

INDIA PROPOSES TO ADOPT THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

24 July 2018 | India

Legal Briefings - By **Kevin Pullen, Paul Apáthy, Alexander Aitken and John Chetwood**

On 20 June 2018, the Indian Government released a suggested draft chapter on cross-border insolvency to be included into the Insolvency & Bankruptcy Code, 2016 (**Code**). This addresses a missing link in the ambitious reforms of the Indian insolvency framework and is to be welcomed.

Despite detailed consideration at the time, when it was introduced the Code was largely silent on cross-border matters. This briefing summarises the proposals and sets out some initial thoughts on the potential impact of the proposals if implemented. Responses were invited until 30 June 2018.

THE BIG PICTURE

As a general rule, each sovereign nation cherishes its own insolvency regime since it reflects that state's priorities. This can lead to reluctance to cede any form of control to an officeholder appointed in a different nation that may have a mandate to pursue alternative purposes in accordance with the laws of that other state.

This can complicate cross-border insolvencies because there are often procedural and substantive barriers to an officeholder appointed in respect of a debtor in one jurisdiction taking steps in a different jurisdiction. Where the stakes are high, any barriers increase the costs, litigation risk and uncertainty for an officeholder.

Despite notable exceptions (such as the ongoing EU attempts to harmonise insolvency provisions across Member States), the prevailing approach to smooth the barriers arising in cross-border insolvencies reflects the provisions of the Model Law on Cross-Border Insolvency which was adopted by the UN Commission on International Trade Law (UNCITRAL) in 1997 (**Model Law**).

The basic principle of the Model Law is that a foreign representative (generally an officeholder) of a debtor that is subject to collective insolvency proceedings can apply to the court in the state that has adopted the Model Law for the foreign proceeding to be recognised. Once recognised, the foreign proceeding will benefit from various automatic and discretionary rights and powers that make it easier for the foreign representative to recover assets of the debtor and pursue litigation in that adopting state.

If this sounds modest in scope, it is a substantial benefit in practice where any uncertainty in the foreign representative's ability to take action can introduce significant levels of risk to an officeholder bringing an action.

THE PROPOSAL

The Government has proposed that India become the latest nation to adopt the Model Law, with certain modifications.

Set out below, we consider a number of the high level principles behind the proposal.

RECIPROCITY

A key part of the policy rationale behind the proposal is that it will benefit the resolution professional (and thereby creditors of Indian businesses generally) by enhancing their ability to seek assistance in other jurisdictions.

As seasoned restructuring practitioners will be aware, the substance of this benefit is fairly narrow. The proposal will obviously only have legal effect in India and the Government has no authority to legislate as to how other states will deal with requests from a resolution professional. The benefit to the proposal is however that where that other state requires that India offers its officeholders reciprocal rights, the proposals will ensure that the resolution professional now has benefits in that other state.

Most adopters of the Model Law do not require reciprocity – notably neither the US under Chapter 15 of the US Bankruptcy Code nor the UK under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) have such a requirement.

The "new" benefit under the proposals to a resolution professional looking to preserve or recover value of a debtor located outside of India is therefore limited to those adopters of the Model Law that require reciprocity – the only states referred to in the proposal with such reciprocity requirements are Mexico and Romania.

Perhaps reflecting this policy approach, the Indian courts will only offer assistance to a foreign representative where that overseas state has adopted the Model Law or entered into a bilateral treaty with India.

CORPORATE DEBTORS ONLY

India has departed from the Model Law in that it only applies to foreign proceedings in respect of "corporate debtors" (a phrase that is not defined).

Accordingly, it appears India's regime will not provide assistance to foreign representatives in respect of the bankruptcies of individuals.

ADJUSTMENT OF DEBT

India's proposal adopts the "traditional" concept that a foreign proceeding must be a proceeding under a law relating to insolvency.

In contrast, Chapter 15 of the US Bankruptcy Code and Singapore's recent adoption of the Model Law take a broader approach that also includes proceedings under a law relating to "the adjustment of debt". This wording has been critical in providing the basis for US bankruptcy courts to recognise the use of schemes of arrangement to restructure New York governed debt under English (or other) law.

Inclusion of similar language in the Indian proposal would provide an additional tool to Indian corporates, allowing them (if they can for example engage the English scheme jurisdiction) a potential avenue to restructure Indian law governed debt without the need to commence the formal corporate insolvency resolution process under the Code.

PROCEDURE

As is customary when adopting the Model Law, a foreign representative must apply for recognition of the foreign proceeding in India to the National Company Law Tribunal (**NCLT**). There is no automatic recognition without a successful application.

Certain procedural requirements for the application are set out in the draft proposals. Perhaps the most significant feature (again, in keeping with the framework of the Model Law) is whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. The factual distinction between the two is that the former is a foreign proceeding that has been opened in the state of the debtor's centre of main interests and the latter is all other foreign proceedings.

BENEFITS FOR FOREIGN REPRESENTATIVES

The principal benefit of recognition of a proceeding as a foreign main proceeding is that subject to certain exceptions the court will grant a moratorium prohibiting the following actions:

- the institution or continuation of suits or proceedings against the corporate debtor (including execution of judgments);
- transferring, encumbering or disposing of any assets, rights or interests of the corporate

debtor;

- enforcing any security interest in respect of property of the corporate debtor; and
- the recovery of any property in possession of the corporate debtor by its owner or lessor.

This moratorium is discretionary upon recognition of a foreign non-main proceeding.

Discretionary relief for all foreign proceedings under the proposal includes:

- the examination of witnesses, the taking of evidence or the delivery of information concerning the corporate debtor's assets, affairs, rights, obligations or liabilities;
- granting any additional relief that may be available to a resolution professional or liquidator under the Code; and
- entrusting (i) the administration or realisation of assets in the NCLT's jurisdiction to the foreign representative, and/or (ii) provided that the NCLT is satisfied that the interests of creditors in India are adequately protected, the distribution of all of the debtor's assets located in India to the foreign representative or another person designated by the NCLT.

The foreign representative is also entitled to apply to the NCLT to avoid acts detrimental to creditors. In foreign non-main proceedings, this right is limited to an application in relation to assets that, under the laws of India, should be administered in the foreign non-main proceeding. As demonstrated in the context of the EC Regulation on Insolvency Proceedings (1346 of 2000) in *Comité d'entreprise de Nortel Networks and others* (Judgment) [2015] EUECJ C-649/13, establishing where certain assets, and in particular intangible assets, are located can be challenging in practice.

CO-OPERATION AND CONCURRENT PROCEEDINGS

As is customary under the Model Law, the draft proposes certain powers for the co-operation between courts in India and in other states. There are also proposals for managing the interplay between concurrent Code proceedings and a foreign proceeding.

Typically the latter is one of the most complex areas. There have been a number of attempts to standardise the approach, such as the attempts of bodies to suggest model protocols (see the European Communication and Cooperation Guidelines for Cross-border Insolvency first developed under the aegis of the academic wing of INSOL Europe in July 2007) and various existing details powers for regulating the relationship between various concurrent proceedings in respect of the same debtor (see the EU Recast Regulation on Insolvency Proceedings (848 of 2015)).

In practice, the outcome from co-operation can vary significantly depending on the facts of the debtor's business, the nature and location of the assets, types of proceeding and states involved. Whilst the inclusion of these provisions in the Code is helpful, the substantive practical benefits it delivers will depend on how these provisions are applied in practice by practitioners and, ultimately, the NCLT.

PUBLIC POLICY

An important qualifier under the Model Law is the public policy exemption. Under the draft proposals this enables the NCLT to refuse to take action under the proposals if that action would be manifestly contrary to the public policy of India.

It is hard to comment precisely on the effect of this since its application by the NCLT will be critical. Many jurisdictions retain this public policy exemption so its existence does not indicate a fatal flaw in the proposals but rather a need to monitor how the exemption is applied in practice.

PRELIMINARY CONCLUSIONS

The draft proposals should be welcomed. They seek to address an important missing feature of the Code and should be viewed in the same light as the attempts of the Indian Government to reform Indian insolvency law and practice.

As to how successful the proposals, if adopted, will be in practice there are two key points.

First, it is critical to assess how these new rights and discretions are applied in practice given the significant role to be played by the NCLT.

Secondly, practitioners should be realistic about the limitations of the Model Law. Cross-border insolvency proceedings involving states that have already implemented the Model Law remain complex, time consuming and expensive. The Model Law, and therefore the draft proposals, will not remove all friction in cross-border restructurings. Instead, they can smooth some of the procedural difficulties for a foreign representative taking steps in India (and vice versa where there is a requirement for reciprocity).

The proposals are therefore likely to be received warmly by restructuring professionals both inside and outside of India who will pay careful attention to early reported examples of how the draft provisions are implemented.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



KEVIN PULLEN
PARTNER, LONDON

+44 20 7466 2976
Kevin.Pullen@hsf.com



CLIVE BARNARD
PARTNER, LONDON

+44 20 7466 2282
Clive.Barnard@hsf.com



**ALEXANDER
AITKEN**
PARTNER, HONG
KONG
+852 21014019
Alexander.Aitken@hsf.com



PAUL APÁTHY
PARTNER, SYDNEY

+61 2 9225 5097
paul.apathy@hsf.com



SOUMYA RAO
OF COUNSEL,
LONDON

+44 20 7466 2991
Soumya.Rao@hsf.com



JOHN CHETWOOD
PARTNER, LONDON

+44 20 7466 7548
John.Chetwood@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close

