

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

Dated: 20.06.2018

Public Notice

Government has taken initiative to introduce a chapter on Cross-Border Insolvency within the Insolvency & Bankruptcy Code, 2016 (the Code) to provide a comprehensive legal framework, considering the fact that corporates transact businesses in more than one jurisdiction and also have assets across many jurisdiction. Introductory note and draft chapter is given at Annexure-A.

Suggestions on the draft chapter on Cross Border Insolvency are invited from the stakeholders to further enhance the same and ensure that wider consultation/views are incorporated. Suggestions in the format prescribed below may be mailed to the email id "crossborder@mca.gov.in till 30.06.2018:-

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ANNEXURE A

**OVERVIEW OF CROSS-BORDER INSOLVENCY FRAMEWORK FOR CORPORATE DEBTORS UNDER THE
INSOLVENCY AND BANKRUPTCY CODE, 2016**

As the size of the Indian economy grows, business and trade have adopted an increasingly international character. Even globally, creditors and corporates frequently transact business in more than one jurisdiction. Foreign banks and creditors finance Indian companies and Indian banks have foreign exposure. Moreover, as part of its Ease of Doing Business and Make in India policies, India seeks to attract foreign companies to set up manufacturing facilities in India. Global experience demonstrates that cross-border investment decisions and their outcomes, are considerably affected by the insolvency laws in force in a country. Towards this end, even though the Insolvency and Bankruptcy Code, 2016 ("Code") has resulted in significant improvement in India's insolvency regime, as the Report of the Joint Committee on Insolvency and Bankruptcy Code, 2015¹ and more recently, the Report of the Insolvency Law Committee² observed, the Code does not provide a comprehensive framework for cross-border insolvency matters presently.

In this backdrop, the government is keen to introduce a globally accepted and well-recognised cross-border insolvency 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

while ensuring the least intrusion into the country's domestic insolvency law. The intent is to introduce cross-border insolvency provisions with respect to corporate debtors initially and based on the experience, formulate similar provisions for personal insolvency in due course of time.

For ease of understanding, a brief description of the current cross-border insolvency framework in India is provided below. This is followed by enlisting the need for adopting the Model Law. Lastly, a draft framework prepared on the basis of the Model Law with certain modification to adapt it for application *in* India has been laid down.

I. CURRENT LEGAL FRAMEWORK

(i) *Cross-Border insolvency law under the Code*: Currently, a cross-border insolvency would be dealt with under sections 234 and 235 of the Code (once notified). Section 234 empowers the Central Government to enter into bilateral agreements with other countries to resolve situations pertaining to cross-border insolvency. Section 235 empowers the Adjudicating Authority under the Code 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 in a specific manner. The agreements under these sections will apply both when proceedings in India would require recognition, assistance, etc. abroad and when foreign proceedings require the same in India.

(ii) *Enforcement of foreign judgments in India*: For foreign proceedings to be recognized in India, the Civil Procedure Code, 1908 is applicable along with principles developed in English common law.

(iii) *Treatment of Indian proceedings abroad*: For Indian proceedings to be recognized abroad, the law of that country will apply. If the country has adopted the Model Law, typically they could recognize the proceedings without requiring India to have adopted the Model Law. For example, Singapore, United States ("US") and the United Kingdom ("UK") have adopted the Model Law and may provide recognition, assistance, cooperation and appropriate relief in relation to Indian insolvency. However, countries that have not adopted the Model Law or the ones that have adopted the Model Law with modifications, may have requirements of reciprocity (i.e. they may require that India also have a cross-border insolvency law formulated on the Model Law). This would mean that such other country would provide recognition, cooperation, etc. in relation to Indian insolvency proceedings only if certain requirements are met by the domestic Indian law. Examples of countries that require reciprocity for their domestic cross-border insolvency provisions based on the Model Law to be applicable include Mexico, Romania, etc.³

II. NEED FOR A CROSS-BORDER INSOLVENCY LAW IN INDIA

A. Drawbacks of the current position

Some drawbacks of the current position are as follows:

(i) The current cross-border insolvency framework under the Code rests on India entering into bilateral treaties with foreign governments. Finalizing such bilateral treaties requires long-term negotiations and every treaty would be distinct which would create uncertainty for foreign investors. This would

also create ambiguity for Indian courts and Adjudicating Authorities under the Code, which would have to administer each treaty differently.

(ii) Where multiple jurisdictions are involved, bilateral treaties with each country will have to be invoked, which may create legal and procedural complexities and unnecessary administrative

(iii) In a situation where the assets of an Indian debtor are located in a foreign jurisdiction with which there are no bilateral agreements, there would be no guidance on remedies available to an Indian insolvency professional in order to avail evidence or take action in relation to such assets of the debtor.

(iv) The current process for recognition, etc. of foreign proceedings in India is not developed. This means that various actions such as recognition of foreign proceedings and cooperation between Indian and foreign courts would not be available unless the bilateral treaties specifically incorporate provisions in this respect. This may be a disincentive for foreigner creditors, who may prefer assistance, recognition, etc. in India of proceedings in their home

(v) The mechanism for enforcement of foreign judgments under the Civil Procedure Code, 1908 is not broad enough to include all insolvency orders, for instance, orders regarding reorganization processes, administrative and interim orders, etc.⁴ This will render many judgments and orders in the insolvency process unenforceable in India.

B. Overview of the Model Law

The Model Law is applicable when:

- a. assistance is sought in a State by a foreign court or foreign insolvency professional;
- b. assistance is sought in a foreign State in connection with domestic proceedings;
- c. foreign and domestic proceedings are concurrently underway; and
- d. foreign creditors and other interested parties want to commence or participate in domestic insolvency proceedings.

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

(i) *Access*: It 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.⁵ This feature of the Model Law has been tailored to meet the Indian context, specifically the judgment of the Honourable Supreme Court of India in *Bar Council of India v. A.K. Balaji & Ors.*⁶ Accordingly, the draft framework provided below deviates from the Model Law so far as allowing foreign representatives 'direct' access to proceedings in India is concerned. The detailed framework may be provided in subordinate legislation, possibly by appointing an Indian insolvency professional as a representative of the foreign representative, to exercise all functions on behalf of the foreign representative.

(ii) *Recognition*: The Model Law allows recognition of foreign proceedings and remedies by the domestic court based on such recognition. If domestic courts determine that the debtor has its centre

of main interests (“COMI”) in the foreign country. they will consider insolvency proceedings in such foreign country to be the main proceedings, if not, they will be considered non-main proceedings.⁷ Recognition as a main proceeding will result in automatic relief, such as a stay / moratorium on domestic proceedings in relation to the debtor and allow the foreign representative greater powers in handling the estate of the company, and domestic proceedings will be treated as ancillary proceedings.⁸ 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 the domestic and foreign courts. and domestic and foreign insolvency professionals. The Model Law provides for ‘direct’ cooperation between: (i) domestic courts and foreign insolvency representatives; (ii) domestic courts and foreign courts; (iii) foreign courts and domestic insolvency professionals; and (iv) foreign insolvency representatives and domestic insolvency professionals. Given that the infrastructure of the Adjudicating Authorities under the Code is still at a nascent stage, the cooperation between domestic courts (i.e. Adjudicating Authorities) and foreign courts is proposed to be subject to guidelines to be notified by the Central Government, and not ‘direct’ per se.

(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 between courts.

C. Benefits of enacting the Model Law

Due to the growing prevalence of multinational insolvencies, the Model Law has been adopted by 44 States till date, including Singapore, UK and US.⁹ Following may be some benefits of adopting the Model Law:

(i) *Ease of doing business*: Enacting an effective cross-border insolvency law shall make India an attractive investment destination for foreign creditors given the increased predictability and certainty of the insolvency framework for foreigners. There are three main economic benefits achieved by Model Law¹⁰: (i) reduction in time for exchanging necessary information between countries (ii) increase in credit recovery efficiency and (iii) cooperation and assistance helps in preserving the company’s assets from dissipating, resulting in successful reorganisation. Though even presently the Code does not differentiate between foreign creditors and domestic creditors, the Model Law provides much more clarity in terms of procedure and lists remedies available to foreign entities. The popularity of the Model Law has increased in recent years and such adoption shall also enable India to learn and adopt global best practices in this area. Moreover, there will be significant positive signalling to global creditors, governments, multinational organizations such as the World Bank as well as multinational corporations vis-a-vis the robustness of India’s financial sector reforms.

(ii) *Flexibility*: The Model Law is designed to be flexible and to respect the differences amongst national laws on insolvency.¹¹ Therefore, deviations may be made from the Model Law to suit the domestic

conditions and maintain consistency with the domestic insolvency. For example, South Africa has introduced a reciprocity requirement¹² and the US has restricted remedies to be available only after recognition of foreign proceedings¹³.

(iii) *Protection of domestic interest*: The Model Law permits countries to refuse recognition of foreign proceedings or provision of any other assistance if such action would be manifestly contrary to the domestic public policy.¹⁴ Hence even once the provisions of the Model Law are incorporated in the Code, the right to refuse assistance to foreign proceedings is retained. Hence, there is limited downside risk of abuse of the law by foreign creditors, debtors or other interested persons.

(iv) *Priority to domestic proceedings*: The Model Law prioritizes domestic insolvency proceedings above foreign proceedings. Thus, a moratorium due to recognition of a foreign proceeding will not bar commencement of domestic insolvency proceedings.

(v) *Empowering insolvency representatives*: Indian insolvency representatives will be empowered to access foreign jurisdictions and avail recognition, cooperation, etc. in such jurisdiction subject to compliance with applicable foreign law.¹⁵ Though such remedy may have been available earlier too, depending on law of the foreign country, sufficient guidance in relation to power of the insolvency representatives is not provided in Indian

(vi) *Mechanism for cooperation*: There is specific guidance in the Model Law regarding direct cooperation and coordination between courts and insolvency professionals, in foreign jurisdiction and domestically. This may enable consistent judgments and faster and effective assistance in case of concurrent proceedings.

(vii) *Protection of Indian creditors*: The scheme of the Model law is that any relief given to a foreign insolvency representative in relation to the foreign proceeding shall be subject to protection of domestic creditors and interested persons, including the debtor.¹⁶ This emphasizes on the prominence given by the Model Law to domestic proceedings and domestic parties.

(viii) *Remedy in jurisdictions with reciprocity*: Some jurisdictions like Romania, Mexico, etc. have enacted the Model Law with a requirement of legislative reciprocity.¹⁷ This means that such a country would only grant recognition, cooperation, etc. to Indian proceedings if India were to adopt the Model law (or have an effective cross-border insolvency law).

Draft Part [Z]

CHAPTER I: GENERAL PROVISIONS

1. Scope of application of this Part

(1) Save as otherwise provided in sub-sections (2) and (3), the provisions of this Part shall apply to all

corporate debtors to whom this Code applies where:

- (a) assistance is sought in India by a foreign court or a foreign representative in connection with foreign proceedings; or
- (b) assistance is sought in a foreign State in connection with proceedings under this Code; or
- (c) foreign proceedings and proceedings under this Code in respect of the same corporate debtor are taking place concurrently; or
- (d) creditors in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under the Code.

(2) The Central Government may notify classes of corporate debtors or entities to whom the provisions of this Part shall not apply.

(3) The provisions of this Part shall apply:

- (a) in the first instance to States, mentioned in Part A of the Schedule, which have adopted the UNCITRAL Model Law on Cross-Border insolvency.
- (b) to any other State, specified in Part B of the Schedule, which the Central Government may notify under sub-section (4).

(4) The Central Government may enter into an agreement with the Government of any State outside India for enforcing provisions of the Code in respect of corporate debtors under this Part and may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor situated at any place in a State outside India with which such an agreement has been entered into, shall be subject to such conditions as stated in the agreement.

(5) Notwithstanding anything contained in this Part, the Central Government may by notification-

- (a) add or omit any State from the Schedule if such addition or omission is necessary in the interest of security of the State or public interest; or
- (b) direct that the application of this Part in relation to any State shall be subject to such conditions, exceptions or qualifications as are specified in the said notification if such conditions, exceptions or qualifications are necessary in the interest of security of the State or public interest.

2. Definitions

In this Part unless the context otherwise requires-

- (a) "Adjudicating Authority" means the National Company Law Tribunal and the National Company Law Appellate Tribunal. notified by the Central Government to perform functions relating to recognition of foreign proceedings and cooperation with foreign courts under this Part;
- (b) "centre of main interests" shall have the meaning assigned to it in **section 14** of this Part.
- (c) "establishment" means any place of operations where the corporate debtor carries out or has carried out a non-transitory economic activity with human means and assets or services in the [three] month period prior to the commencement of insolvency proceedings in the State in which

the corporate debtor's centre of main interest is located;

(d) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(e) "foreign main proceeding" means a foreign proceeding taking place in the State where the corporate debtor has the centre of its main interests;

(f) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the corporate debtor has an establishment;

(g) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the corporate debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(h) "foreign representative" means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the corporate debtor's assets or affairs or to act as a representative of the foreign proceeding and includes any person or a body appointed on an interim basis.

3. Authorisation of a resolution professional or liquidator to act in a foreign State

Any resolution professional or liquidator recognised or authorised to act as such under this Code is, subject to regulations specified by the Board, authorised to act in a foreign State on behalf of a proceeding under this Code, as permitted by the applicable foreign law.

4. Public policy exception

(1) Notwithstanding anything contained in this Part, the Adjudicating Authority may refuse to take an action governed by this Part if the action would be manifestly contrary to the public policy of

(2) The Central Government may notify factors to be considered by the Adjudicating Authority in determining whether an action under sub-section (1) would be manifestly contrary to the public policy of India.

5. Additional assistance under other laws

Without prejudice to the provisions of this Code, the Adjudicating Authority, the resolution professional or the liquidator, as the case may be, may provide additional assistance to a foreign representative under any other law of India.

6. Interpretation

In the interpretation of this Part, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

CHAPTER II

ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE

ADJUDICATING AUTHORITY

7. Right of access by foreign representative

- (1) A foreign representative is entitled to apply to the Adjudicating Authority and exercise his powers and function under the Code [in the manner as may be prescribed].
- (2) A foreign representative shall be subject to a code of conduct as may be specified.

8. Application by a foreign representative to commence a proceeding under the Code

- (1) A foreign representative is entitled to commence a proceeding⁵ under the Code if the conditions for commencing such a proceeding, as provided in sections 7, 9 or 10 of the Code, are otherwise met.
- (2) An application by a foreign representative under sub-section (1) shall be in such form as may be prescribed.

9. Participation by a foreign representative in proceedings under the Code

Subject to [section 7](#) of this Part, upon recognition of a foreign proceeding, the foreign representative is entitled to participate in any proceedings regarding the corporate debtor under the Code.

10. Access of foreign creditors to a proceeding under the Code

- (1) Subject to sub-section (2), foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the Code as creditors in India.
- (2) Sub-section (1) does not affect the exclusion of foreign tax and social security claims from a proceeding under the Code or the ranking of claims in such a proceeding:

Provided that the claims of foreign creditors, other than those concerning tax and social security obligations, shall not be ranked lower than the general class of claims provided in section 53(1)(f) of the Code, unless an equivalent domestic claim has a lower rank under the Code.

11. Notification to foreign creditors of a proceeding under the Code

- (1) Whenever under this Code notification is to be given to creditors in India, such notification shall also be given to the known creditors that do not have addresses in India.
- (2) Such notification shall be made to the foreign creditors in a manner as may be prescribed. No letters rogatory or other, similar formality is required.
- (3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
 - (a) indicate a reasonable time period for filing claims and specify the place for their filing;
 - (b) indicate whether secured creditors need to file their secured claims; and
 - (c) contain any other information required to be included in such a notification to creditors pursuant to the law of India and the orders of the Adjudicating Authority.

CHAPTER III

RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

12. Application for recognition of a foreign proceeding

- (1) A foreign representative may apply to the Adjudicating Authority for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition under sub-section (1) shall be accompanied by-
 - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) in the absence of evidence referred to in clause (a) and (b), any other evidence as may be prescribed, affirming the existence of the foreign proceeding and of the appointment of the foreign representative; and
 - (d) a statement identifying all foreign proceedings and proceedings under the Code in respect of the corporate debtor that are known to the foreign representative, if any; and
 - (e) a translation of documents referred to in clauses (a) to (d) in English, if applicable.
- (3) An application for recognition under sub-section (1) shall be made in such form and accompanied with such fees as may be prescribed.

13. Presumptions concerning recognition

- (1) If the decision or certificate or other document referred to in **section 12(2)(a)**, (b) and (c) indicates that the foreign proceeding is a proceeding within the meaning of section 2(g) of this Part and that the foreign representative is a person or a body within the meaning of section 2(h) of this Part, the Adjudicating Authority is entitled to so presume.
- (2) Notwithstanding that the documents submitted in support of the application under section 12(2) of this Part for recognition have not been legalised, the Adjudicating Authority is entitled to presume they are authentic.

14. Centre of main interests

- (1) In the absence of proof to the contrary, the corporate debtor's registered office is presumed to be the corporate debtor's centre of main interests for the purpose of this Part.
- (2) The presumption in sub-section (1) shall only apply if the registered office of the corporate debtor has not been moved to another State within the [three] month period prior to the commencement of insolvency proceedings in such State.
- (3) While determining the corporate debtor's centre of main interests, the Adjudicating Authority shall

conduct an assessment, including that of factors prescribed by the Central Government, in a manner that is ascertainable by third parties including creditors of the corporate debtor.

15. Decision to recognise a foreign proceeding

(1) Subject to section 4 of this Part, the Adjudicating Authority shall recognise the foreign proceeding if it is satisfied that:

- (a) the foreign proceeding is a proceeding within the meaning of section 2(g) of this Part;
- (b) the foreign representative applying for recognition is a person or body within the meaning of section 2(h) of this Part; and

(c) the application meets the requirements of section 12 of this Part.

(2) The foreign proceeding shall be recognised by the Adjudicating Authority as a:

- (a) foreign main proceeding, if it is taking place in the State where the corporate debtor has the centre of its main interests under section 14 of this Part; or
- (b) foreign non-main proceeding, if it is taking place in a State where the corporate debtor has an establishment as defined in section 2(c) of this Part.

(3) This section and sections 12, 13, 14 and 16 of this Part do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

(4) Every application for recognition under section 12 of this Part shall be decided by the Adjudicating Authority within [fourteen] days from the date of the filing of the application.

16. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the Adjudicating Authority promptly of:

- (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment: and
- (b) any other foreign proceeding or proceeding under the Code regarding the same corporate debtor that becomes known to the foreign representative.

17. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign proceeding as a foreign main proceeding by the Adjudicating Authority, it shall, subject to the provisions of sub-sections (2) and (3), by an order declare moratorium for prohibiting all of the following:

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The scope and the modification or termination of the moratorium under sub-section (1) shall be subject to provisions of section 14 of the Code.

(3) Sub-section (1) does not affect the right to request commencement of a proceeding under this Code or the right to file claims in such a proceeding.

18. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the corporate debtor or the interests of the creditors, the Adjudicating Authority may by an order, at the request of a foreign representative, grant any appropriate relief, including:

(a) moratorium on institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration, to the extent they have not been stayed under section 17(1)(a) of this Part;

(b) moratorium on transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein, to the extent they have not been stayed under section 17(1)(b) of this Part;

(c) moratorium on any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to the extent it has not been stayed under section 17(1)(c) of this Part;

(d) moratorium on recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, to the extent it has not been stayed under section 17(1)(d) of this Part;

(e) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the corporate debtor's assets, affairs, rights, obligations or liabilities;

(f) entrusting the administration or realisation of the corporate debtor's assets located within its jurisdiction to the foreign representative in the manner as may be prescribed;

(g) granting any additional relief that may be available to a resolution professional or liquidator under the Code.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the Adjudicating Authority may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in India to the foreign representative or another person designated by the Adjudicating Authority, provided that the Adjudicating Authority is satisfied that the interests of creditors in India are adequately protected.

(3) The scope and the modification or termination of the relief under sub-section (1) (a),(b),(c) and (d) shall be subject to provisions of section 14 of the Code.

(4) In granting relief under this section to a representative of a foreign non-main proceeding, the Adjudicating Authority shall be satisfied that the relief relates to assets that, under the laws of India, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

19. Protection of creditors and other interested persons

(1) The Adjudicating Authority shall, while granting or refusing to grant any relief under section 18 of this Part, or in modifying or terminating relief under sub-section (3), satisfy itself that the interests of the creditors and other interested persons, including the corporate debtor, are adequately protected.

(2) The Adjudicating Authority may while granting any relief, under section 18 of this Part, impose such conditions as it considers appropriate.

(3) The Adjudicating Authority may, at the request of the foreign representative or a person affected by relief granted under section 18 of this Part, or at its own motion, modify or terminate such relief.

20. Action to avoid acts detrimental to creditors

(1) Subject to section 7 of this Part, upon recognition of a foreign proceeding, the foreign representative shall be entitled to make an application to the Adjudicating Authority under sections 43, 45, 49, 50 and 66 of the Code and he would have the same powers under the Code as a resolution professional or liquidator, as the case may be, making such applications under the said provisions of the Code.

(2) When the foreign proceeding is a foreign non-main proceeding, the Adjudicating Authority shall be satisfied that the action relates to assets that, under the laws of India, should be administered in the foreign non-main proceeding.

CHAPTER IV

COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

21. Cooperation and communication between Adjudicating Authority and foreign courts or foreign representatives

(1) The Central Government in consultation with the Adjudicating Authority, shall notify guidelines for communication and cooperation between Adjudicating Authority and foreign courts in cross-border insolvency matters in the interest of all stakeholders.

(2) Notwithstanding anything contained in any other law for the time being in force, the Adjudication Authority may conduct a joint hearing with another foreign court in a concurrent proceeding, and may communicate directly with, or request information or assistance directly from foreign representatives.

(3) The Central Government shall notify the relevant authority to assist the Adjudicating Authority in facilitating transmission of notices and other communications between the Adjudicating Authority and foreign courts.

22. Cooperation and direct communication between the resolution professionals and liquidators and foreign courts or foreign representatives

(1) The resolution professional or liquidator shall, as the case may be, in the exercise of his functions and subject to the supervision of the Adjudicating Authority, co-operate to the maximum extent possible with foreign courts or foreign representatives.

(2) The resolution professional or liquidator, as the case may be, shall be entitled, in the exercise of its functions and subject to the supervision of the Adjudicating Authority, to communicate directly with foreign courts or foreign representatives.

23. Forms of cooperation

The co-operation referred to in sections 21 and 22 of this Part may be implemented by any appropriate means, including:

- (a) appointment of a person or body to act at the direction of the Adjudicating Authority;
- (b) communication of information by any means considered appropriate by the Adjudicating Authority;
- (c) coordination of the administration and supervision of the corporate debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the co-ordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same corporate debtor.

CHAPTER V CONCURRENT PROCEEDINGS

24. Commencement of a proceeding under the Code after recognition of a foreign main proceeding

After recognition of a foreign main proceeding,

- (a) any proceeding under the Code may be commenced only if the corporate debtor has assets in India; and
- (b) the effects of the proceeding under clause (a) shall be restricted to:
 - (i) the assets of the corporate debtor that are located in India; and

(ii) to the extent necessary to implement co-operation and co-ordination under sections 21, 22 and 23 of this Part, to other assets of the corporate debtor that, under the laws of India, should be administered in that proceeding.

25. Coordination of a proceeding under the Code and a foreign proceeding

Where a foreign proceeding and a proceeding under this Code are taking place concurrently regarding the same corporate debtor, the Adjudicating Authority shall seek cooperation and coordination under sections 21, 22 and 23 of this Part, subject to the following:

- (a) When the proceeding under this Code is taking place at the time the application for recognition of the foreign proceeding is filed,
 - (i) any relief granted under section 18 of this Part must be consistent with the proceeding under the Code: and
 - (ii) if the foreign proceeding is recognised in India as a foreign main proceeding, section 17 of this Part shall not apply;
- (b) When the proceeding under this Code commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
 - (i) any relief in effect under section 18 of this Part shall be reviewed by the Adjudicating Authority and shall be modified or terminated if inconsistent with the proceeding under the Code;
 - (ii) if the foreign proceeding is a foreign main proceeding, the moratorium referred to in section 17 of this Part shall be modified or terminated if inconsistent with the proceeding under the Code; and
 - (iii) any proceedings brought by the foreign representative under section 20 of this Part before the proceeding under this Code commenced shall be reviewed by the Adjudicating Authority, and the Adjudicating Authority may give such directions as it thinks fit regarding the continuance of those proceedings.
- (c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the Adjudicating Authority shall be satisfied that the relief relates to assets that, under the laws of India, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

26. Coordination of more than one foreign proceeding

The Adjudicating Authority shall in respect of more than one foreign proceeding regarding the same corporate debtor, seek cooperation and coordination under sections 21, 22 and 23 of this Part, subject to the following:

- (a) any relief granted under section 18 of this Part to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign

main proceeding;

(b) if a foreign main proceeding is recognised after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under section 18 of this Part shall be reviewed by the Adjudicating Authority and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the Adjudicating Authority shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

27. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the Code, proof that the corporate debtor is insolvent.

28. Rule of payment in concurrent proceedings

(1) In a corporate insolvency resolution process under the Code, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in such corporate insolvency resolution proceeding regarding the same corporate debtor, so long as the payment to the other creditors of the same standing, according to the resolution plan, is proportionately less than the payment the creditor has already received.

(2) In a liquidation proceeding under the Code, without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in such liquidation proceeding regarding the same corporate debtor, so long as the payment to the other creditors of the same ranking is proportionately less than the payment the creditor has already received.

CHAPTER VI MISCELLANEOUS

29. Power of Central Government to issue notifications.

(1) The Central Government may issue notifications under this Part in the Official Gazette.

(2) A draft of every notification proposed to be issued under sub-section (1), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(3) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(4) The period of thirty days referred to in sub-section (2) shall not include any period during which the

House is prorogued or adjourned for more than four consecutive days.

(5) Every notification issued by the Central Government under this Part shall be laid, as soon as may be after it is issued, before each House of Parliament.

THE SCHEDULE

(See section 1(3) of this Part)

Part A

(States that have adopted the UNCITRAL Model Law on Cross Border Insolvency)

Part B

(States with which agreements have been entered under section 1(4) of this Part)

Reference:

- 1 Report of the Joint Committee on Insolvency and Bankruptcy Code, 2015. pg. 44.
- 2 Report of the insolvency Law Committee. Ministry of Corporate Affairs, Government of India. 2018, pg. 5.
- 3 Keith D.Yarnauchi, Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law? (2007). *International Insolvency Review*. Vol. I 6. pp. 145-179.
- 4 Report of the Advisory Group on Bankruptcy Laws, 2001
- 5 Chapter II. UNCITRAL Model Law on Cross-Border Insolvency. 1997.
- 6 *Bar Council of India v. A.K. Baletji & Ors.* Civil Appeal Nos. 7875-7879 OF 2015 with Civil Appeal No. 7170 OF 2015 and Civil Appeal No. 8028 OF 2015. Judgement dated March 13, 2018.
- 7 Article 17, UNCITRAL Model Law on Cross-Border Insolvency, 1997.
- 8 Chapter III. UNCITRAL Model Law on Cross-Border Insolvency, 1997.
- 9 UNCITRAL, Status-
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html last accessed 11 June, 2018.
- 10 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, 14 *Law & Bus. Rev. Am.* 313 (2008)
- 11 Mohan, S. Chandra. Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer? (2012), *International Insolvency Review*. Vol. 21, (3), 199-223.
- 12 Ibid.

13 S. 1509, Chapter XV, Title 11 U.S. Code.

14 Article 6, UNICITRAL Model Law on Cross Border Insolvency, 1997

15 Article 5, UNICITRAL Model Law on Cross Border Insolvency, 1997

16 Article 22, UNICITRAL Model Law on Cross Border Insolvency, 1997

17 Mohan, S. Chandra. Cross Border insolvency Problems: Is the UNICITRAL Model Law the Answer? (2012), International Insolvency Review. Vol. 21, (3), 199-223.