
Report on the rules and regulations for cross-border insolvency resolution

June 2020

Cross Border Insolvency Rules/ Regulations Committee (CBIRC)

Ministry of Corporate Affairs

Government of India

CROSS BORDER INSOLVENCY RULES/REGULATIONS COMMITTEE (CBIRC)

New Delhi, June 15, 2020

To
Secretary to Government of India
Ministry of Corporate Affairs
'A' Wing, Shastri Bhawan
New Delhi - 110001

Dear Sir,

Chairman and Members of the Cross-Border Insolvency Rules/Regulation Committee (CBIRC) constituted, vide office order No. 30/27/2018-Insolvency Section dated 23rd January, 2020, have the privilege and honour to present the first part of the Committee's Report to the Ministry of Corporate Affairs.

2. The CBIRC has adopted a holistic methodology including internal meetings, engagement with stakeholders, examining past reports, global literature and best practices followed by other countries. The Committee while making its recommendations has attempted to provide a comprehensive rules and regulatory framework to enable implementation of the recommendations of the Insolvency Law Committee contained in its Report dated 16th October, 2018 based on the UNCITRAL Model Law on Cross-Border Insolvency.

3. We thank you for providing us this opportunity to put our thoughts together for recommending the rules & regulatory framework for smooth implementation of the proposed Cross Border Insolvency provisions under the Insolvency and Bankruptcy Code, 2016 (Code). We believe that the enactment and implementation of cross border insolvency provisions along with the rules and regulatory framework would make the insolvency regime more comprehensive and internationally competitive.

Yours sincerely,

Sd/-
(Dr. K.P. Krishnan)
Chairman

Sd/-
(A.M. Bajaj)
Member

Sd/-
(Challa Sreenivasulu Setty)
Member

Sd/-
(Harshvardhan Raghunath)
Member

Sd/-
(Somasekhar Sundaresan)
Member

Sd/-
(Aparna Ravi)
Member

Sd/-
(Abizer Diwanji)
Member

Sd/-
(Methil Unnikrishnan)
Member

Acknowledgments

The Cross Border Insolvency Rules/Regulations Committee (CBIRC) is submitting the first part of its Report on the rules and regulatory framework for cross border insolvency.

The Committee is thankful to all stakeholders who provided insightful comments and suggestions during the deliberations of the Committee. The insights from these interactions greatly helped the Committee in drafting this Report.

The Committee deeply appreciates the support provided to it by the research team: Ms. Anjali Sharma and Ms. Bhargavi Zaveri, Lead Research Consultants of Finance Research Group (FRG), Mr. M.V. Pratap Kumar, Advocate, Ms. Varsha Aithala, Research Fellow of Azim Premji University (APU), Mr. Karthik Suresh, Research Fellow of National Institute of Public Finance and Policy (NIPFP), Ms. Aishwarya Satija, Research Fellow, Mr. Akash Chandra Jauhari, Research Fellow and Ms. Priyal Parikh, Associate Fellow of Vidhi Centre for Legal Policy, and Mr. Yadwinder Singh, Assistant Manager and Mr. Kahnava Mahajan, Research Associate of Insolvency and Bankruptcy Board of India (IBBI).

The Committee is grateful to Dr. M.S. Sahoo, Chairperson, Dr. Mukulita Vijayawargiya, Whole Time Member and Mr. Ritesh Kavdia, Executive Director of IBBI for their valuable inputs and guidance during the deliberations. The Committee is also thankful to IBBI for providing logistical, administrative and technical support for its functioning.

Contents

List of Tables	5
1 Executive Summary	8
2 The committee: objective, scope and approach	13
2.1 Committee members	13
2.2 Terms of Reference of the CBIRC	13
2.3 The work process of the CBIRC	14
2.4 Structure of the report and usage of terms	15
2.5 Scope of issues addressed by the Report	16
3 Typology of cross-border insolvency cases	18
3.1 Why create a typology?	18
3.2 Foreign assets, liabilities and operations	18
3.3 Structures likely to trigger cross-border insolvency provisions	21
3.4 Applicability of the key elements of the Part Z to case types	25
3.5 Does sequencing matter for concurrent proceedings?	30
4 Issues arising in cross-border insolvency cases	32
4.1 Applicability of the cross-border insolvency framework	32
4.2 Designated benches for the adjudication of cross-border insolvency cases	36
4.3 Framework for access to and regulation of foreign representatives	38
4.4 Framework for access by Indian Insolvency Professionals (IPs) to foreign insolvency proceedings	46
4.5 Notice of proceedings and opportunity to object	47
4.6 Determinants of the debtor's Centre of Main Interest (COMI)	51
4.7 Reliefs in cross border insolvency cases	56
4.8 Court co-operation and co-operation between insolvency practitioners across jurisdictions	63
4.9 Format, content and fees of applications in cross-border insolvency proceedings in India	67
5 Capacity building and infrastructure for cross-border insolvency	71
5.1 Capacity building at the National Company Law Tribunal (NCLT)	71
5.2 Capacity building at the IBBI	74
A Ministry of Corporate Affairs (MCA) office orders in respect of the CBIRC	76
B Drafts of rules, regulations and notifications	80
C Schedule of meetings of the CBIRC	123

D	List of consultations held by the CBIRC	123
E	Research team for the CBIRC	123

List of Tables

2	List of members	13
3	Issues and form of outputs	17
4	Indicative list of foreign assets and liabilities that Indian companies may hold	20
5	Likelihood of insolvency proceedings across different jurisdictions	21
6	Typology of cross border cases relevant for the Indian insolvency ecosystem	24
7	Applicability of Part Z principles to Indian company with foreign assets and liabilities	27
8	Applicability of Part Z principles to Foreign company with Indian assets and liabilities	28
9	Discretionary reliefs in cross-border insolvency cases	57
10	Indian firms with foreign exposure	72
11	Details of the meetings of the Committee	123
12	List of consultations held with external experts	123
13	Research team	124

List of Boxes

1	Box 1 Recommendations on the applicability of the Insolvency and Bankruptcy Code (IBC) to foreign companies and foreign limited liability partnerships (LLPs)	35
2	Box 2 Recommendations on the applicability of Part Z to financial service providers (FSPs)	35
3	Box 3 Recommendation on the notification of designated benches .	37
4	Box 4 Recommendations on the rules governing access by foreign representatives to the Indian insolvency eco-system	43
5	Box 5 Recommendations on the deemed authorisation system for foreign representatives	44
6	Box 6 Recommendations on Indian IPs accessing foreign insolvency systems	46
7	Box 7 Recommendations on the regulations governing the manner of issuance of notice	49
8	Box 8 Recommendations on the rules governing the notice of proceedings	49
9	Box 9 Recommendations on the amendments to Clause 14 of Part Z in connection with COMI	54
10	Box 10 Recommendations on the determination of COMI	55
11	Box 11 Overview of the cross-border insolvency proceedings of Jet Airways (India) Ltd.	61
12	Box 12 Recommendations on discretionary reliefs	62

13	Box 13 Recommendations on court-to-court communication in cross-border insolvency proceedings	65
14	Box 14 Recommendations on co-operation from the Adjudicating Authority (AA), the corporate debtor or its IP	65
15	Box 15 Recommendations on the rules governing the contents of an application form for recognition of foreign proceedings	69

Acronyms

AA	Adjudicating Authority.
CBIRC	Cross Border Insolvency Rules/Regulations Committee.
CIRP	Corporate Insolvency Resolution Process.
COMI	Centre of Main Interest.
ECB	External Commercial Borrowing.
FCCB	Foreign Currency Convertible Bond.
FSP	Financial Service Provider.
IBBI	Insolvency and Bankruptcy Board of India.
IBC	Insolvency and Bankruptcy Code.
ILC	Insolvency Law Committee.
IP	Insolvency Professional.
IPA	Insolvency Professional Agency.
IPR	Intellectual Property Right.
IU	Information Utilities.
JV	Joint Venture.
LLP	Limited Liability Partnership.
MCA	Ministry of Corporate Affairs.
NBFC	Non-Banking Financial Company.
NCLAT	National Company Law Appellate Tribunal.
NCLT	National Company Law Tribunal.
RoC	Registrar of Companies.
TDS	Tax Deduction at Source.

1 Executive Summary

In October 2018, the Insolvency Law Committee (ILC) submitted a report on cross-border insolvency to the MCA (hereafter, “*ILC Report*”). The *ILC Report* recommended the adoption of the *UNCITRAL Model Law on Cross-Border Insolvency* as a part of the *Insolvency and Bankruptcy Code, 2016* (hereafter, “*IBC*”), with certain modifications. It also submitted a draft law, referred to as “*Part Z*”, which was to be incorporated as a separate Part of the IBC. Part Z is intended to be the cross border framework of the IBC, which will govern all applications seeking recognition of foreign insolvency proceedings as well as applications seeking co-operation in such proceedings from the NCLT.

The *ILC Report* and Part Z leave several aspects of the cross-border insolvency framework to notifications and rules to be issued by the Central Government and regulations to be issued by the IBBI.

On 23rd January, 2020, the MCA constituted this CBIRC. Its original remit was to propose the rules and regulatory framework that would enable the implementation of Part Z of the IBC proposed by the *ILC Report*. On 21st February, 2020, its remit was expanded to analyse the *UNCITRAL Model Law on Enterprise Group Insolvency* and to make recommendations governing the resolution of group enterprises for the purpose of the IBC.

As the CBIRC worked almost entirely during the lock-down period and hence was somewhat hampered, it focused all its energy on the original mandate, namely cross border insolvency, as the first phase of its work. Accordingly, this report (henceforth “*the Report*”) of the CBIRC focuses on its original mandate. It makes recommendations on the rules, regulations and notifications that will enable the implementation of Part Z. In its deliberations, the Committee identified some instances where amendments may be required to be made to Part Z, to the IBC, the *Companies Act 2013* and the *LLP Act, 2008*. These are highlighted in the Report.

The CBIRC followed a bottom-up approach in proposing the rules and regulatory framework. It started by identifying the typology of cases and cross-border actions that the Indian cross-border framework would have to address. It then mapped these cases and actions to the requirements for making rules, regulations and notifications under Part Z. Basis this mapping, it identified a range of issues and challenges that needed to be addressed to make the rules, regulations and notifications robust and comprehensive. For each of these issues, the CBIRC’s recommendations along with the rationale underlying them are laid down. Finally, the CBIRC has also made recommendations in respect of capacity building requirements at the NCLT and the IBBI to deal with cross-border matters.

Key issues and recommendations

The key issues considered by the CBIRC and the recommendations on these issues, are summarised below:

Applicability of the cross border insolvency framework :

The CBIRC considered the applicability of Part Z to certain categories of Indian companies, namely FSPs and critical infrastructure and utility companies.

The CBIRC recommends that unless otherwise notified by the Central Government, the provisions of Part Z must not be made applicable to FSPs, which are notified by the Central Government under section 227 of the IBC. However, since the IBC makes no special exemptions for any other class of companies, such as critical infrastructure companies or utilities, Part Z should also not make any such exemptions (Box 2).

Applicability of the IBC to foreign companies and foreign LLPs :

The CBIRC noted the anomalies that may arise from the non-applicability of the IBC to foreign companies and foreign LLPs. Therefore, the CBIRC recommends that:

1. The provisions of the IBC should be made applicable to entities:
 - (a) incorporated with limited liability under the laws of a foreign country; and
 - (b) having an establishment, as defined in Part Z, in India.
2. The MCA and the IBBI must consider evaluating the provisions of the IBC, the *Companies Act 2013* and the *LLP Act, 2008*, which need to be amended, and the consequential delegated legislation, if any, which might need to be issued, for giving effect to the abovementioned recommendation (Box 1).

Designated benches for the adjudication of cross border matters :

The CBIRC recommends that all the benches of the NCLT should be vested with the jurisdiction to deal with applications under Part Z. Thus, cross-border proceedings arising in respect of corporate debtors that are Indian companies, will be dealt with at the bench having jurisdiction over the location of the registered office of the corporate debtor. However, insolvency proceedings pertaining to any person incorporated with limited liability outside India, should be dealt with by the Principal Bench of the NCLT (Box 3).

Framework for access to and regulation of foreign representatives :

The CBIRC recommends that foreign representatives must be given access to the insolvency system and infrastructure in India for the purpose of cross-border insolvency proceedings. Further, while giving such access, no distinction should be made between foreign representatives regulated by professional regulators and those who are not so regulated (Box 4).

The CBIRC recommends that foreign representatives acting in cross-border insolvency proceedings in India must undergo a minimalistic authorisation process with the IBBI. The IBBI must put in place a deemed authorisation system for such foreign representatives. Such authorisation will allow the foreign representative to act in the proceeding for which such authorisation is granted.

The CBIRC also recommends that a principle based, light-touch code of conduct, should be applied to foreign representatives acting in proceedings under Part Z, and recommends empowering the IBBI to undertake investigation and disciplinary actions against misconduct by foreign representatives (Box 5).

Framework for access by Indian IPs to foreign proceedings :

The CBIRC noted that neither the IBC nor the *IP Regulations* restrict an IP from applying for accessing the insolvency system of a foreign jurisdiction. Accordingly, the CBIRC does not recommend any consequential amendments in respect of this issue, except a requirement on the IP to report such assignments to the IBBI. The IBBI must specify the format and manner in which such reporting must be made to itself (Box 6).

Notice of proceedings :

The CBIRC recommends that when a notice is required to be given to the creditors of a corporate debtor during insolvency resolution, liquidation or in connection with any other proceeding under the IBC, such notice must be given to known foreign creditors in accordance with the provisions of the IBC, the rules and regulations issued under the IBC. However, where it is not possible to give such notice to foreign creditors, the following shall be deemed as sufficient notice to the known foreign creditors for the purposes of Clause 11 of Part Z –

1. publication of the notice on the website of the corporate debtor, if any, and
2. publication of the notice on the website designated by the IBBI for this purpose.

The CBIRC also recommends that where an application is made under Part Z in respect of a corporate debtor, the foreign representative making such

an application must supply a copy of the same to (a) the corporate debtor; or (b) its IP, if a domestic insolvency proceeding is pending in respect of such a corporate debtor.

Similarly, where a domestic IBC proceeding is instituted in respect of a corporate debtor and a proceeding under Part Z is pending with respect to such a corporate debtor, the person instituting the IBC proceeding must supply a copy of the application to the foreign representative in the proceeding under Part Z (Box 8).

Determinants of the corporate debtor's COMI:

The CBIRC considered two key issues in respect to COMI determination:

1. the factors to be considered in determining COMI, where the presumption of *registered office as COMI* is rebutted, and
2. the effective date of COMI determination.

The CBIRC noted that as per the ILC, in case the presumption of the corporate debtor's registered office as COMI is rebutted, the "identifiable place of central administration" of the corporate debtor is the key consideration for the determination of the corporate debtor's COMI. The ILC recommended that if the identifiable place of central administration of the corporate debtor cannot be ascertained, the NCLT may have regard to the other factors, to be prescribed by the Central Government, for the determination of the corporate debtor's COMI.

Based on an extensive review of the case law on COMI in multiple jurisdictions, the CBIRC notes that this current hierarchy, which envisages that other factors be taken into account only if the identifiable place of central administration is not ascertainable, is inappropriate. It noted that the other factors indeed affected the identifiable place of central administration. Accordingly, it recommends placing the identifiable place of central administration on the same footing as the other factors for the determination of COMI (Box 9).

On the question of effective date for COMI determination, the CBIRC recommends that:

1. The rules to be issued by the Central Government must codify the 'date of commencement' of the foreign proceeding as the effective date for the purpose of determination of COMI.
2. The date of commencement of the foreign proceeding shall be determined as per the local law of the jurisdiction in which such proceeding is initiated (Box 10).

Reliefs in cross border insolvency matters :

The CBIRC has endeavoured to provide an indicative list of reliefs which may be granted by the AA in respect of a recognised foreign proceeding (Box 12).

It also recognises that such reliefs may be codified through protocols entered into between the IP and foreign representative where there are concurrent IBC and cross-border insolvency proceedings.

Protocols and court-to-court co-operation across jurisdictions :

The CBIRC recommends that the Central Government may substantially adopt the *JIN Guidelines* with regard to the co-operation and communication between the AA, foreign courts, foreign representatives and IPs, with suitable modifications to suit the Indian context where necessary (Box 13).

Further, keeping in mind the need to balance the burdens that co-operation may impose on corporate debtors or their IPs and the co-operative spirit underlying the *UNCITRAL Model Law on Cross-Border Insolvency*, the CBIRC recommends that foreign representatives could apply for co-operation under Part Z without having applied for recognition. However, the AA must, in such applications, not grant any relief that ought to be granted only in respect of recognised foreign proceedings (Box 14).

In respect of a protocol for co-operation between the domestic IP and the foreign representative for a case, the CBIRC recommends that the scope of such protocols will vary from case to case depending on the nature and complexities of the case. The CBIRC, hence, decided not to attempt to second guess the contents of such a protocol and to leave it to the IPs and foreign representatives.

Format, content and fees for cross border insolvency applications in India :

The CBIRC recommends that the Central Government should prescribe a pre-designed form that can be filled digitally for seeking recognition of foreign proceedings under Part Z. The CBIRC has enumerated an indicative list of fields that may be included in such an application form (Box 15).

The CBIRC recommends that the rules must provide for separate fees for the main application, such as an application for recognition or co-operation under Part Z, and interlocutory applications. However, the CBIRC leaves quantum of the fees to be determined by the Central Government.

2 The committee: objective, scope and approach

The MCA constituted the ILC which submitted its *ILC Report* on 16th October, 2018. This report provided recommendations on the adoption of the *UNCITRAL Model Law on Cross-Border Insolvency* in India with modifications and specific carve-outs as considered necessary by the ILC.

In order to ensure smooth implementation of the cross-border insolvency provisions proposed by the *ILC Report*, the CBIRC was constituted by the MCA through the Office Order dated 23rd January, 2020. The CBIRC's mandate was to make recommendations on rules and regulations required to operationalise the *ILC Report*.

Subsequently, through the Office Order dated 21st February, 2020, the MCA also included the study of the UNCITRAL Model Law for Enterprise Group Insolvency in the mandate of this CBIRC, and requested it to make recommendations on cross-border resolution and insolvency of enterprises as well.

The two Office Orders are annexed to this report as Annexure [A](#).

2.1 Committee members

The CBIRC comprised the following members:

Table 2 List of members

Sr. No.	Members	Role
1.	Dr. K. P. Krishnan, IAS (Retd.)	Chairman
2.	Mr. A.M. Bajaj, Joint Secretary (representing Department of Economic Affairs)	Member
3.	Mr. Challa Sreenivasulu Setty, Managing Director (Stressed Assets), SBI	Member
4.	Dr. Harshvardhan Raghunath, Senior Advisor, Bain & Co.	Member
5.	Mr. Somasekhar Sundaresan, Advocate	Member
6.	Ms. Aparna Ravi, Partner, Samvad Partners	Member
7.	Mr. Abizer Diwanji, EY India Financial Services	Member
8.	Mr. Methil Unnikrishnan, General Manager, IBBI	Member

2.2 Terms of Reference of the CBIRC

The Terms of Reference (ToR) of the CBIRC are as follows:

1. The CBIRC will study and analyze the recommendations of the *ILC Report* on cross border insolvency and the draft law accompanying it, to make recommendations for operationalizing the rules and regulations for the smooth implementation of the proposed cross border insolvency provisions under the IBC and any other matters related or incidental thereto.
2. The CBIRC may invite or co-opt practitioners, experts or individuals who have knowledge or experience in the subject matter. The CBIRC may also consult other stakeholders as part of its deliberations.
3. The CBIRC will study and analyze the UNCITRAL Model Law for Enterprise Group Insolvency and make recommendations in the context of IBC.

This report of the CBIRC focuses on item 1 from the ToR.

The issue of cross border enterprise group insolvency (item 3) is a complex one and will require separate deliberations. The CBIRC, in consultation with the MCA, proposes to take this up after the completion of the work on item 1, and to present its recommendations in respect of item 3 in a separate report.

2.3 The work process of the CBIRC

The CBIRC adopted a holistic methodology including internal meetings, engagement with stakeholders, examining past reports, global literature and best practices followed by other countries, to better understand the kinds of challenges that have and may come up, in cross-border insolvency proceedings.

The CBIRC met six times. The dates of these meetings are available at Annexure C. During these meetings, the CBIRC delineated policy issues arising out of the concerns raised by the members and deliberated on the same. The deliberations of the CBIRC were informed by inputs from various stakeholders.

The CBIRC adopted the following strategy for stakeholder consultation:

- *Meetings with stakeholders:* Stakeholders were given an opportunity to give oral suggestions through formal presentation which was followed by detailed question and answer session for addressing any further clarification.
- *Written suggestions:* In addition to consultation meetings, stakeholders were also given an opportunity to provide detailed written suggestions to the CBIRC.

The CBIRC consulted relevant stakeholders which included practitioners, judges of foreign courts, stakeholders from the financial sector etc. The list of stakeholders who engaged with the CBIRC is available at Annexure D.

The deliberations of the CBIRC were also informed by the research conducted by its research team. The list of members of the research team is available at Annexure E.

2.4 Structure of the report and usage of terms

The report is divided into three main parts. This is the introductory part which sets out the context of the CBIRC and lists the issues dealt with by it.

Section 3 draws out a typology of the different kinds of cross-border proceedings that may arise, who might be the parties to such proceedings and the kinds of steps that may be taken by different parties in different kinds of proceedings and scenarios. This typology and scenario analysis set the foundation for the CBIRC to envisage the various types of issues that could arise in different kinds of cross-border proceedings.

Section 4 sets out the specific issues that were considered by the CBIRC, the different choices presented to the CBIRC for dealing with each issue and the pros and cons of each choice so presented. Each issue is dealt with in a separate sub-section. Each sub-section concludes with a summary of recommendations to guide the drafting of the consequential rules, regulations, notifications and where necessary, amendments to the IBC or other laws, such as the *Companies Act 2013* and the *LLP Act, 2008*.

A critical component of making cross-border insolvency work is the capacity of the NCLT. Section 5 contains the recommendations of this CBIRC on augmenting the capacity of the NCLT and the IBBI to deal with cross-border insolvency cases.

The annexures contain copies of the orders constituting this committee, the draft rules, regulations and notifications, as recommended in the Report, and some information on the functioning of the CBIRC.

Finally, keeping in mind the colloquial and legal usage of terms with the same meanings, some terms and expressions have been used interchangeably through the report to indicate similar concepts. For example, the NCLT is referred to as the Adjudicating Authority (the "AA") under the IBC. The terms NCLT and AA have, accordingly, been used interchangeably in this report. Similarly, the term 'IPs' has been used to denote the resolution professional, interim resolution professional or the liquidator under the IBC, as the context may require. Part Z of the *ILC Report* is the draft law intended to govern the applications made by foreign representatives for the recognition of foreign insolvency proceedings in India and other applications, such as those seeking co-operation from Indian courts, in connection with cross-border insolvency proceedings. References to "Part Z" must be read as references to "Part Z" of the *ILC Report*.

2.5 Scope of issues addressed by the Report

The *ILC Report* provided a broad principle-level statutory framework governing cross border insolvency in India. The ILC drafted a “Part Z” as a draft chapter of the IBC that would govern the conduct of cross-border insolvency proceedings under the IBC. The recommendations of the CBIRC focus on how to operationalize the provisions of Part Z through rules, regulations and notifications.

Table 3 gives an overview of the issues discussed by the CBIRC and the output of each issue. The first column describes the issue discussed, the second column sets out the provision of Part Z which pertains to it and the third column describes whether the outcome of the deliberation will be in the form of a rule or notification to be issued by the Central Government, a regulation to be issued by the IBBI or would warrant an amendment to IBC or Part Z. The third column also indicates whether the output is a rule, notification, regulation or amendment and the box summarising the CBIRC’s recommendations for drafting the same.

Table 3 Issues and form of outputs

Issue	Relevant provision of Part Z	Output
Listing the entities that will be excluded from the ambit of Part Z.	Clause 1(3)	Notification (Boxes 2 and 1)
Designating the benches of NCLT empowered to hear cross border insolvency cases	Clause 2(a)	Notification (Box 3)
Forms for enabling access and recognition by foreign representatives	Clause 7(1)	Rules (Box 15)
Avoidance actions that a foreign representative may take	Paras 15.4, 15.5 <i>ILC Report</i>	No amendments or delegated legislation required.
Indicative list of factors for assessing COMI	Clause 14(4)	Amendments to Part Z (Box 9) Rules (10)
Rules regarding reliefs	Clause 18	Rules (Boxes 12)
Manner of cooperation and communication between courts	Clause 21(1)	Notification (Box 13)
Designating an authority to facilitate transmission between NCLT or any other Indian court and the foreign courts	Clause 21(3)	No amendments or delegated legislation required.
Procedure for joint hearings in concurrent proceedings	Clause 21(2)	Notification (Box 13)
Ability of IPs to act in proceedings outside India	Clause 3	Regulation (Box 6)
Access and regulation of foreign representatives to the Indian insolvency system	Clause 8(2)	Rules (Box 4) Regulations (Box 5)
Mode of providing notice to foreign creditors	Clause 11(2)	Regulations (Box 8)

Possible suggestions for legislative amendments: The *ILC Report* also mentions that the Central Government shall study the amendments that may be needed to different laws such as the *Companies Act, 2013* and other laws. These amendments are indicated at the appropriate place in the report.

3 Typology of cross-border insolvency cases

3.1 Why create a typology?

A starting point for the cross border insolvency rules and regulations making process was the creation of a typology of the cases that are likely to have cross border insolvency implications. The typology approach has several advantages. First, it allows the various issues that need to be addressed through rules and regulations to be identified. Second, it ensures that the rules, regulations and notifications that are framed comprehensively cover the various case types envisaged. Finally, it gives clarity about the scope of actions likely to be undertaken by participants, thereby ensuring that the level of detail in the rules and regulations is such that it provides clarity to participants, without reducing commercial flexibility or adding to costs disproportionately.

The typology is used to answer three key questions:

1. What type of structures or case types are likely to trigger the cross border insolvency provisions under the Part Z? (Section 3.3)
2. Which of the four key elements of the Part Z, *viz* access, recognition, coordination and cooperation will be applicable to each case type, and in what manner? (Section 3.4)
3. How does the sequencing of domestic and foreign insolvency proceedings of a debtor matter for rules and regulations? That is, how should rules and regulations vary if foreign proceedings commence before domestic proceedings and vice versa or if both proceedings commence concurrently. (3.5)

In each section, along with the analysis of these questions, the issues that need to be addressed in respect of the cross border insolvency framework are highlighted.

3.2 Foreign assets, liabilities and operations

For the purposes of the Indian insolvency ecosystem, the possibility of cross border insolvency arises when an Indian company has foreign liabilities, assets or operations or when a foreign company has Indian liabilities, assets or operations. For assets, the term “foreign” generally indicates the presence of assets and operations in a foreign jurisdiction. For instance, cash holdings in a bank account in a foreign country, a production facility or an office in a foreign country and so on. However, foreign assets may also take intangible forms, not always be linked with physical presence or human interventions. For instance, investments in foreign securities, licenses, supply agreements and so on.

The notion of foreign operations too may or may not be linked to physical presence. For instance, operations with physical presence may include branches or

offices in foreign jurisdictions. However, even without physical presence companies may have customers or may have dues to be recovered or paid in foreign jurisdictions.

For liabilities, as long as the creditor is a foreign person, it is a foreign liability. Details such as whether it is in foreign or local currency, or contracted in the debtor's home jurisdiction or a foreign jurisdiction then become irrelevant. This logic holds for financial as well as operational liabilities.

Foreign exposure and physical presence

Foreign exposure of a firm, through assets, liabilities or operations *may not always be* through physical presence of a debtor company in a foreign jurisdiction.

The definition of "establishment" in clause 2(c) of Part Z is as follows:

"establishment" means any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services.

This definition is used to determine whether a proceeding is to be recognised as "main" or "non-main". Jurisdictions where assets, liabilities or operations are not linked to physical presence may not always be able to meet this definition of establishment. Insolvency proceedings from such jurisdictions may not get recognition under the Part Z.

The ILC deliberated on this issue with respect to some classes of debtor companies, such as internet based and e-commerce companies. It noted that:

"Bearing in mind the divergent international precedents, after much deliberations, the Committee noted that at this juncture, it may be advisable to let jurisprudence develop further before recommending any such change to the definition of "establishment" provided in the Model Law." (2.4, page 20, ILC Report)

Table 4 gives an indicative overview of the kinds of foreign liabilities and assets that may exist and that may give rise to cross border insolvency proceedings for a company.

Table 4 Indicative list of foreign assets and liabilities that Indian companies may hold

Foreign liabilities	
Foreign financial liabilities	<ul style="list-style-type: none"> • Secured or unsecured loans • External Commercial Borrowings (ECBs), Foreign Currency Convertible Bonds (FCCBs), other bonds issues by the debtor subscribed to by foreign persons • Fructified guarantees provided by the debtor to foreign persons
Foreign operational liabilities	<ul style="list-style-type: none"> • Trade payables • Wages or salaries • Secured or unsecured operational liabilities • Partly paid goods for which title transfer has not taken place
Foreign judgement creditors	<ul style="list-style-type: none"> • Financial or operational obligations arising out of foreign judgments or arbitral awards
Foreign statutory dues	<ul style="list-style-type: none"> • Compliance payments, such as social security liabilities, statutorily mandated severance contracts • Taxes and other statutory dues
Foreign assets	
Tangible assets in a foreign country	<ul style="list-style-type: none"> • Capital assets, including plant and machinery, office space and related assets and those that are work-in-progress, • Movable assets, such as inventory
Intangible assets in a foreign country	<ul style="list-style-type: none"> • Licenses • Intellectual Property Rights (IPRs) • Long term supply agreements
Loans and advances to foreign debtors	<ul style="list-style-type: none"> • Loans given to third parties, to employees, to shareholders and directors, to associates and subsidiaries
Foreign investments	<ul style="list-style-type: none"> • Investments in foreign financial assets • In subsidiaries, associate companies and Joint Ventures (JVs)
Receivables from foreign parties	<ul style="list-style-type: none"> • From customers, and other parties
Cash and cash equivalents	<ul style="list-style-type: none"> • Cash held in bank accounts in foreign countries, and petty cash in foreign operations • Investments in short dated liquid foreign securities/instruments

It is useful to note that the typology presented in this report focuses on structures where an Indian or foreign company holds foreign liabilities, assets or operations directly, and not through subsidiaries, JVs or associate companies. The treatment of foreign assets and liabilities held through subsidiaries, JVs and associates currently falls in the domain of the local insolvency laws of the jurisdictions in which these entities are incorporated. Any cross border insolvency implications for an

“enterprise group” will be addressed by the CBIRC in a separate report.

The presence of assets, liabilities or operations in multiple jurisdictions may lead to a diverse range of actions being taken by participants in a particular jurisdiction or across jurisdictions.

3.3 Structures likely to trigger cross-border insolvency provisions

3.3.1 Which companies are likely to have cross border proceedings?

For a company, foreign proceedings, stand alone or concurrent with a domestic proceeding, become more likely when there exist assets as well as liabilities in a foreign jurisdiction (Table 5).

Table 5 Likelihood of insolvency proceedings across different jurisdictions

Category	Domestic proceeding	Foreign proceeding/s	Concurrent proceeding
No foreign assets or liabilities	✓		
Foreign liabilities but no foreign assets	✓		
Foreign assets but no foreign liabilities	✓		
Foreign assets & foreign liabilities	✓	✓	✓

✓ indicates the proceeding or proceedings that will most likely get instituted.

The Table does not distinguish between main and non-main proceedings for the time being.

Assets in a foreign jurisdiction may be utilised by the creditors in that jurisdiction in two ways. These assets may be liquidated to recover the dues of the foreign creditors and to pay for the liquidation costs. Or, these assets may be used as a negotiating tool to get a better bargain in the domestic insolvency proceeding of the debtor. Their choice of actions will depend on two features of the foreign assets: (1) their importance to the debtor company insolvency process (strategic value), and (2) the value that will come from their liquidation (realisable value). A foreign asset could have only strategic value, only realisable value or a combination of both.

At a generic level, the realisation for foreign creditors in any insolvency process depends on a range of factors such as: (1) the nature of their claims, (2) the relative position of their claims in the priority of insolvency claims, and (3) the extent of realisation that the insolvency process yields. A foreign insolvency proceeding can benefit foreign creditors both by: improving the priority of their claims *vis-a-vis* what they would have had in a domestic insolvency proceeding, and allowing them to corner the realisation from assets in their jurisdiction towards their claims first.

The incentives of foreign creditors to initiate foreign proceedings will, hence, be driven by the size of the gap G , where G is defined as:

$$G_i = (L_i + C_i) - A_i$$

where,

i : a foreign jurisdiction

L_i : liabilities in jurisdiction i ;

C_i : insolvency process costs in jurisdiction i ; and

A_i : assets in jurisdiction i .

The lower the value of G_i , the higher the possibility of an insolvency proceeding in jurisdiction i . If a debtor company has multiple jurisdictions where G is low, it can expect multiple foreign insolvency proceedings.

This is not to say that other factors do not impact the initiation of insolvency proceedings in foreign jurisdictions. The bankruptcy literature shows that besides the location of assets and the priority of claims rules in a jurisdiction, more generic factors such as the overall efficiency and predictability of the insolvency process and courts in a jurisdiction also matter. For example, if foreign creditors know that the insolvency framework in their jurisdiction is time consuming, costly or unpredictable, they may not start an insolvency proceeding there, even if there are realisable assets. They may prefer to participate in the domestic insolvency proceeding of the debtor, if it is more time and cost efficient and predictable.

The choice of insolvency jurisdiction may also depend on other factors such as the nature and sophistication of creditors as well as the bias in insolvency regimes towards some types of creditors. For instance, operational creditors such as employees may file for the insolvency of their employer in their local jurisdiction, even if no assets of the employer exist to cover their claims. However, the same may not hold for financial creditors or large operational creditors who may act more strategically in initiating insolvency proceedings. Similarly, most jurisdictions have classified some types of claims as “super priority”. Typically, these include workmen and employees dues, pass through claims¹, and statutory claims². Creditors of super priority claims may be incentivised to initiate insolvency proceeding in their jurisdiction, especially if their status as super priority creditors does not hold in the debtor’s domestic jurisdiction.

¹Pass through claims are those that a firm collects from other parties on behalf of the state, and then passes on to the state. In the Indian context, these include Tax Deduction at Source (TDS) from employees, indirect taxes collected from customers and so on.

²Depending on jurisdiction statutory claims may include taxes, compliance related claims, statutory contributions to reserves and so on.

In this context, it is also useful to envisage the types of assets and liabilities that may exist in various foreign jurisdictions and their purpose in cross border insolvency proceedings (Table 4). For instance, the presence of unencumbered and relatively liquid assets, such as investments in securities, cash in bank and so on, may create incentives for foreign creditors to lay claim on those assets in foreign proceedings. Claims on encumbered physical assets, which are difficult to utilise for the purpose of making recoveries, may serve more as a negotiating tool to get a better recovery in domestic proceedings. Similarly, the actions of institutional and sophisticated creditors in seeking to start foreign proceedings may vary widely from those of non-institutional creditors. The former may make an active choice of the jurisdiction that favour their outcome, while the latter may act, based on convenience.

Creditors are most likely to choose the jurisdiction which maximises their benefits while minimising their explicit costs and procedural frictions. This suggests that multi-jurisdictional insolvency actions are most likely in one or more circumstances where: (1) companies have foreign assets as well as foreign liabilities, (2) the jurisdictions where foreign assets and liabilities are located have insolvency laws that are reasonably efficient, in terms of time, costs and certainty of process and outcome, and (3) there exist rules of priority that favour certain classes of creditors who are otherwise disadvantaged in domestic proceedings.

3.3.2 Typology of cross border insolvency cases

Based on the discussion in Section 3.3, Table 6 maps the case types that the Indian cross border insolvency framework needs to address.

For each of the case types for an Indian company, the underlying factor triggering cross border insolvency provisions will be the presence of foreign assets, foreign liabilities or both. For a foreign company, it will be the presence of Indian assets, Indian liabilities or both.

Table 6 Typology of cross border cases relevant for the Indian insolvency ecosystem

Debtor company	Case types
Indian company	<ol style="list-style-type: none"> 1. Indian proceeding (under IBC), 2. Only foreign proceedings, one or many, 3. Concurrent proceedings <i>i.e.</i> Indian proceeding + one or more foreign proceedings
Foreign company	<ol style="list-style-type: none"> 1. Domestic proceedings in the debtor company’s home jurisdiction, 2. Indian proceeding, 3. Foreign proceeding in a jurisdiction outside India and outside the home jurisdiction of the debtor company, and 4. Concurrent proceeding, <i>i.e.</i> Indian proceedings + domestic proceeding or one or more foreign proceedings

The framework for Indian proceedings of a foreign company

Currently, the IBC does not cover foreign companies. For foreign companies, provisions for winding up are laid down in the *Companies Act 2013*. This creates a dual regime where Part Z of the IBC covers foreign companies in respect of cross border issues but the underlying process for insolvency resolution is winding up under the provisions of the *Companies Act 2013*.

The ILC deliberated on this issue and recommended that:

“Accordingly, the Committee recommended that presently it may be advisable to extend applicability of the draft Part Z to corporate debtors only. However, for the purposes of Part Z, the definition of “corporate debtor” should include foreign companies. This will ensure that creditors and insolvency professionals of companies registered outside India can approach the Adjudicating Authority for cooperation or recognition of foreign proceedings to avail relief in India.” (1.2, page 16)

Further,

“The Committee noted that once cross-border insolvency provisions are introduced under the Code, this will in effect result in a dual regime for insolvency of foreign companies. The Committee was of the opinion that the Ministry of Corporate Affairs may undertake a study of such provisions of the 2013 Act and analyse the efficacy of retaining them. The Committee also discussed that since the intention of the Code is to bring together all insolvency proceedings under a common legislation, matters pending under such provisions of the 2013 Act, if any, may be transferred for adjudication under the Code and overlapping provisions may be dispensed with.” (1.3, page 16 – 17)

The CBIRC considered the issue of which insolvency framework should apply to foreign companies' Indian proceedings. Its deliberations in this regard are presented in Section 4.1.1.

The CBIRC recommends that the provisions of Part II of the IBC be made applicable to foreign companies.

3.4 Applicability of the key elements of the Part Z to case types

3.4.1 From cross border case types to cross border actions

For every case type of an Indian or a foreign company, there will be a wide range of cross border insolvency actions that arise. For instance: for an Indian company with foreign assets, even if there is only an IBC proceeding, the IP will have to take actions to take control of the foreign assets and include them in the domestic insolvency proceeding. Similarly, if a foreign proceeding in respect of an Indian company starts, the foreign representative may have to approach the Indian insolvency ecosystem for a variety of reasons, such as getting information about the debtor, getting title records of foreign assets, protecting foreign assets from adverse actions and so on. The widest range of actions may arise in concurrent proceedings, where in addition to the need to manage the proceeding in their respective jurisdictions, the Indian and foreign representatives may also have to cooperate with each other, and coordinate the two proceedings.

3.4.2 The four key elements of the Part Z

Part Z of the *ILC Report* recommends the adoption of the four key elements of the *UNCITRAL Model Law on Cross-Border Insolvency*, with some necessary modifications. These elements are:

1. **Access:** The *UNCITRAL Model Law on Cross-Border Insolvency* allows foreign representatives and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor. Direct access to foreign creditors for insolvency proceedings of Indian companies under IBC is already permitted. Similarly, direct access of foreign creditors to winding up proceedings of foreign debtor companies under the *Companies Act 2013* is also already permitted.

From the perspective of this report, the question of access is hence limited to the access of a foreign representative to Indian proceedings and access of IPs under the IBC to foreign proceedings.

2. **Recognition:** The *UNCITRAL Model Law on Cross-Border Insolvency* allows recognition of foreign insolvency proceedings by a domestic court. It also

allows reliefs to be granted consequent to such recognition. The court may recognise a proceeding as main or non-main.³ Reliefs are allowed to be granted irrespective of whether the proceeding is main or non-main. Upon recognition of a main proceeding, certain reliefs, such as a moratorium on sale or transfer of assets, are required to be granted whereas these may be at the discretion of the court for non-main proceedings.

3. **Cooperation:** The *UNCITRAL Model Law on Cross-Border Insolvency* lays down the basic framework for cooperation between domestic and foreign courts, domestic and foreign insolvency professionals, and courts and domestic or foreign IPs.

Part Z adopts the principle of direct cooperation between: (1) the insolvency courts (domestic or foreign), (2) between courts and insolvency professionals or foreign representatives, and (3) between domestic and foreign insolvency representatives. However, it proposes that cooperation between domestic and foreign courts be subject to Central Government guidelines.

Notably, Part Z also allows for cooperation in respect of foreign proceedings which have not sought recognition.

4. **Coordination:** The *UNCITRAL Model Law on Cross-Border Insolvency* provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts. The principle of coordination between proceedings has been adopted in the Part Z.

3.4.3 Scenario analysis: how access, recognition, cooperation and coordination apply to case types?

The second step in our analysis is to examine the applicability of each of the four principles in Part Z to the various case types laid down in Table 6. This enables us to visualise the range of cross border actions that are likely to arise.

Table 7 shows the applicability of the four elements of Part Z to the various case types for an Indian company with foreign assets and /or liabilities.

³Based on where the court finds the COMI of the debtor to be. The main proceeding is viewed as the overall insolvency proceeding of a debtor company, whereas a non-main proceeding is limited to the assets and liabilities of the debtor that are present in the jurisdiction of the non-main proceeding.

Table 7 Applicability of Part Z principles to Indian company with foreign assets and liabilities

Case type	FA/FL ¹	Recognition	Access	Cooperation	Coordination
Only Indian proceeding (IBC)	Both FA and FL exist	Of IBC proceeding by foreign court (as main)	For Indian IP to the foreign jurisdiction	Between: (1) NCLT and foreign court, and (2) foreign court and Indian IP	-
	Only FA exist, no FL	Of IBC proceeding by foreign court (as main)	For Indian IP to the foreign jurisdiction	Between: (1) NCLT and foreign court, and (2) foreign court and Indian IP	-
	Only FL exist, no FA	-	-	Between: (1) Foreign court and Indian IP	-
Only foreign proceeding	FA and / or FL exist	Of foreign proceeding by NCLT (as main or non-main)	(1) For foreign representative to India (2) For Indian creditors to the foreign proceeding	Between: (1) NCLT and foreign court, and (2) NCLT and foreign representative	-
Concurrent proceedings (Indian + Foreign)	FA and / or FL exist	(1) Of Indian proceeding offshore, and (2) Of foreign proceeding in India (decision on which is main)	(1) For Indian RP to foreign jurisdiction, (2) For foreign representative to India, and (3) For Indian creditors to the foreign proceeding	Between: (1) NCLT and foreign court, (2) foreign court and Indian IP, (3) NCLT and foreign representative, and (4) Indian IP and foreign representative	Between Indian and foreign proceedings

¹FA: Foreign Assets; FL: Foreign Liabilities

Table 8 does the same for a foreign company with Indian assets and / or liabilities.

Table 8 Applicability of Part Z principles to Foreign company with Indian assets and liabilities

Case type	IA/IL ¹	Recognition	Access	Cooperation	Coordination
Only domestic proceeding (in home jurisdiction)	Both IA and IL exist	Of domestic proceeding by NCLT (as main)	(1) For foreign representative to India, and (2) For Indian creditors to the domestic proceeding	Between: (1) NCLT and foreign court, and (2) NCLT and foreign representative	-
	Only IA exist, no IL	Of domestic proceeding by NCLT (as main)	For foreign representative to India	Between: (1) NCLT and foreign court, and (2) NCLT and foreign representative	-
	Only IL exist, no IA	-	For Indian creditors to the domestic proceeding	-	-
Only foreign proceeding	Both IA and IL exist	Of foreign proceeding by NCLT (as main or non-main)	(1) For foreign representative to India, and (2) For Indian creditors to the foreign proceeding	Between: (1) NCLT and foreign court, and (2) NCLT and foreign representative	-
	Only IA exist, no IL	Of foreign proceeding by NCLT (as main or non-main)	For foreign representative to India	Between: (1) NCLT and foreign court, and (2) NCLT and foreign representative	-
	Only IL exist, no IA	-	For Indian creditors to the foreign proceeding	-	-
Concurrent proceedings (Indian + Domestic or Foreign)	IA and / or IL exist	(1) Of Indian proceeding in domestic/foreign jurisdiction, and (2) Of domestic/foreign proceeding in India (decision on which is main)	(1) For Indian IP to foreign jurisdiction, (2) For foreign representative to India, and (3) For Indian creditors to the domestic/foreign proceeding	Between: (1) NCLT and foreign court, (2) foreign court and Indian IP, (3) NCLT and foreign representative, and (4) Indian IP and foreign representative	Between Indian and domestic/foreign proceeding

¹IA: Indian Assets; IL: Indian Liabilities

Typology of cross border actions

From the mapping in Tables 7 and 8, we are able to see the nature of cross border actions that are likely to arise for the various case types for Indian and foreign companies. These are:

- The recognition of Indian proceedings by foreign courts,
- The recognition of foreign proceedings by AA in India,
- The AA in India, the NCLT, designating a proceeding as “main” or “non-main”,
- Grant of access to foreign representative to act in respect of foreign proceedings and to participate in proceedings in India
- Grant of access to Indian IPs to act in respect of Indian proceedings and to participate in proceedings in foreign jurisdictions.

- Grant of access to Indian creditors in respect of foreign proceedings. While the IBC allows foreign creditors access to Indian insolvency proceedings, the same may not be automatically available to Indian creditors in foreign proceedings,
- Cooperation between:
 - foreign court and NCLT,
 - NCLT and foreign representative,
 - foreign court and Indian IPs. This is likely to be largely driven by foreign courts, and
 - Indian IP and foreign representative
- Coordination between domestic and foreign proceedings for an Indian company,
- Coordination between: (1) domestic and Indian proceeding, and (2) Indian proceeding and another foreign proceeding for a foreign company.

For each of these actions, to provide clarity to participants, the following procedural details are required:

- The modalities of initiating the actions, namely:
 - Forum for initiation,
 - Form and manner of initiation,
 - Fees,
 - Eligibility,
 - Disclosure requirements,
 - Documents required,
 - Timelines,
 - Consequential actions
- Ongoing process:
 - Actions,
 - Disclosure requirements,
 - Compliance requirements,
 - Oversight,
 - Investigations into frauds or misdemeanours,
 - Enforcement actions,
 - Timelines
- Termination:
 - Termination on completion,
 - Early termination,
 - Disclosure requirements for termination,
 - Compliance requirements,
 - Timelines

3.5 Does sequencing matter for concurrent proceedings?

In the domain of concurrent proceedings, it is highly likely that the issue of sequencing will arise. For instance, a foreign proceeding may commence before IBC Corporate Insolvency Resolution Process (CIRP) for an Indian company, or a foreign liquidation proceeding may commence just as the CIRP is nearing its completion.

Part Z has already adopted the Model Law provisions that ensure that the existence of a domestic or a foreign proceeding does not: (1) affect the right to undertake individual actions or proceedings necessary to preserve claims against the corporate debtor, and (2) affect the right to commence domestic or foreign insolvency proceedings subsequently. Further, the use of cooperation and coordination mechanisms will ensure that many of the challenges that may arise due to sequencing get resolved, to the extent possible.

However, even with this, two sequencing related issues still remain to be addressed. The first is: which bench of the NCLT will hear cross border matters for an Indian company, and for a foreign company? This is critical to ensure that the domestic and foreign insolvency proceedings of a debtor company are dealt with in a cohesive manner, and effective cooperation and coordination takes place.

The second is the determination of COMI of the company and the recognition of COMI proceeding as “main”, and all other proceedings as “non-main”. This is because, in Part Z, as in the Model Law, “main” proceedings are deemed as the primary insolvency proceeding of the debtor, while “non-main” proceedings have a limited scope.

Two questions are relevant for COMI determination:

- Which factors should the NCLT take into consideration in determining the COMI of the debtor company? and
- What should be the effective date for COMI determination and for designation of a proceeding as “main”? Should it be from the date the proceeding commences OR from the date application for its recognition is made under Part Z?

Sequencing issues: which NCLT bench?

The ILC recommends that benches of the NCLT may be notified by the Central Government to act as the AA for cross border matters.

The CBIRC deliberations in this regard are presented in Section 4.2. The CBIRC recommends that:

- For an Indian company, the NCLT bench that has territorial jurisdiction over the company, also be the bench that hears cross border in-

solvency matters for that company.

- For foreign companies, the Principal Bench of the NCLT be notified as the designated bench for cross border insolvency matters.

Sequencing issues: COMI determination

The CBIRC deliberations in regard to COMI are presented in Section 4.6. The CBIRC recommends that:

- While determining the corporate debtor's COMI, to rebut the presumption of registered office, the NCLT shall assess where the corporate debtor's central administration takes place and that is readily ascertainable to third parties. In making such an assessment, the NCLT shall also consider other relevant factors as prescribed in the rules by the Central Government.

The insolvency proceeding in the jurisdiction where COMI is determined is designated as "main", and all other proceedings where the debtor has an establishment designated as "non-main".

- The effective date for COMI determination for a proceeding should be the *date of commencement*.

There may be some variation across jurisdictions on what is considered the *date of commencement* of proceeding. So, whichever date the local law considers as the *date of commencement* should be accepted by the AA.

4 Issues arising in cross-border insolvency cases

In this section, we set out the issues and questions that may arise in all the different types of cross-border insolvency cases described in Section 3 of the report.

4.1 Applicability of the cross-border insolvency framework

The ILC considered the question of applicability of Part Z at three different levels:

- 1. Kind of debtor :** They envisaged that Part Z should apply only to corporate debtors, as the provisions of the IBC pertaining to individuals and partnership firms had not been notified, except in the context of individuals who are personal guarantors for corporate debtors.
- 2. Place of incorporation :** Part Z would apply to all entities incorporated with limited liability in India and in any foreign country. This would include domestic as well as foreign companies and LLPs.
- 3. Kind of business:** The ILC recommended that certain businesses may be exempted from the applicability of the cross-border insolvency framework. The businesses which may be so exempted are those whose resolution is governed by a special law or whose insolvency “gives rise to a need to protect vital interests of a large number of individuals”.⁴ Clause 1(3) of Part Z empowers the Central Government to notify the class or classes of corporate debtors or entities to whom the provisions of Part Z shall not apply.

The discussions of the CBIRC on the aspects described in items 2 and 3 are summarised below.

4.1.1 Applicability of the IBC to a foreign company

The ILC had explicitly clarified that no provision of the IBC, other than those of Part Z, would be applicable to foreign companies.⁵ The ILC also recommended that the MCA should consider whether foreign companies would be covered in the definition of unregistered companies. If so, should the provisions in the *Companies Act 2013* pertaining to the winding up of unregistered companies for the failure to pay their debts be subsumed under the provisions of the IBC.⁶

The IBC does not define a foreign company, and restricts the definition of a corporate debtor to companies incorporated under the *Companies Act 2013*. However, words and expressions not defined in the IBC take their meaning from, among

⁴See paragraph 1.4 of the Insolvency Law Committee 2018

⁵See paragraph 1.2 of the Insolvency Law Committee 2018 and sub-clause 2 of clause 1 of Part Z

⁶See paragraph 1.3 of the *ILC Report*.

other laws, the *Companies Act 2013*. The *Companies Act 2013* defines a foreign company as: “any company or body corporate incorporated outside India which—

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.”

Section 2 of the IBC provides that the IBC applies to companies, statutory corporations, LLPs and partnership firms and individuals. A plain reading of the IBC indicates that unless the provisions of the IBC are amended, the insolvency and bankruptcy of foreign companies and foreign LLPs will not be governed by the IBC. As explained above, not covering foreign companies under the provisions of the IBC creates three anomalies:

1. While Indian companies having an establishment in foreign countries may be proceeded against under the insolvency laws of such countries, foreign companies with outstanding debt or assets in India cannot be proceeded under the provisions of the IBC.
2. The domestic law in India might allow proceedings (such as winding-up) pursuant to the insolvency of entities, such as limited liability partnerships registered or incorporated outside India. However, such entities and their creditors will not be able to avail of the benefits of Part Z, such as the benefit of a moratorium or other discretionary reliefs envisaged under Part Z, when undergoing insolvency under such domestic law.
3. After the recognition of foreign proceedings in respect of a foreign company under Part Z, domestic creditors of such a company would not be able to initiate winding up proceedings under Companies Act, 2013, if the AA also declares a moratorium as part of the recognition proceedings. A moratorium under Part Z does not pre-empt the initiation of IBC proceedings in respect of the debtor.⁷ Therefore, unless such foreign companies were brought within the ambit of the IBC, domestic creditors of such companies may be at a disadvantageous position with respect to their claims against such foreign companies.

To address the anomalies described above and in line with the original intention of consolidating all insolvency laws into one legislation, the CBIRC recommends that the provisions of the IBC must be made applicable to foreign companies and foreign LLPs, with appropriate modifications as described in Box 1.

On a perusal of the domestic provisions relating to winding up of such entities, it was noted that these provisions are significantly different from the provisions of Part II of the IBC. Therefore, the CBIRC recommends that the Central Govern-

⁷Clause 17(4) of Part Z

ment could consider commissioning a study of the manner in which domestic insolvency of foreign companies and foreign LLPs may be integrated in the IBC. This might also entail amendments to the provisions of Part II of the IBC, regulations governing the insolvency resolution process under the IBC and appropriate provisions of the *Companies Act 2013* and the *LLP Act, 2008*.

4.1.2 Applicability of Part Z to certain businesses

Clause 1(2) of Part Z provides that the provisions of Part Z will apply to all corporate debtors to whom the provisions of the IBC apply.

The CBIRC noted that several jurisdictions have exempted certain kinds of businesses from the purview of the cross-border provisions in their respective insolvency laws. Two sets of businesses are generally exempted from the applicability of cross-border insolvency provisions:

1. Certain types of financial services: Several countries exempt businesses providing critical financial services, such as banks and insurance companies, from the provisions of cross-border insolvency frameworks.

In this context, the CBIRC noted that unless notified otherwise, all corporate debtors covered under the definition of a corporate debtor under the IBC would be governed by Part Z.

Section 227 of the IBC empowers the Central Government to notify FSPs or categories of FSPs whose insolvency and liquidation will be governed by the provisions of the IBC. In exercise of these powers, the Central Government has issued the *FSP Insolvency Rules 2019* which govern the insolvency and resolution process of notified FSPs. Currently, only systemically important non-banking financial companies (NBFCs) (including housing finance companies) have been notified under these rules.⁸

2. Critical infrastructure or utilities: Several countries exempt companies providing critical utility or infrastructure services, such as electricity, water or railways, from the purview of their cross-border insolvency framework. Such entities are often subject to a special insolvency law in such jurisdictions. However, in India, such entities continue to be governed by the IBC if they qualify as 'corporate debtors' under section 3(7) read with section 3(8) of the IBC.

The CBIRC noted the general approach of not including FSPs under the purview of the IBC, unless otherwise notified by the Central Government. It also noted that there were no specific provisions excluding the applicability of the IBC to critical infrastructure or utility companies. Keeping this in mind, the CBIRC rec-

⁸Notification on applicability of IBC to NBFCs 2019

ommends the adoption of the same approach on the applicability of Part Z to FSPs and companies providing critical infrastructure and utility services.

Recommendations

Box 1 summarises the recommendations of the CBIRC on the applicability of the IBC to foreign companies.

Box 1 Recommendations on the applicability of the IBC to foreign companies and foreign LLPs

1. The provisions of the IBC will be applicable to entities:
 - (a) incorporated with limited liability under the laws of a foreign country; and
 - (b) having an establishment, as defined in Part Z, in India.
2. The MCA and the IBBI must evaluate the provisions of the IBC and the *Companies Act* 2013 which need to be amended, and the consequential delegation, if any, which might need to be issued, for giving effect to the abovementioned recommendation.

Box 2 summarises the recommendations of the CBIRC on the applicability of Part Z to FSPs and other corporate debtors.

Box 2 Recommendations on the applicability of Part Z to FSPs

The CBIRC recommends that unless otherwise notified by the Central Government, the provisions of Part Z must not be made applicable to FSPs, which are notified by the Central Government under section 227 of the IBC.

4.2 Designated benches for the adjudication of cross-border insolvency cases

The ILC had recommended that some benches of the NCLT may be notified for the purpose of adjudication of cross-border insolvency cases.⁹

The CBIRC was of the view that it would not be optimal to designate any particular bench/benches of the NCLT to deal with cross border matters for the following reasons:

Capacity considerations : The adjudication of cross border insolvency issues is not any more complex than the overall complexity involved in domestic insolvency cases, and it would be desirable for all the benches of the NCLT to develop and augment expertise to handle such matters.

Further, developing bench specific expertise in cross-border matters might not be efficient as members may be transferred from bench to bench.

Hence, the CBIRC expressed the view that all the benches of the NCLT should be equally empowered to deal with cross border issues.

Complications in case management : Designating specific benches for cross-border matters would lead to complications in the management of cases with cross-border implications. Designating specific benches of the NCLT for cross-border insolvency proceedings would imply the mid-way transfer of concurrent local IBC proceedings, should cross-border proceedings arise in such proceedings. It would disrupt the existing rule on vesting jurisdiction in the bench of the NCLT having territorial jurisdiction in the location of the corporate debtor's registered office.

The CBIRC recommends that all the benches of the NCLT should be vested with the jurisdiction to deal with applications under Part Z in respect of corporate debtors whose registered office is located within their territorial jurisdiction. Thus, all cases in respect of Indian companies under the IBC, including the cross-border proceedings arising in such cases, will continue to be dealt with at the bench having jurisdiction as per the registered office-based jurisdiction rule under the IBC. However, cases pertaining to 'foreign companies' could be dealt with by a designated bench. In such cases, the designated bench would be the Principal Bench of the NCLT on the same analogy as Indian owned foreign companies are required to register themselves with the Registrar of Companies (RoC) in New Delhi.¹⁰

⁹Part Z defines an "Adjudicating Authority" as "benches of the National Company Law Tribunal, as notified by the Central Government in the manner provided in Clause 29 of this Part, to perform functions relating to recognition of foreign proceedings and cooperation with foreign courts and foreign representatives under this Part."

¹⁰Chapter XXII of the *Companies Act 2013* and Rule 8 of the *Companies (Registration of Foreign Companies) Rules, 2014*.

An illustration of the recommended approach is as follows. Suppose the corporate debtor is X. A domestic IBC case in respect of X will proceed entirely at the bench having jurisdiction at the location of the registered office of X. An application under Part Z for the recognition of a foreign insolvency proceeding in respect of X, will also be filed at the same bench.

Suppose X were a foreign company with operations in India. An application for the recognition of foreign insolvency proceedings in respect of X would be filed at the designated bench.

The advantage of this approach is that there is utmost certainty about the place at which the *entire* insolvency proceeding in respect of an Indian company and a foreign company in India, will take place. Further, it does not disrupt the existing registered office based jurisdiction rule and does not overburden one single bench with all potential IBC cases with cross-border implications. However, this implies that the infrastructure, training and technical capacity of the NCLT will require to be augmented across all benches to enable the members to deal with applications under Part Z.

Recommendations

Box 3 summarises the recommendation of the CBIRC with respect to the notification to be issued by the Central Government notifying designated benches of the NCLT for the adjudication of applications made under Part Z.¹¹

Box 3 Recommendation on the notification of designated benches

The Central Government must issue a notification to the following effect:
“For the purpose of Part Z:

1. The Adjudication Authority, in respect of corporate persons incorporated under an Indian law, shall be a bench of the NCLT having jurisdiction under the provisions of Section 60 of the IBC.
2. The Adjudicating Authority, in respect of a corporate debtor incorporated under the laws of a foreign country, shall be the Principal Bench of the NCLT.”

¹¹Clause 2(a) of Part Z.

4.3 Framework for access to and regulation of foreign representatives

The CBIRC deliberated the issue of access by foreign representatives to the Indian insolvency eco-system from two perspectives, namely, the extent of access and the extent of regulation for allowing access. The discussions and recommendations of the CBIRC on these issues are summarised below.

4.3.1 Access

The *UNCITRAL Model Law on Cross-Border Insolvency* allows foreign representatives to directly access the foreign insolvency eco-system in which they seek to apply for recognition or co-operation, including appearing before courts and applying for discretionary reliefs, attending the meetings of creditors and requiring the debtor to share information.

The ILC made the following observation with respect to allowing foreign representatives to access the insolvency system in India:

“The Committee was of the opinion that it may be desirable to adopt a conservative approach in providing access to foreign representatives till the development of infrastructure regarding cross-border insolvency in India. It was also noted that a possible option may be to allow foreign representatives access to courts, and exercise of their powers under the draft Part Z, through domestic insolvency representatives. However, the Committee deemed it appropriate for the Central Government to provide the extent of the right to access, in this regard, through subordinate legislation.”¹²

The right of an insolvency representative to access the foreign court directly is critical to preserve costs and save time in cross-border insolvency cases. The CBIRC reviewed the legal regimes of 15 jurisdictions that have adopted the *UNCITRAL Model Law on Cross-Border Insolvency*, and found that they do not impose rule-based qualifications for the right of foreign representatives to access local courts in a foreign jurisdiction. This is also true in jurisdictions which restrict foreign lawyers from practising, such as Bahrain and South Africa.¹³ Even jurisdictions such as Hong Kong that have not adopted *UNCITRAL Model Law on Cross-Border Insolvency* allow access to foreign liquidators.¹⁴

The CBIRC noted that in several jurisdictions, it was routine for foreign represen-

¹²See paragraph 5.4 of the Insolvency Law Committee 2018.

¹³For South Africa, see section 24 of the Legal Practice Act, 2014. For Bahrain, see https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Bahrain.aspx

¹⁴See *Joint Official Liquidators of A Co. v. B & C*, (2014) 5 HKC 152.

tatives to rely on local practitioners to understand the local insolvency framework and safeguard the value of the debtor's estate. Equally, judges in any jurisdiction would not be familiar with cross-border cases, and would call on the assistance of foreign representatives, generally through their legal counsel.¹⁵ At the national level also, IPs are encouraged to rely on the advice and expertise of local counsel. For example, the UK Insolvency Service's Case Help Manual notes that official receivers (who are UK government officials) may rely on the advice and representation by local counsel in the jurisdiction where they file for the recognition of a UK proceeding.¹⁶ Thus, it is clear that in matters of cross-border insolvency, there are mutual synergies between all the participants involved in the proceeding, namely, foreign representatives, local IPs, lawyers and local judges. The CBIRC recognised the need to optimise the co-operation required of foreign representatives, local IPs and judges, and reduce the costs associated with it. Specifically with respect to appearing before the NCLT, the CBIRC noted that the *Companies Act* does not impose any legal barriers disallowing a foreign representative to appear before NCLT.

The CBIRC recommends that foreign representatives must be given access to the insolvency system and infrastructure, including appearing before the NCLT, in India for the purpose of cross-border insolvency cases.

In the context of access, a question arose as to whether foreign representatives who are not regulated by a professional regulator in their home jurisdiction would be entitled to the same level of access as regulated foreign representatives. This question would specifically arise in two types of cases. First, where the foreign representative is from a jurisdiction that follows the debtor in possession model under its insolvency law. Second, where the foreign representative is a court-appointed officer such as an official liquidator in the home jurisdiction. The CBIRC noted that the *UNCITRAL Model Law on Cross-Border Insolvency* does not distinguish between regulated and unregulated foreign representatives for the purpose of access.

The CBIRC decided that no distinction should be made for the purpose of access between foreign representatives regulated by professional regulators and those who are not so regulated.

4.3.2 Regulation

There was considerable debate among the CBIRC members on the extent and manner of regulation of foreign representatives who access the Indian insolvency eco-system in India. The issues discussed by the CBIRC can be categorized into

¹⁵United Nations Commission on International Trade Law 2012.

¹⁶See <https://www.insolvencydirect.bis.gov.uk/TechnicalManual/Ch37-48/chapter43/Chapter%2043-0/Part%205/Part%205.htm#43.0.45>

four sets of questions:

Whether foreign representatives who access the Indian insolvency eco-system should be regulated?

The CBIRC noted that while several jurisdictions had made the policy choice of not regulating foreign representatives, this was a moot question for India to a large extent, as the *ILC Report* recommends the regulation of the foreign representatives by the IBBI as well as the Central Government. It also envisaged that an authorisation system for foreign representatives with the IBBI could be implemented, if the Central Government, in consultation with the IBBI, deemed fit.¹⁷

Accordingly, clause 7 of the Part Z requires:

1. the Central Government to frame the rules governing the access of the foreign representative to the AA and exercise of his powers and functions under Part Z; and
2. the IBBI to specify a code of conduct for foreign representative who so access.

What is the manner and extent of regulation of foreign representatives?

There are three primary objectives of regulating foreign representatives who access the Indian insolvency eco-system:

1. transparent and honest representation to the local creditors about critical matters, such as the state of affairs of the debtor, the realisation value of the debtor's assets in the foreign jurisdiction, material developments in the foreign insolvency proceeding and to bring value destroying transactions to the notice of the foreign representative;
2. objective and honest assistance and support to the court in dealing with the cross-border insolvency proceeding; and
3. the overall protection of the estate of the debtor and the interests of all creditors, without undue preference or partiality to any of them.

The regulatory framework for foreign representatives would require to achieve the abovementioned objectives. Measures would need to be built in to ensure effective enforcement against foreign representatives who violate it. At the same time, it is critical to not lose sight of the overarching objective of the *UNCITRAL Model Law on Cross-Border Insolvency*, which is to bring about efficiency and reduce the costs associated with resolving cross-border insolvencies.

The CBIRC recommends that a principle based light-touch code of conduct that addresses the objectives described above should be applied to foreign representatives acting in proceedings under Part Z. Most provisions of the Code of Conduct

¹⁷Paragraph 6 of the Insolvency Law Committee 2018.

in the First Schedule of the *IP Regulations 2016* could be applied *mutatis mutandis* to foreign representatives (Box 5).

Who will enforce conduct and other rules against foreign representatives who access the Indian insolvency system?

The CBIRC considered that conduct related rules could be made and enforced through the AA (as is done in the UK and the US) or could be done by the IBBI in exercise of its disciplinary powers. A cross-country analysis revealed that the enforcement of the general principles of good conduct in insolvency matters is routed through the courts, and not the regulator of insolvency professionals. For example, the United Kingdom specifically empowered the insolvency court to examine misfeasance caused by foreign representatives, at the instance of an interested person.¹⁸ To invoke these powers, the applicant would require demonstrating that the foreign representative has misapplied or retained money or other property of the debtor; has breached a fiduciary or other duty in relation to the debtor; or has been guilty of misfeasance. In the United States, on the other hand, there are no specific regulations in the chapter concerning foreign representatives, and courts have used various methods to ensure compliance by the foreign representative. Courts placed reliance on the definition of misconduct in domestic insolvency law (i.e. *U.S. Code: Title 11 - Bankruptcy*) or the general principles to decide on action against foreign representatives.¹⁹

Having considered all the options before it and bearing in mind the recommendations of the ILC, the CBIRC decided that the IBBI should be able to enforce against a foreign representative for any misconduct in the conduct of the cross-border insolvency in India.

To allow the IBBI to enforce its conduct regulations, the CBIRC built on the ILC's recommendation of a robust registration system with the IBBI. The IBBI will put in place a near automatic system for the authorisation of foreign representatives who act in cross-border insolvency cases in India.

The key features of this system are summarised below:

1. The IBBI will authorise a foreign representative at the level of the proceeding, and such authorisation would be valid only for the purpose of acting in the cross-border insolvency proceeding in the context of which such authorisation is granted.
2. The system for granting authorisation will follow a deemed authorisation model. Under this model, unless the IBBI rejects the application for authorisation within ten days of the application having been made, the foreign

¹⁸Schedule 2, para 29 of the *UK Cross-Border Insolvency Regulations*.

¹⁹Also see Gordon 2019 on the general lack of clarity and consistency across several jurisdictions on the manner in which foreign representatives may be sanctioned for misconduct.

representative is deemed to have been authorised for the purpose of the proceeding in which she seeks authorisation.

3. The IBBI may reject the application for authorisation on the ground that the foreign representative has been previously found guilty of misconduct in a disciplinary proceeding conducted by the IBBI or that there is a pending disciplinary proceeding before the IBBI in respect of such foreign representative at the time such authorisation is sought.
4. The rejection of the authorisation application by the IBBI will not affect the proceeding under Part Z which is sought to be recognised. The IBBI will convey its rejection decision to the foreign representative and the NCLT. The NCLT would then take appropriate measures, including requiring the replacement of foreign representative, for the purpose of the proceeding.
5. The authorisation requirements must be minimalistic and the foreign representative may apply for authorisation either simultaneously with applying to the NCLT under Part Z or immediately thereafter. In other words, the authorisation of the foreign representative by the IBBI must not be a pre-condition for initiating cross border insolvency proceedings before the NCLT.

On the specific contents of the application form for authorisation, the CBIRC noted that since most other countries that have adopted the *UNCITRAL Model Law on Cross-Border Insolvency* do not require separate registration of the foreign representative with an insolvency regulator or the government, there is no standard precedent or template that the CBIRC could rely upon for this purpose. The application for authorisation must be minimalistic and require the foreign representative to furnish minimum information pertaining to the proceeding in which the foreign representative seeks to act in India (Box 5).

Certain consequential changes would require to be made to the provisions of the IBC to implement the authorization and oversight framework proposed in this section of the Report. These include amendments to section 196 (powers and functions of the IBBI), section 239 (rule making powers of the Central Government), section 240 (regulation making power of the IBBI) and Chapter VI of Part IV (inspection and investigation powers of the IBBI). The CBIRC suggests that the MCA must take note of these changes, as they are not explicitly provided for in Part Z.

Recommendations

Box 4 summarises the CBIRC's recommendations on the Central Government's rules governing the access of foreign representatives to the Indian insolvency system and the manner in which foreign representatives may exercise their powers

and perform their functions under Part Z.²⁰

Box 4 Recommendations on the rules governing access by foreign representatives to the Indian insolvency eco-system

The Central Government's rules governing access by foreign representatives to the Indian insolvency eco-system will provide for the following:

1. Foreign representatives seeking authorisation or co-operation under Part Z will be entitled to directly access the NCLT and other forums in India, which allow parties to be represented in person or through any other professional authorised to do so under Indian law. This will be subject to the laws governing such other forums.
2. Every foreign representative who proposes to participate/ act in a proceeding under Part Z must apply to the IBBI for his/ her own authorisation in respect of the relevant proceeding.
3. Such application for authorisation may be made to the IBBI at the time of applying for authorisation or co-operation to the NCLT under Part Z or immediately thereafter.
4. The IBBI may reject the application for authorisation if the foreign representative has previously been found guilty of misconduct in proceedings conducted by the IBBI or there is a pending disciplinary proceeding before the IBBI in respect of such foreign representative.
5. If the IBBI does not reject the authorisation application of the foreign representative within ten days of its receipt by the IBBI, the foreign representative shall be deemed to have been authorised for the purpose of the relevant proceeding.
6. The rejection of an authorisation application by the IBBI shall not affect the authorisation of the foreign proceeding by the NCLT.

Box 5 summarises the recommendations of the CBIRC on the authorisation system to be implemented by the IBBI for registering and regulating foreign representatives.²¹

²⁰Clause 7(1) of Part Z.

²¹Clause 7(2) of Part Z.

Box 5 Recommendations on the deemed authorisation system for foreign representatives

The IBBI will implement a deemed authorisation system for foreign representatives in line with the Central Government's rules governing foreign representatives' access to the Indian insolvency system.

1. The IBBI must put in place an online mechanism to allow foreign representatives to apply for authorisation.
2. The online mechanism will require the foreign representative to submit *inter alia* the following information in connection with the authorisation application:
 - the name of the corporate debtor in respect of whose foreign proceeding authorisation or co-operation is sought under Part Z;
 - a copy of the order of the foreign court authorising the foreign representative to administer the reorganization or liquidation of the corporate debtor's assets or affairs and to act as a representative of the foreign proceeding;
 - the date of commencement of the foreign proceeding; and
 - a copy of the application made to the AA for authorisation or co-operation under Part Z.
3. The authorisation shall be valid upto (a) the date on which the order of the NCLT recognizing the foreign proceeding is in force; or (b) the date of disposal of an appeal against an order of the NCLT that dismisses an application under Part Z, whichever is later. The IBBI may revoke the authorisation granted to the foreign representative earlier.
4. The following provisions of the Code of Conduct specified in the First Schedule of the *IP Regulations 2016* shall be applicable to the foreign representative, with appropriate modifications, in all his dealings in the context of the corporate debtor in India:
 - Integrity and objectivity
 - Independence and impartiality
 - Representation of correct facts and correcting misapprehensions
 - Information management
 - Confidentiality
5. The IBBI is empowered to commence disciplinary proceedings against the foreign representative for violation of the code of conduct specified by the IBBI in accordance with its regulations governing the commencement and conduct of disciplinary proceedings for IPs.

6. If, in a disciplinary proceeding initiated by the IBBI, the foreign representative is found guilty of having committed misconduct in connection with the proceeding for which authorisation is granted to him/her, the IBBI may pass a written order revoking such authorisation.
7. A copy of such order shall be transmitted by the IBBI to the bench of the NCLT before which the cross-border proceeding is pending.

4.4 Framework for access by Indian IPs to foreign insolvency proceedings

Where a proceeding is commenced in India in respect of a corporate debtor under the IBC, the IP appointed in such a proceeding may apply for its recognition in a foreign jurisdiction. Such a jurisdiction may or may not have adopted the *UNCITRAL Model Law on Cross-Border Insolvency*. The CBIRC deliberated the implications of this and concluded that there are no additional regulatory concerns with allowing Indian IPs to access a foreign jurisdiction for seeking recognition or co-operation with respect to, an IBC proceeding. The CBIRC recognised that the conduct of the IP with respect to such access would be governed largely by the laws of the jurisdiction in which the IP acts.

The CBIRC also noted that neither the IBC nor the *IP Regulations 2016* restrict an IP from applying for accessing the insolvency system of a foreign jurisdiction. Accordingly, no consequential amendments are required in respect of this issue. However, the CBIRC recommends that the IBBI may mandate IPs to report assignments involving access to foreign insolvency jurisdictions, undertaken by them.

Recommendation

Box 6 summarises the CBIRC's recommendations on allowing Indian IPs access to the insolvency systems of foreign countries.

Box 6 Recommendations on Indian IPs accessing foreign insolvency systems

1. Indian IPs seeking to access the insolvency system and infrastructure of a foreign country must report the details of such assignments to the IBBI.
2. The IBBI must specify the format and manner in which such reporting must be made.

4.5 Notice of proceedings and opportunity to object

The ILC envisaged that where the IBC requires a notice to be given to domestic creditors, such notice must also be given to known foreign creditors that do not have an address in India.²² Clause 11(1) of Part Z provides as under:

“(1) Without prejudice to the provisions of this Code, whenever under this Code notice is to be given to creditors in India, such notice shall also be given to the known creditors that do not have addresses in India.”

Clause 11(2) provides that the notice referred to in clause 11(1) must be provided in accordance with regulations to be issued by the IBBI.

The ILC recommended that such a notice may not be given individually (as prescribed under the *UNCITRAL Model Law on Cross-Border Insolvency*), but may be given in a manner to be specified by the IBBI. The mandate of the CBIRC is to recommend the manner in which such notice must be issued.

Manner of providing notice

The CBIRC recognised that the IBC is agnostic to the place of incorporation or the nationality of a creditor, and provides for equal notice and participation to all the creditors. For example, the *CIRP Regulations* provide for the issuance of a public announcement of the commencement of an insolvency resolution process in the following manner:

1. in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations;
2. on the website, if any, of the corporate debtor; and
3. on the website, if any, designated by the Board for the purpose.

The public announcement must also state where claim forms can be downloaded or obtained from, as the case may be.

The CBIRC built on the ILC’s recommendation that it was not necessary to issue notices individually to each and every foreign creditor. The CBIRC recommends that whenever notice is to be given to the creditors of a corporate debtor during insolvency resolution or liquidation or in connection with any other proceedings in respect of a corporate debtor under the IBC, such notice must be given to

²²Paragraph 9 of the Insolvency Law Committee 2018

known foreign creditors in accordance with the provisions of the applicable regulations issued under the IBC. However, it also recognises a possibility that the physical or email address of foreign creditors may not be known or valid at the time of the issuance of such notice. In such cases, where it is not possible to give a notice to foreign creditors in accordance with the applicable regulations under the IBC, the following shall be deemed as sufficient notice to the known foreign creditors for the purposes of Clause 11 of Part Z –

1. publication of the notice on the website of the corporate debtor, if any, and
2. publication of the notice on the website designated by the IBBI for this purpose.

Stage at which a notice must be issued to a corporate debtor, an IP or a foreign representative

In addition to the manner of issuance of notice, the CBIRC deliberated the need to issue a notice to the corporate debtor (or its IP, if any) of the filing of an application under Part Z or the filing of an insolvency petition during the pendency of an application under Part Z. The CBIRC noted the provisions of the *IBBI (Application to Adjudicating Authority) Rules, 2016* which require a person filing an insolvency resolution petition to despatch a copy of such petition to the corporate debtor at the time of such filing. On the same lines, the CBIRC recommends that:

1. Where a foreign representative applies for the recognition of a foreign insolvency proceeding in respect of a corporate debtor, a copy of such an application must be provided to the corporate debtor, or its IP, if there is a pending IBC proceeding in respect of such a corporate debtor. It must be the obligation of the foreign representative to provide a copy of such an application.
2. Similarly, where an IBC proceeding is instituted in respect of a corporate debtor and a proceeding under Part Z in respect of the same debtor has either been instituted or admitted, the foreign representative must be notified of the subsequent IBC proceeding. It must be the obligation of the person who institutes the IBC proceeding to provide a copy of such an application to the foreign representative in the proceeding instituted or admitted under Part Z.

Recommendations

Box 7 summarises the recommendations of the CBIRC on the regulations governing the manner in which notice may be issued under Clause 11 of the IBC.

Box 7 Recommendations on the regulations governing the manner of issuance of notice

The IBBI regulations relating to cross-border insolvency resolution will provide for the following:

1. When notice is to be given to the creditors of a corporate debtor during insolvency resolution, liquidation or in connection with any other proceeding under the IBC, such notice must be given to known foreign creditors in accordance with the provisions of the applicable regulations issued under the IBC.
2. Where it is not possible to give a notice to foreign creditors in accordance with the applicable regulations under the IBC, the following shall be deemed as sufficient notice to the known foreign creditors for the purposes of Clause 11 of Part Z –
 - (a) publication of the notice on the website of the corporate debtor, if any, and
 - (b) publication of the notice on the website designated by the IBBI for this purpose.

Box 8 summarises the recommendations of the CBIRC on the rules governing the notice to be issued in respect of proceedings initiated under Part Z or concurrent IBC proceedings and Part Z proceedings.

Box 8 Recommendations on the rules governing the notice of proceedings

The Central Government's rules relating to cross-border insolvency resolution will provide for the following:

1. Where an application under Part Z is made and the registered office of the corporate debtor in respect of which such application is made is located in India, a copy of such application shall be given to such corporate debtor.
2. Where an application under Part Z is made in respect of a corporate debtor and there is a pending IBC proceeding in respect of the same corporate debtor, a copy of the Part Z application must be given to the IP appointed in such IBC proceeding.
3. Where an insolvency petition is filed under the IBC in respect of a corporate debtor and an application in respect of such a corporate debtor under Part Z is either pending or admitted, a notice of such

an insolvency petition must be given to the foreign representative.

4. The notice requirements under this provision are without prejudice to the obligation of the IP and the foreign representative to disclose all material developments in the proceeding to the committee of creditors and the AA.

4.6 Determinants of the debtor's COMI

Where an application is made for the recognition of a foreign insolvency proceeding under Part Z, the AA will require to determine the corporate debtor's COMI. If the proceeding sought to be recognised was instituted in the debtor's COMI, the AA must recognise such a proceeding as the main proceeding. The determination of a main or non-main proceeding, in turn, influences the kinds of reliefs that become available to the foreign representative in India.

The CBIRC made two recommendations on the issue of the determination of the corporate debtor's COMI:

1. Date to be taken into account for the determination of the corporate debtor's COMI
2. Factors to be considered in the determination of the corporate debtor's COMI

Date to be taken into account for the determination of COMI

A key question in any proceeding involving the determination of COMI is the date for which COMI is to be determined (hereafter, "effective date"). There may be a significant time-gap between the date on which the foreign insolvency proceeding is instituted in the foreign jurisdiction and the date on which an application for its recognition is made under Part Z. During the intervening period, the corporate debtor may change the location of its operations and assets so that its COMI will differ on these two dates.

There are two policy choices available for deciding the effective date:

1. The date on which the foreign insolvency proceeding sought to be recognised was commenced, may be taken as the effective date.
2. The date on which an application is made for recognition under Part Z, may be taken as the effective date.

The *UNCITRAL Model Law on Cross-Border Insolvency* is silent on this issue. Different jurisdictions have made different choices for the effective date. For example, in the US and Singapore, the 'date on which the application for recognition is filed' is recognised as the effective date for the determination of COMI. In Australia, the 'date of hearing/decision of the application for recognition' is taken as the effective date. On the other hand, the practice followed in the UK suggests that the 'date of filing of the insolvency proceedings in the foreign State' should be the effective date. Given the varying practice across jurisdictions, the ILC recommended that "such date need not be spelt out in the Code".

This CBIRC noted that while the ILC had correctly identified the varying international practice in this regard, the CBIRC did not believe that the issue of timing

should be left open, for three reasons. First, it is possible to lay down a uniform rule with regard to which date should be taken into account for the purpose of determining the corporate debtor's COMI, and this need not be left to the facts and circumstances of each case. Second, leaving it open for interpretation would increase the uncertainty associated with the process of recognition. It will increase the uncertainty on the inputs, namely, the kind of information that a foreign representative must submit for seeking recognition and the outputs, that is, the decisions of the AA on the identification of COMI. It might also, at least until the matter is resolved by the National Company Law Appellate Tribunal (NCLAT), result in inconsistent judgements across various benches on what should be taken as the effective date for the purpose of determination of COMI. Third, it would prolong the time that the AA would require to adjudicate the application for recognition, and may make it difficult for the AA to dispose of the recognition application within the thirty days prescribed in Part Z.

Thus, while leaving open the question of the effective date to case-law provides no immediate benefit, it imposes costs on the process of seeking recognition of foreign insolvency proceedings. The CBIRC, therefore, decided to deviate from the view taken by the ILC and recommended that the 'date of commencement of the foreign proceeding', which is sought to be recognised, must be codified as the effective date under the rules to be issued by the Central Government. The *Guide To Enactment and Interpretation of the Model Law* suggests that the 'date of commencement of the insolvency proceeding' in the foreign state is a suitable date for the determination of the corporate debtor's COMI. The CBIRC envisaged that this would also reduce the scope of forum shopping on the part of the corporate debtor by shifting the COMI between the date of commencement of the foreign proceeding and the date on which the application for recognition is made in India.

The CBIRC recommends that:

1. The rules to be issued by the Central Government must codify the 'date of commencement' of the foreign proceeding in the relevant foreign country as the effective date for the purpose of determination of COMI.
2. The date of commencement of the foreign proceeding in the relevant foreign country shall be determined as per the local law of the jurisdiction in which such proceeding is initiated.

Prescribing the 'date of commencement of the foreign proceeding' as the effective date in the rules, would also warrant a consequential amendment to Clause 14(2) of Part Z. Clause 14(2) provides that the presumption in favour of the location of the debtor's registered office as the COMI "shall only apply if the registered office of the corporate debtor has not been moved to another country within the three month period prior to the **filing of application for initiation of insolvency**

proceedings in such country (emphasis supplied).” The highlighted language in this clause will require to be aligned with the CBIRC’s recommendation on the insolvency commencement date (rather than the date of filing the application) to maintain consistency in time thresholds used in various aspects of the determination of COMI.

Factors to be considered in the determination of COMI

The ILC recognised that there were several factors that affected the determination of the corporate debtor’s COMI. Part Z sets out the following hierarchy in the order of consideration of the factors for ascertaining the debtor’s COMI.

1. **Presumption in favour of registered office:** There is a rebuttable presumption in favour of treating the location of the registered office of the corporate debtor as the COMI.
2. **An identifiable place of central administration:** If this presumption is rebutted, the place where the corporate debtor’s central administration takes place and which is readily ascertainable by third parties, including the creditors, is determined as the COMI. We refer to this as an ‘identifiable place of central administration’.
3. **Other factors in delegated legislation:** If it is not possible to ascertain the identifiable place of central administration, the AA must take into account the factors prescribed in the rules to be framed by the Central Government, in the COMI determination exercise.²³

The mandate of the CBIRC is to indicate the additional factors to be prescribed in the rules, that is, the other factors referred to it item 3 above.

On the basis of an assessment of the rules put in place by jurisdictions that have adopted the *UNCITRAL Model Law on Cross-Border Insolvency* and the jurisprudence that has evolved in this field, the CBIRC recommends some indicative factors to be considered by the AA while determining COMI (hereafter collectively, “other factors”), such as the location of the corporate debtor’s assets; books of account; directors and senior management; the corporate debtor’s creditors; the execution of contracts and applicable law to key contracts and disputes; where financing was organized or authorized, or from where the cash management system was run; primary bank account; and purchasing and sales policy, staff, accounts payable and computer systems were managed.

As per the current scheme of Part Z, the AA would consider the additional factors only if an identifiable place of central administration, was not ascertainable. The CBIRC, however, observed that the hierarchy between an identifiable place of

²³Clause 14 of Part Z.

central administration and other factors indicated above, did not appear to hold up in practice.

A review of case law suggests that the other factors are often considered at par with the identifiable place of central administration and that they are not considered on a standalone basis.²⁴ Further, the other factors are often the basis on which the identifiable place of central administration of the debtor is determined. For example, factors like the place where the senior management of the debtor are situated, where the management decisions are taken, where the books are audited and contracts are executed, are often used to determine the identifiable place of central administration of the debtor.²⁵ Finally, laws in jurisdictions, such as the US, UK and Singapore have not provided such a hierarchical test of the sequence in which different factors are to be considered while determining the COMI.

Based on the above, the CBIRC recommends that while the identifiable place of central administration is a consideration in the determination of COMI, the current hierarchy which envisages the other factors to be taken into account only if the identifiable place of central administration is not ascertainable, is inappropriate. The CBIRC, therefore, recommends dispensing with this hierarchy and placing the identifiable place of central administration on the same footing as the other factors, for the purpose of the determination of COMI.

Recommendations

Box 9 summarises the CBIRC's recommendations on the rules to be issued under Part Z.

Box 9 Recommendations on the amendments to Clause 14 of Part Z in connection with COMI

1. Clause 14(2) of Part Z will be revised to reflect that the presumption in favour of the location of the registered office as the COMI will apply only if the registered office of the corporate debtor has not been moved to another country within the three month period immediately preceding the date of commencement of the foreign proceeding in such country.

²⁴For example, *Stanford International Bank Ltd., Re* [2010] EWCA Civ 137; *In re Millennium Global Emerging Credit Master Fund Ltd*, District Court Southern District of New York, Case No. 11 Civ. 7865 (LBS) (25 June 2012); *In Re Videology Ltd*, England and Wales High Court of Justice, Chancery Division, Companies Court, Case No: CR-2018-003870 (16 August 2018); [2018] EWHC 2186 (Ch); *Zeta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervenor)*, 2019 SGHC 53.

²⁵*In re Millennium Global Emerging Credit Master Fund Ltd*, District Court Southern District of New York, Case No. 11 Civ. 7865 (LBS) (25 June 2012)

2. The date of commencement of the foreign proceeding shall be the date reckoned as such as per the local laws of the jurisdiction in which the foreign proceeding is initiated.
3. Clause 14(3) of Part Z will be revised to state that the AA shall have regard to such factors for the purpose of determining the corporate debtor's COMI as may be prescribed.
4. Clause 14(4) of Part Z will be deleted.

Box 10 summarises the recommendations of the CBIRC on the rules governing the determination of COMI.

Box 10 Recommendations on the determination of COMI

The Central Government's rules on cross-border insolvency proceedings will provide for the following:

1. While determining the corporate debtor's COMI, the AA shall assess where the corporate debtor's central administration takes place and that is readily ascertainable by third parties including its creditors, as on the date of the commencement of the foreign proceeding.
2. The date of commencement of the foreign proceeding will be determined as per the local laws of the national jurisdiction in which the foreign proceeding is initiated.
3. In making the determination on the corporate debtor's central place of administration, the AA shall have regard to other relevant factors, including:
 - (a) location of corporate debtor's assets;
 - (b) location of the corporate debtor's books of account;
 - (c) location of the corporate debtor's directors and senior management;
 - (d) location of the corporate debtor's creditors;
 - (e) location of the execution of contracts and applicable law to key contracts and disputes;
 - (f) location where financing was organized or authorized, or from where the cash management system was run;
 - (g) location of the corporate debtor's primary bank account; and
 - (h) location from which the corporate debtor's purchasing and sales policy, staff, accounts payable and computer systems were managed.

4.7 Reliefs in cross border insolvency cases

In the context of the reliefs that may be granted by the AA in a proceeding under Part Z, the following discussions of the ILC are relevant for the purpose of this report²⁶:

Interim relief : The ILC recommends that since the IBC did not specifically empower the AA to grant interim relief in domestic cases, such relief must not be explicitly provided for in Part Z for cross-border insolvency cases.

Discretionary relief : Clause 18 of Part Z contemplates a wide range of discretionary reliefs that may be granted in respect of main and non-main foreign insolvency proceedings recognised by the AA. Apart from reliefs pertaining to moratoria on the recovery of debts, sub-clauses (e) and (f) of clause 18 empower the AA to grant the following interim reliefs:

1. entrusting the administration or realisation of the corporate debtor's assets located in India to the foreign representative in the manner as may be prescribed; and
2. granting any additional relief that may be available to an IP or liquidator under the IBC.

The CBIRC took note of this and held the following discussions on the issue of interim and discretionary reliefs.

4.7.1 Interim relief

Though the IBC does not specifically empower the AA to grant interim relief in domestic proceedings, the AA has, in some cases, issued orders granting interim reliefs in exercise of its inherent powers.

Further, the recommendation against the grant of interim relief made in the *ILC Report*, appears to have been over-ridden by a subsequent report of the ILC dated 20th February, 2020 which recommended the MCA to consider the grant of interim relief, in the form of interim moratorium, for domestic proceedings.

The CBIRC acknowledged that there is merit in re-considering the recommendation of the ILC on the grant of interim reliefs in cross border proceedings. However, there was consensus in the CBIRC that the adoption of explicit provisions allowing the AA to grant interim reliefs in cross-border cases should follow parallel amendments in the IBC in relation to domestic proceedings.

No consequential amendments to Part Z or any delegated legislation are, therefore, required with respect to the issue of interim reliefs.

²⁶See paragraphs 13 and 14 of the Insolvency Law Committee 2018.

4.7.2 Discretionary reliefs in cross-border insolvency proceedings

Clause 18 of Part Z deals with the kinds of discretionary reliefs that the NCLT may award in an application for recognition of foreign proceedings. In the context of discretionary relief, the role of the CBIRC is to draft the rules that would govern the manner in which the relief of administration and realisation of the corporate debtor's estate could be granted by the AA to the foreign representative under Part Z.²⁷

The administration and realisation of the corporate debtor's assets could involve a variety of different steps depending on the size and complexity of its business. However, all such steps would be directed towards achieving the following objectives:

- Collection of claims against the corporate debtor and negotiating with creditors for restructuring where the choice is available;
- Protecting the corporate debtor's assets, which would involve protection of value of the corporate debtor's operations by running the operations and perfecting the corporate debtor's possession or title to its assets
- Realisation of the corporate debtor's assets through sale
- Distribution of the proceeds of the sale.

To achieve these objectives, it is common for foreign representatives to seek some specific kinds of reliefs in all cross-border proceedings. For example, where there are concurrent cross-border and local insolvency proceedings, it is likely that the foreign representative will seek to attend the meetings of committee of creditors. Similarly, it is likely that foreign representatives will seek to access the corporate debtor's books of account and loan contracts to make a consolidated book of claims against the corporate debtor. The CBIRC deliberated the different sorts of reliefs that are commonly sought in such proceedings. Table 9 is an indicative list of the kinds of reliefs that may be commonly sought under Clause 18(1)(e) and (f) of Part Z.

Table 9: Discretionary reliefs in cross-border insolvency cases

I. Participation in proceedings pertaining to the corporate debtor

1. Convene and/ or attend meetings of creditors
 2. Right to represent creditors's interest in all insolvency related proceedings
 3. Participate in other proceedings materially affecting the corporate debtor
-

II. Information sharing

²⁷Clause 18(1)(e) of Part Z.

-
1. Information about the assets, operations and liabilities of the corporate debtor that is available in public domain
 2. Information about the assets, operations and liabilities of the corporate debtor that is not available in public domain
 3. Developments having material impact on the corporate debtor and/or the insolvency proceedings
-

III. Protection of assets

1. Identification and reconciliation of assets
 2. Actions to run the corporate debtor as a going concern
 3. Actions to perfect the corporate debtor's possession and title over its assets
 4. Actions to conduct a valuation of the corporate debtor's assets or seek valuation reports
-

IV. Collection of claims

1. Pursuing claims due to the corporate debtor in the jurisdiction in which the debtor's estate is being administered by the foreign representative
 2. Admission and verification of claims against the corporate debtor
 3. Identification of super-priority claims and resolution costs
-

V. Realisation of assets

1. Calling for information and access to the corporate debtor's books and conduct on-site inspections.
 2. Information memorandum
 3. Advertise the debtor's assets or any of them for sale
 4. Manner of conducting the sale process (auction, private placement, etc.)
 5. Negotiate on behalf of creditors
-

The CBIRC noted that while all of the abovementioned reliefs would be discretionary, they could also be codified in protocols or insolvency agreements (known by various names such as "co-operation and compromise agreement", "Insolvency Agreements", "Memorandum of Understanding" and/or "Protocols") that are often executed between the foreign representatives and local IPs, if any. The next sub-section gives a brief description of such Protocols.

Protocols and insolvency agreements

In a cross-border insolvency case, the relevant parties in each jurisdiction may enter into an agreement to help co-ordinate the entire cross-border insolvency process, reduce costs associated with the process and to maximise the value of

the assets of the corporate debtor. Protocols have proven to be very efficient in reducing the costs of litigation associated with cross-border insolvency proceedings by resolving the conflict of laws and other ancillary issues.

As per the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, protocols can enhance the value of recovery in insolvency proceedings by approximately 40% by restraining stakeholders from initiating detrimental actions. Protocols have the potential to address a host of administrative issues of a cross-border insolvency proceedings and work out the best possible framework for quick and efficient resolution of the corporate debtor within the confines of the domestic laws of the States involved. However, a Protocol should not be used by the parties as a tool for circumventing any obligations of parties under the respective applicable laws.

Protocols are generally written agreements (although occasionally may be oral) dealing with actual and/or potential matters of conflict. In practice, Protocols are entered into at the behest of parties or insolvency representatives in consultation with the courts involved in cross-border proceedings. Once approved formally by courts, such Protocols entered into and agreed upon between the parties establish a broad framework of principles to govern multiple insolvency proceedings. Furthermore, these Protocols are case-specific and there is no standard, single format or straitjacket formula for determining the contents of a protocol. Moreover, it is even likely that one proceeding may involve multiple Protocols on different procedural issues.²⁸

Cross-border Insolvency Agreements (Protocols)

The main benefits of Protocols include their ability to:

1. facilitate co-ordination between courts and IPs across different countries;
2. address the issues arising out of rights and priorities of creditors;
3. control the factors affecting the cost and timeliness of the process.

Typical parties:

1. the domestic IPs and foreign representative;
2. the courts involved;
3. the debtor(s), especially if the debtor(s) remains in possession, e.g. US Chapter 11 proceedings;
4. the creditors (individually or collectively).

²⁸The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* provides information for practitioners and judges on the practical aspects of co-operation and communication in cross-border insolvency cases which includes sample clauses for Protocols for guidance in cases. Further, The ALI-III Global Principles for Cooperation in International Insolvency Cases also provides principles to facilitate the coordination of the administration of cross border insolvency proceedings, which may be helpful in formulating Protocols.

Restrictive clauses are usually provided in Protocols to ensure that they might not be construed in a manner that may:

1. alter the jurisdiction and independence of courts;
2. require any party to breach its duties under any domestic law;
3. breach the public policy of any of the countries involved;
4. authorise an act that may otherwise require approval of any or all of the courts involved; and
5. preclude any person from exercising its substantive right under any applicable law.

Akin to Protocols between IP and foreign representatives, courts involved in cross-border insolvency proceedings may also enter into protocol agreements for establishing the mode of communication and co-ordination of the proceedings. Such Protocols are dealt with in Section 4.8.

4.7.3 Cohesion in resolution and liquidation strategy across jurisdictions

The CBIRC noted that where there are concurrent proceedings against the same corporate debtor across several jurisdictions, the substantive law applicable in each jurisdiction may mandate a different strategy to deal with the debtor's insolvency. The AA should, where possible, take into account the conflicts between the objectives of concurrent insolvency proceedings and to the extent possible, build provisions in the protocol to achieve the maximum possible cohesion in the steps taken by the foreign representative and the IP in dealing with the insolvency of the corporate debtor.

The order of NCLAT in *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v. State Bank of India and Anr.* (2019) is an instructive precedent in this regard. Recognising the conflicting objectives of the concurrent liquidation proceedings pending in respect of Jet Airways (India) Pvt. Ltd., the NCLAT explicitly imposed obligations on both parties to not take steps that would defeat the purpose of the liquidation order passed by the Dutch court or the purpose of the resolution process under the IBC in India.

In practice, this would imply that although the Dutch liquidator ought to have liquidated the assets of the corporate debtor in Netherlands, he would not do so without keeping the Indian IP informed as it might materially impede the sale of the corporate debtor as a going concern under the IBC. Box 11 gives a brief overview of the facts of the case and the nature of the protocol recorded by the NCLAT in this case.

Box 11 Overview of the cross-border insolvency proceedings of Jet Airways (India) Ltd.

- Jet Airways (India) Ltd., an Indian company (hereafter, “Jet”), had certain operations in The Netherlands.
- On an application made by two creditors in the Netherlands for unpaid claims, Jet was declared bankrupt as per Dutch law and a liquidator was appointed for realising Jet’s assets.
- Shortly thereafter, the NCLT also admitted an insolvency petition under the IBC in respect of Jet in India.
- While the objective of the Dutch proceedings was the liquidation of the debtor’s assets, the objective of the resolution process under the IBC was to attempt to save the organisational capital of the firm including selling the firm as a going concern within the period allowed by the IBC.
- The liquidator of Jet appointed under the Dutch law filed an application for recognition of the Dutch proceedings before the NCLT which was rejected.
- In an appeal filed against this order before the NCLAT, the NCLAT put in place a protocol for co-operation between the Dutch liquidator and the IP under the IBC proceedings.
- The protocol explicitly recognised the conflicting objectives of the Dutch liquidation process and the IBC process and built in a provision requiring the Dutch liquidator and the IP to adhere to the objectives of the two laws to the extent possible.
- The order recognising the protocol states:

“In the spirit of cooperation, the Dutch Trustee aims to not take any decision under the Dutch Proceedings that would adversely impact the interests of the Company or the creditors. In the event it becomes necessary for the Dutch Trustee in compliance of the Dutch Bankruptcy Court or any other court, or under any applicable law, to take any decision that might adversely impact the interests of the Company or the creditors, the Dutch Trustee shall give advance intimation of such decision to the RP.”

Recommendations

Box 12 summarises the CBIRC’s recommendations on the rules governing the kinds of reliefs that the AA may award in exercise of its discretionary powers

under Clause 18 of Part Z.²⁹

Box 12 Recommendations on discretionary reliefs

The Central Government's rules on cross-border insolvency will provide for the following matters governing discretionary reliefs :

1. The AA may, in exercise of its powers under Clause 18(1) of Part Z, pass an order allowing the foreign representative to take one or more of the following actions in respect of the corporate debtor:
 - (a) access the books of accounts, records and other relevant documents of the corporate debtor as are available with government authorities or are otherwise available in the public domain on the payment of fees or otherwise;
 - (b) access such books, records, documents and other data of the corporate debtor as are available with statutory auditors, accountants, other professional advisors, depositories, contractual counterparties and the management, whether or not they are available in the public domain, on such terms as may be specified by the AA;
 - (c) call for and collect claims against the corporate debtor and preparing a consolidated list of claims across jurisdictions, where necessary;
 - (d) identify the priority pay-outs, including the foreign representative's remuneration, from the claims' list so collated by him;
 - (e) to act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, for the purpose of such administration or realisation;
 - (f) allowing the taking of such actions, in the manner and subject to such restrictions as may be specified by the AA, for the purpose of such administration or realisation.
2. The AA may require the foreign representative to report any material development in relation to the corporate debtor's estate, the foreign proceedings or any other insolvency proceedings that the foreign representative becomes aware of, to the AA as soon as such developments come to the knowledge of the foreign representative.

²⁹Clause 18(1)(e) of Part Z.

4.8 Court co-operation and co-operation between insolvency practitioners across jurisdictions

The following discussions of the ILC with regard to co-operation in cross-border insolvency proceedings, are relevant:

1. **Co-operation between the AA and foreign courts:** Chapter IV of Part Z requires the Central Government to issue guidelines governing the interaction between the AA and foreign courts. It also requires the Central Government to notify the authority responsible for assisting the AA in facilitating the transmission of notices and other communication between the AA and foreign courts.
2. **Co-operation between courts, foreign representatives, IPs and corporate debtors:** While there is no specific provision with regard to this, the theme of co-operation between the foreign representative and the IP, if any appointed in the local IBC proceedings, is assumed to be a critical component of cross-border insolvency. For example, Clause 22 of Part Z provides that the IP or liquidator shall, subject to the supervision of the AA, co-operate to the maximum extent possible with foreign courts and foreign representatives.

The CBIRC discussed these two aspects of co-operation.

4.8.1 Co-operation and communication between courts

The CBIRC considered whether India should adopt the guidelines which are already being followed by several countries in the area of court co-operation and communication or should a new set of guidelines be prescribed for adopting by the courts in this matter. The CBIRC considered comparative analyses of the provisions of the some reasonably widely accepted guidelines, namely, the *JIN Guidelines, 2016*, the *NAFTA Guidelines, 2000*, the *EU Guidelines, 2014* and the *ALI III Global Guidelines for Court-to-Court Communications in International Insolvency Cases, 2012*.

The CBIRC noted the key provisions of these guidelines and also noted the recommendation of the ILC to adopt the *JIN Guidelines, 2016*.

The CBIRC recommends that the *JIN Guidelines* may be substantially adopted with regard to co-operation and communication between the AA and foreign courts, with suitable modifications and adoption of appropriate provisions from the *NAFTA Guidelines* and the *EU Guidelines*, to suit the Indian context where necessary. The CBIRC also suggested that while redrafting guidelines, the *ALI Guidelines* on co-operation in international insolvency cases may also be taken into account.

Courts may be parties to a protocol or recognise a protocol entered into, on the manner of communication to be adopted by them to facilitate co-operation in cross border insolvency proceedings. Such Protocols may deal with the application of communication guidelines (like the *JIN Guidelines*) adopted by a country. Further, the abovementioned guidelines may be applied in a case concerning cross border insolvency, with or without modifications, through either a protocol, or through an order of the court involved.

Specifically, on the question of designating a “Facilitator” to serve as a channel of communication between the judges of the courts involved in parallel proceedings as contemplated under the *JIN Guidelines*³⁰, the CBIRC was of the view that this is an administrative issue, and there is no need to specifically recommend who would act as a Facilitator. It was observed that the registry of the concerned bench of the NCLT may serve as a channel for communication at the initial stage and the post of a “Facilitator” may be subsequently created, if the need arises.

4.8.2 Co-operation between courts, foreign representatives, IPs and corporate debtors

In the context of co-operation between foreign representatives, IPs and corporate debtors, the CBIRC discussed whether a foreign representative could apply for co-operation without having applied for or obtained recognition of the foreign proceeding.

Part Z does not specify whether a foreign representative may file an application for co-operation where: (i) an application for recognition has not been filed; or (ii) an application for recognition has been filed and rejected by the domestic court.

According to the *Guide To Enactment and Interpretation of the Model Law*, co-operation is not dependent upon recognition, and may thus occur at an early stage and before an application for recognition is made. However, jurisdictions have adopted a different approach towards this question. For example, while Canada³¹ and the United States³² make recognition of a foreign proceeding a pre-condition to any application for co-operation, the UK and Singapore do not mandate recognition as condition precedent to co-operation.

Keeping in mind the need to balance the burdens that co-operation may impose on corporate debtors or their IPs and the co-operative spirit underlying the *UNCITRAL Model Law on Cross-Border Insolvency*, the CBIRC recommends that foreign representatives could apply for co-operation under Part Z without having ap-

³⁰*JIN Guidelines* Modalities of Court-to-Court Communication (adopted by JIN in 2019).

³¹Part XIII of the Bankruptcy and Insolvency Act of Canada, which has adopted the Model Law, provides that cooperation will be provided only if an application for recognition is allowed.

³²Section 1509 of Chapter XV of the US Bankruptcy Code provides that, upon granting recognition, a court in the United States shall grant comity or cooperation to the foreign representative.

plied for recognition. However, the AA must, in such applications, not grant any relief that ought to be granted only in respect of recognised foreign proceedings. The CBIRC also noted that such applications for cooperation without recognition would largely come up in cases where cooperation was being sought in respect of a proceeding that was neither main nor non-main and may not be very frequent.

Recommendations

Box 13 summarises the recommendations of the CBIRC on guidelines to be put in place for court-to-court communication in cross-border insolvency proceedings.

Box 13 Recommendations on court-to-court communication in cross-border insolvency proceedings

1. The Central Government must frame guidelines for communication between the AA and foreign courts in connection with matters under Part Z.
2. These guidelines will largely adopt the *JIN Guidelines* with suitable modifications and adoption from other applicable international guidelines to suit the Indian context.
3. The AA may adopt the guidelines framed by the Central Government on a case-to-case basis, with such modifications as it may deem fit in the context of a given case.

Box 14 summarises the recommendations of the CBIRC on the manner in which foreign representatives may apply for co-operation from the AA under Part Z in respect of foreign proceedings which are not yet recognised in India, and the kinds of reliefs that may be granted in such proceedings.

Box 14 Recommendations on co-operation from the AA, the corporate debtor or its IP

The CBIRC recommends as follows:

1. A foreign representative appointed in a foreign proceeding may apply to the AA for co-operation in the following circumstances:
 - (a) where no application for recognition has been made before the AA;
 - (b) where an application for recognition has been made, but is pending before the AA; or

- (c) where an application for recognition was made and dismissed by the AA.
2. Such co-operation may be sought from the AA, the corporate debtor or the IP of the corporate debtor in respect of whose foreign proceeding the foreign representative is appointed.
 3. The AA may, while considering applications for co-operation in such cases, allow or direct some forms of co-operation which do not impose any substantive burden on the corporate debtor or the IP of such a corporate debtor. For example, the AA may direct the sharing of information pertaining to the corporate debtor that is available in the public domain with the foreign representative, in such cases.
 4. The AA must not, while considering applications for co-operation in such cases, allow substantive reliefs that can be granted only upon the recognition of a foreign proceeding. In other words, the process of seeking co-operation must not be mis-used so as to circumvent the rigour of the process of seeking recognition under Part Z.

4.9 Format, content and fees of applications in cross-border insolvency proceedings in India

The CBIRC deliberated the contents of three kinds of applications contemplated under Part Z:

1. an application for recognition of foreign proceedings;
2. an application for avoidance transactions in cross-border insolvency proceedings; and
3. an application for co-operation in cross-border insolvency proceedings.

While Part Z briefly sets out the contents of an application for recognition of foreign proceedings, it is silent on the contents of the other two applications referred above. The CBIRC dealt with the contents of these three applications as follows.

Clause (3) of Part Z provides that an application for recognition must be in such form and accompanied with such fees as may be prescribed by rules to be framed by the Central Government.

4.9.1 Application for recognition of foreign proceedings

Clause 12(2) of Part Z provides that an application for recognition must be accompanied by:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
3. in the absence of the evidence referred to in items 1 and 2, any other evidence as may be prescribed by rules, affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
4. a statement identifying all foreign proceedings and proceedings under the IBC in respect of the corporate debtor that are known to the foreign representative; and
5. a translation of documents in support of the application for recognition in English, if applicable.

Keeping this in mind, the CBIRC recommends a list of information fields to be contained in the application form to be filed by a foreign representative for recognition of foreign proceedings. The list of information fields are enumerated in [Box 15](#).

In addition to the application, the foreign representative must file an affidavit in support of the application affirming the following:

1. that the evidence and statements as required Clause 12 of the Part Z are true to the best of the knowledge and information of the foreign representative; and
2. that the order commencing the foreign proceeding sought to be recognised and appointing the foreign representative is operational and in force.

The foreign representative must also be given the flexibility to submit:

1. any other documents or evidence which, in the opinion of the foreign representative, will assist the AA in determining whether proceeding sought to be recognised is a foreign proceeding and whether the applicant is a foreign representative, as defined under Part Z;
2. evidence that the debtor has its COMI or an establishment, as the case may be, within the country where the foreign proceeding is taking place; and
3. any other information which, in the opinion of the applicant, will assist the AA in deciding the application for recognition.

4.9.2 Application for avoidance of transactions in a cross-border insolvency proceeding

Clause 20 of Part Z provides that upon recognition of a foreign proceeding, the foreign representative is entitled to make an application to the AA for an order in connection with the avoidance of transactions under Sections 43, 45, 49, 50 and 66 of the IBC. These provisions of the IBC refer to the powers of the IP or the liquidator, to seek an order from the AA to avoid or set aside certain transactions that have taken place within a specified time period prior to the 'insolvency commencement date' on the ground of them being undervalued, preferential, extortionate or fraudulent transactions meant to avoid legitimate dues.

Part Z does not envisage rules to be drafted governing the contents of an application under Clause 20. Equally, the IBC does not prescribe any format for avoidance applications in domestic IBC matters. The CBIRC noted that no specific formats for this purpose were prescribed in other jurisdictions as well. Accordingly, no delegated legislation or amendments to Part Z or the IBC are required on this issue.

4.9.3 Fees accompanying applications

The CBIRC recommends that the Central Government could prescribe the fees to be paid in respect of:

1. every main application under Part Z; and
2. every interlocutory application under Part Z.

Recommendations

Box 15 summarises the CBIRC's recommendations on the rules to be issued by the Central Government governing the applications for recognition of foreign proceedings.

Box 15 Recommendations on the rules governing the contents of an application form for recognition of foreign proceedings

The Central Government must prescribe a pre-designed form that can be filled digitally with the following fields of information:

1. full name of Applicant/foreign representative along with address and the Certificate of Practice (if applicable under the jurisdiction of the foreign country);
2. full name of Corporate Debtor;
3. the nature of the business carried on by the Corporate Debtor in the foreign country;
4. details of the registered office or any branch or establishment of the Corporate Debtor in the foreign country;
5. the name or names in which the corporate debtor carries on business in the country where the foreign proceeding is taking place;
6. the principal or last known place of business of the debtor in the foreign country;
7. list of foreign creditors and assets of the corporate debtor known to the foreign representative;
8. a statement that the foreign representative is authorized to approach the AA under the IBC, that the foreign proceeding is recognized as such under the IBC and the foreign proceeding satisfies the requirements under Clause 2(g) of Part Z of the IBC;
9. list of the corporate debtor's assets located in the foreign country;
10. details of the foreign proceeding in respect of which the application for recognition is made, including:
 - (a) the applicants in the foreign proceedings.
 - (b) the nature of the debt provided to the Corporate Debtor, if applicable.
 - (c) the date of default and amount of default, if applicable.
 - (d) the court before which the proceedings are pending.
 - (e) the date of the orders passed by the court appointing the for-

eign representative as such.

- (f) the date of commencement of the foreign proceeding.
- (g) whether the application is for the recognition of a main proceeding or non-main proceeding and the place where COMI lies.
- (h) is the foreign country a signatory to the *UNCITRAL Model Law on Cross-Border Insolvency*.
- (i) if not, is there is any Co-operation Agreement or Treaty between the foreign country and India.

5 Capacity building and infrastructure for cross-border insolvency

As India gets more and more integrated with the world, many Indian companies are growing their global presence, and many foreign companies are finding their way to India. In this scenario, an effective cross border insolvency framework is a must for India. The *ILC Report* has proposed Part Z of the IBC as the legislative framework for cross border insolvency, and this Committee has proposed the rules and regulatory framework.

However, for the legislative framework to deliver solutions to the complex problem of the cross border insolvency of a debtor company, there is also need to build human and organisational capacity and physical infrastructure to support the legislative framework.

This capacity building needs to take place mainly at the NCLT and at the IBBI.

5.1 Capacity building at the NCLT

For dealing with cross border matters, whether for Indian or foreign companies the NCLT will have to undertake multi-dimensional capacity augmentation:

Bench capacity:

As of today, it is difficult to anticipate the case flow volume that NCLT will get under the cross border framework. However, facts about the foreign exposure of Indian companies suggest that it may not be insignificant. Table 10 shows the foreign exposure of Indian firms is not trivial. As many as 23,500 firms show foreign exposure, through one or more heads, such as foreign exchange earnings, foreign exchange spending, foreign exchange borrowing or a combination of these. Foreign exchange earnings indicate that these companies either have foreign assets and / or operations. Foreign spending and foreign currency borrowings shows that they have foreign liabilities and / or foreign operations.

Table 10 Indian firms with foreign exposure

Type of exposure	Count of firms	Value (Rs. trillion)
Forex earnings	7,571	17.3
Export	6,277	10.4
Forex spending	9,744	20.9
Import	6,048	10.1
Foreign currency borrowing	1,773	13.4

Source: CMIE Prowess Dx

Similarly, data from MCA³³ shows that as at December 2014, there were 4,063 non-financial foreign companies with presence in India. Of these, 3,216 were active and 847 were inactive.

This suggests that the NCLT will need to undertake a calibrated expansion of its bench strength to meet the case flow arising from the cross border insolvency of both Indian and foreign companies.

Also, depending on the flow of cases, there may also be need to undertake bench capacity augmentation at the NCLAT. The expansion of court capacity, at the NCLT and the NCLAT, will have to be accompanied by commensurate augmentation of the capacity of the court registry.

Physical and technological capacity:

NCLT will have to consider expansion of physical and technological infrastructure such as:

1. e-filing of applications and documents for cross border proceedings,
2. electronic access to records and court proceedings for foreign representatives,
3. facility for electronic hearings for foreign representatives and other foreign parties, and
4. facilities to enable court to court communication and cooperation, and to hold joint hearings.

Once these capabilities are put in place, there will also be a need to: (1) undertake training programs for the court and registry personnel in their use, and (2) create capacity to maintain and troubleshoot these systems on an ongoing basis.

³³Data on foreign companies available at <http://www.mca.gov.in/MinistryV2/indianandforeigncompaniesllps.html>. Accessed on 23rd May, 20:11 pm

Human capacity, Standards of Procedure (SoP), and training:

It would be desirable to:

- Develop SoPs on how cross border matters cases will move through the NCLT system,
- Train NCLT registry staff in dealing with the wide range of issues and challenges that will arise in respect of cross-border matters, and
- Develop SoPs on court to court communication and cooperation, and on holding joint hearings.

Over time, as more and more cases with cross border implications come for adjudication, judicial familiarity with the international jurisprudence in respect of: (1) the Model Law, and (2) conflict of laws related issues will get enhanced, and the systems and processes for court to court cooperation and communication will get fine tuned.

Developing a system of root-node numbering for cases:

For every insolvency case that comes to NCLT, there are multiple offshoot cases that arise. Each of these cases has a life cycle of adjudication and appeals. Often, the completion of the insolvency resolution of the debtor company is path dependent on the completion of these offshoot cases. This issue is likely to get more complex as cross border insolvency provisions are implemented. In addition to domestic offshoots of a debtor company's case, there will now also be cross border matters in respect of domestic proceedings, and foreign proceedings and their offshoots. In many instances, the insolvency resolution process of the debtor will also be path dependent on these cross border offshoots.

The case numbering system that the NCLT currently follows assigns a unique case number to every case, whether an insolvency proceeding or an offshoot case. Further, at each appellate forum the cases get assigned a different case number. This system of case numbering creates difficulties in understanding: (1) the complete life cycle³⁴ of an insolvency proceeding, (2) the life cycles of its offshoot cases, and (3) the interaction between the life cycles of the main and the offshoot cases.

In this respect, to enable a better understanding of an insolvency case's adjudication life cycle, the NCLT can consider developing a system of case numbering that:

³⁴The life cycle of a case starts from its adjudication at forum that has original jurisdiction over it and its journey through the appeal process.

1. Assigns a unique identifier to every debtor company's insolvency proceeding, that identifies as the "root" case,
2. Enables the identification of the "root-main" and "root-non-main" proceeding, for cases where domestic and cross border proceedings concurrently exist,
3. Enables the identification of every offshoot, domestic or foreign, as a "node",
4. Enables the mapping of every node to a "root-main" or "root-non-main" identifier.

What would be even more beneficial is if the use of this system of case numbering continued across the appeal process.

This system of case numbering will enable analysis of the complete life cycle of a corporate debtor's insolvency proceeding, including domestic and cross border matters. It can help the NCLT in better planning their: (1) physical and technological infrastructure requirements, (2) adjudication capacity requirement, and (3) registry and support staff capacity requirement.

The proposed system of "root-node" case numbering is equally relevant for domestic insolvency proceedings under the IBC, and will deliver the benefits highlighted above therein too.

5.2 Capacity building at the IBBI

The IBBI primarily has three roles in respect to the domestic corporate insolvency process:

1. It is the regulator of the IPs, Insolvency Professional Agencies (IPAs) and the Information Utilities (IUs),
2. It provides the procedural details of the IBC proceedings through process regulations, and
3. It is the repository of information about insolvency proceedings.

The IBBI will need to bolster its organisational and human capacity to perform each of these roles in the context of the cross border insolvency framework:

- In respect of IPs, it will be to regulate Indian IPs who undertake foreign assignments.
- In respect of foreign representatives, the IBBI's oversight may be in the form of light touch disclosure based regulation in the initial period of the implementation of the cross border framework. Subsequently, based on the expe-

rience in the early period, the same regulatory system may be continued or a revised one put in its place.

- In respect of regulations on cross border insolvency procedure, if foreign companies get included within the remit of the IBC, the IBBI may consider developing separate regulations in respect to IBC proceedings for foreign companies.
- In respect of IUs, the IBBI may consider allowing them to:
 - keep records of foreign companies' debts and defaults, and to make these available in respect of Indian proceedings of these companies; and
 - accept foreign representative filings in respect of cross border cases related information, in line with domestic IP filings about IBC cases.
- The IBBI may also consider creating a central repository of information of matters under Part Z, akin to the central repository of case information it has created for CIRP and liquidation proceedings.

A MCA office orders in respect of the CBIRC

No. 30/27/2018-Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhawan, New Delhi
Dated: 23.01.2020

Order

Subject: - Constitution of a committee for recommending Rules & Regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Insolvency & Bankruptcy Code, 2016.

The Insolvency Law Committee (ILC) examined the suggestions/representations from public & stakeholders, deliberated on the provisions among its members and accordingly submitted its report on Cross border Insolvency, which provides recommendations of the Committee on adoption of the UNCITRAL Model Law in India with the modifications as considered necessary by the ILC in the Indian context. The Committee has also recommended a few carve outs to ensure that there is no inconsistency between the domestic insolvency framework and the proposed Cross Border Insolvency Framework.

2. For smooth implementation of the cross border insolvency provisions under the Insolvency & Bankruptcy Code, 2016 (Code) it has been decided to refer the matter to a committee to suggest its recommendations on rules & regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Code to this ministry on following terms of reference:

- (i) The committee will study & analyze the recommendations of Insolvency Law Committee (ILC) Report on cross border insolvency and the proposed draft Bill to make recommendations to operationalize the rules & regulatory framework for smooth implementation of proposed cross border insolvency provisions under the Insolvency and Bankruptcy Code, 2016 and other matter related to or incidental thereto.
- (ii) The Committee may invite or co-opt practitioners, experts or individuals who have knowledge or experience in the subject matter. The Committee may also consult other stakeholders as part of its deliberations.


3. The composition of the Committee is as under:-

- | | | |
|--------|---|----------|
| (i) | Shri K.P. Krishnan, IAS (Retd): | Chairman |
| (ii) | Ms Aparna Ravi, Partner, Samvad Partners: | Member |
| (iii) | Shri Abizer Diwanji, EY India Financial Services: | Member |
| (iv) | Shri C.S. Shetty, MD Stressed Assests Resolution Group, SBI: | Member |
| (v) | Shri Harshvardhan Raghunath, Partner/Senior Advisor, Bain & Co: | Member |
| (vi) | Shri Somasekhar Sundaresan, Advocate: | Member |
| (vii) | Shri M. Unnikrishnan, CGM, IBBI: | Member |
| (viii) | Representative of Department of Economic Affairs not below the rank of Joint Secretary: | Member |

4. Secretarial support to the Committee will be provided by Insolvency and Bankruptcy Board of India which will also bear the expenses incurred by the non-official members of the committee towards travel, local conveyance and other allowances as per extant government instructions, wherever the sponsoring agency is unable to bear their expenditure.

5. The Committee shall submit its recommendations within three months from its first meeting.

6. This issues with the approval of Secretary, Corporate Affairs.


(Rakesh Tyagi)
Director

To

All members

Copy to:-

- i. PS to CAM
- ii. PS to MOS for CA
- iii. Sr. PPS to Secretary, MCA
- iv. Secretary, DEA with a request to nominate an officer not below the rank of Joint Secretary as member of the Committee
- v. Chairperson, IBBI
- vi. PS to AS
- vii. PS to JS(G)

No. 30/27/2018-Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhavan, New Delhi
Dated:21.02.2020

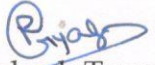
Order

Subject: Constitution of a committee for recommending Rules & Regulatory framework for smooth implementation of proposed Cross Border Insolvency provisions in the Insolvency & Bankruptcy Code, 2016

Pursuant to the issuance of order dated 23.01.2020, I am directed to issue the instant addendum to the said order, wherein the following term of reference as point no. (iii) may be inserted after 2(ii):-

(iii) "The committee will study and analyze UNCITRAL Model Law for enterprise group insolvency and will make its recommendations in the context of Insolvency and Bankruptcy Code, 2016."

This issues with the approval of Secretary, Corporate Affairs


(Rakesh Tyagi)
Director

To

- (i) Shri K.P. Krishnan, IAS (Retd)
- (ii) Ms Aparna Ravi, Samvad Partners
- (iii) Shri Abizer Diwanji, EY India Financial Services
- (iv) Shri C.S. Shetty, MD Stressed Assests Resolution Group, SBI
- (v) Shri Harshvardhan Raghunath, Partner /Senior Advisor, Bain & Co.
- (vi) Shri Samasekhar Sundaresan, Advocate
- (vii) Shri M. Unnikrishnan, CGM, IBBI
- (viii) Shri. A.M. Bajaj, Joint Secretary, DEA

Copy to:-

- (i) PS to CAM
- (ii) PS to MOS for CA
- (iii) Sr. PPS to Secretary, MCA
- (iv) Chairperson, IBBI

B Drafts of rules, regulations and notifications

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

G.S.R...- In exercise of the powers conferred by [*suitable references inserted in section 239 read with sections 7, 8, 11, 12 and 14 of Part Z*]¹ of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following rules, namely: -

1. Short title and commencement.

- (1) These rules may be called the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020.
- (2) They shall come into force from the date of the publication of these Rules in the Official Gazette.

2. Application.

These Rules shall apply to matters relating to the cases of cross-border insolvency provided in Part Z of the Code.

3. Definitions.

- (1) In these Rules, unless the context otherwise requires:
 - (a) “Code” means the Insolvency and Bankruptcy Code, 2016 (31 of 2016);
 - (b) “electronic form” shall have the meaning assigned to it in clause (r) of section 2 of the Information Technology Act, 2000 (21 of 2000);
 - (c) “electronic means” means an authorized and secured computer programme which is capable of producing confirmation of sending communication to the participant entitled to receive such communication at the last electronic mail address provided by such participant and keeping record of such communication;
 - (d) “form” means a Form appended to these rules;
 - (e) “identification number” means the limited liability partnership identification number or the corporate identity number, as the case may be, of the corporate debtor;
 - (f) “protocol” includes an agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation which may be between-

¹ Please note that references to provisions related to cross border insolvency in these rules are based on Draft Part Z as provided in the report of the Insolvency Law Committee. These references will need to be altered based on the manner of incorporation of Draft Part Z in the Code.

- (i) the Adjudicating Authority and foreign courts,
- (ii) the Adjudicating Authority, foreign courts, and domestic and foreign representatives, and
- (iii) domestic and foreign representatives,

and which may sometimes also involve other parties in interest.

- (g) “recognition application” means an application made to the Adjudicating Authority by a foreign representative in accordance with Section 12 of Part Z;
- (h) “recognition order” means an order made by the Adjudicating Authority in accordance with section 15 of Part Z;
- (i) “regulations” means any regulations made by the Board under the Code;
- (j) “schedule” means a schedule appended to these rules;
- (k) “section” means a section of the Code;
- (l) “serve” means sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgement of receipt of such communication:

Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or carries on business or personally works for gain.

- (2) All the words and expressions used herein and not defined shall have the meanings respectively assigned to them under Part Z and the Code.

4. Access to foreign representatives.

Notwithstanding anything contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, a foreign representative may apply to the Adjudicating Authority under the provisions of Part Z seeking:

- (a) recognition of a foreign proceeding under rule 6; or
- (b) cooperation in respect of a foreign proceeding under rule 12; or
- (c) both (a) and (b).

5. Authorization of a foreign representative.

- (1) A foreign representative seeking to act, in connection with an application made under Part Z, shall seek authorization from the Board in respect of each foreign

proceeding, by submitting Form A to the Board along with a non-refundable authorization fee of INR 10,000.

- (2) A foreign representative shall submit Form A to the Board under sub-rule (1) at the time of or within 3 days from the date of submission of an application under Part Z in respect of a foreign proceeding for the first time before the Adjudicating Authority.
- (3) If any disciplinary proceedings are pending or if any disciplinary actions have been taken against the foreign representative by the Board under the Code or the rules or regulations thereunder, in relation to any previous assignments, the Board may reject an application for authorization and inform the Adjudicating Authority regarding the same, within 10 days of receipt of Form A.
- (4) In the absence of any intimation by the Board under sub-rule (3), the foreign representative shall be deemed to have been authorized by the Board for acting as a foreign representative under the Code.
- (5) An authorization under this rule in respect of a foreign proceeding in relation to a corporate debtor shall not confer upon the foreign representative any rights under the Code to act in relation to any other foreign proceeding in India.
- (6) Where a foreign representative is authorized under the provisions of this rule, such authorization will be effective from the date on which he applies to the Adjudicating Authority, in respect of a foreign proceeding for the first time, under rule 4.
- (7) The authorization granted or deemed to be granted under this rule shall be valid until:
 - (a) the date on which the order of the Adjudicating Authority recognizing the foreign proceeding is in force; or
 - (b) the date of disposal of an appeal against an order of the Adjudicating Authority that dismisses an application under Part Z,whichever is later.

6. Application for recognition of foreign proceedings.

- (1) A foreign representative may make an application for the recognition of a foreign proceeding under section 12 of Part Z in Form B.
- (2) The applicant shall serve a copy of the application referred to in sub-rule (1) forthwith after filing such application with the Adjudicating Authority, on-
 - (a) the registered office of the corporate debtor; or
 - (b) if the corporate debtor is undergoing insolvency resolution or liquidation proceeding under the Code, the interim resolution professional or the

resolution professional or the liquidator, as the case may be, appointed in that proceeding.

7. Centre of main interests.

- (1) While determining the centre of main interests under sub-section (3) of section 14 of Part Z, the Adjudicating Authority shall assess the place where the corporate debtor's central administration takes place which is readily ascertainable by third parties including creditors of the corporate debtor.
- (2) In making the assessment under sub-rule (1), the Adjudicating Authority shall have regard to other relevant factors, including the-
 - (a) location of assets of the corporate debtor;
 - (b) location of book of accounts of the corporate debtor;
 - (c) location of directors and senior management of the corporate debtor;
 - (d) location of creditors of the corporate debtor;
 - (e) location of execution of contracts and applicable law to key contracts and disputes;
 - (f) location where financing was organized or authorized, or from where the cash management system was run;
 - (g) location of corporate debtor's primary bank account; and
 - (h) location from which purchasing and sales policy, staff, accounts payable and computer systems were managed.
- (3) The relevant date for determining the centre of main interests of the corporate debtor shall be the date of commencement of the foreign proceedings as per the laws of the respective foreign country.

8. Application for relief on recognition.

- (1) An application seeking relief under section 18 of Part Z, including any relief under rule 9 or 10, may be filed along with the application for recognition under sub-rule (1) of rule 6, or any time thereafter.
- (2) An application under sub-rule (1) shall contain the following particulars-
 - (a) the grounds for the relief sought;
 - (b) the facts to establish that the relief is necessary to protect the assets of the corporate debtor or the interests of the creditors; and
 - (c) all other facts as may be necessary to assist the Adjudicating Authority in deciding appropriateness to grant the relief sought by the applicant.

- (3) The foreign representative shall, at the time of making an application under sub-rule (1), serve a copy of such application, on-
- (a) the registered office of the corporate debtor; or
 - (b) if the corporate debtor is undergoing insolvency resolution or liquidation proceeding under the Code, the interim resolution professional or the resolution professional or the liquidator, as the case may be, appointed in that proceeding.

9. Manner of entrustment of assets.

- (1) The Adjudicating Authority may, while exercising its powers under clause (e) of sub-section (1) of section 18 of Part Z, pass an order allowing the foreign representative to take any one or more of the following actions, for the purposes of administration or realization of assets of the corporate debtor, -
- (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
 - (b) make a public announcement for collection of claims of the corporate debtor or collect them in any other manner directed by the Adjudicating Authority, if there are no insolvency resolution or liquidation proceedings ongoing against the corporate debtor under the Code;
 - (c) prepare a consolidated list of claims with a resolution professional or liquidator appointed in any insolvency resolution or liquidation proceedings ongoing against the corporate debtor under the Code or with any other foreign representative in another foreign proceeding in respect of the corporate debtor;
 - (d) advertise the assets of the corporate debtor for sale in the manner as agreed in a protocol between the parties, if any, or by means of auction or private placement, upon such terms as directed by the Adjudicating Authority;
 - (e) negotiate the sale price of the assets of the corporate debtor;
 - (f) undertake identification of priority payouts for distribution and costs of the processes; or
 - (g) take of any other actions that may be necessary for the purpose of administration or realization of the assets of the corporate debtor.
- (2) While passing an order under sub-rule (1), the Adjudicating Authority may, where considered necessary to protect the assets of the corporate debtor or the interests of the creditors, impose any limitations or restrictions to the

administration and realisation of the corporate debtor's assets located in India by the foreign representative.

- (3) While passing an order under sub-rule (1), the Adjudicating Authority may require the foreign representative to report any material development in relation to the assets of the corporate debtor, as soon as reasonably practicable or in the manner as directed.
- (4) The Adjudicating Authority shall consider the relevant terms of protocol, if any, in respect of the foreign proceeding while providing any relief under this rule.

10. Additional relief on recognition.

While exercising powers under clause (f) of sub-section (1) of section 18 of Part Z, the Adjudicating Authority may grant any relief that may be available to a resolution professional or liquidator under the Code, including permitting the foreign representative to-

- (a) access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
- (b) access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and other relevant persons;
- (c) conduct a valuation of the corporate debtor's assets or seek valuation reports; or
- (d) seek directions from the Adjudicating Authority to compel co-operation from any person whose assistance or cooperation may be required by the foreign representative.

11. Subsequent information.

- (1) The foreign representative shall provide any subsequent information under section 16 of Part Z to the Adjudicating Authority by filing Form C.
- (2) The foreign representative shall serve a copy of Form C filed under sub-rule (1), forthwith after the date of filing such form with the Adjudicating Authority, on-
 - (a) the registered office of the corporate debtor; or
 - (b) if the corporate debtor is undergoing insolvency resolution or liquidation proceeding under the Code, the interim resolution professional or the resolution professional or the liquidator, as the case may be, appointed in that proceeding.

12. Request for facilitating co-operation.

(1) A foreign representative may apply to the Adjudicating Authority to request for co-operation under Chapter IV of Part Z and shall submit the following information to the Adjudicating Authority, unless already submitted to the Adjudicating Authority in respect of the same foreign proceeding, -

- (a) a certified copy of the decision of the commencement of the foreign proceeding and appointment of the foreign representative in such proceedings;
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
- (c) in the absence of documents under clause (a) and (b), any other evidence affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
- (d) a statement identifying all foreign proceedings and proceedings under this Code in respect of the corporate debtor that are known to the foreign representative;
- (e) proof that the requisite fee for this application has been paid;
- (f) a statement indicating the status of authorisation of the foreign representative by the Board, according to section 7 of Part Z of the Insolvency and Bankruptcy Code, 2016 read with rule 5 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020;
- (g) the nature of cooperation sought by the foreign representatives; and
- (h) any order or letter of request from the court/Adjudicating Authority in foreign proceedings seeking cooperation or assistance from the Adjudicating Authority in India, if any.

(2) The foreign representative shall forthwith serve a copy of the application filed under sub-rule (1) on-

- (a) the registered office of the corporate debtor; or
- (b) if the corporate debtor is undergoing insolvency resolution or liquidation proceeding under the Code, the interim resolution professional or the resolution professional or the liquidator, as the case may be, appointed in that proceeding.

13. Application by a replaced foreign representative.

At any time after filing an application with the Adjudicating Authority under Part Z, if a foreign representative ceases to be the foreign representative in relation to the foreign proceeding for the corporate debtor and is replaced by another person, such

person shall-

- (i) file an application before the Adjudicating Authority to inform it about such replacement and confirm his status as the new foreign representative in Form D; and
- (ii) apply for authorisation to the Board, under rule 5, at the time of or within 3 days of the date on which the application under clause (i) is filed.

14. Procedure of filing and application fee.

- (1) Till such time, rules of procedure for the conduct of proceedings under the Code are notified, the applications under these rules shall be filed and dealt with by the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 made under section 469 of the Companies Act, 2013 (18 of 2013).
- (2) The application and accompanying documents shall be filed in electronic form, as and when such facility is made available and as directed by the Adjudicating Authority:
Provided that till such facility is made available, the applicant may submit accompanying documents, and wherever they are bulky, in electronic form, in scanned, legible portable document format in a data storage device such as compact disc or a USB flash drive acceptable to the Adjudicating Authority.
- (3) Any application under these rules shall be submitted to the Adjudicating Authority with a fee, in accordance with Schedule I.
- (4) Any application and documents filed under these rules shall be translated to English, and may be accompanied by a certificate or affidavit from a translator approving accuracy of the translation.

Form A

(Under sub-rule (1) of rule 5)

APPLICATION FOR AUTHORIZATION OF FOREIGN REPRESENTATIVE

(Under section 7 of Part Z read with rule 5 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020)

To
The Executive Director (IP Division)
Insolvency and Bankruptcy Board of India

Subject: Application for authorization as a Foreign Representative

Sir / Madam,

I, having been appointed as a foreign representative in insolvency proceedings commenced in respect of [*Name of the corporate debtor*] in [*Name of the Country*] on [*date of appointment*], hereby apply for authorization as a Foreign Representative under section 7 of Part Z read with rules 4 and 5 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020. My details are as under:

Sr. No	Particulars	Details
1.	TITLE (MR. / MRS. / MS. / OTHER):	
2.	FULL NAME	
3.	ADDRESS FOR SERVICE OF NOTICE IN INDIA IN CONNECTION WITH THE PROCEEDINGS INITIATED BY THE FOREIGN REPRESENTATIVE (IF ANY)	
4.	E-MAIL ADDRESS	
5.	CONTACT NO. (DOMESTIC AND FOREIGN)	
6.	DATE OF BIRTH	
7.	PROFESSION/ VOCATION	
8.	REGISTRATION DETAILS WITH ANY PROFESSIONAL BODY (IF APPLICABLE)	
9.	DETAILS OF OTHER ASSIGNMENTS IN INDIA, IF ANY	
10.	DETAILS OF ANY DISCIPLINARY PROCEEDINGS PENDING OR CONDUCTED AGAINST THE FOREIGN REPRESENTATIVE BY THE	

	INSOLVENCY AND BANKRUPTCY BOARD AND CURRENT STATUS OF SUCH PROCEEDING(S)	
11.	DETAILS OF THE CORPORATE DEBTOR (I) NAME (II) PLACE OF INCORPORATION (III) REGISTRATION DETAILS IN INDIA (IF REGISTERED IN INDIA)	
12.	DETAILS OF THE FOREIGN PROCEEDING IN RESPECT OF THE CORPORATE DEBTOR (I) DATE OF INITIATION OF FOREIGN PROCEEDING AND COURT IN WHICH THEY ARE ONGOING (II) PRESENT STATUS OF FOREIGN PROCEEDING (III) DATE OF AUTHORISATION OF APPLICANT TO ACT AS A FOREIGN REPRESENTATIVE FOR SUCH FOREIGN PROCEEDING	

I, [*Name of the foreign representative*], have paid the requisite fee for this application through [*state means of payment*] on [*date*].

Yours sincerely,

Signature of Foreign Representative
Name in block letters
Address

Instructions

Please attach the following to this application:

- Annex I A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative in the foreign proceedings.
- Annex II A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.
- Annex III A copy of the application(s) filed with the Adjudicating Authority under Part Z of the Insolvency and Bankruptcy Code, 2016.
- Annex IV Copies of all documents referred to in this application.

DECLARATION

1. I affirm that I am eligible to be authorized as a Foreign Representative under the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020 read with section 7 of Part Z of the Insolvency and Bankruptcy Code, 2016.
2. The contents of the said application along with the said documents are true, valid and genuine to the best of my knowledge, information and belief and nothing material facts have been concealed therefrom.
3. I undertake to comply with the requirements of the Insolvency and Bankruptcy Code, 2016, rules, regulations, guidelines and circulars issued thereunder, and any directions given by the Board from time to time.

Place:

Date:

(Name and signature of applicant)

VERIFICATION

I, [*name of applicant*], do hereby verify that the contents of this application are true and correct to my knowledge and belief. Nothing is false and no material has been concealed therefrom.

Verified at _____ on this _____ day of _____ 201__

(Signature of the Applicant)

Form B
(Under sub-rule (1) of rule 6)

APPLICATION FOR RECOGNITION OF FOREIGN PROCEEDING

(Under section 12 of Part Z of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020)

[Date]

To,
The National Company Law Tribunal
[Address]

From,
[Names and addresses of the foreign representative]

In the matter of [name of the corporate debtor]

Subject: Recognition application for foreign proceedings in [name of the country] in respect of [name of the corporate debtor] as a [state whether recognition is sought as a foreign main or as a foreign non-main proceeding] under Part Z of the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

I, [Name of the foreign representative], hereby submit this application for recognition of the foreign proceedings in [name of the country] in the matter of [name of corporate debtor] as [foreign main proceedings/ foreign non-main proceedings]. The details for the purposes of this application are set out below:

Part-I

PARTICULARS OF THE APPLICANT		
1.	NAME OF FOREIGN REPRESENTATIVE	
2.	IDENTIFICATION NUMBER OF FOREIGN REPRESENTATIVE, IF ANY	
3.	ADDRESS OF FOREIGN REPRESENTATIVE (FOREIGN AND DOMESTIC, IF ANY)	
4.	EMAIL ADDRESS AND TELEPHONE NUMBER OF FOREIGN REPRESENTATIVE	
5.	ADDRESS FOR SERVICE OF NOTICE IN INDIA IN CONNECTION WITH THE PROCEEDINGS INITIATED BY THE	

	FOREIGN REPRESENTATIVE (IF ANY)	
--	---------------------------------	--

Part-II

PARTICULARS OF THE CORPORATE DEBTOR		
1.	NAME OF THE CORPORATE DEBTOR	
2.	PLACE OF INCORPORATION OF THE CORPORATE DEBTOR	
3.	IDENTIFICATION NUMBER OF CORPORATE DEBTOR, IF APPLICABLE (INCLUDING REGISTRATION DETAILS IN INDIA, IF IT IS REGISTERED IN INDIA)	
4.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
5.	NATURE OF BUSINESS CARRIED ON BY THE CORPORATE DEBTOR IN INDIA AND IN THE RESPECTIVE FOREIGN COUNTRY	
6.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (IF APPLICABLE)	
7.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR <i>Please indicate if there has been a shift in the registered office of the corporate debtor. If so, then when was it shifted?</i>	
8.	ADDRESS OF THE BRANCH OR ESTABLISHMENT OF THE CORPORATE DEBTOR IN THE RESPECTIVE FOREIGN COUNTRY AND IN INDIA, IF ANY	
9.	NAME IN WHICH THE CORPORATE DEBTOR CARRIES ON BUSINESS IN THE FOREIGN COUNTRY AND IN INDIA	
10.	LIST OF ASSETS OF THE CORPORATE DEBTOR IN THE FOREIGN COUNTRY AND IN INDIA, BOTH SECURED AND UNSECURED (OPTIONAL)	

11.	DETAILS OF ANY INSOLVENCY RESOLUTION OR LIQUIDATION PROCEEDINGS PENDING UNDER THE CODE IN RESPECT OF THE CORPORATE DEBTOR, IF ANY	
-----	---	--

Part-III

PARTICULARS OF THE FOREIGN PROCEEDING		
1.	<p>NAME OF THE FOREIGN COUNTRY AND DETAILS OF THE COURT BEFORE WHICH FOREIGN PROCEEDINGS (IN RESPECT OF WHICH THE FOREIGN REPRESENTATIVE HAS BEEN APPOINTED) ARE PENDING</p> <p><i>Please also indicate if the respective foreign country has-</i></p> <p><i>(i) adopted the UNCITRAL Model Law on Cross Border Insolvency, and</i></p> <p><i>(ii) entered into an agreement with the Government of India in relation to cross border insolvency.</i></p>	
2.	DATE OF DECISION OF FOREIGN COURT COMMENCING THE FOREIGN PROCEEDING AND APPOINTING THE FOREIGN REPRESENTATIVE (ATTACH CERTIFIED COPY)	
3.	DATE OF CERTIFICATE OF FOREIGN COURT AFFIRMING THE EXISTENCE OF THE FOREIGN PROCEEDING AND APPOINTMENT OF THE FOREIGN REPRESENTATIVE (ATTACH COPY)	
4.	STATUS OF FOREIGN PROCEEDING	
5.	DETAILS OF ANY OTHER FOREIGN PROCEEDINGS ONGOING IN RESPECT OF THE CORPORATE DEBTOR (IF KNOWN, PLEASE SPECIFY THE COUNTRY IN WHICH SUCH PROCEEDINGS ARE TAKING PLACE, THE	

	DATE OF INITIATION OF SUCH PROCEEDINGS AND THE COURT INVOLVED)	
--	--	--

Part – IV

NATURE OF RECOGNITION OF FOREIGN PROCEEDING		
1.	WHETHER THE RECOGNITION APPLICATION IS FILED FOR RECOGNITION OF THE FOREIGN PROCEEDING AS A FOREIGN MAIN PROCEEDING OR A FOREIGN NON-MAIN PROCEEDING (WITH REASONS AND PROOF THEREOF)	

Part-V

PARTICULARS OF DEBT AND CREDITORS [OPTIONAL]		
1.	WHETHER FOREIGN PROCEEDINGS WERE INITIATED DUE TO DEFAULT ON PAYMENT OF DEBT (IF SO, PLEASE SPECIFY DETAILS OF SUCH DEFAULT INCLUDING THE DATE OF DEFAULT, AMOUNT OF DEFAULT, AND RESPECTIVE CREDITOR)	
2.	LIST OF CREDITORS, DOMESTIC AND FOREIGN, OF THE CORPORATE DEBTOR, AND DETAILS OF CLAIMS, KNOWN TO THE FOREIGN REPRESENTATIVE	

I, *[Name of the foreign representative]* have paid the requisite fee for this application through *[state means of payment]* on *[date]*.

Yours sincerely,

Signature of Foreign Representative
Name in block letters
Address

Instructions

Please attach the following to this application:

- Annex I A certified copy of the decision of the commencement of the foreign proceeding and appointment of the foreign representative in such proceedings.
- Annex II A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.
- Annex III In the absence of annexures I and II, any other evidence affirming the existence of the foreign proceeding and of the appointment of the foreign representative.
- Annex IV A statement identifying all foreign proceedings and proceedings under this Code in respect of the corporate debtor that are known to the foreign representative.
- Annex V A copy of any previous application filed by the foreign representative with the Adjudicating Authority in respect of the same foreign proceeding under Part Z of the Insolvency and Bankruptcy Code, 2016.
- Annexure VI Any document establishing evidence that the corporate debtor has its centre of main interests or an establishment, as the case may be, within the country where the foreign proceeding is taking place.
- Annex VII Proof that the requisite fee for this application has been paid.
- Annex VIII A statement indicating the status of authorisation of the foreign representative by the Board, according to section 7 of Part Z of the Insolvency and Bankruptcy Code, 2016 read with rule 5 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020.
- Annex IX Copies of any other documents referred to in this application.

AFFIDAVIT

I, [*insert name of deponent*], currently residing at [*address of deponent*], do solemnly affirm and state as follows:

1. I represent foreign proceedings, in the nature of [*insert name of relevant foreign proceeding under the relevant law in the foreign country*], in [*insert name of the country*] in respect of [*insert name of the corporate debtor*]. I have filed the present application for recognition of these foreign proceedings as [*foreign main proceedings/foreign non-main proceedings*] under Part Z of the Insolvency and Bankruptcy Code, 2016.
2. I affirm that I am eligible to act as a foreign representative under Part Z of the Insolvency and Bankruptcy Code, 2016 and the rules and regulations thereunder.

3. To the best of my knowledge, this application is not in breach of the Insolvency and Bankruptcy Code, 2016 and the rules and regulations thereunder.

4. In respect of the present application for recognition of the foreign proceedings as a [foreign main proceedings/foreign non-main proceedings], I have relied on the documents below-

[Please provide a list of all documents annexed to the application for recognition of the foreign proceeding]

5. The said documents are true, valid and genuine to the best of my knowledge, information and belief.

Solemnly, affirmed at _____ on _____ day, the _____ day of _____ 20_____

Before me,

Notary / Oath Commissioner

Deponent's signature

VERIFICATION

I, the Deponent hereinabove, do hereby verify and affirm that the contents of para ___ to ___ of this affidavit are true and correct to my knowledge and belief. Nothing is false and nothing material has been concealed therefrom.

Verified at _____ on this _____ day of _____ 201_____

Deponent's signature

Form C
(Under sub-rule (1) of rule 11)

APPLICATION FOR SUBSEQUENT INFORMATION

(Under section 16 of Part Z of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the Insolvency and Bankruptcy (Cross Border Insolvency) Rules, 2020)

[Date]

To,
The National Company Law Tribunal
[Address]

From,
[Names and addresses of the foreign representative]

In the matter of [name of corporate debtor]

Subject: Application for filing subsequent information

Madam/Sir,

I, [name of the foreign representative], am submitting this application for filing subsequent information that has come to my knowledge pursuant to the application for recognition of foreign proceeding in [name of the country] in respect of [name of the corporate debtor]. The details for the purposes of this application are set out below:

Sr. No	Particulars	Details
1.	DATE OF FILING OF APPLICATION FOR RECOGNITION WITH THE ADJUDICATING AUTHORITY IN RESPECT OF THE FOREIGN PROCEEDING	
2.	DETAILS OF ORDERS, IF ANY, PASSED BY THE ADJUDICATING AUTHORITY IN RESPECT OF THE APPLICATION FOR RECOGNITION OF FOREIGN PROCEEDING	
3.	PLEASE TICK THE APPLICABLE INFORMATION BEING SUBMITTED	<input type="checkbox"/> Change in status of recognized foreign proceeding <input type="checkbox"/> Change in status of appointment of foreign representative

		<input type="checkbox"/> Change in status of any other foreign proceeding <input type="checkbox"/> Change in status of proceedings under this Code.
4.	BRIEF DESCRIPTION OF SUBSEQUENT INFORMATION THAT IS BEING FILED BY THE FOREIGN REPRESENTATIVE (PLEASE ATTACHED A DETAILED STATEMENT INCLUDING DETAILS OF THE TIME AND MANNER IN WHICH THE FOREIGN REPRESENTATIVE CAME TO KNOW OF SUCH INFORMATION)	

I, [*Name of the foreign representative*], have paid the requisite fee for this application through [*state means of payment*] on [*date*].

Yours sincerely,

Signature of Foreign Representative
Name in block letters
Address

Instructions

Please attach the copies of any documents referred to in this application and proof that the requisite fee for this application has been paid.

DECLARATION

I, [*Name of foreign representative*], currently residing at [*insert address*], hereby declare and state as follows: -

1. In respect of this application for subsequent information, I have relied on-

[*Insert list of documents annexed to this application*]

2. The contents of the said application along with the said documents are true, valid and genuine to the best of my knowledge, information and belief and nothing material facts have been concealed therefrom.

Date:

Place:

(Name and Signature of the applicant)

VERIFICATION

I, [*name of applicant*], do hereby verify that the contents of this application are true and correct to my knowledge and belief. Nothing is false and no material has been concealed therefrom.

Verified at _____ on this _____ day of _____ 201__

(Signature of the Applicant)

Form D

(Under rule 13)

**APPLICATION TO GIVE INFORMATION REGARDING REPLACEMENT OF
FOREIGN REPRESENTATIVE**

(Under rule 13 of the Insolvency and Bankruptcy (Cross Border) Rules, 2020)

[Date]

To,
The National Company Law Tribunal
[Address]

From,
[Names and addresses of the foreign representative]

In the matter of [name of corporate debtor]

**Subject: Application to give information regarding replacement of foreign representative
and confirm status of new foreign representative.**

Sir / Madam,

I, [name of the applicant], hereby submit this application to provide information regarding replacement of a foreign representative. [name of previous foreign representative], who was acting as the foreign representative under Part Z of the Insolvency and Bankruptcy Code, 2016 in respect of [name of the corporate debtor] in the following matters-

[insert details of cases in respect of which the foreign representative has been acting as such under the Insolvency and Bankruptcy Code, 2016].

I have replaced the previous foreign representative, and hereby apply to confirm my status as the new foreign representative in the matter of [name of corporate debtor]. The details for the purposes of this application are set out below:

Part I

PARTICULARS OF PREVIOUS FOREIGN REPRESENTATIVE		
1.	NAME OF PREVIOUS FOREIGN REPRESENTATIVE	
2.	IDENTIFICATION NUMBER OF PREVIOUS FOREIGN REPRESENTATIVE, IF ANY	
3.	ADDRESS OF PREVIOUS FOREIGN REPRESENTATIVE (AS PREVIOUSLY	

	FILED WITH THE ADJUDICATING AUTHORITY)	
4.	DATE OF TERMINATION OF SERVICES OF THE PREVIOUS FOREIGN REPRESENTATIVE IN RESPECT OF THE FOREIGN PROCEEDING	
5.	REASONS FOR TERMINATION OF SERVICE, IF KNOWN TO THE APPLICANT	

Part II

PARTICULARS OF APPLICANT		
1.	NAME OF PERSON PURPORTING TO BE FOREIGN REPRESENTATIVE	
2.	IDENTIFICATION NUMBER OF PERSON PURPORTING TO BE FOREIGN REPRESENTATIVE, IF ANY	
3.	ADDRESS OF PERSON PURPORTING TO BE FOREIGN REPRESENTATIVE (FOREIGN AND DOMESTIC, IF ANY)	
4.	EMAIL ADDRESS AND TELEPHONE NUMBER OF PERSON PURPORTING TO BE FOREIGN REPRESENTATIVE	
5.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON BEHALF OF THE PERSON PURPORTING TO BE FOREIGN REPRESENTATIVE (ENCLOSE AUTHORISATION)	
6.	DATE OF APPOINTMENT IN RESPECT OF THE FOREIGN PROCEEDING OR DATE OF AUTHORISATION TO ACT AS FOREIGN REPRESENTATIVE OF THE FOREIGN PROCEEDING, AS APPLICABLE	

I, [*Name of the foreign representative*], have paid the requisite fee for this application through [*state means of payment*] on [*date*].

Yours sincerely,

Signature of Foreign Representative
Name in block letters

Address

Instructions

Please attach the following to this application:

- Annex I A certified copy of the decision appointing the foreign representative in the foreign proceedings, or in the absence of such a certified copy, any other evidence affirming the appointment of the foreign representative.
- Annex II Proof that the requisite fee for this application has been paid.
- Annex III Copies of any other documents referred to in this application.

DECLARATION

I, [*Name of foreign representative*], currently residing at [*address*], hereby declare and state as follows: -

1. I have filed the present application for giving information regarding replacement of foreign representative and confirming my status as a new foreign representative.

2. In respect of the said application, I have relied on-

[*Insert list of documents annexed to this application*]

3. The contents of the said application along with the said documents are true, valid and genuine to the best of my knowledge, information and belief and nothing material facts have been concealed therefrom.

Place:

Date:

(Name and signature of applicant)

VERIFICATION

I, [*name of applicant*], do hereby verify that the contents of this application are true and correct to my knowledge and belief. Nothing is false and no material has been concealed therefrom.

Verified at _____ on this _____ day of _____ 201__

(Signature of the Applicant)

Schedule I
Fee for Applications
(Under sub-rule (3) of rule 14)

Sr. No.	Kind of Application	Requisite fee
1.	Application to the Adjudicating Authority for recognition of foreign proceedings	<i>May be provided at the time of notification of these rules as decided by the Central Government</i>
2.	Application to the Adjudicating Authority for requesting cooperation	<i>May be provided at the time of notification of these rules as decided by the Central Government</i>
3.	Any other application made to the Adjudicating Authority	<i>May be provided at the time of notification of these rules as decided by the Central Government</i>

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

NOTIFICATION

New Delhi, the ____ ____, 2020

IBBI/2020-21/GN/REG ___ – In exercise of powers conferred by [*sections 3, 7, 8 and 11 of the Part Z of the Code read with suitable provisions of section 240 of the Code*]¹, the Board hereby makes the following regulations, namely-

CHAPTER I

PRELIMINARY

1. Short title and commencement.

- (1) These Regulations may be called the Insolvency and Bankruptcy Board of India (Cross Border Insolvency) Regulations, 2020.
- (2) These Regulations shall come into force on the date of their publication in the Official Gazette.
- (3) These Regulations shall apply to matters relating to the cross border insolvency provided in Part Z of the Code.

2. Definitions.

- (1) In these Regulations, unless the context otherwise requires:
 - (a) “Code” means the Insolvency and Bankruptcy Code, 2016 (31 of 2016);
 - (b) “Disciplinary Committee” means Disciplinary Committee as defined in clause (a) of sub-regulation (1) of Regulation 2 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulation, 2017;
 - (c) “form” means a Form appended to these regulations;
 - (d) “known foreign creditor” means any foreign creditor of the corporate debtor that does not have an address in India and is known to the insolvency professional at the relevant time;
 - (e) “authorization of a foreign representative” means the authorization of a foreign representative under Rule 5;
 - (f) “Rule” means a rule of the Insolvency and Bankruptcy (Cross Border

¹ Please note that references to provisions related to cross border insolvency in these regulations are based on Draft Part Z as provided in the report of the Insolvency Law Committee. These references will need to be altered based on the manner of incorporation of Draft Part Z in the Code.

Insolvency) Rules, 2020;

- (g) “schedule” means the Schedule appended to these regulations;
- (h) “section” means a section of the Code.

- (2) All the words and expressions used herein and not defined shall have the meanings respectively assigned to them under the Part Z and the Code.

CHAPTER II

RESOLUTION PROFESSIONAL OR LIQUIDATOR

3. Resolution professional or liquidator authorised to act in a foreign country.

Without prejudice to any requirements for reporting under the Code or the rules and regulations thereunder, where a resolution professional or liquidator acts in a foreign country in relation to a proceeding under this Code, as authorised by section 3 of Part Z, he shall intimate the Board by submitting Form A prior to undertaking any such acts.

4. Insolvency resolution or liquidation process costs.

Any costs incurred by the resolution professional or liquidator while acting in a foreign country on behalf of a proceeding under the Code shall form a part of the insolvency resolution process costs under clause (e) of sub-section (13) of section 5 or the liquidation costs under sub-section (16) of section 5, as the case may be.

CHAPTER III

FOREIGN REPRESENTATIVES

5. Conduct of foreign representatives.

- (1) A foreign representative authorised under Rule 5 shall abide by the code of conduct in the First Schedule while acting in respect of a foreign proceeding under Part Z.
- (2) A foreign representative acting in India in respect of a foreign proceeding shall forward all records relating to the conduct of the foreign proceeding in India to the Board to be recorded on its database, through an electronic platform of the Board, in such manner as may be communicated by the Board.

6. Preservation of records.

A foreign representative shall preserve an electronic copy of the records relating to

the proceedings in India in respect of the foreign proceeding as per the record retention schedule as may be communicated by the Board.

7. Disciplinary proceedings against foreign representatives.

- (1) The provisions of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 shall apply *mutatis mutandis* to foreign representatives as they apply to the insolvency professionals.
- (2) Where, upon the conclusion of the disciplinary proceedings undertaken against a foreign representative, the Disciplinary Committee finds that the foreign representative has contravened any of the provisions of the Code or the rules and regulations framed thereunder, the Disciplinary Committee shall pass a reasoned order, which may provide for:
 - (a) closure of the show-cause notice issued in respect of the foreign representative without any direction;
 - (b) issuance of a warning;
 - (c) cancelation of the authorisation of a foreign representative;
 - (d) any actions specified in clauses (a), (b) or (c) of sub-section (2) of section 8 of Part Z; or
 - (e) making a reference to the Board to take any action under sub-sections (4) or (5) of section 220.
- (3) The Board shall send a copy of the order passed under sub-regulation (2) to the concerned bench of the Adjudicating Authority.

CHAPTER IV

NOTICES

8. Notice to creditors having addresses outside India.

- (1) Whenever notice is to be given to the creditors of a corporate debtor during insolvency resolution, liquidation or any other proceedings in respect of a corporate debtor under the Code, such notice must be given to known foreign creditors in accordance with the Code or the rules and regulations framed thereunder.
- (2) Subject to sub-regulation (1), where it is not possible to give notice to a known foreign creditor in accordance with the Code or the rules and regulations framed thereunder, the following shall be deemed to be notice to such known foreign creditors for the purposes of section 11 of Part Z-

- (i) publication of the notice forthwith on the website of the corporate debtor, if any, and
- (ii) publication of the notice forthwith on the website designated by the Board for this purpose.

FORM A

(Under sub-regulation (2) of Regulation 3)

INTIMATION OF ACTS TO BE UNDERTAKEN IN A FOREIGN COUNTRY

(Under section 3 of Part Z of the Code read with regulation 3 of the Insolvency and Bankruptcy Board of India (Cross Border Insolvency) Regulation, 2020)

To,
The Executive Director (IP Division)
Insolvency and Bankruptcy Board of India

Subject: Intimation of acts to be undertaken in a foreign country on behalf of a proceedings under the Insolvency and Bankruptcy Code, 2016 under section 3 of the Part Z

Madam/Sir,

I, [*name of the resolution professional/liquidator*], hereby intimate acts to be undertaken by myself in [*name of the foreign country*] on behalf of the [*proceedings under the Insolvency and Bankruptcy Code, 2016*] of [*name of the corporate debtor*] under section 3 of Part Z. The details for the said purpose are set out below:

S. No.	Particulars	Details
1.	DETAILS OF THE CORPORATE DEBTOR (I) NAME (II) PLACE OF INCORPORATION (III) REGISTRATION DETAILS IN INDIA	
2.	DETAILS OF THE APPOINTMENT OF RESOLUTION PROFESSIONAL OR LIQUIDATOR (I) DATE OF ORDER OF THE ADJUDICATING AUTHORITY APPOINTING THE RESOLUTION PROFESSIONAL OR THE LIQUIDATOR (II) CASE DETAILS OF THE PROCEEDINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 PENDING BEFORE THE ADJUDICATING AUTHORITY	
3.	STATUS OF PROCEEDINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 PENDING UNDER THE CODE IN RESPECT OF THE CORPORATE DEBTOR	

4.	DETAILS OF THE ACTS TO BE UNDERTAKEN IN A FOREIGN COUNTRY (MAY BE AN ESTIMATION) AND THE NAME OF THE FOREIGN COUNTRY	
5.	DETAILS OF THE FOREIGN PROCEEDINGS OF THE CORPORATE DEBTOR (IF APPLICABLE) (I) NAME OF THE FOREIGN COURT (II) CASE DETAILS OF THE FOREIGN PROCEEDINGS PENDING BEFORE THE FOREIGN COURT (III) STATUS OF FOREIGN PROCEEDINGS	
6.	LIST OF DOCUMENTS ATTACHED TO THIS FORM	

AFFIRMATION

I, hereby affirm that -

- (i) I am intimating prior to undertaking the acts in [*name of the foreign country*] on behalf of a [*proceedings under the Insolvency and Bankruptcy Code, 2016*] of the [*name of the corporate debtor*] under the Code,
- (ii) all information contained in this form is complete and correct in all material respects, and
- (ii) no material information relevant for the purposes of this form has been suppressed.

Yours sincerely,

Signature of the Resolution Professional/Liquidator:
Name in block letters

FIRST SCHEDULE

(Under sub-regulation (1) of Regulation 5)

CODE OF CONDUCT FOR FOREIGN REPRESENTATIVES

Integrity and objectivity.

1. A foreign representative must maintain integrity by being honest, straightforward, and forthright in all professional relationships.
2. A foreign representative must not misrepresent any facts or situations and must make full and fair disclosure of any information required by the Adjudicating Authority.
3. A foreign representative must not knowingly disobey any orders or directions of the Adjudicating Authority.
4. A foreign representative must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.
5. A foreign representative must disclose the details of any conflict of interests to the stakeholders or to the Adjudicating Authority, whenever he comes across such conflict of interest while exercising powers and functions under Part Z of the Code.

Independence and impartiality.

6. A foreign representative must maintain complete independence and impartiality in his professional relationships and should conduct his duties independent of external influences.
7. A foreign representative while acting in respect of the foreign proceeding in India, must act in a fiduciary capacity and undertake actions that are in the best interest of the creditors of the corporate debtor.
8. In cases where the foreign representative is dealing with assets of a corporate debtor under the Code, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality and the same is permitted by the applicable law or the Adjudicating Authority.
9. A foreign representative shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under the Code, and the concerned corporate debtor as soon as he becomes aware of it, by making a declaration of the same to the Adjudicating Authority.
10. A foreign representative shall not influence the decision or the work of the creditors, the corporate debtor, any insolvency professional appointed in the proceedings under the Code in relation to the concerned corporate debtor, or any other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties,

or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

Representation of correct facts and correcting misapprehensions.

11. A foreign representative must inform the Adjudicating Authority under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.
12. A foreign representative must not conceal any material information or knowingly make a misleading statement to an insolvency professional appointed in the proceedings under the Code in relation to the concerned corporate debtor, to the Board, the Adjudicating Authority or any stakeholder, as applicable.

Information management.

13. A foreign representative must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.
14. A foreign representative must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.
15. A foreign representative must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.
16. A foreign representative must appear, co-operate and be available for inspections and investigations carried out by the Board or any person authorised by the Board.
17. A foreign representative must provide all information and records as may be required by the Board for the purposes of disciplinary proceedings.

Confidentiality.

18. A foreign representative must ensure that confidentiality of the information relating to the proceedings under the Code, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the _____ June, 2020

S.O. _____.— (1) In exercise of the powers conferred by [*sub-section (1) of section 21 read with section 29 of the Part Z*]¹ of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (the “Code”), the Central Government² hereby notifies the guidelines for communication and cooperation between the Adjudicating Authority and foreign courts in the interest of all stakeholders (the “Guidelines”) in the manner specified in the First Schedule.

(2) These Guidelines shall be subject to the provisions of Part Z of the Code and rules and regulations framed thereunder.

(3) As per [*sub-section (d) of section 23 read with sections 21 and 22 of the Part Z*] of the Code, cooperation may be implemented by approval or implementation of agreements concerning coordination of proceedings or protocol, between the Adjudicating Authority and foreign courts or foreign representatives, or between the resolution professionals or liquidators and foreign courts or foreign representatives. These Guidelines are limited to the agreements concerning coordination of proceedings or protocol for cooperation and communication between the Adjudicating Authority and foreign courts. Unless otherwise specified in the Guidelines, the obligations of foreign courts under these Guidelines shall be based on agreement through protocol or through communication with the Adjudicating Authority.

(4) The Guidelines enclosed in First Schedule may be implemented in a particular case, whether in whole or in part and with or without modification, after approval of the Adjudicating Authority as per Guideline 2 of the Guidelines.

(5) This notification shall come into force with effect from the _____, 2020.

¹ Please note that references to provisions related to cross border insolvency in these Guidelines are based on Draft Part Z as provided in the report of the Insolvency Law Committee. These references will need to be altered based on the manner of incorporation of Draft Part Z in the Code.

² Please note that Clause 21 states that the Central Government consult with the Adjudicating Authority before notifying the guidelines. Under clause 2(a) of the Draft Part Z, the phrase “Adjudicating Authority” means benches of the National Company Law Tribunal (“NCLT”), as notified by the Central Government. Therefore, before notifying these rules consultation will be required with the presiding officers of the NCLTs.

FIRST SCHEDULE

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN THE ADJUDICATING AUTHORITY AND FOREIGN COURTS IN CROSS-BORDER INSOLVENCY MATTERS

INTRODUCTION

- A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency opened in more than one jurisdiction (“Parallel Proceedings”) by enhancing coordination and cooperation amongst the Adjudicating Authority and foreign courts under whose supervision such proceedings are being conducted.
- B. In all Parallel Proceedings, these Guidelines shall be considered at the earliest practicable opportunity.
- C. In particular, these Guidelines aim to promote:
- (i) the efficient and timely coordination and administration of Parallel Proceedings;
 - (ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders’ interests are respected;
 - (iii) the identification, preservation, and maximisation of the value of the debtor's assets, including the debtor's business;
 - (iv) the management of the debtor’s estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;
 - (v) the sharing of information in order to reduce costs; and
 - (vi) the avoidance or minimisation of litigation, costs, and inconvenience to the parties in Parallel Proceedings.
- D. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.
- E. The Adjudicating Authority shall consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. The Adjudicating Authority shall encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the Adjudicating Authority or foreign courts to facilitate such

implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

- F. For the purposes of these guidelines, the term “authority” shall mean the Adjudicating Authority and the foreign courts that have signified their assent to the adoption of these guidelines in whole or in part and with or without modification.
- G. Unless the context otherwise requires, words and expressions used and not defined in these Guidelines but defined in Part Z of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), shall have the meanings respectively assigned therein.

ADOPTION & INTERPRETATION

Guideline 1: In furtherance of paragraph E above, the Adjudicating Authority shall encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the Adjudicating Authority or foreign courts involved at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the Adjudicating Authority and foreign courts. For the purpose of these Guidelines, “administrator” includes a foreign representative, interim resolution professional, resolution professional, or liquidator.

Guideline 2: Where the Adjudicating Authority intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order, following an application by the parties or on its own motion.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for approvals from the Adjudicating Authority and foreign courts of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly judicial hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

- (i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by the Adjudicating Authority or foreign courts in any proceedings including their authority or supervision over an administrator in those proceedings;
- (ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;

- (iii) prevent the Adjudicating Authority or foreign courts from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction; or
- (iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the Adjudicating Authority or foreign courts of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before them or a waiver by any of the parties of any of their substantive rights and claims.

Guideline 6: In the interpretation of these Guidelines or any protocol or order under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN THE ADJUDICATING AUTHORITY AND FOREIGN COURTS

Guideline 7: The Adjudicating Authority may receive communications from foreign courts and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the Adjudicating Authority, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the Adjudicating Authority and the foreign courts in a specific case:

- (i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the foreign courts and providing advance notice to counsel for affected parties in such manner as considered appropriate by the Adjudicating Authority.
- (ii) Directing counsel or other appropriate person to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the Adjudicating Authority to the foreign courts in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as considered appropriate by the Adjudicating Authority.
- (iii) Participating in two-way communications with the other foreign courts, by telephone or video conference call or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications with foreign courts, other than on administrative or procedural matters, unless otherwise directed by the Adjudicating Authority or any foreign courts involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol, the following shall apply:

- (i) In the normal case, parties may be present.
- (ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the authorities involved in the communication.
- (iii) The communications between the Adjudicating Authority and foreign courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of the Adjudicating Authority and each foreign court involved in the communications, may be treated as the official transcript of the communications.
- (iv) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of the Adjudicating Authority or any foreign courts involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as the Adjudicating Authority and foreign courts may consider appropriate.
- (v) The time and place for communications between the Adjudicating Authority and foreign courts shall be as directed by them. Personnel other than judges may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties, taking care to address fairness and transparency in their actions.

Guideline 9: The Adjudicating Authority may direct that notice of their proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before it may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Adjudicating Authority in accordance with the procedures applicable.

APPEARANCE BEFORE THE ADJUDICATING AUTHORITY

Guideline 10: The Adjudicating Authority may authorise a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, the Adjudicating Authority may authorise a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: The Adjudicating Authority shall, except on proper objection on valid grounds and then only to the extent of such objection, recognise and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of the foreign courts of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: The Adjudicating Authority shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the Adjudicating Authority are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the Adjudicating Authority, as soon as it is practicable to do so.

Guideline 14: A protocol, order or directions made by the Adjudicating Authority under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the Adjudicating Authority, and to reflect the changes and developments from time to time in any Parallel Proceedings. Such amendments, modifications and extensions should become effective upon being accepted by all the foreign courts involved. If the Adjudicating Authority intends to supplement, change, or abrogate any protocol, order or directions issued under these Guidelines in the absence of joint approval by foreign courts involved, the Adjudicating Authority shall give the other foreign courts involved reasonable notice of its intention to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to the Adjudicating Authority and foreign courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

The Adjudicating Authority and foreign courts may conduct a joint hearing with each other. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

- (i) The implementation of this Annex shall not divest nor diminish the respective independent jurisdiction of any of the authorities over the subject matter of proceedings. By implementing this Annex, neither the Adjudicating Authority nor foreign courts nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of another jurisdiction.
- (ii) Each authority shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.
- (iii) Each authority should be able simultaneously to hear the proceedings in the other authority. Consideration should be given as to how to provide the best audio-visual access possible.
- (iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in the respective authority.
- (v) If permitted by its law, the authorities may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant authority and/or its professional regulations.
- (vi) The authorities should be entitled to communicate with each other in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the respective authorities, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.
- (vii) The authorities, subsequent to the joint hearing, should be entitled to communicate with each other with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the _____ June, 2020

S.O. _____.- (1) In exercise of the powers conferred by [*clause (a) of section 2 read with section 29 of the Part Z*]¹ of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies the following Benches of the National Companies Law Tribunal constituted under sub-section (1) of Section 419 of the Companies Act, 2013 (18 of 2013) as the Adjudicating Authority to perform the functions under Part Z as mentioned below—

Serial Number	Benches of National Companies Law Tribunal	Adjudicating Authority in relation to
1.	The respective benches of the National Company Law Tribunal constituted under sub-section (1) of section 419 of the Companies Act, 2013 (18 of 2013) and notified vide notification number S.O. 1935 (E), dated 1st day of July 2016 under the Companies Act, 2013 (18 of 2013)	A corporate debtor whose registered office is located within the territorial jurisdiction of the respective bench.
2.	National Company Law Tribunal, Principal Bench constituted under sub-section (1) of section 419 of the Companies Act, 2013 (18 of 2013) and notified vide notification number S.O. 1935 (E), dated 1st day of July 2016 under the Companies Act, 2013 (18 of 2013)	Any body corporate incorporated with limited liability outside India

(2) This notification shall come into force with effect from _____ June, 2020.

¹ Please note that references to provisions related to cross border insolvency in these Guidelines are based on Draft Part Z as provided in the report of the Insolvency Law Committee. These references will need to be altered based on the manner of incorporation of Draft Part Z in the Code.

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the _____ June, 2020

S.O. _____.- (1) In exercise of the powers conferred by [*sub-section (3) of section 1 read with section 29 of the Part Z*]² of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies that the provisions of the [*Part Z*] of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) shall not apply to categories of Financial Service Providers notified under section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(2) This notification shall come into force with effect from _____ June, 2020.

² Please note that references to provisions related to cross border insolvency in these Guidelines are based on Draft Part Z as provided in the report of the Insolvency Law Committee. These references will need to be altered based on the manner of incorporation of Draft Part Z in the Code.

C Schedule of meetings of the CBIRC

Table 11 Details of the meetings of the Committee

Sr. No.	Date of meeting	Venue of meeting
1.	7 th February, 2020	New Delhi
2.	25 th February, 2020	Mumbai
3.	4 th March, 2020	New Delhi
4.	21 st April, 2020	Video-conferencing
5.	12 th May, 2020	Video-conferencing
6.	27 th May, 2020	Video-conferencing

D List of consultations held by the CBIRC

The CBIRC held consultations with the following people:

Table 12 List of consultations held with external experts

Sr. No.	Name	Organisation
1.	Mr. Justice Kannan Ramesh	Singapore Supreme Court
2.	Mr. Ashish Chhawchharia	Grant Thornton
3.	Mr. Sandeep Chandak	Varde Partners
4.	Mr. Rahul Chawla	Deutsche Bank
5.	Mr. Nilang Desai	AZB Partners
6.	Mr. Juan Dominguez	Arcelor Mittal
7.	Mr. Abhijit Guha Thakurta	Deloitte

E Research team for the CBIRC

The Research Team for this committee was an inter-disciplinary team of persons with a background in law, economics and finance. It comprised the following persons (in alphabetic order of their surnames):

Table 13 Research team

Sr. No.	Name	Designation & Organisation
1.	Ms. Varsha Mahadev Aithala	Research Fellow, Azim Premji University
2.	Mr. Akash Chandra Jauhari	Research Fellow, Vidhi Centre for Legal Policy
3.	Mr. M. V. Pratap Kumar	Advocate
4.	Mr. Kahnnav Mahajan	Research Associate, IBBI
5.	Ms. Priyal Parikh	Associate Fellow, Vidhi Centre for Legal Policy
6.	Ms. Aishwarya Satija	Research Fellow, Vidhi Centre for Legal Policy
7.	Ms. Anjali Sharma	Lead Research Consultant, Finance Research Group
8.	Mr. Yadwinder Singh	Assistant Manager, IBBI
9.	Mr. Karthik Suresh	Research Fellow, National Institute of Public Finance and Policy
10.	Ms. Bhargavi Zaveri	Lead Research Consultant, Finance Research Group

References

- ALI (2012). *ALI III Global Guidelines for Court-to-Court Communications in International Insolvency Cases*, 2012.
- Companies Act (2013). *Companies Act*.
- EU Guidelines (2014).
- Gordon, Jonathan (2019). "Crossing the Line in Cross-Border Insolvencies". In: *ABI Law Review*. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3344796.
- FSP Insolvency Rules (2019). *Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules*.
- Insolvency and Bankruptcy Code* (2016).
- Insolvency Law Committee (2018). Tech. rep. URL: https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
- Judicial Insolvency Network (2016).
- LLP Act, 2008 (2008). *Limited Liability Partnership Act*.
- MCA (2016).
- NAFTA Guidelines (2000).
- Notification on applicability of IBC to NBFCS (2019). *Notification on applicability of IBC to NBFCS*.
- IP Regulations (2016). *The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations*.
- CIRP Regulations (2016). *The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations*.
- U.S. Code: Title 11 - Bankruptcy (2012).
- United Kingdom (2006). *UK Cross-Border Insolvency Regulations*. URL: <http://www.legislation.gov.uk/ukxi/2006/1030/contents> (visited on Mar. 9, 2020).
- United Nations Commission on International Trade Law (1997). *UNCITRAL Model Law on Cross-Border Insolvency*. URL: <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (visited on Mar. 8, 2020).
- (2012). *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*. URL: https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf (visited on Mar. 12, 2020).
- (2020a). *Guide To Enactment and Interpretation of the Model Law*. URL: <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (visited on Mar. 8, 2020).
- (2020b). *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*. URL: <https://www.uncitral.org/pdf/english/texts/insolven/>

[1997 - Model - Law - Insol - 2013 - Guide - Enactment - e . pdf](#) (visited on Mar. 8, 2020).