

# 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