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**AN ANALYTICAL REVIEW OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW (UNCITRAL) MODEL LAW**

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**ABSTRACT**

*National insolvency laws provide treatment and remedy to the issues arising out of the corporate restructuring drives within the jurisdictions of the national laws. This excludes the remedy to the cross-border corporate restructuring exercises especially when there is one or more companies are subjects of foreign laws giving no exclusive authority to any particular country-laws. As a remedy, The United Nations Commission on International Trade Law (UNCITRAL) has come with the Model Law for the cross border mergers & acquisitions exercise. This paper carries out an analytical study of the UNICITRAL Model Law.*

**ISSUE AT ANALYSIS**

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 as a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade.

The UN General Assembly is the main deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by its Charter.

UNCITRAL is the subsidiary body of UN General Assembly and WTO is an intergovernmental organization independent from United Nations. Harmonization of legislations on cross-border insolvency

The following circumstances necessitated the harmonization of legislations across nations with reference to cross border insolvency

- Continuing global expansion of trade and investment.

- Increasing incidences of cross-border insolvency due to integration of trade across countries.

- National insolvency laws of different countries have by and large not kept pace with the trend.

- Inadequate and inharmonious legal approaches due to differences in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of the assets of the insolvent debtor against dissipation.

The UNCITRAL Model Law aims at harmonization of legislations across countries. The United Nations Commission on International Trade Law (UNCITRAL) has a mandate from the General Assembly of the United Nations to harmonize and unify the law of international trade. As part of this programme of harmonization, the Commission has developed a Model Law on Cross-Border Insolvency (“the Model-Law”) in order to create and maintain harmony in regulatory aspects of insolvency mechanism across countries. The Commission approved the text of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) in May 1997. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways to have harmony among regulatory frameworks..

**THE OBJECTIVES**

The purpose of the Model Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of different countries dealing with cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

#### KEY PROVISIONS OF MODEL LAW

The model law focuses on four identified elements viz

- (a) access,
- (b) recognition,
- (c) relief (assistance) and
- (d) cooperation.

#### (A) ACCESS

The provisions relating

(i) to access give representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting (domestic) country to seek assistance, and

(ii) to authorize representatives of local proceedings being conducted in the enacting country (domestic) to seek assistance elsewhere.

For Example, in a cross border insolvency involving Indian and Australian companies, the access is with respect to representatives of Australian proceedings to Indian court and vice versa.

#### (B) RECOGNITION

These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding,

taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects - principal amongst them is the relief accorded to assist the foreign proceeding.

#### (C) RELIEF

A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of cross-border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model Law neither imports the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State.

Key elements of the relief include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the court for both main and non-main proceedings following recognition.

#### (D) COOPERATION AND COORDINATION

These provisions address cooperation among the courts of different countries where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts.

Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

#### SITUATIONS UNDER WHICH MODEL LAW CAN BE APPLIED FOR CROSS BORDER INSOLVENCIES- EXAMPLES

- Access to local representatives for foreign records and access to foreign representatives to local records
- Request for assistance by foreign court/foreign representatives in a foreign proceedings

- Co-ordination of concurrent proceedings etc.,

## KEY ASPECTS AND TERMS OF THE MODEL LAW

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this Article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

(g) The word "State", as used in the preamble and throughout the Model Law, refers to the country that enacts the Law (the "enacting State"). The term should not be understood as referring, for example, to a state in a country with a federal system.

The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization. According to Article 16, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the

signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

In respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents. According to Article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail. In order not to prevent recognition because of non-compliance with a mere technicality, the law allows evidence other than that specified; that provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it.

It further requires that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. In order to tailor such relief appropriately and make sure that the relief is consistent with any other insolvency proceeding concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States.

## CONCLUDING REMARKS

The UNICITRAL Model Law has provided a broad framework for the national level insolvency laws. This has put all the legal hurdles in the cross border corporate restructuring exercises. The stakeholders are now have well protected rights with unambiguous set of obligations for all business locations across all geographies.

## REFERENCES

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