://www.finmin.nic.in/reports/BLRCReportVol1_04112015.pdf> accessed 18 January 2016.

[189] The Insolvency and Bankruptcy Code 2016, No. 31 of 2016, entered into force on 28 May 2016, <www.indiacode.nic.in/acts-in-pdf/2016/201631.pdf> accessed 13 September 2016.

[190] *See*, The Bankruptcy Law Reform Committee, 'The Report of the Bankruptcy Law Reforms Committee', Vol. 1: Rationale and Design (n 188) 16; Ashutosh Kumar, 'Bankruptcy Code tweaked to cover foreign assets of ailing firms' Business Broadcast News Pvt. Ltd. (New Delhi, 27 April 2016) <http://www.btvin.com/article/read/news/5438/bankruptcy-code-tweaked-to-cover-foreign-assets-of-ailing-firms%0A> accessed 28 April 2016; the collapse of Kingfisher Airlines is particularly noteworthy in this regard, *see* Simon Mundy and Amy Kazmin, 'India Passes National Bankruptcy Law' *Financial Times* (London, 12 May 2016).

[191] *See*, sections 18(f)(i) and 35(1)(b), Insolvency and Bankruptcy Code 2016 in particular.

[192] Section 234(2), Insolvency and Bankruptcy Code 2016.

the practices in China and Russia. It also opens up the country's legal system to in-bound insolvency practitioners and proceedings from reciprocating states, such as, potentially, the United States.[193]

However, the choice not to adopt the Model Law during an overhaul of the country's insolvency regimes signals India's abiding territorialist inclinations. Furthermore, aspects of the Code may even be detrimental to foreign parties, as the congealing of creditor classes and the short insolvency resolution timeframe (180 or 270 days), may lead to damaging, avoidable liquidations.[194] This is especially as local parties may seek to hinder such resolutions and force liquidation through dilatory tactics such as frequent adjournments.

Nonetheless, as an encouraging recent development, Pakistan, Bangladesh and India ratified the Cape Town Convention on International Interests in Mobile Equipment 2001 in 2006, 2008 and 2008 respectively[195] and the Aircraft Equipment Protocol in 2006, 2009 and 2008 respectively.[196] By doing so they have, *inter alia*, committed to protect (foreign) creditors' priority rights and claims from the debtor's insolvency administrator. It is notable that all three countries opted for Alternative A under Article XI of the Protocol which requires an insolvency administrator within a specified waiting period, 'to cure all defaults and agree to perform all future obligations, failing which the

[193] *See, e.g.*, Abhishek Saxena and Jyoti Singh, 'India – Cross Border Insolvency: Breaking Down the Indian Insolvency and Bankruptcy Code, 2016' *Mondaq* (5 July 2016).
[194] Anurag Das, 'Insolvency bill is a real credit to India' *Live Mint*, 15 January 2016, <http://www.livemint.com/Opinion/Vdoo3YI1xTALyCTcgQjIjN/Insolvencybill-is-a-realcredittoIndia.html> accessed 28 April 2016.
[195] UNIDROIT, 'Convention on International Interests in Mobile Equipment (Cape Town, 2001) – Status' <http://www.unidroit.org/status-2001capetown> accessed 11 September 2016.
[196] UNIDROIT, 'Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment' <http://www.unidroit.org/status-2001capetown-aircraft> accessed 10 September 2016.

administrator must give the creditor the opportunity to take possession of the aircraft object'.[197] This, by its very nature, requires a substantial degree of cross-border cooperation and coordination, as well as a measure of access for foreign insolvency representatives and creditors. The short waiting period, 30 days for India and 60 days for Bangladesh and Pakistan emphasizes that such cooperation between local authorities and the insolvency administrator must occur swiftly. Thus, for these countries to be able to fully implement its commitments under these instruments, the need for a solid cross-border insolvency regime becomes even more pressing.

8. The Way Forward

In view of the above, adopting the Model Law on its own will not establish a solid cross-border insolvency regime in Bangladesh, India and Pakistan. Given the nascent professional landscape and lack of political will in India and the state of insolvency law in Bangladesh and Pakistan, it would appear that the time is not ripe for these countries to adopt the Model Law. This view is shared by India's BLRC, which stated 'that further thought and consideration is required before implementing the UNCITRAL Model Law'.[198] As evident from the abovementioned examples of enacting states, the Model Law is most effective when built on a solid substantive insolvency law framework and other interim measures are needed before the Model Law can be adopted as a useful procedural instrument.

[197] Roy Goode, 'The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing' (2002) Uniform Law Review 1.
[198] The Bankruptcy Law Reform Committee, 'Interim Report of the Bankruptcy Law Reform Committee' (February 2015) (n 188) at 6.

In the short term, it is imperative that the legislation of Bangladesh and Pakistan be reformed to ease the process of corporate insolvency. India has already taken commendable steps in this regard through its new Insolvency and Bankruptcy Code. Furthermore, steps should be taken so that the court system does not unduly influence winding up proceedings in the event that a foreign company that has a place of business in their jurisdiction seeks to enter into insolvency proceedings. This could be by deleting the provision that unregistered companies cannot be wound up voluntarily or adding an exception for foreign companies. While many countries reserve the right to commence concurrent proceedings, the language of such sections could be amended to reflect a willingness to cooperate with foreign courts and representatives. This would have to be complemented with initiatives to train insolvency law practitioners familiarise judges with cross-border insolvency practices. The Asian Business Law Institute, launched in January 2016, may have a significant role in this regard.[199]

Longer term, local business communities need to become more vocal about the challenges posed to them by an inadequate cross-border insolvency regime, so that it becomes high on the agenda of policy-level discussions on the modernization of insolvency law. In Bangladesh and Pakistan, policy makers could deliberate upon the Recommendations of the UNCITRAL Legislative Guide, as India's BLRC has recently done, or draft provisions in accordance with the World Bank Principles.

If cross-border insolvency proceedings arise in the meantime, ad hoc court-to-court protocols still present the best option for these three countries as it will allow parties to

[199] Asian Business Law Institute, 'Introduction' <http://abli.asia/ABOUT-US/Introduction> accessed 28 April 2016.

expeditiously prepare custom agreements.[200] Drawing from existing guidelines and practice standards, these protocols could encourage cooperation and coordination in a particular set of circumstances for the efficient recovery of assets for creditors, while assuaging policy concerns about sovereignty and the interests of other stakeholders. They may also be able to address complex issues regarding group of companies or the determination of applicable law.

This may serve as a confidence-building measure in dealing with cross-border insolvencies and set these countries on the path towards enacting the Model Law.

[200] This line of argument was supported by a panel of lawyers and judges at the TMA Asia Pacific Conference in Singapore in November 2015. See Toby Luckhurst, 'Singapore: Court-to-court protocols are the key to cross-border consensus' Global Restructuring Review (11 April 2016) <http://globalrestructuringreview.com/article/1025565/singapore-court-to-court-protocols-are-the-key-to-cross-border-consensus> accessed on 28 April 2016.