

How to Obtain Recognition of a Foreign Insolvency Process and How to Enforce Insolvency Related Judgments (India)

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A Practice Note providing a guide to the domestic processes and requirements for gaining legal recognition of a foreign insolvency process in India. This Note also details any separate considerations around the enforcement of insolvency-related judgments in India.

At present, a foreign insolvency process cannot be recognised in India. While the Insolvency Law Committee (ILC) has proposed a comprehensive framework for matters relating to cross border insolvency (Draft Law), which does provide for the recognition of foreign insolvency processes, it has not yet been notified.

There are other pieces of legislation, namely the *Insolvency and Bankruptcy Code, 2016* (Bankruptcy Code) and the *Code of Civil Procedure, 1908* (CPC), which contain provisions for the recognition in India of certain foreign processes and court orders; however, as explained in this Note, these cannot at present be relied on for the recognition of foreign insolvency processes. India has not signed up to any relevant international treaties or conventions that would aid in the recognition.

Therefore, this Note mainly examines the Draft Law in its current form, which, once notified, will be the primary framework under which foreign insolvency processes will be recognised in India.

Legal Framework for the Recognition of a Foreign Insolvency Process in India

The Bankruptcy Code

The Bankruptcy Code was enacted in India to create a consolidated framework to govern insolvency and bankruptcy proceedings for companies, partnership firms, and individuals.

Sections 234 (Agreements with Foreign Countries) and 235 (Letter of Request to a Country Outside India in Certain Cases) of the Bankruptcy Code provide the framework to deal with cross border insolvencies.

Section 234 states that the Indian government may enter into an agreement with the government of any foreign country to enforce the provisions of the Bankruptcy Code. Once such reciprocal agreements have been made, Section 235 enables the Indian government to extend the provisions of the Bankruptcy Code to assets or property of Indian debtors located in foreign countries.

The Indian government has not yet entered into any reciprocal agreements for recognition with any foreign country.

Therefore, to date, a cross border insolvency process cannot be recognised in India.

After the Bankruptcy Code was enacted, the Indian government formed the ILC to recommend amendments to the Bankruptcy Code.

The ILC in its *report dated 16 October 2018*, noted that the Indian Government had not entered into any reciprocal agreements. Therefore, the ILC provided a comprehensive framework for matters relating to cross border insolvency. The Draft Law is substantially based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (Model Law).

Scope and Objectives of the Draft Law

The Draft Law aims to provide effective mechanisms for dealing with cross-border insolvency cases. However, the Draft Law applies only to companies and limited liability partnerships (LLPs) where:

- A foreign court or a foreign representative seeks assistance in India in connection with a foreign proceeding. The term foreign representative is defined under the Bankruptcy Code to mean a person or body, including appointed on an interim basis, authorised in a foreign proceeding to:
 - administer the reorganisation or the liquidation of the company's or LLP's assets or affairs; or
 - act as a representative of the foreign proceeding.
- Assistance is sought by a court or a representative in a foreign country in connection with a proceeding under the Bankruptcy Code.
- A foreign proceeding and a proceeding under the Bankruptcy Code in respect of the same debtor is taking place concurrently.
- Foreign creditors in a foreign country have an interest to participate in a proceeding under the Bankruptcy Code.

The Bankruptcy Code applies to companies, LLPs, and individuals. The Draft Law applies to companies and LLPs but has not been extended to individuals.

However, the Draft Law has not yet been notified and therefore, one must rely on the CPC to recognise a cross border insolvency proceeding in India. The CPC regulates the enforcement of any court ordered decrees or orders passed by a court.

Process Under the Indian Civil Procedure Code

Section 13 of the CPC deals with the enforcement of conclusive foreign judgements in India. Under Section 13 of the CPC, a foreign judgement is not considered conclusive if, among other things:

- It has not been pronounced by a court of competent jurisdiction.
- It has not been given on the merits of the case.
- It appears on the face of the proceedings the judgment was founded on an incorrect view of international law or a refusal to recognise the law of India where such law is applicable.
- The proceedings in which the judgment was obtained are opposed to natural justice.
- It has been obtained by fraud.
- It sustains a claim founded on a breach of any law in force in India.

Section 44A of the CPC sets out the procedure for executing a money decree passed by a superior court of any reciprocating territory in India. CPC defines reciprocating territory as any country or territory outside India which the Indian government may, by way of a notification, declare to be a reciprocating territory for the purposes of enforcement of foreign judgements.

An insolvency order passed by a foreign court may be considered conclusive under Section 13 of the CPC since it is likely to satisfy the conditions enumerated under the section. However, relying on section 44A of the CPC for enforcement of a foreign insolvency order can be difficult since the order does not meet the condition prescribed under section 44A of being a money decree passed in a reciprocal territory.

A foreign proceeding is defined in the Model Law as a collective judicial or administrative proceeding in a foreign country pursuant to a law relating to insolvency, and in which the assets and affairs of the company are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation (Article 2(b), Model Law). Since a foreign insolvency proceeding is not a money decree, it is unlikely to be executed in India under the CPC. Therefore, until the Draft Law is notified, a foreign insolvency proceeding is not recognised under Indian Law.

UNCITRAL Model Law on Cross-Border Insolvency

India has not adopted the Model Law; however, the Draft Law is substantially based on the Model Law.

Requirements for the Recognition of a Foreign Insolvency Process under Domestic Law

The Draft Law, which is yet to be enacted, specifies the following requirements for a foreign insolvency process or proceeding to be capable of recognition under domestic law:

- The foreign insolvency process must meet the definition of foreign proceeding.
- An insolvency professional, such as a foreign representative, must be appointed to administer the debtor's assets in India.

(Section 23, Draft Law.)

The definition of foreign proceeding was taken from the Model Law. The Draft Law defines foreign proceeding to mean:

- A collective judicial or administrative proceeding in a foreign country, including an interim proceeding,
- An insolvency where the assets and affairs of the company or LLP are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

(Clause 2(g), Draft Law.)

Procedure for Applying for Recognition of Foreign Insolvency Processes

Types of Foreign Insolvency Processes

Before dealing with the procedure for applying for recognition of foreign insolvency processes, it is important to elaborate the different kinds of foreign proceedings that can be recognised in India that is, the *National Company Law Tribunal* (NCLT).

The Draft Law states that the NCLT recognises foreign proceedings through an application made by the foreign representative, either as:

- A foreign main proceeding, if it is taking place in the country where the debtor has its centre of main interest (COMI) (For detailed information on how COMI is determined, see *Requirement of Connection Between the Foreign proceedings or Insolvent Debtor and the Jurisdiction in a Court Application*).
- A foreign non-main proceeding, if it is taking place in a country where the company or LLP has an establishment. An establishment is defined as any place of operations where the debtor performs a non-transitory economic activity with human means and assets or services.

If more than one foreign proceeding is pending in respect of the same debtor, the NCLT must seek cooperation and coordination subject to the following:

- Any relief granted to a representative of a foreign non-main proceeding after recognition must be consistent with the foreign main proceeding.
- If a foreign main proceeding is recognised after recognition of a foreign non-main proceeding, any relief must be reviewed by the NCLT and modified or terminated if inconsistent with the foreign main proceeding.

In addition, if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the NCLT must grant, modify, or terminate relief to facilitate coordination of the proceedings (Section 26(c), Draft Law).

Filing the Application

The Draft Law requires the foreign representative to file an application before the NCLT.

On June 15, 2022, the *Insolvency and Bankruptcy Cross Border Insolvency Rules, 2020* (Draft CBI Rules) were published in a report, but are still in draft form, given that the Draft Law is yet to be notified.

Under the Draft CBI Rules, an application for recognition of foreign proceedings should be accompanied by one of the following supporting documents:

- A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.
- A certificate or other evidence from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.
- A statement identifying all known insolvency proceedings in respect of the debtor.

English translations of the documents in support of the application must also be provided.

Notably, under the Draft Law, there is no requirement for the documents submitted in support of the application to be legalised.

Timeline and Court Fees

According to the Draft Law, the NCLT must decide every application for recognition of a foreign proceeding within thirty days from the date of the filing of the application. The period of thirty days can be extended by an additional thirty days, if required

(Section 15, Draft Law). In similar instances of timelines prescribed by legislation, the courts have held that the timelines are directory, not mandatory.

The Draft CBI Rules, once notified, will prescribe the required fees for filing various applications, such as an application for recognition of foreign proceedings and requesting cooperation.

The Draft CBI Rules do not provide for the procedure on how cross border insolvency proceedings are conducted. Until such procedure is determined, all applications must be filed and dealt with in accordance with general filing rules (that is, the *National Company Law Tribunal Rules, 2016* (NCLT Rules)).

The NCLT Rules contain all the necessary rules and procedures, including for filing pleadings and conducting hearings. The NCLT Rules also require parties to be afforded an opportunity for a judicial hearing following due process.

Automatic Recognition or Court Application

The Draft Law stipulates the foreign representative must file an application to the NCLT (see *Procedure for Applying for Recognition of Foreign Insolvency Processes*.)

Requirement for Reciprocity

The Indian government can enter into reciprocal agreement for recognition of the foreign insolvency process under section 234 of the Bankruptcy Code, but this section is yet to be notified.

The Draft Law although not notified, has simplified the process stating:

- Reciprocity must be presumed for countries that have adopted the Model Law.
- For countries that have not adopted the Model Law, the Indian government may enter into reciprocal agreements as stated under section 234 of the Bankruptcy Code.

Requirement of Connection Between the Foreign proceedings or Insolvent Debtor and the Jurisdiction in a Court Application

The Draft Law states that foreign proceedings are recognised by the NCLT, on an application made by the foreign representative, either as foreign main proceedings or foreign non – main proceedings (see *Filing the Application*).

Foreign Main Proceeding

If the foreign proceeding has been recognised as a foreign main proceeding, then a connection between the foreign proceedings or insolvent debtor and India must be established through the debtor's COMI.

The country of the debtor's registered office is presumed to be its COMI subject to the registered office not being moved to another country within the three- month period before the application to initiate insolvency proceedings in such country was filed.

Further, a relevant factor for determining the debtor's COMI, is the place of its central administration which is readily ascertainable by third parties including creditors. Other factors may also be considered, such as the location of the following in respect of the debtor:

- Assets.
- Book of accounts.
- Directors and senior management.
- Creditors.
- Execution of contracts and applicable law to key contracts and disputes.
- The Organisation or authorisation of financing or running of the cash management system.
- Primary bank account.
- Management of purchasing and sales policy, staff, accounts payable and computer systems.

Additional factors can also be prescribed by the Indian government.

The relevant date to determine the COMI of the debtor is the date the foreign proceedings commence under the laws of the relevant foreign country.

Foreign Non-Main Proceeding

If the foreign proceeding has been recognised as a foreign non-main proceeding, then it must be proved that the debtor has an "establishment" (as defined under Clause 2(c) of the Draft Law) to establish a connection between the foreign proceeding and the insolvent debtor in India.

Court Application Procedure

After recognition of a foreign main proceeding, a proceeding under the Bankruptcy Code begins only if the debtor has assets in India and the effects of the proceeding are restricted to:

- The assets of the debtor located in India.
- The extent necessary to implement cooperation and coordination to other assets of the debtor that, under the laws of India, should be administered in that proceeding.

Court Power to Grant Discretionary Relief to Assist Foreign Insolvency Proceedings

Discretionary Reliefs

The Draft Law gives the NCLT the power to grant discretionary reliefs to assist in the foreign insolvency proceedings. It provides that on recognition of a foreign proceeding, the NCLT can, at the request of a foreign representative, grant any appropriate relief to protect the assets of the debtor or the interests of the creditors and other interested persons including:

- Imposing a moratorium (see *Moratorium on Creditor Action against the Debtor*).
- Entrusting the administration or realisation of the debtor's assets located in India to the foreign representative or another person designated by the NCLT.
- Granting any additional relief that may be available to an insolvency professional, including permitting the foreign representative to:
 - access the electronic records of the debtor;
 - access the books of accounts, records, and other relevant documents of debtor available with government authorities, statutory auditors, accountants, and other relevant persons;
 - conduct a valuation of the debtor or seek valuation reports; or
 - seek directions from the NCLT to compel cooperation from any person whose assistance or cooperation may be required by the foreign representative.

The NCLT also has the power to grant relief to a representative of a foreign non-main proceeding if it is satisfied the relief relates to:

- Assets that, under the laws of India, should be administered in the foreign non-main proceeding.
- Information required in that proceeding.

To administer the assets of the debtor, the NCLT can allow the foreign representative to take any one or more of the following actions:

- Act and execute all deeds, receipts, and other documents in the name and on behalf of the debtor.
- Make a public announcement for collection of claims of the debtor.
- Prepare a consolidated list of claims with a resolution professional, a liquidator appointed under the Bankruptcy Code, or any other foreign representative in another foreign proceeding in respect of the company or LLP.
- Advertise the assets of the company or LLP for sale either:
 - in the manner as agreed in a protocol between the parties; or
 - through an auction or private placement, upon such terms as directed by the NCLT.
- Negotiate the sale price of the assets of the company or LLP.
- Identify priority payouts for distribution and costs of the processes.
- Take any other actions that may be necessary to administer or realise the assets of the debtor.

(Rule 9, Draft CBI Rules.)

The NCLT can also impose limitations, restrictions, or conditions as it considers appropriate. Accordingly, the NCLT can modify or terminate such relief to adequately protect the interests of the creditors and other interested persons, including the debtor through either:

- At the request of the foreign representative.
- At the request of a person affected by the relief granted.
- On its own motion.

Moratorium on Creditor Action against the Debtor

Moratorium

The Draft Law provides that if a foreign proceeding is recognised as a foreign main proceeding in India, creditors in India cannot bring or continue legal proceedings against the debtor due to imposition of a moratorium.

The NCLT by an order must declare a moratorium automatically without any requirement of filing a separate application or initiating a proceeding. The following actions are prohibited on imposition of the moratorium:

- Instituting suits or continuing pending suits or proceedings against the debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority.
- Transferring, encumbering, alienating, or disposing of by the debtor of any of its assets or any legal right or beneficial interest therein.
- Any action by the debtor to foreclose, recover, or enforce any security interest.
- Recovering any property by an owner or lessor where such property is occupied by or in the possession of the debtor.

(Section 18 Draft Law.)

The moratorium is subject to the following exemptions:

- Supply of essential goods or services (as prescribed under certain regulations issued under the Bankruptcy Code) can not be terminated, suspended, or interrupted.
- If the insolvency professional considers the supply of other goods or services (that is, that are not covered under the above exemption) as critical to protect and preserve the value of the debtor and manage its operations as a going concern, then the supply of such other goods or services cannot be terminated, suspended, or interrupted, provided the debtor has paid any dues arising from such supply during the moratorium period.
- Transactions, agreements, or other arrangements notified by the Indian government in consultation with any financial sector regulator or any other authority.
- Enforcement of surety obligations in a contract of guarantee to the debtor.

(Section 17 (2), Draft Law.)

Enforcement of Insolvency-Related Foreign Judgements

An insolvency proceeding initiated by a foreign court is unlikely to be enforced in India under India's CPC. Though a foreign insolvency order may meet the conditions of being recognised in India as a foreign judgement, it is unlikely to be given effect since section 44A of the CPC states that only money decrees passed by foreign courts of certain territories can be executed under India's CPC (see *Process Under the Indian Civil Procedure Code*).

A recent order by the Delhi High Court dealt with appointing a Bankruptcy Trustee in accordance with the provisions of the Japanese Bankruptcy Act concerning bankrupt individual with assets located in India (*Toshiaki Aiba as the Bankruptcy Trustee of the Estate of Vipin Kumar Sharma v. Vipin Kumar Sharma and Another* (2022 SCC OnLine Delhi 1260)). Based on orders passed by the Supreme Court of Japan, the Japanese Bankruptcy Trustee sought certain reliefs before Indian courts including administration and sale of properties located in India and appropriation of the sale proceeds. The Delhi High Court granted these reliefs.

Therefore, even though a foreign insolvency proceeding may not be given effect to in India, if there are insolvency related orders under the foreign proceeding which otherwise satisfy the conditions under the CPC (such as attachment and sale of the properties belonging to a bankrupt individual's estate), Indian courts may grant execution of such proceedings in such limited circumstances. Note that the order of the Delhi High Court is particular to the facts in the matter and there is still limited precedent for recognition and execution of insolvency related orders passed by foreign courts in India.

Recognition of Schemes of Arrangement

A foreign proceeding is defined as a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the company or LLP are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation (Clause 2(g), Draft Law).

A plan of reorganisation under Chapter 11 of Title 11 of the United States Code (11 U.S.C.A. § 101 to 1532) (Chapter 11) envisages that affected creditors may vote on the plan of reorganisation. The plan of reorganisation can be confirmed by the jurisdictional court if it gets the requisite votes and satisfies other legal requirements under the Chapter 11. A plan of reorganisation under Chapter 11 is recognised under the Draft law since the plan is:

- Pursuant to a formal insolvency process.
- For a reorganisation of an insolvent entity.

A scheme of arrangement typically entails a court approved agreement between a company, its shareholders, and creditors for the purpose of certain corporate actions including restructuring debt. However, since a scheme of arrangement is not a formal insolvency process and may not be solely for the purpose of reorganisation or liquidation, it is doubtful that the provisions of the Draft law are broad enough to confer recognition to a scheme of arrangement. If a scheme of arrangement is proposed between a foreign company and an Indian company, it can be given effect under the provisions of the *Indian Companies Act, 1956*.

Future Developments

The Draft Law has not been notified yet. However, the Minister of Finance of India indicated necessary amendments to the Bankruptcy Code will be carried out to enhance the efficacy of the resolution process and facilitate cross border insolvency resolution. (See Paragraph 76 of the *Budget 2022-2023 Speech of Nirmala Sitharaman Minister of Finance*, February 1, 2022)

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