

Comments on Draft on Cross Border Insolvency to be introduced in the Insolvency and Bankruptcy Code, 2016

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In this document, we have dealt with the Draft topic-wise. The entire document is divided into four parts namely:

- ***Part I – Background***
- ***Part II – Scope and Applicability***
- ***Part III – Foreign Assets and other provisions***

The provisions of the Draft Part are merged into discussions.

Part I: Background

Cross Border Insolvency is understood to be of immense importance. With growing multi-national/ cross border trading and business across nations, it becomes pertinent to have a framework over and above domestic insolvency framework, to provide for dealing with such cases of corporate debtor, where assets and operations of the debtor are distributed globally. While the Insolvency and Bankruptcy Code, 2016 ('the Code') was enacted in the year 2016, a comprehensive framework was put in place for domestic insolvency. The law-makers, however, refrained from including a comprehensive framework for cross-border insolvency; a twin-section provision was however provided in the Code: namely, section 234 and 235, enforced on 1st April, 2017. Various committees had mentioned the need to have an all-inclusive mechanism, including the recent recommendation in the Report of the Insolvency Law Committee, March 2018¹. An excerpt from the report is as follows:

*"The Committee deliberated on Cross Border Insolvency and noted that the existing two provisions in the Code (S. 234 & S. 235) do not provide a comprehensive framework for cross border insolvency matters. Accordingly, **it was decided to attempt a comprehensive framework for this purpose based on UNCITRAL model law on Cross Border Insolvency**, which could be made a part of the Code by inserting a separate chapter for this purpose. Given the complexity of the subject matter and the requirement of in-depth research to adapt the model law in the Indian context, the Committee decided to submit its recommendations on Cross Border Insolvency separately."*

Accordingly, specific stress was laid on adoption of a framework, which would necessarily be based upon the UNCITRAL Model Law on Cross Border Insolvency ('the Model Law'). Till date, the Model Law has been adopted by as good as 44 countries in a total of 46 jurisdictions².

Based on all the suggestions, it was deemed fit to include a separate Part in the Code which would deal with Cross Border Insolvency, based on the Model Law. The Draft³ of the proposed Part has been issued for public comments, open till 30th June, 2018. To begin with, these provisions will only be applicable to corporate debtors and will gradually extend to entities other than corporate debtors.

¹ http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf

² http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

³ [Public Notice dated 20th June, 2018](#)

Current Provisions

Presently, the framework for Cross Border Insolvency has been provided under the following two miscellaneous sections of the Code:

1. **Section 234: Agreements with foreign countries** – This provision provides for the following two things:
 - a. *Bilateral agreements* – it empowers the Central Government to enter into a bilateral agreement with a foreign government to enforce the provisions of the Code.
 - b. *Reciprocal arrangements* – Central Government has the power to direct that the assets of a corporate debtor or debtor or personal debtor, situated outside India be dealt with as per specified conditions. This is allowed only in case there is a bilateral arrangement of India with the foreign government. This may however require India to have reciprocity in its domestic law on insolvency, a provision in respect of which has been lacking in the Code.
2. **Section 235: Letter of request to a country outside India in certain cases** – Accordingly, an RP/ liquidator/ bankruptcy trustee can make an application to seek NCLT to issue a request letter to a foreign court/ authority in a country with which there is an agreement, requesting evidence in relation to an asset, in relation to proceedings against a corporate debtor in India.

Limitations of existing framework

- As mentioned by the Insolvency Law Committee in its report, section 234 and 235 are not adequate to deal with situations of default where the assets of the corporate debtor are situated in foreign jurisdiction. While section 235 allows NCLT to issue a letter of request, there is **no provision for effective cooperation**.
- The **validity of orders passed in Indian proceedings, in foreign country** has not been dealt with. In such a case, moratorium passed as per section 14 of the Code, will not be applicable on assets/ institution/ continuation of suits in foreign jurisdictions.
- A bilateral agreement with a single government will not be effective enough to cover those cases where the corporate debtor holds **assets in multiple jurisdictions**. This makes the process more costly and time-taking.
- Since there are no specific provisions to deal with specific issues, namely, recognition of proceeding, access to proceeding, cooperation of courts and parallel proceedings, **each bilateral agreement will require explicit inclusions** of these provisions to render these agreements effective.
- **Orders passed by foreign courts are not effective in India** unless there is a specific reference in respect of Indian laws. The mechanism for enforcement of such orders has been provided under the Civil Procedure Code, 1908 which is not effective in cases of insolvency proceedings.

Advantages of proposed framework

- **Cost and time effective** – the proposed framework will do away with the requirement of specific inclusion of provisions with respect to each issue separately, as all will be incorporated as one Part of the Code. This will save time and cost of negotiations with each foreign government.
- **Standardisation of provisions** – the proposed framework is based upon Model Law, which is adopted by numerous countries. A uniform mechanism will bring standardisation in procedures and effective coordination between countries.
- **Reciprocity agreements** – the shortcomings of section 235, will be met by enactment of the proposed framework. It will allow cooperation with even those countries, which have adopted Model Law with modifications, such as Romania, Mexico, etc.
- **Power to insolvency practitioners** – There is specific provision which allows Indian insolvency practitioners to access foreign proceedings and foreign practitioners to access Indian proceedings.

Part II: Scope and applicability

General Observations

Listed below are some preliminary observations –

1. The provisions relating to cross-border insolvency will be inserted as a separate part; however, it is opined that the continuity of the sections shall not be interrupted. The references as to those sections, shall therefore change wherever these occur.
2. The provisions, as is evident, deal solely with corporate debtor. However, it must be noted that there must be appropriate provisions to deal with issues involving personal guarantors of such corporate debtors. There might be cases where the assets of these personal guarantors are located in a foreign jurisdictions. The scope of applicability of such provisions may be re-defined as such. Consequentially, provision akin to section 60(2) of the Code should be incorporated so as to provide for a common forum for dealing with insolvency/bankruptcy/liquidation (as the case may be) of corporate/personal guarantors.
3. The applicability of the Part shall also be defined in relation to the “corporate debtor”, e.g., the Part shall apply to the following classes of corporate debtor –
 - a. a corporate debtor, which has a centre of main interest in a foreign jurisdiction;
 - b. a corporate debtor, which has an establishment in a foreign jurisdiction;
 - c. a corporate debtor, which has foreign creditors;

- d. a corporate debtor, which has one or more of its assets, in foreign jurisdictions; and
 - e. a corporate debtor, which has one or more of its subsidiaries (investments), in foreign jurisdictions.
4. Foreign creditors are already at par with domestic creditors (please refer discussion below); therefore, there is no need to include separate provisions as such. A generic clarification will serve the purpose.
 5. The Schedule should be inserted as the Thirteenth Schedule under the Code.

Proceedings covered under the Draft

The scope provided under section 1(1) of the Draft Part covers the following aspects:

1. Assistance in India and by India;
2. Concurrent proceedings under the Code and in foreign jurisdiction in respect of same corporate debtor;
3. Foreign creditors requesting commencement of/ participation in proceedings under the Code.

Assistance in India and by India

This will allow a foreign court or a foreign representative to seek assistance in India in connection with a foreign proceeding. Such access is also being granted to Adjudication Authority or Indian representative to seek assistance from foreign courts.

Concurrent proceedings

This will allow dealing with cases where there are multiple proceedings being carried on against the same corporate debtor in multiple jurisdictions. Several issues arise, which are discussed in detail later.

Right of foreign creditors

As mentioned in the scope, it provides for right of foreign creditors in proceedings under the Code. It may be noted that a “creditor” as defined under the Code is a “person” to whom debt is owed, and “person”, as defined under the Code, includes a person resident outside India. Therefore, debt due towards foreign creditors, is included in the definition of ‘debt’ given under section 3(11) of the Code.

Foreign creditors have *pari passu* right to file an application under section 7 or 9 of the Code. Further, they also have a right to take part in the proceedings of the Code. Being a financial creditor based outside India, it has an equal right to be part of the Committee of Creditors under the Code. To add, they can also approach the resolution professional to file their claims against the corporate debtor. **Given, there is an existing framework for the foreign creditors; there is no need to include provision related to right of a foreign creditor to commence/ participate in Indian proceedings, as it will give rise to duplication of provisions.**

Ambiguity in the definition of 'establishment'

'Foreign proceedings' are further divided into 'foreign main proceedings' and 'foreign non-main proceedings'. While foreign main proceedings are where centre of main interests of the corporate debtor lies, foreign non-main proceeding is where the corporate debtor has an establishment. The definition of establishment as provided in the Draft Part, is as below:

Section 2

XX

(c) *"establishment" means any place of operations where the corporate debtor carries out or has carried out a non-transitory economic activity with human means and assets or services in the **[three] month period** prior to the commencement of insolvency proceedings in the State in which the corporate debtor's **centre of main interest** is located.*

XX

'Centre of main interests' is explained in section 14 of the Draft Part. Accordingly, the state where registered office of the corporate debtor shall be the centre of main of interests, unless the registered office was shifted to another state, i.e. another country, in which case the state in which the erstwhile office was located, shall be deemed centre of main interest. This therefore, excluded such place where economic activity was carried on in last three months before commencement of proceedings, which becomes an 'establishment' by virtue of aforementioned definition.

However, the said definition fails to include all other places where the corporate debtor carries on principle/ substantial economic activity for a period before the said three months. On account of this, proceedings in such state where such place of office is located will not be eligible to be recognised as foreign non-main proceedings. This issue must be addressed in the Final Part as to be included in the Code.

No provision for definition of 'state'

The provisions are consistently referring to the word, 'state', however, the same is not defined anywhere in the Draft Part. As inferred from the interpretation, the word 'state' seems to refer to mean a country. To avoid any confusion in respect to its meaning, we suggest that the same be defined to bring more clarity.

Part III: Foreign Assets and other provisions

The assets of a company may be classified into following categories:

- a. Moveable and Immovable assets of a domestic company in foreign jurisdictions; and

- b. Moveable and Immovable assets of a foreign company in domestic jurisdictions.

There may be transactions with respect to the movable and immovable assets of the debtor for the purpose of its insolvency resolution. In this regard, there may be several issues involved with respect to above categories of assets with respect to their sale or realization during the process of insolvency resolution.

Movable and Immovable assets of a domestic company in foreign jurisdictions

Section 18 of the Code empowers the IRP to take control and custody of assets over which the corporate debtor has ownership rights and are located in a foreign country. However, there is no provision specified either in Code or in Regulations made thereunder with respect to the procedure for taking such assets under control and appropriating such assets in the beneficial interest of the stakeholders.

In absence of specific provisions in this regard under the Code, cue can be taken from the common law procedures whereby, appropriation of assets located in any foreign jurisdictions can be done in terms of applicable laws of the appropriate jurisdiction. Even the Draft Part doesn't provide clarity in this regard. As a result, they may still be governed by common law principles and applicable FEMA Regulations in cases of inward flow of sale proceed into India.

Until enactment and enforcement of the Code, foreign assets were being appropriated using the classic traditional route whereby the creditor would get an order passed by an Indian court and get the said order recognized by the foreign court having sufficient jurisdiction and thereby executing the said order.

Movable and Immovable assets of a foreign company in domestic jurisdictions

In this case, there has been no law in India apart from the provisions of the Code of Civil Procedure, 1908 (CPC). Section 13 of CPC provides for instances wherein a foreign judgment can be conclusive and thereby being eligible to be executed. Apart from CPC, in cases involving transfer of assets located in jurisdiction of India and being owned by a foreign company, the same shall have to comply with the applicable FEMA Regulations viz. Master Direction – Acquisition and Transfer of Immovable Property under Foreign Exchange Management Act, 1999.

However, the Draft Part provides for the following, which may help in smooth flow of transfer of movable and/ or immovable assets of the company under insolvency:

- i. Recognition of foreign proceeding by Adjudicating Authority in India and grant of relief accordingly (Chapter- III of the Draft Part*);
- ii. Access of foreign creditors to a proceeding under the Code and vice versa;
- iii. Cooperation and communications between Adjudicating Authority and foreign courts or foreign representatives (Chapter- IV of the Draft Part); and
- iv. Commencement of a proceeding under the Code after recognition of foreign main proceeding. (section 24 of the Draft Part)

*Section 12(1) of the Draft Part provides that the foreign representative may apply to the Adjudicating Authority for recognition of the foreign proceeding in which the foreign representative has been appointed. However, the Draft Part doesn't clarify as to what does "recognition of the foreign proceeding" mean. Moreover, from the wordings of section 17 and 18 of the Draft Part it can be implied that recognition of foreign proceeding would have the same effect as provided under the Code in case of commencement of Corporate Insolvency Resolution Process. It is our opinion in this case that such provision shall come into force only when corresponding provision is provided for in the legal structure of the respective foreign countries.

Avoidance Proceedings

Section 20 of the Draft Part deals with action to avoid acts detrimental to creditors. The section provides participative powers to a foreign representative at par with the resolution professional and the liquidator under the Code.

Two aspects should be dealt with –

1. In case of a proceeding under the Code, the resolution professional/liquidator should be well-equipped with provisions entitling him to have support from foreign courts to recover foreign assets by initiating avoidance proceedings under the Code;
2. Rights of the resolution professional/liquidator and the domestic creditors in case of a foreign proceeding (main or non-main).

Scope of Powers and Rights of Foreign Representatives

The Code empowers the foreign creditors to participate in the Corporate Insolvency Resolution Process of a Corporate Debtor. The only condition precedent to such participation is that the participant fits into the definition of creditor. The Draft Part also extends its scope to a situation wherein creditor(s) in a foreign State has an interest in requesting the commencement of, or participation in, a proceeding under the Code. Apart from the creditors, the Draft Part empowers the foreign representatives also to commence proceeding under section 7 or 9 or 10 of the Code and to participate in any proceeding regarding the Corporate Debtor under the Code. However, it is yet to be clarified as to how would foreign creditors or foreign representatives participate in Corporate Insolvency Resolution Process of a Corporate Debtor under the Code.

Recognition of a foreign proceeding

Within the powers provided to a foreign representative, he is also allowed to apply to Adjudicating Authority for recognition an existing foreign proceeding, under the Code. A foreign proceeding is recognized as foreign main proceeding in case it is being carried on in the debtor's centre of main interests and as foreign non-main proceeding in case, it is being carried on in the place where debtor has an establishment.

Further, section 17 of the Draft Part provides for effects of recognition of a foreign main proceeding. Upon recognition, the Adjudicating Authority shall declare moratorium, subject to the provisions of section 14 of the Code. **However, no**

provision has been provided to deal with prohibition/ stay/ moratorium in case of recognition of a foreign non-main proceeding, under the said section.

Moving on, section 18 deals with granting of relief upon recognition of a foreign proceeding, Such relief is can be granted, both in case the recognized foreign proceeding is main or non-main. While on account of section 18, provision has been included to provide moratorium for even non-main proceeding, there is no clear distinction which can be drawn between the provisions of section 17 and 18.

Further to add, provisions with respect to communication of orders passed by the Adjudicating Authority must be provided for. So far, the implementation experience shows that except for the public announcement, there is no systematic procedure which ensures that other components of the judiciary (civil courts, etc.) and quasi-judicial authorities are well aware of the proceedings and consequences of such proceedings before

Concurrent proceedings

Orders passed in foreign proceeding

There might be instances where the concurrent proceedings are being carried on, i.e. foreign proceedings and proceedings under the Code, being carried on simultaneously. In such cases, order may be passed in one jurisdiction before proceedings in another are closed. This raises a question as to what will happen to the other proceeding where order is pending to be passed. Will such proceeding cease or continue? Such instances must be adequately provided for under the Final Part to be included in the Code.