

Cross Border Insolvency and the Indian Bankruptcy Code

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Cross Border Provisions in the IBC?

- ▶ Foreign creditors given equal access and rights as domestic creditors
- ▶ Insolvency professionals are permitted to access and gain control of all of debtor's assets, including assets located abroad (Section 18(1)(f)(i))
- ▶ Debtor's overseas assets also not excluded from the liquidation estate (Section 36)

Amendments by the Joint Parliamentary Committee

- ▶ Clause 1: Enabling provision for Central Government to enter into bilateral agreements for purposes of enforcing the Code.
- ▶ Clause 2:
 - ▶ In cases where a debtor's assets are located in a country with which there are reciprocal arrangements, IP, liquidator or bankruptcy trustee may make an application to adjudicating authority.
 - ▶ Adjudicating authority may then issue a letter of request to the relevant foreign court or authority

Gaps in the IBC

- ▶ No mechanisms for Indian court to seek or give assistance from or to a foreign court or insolvency professional
- ▶ No provisions on recognition of foreign insolvency proceedings
- ▶ No provisions on dealing with concurrent insolvency proceedings
- ▶ No provisions on whether foreign insolvency representatives can gain access to Indian insolvency proceedings

JPC proposes that these issues will be dealt with through bilateral agreements

Are Bilateral Agreements the way forward?

- ▶ Have been used in the past for information exchange and coordination
- ▶ Court-developed insolvency protocols

BUT..

- ▶ Take time to negotiate
- ▶ Countries insolvency regimes vary widely
- ▶ Same country may have different rules regarding assistance and recognition of judgments with different countries

UNCITRAL Model Law on Cross Border Insolvency

Applies in Four Situations

- ▶ In-bound requests - foreign court or “foreign representative” seeks assistance of the Enacting State in connection with a foreign insolvency proceeding
- ▶ Out-bound requests - Enacting State seeks assistance of a foreign court or foreign insolvency representative in connection with a domestic insolvency proceeding
- ▶ Concurrent insolvency proceedings against the same debtor in a court in the Enacting State and in one or more foreign courts.
- ▶ Foreign creditors or foreign insolvency representatives want to participate in, or commence, an insolvency proceeding in the Enacting State.

UNCITRAL Model Law

- ▶ Access to foreign creditors and foreign insolvency representatives
- ▶ Recognition of foreign insolvency proceedings
 - ▶ Foreign main proceedings - Centre of Main Interests “COMI”
 - ▶ Foreign non-main proceedings
 - ▶ Reliefs granted following recognition
- ▶ Cooperation and direct communication between courts and insolvency representatives
- ▶ Dealing with concurrent insolvency proceedings

Adopting the Model Law

- ▶ Recognized international standard, brings greater certainty to investors
- ▶ 41 countries, including U.S., U.K., Australia, Canada and Japan have adopted legislation based on Model Law
- ▶ Simplifies recognition process - faster and allows recognition of proceedings rather than judgments
- ▶ Amendment to the IBC or stand-alone legislation

Considerations

- ▶ Problems with determining COMI
- ▶ Reciprocity
- ▶ Entrusting proceedings to foreign representatives
- ▶ Gives significant discretion to courts