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## Basic Contours of Cross Border Insolvency

In this article, the author explains basic contours of cross border insolvency based on UNCITRAL Model Law on Cross Border Insolvency, 1997 and recommendations of the Insolvency Law Committee.

### Introduction

The Insolvency and Bankruptcy Code, 2016 (IBC Code) is still in a nascent stage in India which is frequently getting amended and fine tuned with learning and experiences. The law, regulation, procedures and practices are evolving continuously and Insolvency Resolution Professionals (IRPs) are also adding in numbers as well as settling down in this new area of professional practice. While the opportunities are galore, one needs to be diligent, prudent and cautious in handling Corporate Insolvency Resolution Processes.

### Insolvency Law Committee

Government of India had on 16 November, 2017 appointed 'Insolvency Law Committee' headed by Secretary of Ministry of Corporate Affairs (MCA) to review the implementation in India of Code, identify issues effecting efficiency of corporate insolvency and liquidation framework and to suggest / recommend on adoption of UNCITRAL Model Law on Cross Border Insolvency, 1997.

### Report of Insolvency Law Committee

This Committee submitted its first report in March, 2018 recommending certain recent amendments carried out in the IBC. The Insolvency and Bankruptcy (Second Amendment) Act, 2018 received President's assent on 17 August, 2018 and made effective from 6th June, 2018, (date on which corresponding Ordinance was notified). It has now submitted its second report on 16 October, 2018 on proposed law to be adopted for Cross Border Insolvency (CBI). It is pertinent to point out here that the Report of the Bankruptcy Law Reforms Committee which laid down the foundation for the Code had also recommended that regulation of cross-border insolvency cases must be deliberated upon once the proposed legal regime for domestic insolvency matters was in place. The report also contain contains an Annexure containing the draft Cross Border

Insolvency legislation which will go into the main IBC (Code), once it is legislated.

### Proposed law on Cross Border Insolvency (CBI)

The proposed law on CBI is likely to be framed as under:

Chapter	Section	Provision
1	1 -6	General provision
2	7-11	Access of foreign representatives and creditors to the Adjudicating Authority
3	12-20	Recognition of a foreign proceeding and relief
4	21-23	Cooperation with foreign courts and foreign representatives
5	24-28	Concurrent proceedings
6	29-31	Miscellaneous (Appeal etc.)

The report also contains following two Schedules listing the countries with UNCITRAL Model/ where agreements have been signed :

Schedule-A	Countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency
Schedule-B	Countries with which agreements have been entered

### What is UNCITRAL Model Law

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 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 (USA), Japan, South Korea and Singapore.

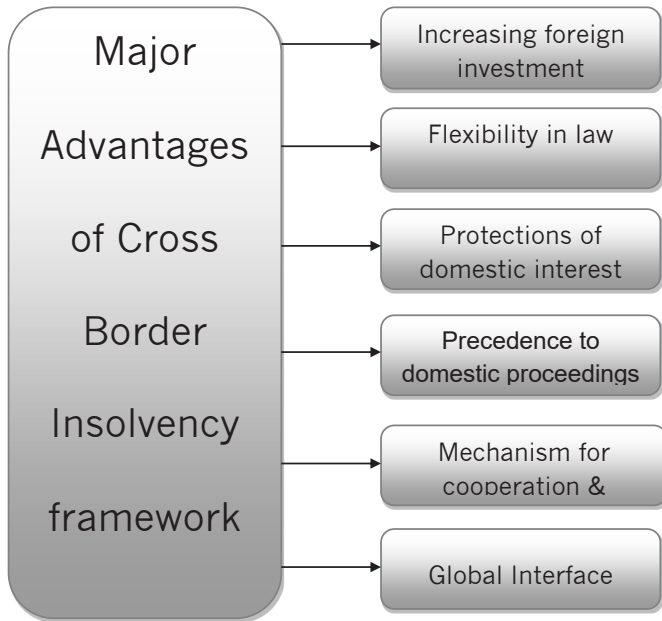
The UNCITRAL Model Law has emerged as the most widely accepted legal framework, globally to deal with cross-border insolvency issues and legislation based on the Model Law has been adopted in 44 countries in a total of 46 jurisdictions. The UNCITRAL Model Law ensures full recognition of a country's domestic 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 Committee has recommended that the Model Law be adopted with necessary modifications. The model to be adopted (UNCITRAL Model) with modifications will provide a mechanism to liquidate or recover from foreign assets of Indian Corporate Debtors which are undergoing insolvency or vice-versa also. It has recommended 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.

### Advantages of CBI

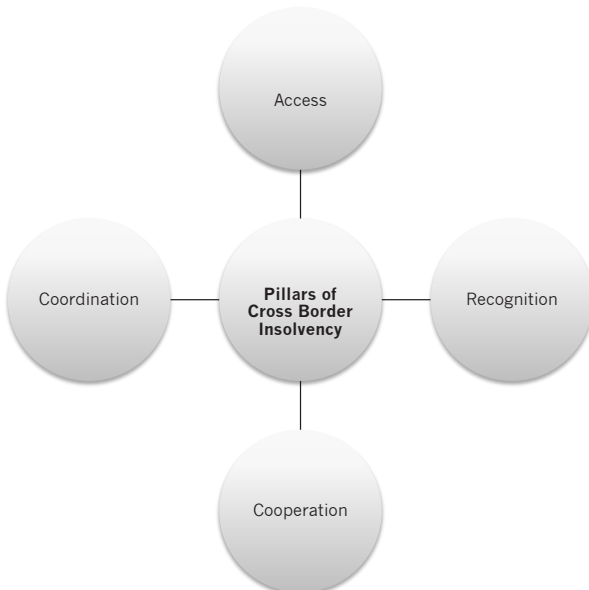
Adopting the model law on CBI has the following underlying advantages:

- Increasing foreign investment
- Flexibility amongst different insolvency laws to maintain consistency with domestic laws
- Protection of domestic interest / public interest so that national public policy is not impacted
- Preference and precedence to domestic insolvency proceedings with reference to foreign proceedings
- Mechanism for cooperation and coordination between courts, professionals etc., both domestically and globally.



**Pillars of CBI Framework**

The Model Law is based on four major principles of cross border insolvency- direct access to foreign Insolvency Professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor, recognition of foreign proceedings and provision of remedies, cooperation between domestic and foreign courts and domestic and foreign insolvency practitioners and coordination between two or more concurrent insolvency proceedings in different countries.



**Objectives of CBI Law**

The purpose of CBI law is to provide effective mechanism for dealing with cases of cross boarder insolvency with the following underlying objectives :

- 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
- Greater legal certainty for trade and investment
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the Corporate Debtor
- Protection and maximization of the value of the Corporate Debtor’s assets
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

**Application of CBI framework**

CBI framework will be applicable to all Corporate Debtors 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.

This will also apply to (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.

For this purpose, Corporate Debtor will include any person incorporated with limited liability outside India but however, Central Government may notify class of Corporate Debtors / entities to which CBI law may not apply. Thus, Corporate Debtor would include foreign companies so as to ensure that creditors and Insolvency Professionals of companies incorporated outside India can approach the Adjudicating Authority to avail relief in India.

### **Concept of reciprocity**

‘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. In India, it will operate under the principle of legislative reciprocity to begin with. UNCITRAL Model Law also does not prohibit this. Further, IBC Code in its present form will not be affected due to reciprocity.

### **Summing up**

In India, cross border insolvency is yet to be legislated and implemented. In 44 jurisdictions, CBI law already exists and in such cases, complaints can be filed directly and there will be no reciprocal arrangement. However, where there will be proceedings against the company in different or multiple jurisdictions, there will be a mechanism of e-courts for adjudication. Once the law is in place which may take few more months, insolvency cases will become a global phenomena and an aid to corporate world and opportunity to Insolvency Professionals.

It is expected that 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.



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