Cross Border Insolvency and the Indian Bankruptcy Code

Aparna Ravi
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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