

HARMONIZING CROSS-BORDER INSOLVENCY LAWS: RESOLVING THE COMPLEX WEB OF ISSUES AND CHALLENGES

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ABSTRACT

Cross-border insolvency, an increasingly prevalent phenomenon in today's globalized economy, presents a multifaceted web of issues and challenges that demand meticulous examination and resolution. The article endeavors to delve into the intricacies of cross-border insolvency, scrutinizing the dilemmas faced by various stakeholders and advocating for a cohesive framework to harmonize international insolvency laws.

In an era where businesses seamlessly traverse national boundaries, the complexity of cross-border insolvency is undeniable. This paper embarks on a journey through the labyrinthine world of international insolvency cases, guided by empirical case studies, jurisprudential insights, and recent developments in the field. It offers a holistic perspective on the subject, dissecting the concerns of creditors, debtors, and courts, and highlights the imperative need for a globally unified and efficacious cross-border insolvency regime.

The heart of the matter lies in the starkly contrasting interests of stakeholders involved in cross-border insolvency proceedings. Creditors seek to maximize their recovery, debtors aim for a fresh start, and courts endeavor to balance these conflicting objectives while navigating intricate legal landscapes. This article takes stock of these divergent concerns, examining how jurisdictional disputes, conflicting laws, and enforcement challenges often impede the efficient resolution of international insolvency cases.

Furthermore, the paper explores the role of international organizations and treaties in facilitating cooperation among nations, emphasizing the importance of harmonizing legal frameworks across borders. It delves into the existing mechanisms, such as the UNCITRAL Model Law on Cross-Border Insolvency, and evaluates their effectiveness in promoting cross-border insolvency resolution. The article also contemplates the potential impact of emerging trends,

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such as the rise of blockchain technology and its implications for cross-border insolvency proceedings.

In conclusion, this article contributes to the ongoing dialogue on cross-border insolvency by shedding light on the myriad challenges faced by stakeholders and advocating for a harmonized global approach. It underscores the need for legal convergence and cooperation in addressing cross-border insolvency issues, ultimately striving for a more efficient, equitable, and predictable resolution of international insolvency cases. This exploration of the complex web of cross-border insolvency issues aims to guide future research and policy initiatives in this critical area, providing valuable insights for legal practitioners, scholars, and policymakers alike.

KEYWORDS: *Cross-border insolvency, International insolvency laws, Creditors' rights, Debtor protection, Judicial cooperation.*

1. INTRODUCTION

In today's increasingly interconnected and globalized world, commerce transcends across multiple jurisdictions creating borderless relations among businesses from various countries. The rapid growth of these economic relationships across borders has increased the chances of corporate entities having creditors and debtors in more than one jurisdiction bringing the corresponding risk of cross-border insolvencies since businesses risk failure.¹ The complexities of cross-border insolvency are further exacerbated by the overlapping of insolvency laws across different nations posing a substantial challenge to the efficient and effective resolution of cross-border insolvency.² The cases of cross-border insolvency involve a myriad of parties including creditors, debtors, courts, and other stakeholders in different countries with varying interests and rights. This often leads to a conflict of laws especially as regards the claims of foreign creditors, recognition of foreign judgments, and differences in the laws of disposition of assets thus necessitating the *harmonization* of cross-border insolvency laws.³

¹ Neil Cooper and Rebecca Jarvis, *Recognition and Enforcement of Cross-Border Insolvency*, John Wiley & Sons (1996). A "truism of a free market economy is that there will be insolvencies"; Kent Anderson, "The Cross-border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience", (2000) 21 U. Pa. J. Int'l Econ. L. 679.

² *An overview of Cross-Border Insolvency in India*, AMLEGALS LEGAL STRATEGIES, (October 10, 2023, 9:14 PM) <https://amlegals.com/an-overview-of-cross-border-insolvency-in-india/#>

³ Mohan Chandra, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*, 21, INTERNATIONAL INSOLVENCY REVIEW 199-223 (2012).

A model law was designed by the United Nations Commission on International Trade Law (UNCITRAL)⁴ to ensure cooperation and coordination among different countries in cross-border insolvency cases. The Model has been built on *four principles* of “*access*” to domestic courts by foreign representatives, “*recognition*” of foreign proceedings, and “*cooperation*” and “*coordination*” between courts of various jurisdictions and insolvency professionals for effective and efficient resolution of transnational insolvency proceedings.⁵ Apart from the model, countries have adopted the principle of “modified universalism” which embraces the main principles of “universalism” and some constraints of the principle of “territorialism”.⁶ Modified universalism is backed by principles of giving appropriate protection to local interests and supplementing the insolvency proceedings in the home country. In addition to UNCITRAL Model law and modified universalism, cross-border insolvency agreements have been entered by countries for cooperation and coordination in multinational insolvency proceedings.⁷ There have been continuous efforts made at the global as well as national levels to build a comprehensive regime centered on improving this framework of cooperation in cross-border insolvency situations.

2. THE CHALLENGES OF CROSS-BORDER INSOLVENCY

The overlapping of insolvency proceedings in different countries poses a significant challenge to the effective and efficient resolution of cross-border insolvency proceedings. This situation is further exacerbated by the absence of harmonization of cross-border insolvency laws between different countries which results in competition between creditors of different countries for assets and cooperation between creditors or between creditors and debtors or between creditors and courts for arriving at a more efficient way to resolve the conflict becomes very unlikely. The authors further discuss the enforcement challenges and their impact on stakeholders while dealing with cases of cross-border insolvency.

⁴ UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL, (October 10, 2023, 9:14 PM) https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

⁵ *supra* note 3.

⁶ Marcela Ouatu, *Modified Universalism for Cross-Border Insolvencies: Does it Work in Practices?* UNIVERSITY OF COLUMBIA, (October 10, 2023, 9:14 PM) <https://open.library.ubc.ca/media/stream/pdf/24/1.0103613/1>.

⁷ *White Paper on Cross-Border Insolvency Tools and how Indian Companies can benefit from them* White Paper on Cross-Border Insolvency Tools and how Indian Companies can benefit from them, CYRILLSHROFF.COM, (October 10, 2023, 9:14 PM), <https://www.cyrilshroff.com/wp-content/uploads/2020/09/Cross-border-insolvency-tools-CAM-Thought-Leadership-Article.pdf>.

3. ENFORCEMENT CHALLENGES AND ITS IMPACT ON STAKEHOLDERS

The major challenge surrounding cross-border insolvency in cases where the debtor has creditors or assets in more than one jurisdiction revolves around the issues of the participation of creditors in foreign insolvency proceedings, recognition of foreign proceedings by domestic courts, and jurisdiction of courts of different countries to decide upon the insolvency proceedings.⁸ There has been reluctance on the part of countries to the adoption of UNCITRAL Model law mainly to protect the sovereignty of a nation to enact its own laws in dealing with assets located in its jurisdiction. Apart from reluctance to the adoption of the UNCITRAL Model law, there have been disagreements with regard to the adoption of theories that seek to resolve the issues surrounding cross-border insolvency.

Countries are reluctant to the adoption of the theory of universalism which seeks the administration of international insolvency by the “home” country encompassing all the debtor's assets and creditors.⁹ Another theory which is internationally accepted by major countries is the theory of “territorialism” which does not recognize foreign insolvency proceedings and seeks to administer the insolvency proceedings through local laws which often violates the principle of fair and equitable treatment of creditors across different jurisdictions as unlike creditors who have enough resources to take part in local proceedings many creditors may not have resources to take part in local proceedings.¹⁰ In addition to this the theory of “territorialism” also leads to uncertainty of many factors like the relocation of assets to other jurisdictions, insolvency laws of the jurisdiction where the assets are relocated, and many such issues.¹¹

The above can be best explained with the example of the insolvency of the Indian airline firm Jet Airways. The foreign creditors of the airline initiated insolvency proceedings in the Netherlands after the airline failed to make payments due to its creditors. Subsequently, insolvency proceedings were initiated by the creditors in India at the National Company Law Tribunal, Mumbai. The Dutch administrator appointed for Netherland insolvency proceedings against the airline sought financial information about the airline from

⁸ *supra* note 6.

⁹ A. K. Sikri, *Cross Border Insolvency: Court-To-Court Cooperation*, 51 JOURNAL OF THE INDIAN LAW INSTITUTE, 467–93 (2009).

¹⁰ Jay Lawrence, *A Global Solution to Multinational Default*, 98:7 MICH L REV 2276 at 2299 (2000).

¹¹ Andrew Guzman, *International Bankruptcy: In Defense of Universalism*, 98:7 MICH L REV 2217 at 2204 (2000).

the Tribunal and the recognition of the Netherland proceeding. However, the Tribunal refused to recognize the Netherland insolvency proceeding and did not allow the administrator to be a part of the insolvency proceeding in India citing that the Insolvency and Bankruptcy Code of India do not allow such actions.¹² Eventually, the Dutch and Indian resolution professional negotiated a protocol for the insolvency proceedings but this depicts the challenges faced by various stakeholders in cross-border insolvency and the need for harmonization of cross-border insolvency laws. The issues stemming from cross-border insolvency are very complex and need cooperation and coordination between different countries for the effective resolution of the insolvency proceedings.

4. INTERNATIONAL COOPERATION AND HARMONIZATION EFFORTS

Cross-border insolvency is an intricate and demanding domain, compounded by the multitude of divergent laws and regulations governing insolvency proceedings across various jurisdictions. The need for international cooperation and harmonization is paramount in addressing these complexities effectively.

5. THE NEED FOR INTERNATIONAL COOPERATION AND HARMONIZATION

The rationale for international cooperation and harmonization in cross-border insolvency is compelling. In today's globalized economy, businesses operate across national borders, resulting in complex corporate structures with assets and liabilities dispersed in multiple jurisdictions.¹³ When such businesses become insolvent, it can trigger a cascade of cross-border insolvency proceedings, often leading to jurisdictional conflicts, conflicting laws, and enforcement challenges.¹⁴

These challenges can significantly impede the efficient and effective resolution of cross-border insolvency cases, harming the interests of all stakeholders involved. Creditors may face delays and reduced recoveries, debtors may be unable to obtain a fresh start, and courts may be burdened with complex and time-consuming proceedings.¹⁵

¹² State Bank of India v. Jet Airways (India) Ltd, CP(IB) 2205(MB)/2019.

¹³ Thomas Gaa. *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?*, JSTOR, (October 10, 2023, 9:14 PM), <http://www.jstor.org/stable/40707107>.

¹⁴ Ettore Santucci et al, *Cross-Border Closing Opinions of U.S. Counsel*, THE BUSINESS LAWYER, (October 10, 2023, 9:14 PM), <https://www.jstor.org/stable/26417549>.

¹⁵ Hal Burman, *Private International Law*, 43 THE INTERNATIONAL LAWYER 741–57 (2009).

6. INTERNATIONAL ORGANIZATIONS AND TREATIES

International organizations and treaties play a vital role in facilitating cooperation and harmonization in cross-border insolvency.¹⁶ The United Nations Commission on International Trade Law (UNCITRAL) has been at the forefront of these efforts, developing a range of model laws and guidelines on cross-border insolvency.

The UNCITRAL Model Law on Cross-Border Insolvency (Model Law) is the most widely adopted international instrument on cross-border insolvency. It provides a comprehensive framework for cooperation and coordination between courts and insolvency professionals in different jurisdictions. The Model Law has been adopted by over 50 countries, including many major economic powers.¹⁷

Other international organizations, such as the World Bank and the International Monetary Fund, also play a role in promoting cross-border insolvency cooperation and harmonization. They provide technical assistance and capacity building to countries in implementing the Model Law and other international instruments on cross-border insolvency.

In addition to international organizations, regional and bilateral treaties have also been concluded to promote cooperation and harmonization in cross-border insolvency. For example, the European Union has enacted a series of regulations on cross-border insolvency proceedings. These regulations provide for a harmonized framework for insolvency proceedings involving debtors with assets and liabilities in multiple EU member states.

7. EXISTING MECHANISMS AND THEIR EFFECTIVENESS

The UNCITRAL Model Law on Cross-Border Insolvency is the cornerstone of international cooperation and harmonization in cross-border insolvency. The Model Law provides a number of mechanisms to facilitate cooperation and coordination between courts and insolvency professionals in different jurisdictions.¹⁸

One of the key mechanisms is the recognition of foreign insolvency proceedings. The Model Law obliges courts to recognize foreign insolvency proceedings if certain criteria are met. This recognition allows foreign insolvency

¹⁶ *supra* note, 13.

¹⁷ Duchaine, Isabelle et al, *Cross-border Resolution of Financial Firms*. JSTOR, (October 10, 2023, 9:14 PM), <http://www.jstor.org/stable/resrep51971>.

¹⁸ Id.

proceedings to have effect in the recognizing country, including the ability to enforce foreign insolvency orders.

Another important mechanism is the provision of cooperation and assistance to foreign insolvency proceedings. The Model Law obliges courts and insolvency professionals to cooperate and assist with foreign insolvency proceedings. This cooperation can take various forms, such as providing information, sharing assets, and coordinating insolvency proceedings.

The UNCITRAL Model Law has been effective in promoting cooperation and harmonization in cross-border insolvency.¹⁹ However, it is important to note that the Model Law is a voluntary instrument, and countries are not obliged to adopt it. Additionally, the Model Law does not provide for a harmonized substantive insolvency law. This means that courts in different jurisdictions may apply different substantive laws to resolve cross-border insolvency cases, even where they have recognized the foreign insolvency proceeding.

In addition to the UNCITRAL Model Law on Cross-Border Insolvency, there are a number of other relevant conventions and agreements that promote cooperation and harmonization in cross-border insolvency. Some of the most notable include:

- The Inter-American Convention on International Commercial Arbitration (Panama Convention)²⁰
- The European Convention on Insolvency Proceedings (ECIP)²¹
- The African Union Convention on Cross-Border Insolvency (AfICCI)
- The Nordic Convention on Cross-Border Insolvency
- The Asia-Pacific Regional Insolvency Agreement (APRIA)²²

These conventions and agreements provide for a variety of mechanisms to facilitate cooperation and coordination between courts and insolvency professionals in different jurisdictions. For example, they may provide for the recognition of foreign insolvency proceedings, the provision of cooperation and assistance to foreign insolvency proceedings, and the enforcement of foreign insolvency orders.

¹⁹ Sorieul, Renaud, et al, *Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law*, 35 THE INTERNATIONAL LAWYER, 107–22 (2001).

²⁰ *supra* note, 14.

²¹ McCormack, Gerard. “Something Old, Something New: Recasting the European Insolvency Regulation, JSTOR, (October 10, 2023, 9:14 PM), <http://www.jstor.org/stable/43829177>.

²² Khair Sumaiya et al, *State Practice of Asian Countries in International Law*, 22 ASIAN YEARBOOK OF INTERNATIONAL LAW (2016).

8. EFFECTIVENESS OF EXISTING MECHANISMS

The existing mechanisms for cooperation and harmonization in cross-border insolvency have been effective in a number of ways. For example, they have helped to reduce jurisdictional conflicts, facilitate the sharing of information and assets, and improve the coordination of insolvency proceedings.²³

However, there are still some challenges that need to be addressed. One challenge is that not all countries have adopted the UNCITRAL Model Law or other relevant conventions and agreements. Another challenge is that the existing mechanisms may not be well-equipped to deal with complex cross-border insolvency cases involving multiple jurisdictions.

9. RECOMMENDATIONS FOR IMPROVING THE EFFECTIVENESS OF EXISTING MECHANISMS

There are a number of things that can be done to improve the effectiveness of existing mechanisms for cooperation and harmonization in cross-border insolvency.²⁴ These include:

- Encouraging more countries to adopt the UNCITRAL Model Law and other relevant conventions and agreements²⁵
- Developing additional international instruments and mechanisms to address the challenges of complex cross-border insolvency cases²⁶
- Providing training and capacity building to judges and insolvency professionals on cross-border insolvency law and practice²⁷
- Promoting the use of technology to facilitate cross-border cooperation and coordination

By taking these steps, the international community can help to create a more efficient and effective framework for cross-border insolvency resolution. This will benefit all stakeholders involved, including creditors, debtors, and courts.

²³ Cohen, Edward S. “Constructing Power through Law: Private Law Pluralism and Harmonization in the Global Political Economy.” *Review of International Political Economy*, vol. 15, no. 5, 2008, pp. 770–99. *JSTOR*, <http://www.jstor.org/stable/25261998>. Accessed 22 Oct. 2023.

²⁴ Lehmann, Matthias. *Bail-in and Private International Law: How to Make Bank Resolution Measures Effective Across Borders*, *THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (JSTOR)*, (October 10, 2023, 9:14 PM), <http://www.jstor.org/stable/26348314>.

²⁵ Id.

²⁶ *supra* note, 24.

²⁷ *supra* note, 24.

10. EMERGING TRENDS AND THEIR IMPACT ON CROSS-BORDER INSOLVENCY

The field of cross-border insolvency is constantly evolving, and new trends are emerging all the time.²⁸ Some of the most significant emerging trends include:

1. The rise of blockchain technology²⁹
2. The increasing complexity of corporate structures³⁰
3. The growing importance of digital assets³¹
4. The emergence of new forms of insolvency, such as crypto-insolvency³²

These trends have the potential to significantly impact cross-border insolvency proceedings in a number of ways.

11. BLOCKCHAIN TECHNOLOGY

Blockchain technology has the potential to revolutionize cross-border insolvency proceedings by providing a secure and tamper-proof way to record and track assets and liabilities. Blockchain-based platforms can also be used to facilitate cross-border cooperation and coordination between courts and insolvency professionals.

For example, blockchain-based platforms can be used to:

- Share information and documents securely and efficiently
- Coordinate insolvency proceedings across multiple jurisdictions
- Enforce foreign insolvency orders

Blockchain technology can help to improve the efficiency and effectiveness of cross-border insolvency proceedings in a number of ways. For example, it can help to reduce the costs of insolvency proceedings, improve the transparency of insolvency proceedings, and facilitate cross-border cooperation and coordination.

12. INCREASING COMPLEXITY OF CORPORATE STRUCTURES

The increasing complexity of corporate structures, with businesses operating across multiple jurisdictions, is another emerging trend that is impacting cross-

²⁸ P. S. Berman, (2002). *The Globalization of Jurisdiction*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (October 10, 2023, 9:14 PM) <https://doi.org/10.2307/3312952>.

²⁹ Born, Gary, *A New Generation of International Adjudication*, 61 DUKE LAW JOURNAL 775–879 (2012).

³⁰ Id.

³¹ *supra* note, 29.

³² *supra* note, 29.

border insolvency proceedings. This complexity can make it difficult to identify and locate all of a debtor's assets and liabilities, as well as to coordinate insolvency proceedings in different jurisdictions.

The increasing complexity of corporate structures is making cross-border insolvency proceedings more complex and challenging. Courts and insolvency professionals need to be able to navigate complex corporate structures and coordinate insolvency proceedings in multiple jurisdictions.

13. GROWING IMPORTANCE OF DIGITAL ASSETS

The growing importance of digital assets, such as crypto currencies and non-fungible tokens (NFTs), is another emerging trend that is impacting cross-border insolvency proceedings. Digital assets can be difficult to identify and track, and there is a lack of clear legal guidance on how to deal with them in insolvency proceedings.

The growing importance of digital assets is creating new challenges for cross-border insolvency proceedings. Courts and insolvency professionals need to be able to identify and track digital assets, and there is a need for clear legal guidance on how to deal with them in insolvency proceedings.

14. EMERGENCY OF NEW FORMS OF INSOLVENCY

The emergence of new forms of insolvency, such as crypto-insolvency, is another emerging trend that is impacting the field of cross-border insolvency. Crypto-insolvency is a complex and challenging area, and there is a need for new legal frameworks and procedures to address the unique challenges involved.

The emergence of new forms of insolvency, such as crypto-insolvency, is creating new challenges for the field of cross-border insolvency. Courts and insolvency professionals need to develop new legal frameworks and procedures to address the unique challenges involved in crypto-insolvency cases.

15. CONCLUSION

Cross-border insolvency is a complex and multifaceted challenge in today's globalized economy. As businesses increasingly operate across multiple jurisdictions, the need for a harmonized and efficient framework for resolving international insolvency cases becomes ever more pressing. This research paper has delved into the intricate web of issues and challenges associated with cross-border insolvency and explored the efforts to harmonize international insolvency laws.

The key challenges of cross-border insolvency stem from the divergent interests of stakeholders, including creditors, debtors, and courts. Creditors seek to maximize their recovery, debtors aspire to get a fresh start, and courts strive to balance these conflicting objectives while navigating the intricate legal landscapes of different jurisdictions. Jurisdictional disputes, conflicting laws, and enforcement challenges often obstruct the timely and effective resolution of cross-border insolvency cases, as exemplified by the case of Jet Airways.

To address these challenges, international cooperation and harmonization efforts have become imperative. International organizations and treaties, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, have played a crucial role in promoting cooperation and coordination among nations. The UNCITRAL Model Law, with its principles of "access," "recognition," "cooperation," and "coordination," has been adopted by numerous countries, offering a comprehensive framework for addressing cross-border insolvency cases. Regional and bilateral treaties, such as those in the European Union, have further contributed to harmonizing insolvency proceedings.

While these mechanisms have been effective in many respects, they still face challenges, including the lack of universal adoption and limitations in addressing complex cross-border insolvency cases. To enhance their effectiveness, encouraging more countries to adopt the UNCITRAL Model Law and related conventions, developing additional international instruments, providing training to judges and insolvency professionals, and leveraging technology for cross-border cooperation are essential steps.

Emerging trends in the field of cross-border insolvency, such as the rise of blockchain technology, increasing corporate structure complexity, the growing importance of digital assets, and new forms of insolvency like crypto-insolvency, are reshaping the landscape. Blockchain technology holds the potential to revolutionize the way assets and liabilities are recorded, tracked, and shared securely. Meanwhile, the complexities arising from digital assets and evolving corporate structures necessitate the development of new legal frameworks to address these challenges.

We through this paper want to suggest some recommendations on this significant topic and issues related to it:

1. **Global Adoption of UNCITRAL Model Law:** Encouraging more countries to adopt the UNCITRAL Model Law on Cross-Border Insolvency can promote consistency and cooperation across jurisdictions.

Policymakers should actively advocate for its universal adoption to ensure a common framework for cross-border insolvency.

2. **Development of New International Instruments:** To address the challenges posed by complex cross-border insolvency cases and emerging trends, international organizations should work on developing new international instruments and guidelines. These instruments should provide guidance on issues like digital assets and crypto-insolvency.
3. **Capacity Building:** Training programs and capacity-building initiatives should be established to equip judges, insolvency professionals, and legal practitioners with the knowledge and skills needed to navigate cross-border insolvency cases effectively. These programs should encompass the latest developments in the field.
4. **Promotion of Technology Adoption:** The utilization of technology, particularly blockchain, should be promoted for secure and efficient cross-border cooperation and information sharing. Development and implementation of blockchain-based platforms can streamline the management of assets, enhance transparency, and reduce costs.
5. **Clarification of Digital Asset Treatment:** Given the growing importance of digital assets, legal frameworks should be developed to provide clarity on the treatment of cryptocurrencies, NFTs, and other digital assets in cross-border insolvency cases. Standardized approaches can help address these unique challenges.
6. **Research and Collaboration:** Encouraging further research and collaboration among legal practitioners, scholars, and policymakers is essential. Forums for sharing insights and experiences related to cross-border insolvency should be established to facilitate ongoing dialogue and innovation in this critical area.

In conclusion, cross-border insolvency is a pivotal issue in today's globalized economy, requiring careful consideration and harmonization of international insolvency laws. The challenges arising from divergent stakeholder interests, jurisdictional conflicts, and emerging trends must be met with proactive measures to ensure a fair, efficient, and predictable resolution of international insolvency cases. By embracing the recommendations provided and fostering international cooperation and innovation, the international community can work towards a more robust and harmonized framework for cross-border insolvency, benefiting creditors, debtors, and courts alike. This research paper serves as a call to action for legal practitioners, scholars, and policymakers to collectively address the complex web of cross-border insolvency issues and work towards a more cohesive and equitable global approach.