File No. 30/27/2018-Insolvency Section
Government of India
Ministry of Corporate Affairs

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NOTICE

Invitation of comments from public on Cross-Border Insolvency under Insolvency and Bankruptcy Code, 2016

'Cross-border insolvency' denotes circumstances in which an insolvent debtor has assets and/or creditors in more than one country. With the rapid increase in globalisation and the advent of sophisticated communications technology, cross-border trade and investment has increased the dependence of national economies on each other. The impact of business failure in such a globalised market economy often spans beyond national boundaries. Consequently, insolvency laws need to account for domestic as well as cross-border scenarios.

Domestic insolvency laws, *inter alia*, deal with establishing rights of various stakeholders during insolvency proceedings and prescribe procedures at various stages of the proceedings, such as locating the debtor's assets; identifying creditors of the debtor and their claims; establishing the manner of determining the means of repaying creditors and making distributions based on priority rules, etc. In a cross-border insolvency context, the law in a country will need to provide additional rules to deal with complexities such as the extent of access available to foreign insolvency practitioners to assets held in the respective country; rights of foreign creditors in respect of distribution in the respective country; the validity of orders of an adjudicatory forum in a foreign country, etc.

Such additional complexities in dealing with cross-border insolvencies result in uncertainty, risk, and ultimately costs to businesses. To resolve these concerns holistically, the need for having robust institutional arrangements to deal with cross-border insolvency issues has gained momentum in various jurisdictions, particularly under the aegis of UNCITRAL Model Law, during the last few decades. This note discusses the policy deliberations on the enactment of a cross-border insolvency law in India.

I. Background

India reformed its erstwhile insolvency regime by enacting the Insolvency and Bankruptcy Code, 2016 ("**IBC/Code**") that *inter alia* consolidates the laws relating to insolvency of corporate entities, individuals and partnership firms. The Code has transformed the insolvency landscape in the country by providing reorganization, liquidation and bankruptcy processes that aim at maximizing the value of assets in a time-bound manner, promote entrepreneurship, availability of credit, and balance the interests of all stakeholders.

The initial draft of the Insolvency and Bankruptcy Bill did not contain any provisions to deal with cross-border insolvency. The Bankruptcy Law Reforms Committee ("**BLRC**"), which recommended the design of the IBC, noted the following in its report in November 2015 –

> *"The Committee has taken up, and attempted to comprehensively solve, the question of bankruptcy and insolvency insofar as it is a purely domestic question. This is an important first milestone for India.*
>
> *The next frontier lies in addressing cross-border issues. This includes Indian financial firms having claims upon defaulting firms which are global, or global financial persons having claims upon Indian defaulting firms.*
>
> *Some important elements of internationalisation – foreign holders of corporate bonds issued in India, or borrowing abroad by an Indian firm – are dealt with by the present report. However, there are many other elements of cross-border insolvency which are not addressed by this report. Examples of these problems include thousands of Indian firms have become multinationals, and Indian financial investors that lend to overseas persons.*
>
> *The Committee proposes to take up this work in the next stage of its deliberations."*

The draft Bill prepared based on the recommendations of the BLRC was reviewed by a Joint Parliamentary Committee ("**JPC**") before its enactment. The JPC made several changes to the draft Bill and made the following observations in respect of cross-border insolvency in its report in April 2016 –

> *"The Committee deliberated the issue and noted that 'The Code at present does not explicitly deal with issues and text related to cross border insolvency. However given that many corporate transactions and businesses today involve an international and cross border element, the implications of cross border insolvency cannot be ignored for too long if India is to have a comprehensive and long lasting insolvency law as the Code aims to achieve. Not incorporating this will lead to an incomplete Code"*

Thereafter, two provisions were added to the draft Bill to deal with cross-border insolvency issues - Sections 234 and 235 of the IBC. Section 234 empowers the Central Government to enter into bilateral agreements with other countries to resolve situations of cross-border insolvency. Section 235 allows the Adjudicating Authority ("**AA**") to issue a letter of request to a court in a country with which an agreement under Section 234 has been entered into, to deal with assets situated in that country.

These provisions provide a basic framework for cross-border insolvency. Entering into agreements or treaties with various countries may be time-consuming, costly, and involve multiple negotiations. Further, in scenarios where multiple countries are involved in an insolvency proceeding, balancing competing clauses of such treaties may become difficult to handle. This was also acknowledged by the JPC and is evident from its observation where it noted that "*But cross border insolvency has a larger issue. There can be a multinational company having branches elsewhere and they actually go for liquidation somewhere. That may*

have a ramification. There are various other issues. Later on, these issues perhaps could be considered."

In this backdrop, the Insolvency Law Committee ("**ILC**"), a committee constituted under the Ministry of Corporate Affairs ("**MCA**") to review the implementation of the Code, took cognizance of the issues surrounding cross-border insolvency under the Code. In its first report released in March 2018, it discussed the gaps in the law due to the lack of a framework for cross-border insolvency, and noted –

> *"The Committee deliberated on Cross Border Insolvency and noted that the existing two provisions in the Code (S. 234 & S. 235) do not provide a comprehensive framework for cross border insolvency matters. Accordingly, it was decided to attempt a comprehensive framework for this purpose based on UNCITRAL model law on Cross Border Insolvency, which could be made a part of the Code by inserting a separate chapter for this purpose. Given the complexity of the subject matter and the requirement of in-depth research to adapt the model law in the Indian context, the Committee decided to submit its recommendations on Cross Border Insolvency separately."*

Pursuant to this, the MCA invited comments and views from stakeholders on an introductory note and a draft legal framework for cross-border insolvency in June 2018. The comments received from this consultation were considered by the MCA and the ILC. Thereafter, the ILC released its second report in October 2018, wherein it provided detailed recommendations on a legislative framework for cross-border insolvency in India.

II. Model Law

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 ("**Model Law**") has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. The Model Law provides a legislative framework that can be adopted by countries with modifications to suit the domestic context of the enacting jurisdiction. It has been adopted by 49 States to date. This includes developed as well as developing countries, such as Singapore, the UK, the US, South Africa, the Republic of Korea, etc.

The following gives a brief outline of the procedure envisaged in the Model Law:

(i) *Access:* The Model Law allows foreign insolvency officials and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor.

(ii) *Recognition and relief:* The Model Law allows recognition of foreign proceedings and relief by the domestic court based on such recognition. If domestic courts determine that the debtor has its centre of main interests ("**COMI**") in a foreign country, they will consider insolvency proceedings in such foreign country to be the main proceedings. Otherwise, they will be considered as non-main proceedings.

Recognition as the main proceeding will result in automatic relief, such as enforcing a moratorium on domestic proceedings regarding the debtor and providing greater powers to the foreign representative in handling the estate of the debtor. For non-main proceedings, such relief is at the discretion of the domestic court.

(iii) *Cooperation:* The Model Law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals. It provides for direct cooperation between: (a) domestic courts and foreign insolvency professionals; (b) domestic courts and foreign courts; (c) foreign courts and domestic insolvency professionals; and (d) foreign insolvency professionals and domestic insolvency professionals.

(iv) *Coordination:* The Model Law also provides a framework for commencement of domestic insolvency proceedings when a foreign insolvency proceeding has already commenced or vice versa. It provides for coordination of two or more concurrent insolvency proceedings in different States by encouraging cooperation amongst courts.

(v) *Public policy:* While the Model Law seeks to promote cooperation amongst countries, it also provides flexibility to courts to refuse any action that may be against the public policy of the enacting jurisdiction. Thus, a court in a country can refuse to take any action or provide any relief if it concludes that such action or relief would be manifestly contrary to the public policy of such a country. The determination of what constitutes 'public policy' is left to enacting jurisdictions and is not detailed in the Model Law.

A detailed discussion on the shortcomings of the current legal framework on cross-border insolvency in India, the need for reform, and the benefits of adopting the Model Law may be found in the note released for public consultation in June 2018 *(may be accessed here: https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf*).

III. ILC Recommendations on Cross-Border Insolvency

The report of the ILC on cross-border insolvency was submitted to the Government in October 2018 which primarily recommended the adoption of the Model Law in the IBC. It undertook a clause-by-clause analysis of the Model Law and suggested certain modifications to it to make it suitable to the Indian context. On this basis, it recommended draft provisions on cross-border insolvency for insertion in the Code (hereinafter referred to as "**Draft Part Z**"). The Draft Part Z is provided as Annexure II to the Report of the ILC (*may be accessed here: https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf*).

IV. Further Developments

In January 2020, the MCA constituted a cross-border insolvency rules/ regulations committee

("**CBIRC**") to recommend subordinate legislation for Draft Part Z. The CBIRC submitted its report to the Government in June 2020 (*may be accessed here: https://mca.gov.in/bin/dms/getdocument?mds=rrg9eENnNT9kek31pVicTQ%253D%253D&type=open*). This report provides recommendations on draft rules, regulations, notifications, guidelines, and capacity building for cross-border insolvency. It also suggests a few modifications to the ILC recommendations in Draft Part Z.

It is felt that enacting legislative provisions on cross-border insolvency is essential to address the emerging issues on cross-border insolvency in recent cases under the Code. The introduction of a cross-border insolvency law in the IBC, that is in line with international best practices and suitable for the Indian context, may be beneficial to all stakeholders. Draft Part Z, as recommended by the ILC, is under consideration for enactment. Certain modifications to the Draft Part Z may be considered based on suggestions of the CBIRC and jurisprudence developed under the Code. Additionally, the scope of this note is limited to cross-border provisions for single entity insolvency and the treatment of corporate groups is not considered herein.

Therefore, it is proposed to enact provisions on cross-border insolvency in line with Draft Part Z along with the following modifications:

1. Applicability

A. Personal guarantors to corporate debtors

1.1. The Model Law applies to individuals as well as corporate persons. When the ILC contemplated its report in 2018, the provisions of the Code had only been notified with respect to corporate debtors. Since personal insolvency provisions of the Code had not been operationalised at the time, the ILC recommended that Draft Part Z should apply only to corporate debtors. Part III of the Code has now been notified by the Central Government to the extent it applies to personal guarantors to corporate debtors.

1.2. It is proposed that the provisions of Draft Part Z should be revised to apply them to debtors under Part III of the Code. The provisions for insolvency resolution and bankruptcy under Part III have been notified in respect of personal guarantors to corporate debtors. Consequently, immediate application of the cross-border law is proposed to be to corporate debtors and personal guarantors to corporate debtors.

1.3. In this context, the following is further proposed:

(i) The Adjudicating Authority for Part III debtors may be the Debt Recovery Tribunal ("**DRT**"). However, where the insolvency proceeding of a personal guarantor is being adjudicated in the National Company Law Tribunal ("**NCLT**") (per Section 60(2) or (3)), cross-border applications for such guarantor may also be filed in the NCLT instead of the DRT. Any appeals from

DRT decisions may be filed with the Debt Recovery Appellate Tribunal ("**DRAT**") and any appeals from NCLT decisions may be filed with the National Company Law Appellate Tribunal ("**NCLAT**").

(ii) The COMI for Part III debtors may be presumed to be the 'habitual place of residence' of the debtor. This shall be a rebuttable presumption for determining the COMI, as recommended in the Model Law.

(iii) The relief on recognition of a foreign proceeding under the Model Law includes moratorium-related relief. Wherever a moratorium is to be imposed in respect of Part III debtors in Draft Part Z, it may be the same in scope as the moratorium imposed under Section 101 of the Code.

B. Exclusion of pre-packaged insolvency resolution process

1.4. A pre-packaged insolvency resolution process ("**pre-pack process**") was recently introduced in the Code for micro, small and medium corporations. Since provisions related to the pre-pack process were enacted this year, they had not been considered by the ILC at the time of designing Draft Part Z. The pre-pack process is a quicker and simpler resolution process for MSME corporate debtors. It is a voluntary process designed for smaller businesses to effectively resolve their financial distress. It is felt that cross-border issues may sparingly arise in the pre-pack process as it applies to small businesses. Further, since it has been introduced recently, jurisprudence and practice under the pre-pack mechanism are at a nascent stage. Given this, applying cross-border insolvency provisions to the pre-pack process may not be suitable at this stage.

1.5. Therefore, it is proposed that cross-border insolvency provisions may not apply to the pre-pack process.

C. Excluded entities

1.6. The Model Law suggests that businesses whose resolution is governed by a special law or whose insolvency significantly affects public interests may be exempt from the applicability of the cross-border insolvency law. In line with this, the ILC recommended that certain debtors may be exempted from the applicability of Draft Part Z. Consequently, Clause 1(3) of Draft Part Z empowers the Central Government to notify a class or classes of corporate debtors or entities to whom the provisions of Draft Part Z shall not apply.

1.7. The CBIRC noted that several jurisdictions have exempted certain kinds of businesses from the purview of the cross-border provisions in their respective insolvency laws. Many countries exempt businesses providing critical financial services, such as banks and insurance companies, from the provisions of cross-

border insolvency frameworks. Given this, it recommended that financial service providers notified under Section 227 of the IBC should be excluded from the purview of Draft Part Z.

1.8. Thus, it is proposed that financial service providers may be excluded from the applicability of cross-border insolvency provisions under Draft Part Z. Such exclusion is in line with the design of the Code as financial service providers are subject to a special insolvency process that has been notified under Section 227. Further, the Central Government may, if required, notify any other entities that should be excluded from the application of cross-border insolvency provisions by utilising its power under Clause 1(3) of Draft Part Z.

2. Adjudicating Authority for cross-border applications

2.1. The ILC recommended that the Central Government may notify the NCLT benches that shall act as the AA under Draft Part Z. In this regard, the CBIRC suggested that all benches of the NCLT may be given the power to adjudicate cross-border insolvency matters. It noted that this would promote certainty and accessibility in the law. This approach would also not disrupt the existing registered office jurisdiction rule under the Code and would avoid over-burdening a few NCLT benches.

2.2. Thus, it is proposed that all benches of the NCLT and DRT may have jurisdiction to adjudicate applications under Draft Part Z. This would mean that cross-border proceedings arising in respect of corporate debtors that have registrations in India will be dealt with at the NCLT bench having jurisdiction over the registered office of the corporate debtor. Cross-border applications regarding any person incorporated with limited liability outside India may be dealt with by the Principal Bench of the NCLT. In respect of Part III debtors, all benches of the DRT may be given jurisdiction to deal with cross-border applications in line with the jurisdiction under Section 179 of the Code.

3. Enforcement of judgments

3.1. Article 21 of the Model Law allows for the granting of certain discretionary relief upon the recognition of a foreign main or non-main proceeding (reflected in Clause 18 of Draft Part Z). Recent interpretation of the Model Law has caused uncertainty regarding its application to the enforcement of judgments - this was highlighted most impactfully in the case of *Rubin v. Eurofinance SA* [(2012) UKSC 46]. In this case, the UK Supreme Court refused to enforce a foreign judgment despite recognising the foreign proceeding from which the judgment arose. The underlying issue brought out by this case was that Article 21 of the Model Law does not expressly allow a court to enforce a judgment. Such power can only be implied from the scope of 'any appropriate relief' that may be provided under Article 21.

3.2. The interpretation adopted in *Rubin* has been criticised by many practitioners since mere recognition of proceedings without enforcement of judgments may render the Model Law toothless. To address this gap in interpretation of the Model Law, the UNCITRAL recommends in Article X of the UNCITRAL Model Law on Insolvency Related Judgments 2018 that jurisdictions enacting the Model Law may clarify that enforcement of a judgment is permitted as a discretionary relief under Article 21.

3.3. It is felt that recognition of a foreign proceeding may be immaterial without the power to enforce a judgment arising out of such proceeding. Enforcement of judgments is recommended as a discretionary relief under the Model law and would only be granted after considering the need for such enforcement. Further, leaving this issue to interpretation may result in a lack of clarity in the law and inconsistent interpretations by different fora. To avoid this, it is proposed that Draft Part Z may include an explanation that clarifies that the AA may order the enforcement of a judgment arising out of a foreign proceeding. To avail such enforcement, the foreign proceeding should have gained recognition under Draft Part Z.

V. Comments Sought

Public comments are hereby invited on Draft Part Z (Annexure II of the ILC Report of October 2018) along with proposed modifications mentioned in para 1.1 – 3.3 above.

Suggestion/comments, if any, along with brief justification may be submitted online therein at the below mentioned **weblink latest by 5:30 PM on 15th December 2021**:

https://ibbi.gov.in/webfront/cross_border_comments.php

Stakeholders may please note that comments should not be sent separately through e-mail or hard copy and should be sent only through the weblink created for the purpose.

-Sd/-
(Satyajit Roul)
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