

Key Recommendations of Insolvency Committee on Cross Border Insolvency

- Contributed by CA Sri Harsha, CS Phanindra & CA Suresh Babu

The Insolvency Committee (Committee) constituted by Ministry of Corporate Affairs submitted its first report in March 2018 which recommended amendments to Insolvency & Bankruptcy Code (IBC/Code) based on the experience gained from implementation of code. The Committee decided to submit its recommendations on cross border insolvency separately given the complexity of the subject matter and requirement of in-depth research on the matter.

The existing provisions of the code Section 234 and Section 235 (entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities) do not provide a comprehensive framework for cross-border insolvency matters and in light of which the Committee recommended adoption of UNCITRAL Model Law on Cross Border Insolvency, 1997. UNCITRAL Model law was the most widely accepted legal framework to deal with cross border insolvency and legislation based on the Model law has been adopted in 44 countries in a total of 46 jurisdictions. **UNCITRAL Model Law ensures full recognition of a country's domestic insolvency law by giving precedence to domestic proceedings and allowing denial of relief under the Model Law if such relief is against the public policy of the enacting country.**

The Committee reported that it is necessary to make the existing cross border insolvency framework under the Code more elaborate and self-contained and needs immediate attention. Some of the key advantages of adopting Model Law with specific carve outs as recommended by the Committee are as under:

Increasing Foreign Investment

Even though the foreign creditors have a remedy under the current code, adoption of model law will provide added avenues for recognition of foreign insolvency proceedings, foster cooperation and communication between domestic and foreign courts and insolvency professionals and so on. Moreover, there will be significant positive signalling to global investors, creditors, governments, international organizations such as World Bank as well as multinational corporations with regard to the robustness of India's financial sector reforms.

Flexibility

The model law is designed to be flexible and to respect the differences amongst national insolvency laws. Therefore,

	necessary carve outs may be made in relation to model law to maintain consistency with domestic insolvency law while adopting a globally accepted framework. For example, the moratorium under the model law may be tweaked to make it harmonious with the moratorium under Section 14 of Code, a reciprocity requirement may be incorporated for stakeholders in other countries.
Protection of Domestic Interest	The model law enables refusal of recognition of foreign proceedings or provision of any other assistance if such action contradicts domestic public policy. Hence, it provides enough flexibility to protect public interest.
Priority to Domestic Proceedings	The model law gives precedence to domestic insolvency proceedings in relation to foreign proceedings. For example, a moratorium due to recognition of a foreign proceeding will not prevent commencement of domestic insolvency proceedings.
Mechanism for Cooperation	The model law incorporates a robust mechanism for cooperation and coordination between courts and insolvency professionals, in foreign jurisdictions and domestically. This would facilitate faster and effective conduct of current proceedings.

In light of the above, the Committee has recommended the Model Law be adopted with necessary modifications. Broadly, the four main principles on which the Model Law is based on are as follows:

Access	<p>The model law allows foreign insolvency professionals 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.</p> <p>The committee recommends that Central Government to devise a mechanism for creating access to foreign insolvency professionals that is practicable in light of the Honourable Supreme Court judgment in the case of Bar Council of India v AK Balaji & Others.</p>
Recognition	The model law allows recognition of foreign and provision of remedies by domestic courts based on such recognition. Relief can be provided if the foreign proceeding is either a main or non-

main proceeding.

If domestic courts decide that the debtor has its centre of main interest (COMI) in the foreign country, such a foreign insolvency proceeding is recognized as main proceeding. If domestic courts determine that the debtor has an establishment (applying a test based on carrying on of non-transitory economic activity), such a foreign insolvency proceeding is recognized as non-main proceeding.

Recognition as a main proceeding will result in automatic relief, such as moratorium on transfer of assets of debtor, and allow the foreign representative greater powers in handling the estate of debtor. For non-main proceedings, such relief is at discretion of courts.

Cooperation

The model law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals.

The committee recommends that guidelines to be notified for cooperation between Adjudicating Authorities and Foreign Courts since the infrastructure of Adjudicating Authorities is still evolving. However, the cooperation between domestic and foreign insolvency professionals, domestic insolvency professionals and foreign courts and foreign insolvency professionals and domestic courts have been retained as stated in model law.

Coordination

The model law provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

Recommendations:

The Committee has made recommendations under 19 heads. The key recommendations are discussed hereunder:

1. General Provisions:

- a. The Committee recommends that the provisions dealing with cross border insolvency should be made applicable only to corporate debtors in the first phase. After gaining experience, such provisions may be made applicable to individuals and partnership firms. The Committee states that globally all the countries adopted the provisions of Model Law initially for corporate entities and then extended them to other individuals and other entities. Also, the Committee recommends that certain entities like banks,

insurance companies may also be excluded from the operations of Model Law considering the public interest in such entities.

- b. The Committee recommends that the definition of 'corporate debtor' for the purposes of cross border insolvency proceedings has to be amended to include 'foreign companies' to ensure that creditors and insolvency professionals of companies registered outside India can approach the Adjudicating Authority (AA) for cooperation or recognition of foreign proceedings to avail relief in India.
- c. The Committee also opines that certain provisions of Companies Act, 2013 deal with insolvency of foreign companies like Section 375(3)(b) may not be relevant after commencement of cross border insolvency regulations. Hence, to avoid dual regime for insolvency of foreign companies, the Committee recommends that Ministry of Corporate Affairs may undertake a study and analyse the efficacy of retaining such provisions in Companies Act which deal with insolvency of foreign companies.
- d. The Committee deliberated whether the Model Law must be adopted based on legislative reciprocity¹ or without any reciprocity requirement. The UNCITRAL has not contemplated a complete rejection of reciprocity and settled on a Model Law so that countries may have the freedom to incorporate reciprocity provisions. The Committee recommends that initially the Model Law may be adopted on reciprocity basis and based on experience in implementation the requirement of reciprocity may be diluted. The Committee also stressed that the reciprocity requirement would be confined only to the cross-border insolvency provisions and not to the entire code so as to allow foreign creditors to initiate, participate and file claims in proceedings under the Code regardless of reciprocity.

2. **Definitions:**

- a. **Establishment:** The definition of 'establishment' in the draft of cross-border insolvency provisions tracks the definition provided in Model Law. This definition assumes significance since the Model Law limits recognition as foreign non-main proceedings to proceedings in countries where the debtor has an 'establishment'. The Committee considered whether the requirement to carry out economic activity 'with human means' may be omitted from definition of 'establishment' to account for internet-based companies, like e-commerce companies. However, the committee observed that US have excluded such entities from the definition of 'establishment', whereas UK and Singapore retained. The Committee opines that at this juncture, it would be advisable to develop the jurisprudence internationally, recommending any change to definition of 'establishment' for Indian scenario.

¹ Legislative Reciprocity in general would indicate that a domestic court will recognize and enforce a foreign courts judgment or orders only if the country in which the foreign court is located had adopted the same or similar legislation to that governing the domestic court.

- b. The Committee also deliberated whether a precautionary look back period of 3 months must be built in the definition of 'establishment' in order to ensure that only those proceedings which were opened in a place where the corporate debtor had a stable business location would be recognised. The look back period would essentially mean that if the debtor has conducted economic activity in a country only within or after the specified look back period then such activity shall not be regarded for purpose of deciding that an establishment exists in such a country. Under the model law, commencement of foreign main proceedings is not mandatory before commencement of foreign non-main proceedings and recognition of foreign non-main proceedings may be made prior to recognition of foreign main proceeding. Hence, the 3 months look back period for determining the 'establishment' cannot be benchmarked from date of filing of application to initiate the foreign proceeding. Further, 3-month look back period for determining existence of an 'establishment' cannot also be benchmarked from date of filing of insolvency application in foreign non-main proceeding as by such time in many cases it may be possible that no economic activity exists. This may result in denial of recognition for several foreign non-main proceedings unintendedly. In light of qualifying the term economic activity with the adjective, 'non-transitory' already provided sufficient room for courts to prevent abuse and forum shopping and accordingly it was decided the look back period is not necessary.

3. **Public Policy:**

- a. The Committee opines that the draft cross-border insolvency provisions have right to refuse to take any action, including denial of recognition or relief, if such action would be manifestly contrary to the public policy of the country that receives the application for recognition.
- b. The Committee noted that the UNCITRAL Guide to Enactment recommends that the interpretation of 'public policy' should be narrow, so that the courts discretion should be minimal, and the aim should be to provide relief to a bigger pool of proceedings. The Committee opined that the phrase 'public policy' should be qualified with phrase 'manifestly', to narrow the ambit of 'public policy'.
- c. **The Committee suggested that while determining, whether an issue is contrary to public policy or not, AA may consider existing international jurisprudence along with domestic interpretations of public policy².** The Committee outlined the instances by US Courts where the public policy exception was applied to cases where relief sought in foreign proceedings amounted to:
 - i. abuse of automatic stay order of US court by foreign insolvency proceedings
 - ii. violation of US privacy and criminal laws
 - iii. detrimental effect on technological innovations in US by disregard of US patent licensing agreements.

² For jurisprudence on 'public policy', please refer the judgments of Arbitration and Conciliation Act, 1996.

- d. The Committee stated that differences in insolvency laws do not themselves justify a finding that enforcing one country's laws would violate the public policy of another country. The Committee recommended that when the matter pertains to determination whether an action is against the public policy of the country, the Central Government should also be given an opportunity to provide its submission **(please recollect the situation which RBI has faced before the Delhi High Court in the case of NTT Docomo Inc v Tata Sons Limited 2017 SCC OnLine Del 8078 – these lines are added by paper writer and does not form part of the committee report)** and accordingly suggested to incorporate such provisions in cross border insolvency scheme.

4. Other Provisions:

- a. The Committee opined that the model law allows domestic insolvency professionals in the enacting country to access foreign courts or act in a foreign country in relation to insolvency proceedings against debtor and currently there is no bar on the Indian Insolvency Professionals to access courts in foreign or to act in foreign countries and suggested that the same shall be subjected to regulations framed by Insolvency & Bankruptcy Board of India (IBBI).

5. Access to Foreign Representatives:

- a. The model law provides that the foreign representative shall have the right to access to a court in the enacting country, which allows the foreign representative to approach courts to seek remedies directly and aims to simplify the process. Formal requirements such as registration, license or consular action which may be applicable domestically are intended to be dispensed with for foreign representatives.
- b. The Committee stated that countries like US and Singapore have implemented such provisions of mode law into their cross-border insolvency laws, with minor changes. The Committee noticed that the challenge in allowing the foreign representatives with direct access to India Courts is not permissible in India in light of the recent judgment of Honourable Supreme Court in Bar Council of India v AK Balaji & Others (supra).
- c. The Committee has provided two options to resolve the subject issue. One, the foreign representatives may form a separate class of professionals akin to Indian Insolvency professionals and may therefore not have a legal bar to access courts in India. Second, the foreign representatives may be allowed to access courts and exercise their powers under the cross-border insolvency provisions through domestic representatives. Finally, the Committee was of the opinion that it may be desirable to adopt a conservative approach in providing access to foreign representatives till the development infrastructure regarding the cross-border insolvency in India.

6. Regulating the Foreign Representative:

- a. The model law provides that merely based on application of foreign representative, a court in the enacting country shall not exercise jurisdiction over the foreign representative or foreign assets of the debtor. UNCITRAL Guide to Enactment discusses that this is a 'safe conduct' rule which controls excessive imposition of jurisdiction by Courts. However, this should not prevent the domestic courts for imposing penalties for any misconduct by foreign representative according to the law in the enacting country.
- b. **The Committee discussed that above provisions of Model Law may be adopted in our cross-border insolvency law and may be subjected to a code of conduct by IBBI and to a penalty provision, similar to that applicable to domestic insolvency professionals under Code.**

7. Participation in a proceeding under the Code:

- a. The model law allows the foreign representative to commence and participate in domestic insolvency proceedings against the debtor. The power to commence domestic insolvency proceedings is provided as a remedy, to the foreign representative, exercisable without availing recognition of the foreign proceeding in which she is appointed. The Committee opines that the foreign representative may be allowed to participate in domestic insolvency proceedings and the power to initiate the domestic insolvency proceedings need not be vested with the foreign representative (since creditors under the code includes foreign creditors who are already allowed to initiate the domestic insolvency proceedings).

8. Access of Foreign Creditors to a proceeding under the Code:

- a. The model law embodies the principle that subject to the exclusions provided in mode law, foreign creditors who apply to commence insolvency proceedings in the enacting country or file claims in such a proceeding, should not be treated as worse than domestic creditors. The exclusions normally refer to tax claims and foreign social security. The Committee recommends that adoption of such provision under the Indian cross-border insolvency laws without any substantial modification.

9. Notice to Foreign Creditors:

- a. The model law provides that know foreign creditors may be given notice individually whenever a notice is to be given to creditors of the debtor. This is to enable foreign creditors to have easy access to information regarding the insolvency of the debtor since many modes of services of notice may not be accessible to foreign creditors. The Committee suggested that IBBI has to come up with a procedure to notify such foreign creditors either through website of corporate debtor or IBBI, instead of sending individual notices to foreign creditors.

10. Recognition of Foreign Proceeding and Relief:

- a. The model law empowers a foreign representative to seek recognition of a foreign proceeding from a court in the domestic country, in order to avail appropriate relief in

relation to foreign proceeding. The provisions dealing with recognition of foreign proceedings have been identified as the core of model law.

- b. The model law provides the documents required to be submitted by foreign representative when making an application for recognition. This includes proof of existence of the foreign proceeding and of the appointment of foreign representative in such proceedings along with details of any pending foreign proceedings against the debtor.
- c. The Committee is of the view that both the above provisions can be incorporated in the cross-border insolvency laws in India along with foreign representative may also be mandated to specify pending foreign and domestic insolvency proceedings against the corporate debtor that are known to her to ensure that AA has complete information about the foreign proceedings along with any proceedings under the Code against the corporate debtor.

11. COMI:

- a. The model law provides recognition as foreign main proceeding is based on the finding of COMI. Thus, determination of COMI is central to operation of model law as it accords proceedings in COMI greater deference and more immediate, automatic relief.
- b. The foreign main proceeding is expected to have the principal responsibility for managing the insolvency of the corporate debtor regardless of number of countries in which the debtor has assets and creditors. Therefore, essential attributes of corporate debtor's COMI correspond to those attributes that will enable those who deal with debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning corporate debtor is likely to commence.
- c. **The model law does not define COMI but provides a rebuttable presumption that a corporate debtor's registered office is its COMI in the absence of proof to the contrary.** This presumption ensures speed and convenience of proof in vanilla cases where no controversy on COMI is involved. However, the Committee opined that this presumption may in certain cases lead to abuse and forum shopping and UNCITRAL Guide to Enactment has left the onus on court to detect such an abuse.
- d. **The EU Insolvency Regulation (Recast) seeks to prevent such forum shopping by making the presumption inapplicable in cases where the debtor has relocated its registered office to another country within a 3-month period prior to request for opening insolvency proceeding. The Committee recommends in addition to proactive enquiry by AA, adoption of look back period of 3 months while enforcing COMI presumption would be suitable to Indian context.**

- e. The UNCITRAL Guide to Enactment provides the following two principal factors which may indicate COMI in most cases:
 - i. **Where the central administration of debtor takes place and**
 - ii. **Which is readily ascertainable by Creditors**

The Committee recommends that the code and its enforcement in India is still evolving, it may be prudent to include these principal factors in code with an intent to provide objective factors to assist the AA in cases where the COMI does not coincide with the registered office.

12. Decision of Recognition:

- a. The model law provides that as long as the requirements set out are met, the court shall recognise the foreign proceeding at the earliest times possible. This reduces discretion given to the court in selecting the proceeding which are to be recognized and lays down the objective criterion for recognition if the application for recognition is made to the appropriate court.
- b. Based on certain criterion, a foreign proceeding may be recognized as a foreign main proceeding or a foreign non-main proceeding. This is based on the finding of COMI in the case of recognition as a foreign main proceeding and existence of an establishment in case of recognition as foreign non-main proceeding. The approach of model law is to provide distinct treatment of foreign main and non-main proceedings with respect to the nature of relief available and the coordination of concurrent proceedings. The Committee is of the view that same provisions may be adopted in the cross-border insolvency provisions without substantial modifications. However, a period of 30 days may be provided to AA to decide on the application for recognition with an additional limit of 30 days.

13. Interim Relief:

- a. The model law provides for two kinds of relief – interim relief and relief on recognition. While the former may be provided by the Court until an application for recognition of foreign proceeding is decided upon, the latter is to be granted if a foreign proceeding is recognised.
- b. The model law provides urgent relief which may be granted, at the discretion of the court, after an application for recognition is filed. The relief mentioned is narrower than the relief which may be granted after recognition of foreign proceedings. Unless extended by Court, the relief shall terminate when the decision with respect to recognition of the foreign proceedings is taken by the Court.
- c. This relief is not exhaustively provided and may include – (a) staying of the execution of debtor’s assets (b) staying transfer and disposal of debtor’s assets and other related. **The Code does not empower the AA to provide any interim relief in CIRP. In**

view of the above, the Committee recommends that power to grant interim relief may not be provided under cross-border insolvency laws.

14. Relief on Recognition:

- a. The relief available on recognition of foreign proceeding may be of two kinds – (a) mandatory relief on recognition as a foreign main proceeding and (b) discretionary relief on recognition as either foreign main proceeding or foreign non-main proceeding. The former applies when a foreign main proceeding is recognized while the later may be provided by court on recognition of either foreign main or foreign non-main proceeding.
- b. The model law provides that **an automatic moratorium shall apply on recognition of foreign main proceedings. This moratorium is to be similar in scope as the moratorium available under the domestic insolvency law of the enacting country. This moratorium in the model law does not interfere with the right to commence any domestic insolvency proceedings or with the right to file claims in such a domestic proceeding.** This is in line with the general approach of model law which gives prominence to the domestic insolvency proceedings of the enacting country over foreign proceedings.
- c. The Committee is of the view that a moratorium similar in scope as Section 14 of Code may be inserted in draft cross-border insolvency provisions and such moratorium shall be applicable immediately on recognition of foreign main proceeding. The Committee also recommends that the automatic moratorium does not affect the right to commence individual proceedings against the corporate debtor to the extent necessary to preserve claims against the corporate debtor.
- d. The model law provides relief that may be granted in respect of foreign main or non-main proceedings and provision of such relief is left to discretion of court. The relief provided in model law is not limited in scope as it is assumed that the courts will utilise their discretion to define the scope of relief while providing it. Therefore, the Committee is of the view that the AA shall consider the scope of moratorium under Section 14 of Code, including limitations and exceptions to it, while providing discretionary relief.
- e. **The model law provides a broad power to the Court to enable the foreign representative or any other designated person to distribute all or part of the debtor's assets located in the enacting country. This provision also envisages a safeguard for domestic creditors by subjecting entrustment of distribution of assets of corporate debtor to the foreign representative on satisfaction of the court that interests of domestic creditors are adequately protected. Further, the relief provided as interim relief or as discretionary relief on recognition in the model law is subject to satisfaction of the court that the interests of parts, such as creditors and**

the debtor, are protected. This may help in achieving a balance between the relief provided by Court and the interests of various stakeholders.

- f. In view of the above, the Committee advised that the power to provide discretionary relief to distribute all or part of assets of debtor may be sparingly exercised in cases where the need for such relief is clearly established and interests of domestic creditors are protected.

15. Avoidance Actions:

- a. Insolvency laws across various jurisdictions provide insolvency professionals with power to commence an avoidance action to collect assets that the debtor fraudulently transferred out of its estate, often to place them beyond the reach of debtor's creditors. The model law provides that a foreign representative may apply to the court, upon recognition of foreign proceeding, to set aside such antecedent transactions of the debtor which are detrimental to creditors. **The Committee concluded that the above provisions of model law shall be admitted in the cross-border insolvency provisions and like all other powers given to the foreign representative, exercise of power under this provision of model law will be subject to manner of access of foreign representative.**

16. Cooperation with Foreign Courts and Foreign Representatives:

- a. The model law contains provisions regarding cooperation and communication with foreign courts and foreign representatives. This part is the key element of model law. **The UNCITRAL Guide to Enactment states that cooperation is often the only realistic way to prevent dissipation of assets, to maximize the value of assets, to find the best solutions for reorganization of enterprise and so on.**
- b. The Committee opined that given the nascent stage of insolvency infrastructure under the Code and lack of experience of AA in communicating with foreign courts, the Committee discussed the obligatory cooperation and direct communication of domestic AA with foreign courts may be premature and accordingly recommended that in the initial stages of introduction of model law, cooperation and communication between AA and foreign courts must be based on framework as notified by Central Government.
- c. **The Committee recommended that in light of burden of the overworked AA and in the interest of speed and efficiency, the Central Government may notify an appropriate authority to assist the AA in facilitating transmission of notices and other communications between AA and foreign courts.**

17. Concurrent Proceedings:

- a. The model law permits multiple proceedings in various jurisdictions to take place simultaneously by enabling coordination and cooperation of such proceedings. It also provides the conditions for commencement of domestic proceedings after recognition of foreign main proceeding and enables modification of relief to maintain consistency in multiple proceedings.
- b. **As stated above, the model law permits initiation of domestic insolvency proceedings after recognition of a foreign main proceeding, as long as the debtor has assets in enacting country. For example, if a foreign main proceeding taking place in another country in respect of a corporate debtor is recognized in India, an insolvency resolution process may also be commenced against such a corporate debtor in India, if it has assets in India.**
- c. The effect of domestic insolvency proceeding in such a scenario will be limited to the assets in the enacting country. The model law also provides a manner in which relief may be modified when a foreign proceeding and domestic insolvency proceeding are taking place concurrently. The Committee therefore concluded that the above provisions of model law may be adopted with an option to review the relief.

18. Payment in Concurrent Proceedings:

- a. As discussed above, the Model Law contemplates that multiple insolvency proceedings in separate jurisdictions may run concurrently. However, there may be instances where a creditor may have a common claim in more than one jurisdiction. In this scenario, such a creditor may receive payment from multiple insolvency proceedings in relation to the same claim. To counter the possibility of unjust enrichment of creditors due to concurrent insolvency proceedings, Article 32 of the Model Law provides the *hotch pot rule*, by virtue of which if the creditor has received part payment for a claim in an insolvency proceeding, she may not receive a payment for the same claim in another insolvency proceeding relating to the same debtor.
- b. **The Committee recommends the adoption of the same in draft provisions of cross-border insolvency with two modifications:**
 - i. In case of insolvency resolution process under the Code, the payment to creditors will be in accordance with resolution plan. Therefore, the threshold for comparison of payment to the creditor may be the payment according to the resolution plan to creditors of the same standing.
 - ii. In case of liquidation under the Code, the threshold for comparison may be creditors of the same class and ranking.

19. Presumption of Insolvency:

- a. The model law provides that on recognition of a foreign main proceeding, the debtor shall be presumed to be insolvent for the purposes of commencement of domestic insolvency proceeding. The intent of this provision is to enable a simple trigger for

commencing insolvency proceedings in jurisdictions which have to establish a state of insolvency of the debtor to initiate insolvency proceedings. Since the test of insolvency is subjective and a criterion which may be time-consuming to satisfy, this provision is of special significance in jurisdictions which have such a test of insolvency. In India, the test for commencing CIRP does not involve satisfying the Adjudicating Authority that the corporate debtor is insolvent. Rather, the Code provides an objective criterion which allows initiation of a CIRP on default of INR 1 lakh.

- b. The Committee agreed that a presumption relating to a test of insolvency may not be of practical significance since the Code does not contemplate the satisfaction of a test of insolvency for the purposes of commencement of a proceeding. However, the Committee discussed that it may be beneficial for creditors if initiating insolvency resolution proceedings in India is made simpler when an insolvency proceeding in corporate debtor's COMI has been recognized in India. Therefore, the draft provisions may provide that instead of test of insolvency, recognition of a foreign man proceeding may be presumed to be proof of default by the corporate debtor for the purposes of commencement of CIRP.