

**REPORT  
OF  
INSOLVENCY  
LAW COMMITTEE ON  
CROSS BORDER INSOLVENCY**

**OCTOBER, 2018**



**Ministry of Corporate Affairs  
Government of India**

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## REPORT OF THE INSOLVENCY LAW COMMITTEE

New Delhi, the 16<sup>th</sup> October, 2018

To,

Honourable Union Minister of Finance and Corporate Affairs

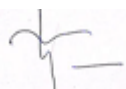
Sir,

We have the privilege and honour to present this second part of the report of the Insolvency Law Committee, set up on 16<sup>th</sup> November, 2017, to make recommendations to the Government on adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997.

2. The Committee had the benefit of comments received from public and has attempted to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997 which is proposed to be added as a part of the Code.

3. We thank you for providing us an opportunity to present our views on the said issue, for providing an internationally competitive and comprehensive insolvency framework for corporate debtors under the Code.

Yours sincerely,



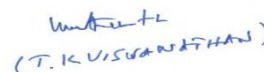
(Shri Injeti Srinivas)  
Chairman



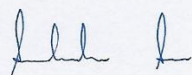
(Dr. M. S. Sahoo)  
Member



(Ms. Vandita Kaul)  
Member Rep.



(Shri T. K. Vishwanathan)  
Member



(Shri Sudarshan Sen)  
Member



(Shri Shardul Shroff)  
Member



(Shri Rashesh Shah)  
Member



(Shri B. Sriram)  
Member



(Shri Bahram Vakil)  
Member



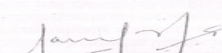
(Shri Sidharth Birla)  
Member



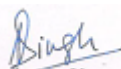
(Dr. Makarand Lele)  
Member



(Shri Amit Anand Apte)  
Member



(CA Naveen ND Gupta)  
Member



Shri Gyaneshwar Kumar Singh, Member Secretary

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## PREFACE

The Insolvency Law Committee constituted by the Ministry of Corporate Affairs submitted its first Report in March 2018 which recommended amendments to the Insolvency and Bankruptcy Code, 2016 based on the experience gained from implementation of the Code. With respect to cross-border insolvency, the Committee noted that the existing provisions in the Code (sections 234 and 235) do not provide a comprehensive framework for cross-border insolvency matters.<sup>1</sup> The Committee decided to attempt to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997 which could be made a part of the Code by inserting a separate part for this purpose.<sup>2</sup> Given the complexity of the subject matter and the requirement of in-depth research to adapt the UNCITRAL Model Law for India, the Committee decided to submit its recommendations on cross-border insolvency separately.<sup>3</sup> Accordingly, this Report provides recommendations of the Committee on adoption of the UNCITRAL Model Law and the modifications necessary in the Indian context.

Globally, the UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues and legislation based on the Model Law has been adopted in 44 countries in a total of 46 jurisdictions.<sup>4</sup> The 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 necessity to make the existing cross-border insolvency framework under the Code more elaborate and self-contained, is widely accepted<sup>5</sup> and needs immediate attention. Some of the key advantages of adopting the Model Law with specific carve outs as recommended by the Committee are as under:

- (i) *Increasing foreign investment:* Even though foreign creditors have a remedy under the Code presently, adoption of the Model Law will provide added

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<sup>1</sup> Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018, p. 5.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Status, The UNCITRAL Model Law on Cross-Border Insolvency (1997), available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)>, last accessed on 12 September 2018.

<sup>5</sup> Report of the Joint Committee on Insolvency and Bankruptcy Code, (2015), p. 44.

avenues for recognition of foreign insolvency proceedings, foster cooperation and communication between domestic and foreign courts and insolvency professionals and so on. Popularity of the Model Law has increased in recent years and its adoption shall also enable India to align with global best practices in insolvency resolution and liquidation. Moreover, there will be significant positive signalling to global investors, creditors, governments, international organizations such as the World Bank as well as multinational corporations with regard to 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 insolvency laws.<sup>6</sup> Therefore, necessary carve outs may be made in relation to the 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 the Code; a reciprocity requirement may be incorporated for stakeholders in other countries.
- (iii) *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.<sup>7</sup> Hence, it provides enough flexibility to protect public interest.
- (iv) *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.
- (v) *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 concurrent proceedings.

Further, as Part III of the Code that deals with insolvency resolution and bankruptcy for individuals and partnership firms has not been notified yet, the Committee recommends application of cross-border insolvency provisions to corporate debtors to start with and based on the experience gained, it could be extended to individual insolvency in due course of time. Similar approach has been followed in Singapore and some other countries.

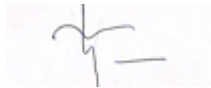
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<sup>6</sup> Mohan, S. Chandra. 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?', (2012), International Insolvency Review. Vol. 21, (3), pp. 199-223.

<sup>7</sup> Article 6, UNCITRAL Model Law on Cross-Border Insolvency, 1997.

Also, incorporation of cross-border insolvency provisions as recommended by the Committee, will create an internationally aligned and comprehensive insolvency framework for corporate debtors under the Code, which is most essential in a globalised environment. However, issues such as treatment of insolvency of enterprise groups will still remain a challenge, as the proposed framework is meant for individual companies and not enterprise groups. As the UNCITRAL and other international bodies continue to study these issues and devise internationally workable solutions, the cross-border framework is expected to further evolve.

Lastly, the Insolvency Law Committee is deliberating modifications to the role and powers of IBBI regarding inspection and investigation as provided in Chapter VI of Part IV of the Code, and will submit a supplementary report on the same in due course.



Secretary,  
Ministry of Corporate Affairs & Chairman, Insolvency Law Committee  
New Delhi, [October, 16], 2018

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## ACKNOWLEDGMENTS

The Insolvency Law Committee is submitting the second part of its Report after deliberating on the existing provisions of cross-border insolvency in the Insolvency and Bankruptcy Code, 2016 (S.234 & S.235) and the UNCITRAL Model Law on Cross-Border Insolvency. The Committee is thankful to all stakeholders who provided insightful comments and suggestions on the proposed draft Part on Cross Border Insolvency in the Insolvency and Bankruptcy Code. The valuable suggestions on the same have been discussed and suitably incorporated in the proposed draft Part in the Report.

The Committee appreciates the support provided by the team from Vidhi Centre for Legal Policy comprising of Ms. Vedika Mittal Kumar, Ms. Aishwarya Satija and Ms. Shreya Garg, in terms of legal research and drafting, which proved to be very useful to the Committee.

The Committee is grateful to Ministry of Corporate Affairs for providing logistical support and would like to make a special mention of the dedicated efforts put in by the team of officers of the Insolvency Division at the MCA comprising Sh. Rakesh Tyagi, Director, Ms. Yogini D. Chauhan, Deputy Director, Sh. Saurabh Gautam, Assistant Director, Sh. Jatinder Kataria, Company Prosecutor and Ms. Sunidhi Misra, STA for collating suggestions, facilitating discussions and providing administrative and technical support for the functioning of the Committee.

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## BACKGROUND

### **Introduction**

The Insolvency Law Committee (“**Committee**”) was constituted by the Ministry of Corporate Affairs on 16 November 2017 to take stock of the functioning and implementation of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) and identify issues that affect the efficiency of the corporate insolvency resolution and liquidation framework under the Code.<sup>8</sup> In its last Report dated March 2018, the Committee discussed that there was a need to re-evaluate the current cross-border insolvency framework in India as it was fragmented, complicated and not at par with global standards.<sup>9</sup> The Committee noted that even the Report of the Bankruptcy Law Reforms Committee which laid down the foundation for the Code had recommended that regulation of cross-border insolvency cases must be deliberated upon once the proposed legal regime for domestic insolvency matters was in place.<sup>10</sup>

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 (“**Model Law**”) was identified as a framework which was globally recognised and accepted. The Model Law was approved by UNCITRAL by consensus in 1997 and since then it has been implemented by 44 countries, including the United Kingdom (“**UK**”), the United States of America (“**US**”), Japan, South Korea and Singapore.<sup>11</sup> However, given that adoption of the Model Law would require significant study and discussion, the Committee decided to present its recommendations in this regard at a later date.<sup>12</sup>

Now having analysed the provisions of the Model Law, the Committee has recommended its adoption with suitable modifications as detailed in this Report. For the sake of brevity, a background of the present legal framework in India regarding cross-border insolvency is not discussed in detail here. Suffice it to say that sections 234 and 235 of the Code which envisage entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities under the

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<sup>8</sup> Order of the Ministry of Corporate Affairs, November 16, 2017, available at <[http://www.mca.gov.in/Ministry/pdf/constitutionOrder\\_17112017.pdf](http://www.mca.gov.in/Ministry/pdf/constitutionOrder_17112017.pdf)>, last accessed on 11 September 2018.

<sup>9</sup> Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018, p. 5.

<sup>10</sup> Report of the Bankruptcy Law Reforms Committee, Volume I, November 2015, para. 2.

<sup>11</sup> Status, The UNCITRAL Model Law on Cross-Border Insolvency (1997), available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)>, last accessed on 12 September 2018.

<sup>12</sup> Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018, p. 5.

Code resulted in an ad-hoc framework that was susceptible to delay and uncertainty for creditors and debtors as well as for courts.

Moreover, the mechanism for enforcement of foreign judgments under the Civil Procedure Code, 1908 is not broad enough to include all insolvency orders such as orders regarding reorganization processes, administrative and interim orders, etc., rendering many judgments and orders in the insolvency process unenforceable in India.

In this backdrop, the Committee has recommended that the Model Law be adopted with necessary modifications as recommended in this Report. Broadly, the four main principles on which the Model Law is based on are as follows:

- (i) *Access*: 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.<sup>13</sup> Direct access with regards to foreign creditors is envisaged under the Code even presently. With respect to access by foreign insolvency professionals to Indian courts, the Committee has recommended that the Central Government be empowered to devise a mechanism that is practicable in the current Indian legal framework.<sup>14</sup>
- (ii) *Recognition*: The Model Law allows recognition of foreign proceedings and provision of remedies by domestic courts based on such recognition. Relief can be provided if the foreign proceeding is either a main or a non-main proceeding. If domestic courts determine that the debtor has its centre of main interests (“COMI”) in the foreign country, such a foreign insolvency proceeding is recognised as the 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 recognised as the non-main proceeding. Recognition as a main proceeding will result in automatic relief, such as a moratorium on transfer of assets of the debtor, and allow the foreign representative greater powers in handling the estate of the debtor.<sup>15</sup> For non-main proceedings, such relief is at the discretion of the domestic court.

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<sup>13</sup> Chapter II of the Model Law.

<sup>14</sup> *Bar Council of India v. A.K. Balaji & 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.

<sup>15</sup> Chapter III of the Model Law.

- (iii) *Cooperation*: The Model Law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals. Given that the infrastructure of Adjudicating Authorities under the Code is still evolving, the cooperation between Adjudicating Authorities and foreign courts is proposed to be subject to guidelines to be notified by the Central Government, and not “direct” per se. However, direct cooperation between Adjudicating Authorities and foreign insolvency professionals, foreign and domestic insolvency professionals inter-se and between domestic insolvency professionals and foreign courts has been retained as is provided under the Model Law. Notably, cooperation may also be provided to foreign proceedings that have not been recognised as either main or non-main.
- (iv) *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.

In line with its earlier practice, the Committee consolidated views and recommendations from a gamut of stakeholders based on a draft cross-border insolvency framework that was put up for public comments. The Committee deliberated upon relevant issues, and considered international best practices, domestic legal principles and relevant material prepared by the UNCITRAL including the texts issued by UNCITRAL for guidance on the Model Law, Reports of the UNCITRAL Working Groups that formulated the Model Law and other international jurisprudence. Based on this detailed study, the Committee has prepared its Report which recommends adoption of the Model Law with certain modifications. The proposed draft is annexed along with this Report (“**draft Part Z**”).

Additionally, certain amendments to the Code shall also be required to be made to streamline the inclusion of draft Part Z in the Code For example, (i) sections 234 and 235 may be amended to exclude corporate debtors; (ii) section 60 may be amended to allow transfer of domestic proceedings to the Adjudicating Authority notified under the draft Part Z in relevant instances; (iii) the inspection and investigation powers of the Insolvency and Bankruptcy Board of India (“**IBBI**”) may need to be amended to include a suitable mechanism for investigation and adjudication of penalties against foreign representatives; (iv) section 196 may be amended to include regulation of foreign representatives within the functions of the IBBI; and (v) additional rule and regulation making power will need to be incorporated in sections 239 and 240, respectively; (vi) the 11<sup>th</sup> Schedule may be amended based on the decision to amend

section 375(3)(b) of the Companies Act (“**2013 Act**”), as discussed in paragraph 1.3 below; (vii) Preamble to the Code may be amended to reflect inclusion of cross-border insolvency under the Code. Suitable amendments to subordinate legislations under the Code may also be required.

### **Working Process of the Committee**

A preliminary draft for the Part on cross-border insolvency to be inserted in the Code was released for public comments on 20 June 2018. The Committee discussed the issues relating to cross-border insolvency, in a meeting on 11 August 2018, based on the comments received from the public consultation and comments collated by the IBBI in this regard. Accordingly, the Committee has prepared the present Report and draft Part Z encapsulating its recommendations.

The MCA engaged Vidhi Centre for Legal Policy to assist the Committee in reaching informed decisions by carrying out legal research on the principles involved as well as international practices, and for providing drafting assistance.

### **Structure of the Report**

The Report deals with the recommendations of the Committee and the rationale for such recommendations, in relation to the Model Law and its adoption in to the Code.

The Report also contains two annexures: Annexure I comprising of the notification dated 16 November 2017 constituting the Committee. Annexure II containing the proposed draft cross-border insolvency legislation, i.e. draft Part Z, to be incorporated into the Code.

**RECOMMENDATIONS OF THE COMMITTEE ON ADOPTION OF THE  
UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY**

**GENERAL PROVISIONS**

**1. Scope of Application**

*Applicability to corporate debtors*

- 1.1. Part III of the Code which deals with individuals and partnership firms has not been notified yet. Therefore, the Committee was of the opinion that extending cross-border insolvency provisions of the Model Law to individuals and partnership firms will be premature. Further, Debt Recovery Tribunals that are proposed to deal with personal insolvency matters currently may not have the bandwidth or infrastructure for management of cross-border insolvency cases. Even globally, countries such as Singapore have adopted the Model Law for corporates initially and intend to extend it to individuals and other entities based on this experience.<sup>16</sup>
- 1.2. **Accordingly, the Committee recommended that presently it may be advisable to extend applicability of the draft Part Z to corporate debtors only. However, for the purposes of Part Z, the definition of “corporate debtor” should include foreign companies. This will ensure that creditors and insolvency professionals of companies registered outside India can approach the Adjudicating Authority for cooperation or recognition of foreign proceedings to avail relief in India. The Committee discussed that this may be clarified in draft Part Z. It may be noted that this shall not expand the scope of the term “corporate debtor” under the Code other than under draft Part Z.**
- 1.3. It was also noted that certain provisions in the 2013 Act continue to deal with insolvency of foreign companies. For example, section 375(3)(b) of the 2013 Act provides that an unregistered company (which may include foreign companies)<sup>17</sup> may be wound up due to inability to pay debts. The Committee noted that once cross-border insolvency provisions are introduced under the Code, this will in effect result in a dual regime for insolvency of foreign companies. **The Committee was of the opinion that the Ministry of Corporate Affairs may undertake a study of such provisions of the 2013 Act and analyse the efficacy of retaining them. The Committee also discussed that since the**

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<sup>16</sup> Ministry of Law, ‘Report of the Insolvency Law Review Committee’, (2013), recommendation 11.4, p. 272, available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Revised%20Report%20of%20the%20Insolvency%20Law%20Review%20Committee.pdf>, last accessed on 11 September 2018.

<sup>17</sup> A Ramaiya, ‘Guide to the Companies Act’, (2015), vol. 3 ed. 18, p. 5420.



**intention of the Code is to bring together all insolvency proceedings under a common legislation, matters pending under such provisions of the 2013 Act, if any, may be transferred for adjudication under the Code and overlapping provisions may be dispensed with.**

*Excluded entities*

- 1.4. The Model Law allows enacting countries to exempt certain entities from the application of the Model Law.<sup>18</sup> The Committee noted that banks and insurance companies are mentioned as examples of entities that the enacting country may decide to exclude from the scope of the Model Law. The reason for the exclusion would typically be that the insolvency of such entities gives rise to a particular need to protect vital interests of a large number of individuals or that the insolvency of those entities usually requires particularly prompt and circumspect action and may be subject to a special insolvency regime. The Code currently already excludes financial service providers, such as banks, public financial institutions etc., from its application.<sup>19</sup> Notably, the Model Law also envisages exclusion of entities other than banks and insurance companies.<sup>20</sup> This may be necessary where policy considerations underlying the special insolvency regime for such other types of entities (e.g. public utility companies) call for special solutions in cross-border insolvency cases. The Committee noted that even globally, countries such as Singapore<sup>21</sup>, UK<sup>22</sup> and US<sup>23</sup> that have adopted the Model Law permit exclusion from its applicability for certain entities and in certain cases. **In this backdrop, the Committee recommended that certain entities may be excluded from applicability of the proposed cross-border insolvency provisions under draft Part Z.**
- 1.5. The Committee also discussed that stating names of such entities in the Code may lead to inflexibility and delay as it may be possible that entities need to be excluded or included based on the experience drawn from enforcement of the proposed draft Part Z. **Accordingly, the Committee recommended that the**

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<sup>18</sup> Para 2, Article 1 of the Model Law.

<sup>19</sup> Section 3(7), Code.

<sup>20</sup> Paras 56 and 57, UNCITRAL, 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation' ("UNCITRAL Guide to Enactment"), available at <<https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>>, last accessed on 8 September 2018.

<sup>21</sup> Article 1, Tenth Schedule, Companies Act, 2006.

<sup>22</sup> Article 1, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

<sup>23</sup> Section 1, Chapter 15, Title 11, US Code.

**Central Government be empowered to notify the entities that may be excluded from applicability of draft Part Z.**

*Reciprocity*

1.6. The Committee deliberated whether the Model Law must be adopted based on legislative reciprocity or without any reciprocity requirement. Broadly, “legislative reciprocity” indicates that a domestic court will recognize and enforce a foreign court’s judgments or orders only if the country in which the foreign court is located has adopted the same or similar legislation to that governing the domestic court.<sup>24</sup> Globally, countries such as South Africa, Mexico, Romania, etc. have incorporated a reciprocity requirement while adopting the Model Law in their domestic insolvency statutes.<sup>25</sup>

1.7. While considering whether to formulate a Draft Convention or a Model Law for cross border insolvency, the UNCITRAL Working Group recorded as follows<sup>26</sup>:

*“As regards the question of reciprocity, it was pointed out that national laws often contemplated different notions of reciprocity so that no single solution could be easily provided, even in the form of a convention. In the case of model legislation, on the other hand, it would still be possible for those States which wished to do so, to subject its application to the rule of reciprocity, by listing those jurisdictions with regard to which the requirements of reciprocity had been fulfilled.”*

Thus, it seems, the UNCITRAL did not contemplate a complete rejection of reciprocity and settled on a Model Law so that countries may have the freedom to incorporate reciprocity provisions.

**1.8. Keeping in mind the above and given the stage of development of the Indian insolvency infrastructure, along with our overall economic development and**

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<sup>24</sup> Keith D.Yamauchi, ‘Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?’ (2007) 16 Int. Insolv. Rev. 149, available at <<https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.151>>, last accesses on 9 September 2018.

<sup>25</sup> Para 47, ‘UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective’ (“**UNCITRAL Judicial Perspective**”), available at <[https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial\\_Perspective\\_ebook-E.pdf](https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf)>, last accessed on 8 September 2018.

<sup>26</sup> Report of the Working Group on Insolvency Law on the Work of its 20th Session (Vienna, 7-18 October 1996), available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/868/15/PDF/V9686815.pdf?OpenElement>>, last accessed on 9 September 2018.

our position globally, the Committee recommended that initially the Model Law may be adopted on a reciprocity basis. Eventually, the reciprocity requirement may be diluted based on the experience in implementation of the Model Law and development of adequate infrastructure in the Indian insolvency system. The Committee clarified that provisions of the Code, other than draft Part Z, would not be affected by the reciprocity requirement. Therefore, foreign creditors will still be able to initiate, participate in and file claims in proceedings under the Code regardless of reciprocity.

*Excluding “other interested persons”*

- 1.9. The Committee also noted that Article 1(1)(d) of the Model Law allows creditors as well as “other interested persons” in foreign countries to commence and participate in domestic insolvency proceedings. **Since it is unclear who these parties would be and including such parties may make the right to commence and participate in insolvency proceedings under the Code too broad, the Committee recommended that such rights be restricted to creditors at present.**

*Amendment of sections 234 and 235 of the Code*

- 1.10. **Finally, the Committee noted that sections 234 and 235 of the Code will be required to be suitably amended to only apply to individuals and partnership firms since the content relevant to corporate debtors from these provisions has been proposed to be incorporated in the draft Part Z.**

## **2. Definitions**

*Adjudicating Authority*

- 2.1. Article 4 of the Model Law provides that a court shall be authorised by the enacting country to exercise the powers granted to courts pursuant to the Model Law. **The Committee discussed that a definition may be provided for the “Adjudicating Authority” for the purposes of the draft Part Z. Benches of the National Company Law Tribunal (“NCLT”) may be notified by the Central Government in this regard. Separate provisions for appeals to the National Company Law Appellate Tribunal as well as the Supreme Court may also be provided.**

*COMI and Establishment*

- 2.2. For discussion on COMI, refer to paragraph 11 below.
- 2.3. Clause 2(c) of draft Part Z defines “establishment”. The definition broadly tracks the definition provided in Article 2(f) of the 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”.

2.4. The Committee considered whether the requirement to carry out the economic activity “with human means” may be omitted from the definition of “establishment” to account for internet-based companies, like e-commerce companies. It was brought to the attention of the Committee that a proposal to delete the words “with human means and goods” from the definition of “establishment” to prevent an interpretation that would exclude certain enterprises such as those operating in a strictly electronic environment was analysed by the UNCITRAL Working Group in its 21st Session.<sup>27</sup> But the Working Group agreed on retaining the present definition which followed a similar definition provided in Article 2(h) of the European Union (“EU”) Convention on Insolvency Proceedings.<sup>28</sup> Notably, the US<sup>29</sup> has deleted such reference in its definition of “establishment” whereas countries such as UK<sup>30</sup> and Singapore<sup>31</sup> have not. **Bearing in mind the divergent international precedents, after much deliberations, the Committee noted that at this juncture, it may be advisable to let jurisprudence develop further before recommending any such change to the definition of “establishment” provided in the Model Law.**

2.5. 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 the purpose of deciding that an establishment exists in such a country. The definition of “establishment” in the EU Insolvency Regulation (Recast) which follows this approach is as follows<sup>32</sup>:

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<sup>27</sup> Para 113, Report of the Working Group on Insolvency Law on the Work of its 21<sup>st</sup> Session (New York, 20-31 January 1997), available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V97/209/05/PDF/V9720905.pdf?OpenElement>>, last accessed on 9 September 2018.

<sup>28</sup> *Ibid.*

<sup>29</sup> Section 1502(2), Chapter 15, Title 11, US Code.

<sup>30</sup> Article 2(e), Schedule 1, The Cross-Border Insolvency Regulations, 2006.

<sup>31</sup> Article 2(d), Tenth Schedule, Companies Act, 2006.

<sup>32</sup> Article 2(10), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>, last accessed on 9 September 2018.

*“establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets;”*

2.6. Although this proposition seems attractive, several issues were identified. In the EU, existence of COMI and establishment result in the right to *commence* main and non-main insolvency proceedings, respectively. On the contrary, such classification in the Model Law is only for the purpose of *recognition of foreign insolvency proceedings*. Moreover, in the EU commencement of non-main proceedings prior to a main proceeding is sought to be restricted to those proceedings that are absolutely necessary<sup>33</sup> and therefore benchmarking finding of establishment from the COMI is viable. However, 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 a foreign main proceeding. Hence, the 3-month look back period for determining “establishment” cannot be benchmarked from the date of filing of application to initiate the foreign main proceeding.

2.7. Further, the 3-month look back period for determining existence of an “establishment” can also not be benchmarked from the date of filing insolvency application in the 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. Moreover, the Committee discussed that the Model Law by qualifying the term economic activity with the adjective, “non-transitory” already provided sufficient room for courts to prevent abuse and forum shopping. **Consequently, the Committee agreed that it may not be necessary to build in a look back period in the definition of “establishment” presently.**

2.8. The Committee also discussed whether proceedings where the debtor neither has its COMI nor an establishment may be included within the ambit of non-main proceedings. However, the Committee believed that the requirement to establish a certain threshold of nexus prior to recognition was prudent. International experience including in US<sup>34</sup>, UK<sup>35</sup> and Singapore<sup>36</sup> also suggests

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<sup>33</sup> Recitals 37 and 38, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>, last accessed on 9 September 2018.

<sup>34</sup> Section 1502(5), Chapter 15, Title 11, US Code.

<sup>35</sup> Article 2(h), Schedule 1, The Cross-Border Insolvency Regulations, 2006.

<sup>36</sup> Article 2(g), Tenth Schedule, Companies Act, 2006.

that recognition as non-main proceedings may be restricted to proceedings in countries where the debtor has an establishment. Moreover, the Committee noted that this rule did not affect the right under Article 28 of the Model Law to commence a domestic proceeding in India, in cases where India is not the COMI, so long as the corporate debtor has assets in India. **Finally, the Committee decided that the definition of non-main proceedings must be limited to proceedings in countries where the corporate debtor has an establishment.**

#### *Foreign proceeding and foreign representative*

- 2.9. **The definitions of “foreign court”, “foreign representative”, “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding” have been adopted in draft Part Z as they have been provided in Article 2 of the Model Law.**
- 2.10. It may be noted however, that the term “reorganisation” used in the definition of “foreign proceeding” denotes insolvency procedures with similar objectives as the corporate insolvency resolution process (“CIRP”) provided in the Code. **The Committee recommended that an explanation in this regard may be provided in the draft Part Z.**

### **3. Public Policy**

- 3.1 Clause 4 of the draft Part Z mirrors Article 6 of the Model Law that provides receiving countries the right to refuse to take any action covered under the Model Law, 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.
- 3.2 The Committee noted that the UNCITRAL Guide to Enactment recommends that the interpretation of “public policy” must be narrow.<sup>37</sup> The reason for this is that discretion with courts should be minimal and the aim should be to provide relief to a bigger pool of proceedings. Accordingly, the Model Law states that the relevant action must be “*manifestly*” contrary to public policy for a court to deny recognition or relief under this provision. The Committee

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<sup>37</sup> For example, the UNCITRAL Guide to Enactment in para 103 states, “...international cooperation would be unduly hampered if “public policy” were to be understood in an extensive manner”; in para161 it states, “As a general rule, article 6 should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.”

noted that while several countries including the US<sup>38</sup>, UK<sup>39</sup> and South Africa<sup>40</sup> have retained the word “*manifestly*”, certain countries such as Singapore<sup>41</sup> have omitted it. It was also brought to the attention of the Committee that the UNCITRAL Judicial Perspective explains the usage of the term “*manifestly*” as follows<sup>42</sup>

*“51. The purpose of the expression “manifestly contrary”, used in many international legal texts to qualify the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that the exception is intended to be invoked only under exceptional circumstances involving matters of fundamental importance to the enacting State.”*

3.3 It was further pointed out to the Committee that US courts have read this public policy exception narrowly and applied it sparingly<sup>43</sup> in line with the primary purpose of cross-border insolvency provisions under the US Code which is to foster assistance to non-US proceedings, and thus defer to the substantive laws of the foreign jurisdiction.<sup>44</sup>

3.4 **Accordingly, the Committee recommended that, in line with the spirit of the Model Law, the language used in Article 6 of the Model Law must be retained as it is, including usage of the term “*manifestly*”.**

3.5 While determining public policy, the Adjudicating Authority may consider existing international jurisprudence along with domestic interpretations of public policy. For example, in the US, some of the major instances where the public policy exception was applied relate to cases where the recognition/relief sought in foreign proceedings amounted to: (i) abuse of automatic stay order of a US court by foreign insolvency proceedings<sup>45</sup>; (ii) violation of US privacy and criminal laws<sup>46</sup>; and (iii) a detrimental effect on

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<sup>38</sup> Section 1506, Chapter 15, Title 11, US Code.

<sup>39</sup> Article 6, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

<sup>40</sup> Section 6, Cross-Border Insolvency Act, 2000.

<sup>41</sup> Article 6, Tenth Schedule, Companies Act, 2006. For brief discussion on public policy exception in Singapore see, Re: Zetta Jet Pte Ltd [2018] SGHC 16, para 23.

<sup>42</sup> Para 51, UNCITRAL Judicial Perspective.

<sup>43</sup> Look Chan Ho, ‘A Commentary on the UNCITRAL Model Law’, (2017), vol. 1 ed. 4, p. 622.

<sup>44</sup> *Ibid.*

<sup>45</sup> In re Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009); Also see para 53 and p. 89-90 of the UNCITRAL Judicial Perspective.

<sup>46</sup> In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011); Also see para 54 and p. 99 of the UNCITRAL Judicial Perspective.

technological innovation in the US by disregard of US patent licensing agreements<sup>47</sup>. In Singapore in the *Zetta* case, although the court did not state what would specifically trigger the public policy bar in Singapore, it made it clear that those who do not comply with orders issued by a Singapore court will not generally be able to seek full recognition of foreign proceedings by Singapore courts.<sup>48</sup>

3.6 It may be noted 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.<sup>49</sup> The Committee noted that a US court in the case of *In re Qimonda AG*<sup>50</sup> has outlined a three-part test to aid courts in determining whether an action is manifestly contrary to US public policy.

3.7 **The Committee also discussed that the Central Government may be given an opportunity to be heard vis-à-vis actions under draft Part Z that may be manifestly contrary to the public policy of India. The Committee recommended that in proceedings where the Adjudicating Authority is of the opinion that a violation of public policy may be involved, a notice must be issued to the Central Government to provide its submissions. Further, the Committee discussed that it may be advisable to include a provision similar to section 241(2) of the 2013 Act to empower Central Government to *suo moto* apply to the Adjudicating Authority for an order under clause 4 of draft Part Z if it is of the opinion that an action under draft Part Z would be manifestly contrary to the public policy of India and the notice discussed above has not been issued by the Adjudicating Authority.**

#### 4. Other provisions

4.1 Article 5 of the Model Law provides that the domestic insolvency representatives in the enacting country shall be authorized to access foreign courts or act in a foreign country in relation to insolvency proceedings against the debtor. **The Committee discussed that currently there is no bar under Indian law, on Indian insolvency professionals, to access courts in foreign countries or to act in foreign countries in this regard and concluded that Article 5 may be adopted in draft Part Z as it has been provided in the Model Law. This may be subject to regulations framed by the IBBI.**

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<sup>47</sup> *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

<sup>48</sup> *Re: Zetta Jet Pte Ltd* [2018] SGHC 16.

<sup>49</sup> Para 30, UNCITRAL Guide to Enactment.

<sup>50</sup> *In re Qimonda AG Bankruptcy Litigation*, 433 BR 547 (EDVA 2010) and *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011) (Appeal); Also see Look Chan Ho, 'A Commentary on the UNCITRAL Model Law', (2017), vol. 1 ed. 4, p. 623.



**4.2 The Committee also discussed that Articles 7 (Additional assistance under other laws) and 8 (Interpretation) of the Model Law may be adopted in the draft Part Z as they have been provided in the Model Law.**

## ACCESS TO FOREIGN REPRESENTATIVES

### 5. Right of access

- 5.1 Article 9 of the Model Law provides that the foreign representative shall have the right to have direct access to a court in the enacting country. This allows the foreign representative to approach courts to seek remedies directly and aims to simplify the process of availing remedies from the court in relation to the foreign proceeding. Formal requirements such as registration, license or consular action which may be applicable domestically are intended to be dispensed with for foreign representatives.<sup>51</sup>
- 5.2 UK<sup>52</sup> and Singapore<sup>53</sup> have adopted Article 9 into their cross-border insolvency law as it is. However, the US has made a deviation while adopting Article 9 which allows the foreign representative direct access only after recognition of the foreign proceeding for which she is appointed.<sup>54</sup> This is to allow some check on the right of access by a foreign representative.
- 5.3 The Committee discussed that one of the issues which may affect providing foreign representatives with *direct* access is that Indian law currently does not allow foreign lawyers to practice law in India.<sup>55</sup> However, the Committee discussed that foreign representatives may form a separate class of professionals akin to insolvency professionals in India and may therefore not have a legal bar to access courts in India.
- 5.4 **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 of infrastructure regarding cross-border insolvency in India. It was also noted that a possible option may be to allow foreign representatives access to courts, and exercise of their powers under the draft Part Z, through domestic insolvency representatives. However, the Committee deemed it appropriate for the Central Government to provide the extent of the right to access, in this regard, through subordinate legislation.**

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<sup>51</sup>Para 108, UNCITRAL Guide to Enactment.

<sup>52</sup> Article 9, Schedule 1, The Cross-Border Insolvency Regulations, 2006.

<sup>53</sup> Article 9, Tenth Schedule, Companies Act, 2006;

<sup>54</sup> Section 1509, Chapter 15, Title 11, US Code. The bankruptcy court may also allow access to foreign representatives in an order denying recognition. *See* section 1509(d), Chapter 15, Title 11, US Code.

<sup>55</sup> *Bar Council of India v. A.K. Balaji*, Civil Appeal Nos. 7875-7879 of 2015 with Civil Appeal No. 7170 of 2015 and Civil Appeal No. 8028 of 2015, Judgment dated 13 March 2018, Supreme Court of India.

## 6. Regulating the foreign representative

- 6.1 Article 10 of the Model Law provides that merely based on an application of the foreign representative under the Model Law, a court in the enacting country shall not exercise jurisdiction over the foreign representative or foreign assets of the debtor. The UNCITRAL Guide to Enactment discusses that this is a “safe conduct” rule which controls excessive imposition of jurisdiction by courts.<sup>56</sup> However, it clarifies that Article 10 does not bar courts from imposing penalties for any misconduct by the foreign representative according to the law in the enacting country.<sup>57</sup>
- 6.2 It may be noted that jurisdictions like US<sup>58</sup>, UK<sup>59</sup> and Singapore<sup>60</sup> have adopted Article 10 in their respective cross-border insolvency laws. UK has also provided a penalty provision for misfeasance by foreign representatives, similar to the penalty applicable to local insolvency practitioners in UK.<sup>61</sup>
- 6.3 The Committee discussed that Article 10 may be adopted in draft Part Z. Additionally, foreign representatives may be subject to a code of conduct which may be specified by the IBBI and to a penalty provision, similar to that applicable to domestic insolvency professionals under Code, which may be inserted in draft Part Z.**
- 6.4 It was also deliberated by the Committee that foreign representatives may be made to register with the IBBI though no conclusion was reached in this regard. This may be contemplated by the Central Government, in consultation with the IBBI. It was also discussed by the Committee that the extent of obligations imposed on foreign representatives as well as the manner of imposition of penalty should be proportionate to the degree of access provided through subordinate legislation, as discussed in paragraph 5.4 above.**

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<sup>56</sup> Para 109, UNCITRAL Guide to Enactment.

<sup>57</sup> Para 110, UNCITRAL Guide to Enactment.

<sup>58</sup> Section 10, Chapter 15, Title 11, US Code.

<sup>59</sup> Article 10, Schedule 1, Cross-Border Insolvency Regulations, 2006.

<sup>60</sup> Article 10, Tenth Schedule, Companies Act, 2006.

<sup>61</sup> Paragraph 29, Schedule 2, Cross-Border Insolvency Regulations, 2006.

## 7. Participation in a proceeding under the Code

7.1. The Model Law allows the foreign representative to commence<sup>62</sup> and participate<sup>63</sup> 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 discussed that the foreign representative may be allowed to participate in domestic insolvency proceedings, subject to the manner of access to be prescribed by subordinate legislation.<sup>64</sup> However, since creditors under the Code include foreign creditors, the Committee discussed that allowing the foreign representative to initiate domestic insolvency proceedings against the corporate debtor may not be necessary.**

7.2. Article 24 of the Model Law also permits the foreign representative to intervene in any proceeding in which a debtor is a party, if the requirements of the law in the enacting country are met. This is intended to include *any* proceedings regarding the debtor and not just insolvency proceedings. **The Committee discussed that this may be an expansive power to give to the foreign representative. It was noted that it may not be necessary to provide such power in the draft Part Z as the foreign representative can satisfy the court that she is a party of interest to intervene in such proceeding. It was therefore concluded that this provision may not be included in draft Part Z.**

## 8. Access of foreign creditors to a proceeding under the Code

8.1 Article 13 of the Model Law embodies the principle that subject to the exclusions provided in this article, foreign creditors who apply to commence insolvency proceedings in the enacting country or file claims in such a proceeding, should not be treated worse than domestic creditors.<sup>65</sup> The exclusions envisaged in this provision essentially pertain to foreign social security and tax claims. Singapore has adopted this provision without any substantial modification.<sup>66</sup> The US has stated that treatment of foreign revenue claims, foreign public law claims and foreign tax claims shall be as per

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<sup>62</sup> Article 11 of the Model Law.

<sup>63</sup> Article 12 of the Model Law.

<sup>64</sup> See para 5.4.

<sup>65</sup> Para 118, UNCITRAL Guide to Enactment.

<sup>66</sup> Article 13, Tenth Schedule, Companies Act, 2006.

domestic US law and treaties entered into with different countries.<sup>67</sup> **The Committee concluded that Article 13 of the Model Law be adopted in the draft Part Z without any substantial modification.**

## 9. Notice to foreign creditors

- 9.1. Article 14 of the Model Law provides that known foreign creditors may be given notice individually whenever 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 service of notice may not be easily accessible to foreign creditors. For example, it may not be convenient for a foreign creditor to check local newspapers in the enacting country. To ensure that time taken to make such notice is not excessive, requirements such as letters rogatory or such similar formalities are dispensed with.<sup>68</sup>
- 9.2. **The Committee discussed that Article 14 may be adopted in the draft Part Z. The Committee also discussed that the requirement of individual notice in Article 14(2) of the Model Law may increase costs and therefore may not be mandated. In order to ensure that costs of providing notice are not too high, the Committee decided that the IBBI may specify the mode of providing notice to a foreign creditor. Electronic notice and uploading notices on the website of the corporate debtor or the IBBI may also be considered.**
- 9.3. **The Committee noted that the Code currently accounts for foreign creditors also while giving notice to the creditors of the corporate debtor. However, since a special provision for foreign creditors is provided in the Model Law, it was decided to retain it in the draft Part Z. It was also noted, in this regard, that the intention of adopting this provision is not to give any special treatment to foreign creditors but to merely ensure that notices are served in a manner that is accessible to foreign creditors as well. The Committee therefore concluded that while framing the subordinate legislation regarding notice to foreign creditors, the IBBI must ensure that no favourable treatment is given to foreign creditors over the domestic creditors under the Code.**
- 9.4. Article 14(1) of the Model Law also provides that the court may order appropriate steps regarding notice to foreign creditors whose addresses are not known. **The Committee discussed that this may not be required to be inserted in the draft Part Z since the manner of giving notice, discussed in paragraph 9.2 above, may account for giving notice to such creditors as well.**

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<sup>67</sup> Section 1513, Chapter 15, Title 11, US Code.

<sup>68</sup> Para 123, UNCITRAL Guide to Enactment.

## RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

### 10. Application for recognition

- 10.1. The Model Law empowers foreign representatives to seek recognition of a foreign proceeding from a court in the domestic country, in order to avail appropriate relief in relation to the foreign proceeding. This is embodied in Chapter III of the Model Law which broadly sets out the requirements for recognition, the manner of recognition on satisfaction of these requirements, and the effects of such recognition.<sup>69</sup> The provisions dealing with recognition of foreign proceedings have been identified as the core of the Model Law.<sup>70</sup>
- 10.2. Article 15 of the Model Law provides the documents required to be submitted by the foreign representative when making an application for recognition. This includes proof of the existence of the foreign proceeding and of the appointment of the foreign representative in such proceeding<sup>71</sup>, along with details of any pending foreign proceedings against the debtor<sup>72</sup>. The court to which the application for recognition is made may also require these documents to be translated, if necessary.<sup>73</sup>
- 10.3. Further, Articles 16(1) and (2) of the Model Law provide a presumption of authenticity of the documents submitted with the application for recognition and dispense with the requirement of legalisation of documents. “Legalisation” of documents usually refers to special authentication through certification by diplomatic or consular agents.<sup>74</sup> This presumption has been provided in the Model Law to avoid cumbersome and time-consuming procedures for authentication of documents.<sup>75</sup> However, such dispensation of authentication has only been provided as a presumption and the court may order that the documents be authenticated if it thinks fit.
- 10.4. Articles 15 and 16(1) and (2) of the Model Law have been adopted in the respective cross-border insolvency laws of jurisdictions like US and Singapore,

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<sup>69</sup> Look Chan Ho, *‘A Commentary on the UNCITRAL Model Law’*, (2017), vol. 1 ed. 4, p. 11.

<sup>70</sup> *Ibid.*

<sup>71</sup> Para 2, Article 15 of the Model Law.

<sup>72</sup> Para 3, Article 15 of the Model Law.

<sup>73</sup> Para 4, Article 15 of the Model Law.

<sup>74</sup> Para 128, UNCITRAL Guide to Enactment.

<sup>75</sup> Para 129, UNCITRAL Guide to Enactment.

albeit with minor modifications. In both US<sup>76</sup> and Singapore<sup>77</sup>, translations of the documents given with the application in English is mandated.

- 10.5. **The Committee is of the view that Articles 15 and 16(1) and (2) of the Model Law may be adopted in the present draft Part Z with similar mandate for submission of translations of documents in English. Along with this, the foreign representative may be mandated to specify pending foreign *and domestic* insolvency proceedings against the corporate debtor that are known to her. This is to ensure that the Adjudicating Authority has complete information about the foreign proceedings along with any proceedings under the Code pending against the corporate debtor.**

## 11. COMI

- 11.1. Clause 2(b) read with Clause 14 of the draft Part Z deals with determination of the COMI of the corporate debtor. In terms of Article 2(b) of the Model Law, recognition as foreign main proceeding is based on the finding of COMI. Thus, determination of the COMI is central to operation of the Model Law as it accords proceedings in the COMI greater deference and, more immediate, automatic relief.<sup>78</sup>
- 11.2. The foreign main proceeding is expected to have the principal responsibility for managing the insolvency of the corporate debtor regardless of the number of countries in which the corporate debtor has assets and creditors, subject to adequate coordination procedures to accommodate local needs.<sup>79</sup> Therefore, essential attributes of the corporate debtor's COMI correspond to those attributes that will enable those who deal with the corporate debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning the corporate debtor is likely to commence.

### *Rebuttable presumption in favour of registered office being COMI*

- 11.3. The Model Law does not define COMI but provides a rebuttable presumption in Article 16(3). Clause 14 of the draft Part Z follows the Model Law by providing 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

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<sup>76</sup> Section 1515(4), Chapter 15, Title 11, US Code.

<sup>77</sup> Article 15(4), Tenth Schedule, Companies Act, 2006.

<sup>78</sup> Para 144, UNCITRAL Guide to Enactment.

<sup>79</sup> Para 1, UNCITRAL Guide to Enactment.

COMI is involved.<sup>80</sup> However, it was brought to the notice of the Committee that this presumption may in certain cases lead to abuse and forum shopping. The Committee noted that the Model Law does not provide any statutory mechanism to prevent forum shopping and the UNCITRAL Guide to Enactment places the onus on courts to detect such abuse.<sup>81</sup> In this regard the Committee thought it must be highlighted that the UNCITRAL Guide to Enactment<sup>82</sup>, EU Insolvency Regulation (Recast)<sup>83</sup> as well as international case law<sup>84</sup> state that, courts have a duty to determine independently if COMI should be decided against the presumption.

- 11.4. As an added precaution, the EU Insolvency Regulation (Recast) seeks to prevent such forum shopping by making the presumption inapplicable in cases where the corporate debtor has relocated its registered office to another country within the 3-month period prior to the request for opening insolvency proceedings.<sup>85</sup> **Given that the Code and its enforcement architecture in India is still evolving, the Committee discussed that in addition to proactive enquiry by Adjudicating Authorities, adoption of a look-back period of 3 months while enforcing of the COMI presumption would be suitable in the Indian context.**

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<sup>80</sup> Para 15, Report of the 11th Multinational Judicial Colloquium, UNCITRAL-INSOL-World Bank (21-22 March 2015, San Francisco ), available at <<http://www.uncitral.org/pdf/english/news/EleventhJC.pdf>>, last accessed on 11 September 2018 - **In 95% of cases under the Model Law the identification of COMI was straightforward**; Also see, Report of the Working Group on Insolvency Law on the Work of its 18<sup>th</sup> Session (30 October 30 – 10 November, 1995, Vienna), available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V95/600/43/IMG/V9560043.pdf?OpenElement>>, last accessed on 11 September 2018 - while formulating the rebuttable presumption also noted that this approach would take into account that in a large number of cases the validity of foreign proceedings would not be contested for certain reasons.

<sup>81</sup> Para 148, UNCITRAL Guide to Enactment.

<sup>82</sup> Para 143, UNCITRAL Guide to Enactment.

<sup>83</sup> Recital 30 of the EU Insolvency Regulation (Recast), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>, last accessed on 7 September 2018.

<sup>84</sup> Para 81, UNCITRAL Judicial Perspective; See also, Look Chan Ho, 'A Commentary on the UNCITRAL Model Law', (2017), vol. 1 ed. 4, p. 616-18.

<sup>85</sup> Recital 31 and Article 3 of the EU Insolvency Regulation (Recast), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>, last accessed on 7 September 2018.



## *Factors to determine COMI*

11.5. The UNCITRAL Guide to Enactment provides the following two principal factors which may indicate COMI in most cases:

- (a) where the central administration of the debtor takes place; and
- (b) which is readily ascertainable by creditors.

**The Committee recommended that given that the Code and its enforcement architecture in India is still evolving, it may be prudent to include these principal factors in the Code. The intent is to provide objective factors to assist the Adjudicating Authority in cases where the COMI does not coincide with the registered office.**

11.6. It was brought to the attention of the Committee that there may be cases where the two principal factors alone may not provide a conclusive answer regarding the COMI. **In this regard, the Committee thought that since even generally international experience suggests that courts struggle with factors necessary to refute the presumption of COMI<sup>86</sup>, it would be advisable to provide a list of *indicative*<sup>87</sup> factors in subordinate legislation that may be considered by Adjudicating Authorities while determining COMI.**

11.7. The Committee noted that there have been a number of court decisions globally that consider the meaning of the phrase “COMI” and identify factors relevant for rebutting the presumption in favour of the place of registered office being the COMI. Further, the UNCITRAL Guide to Enactment provides a list of additional factors for determination of COMI such as the location of the debtor’s books and records; the location where financing was organized or authorized, from where the cash management system was run; the location of

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<sup>86</sup> Ryan Halimi, ‘An Analysis of the three Major Cross-Border Insolvency Regimes’, (2017) 47 International Immersion Program Papers 25, 26 available at <[http://chicagounbound.uchicago.edu/international\\_immersion\\_program\\_papers/47](http://chicagounbound.uchicago.edu/international_immersion_program_papers/47)>, last accessed on 4 September 2018.

<sup>87</sup> The Committee noted that the Model Law does not state factors for determination of COMI deliberately to avoid the exclusionary effect of a test based on a single factor, namely, that proceedings founded on other than the connecting factor used as a filter would be precluded from recognition - Para 25, Report of the Working Group on Insolvency Law on the Work of its 18<sup>th</sup> Session (30 October - 10 November, 1995, Vienna), available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V95/600/43/IMG/V9560043.pdf?OpenElement>>, last accessed on 11 September 2018.. Therefore, the Committee recommended that the Central Government must be empowered to prescribe a list of factors which are only *indicative* and not exhaustive. Courts should have the freedom to consider other factors not mentioned in the subordinate legislation, based on the facts of each case.

employees and so on.<sup>88</sup> **The Committee was of the view that these sources may be considered by the Central Government while formulating subordinate legislation. With regards to the weightage or priority to be given to various additional factors by Adjudicating Authorities, the Committee discussed that it must be left for them to decide based on the circumstances of the particular case.**<sup>89</sup>

#### *Date for benchmarking COMI*

11.8. When an application for recognition of foreign proceedings is made, generally, the date of commencement of foreign proceeding is used as the benchmark date for determining COMI as this can be applied with certainty to all insolvency proceedings.<sup>90</sup> However, some cases have also relied on the time when the foreign court was first required to decide whether to open the insolvency proceeding or the date on which application for recognition of foreign proceeding was made.<sup>91</sup> **The Committee decided that such date need not be spelt out in the Code as the understanding may evolve based on international as well as domestic experience.**

#### *COMI of enterprise groups*

11.9. With respect to determination of COMI of enterprise groups, the Committee discussed that since the Model Law does not envisage treatment of insolvency of enterprise groups as a unit in its present form, there was no scope to provide for determination of COMI of an enterprise group as a whole.<sup>92</sup> **It was discussed that if in the future there is international consensus on insolvency of enterprise groups, this matter would be addressed at such time.**

## **12. Decision of recognition**

12.1. Article 17(1) of Model Law provides that as long as the requirements set out in this provision are met, the court *shall* recognise the foreign proceeding at the earliest time possible. This reduces discretion given to the court in selecting the proceedings which are to be recognised and lays down an objective

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<sup>88</sup> Para 147, UNCITRAL Guide to Enactment.

<sup>89</sup> Paras 146 and 147, UNCITRAL Guide to Enactment.

<sup>90</sup> Para 159, UNCITRAL Guide to Enactment; Report of the 11<sup>th</sup> Multinational Judicial Colloquium, UNCITRAL-INSOL-World Bank (21-22 March 2015, San Francisco) para 10, available at <<http://www.uncitral.org/pdf/english/news/EleventhJC.pdf>>, last accessed on 10 September 2018.

<sup>91</sup> Paras 130-133, UNCITRAL Judicial Perspective; See also, Look Chan Ho, 'A Commentary on the UNCITRAL Model Law', (2017), vol.

<sup>92</sup> Para 68, UNCITRAL Judicial Perspective.

criterion for recognition if the application for recognition is made to the appropriate court.<sup>93</sup> This criterion is limited to public policy constraints and the pre-conditions set out in the definitions of “foreign proceeding” and “foreign representative”.

12.2. Based on this criterion, a foreign proceeding may be recognised as a foreign main proceeding or a foreign non-main proceeding. As discussed above, this is based on the finding of the COMI in case of recognition as a foreign main proceeding and existence of an establishment in case of recognition as a foreign non-main proceeding.<sup>94</sup> The approach of the Model Law is to provide distinct treatment to foreign main and non-main proceedings with respect to the nature of relief available and the coordination of concurrent proceedings. Any recognition provided under this Article may be modified or terminated if it is established that the grounds on which such recognition was granted do not exist anymore.

**12.3. The Committee is of the view that Article 17 of the Model Law may be adopted in the draft Part Z without any substantial modifications. However, a timeline of thirty days may be provided to the Adjudicating Authority to decide on the application for recognition. An additional thirty days may be taken by the Adjudicating Authority in case the decision regarding recognition has not been concluded within the initial thirty days.**

### **13. Interim relief**

13.1. 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 proceedings is decided upon, the latter is to be granted if a foreign proceeding is recognised.

13.2. Article 19 of the Model Law provides urgent relief which may be granted, at the discretion of the court, after an application for recognition is filed.<sup>95</sup> The relief mentioned in Article 19 is narrower than the relief which may be provided after recognition of foreign proceedings under the Model Law. Unless extended by the court, the relief in Article 19 shall terminate when the decision with respect to recognition of the foreign proceedings is taken by the court.

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<sup>93</sup> Para 150, UNCITRAL Guide to Enactment.

<sup>94</sup> Para 2, Article 17 of the Model Law.

<sup>95</sup> Para 150, UNCITRAL Judicial Perspective

- 13.3. 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; (c) entrusting of administration of debtor's assets to the foreign representative or other designated person; (d) providing for the examination of witnesses and taking of evidence related to the debtor's property; (e) any additional relief available to an insolvency professional in the enacting country.<sup>96</sup>
- 13.4. The Code does not empower the Adjudicating Authority to provide any interim relief in CIRP. This may have been to reduce the discretion available with the Adjudicating Authority before any decision for admission is taken. The experience with the Sick Industrial Companies (Special Provisions) Act, 1985 has set a precedent for misuse of interim relief and delay of decision regarding admission of application on availability of interim relief. **In view of the above, the Committee recommended that power to grant interim relief may not be provided in the draft Part Z.**

#### 14. Relief on recognition

- 14.1. The relief available on recognition of a foreign proceeding may be of two kinds: (i) mandatory relief on recognition as a foreign main proceeding, and (ii) discretionary relief on recognition as either foreign main proceeding or foreign non-main proceeding. The former applies automatically when a foreign main proceeding is recognised while the latter may be provided by the court on recognition of either foreign main or foreign non-main proceeding.

##### *Mandatory relief*

- 14.2. Article 20 of 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.<sup>97</sup> 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.<sup>98</sup> This is in line with the general approach of the Model Law which gives prominence to the domestic insolvency proceedings of the enacting country over foreign proceedings.
- 14.3. Various jurisdictions have made modifications to the automatic moratorium under Article 20 while adopting the Model Law to maintain uniformity with

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<sup>96</sup> Article 19 of the Model Law.

<sup>97</sup> Para 183, UNCITRAL Guide to Enactment.

<sup>98</sup> Para 4, Article 20 of the Model Law.

the moratorium in their domestic insolvency law. For example, in UK secured creditors are permitted to enforce their security despite the moratorium.<sup>99</sup> **The Committee is of the view that a moratorium similar in scope as section 14 of the Code may be inserted in the draft Part Z and such moratorium shall be made applicable automatically on recognition of a foreign main proceeding. The exceptions and limitations applicable to the moratorium in section 14 of the Code may be made applicable to the moratorium on recognition of a foreign main proceeding.**

14.4. The Committee also discussed that the power to modify or terminate the relief discussed above, as provided in Article 20 of the Model Law, may not be desirable as it may provide excessive discretion to the Adjudicating Authority to modify or terminate the moratorium in each case. **Additionally, since the Code currently does not empower the Adjudicating Authority to modify the moratorium in section 14 of the Code, no such provision may be inserted in the draft Part Z.**

14.5. Further, Article 20(3) of the Model Law provides that the moratorium discussed above does not affect the right to commence individual actions or proceedings to the extent necessary to preserve claims against the debtor. This is because the Model Law does not cover the question of the effect of the moratorium on the limitation period for filing of claims. Section 60(6) of the Code provides that moratorium in section 14 of the Code has the effect of ceasing of the running of limitation period for the duration of the moratorium. This results in exclusion of the moratorium period from the limitation period for a claim to be filed in any suit or proceeding against the corporate debtor.

14.6. However, the UNCITRAL Guide to Enactment discusses that providing the exclusion given in Article 20(3) may be essential even in countries which have a provision similar to section 60(6) of the Code.<sup>100</sup> This is because the question of cessation of running of the limitation period will be subject to conflict of law rules and may be adjudged by another country. **The Committee is therefore of the view that a provision similar to Article 20(3) of the Model Law may be inserted in the draft Part Z to ensure that the automatic moratorium does not affect the right to commence individual actions or proceedings against the corporate debtor to the extent necessary to preserve claims against the corporate debtor.**

14.7. Similarly, Article 20(4) of the Model Law provides that the moratorium in Article 20(1) does not affect the right to commence domestic insolvency

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<sup>99</sup> Look Chan Ho, *'A Commentary on the UNCITRAL Model Law'*, (2017), vol. 1 ed. 4, p. 12.

<sup>100</sup> Para 187, UNCITRAL Guide to Enactment.

proceedings or the right to file claims in such proceeding. **The Committee discussed that this provision may be adopted in the draft Part Z.**

### *Discretionary relief*

- 14.8. Article 21 of 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 the discretion of the court. The list of relief provided in Article 21(1) is broad and encompasses various kinds of relief provided in various jurisdictions in insolvency processes. However, this list is meant to be inclusive and is not exhaustive.<sup>101</sup>
- 14.9. The relief provided in Article 21(1) of the Model Law is not limited in scope as it is assumed that courts will utilise their discretion to define the scope of the relief while providing it.<sup>102</sup> In relation to relief available under Article 21(1)(a)-(c) of the Model Law, the intent of the Model Law is that the Adjudicating Authority while granting relief shall consider the scope of the moratorium under domestic law of the enacting country.<sup>103</sup> **Therefore, the Adjudicating Authority shall consider the scope of the moratorium under section 14 of the Code, including limitations and exceptions to it, while providing discretionary relief under clause 18 of the draft Part Z which incorporates Article 21 of the Model Law.**
- 14.10. Article 21(1)(d) provides relief relating to examination of witnesses and collecting information and evidence regarding the debtor and her affairs. The Committee felt that providing examination of witnesses may not be suitable as a relief for a foreign representative. Additionally, the power to collect evidence and information regarding the debtor may be provided through Article 21(g) (adopted in clause 18(1)(f) of draft Part Z) as it is a power that is available to an insolvency professional under the Code.<sup>104</sup> **Therefore, the Committee felt that relief mentioned in Article 21(1)(d) may not be included in draft Part Z.**

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<sup>101</sup> Para 189, UNCITRAL Guide to Enactment.

<sup>102</sup> UNCITRAL, 'Report of the Working Group on Insolvency Law on the Work of its Twenty-First Session', A/CN.9/435, paragraph 52, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V97/209/05/PDF/V9720905.pdf?OpenElement>>, last accessed 12 October 2018.

<sup>103</sup> *Ibid.*

<sup>104</sup> See Sections 18, 19 and 23 of the Code.

- 14.11. Article 21(2) 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 the corporate debtor to the foreign representative on satisfaction of the court that interests of domestic creditors are adequately protected. Additionally, safeguards have been provided in the Model Law to clarify that interests of creditors and other interested persons be adequately protected.
- 14.12. Further, the relief provided as interim relief (Article 19) or as discretionary relief on recognition (Article 21) in the Model Law is subject to satisfaction of the court that the interests of parties, such as the creditors and the debtor, are protected.<sup>105</sup> This may help in achieving a balance between the relief provided by the court and the interests of various stakeholders. Additionally, Article 22 of the Model Law provides courts with the flexibility to impose conditions on the relief given under Articles 19 and 21 or to modify or terminate such relief.
- 14.13. **The Committee therefore concluded that the relief in Articles 21(1) and (2) be adopted with appropriate modifications to ensure consistency with the Code, including the modification mentioned in paragraph 14.10 above. It may be noted that the power in Article 21(2) may be sparingly exercised in cases where the need for such relief is clearly established and the interests of domestic creditors are protected. To ensure protection of interested parties at all times, Article 22 should be inserted as has been provided in the Model Law. It may also be noted that references to "interim relief" in Articles 21(1)(f) and 22 may be deleted as such relief is not adopted in the draft Part Z.**
- 14.14. A general principle of the Model Law is that relief given to foreign non-main proceedings should not be too expansive and such relief should not interfere with the administration of other insolvency proceedings against the debtor, especially foreign main proceedings.<sup>106</sup> This has been captured in Article 21(3) which provides that any relief given in respect of foreign non-main proceedings should be restricted to the assets that are to be administered in such non-main proceeding, according to domestic law of the enacting country. The hierarchy of relief available to foreign main and non-main proceedings, as captured in Article 21(3), has been accepted as a general principle of the Model Law and has been adopted by leading jurisdictions

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<sup>105</sup> Article 22 of the Model Law.

<sup>106</sup> See also Para 4, Article 19; Clause (c), Article 29 and Article 30 of the Model Law.

like UK, US and Singapore. **Therefore, the Committee did not deem any deviation necessary in this regard.**

14.15. It was also noted by the Committee that in the final months of its work, the UNCITRAL adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (“**MLREIJ**”). The MLREIJ is broader in scope than the Model Law and covers treatment of judgments on insolvency-related matters in other countries. The MLREIJ also recommends a clarification in relation to the interpretation of Article 21 of the Model Law regarding discretionary relief available to foreign proceedings.<sup>107</sup> It clarifies that the language of Article 21 of the Model Law is broad enough to allow for providing recognition and *enforcement of judgments*. This clarification was issued as some jurisdictions had previously interpreted that the Model Law only includes recognition of proceedings and not enforcement of judgments.<sup>108</sup> However, such an interpretation has been criticised<sup>109</sup> since it may render the Model Law toothless. This position of the Model Law permitting enforcement of a judgment has also been agreed to by cases in other jurisdictions like US.<sup>110</sup> **The Committee agreed with the clarification provided in the MLREIJ that Article 21 of the Model Law may include enforcement of judgments as a relief, if deemed fit by the Adjudicating Authority. However, since the MLREIJ has been adopted by the UNCITRAL very recently and international consensus is still evolving in this regard, the Committee discussed that legislative change pertaining to this may be contemplated at a later stage.**

## 15. Avoidance actions

15.1. Insolvency laws across various jurisdictions provide insolvency professionals with the 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 the debtor’s creditors.<sup>111</sup> Article 23 of the Model

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<sup>107</sup> Article X, MLREIJ.

<sup>108</sup> For example, *Rubin v. Eurofinance SA*, [2012] UKSC 46.

<sup>109</sup> Lia Metreveli, ‘*Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL’s Recent Amendment to its Model Law on Cross-Border Insolvency*’, <<http://jlsplaw.columbia.edu/wp-content/uploads/sites/8/2018/04/Vol51-Metreveli.pdf>>, last accessed 25 September 2018.

<sup>110</sup> For example, *In re Metcalf & Mansfield Alternate Investments*, 421 BR 685 (Bankr SDNY 2010). See also Look Chan Ho, ‘*A Commentary on the UNCITRAL Model Law*’, (2017), vol. 1 ed. 4, p. 249.

<sup>111</sup> Segaal Schorr, ‘*Avoidance Actions under Chapter 15: Was Condor Correct?*’, (2016), vol. 35 issue 1, p. 354, available at <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2420&context=ilj>>, last accessed on 6 September 2018.



Law provides that a foreign representative may apply to the court, upon recognition of a foreign proceeding, to set aside such antecedent transactions of the debtor which are detrimental to her creditors.

- 15.2. This has been provided as an additional remedy on recognition of foreign proceedings, apart from Articles 20 and 21 of the Model Law. Reports of the UNCITRAL Working Group discuss that avoidance actions were excluded from the general provision governing the effects of recognition under the Model Law because of their sensitive nature and instead should be dealt with by a separate provision.<sup>112</sup>
- 15.3. The UNCITRAL Guide to Enactment discusses that the text of Article 23(1) does not provide any substantive rights in relation to such antecedent transactions and does not elaborate on the solution to issues involving conflict of laws.<sup>113</sup> This has been left to the domestic policy and conflict of law rules of each enacting country. Therefore, the effect of Article 23(1) is to only provide standing to foreign representatives to initiate avoidance actions on recognition of foreign proceedings.
- 15.4. Additionally, Article 23(2) reiterates that the relief given with respect to foreign non-main proceedings should relate to assets that are to be administered in such proceeding, according to the law of the enacting country. **The Committee concluded that Article 23 may be adopted as it has been provided in the Model Law. It also discussed that like all the other powers given to the foreign representative under the draft Part Z, exercise of power pursuant to Article 23 of the Model Law will be subject to the manner of access of the foreign representative discussed in paragraph 5.4 above.**
- 15.5. However, Singapore<sup>114</sup> and UK<sup>115</sup> have clarified, in their respective cross-border insolvency laws, that the date of commencement of insolvency for the purposes of interpretation of avoidance provisions shall be the date of opening of the foreign proceeding. This may be of importance since the Model Law does not prescribe the law applicable in this regard and leaves it to the enacting country to apply its rules regarding conflict of laws. **The Committee discussed that such a provision may be included in Clause 20 of the draft Part Z.**

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<sup>112</sup> *Ibid*, p. 377.

<sup>113</sup> Para 201, UNCITRAL Guide to Enactment.

<sup>114</sup> Article 23(4), Tenth Schedule, Companies Act, 2006.

<sup>115</sup> Article 23(4), Schedule 1, Cross-Border Insolvency Regulations, 2006.

## COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

### 16. Cooperation

- 16.1. Chapter IV of the Model Law contains provisions regarding cooperation and communication with foreign courts and foreign representatives. This chapter is a key element of the Model Law.<sup>116</sup> It seeks to fill the gap found in many national laws by expressly empowering courts to extend cooperation in the areas covered by the Model Law.<sup>117</sup> The UNCITRAL Guide to Enactment states that cooperation as described in Chapter IV is often the only realistic way to prevent dissipation of assets, to maximize the value of assets, to find the best solutions for the reorganization of the enterprise and so on.<sup>118</sup> Moreover, cooperation is not limited to foreign proceedings within the meaning of Article 2(a) of the Model Law, that would qualify for recognition under Article 17 (i.e. that they are either main or non-main proceedings), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets.<sup>119</sup>
- 16.2. Article 25 relates to cooperation and *direct communication* between courts in enacting countries and foreign courts and foreign representatives. Given the nascent stage of the insolvency infrastructure under the Code and lack of experience of Adjudicating Authorities in communicating with foreign courts, the Committee discussed that obligatory cooperation and direct communication of domestic Adjudicating Authorities with foreign courts may be premature. **The Committee recommended that in the initial stages of introduction of the Model Law, cooperation and communication between Adjudicating Authorities and foreign courts in cross-border insolvency matters must be based on a framework to be notified by the Central Government in consultation with the Adjudicating Authority in the interest of all stakeholders. With respect to the form of the framework, the Committee noted that adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters<sup>120</sup> framed by the Judicial Insolvency Network may be considered as these Guidelines have been adopted by courts in several jurisdictions such as**

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<sup>116</sup> Para 211, UNCITRAL Guide to Enactment.

<sup>117</sup> Para 210, UNCITRAL Guide to Enactment.

<sup>118</sup> Para 211, UNCITRAL Guide to Enactment.

<sup>119</sup> Para 212, UNCITRAL Guide to Enactment.

<sup>120</sup> Guidelines for Communication and Co-operation between Courts in Cross Border Insolvency Matters, (2016), available at <[https://www.insol.org/emailer/January\\_2017\\_downloads/doc1a.pdf](https://www.insol.org/emailer/January_2017_downloads/doc1a.pdf)>, last accessed on 9 September 2018.

Singapore, UK (England and Wales) and courts in certain states of the US.<sup>121</sup>

- 16.3. Further, in order to ease the burden of the overworked Adjudicating Authorities and in the interest of speed and efficiency, the Committee recommended that the Central Government may notify an appropriate authority to assist the Adjudicating Authority in facilitating transmission of notices and other communications between the Adjudicating Authority and foreign courts.
- 16.4. In addition to the above, the Committee discussed that joint hearings in concurrent proceedings may be undertaken directly by Adjudicating Authorities and foreign courts. Moreover, Adjudicating Authorities may also be allowed to directly communicate and request assistance or information directly from foreign representatives.
- 16.5. Article 26 of the Model Law that provides for cooperation and communication between insolvency professionals with foreign courts and foreign representatives under supervision of the domestic courts was recommended to be adopted in the draft Part Z without any substantial modifications.
- 16.6. Article 27 of the Model Law that provides examples of various forms of cooperation between domestic and foreign courts and insolvency professionals was also recommended to be adopted without any substantial modifications.

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<sup>121</sup> Supreme Court Singapore, *'England and Wales -- the latest to adopt the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters'*, (May 2017), available at <<https://www.supremecourt.gov.sg/news/media-releases/england-and-wales---the-latest-to-adopt-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters>>, last accessed on 9 September 2018.

## CONCURRENT PROCEEDINGS

### 17. Coordination of concurrent proceedings

- 17.1. 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 a foreign main proceeding and enables modification of relief to maintain consistency in multiple proceedings.
- 17.2. Articles 28 and 29 of the Model Law permit initiation of domestic insolvency proceedings after recognition of a foreign main proceeding, as long as the debtor has assets in the 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. This threshold is lower than having an establishment and hence provides enacting country with a low threshold to maintain domestic insolvency proceedings.<sup>122</sup>
- 17.3. According to Article 28 of the Model Law, the effect of a domestic insolvency proceeding in such a scenario will be limited to the assets in the enacting country. However, in some cases it may affect assets of the debtor abroad, for example, an operating plant of the corporate debtor in a foreign jurisdiction may be affected on sale of the corporate debtor as a “going concern” in domestic insolvency proceedings.<sup>123</sup>
- 17.4. Article 29 of the Model Law provides the manner in which relief may be modified when a foreign proceeding and a local insolvency proceeding are taking place concurrently. This only relates to relief under Articles 19, 20 and 21 in the Model Law. However, UK<sup>124</sup> and Singapore<sup>125</sup> have also enabled review of ongoing proceedings under Article 23 (Actions to avoid acts detrimental to creditors). Other than this, Articles 28 and 29 have largely been reflected as it is in the cross-border insolvency laws of various jurisdictions.<sup>126</sup>

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<sup>122</sup> Look Chan Ho, *'A Commentary on the UNCITRAL Model Law'*, (2017), vol. 1 ed. 4, p. 14.

<sup>123</sup> It may be noted, however, that the effect of a domestic proceeding, on debtor's assets abroad, is restricted to the extent necessary to implement provisions regarding cooperation and coordination under Articles 25, 26 and 27 of the Model Law. *See* Article 28 of the Model Law.

<sup>124</sup> Article 29(b)(iii), Schedule 1, The Cross-Border Insolvency Regulation, 2006.

<sup>125</sup> Article 29(b)(iii), Tenth Schedule, Companies Act, 2006.

<sup>126</sup> Look Chan Ho, *'A Commentary on the UNCITRAL Model Law'*, (2017), vol. 1 ed. 4, p. 14. The commentary discusses that other than Japan, most countries have adopted the text of Articles 28-30 of the Model Law without any major deviation.

**The Committee therefore concluded that Articles 28 and 29 of the Model Law may be reflected in the draft Part Z. Further, similar to UK and Singapore, review of proceedings under the corresponding clause to Article 23 may be adopted. However, references to interim relief may be deleted as such relief has not been adopted in the draft Part Z.**

17.5. Similarly, Article 30 of the Model Law provides modification of relief given under Article 19 or 21 for coordinating multiple foreign proceedings. Unlike Article 29 however, Article 30 gives preference to foreign main proceedings instead of local insolvency proceedings.<sup>127</sup> It provides that any relief in relation to a foreign non-main proceeding, shall be consistent with the foreign main proceeding.<sup>128</sup> **The Committee deliberated that this provision may be reflected in the Part Z without any substantial deviations. However, references to interim relief may be deleted as such relief has not been adopted in the draft Part Z.**

## **18. Payment in concurrent proceedings**

18.1. 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*.<sup>129</sup>

18.2. This means that if a 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 in relation to the same debtor.<sup>130</sup> The only exception to this rule is in case payment to other creditors of the same class is proportionately more than the payment the creditor has already received. This exception ensures that if a subsequent insolvency proceeding guarantees more in repayment, then a creditor is not denied such benefit because she has

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<sup>127</sup> Para 216, UNCITRAL Judicial Perspective.

<sup>128</sup> Clause (a) and (b), Article 30 of the Model Law.

<sup>129</sup> Allan L. Gropper, 'The Payment of Priority Claims in Cross-Border Insolvency Cases', (2011), p. 566, available at <<http://www.tilj.org/content/journal/46/num3/Gropper559.pdf>>, last accessed on 7 September 2018.

<sup>130</sup> Look Chan Ho, 'On Pari Passu, Equality and Hotchpot in Cross-Border Insolvency', available at <<https://ssrn.com/abstract=365660>>, last accessed on 7 September 2018.

received a part of the repayment of lower value in a prior insolvency proceeding regarding the same debtor.<sup>131</sup>

**18.3. The Committee discussed the significance of this provision and agreed that it may be adopted in the draft Part Z. However, two modifications may be made:**

- (i) In case of an insolvency resolution process under the Code, the payment to creditors will be in accordance with the 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**

19.1. Article 31 of 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 a 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

**19.2. 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 the corporate debtor's COMI has been recognized in India. Therefore, Part Z may provide that, instead of test of insolvency, recognition of a foreign main proceeding may be presumed**

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<sup>131</sup> *Ibid.*

<sup>132</sup> Para 235, UNCITRAL Guide to Enactment.

<sup>133</sup> Para 236 and 237, UNCITRAL Guide to Enactment.

<sup>134</sup> See section 4 of the Code.

**to be proof of default by the corporate debtor for the purposes of commencement of CIRP.**

19.3. The Committee also discussed that some jurisdictions have recognised foreign proceedings even though they do not strictly relate to insolvency, even though the definition of a “foreign proceeding” mentions the words “*pursuant to a law relating to insolvency*”. For example, in the case of *Stanford International Bank Ltd.*<sup>135</sup> an English court concluded that the liquidation of an Antiguan company ordered by a court in Antigua on the basis that it was just and equitable to do so, fit within the definition of a “foreign proceeding”.<sup>136</sup> Though the UNCITRAL Guide to Enactment warns that the Model Law is meant solely for proceedings related to insolvency<sup>137</sup>, the English court here took into consideration that one of the ground for concluding that it was just and equitable to order liquidation was that the Antiguan company was unable to pay its debts.<sup>138</sup> **The Committee therefore recommended that a proviso may be added to the proposed clause, discussed in paragraph 19.2 above, to provide that for a default to be deemed to have occurred under Part II of the Code based on recognition of a foreign main proceeding, the foreign main proceeding recognised in India should be initiated based on an inability to pay debts or pursuant to a state of insolvency.**

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<sup>135</sup> [2010] ECWA Civ. 137.

<sup>136</sup> Para 80, UNCITRAL Judicial Perspective.

<sup>137</sup> Para 73, UNCITRAL Guide to Enactment.

<sup>138</sup> Para 80, UNCITRAL Judicial Perspective.

## Annexure I

No. 35/14/2017-Insolvency Section  
Government of India  
Ministry of Corporate Affairs

5<sup>th</sup> Floor, A wing  
Shastri Bhawan, New Delhi  
Dated: 16.11.2017

### ORDER

**Subject: - Constitution of Insolvency Law Committee**

The provisions related to corporate insolvency resolution and liquidation of the Insolvency and Bankruptcy Code, 2016 (the Code) were commenced in the month of December, 2016. As on date, more than 300 cases have been admitted for resolution by the Adjudicating Authority i.e., National Company Law Tribunal. References/suggestions from various stakeholders have also been received for further improvement in the processes prescribed in the Code.

2. With a view to examine the suggestions received and related matters, the Government hereby constitutes an Insolvency Law Committee consisting of the following members:-

- |   |                  |
|---|------------------|
| 1. Secretary, Ministry of Corporate Affairs                                     | Chairperson      |
| 2. Chairperson, IBBI  | Member           |
| 3. Additional Secretary (Banking), Department of Financial Services             | Member           |
| 4. Shri Sudarshan Sen, Executive Director, RBI                                  | Member           |
| 5. Sh. T.K. Viswanathan, Former Secretary General, Lok Sabha and Chairman, BLRC | Member           |
| 6. Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.    | Member           |
| 7. Sh. Rashesh Shah, Chairman & CEO, Edelweiss Group                            | Member           |
| 8. Shri Sidharth Birla, past President FICCI and Chairman Xpro India Limited    | Member           |
| 9. Shri Bahram Vakil, Partner, AZB & Partners                                   | Member           |
| 10. Sh. B Sriram, MD, Stressed Assets Resolution Group, State Bank of India     | Member           |
| 11. President, Institute of Chartered Accountants of India                      | Member           |
| 12. President, Institute of Cost Accountants of India                           | Member           |
| 13. President, Institute of Company Secretaries of India                        | Member           |
| 14. Joint Secretary (Policy/Insolvency), Ministry of Corporate Affairs          | Member Secretary |



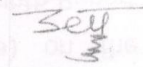
3. The Committee shall take stock of the functioning and implementation of the Code, identify the issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and make suitable recommendations to address such issues, enhance efficiency of the processes prescribed and for effective implementation of the Code. The Committee may also make any other relevant recommendation as it may deem necessary.

4. The Committee may also invite or co-opt practitioners, experts or individuals who have knowledge or experience in insolvency, law or economics and representatives from other Regulators or Ministries. The Committee may also consult other stakeholders as part of its deliberations.

5. The non-official members of the Committee shall be eligible for travelling, conveyance and other allowances as per extant government instructions, wherever the sponsoring agency is unable to bear their expenditure. Secretarial support to the Committee will be arranged by Ministry of Corporate Affairs/Insolvency and Bankruptcy Board of India.

6. The Committee shall submit its recommendations within two months from its first meeting.

7. This issues with the approval of competent authority.



(Ashish Kushwaha)  
Director

To

All members

Copy to:-

- i. PS to CAM
- ii. Sr. PPS to Secretary, MCA
- iii. Governor, Reserve Bank of India
- iv. Secretary, Department of Financial Services, Ministry of Finance,
- v. PS to AS
- vi. PS to JS(B)

## Annexure II

### Draft Part Z

#### CHAPTER 1: GENERAL PROVISIONS

##### 1. Purpose and scope of application of this Part

- (1) The purpose of this Part is to incorporate the UNCITRAL Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of:
  - (a) cooperation between
    - i. Adjudicating Authorities, resolution professionals, liquidators, corporate debtors, other stakeholders and
    - ii. the courts and other competent authorities of foreign countries involved in cases of cross-border insolvency;
  - (b) greater legal certainty for trade and investment;
  - (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the corporate debtor;
  - (d) protection and maximization of the value of the corporate debtor's assets; and
  - (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
- (2) Save as otherwise provided in sub-clauses (3) and (4), 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 a foreign proceeding; or

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

Provided that “corporate debtor” for the purposes of this Part shall also include any person incorporated with limited liability outside India.

- (3) Subject to clause 29 of this Part, the Central Government may notify classes of corporate debtors or entities to whom the provisions of this Part shall not apply.
- (4) The provisions of this Part shall apply:
  - (a) in the first instance to countries, mentioned in Part A of the Schedule, which have adopted the UNCITRAL Model Law on Cross-Border Insolvency.
  - (b) to any other country, specified in Part B of the Schedule, which the Central Government may notify under sub-clause (5).
- (5) Subject to clause 29 of this Part, the Central Government may enter into an agreement with the Government of any country 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 the corporate debtor situated at any place in a country outside India with which such an agreement has been entered into, shall be subject to such conditions as stated in the agreement.
- (6) Notwithstanding anything contained in this Part but subject to clause 29 of this Part, the Central Government may by notification-

- (a) add or omit any country from the Schedule if such addition or omission is necessary in the interest of security of India or public interest; or
- (b) direct that the application of this Part in relation to any country 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 India or public interest.

## 2. Definitions

In this Part, unless the context otherwise requires, -

- (a) “Adjudicating Authority” means benches of the National Company Law Tribunal, as notified by the Central Government in the manner provided in Clause 29 of this Part, to perform functions relating to recognition of foreign proceedings and cooperation with foreign courts and foreign representatives under this Part;
- (b) “centre of main interests” shall have the meaning assigned to it in clause 14 of this Part;
- (c) “establishment” means any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services;
- (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 country 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 country where the corporate debtor has an establishment;
- (g) “foreign proceeding” means a collective judicial or administrative proceeding in a foreign country, 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;

*Explanation: For the purposes of this Part, the term “reorganisation” shall have the same meaning as “resolution” under the Code.*

- (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 country**

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 country 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 any action authorised by this Part if, in its opinion, the implementation of such action would be manifestly contrary to the public policy of India.
- (2) Before passing any orders under sub-clause (1), the Adjudicating Authority shall serve a notice to the Central Government as soon as may be practicable for inviting submissions on the matter.
- (3) Without prejudice to the provisions of this clause, the Central Government, if it is of the opinion that the implementation of any action authorised by this Part would be manifestly contrary to the public policy of India, it may itself apply to the Adjudicating Authority for an order under sub-clause (1).

## **5. Additional assistance under other laws**

Without prejudice to the provisions of this Part, 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 laws 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 functions under this Part in the manner as may be prescribed.
- (2) A foreign representative shall be subject to a code of conduct as may be specified.

## **8. Limited jurisdiction**

- (1) Subject to sub-clause (2), the sole fact that an application pursuant to this Part is made to the Adjudicating Authority by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the corporate debtor to the jurisdiction of courts in India, or the Adjudicating Authority, for any purpose other than the application.
- (2) Where a foreign representative has contravened any provision of this Part or

rules or regulations made thereunder, the Board may:

- (a) impose a penalty which is three times the amount of loss caused, or is likely to be caused, to persons concerned on account of such contravention; or
  - (b) impose a penalty which is three times the amount of unlawful gain made on account of such contravention; or
  - (c) give any other direction that the Board is authorised to give in relation to an insolvency professional under this Code, in the manner as may be specified.
- (3) A foreign representative referred to in sub-clause (2), includes a person who purports to be a foreign representative under this Part.

#### **9. Participation by a foreign representative in proceedings under this Code**

Subject to clause 7 of this Part, upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the corporate debtor under this Code.

#### **10. Access of foreign creditors to a proceeding under this Code**

- (1) Subject to sub-clause (2), foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under this Code as creditors in India.
- (2) Sub-clause (1) does not affect the ranking of claims in a proceeding under this Code or the exclusion of foreign tax and social security claims from 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 this Code, unless an equivalent domestic claim has a lower rank under this Code.

## **11. Notice to foreign creditors of a proceeding under this Code**

- (1) Without prejudice to the provisions of this Code, whenever under this Code notice is to be given to creditors in India, such notice shall also be given to the known creditors that do not have addresses in India.
- (2) Such notice shall be made to the foreign creditors in a manner as may be specified. No letters rogatory or other, similar formality may be required.
- (3) When a notice of commencement of a proceeding is to be given to foreign creditors, the notice shall:
  - (a) indicate the time period for filing claims as per the provisions of this Code and specify the place for their filing;
  - (b) indicate whether secured creditors need to file their secured claims as provided by this Code; and
  - (c) contain any other information required to be included in such a notice 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) Subject to clause 7, 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-clause (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 sub-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 this Code in respect of the corporate debtor that are known to the foreign representative; and
  - (e) a translation of documents in support of the application for recognition in English, if applicable.
- (3) An application for recognition under sub-clause (1) shall be made in such form and manner and be accompanied with such fees as may be prescribed.

### **13. Presumptions concerning recognition**

- (1) If the decision or certificate or any other document referred to in clause 12(2)(a), (b) and (c) of this Part indicates that the foreign proceeding is a proceeding within the meaning of clause 2(g) of this Part and that the foreign representative is a person or a body within the meaning of clause 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 clause 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-clause (1) shall only apply if the registered office of the corporate debtor has not been moved to another country within the three-month period prior to the filing of application for initiation of insolvency proceedings in such country.
- (3) While determining the corporate debtor's centre of main interests, the Adjudicating Authority shall conduct an assessment, of where the corporate debtor's central administration takes place, and which is readily ascertainable by third parties including creditors of the corporate debtor.
- (4) If the corporate debtor's centre of main interests is not determined by factors stated in sub-clause (3), the Adjudicating Authority may conduct an assessment of factors prescribed by the Central Government for this purpose.

## **15. Decision to recognise a foreign proceeding**

- (1) Subject to clause 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 clause 2(g) of this Part;
  - (b) the foreign representative applying for recognition is a person or body within the meaning of clause 2(h) of this Part; and
  - (c) the application meets the requirements of clause 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 country where the corporate debtor has the centre of its main interests under clause 14 of this Part; or
  - (b) foreign non-main proceeding, if it is taking place in a country where the corporate debtor has an establishment as defined in clause 2(c) of this Part.

(3) This clause and clauses 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 clause 12 of this Part shall be decided by the Adjudicating Authority within thirty days from the date of the filing of the application:

Provided that the Adjudicating Authority may extend the period specified above by an additional thirty days, if required.

## **16. Subsequent information**

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the Adjudicating Authority within three days of having known 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 this Code regarding the same corporate debtor.

## **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-clauses (2), (3) and (4), 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 of the moratorium under sub-clause (1) shall be subject to provisions of section 14 of the Code, including any exemptions applicable to section 14 of the Code.
- (3) Sub-clause (1) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the corporate debtor.
- (4) Sub-clause (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 clause 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 clause 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 clause 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 clause 17(1)(d) of this Part;
  - (e) entrusting the administration or realisation of the corporate debtor's assets located in India to the foreign representative in the manner as may be prescribed;
  - (f) granting any additional relief that may be available to a resolution professional or liquidator under this 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 corporate 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) In granting relief under this clause 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 clause 18 of this Part, or in modifying or terminating relief under sub-clause (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 clause 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 clause 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 clause 7 of this Part, upon recognition of a foreign proceeding, the foreign representative shall be entitled to make an application to the Adjudicating Authority for an order in connection with sections 43, 45, 49, 50 and 66 of this Code.
- (2) For the purposes of sub-clause (1), the insolvency commencement date of the foreign proceeding shall be determined in accordance with the law of the country in which the foreign proceeding is taking place, including any law by virtue of which the foreign proceeding is deemed to have opened at an earlier time.
- (3) 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 the Adjudicating Authority and foreign courts or foreign representatives**

- (1) For matters referred to in clause 1 of this Part, the Central Government in consultation with the Adjudicating Authority, shall notify guidelines for communication and cooperation between the Adjudicating Authority and foreign courts in the interest of all stakeholders.
- (2) The Adjudicating 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.
- (4) Notifications under sub-clauses (1) and (3) shall be issued in the manner provided in clause 29 of this Part.

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

- (1) In matters referred to in clause 1 of this Part, the resolution professional or liquidator shall, as the case may be, in the exercise of its functions and subject to the supervision of the Adjudicating Authority, cooperate 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**

Subject to clause 21, the cooperation referred to in clauses 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 coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same corporate debtor.

## **CHAPTER V CONCURRENT PROCEEDINGS**

### **24. Commencement of a proceeding under this Code after recognition of a foreign main proceeding**

After recognition of a foreign main proceeding,

- (a) any proceeding under this 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 cooperation and coordination under clauses 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 this 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 clauses 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 clauses 18 of this Part on recognition of foreign proceeding must be consistent with the proceeding under this Code; and
  - (ii) if the foreign proceeding is recognised in India as a foreign main proceeding, clause 17 of this Part shall not apply;
  
- (b) When the proceeding under this Code commences after recognition of the foreign proceeding,
  - (i) any relief in effect under clause 18 of this Part shall be reviewed by the Adjudicating Authority and shall be modified or terminated if inconsistent with the proceeding under this Code;
  - (ii) if the foreign proceeding is a foreign main proceeding, the moratorium referred to in clause 17 of this Part shall be modified or terminated if inconsistent with the proceeding under this Code; and
  - (iii) any proceedings brought by the foreign representative under clause 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**

In the matters referred to in clause 1 of this Part, the Adjudicating Authority shall in respect of more than one foreign proceeding regarding the same corporate debtor, seek cooperation and coordination under clauses 21, 22 and 23 of this Part, subject to the following:

- (a) any relief granted under clause 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 of a foreign non-main proceeding, any relief in effect under clause 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 this Code, proof that the corporate debtor has made a default mentioned in section 4 of this Code:

Provided that for the purposes of this clause, the foreign main proceeding being recognised should be borne out of an inability to pay debts or pursuant to a state of insolvency of the corporate debtor.

## **28. Rule of payment in concurrent proceedings**

- (1) In a corporate insolvency resolution process under this 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 country, 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 country, 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 class and ranking is proportionately less than the payment the creditor has already received.

## **CHAPTER VI MISCELLANEOUS**

### **29. Power of Central Government to issue notifications.**

- (1) Without prejudice to the provisions of this Code, the Central Government shall issue notifications under clauses 1(3), 1(5), 1(6), 2(a), 21(1) and 21(3) of this Part in the Official Gazette as provided in sub-clause (2).

- (2) Every notification issued under sub-clause (1) shall be laid, as soon as may be after its made, 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, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be.
- (3) Any modification or annulment under sub-clause (2) shall be without prejudice to the validity of anything previously done under that notification.

### **30. Appeals and Appellate Authority**

- (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this Part may prefer an appeal to the National Company Law Appellate Tribunal.
- (2) Every appeal under sub-clause (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty of days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

### **31. Appeal to Supreme Court**

- (1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

- (2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from the filing of an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days.

## **THE SCHEDULE**

(See clause 1(4) of this Part)

### **Part A**

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

### **Part B**

(Countries with which agreements have been entered under clause 1(5) of this Part)

### List of Defined Terms

<b>2013 Act</b>	Companies Act, 2013
<b>CIRP</b>	Corporate Insolvency Resolution Process
<b>Code</b>	Insolvency and Bankruptcy Code, 2016
<b>Committee</b>	Insolvency Law Committee
<b>EU</b>	European Union
<b>IBBI</b>	Insolvency and Bankruptcy Board of India
<b>Model Law</b>	UNCITRAL Model Law on Cross-Border Insolvency
<b>MLREIJ</b>	UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments
<b>NCLT</b>	National Company Law Tribunal
<b>UK</b>	United Kingdom
<b>UNCITRAL Guide to Enactment</b>	Guide to Enactment and Interpretation of UNCITRAL Model Law on Cross-Border Insolvency
<b>UNCITRAL Judicial Perspective</b>	UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective
<b>US</b>	United States of America