**August 2018**

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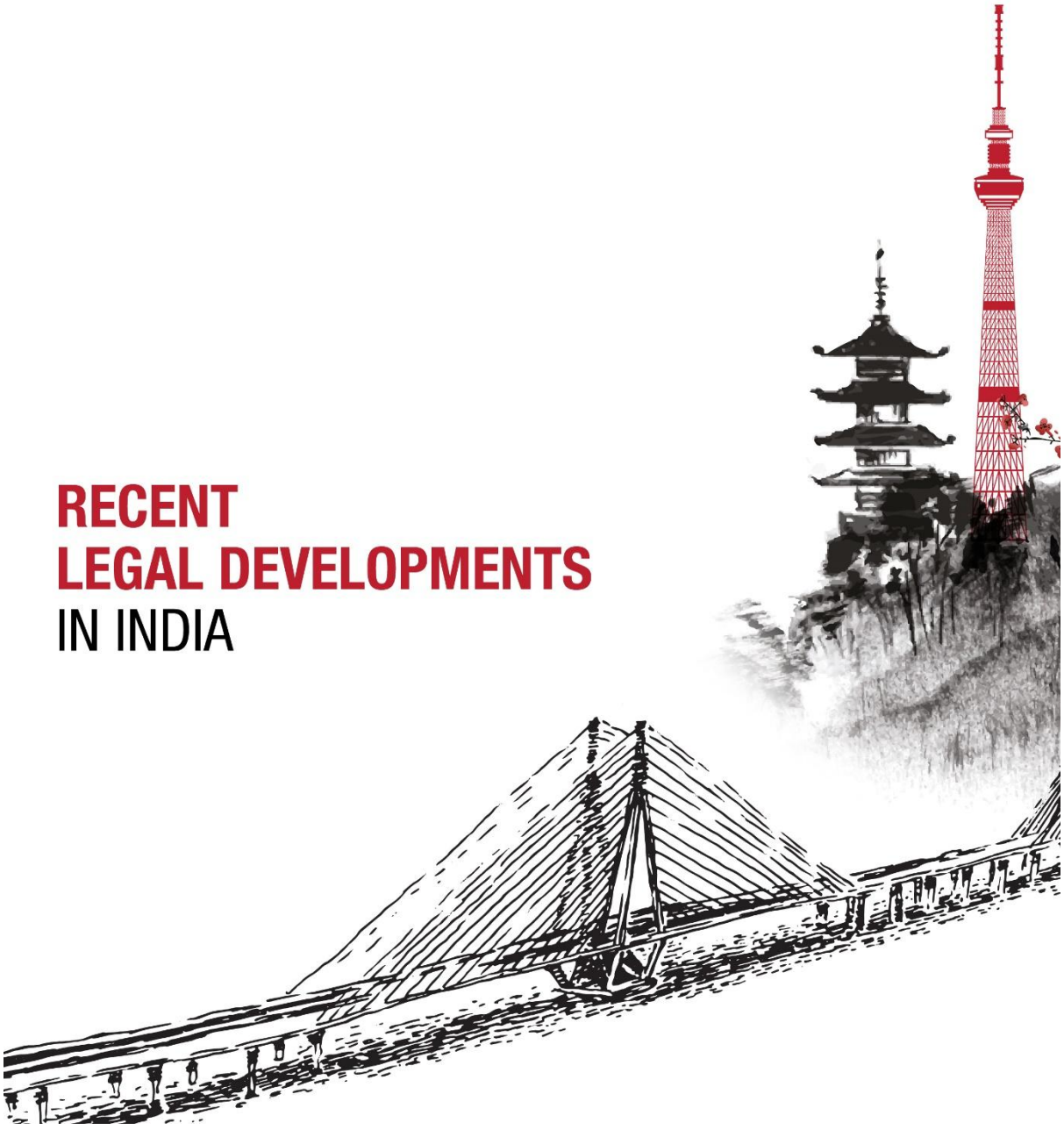

# RECENT LEGAL DEVELOPMENTS IN INDIA

# INDUSLAW 日本のニュースレター

**August 2018**

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1. 海外直接投資

1.1. **シングル・マスター・フォーム – オンライ申請の第一段階**

インドでの各種の海外投資の既存の報告構造がシングル・マスター・フォームに統合される旨をRBI[1]（インド準備銀行）が発表したが、この度、オンライン申請フォームの第一段階（エンティティ・マスター）が導入される運びとなった。

エンティティ・マスターは2018年6月28日から7月12日の間、データ入力を行うために一般に公開されていた。この期間は7月20日までに延長された後、終了した。現在、エンティティ・マスターで登録された全てのエンティティ（組織）に対しては2018年8月15日まで詳細の追加や編集が許可されているが、新しい企業の登録は認められていない。

2. **企業と商業**

2.1. **最高裁判所が仮想通貨の取引禁止の延期を却下**

最高裁判所は、インド・インターネットおよび携帯電話協会（**IAMAI**）が申請した、RBIの通達の延期に関する申し立てに対して、裁判所命令（**命令**）を出した。IAMAIは仮想通貨の利用を禁止し、RBIの規制を受ける企業が仮想通貨を取引する行為や仮想通貨を取引、または、決済を促進するサービスを提供する行為を禁止するRBIの通達に反対していた。

命令を通じて、最高裁判所はRBIに対して命令の発令から一週間以内にIAMAIが申請した全ての書類を全て破棄するようRBIに指示を与え、今回の申し立てを、申立人がとりわけ仮想通貨を違法と布告することを求めたSiddharth Dalmia & Anr. 対 Union of India & Ors.の裁判と結びつけた。

2.2. **企業省、2017年改正会社法の第20項に関する通達を行う**

2018年7月5日、企業省が2017年改正会社法の第20項に関する通達を行った。

改正条項は企業または支払う義務を持つ者の通告期限を、支払い、または、追加料金の支払い後30日以内から300日以内に延長した。

2.3. **企業省、2014年会社（登録認可）規則の改正を通達**

企業省は2014年会社（登録認可）規則への改正条項が2018年8月15日に施行されると通達した。この改正では、「協会」、「トラスト」、「会社登記」、「トラストの登録機関」の定義が追加され、また、2013年会社法で規定されている会社としての提携、有限事業責任組合、協会等の登録基準の修正が行われている。

2.4. **企業省、2014年会社（預金の受け入れ）規則の改正の通達を行う**

企業省は2018年8月15日に施行される2014年会社（預金の受け入れ）規則の改正を通達した。改正では、預金を勧誘する回状に監査役による証明書を必要とする点、預金保険の条件を削除する点、および、会計年度内に満期になる預金の最低限の残金を15%から20%へ引き上げる点が盛り込まれている。

2.5. **企業省、2014年会社（取締役の任命と資格）規則の改正を通達**

企業省は2014年会社（役員の任命と資格）への改正を通達した。改正条項は2018年7月10日に施行される。改正では、DIR-3-KYCにおけるDIN（取締役識別番号）の非通告に関する項目の中止、および、その他のDIR-3-KYCの導入に対する規定が盛り込まれている。

2.6. **SEBI[2]、代替投資ファンドに関する通達を発表**

[1] *インド準備銀行（RBI）はインドの中央銀行である。インド経済の金融政策の規制を主な任務とする。*

[2] インド証券取引員会（**SEBI**）は証券における投資家の利益を守り、1992年インド証券取引委員会法の規定に従って、証券市場の発展の推進、および、規制を行うために設立された。

インド証券取引委員会（SEBI）は2018年7月3日付けで代替投資ファンドに関連する通達を出した。RBIとの協議の末、代替投資ファンドおよびベンチャーキャピタルファンドによる海外投資の上限は7億5000万米ドルに引き上げられた。

SEBIは2015年10月1日付けの通達では、代替投資ファンドおよびベンチャーキャピタルファンドによる海外投資を5億米ドルに制限していた。

2.7. **2013年会社法の違反を見直す委員会を結成**

2018年7月13日、インド中央政府は2013年会社法の違反を見直す委員会を結成したことを明らかにした。委員会は2013年会社法の違反を精査し、また、法律に加えるべき変更を提案することができる。

3. **情報技術（IT）**

3.1. **TRAI、「通信分野におけるデータのプライバシー、セキュリティーおよび所有」に関する推奨事項を発表**

インド電気通信規制庁（TRAI）[3]は「通信分野におけるデータのプライバシー、セキュリティーおよび所有」に関する推奨事項を発表した。この推奨事項でTRAIは次の取り組みを含む複数の措置を推奨している。

(a) デジタル・エンティティが生成および集めた個人データの匿名化/非特定化の基準を策定するために調査を実行するべきである。

(b) 設計原理とデータの最小化によるプライバシー保護を全てのデジタル・エンティティに適用するべきである。

4. **雇用**

4.1. **労働雇用省、1926年労働組合法の改正を提案**

労働雇用省が、中央および州のレベルで労働組合の認知度を向上させるため、1926年労働組合法の改正を提案した。同省は草稿段階の2018年（改正）労働組合法案へのコメントを募集している。

*[3]インド電気通信規制庁（TRAI）は1997年通信規制庁法第3項の下、インド政府が設立した法定組織である。この組織はインドの通信分野の規制機関の役割を果たす。*

## 1. FOREIGN DIRECT INVESTMENT

### 1.1. SINGLE MASTER FORM – FIRST PHASE OF AN ONLINE APPLICATION

Further to the RBI's[4]announcement that the existing reporting structures for various types of foreign investment in India will be integrated into a Single Master Form (the "**SMF**"), the first phase of online application forms(the "**Entity Master**")was introduced.

The RBI announced the new regime for reporting on June 7, 2018.

Indian entities not complying with these instructions will not be able to receive foreign investment (including indirect foreign investment) and will be treated as non-compliant with the Foreign Exchange Management Act, 1999 (the "**FEMA**") and regulations made thereunder and liable for action as specified in FEMA or the regulations made thereunder.

The full text of the notification from the RBI for the SMF is available at:

https://rbi.org.in/Scripts/femaview.aspx?femaid=64

The Entity Master was available to the public for data entry between June 28 and July 12, 2018, which was extended to July 20, 2018 and has now been closed.

However, all entities registered under the Entity Master are now permitted to add or edit details in the Entity Master until August 15, 2018, but the Entity Master cannot register any new companies. It has also been clarified in the updated user manual that no email acknowledgement will be sent for the submission in the Entity Master. The updated user manual can be accessed by companies for a gist of the Entity Master and the exact details required therein.

The user manual can be downloaded from https://firms.rbi.org.in/firms/faces/pages/login.xhtml.

**Reason for Change**: It appears that registered entities are now being asked to crosscheck if the details provided by them in the Entity Master comply with the express directions under the user manual. If not, they are being given time to modify their details in accordance with the user manual.

## 2. CORPORATE AND COMMERCIAL

### 2.1. INDIA'S PROPOSED CROSS BORDER INSOLVENCY REGIME

#### INTRODUCTION

Currently, cross border insolvency has no clear legal framework in India and the Ministry of Corporate Affairs issued a public notice at the end of June (the "**Notification**") inviting comments and suggestions on the proposed draft chapter on cross border insolvency it plans to introduce under the Insolvency & Bankruptcy Code, 2016 (the "**Code**"), broadly based on the United Nations Commission on International Trade Law Model Law on Cross Border Insolvency (the "**UNCITRAL Model Law**")[5]

This article will discuss the complexities of cross-border insolvency in the Indian context, set out the broad principles of the UNCITRAL Model Law and ask the nuanced question in the context of the Notification: whether the so-called *Gibbs rule* prioritizing the rights of creditors under English law contracts over and

[4]*Reserve Bank of India or RBI is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.*

[5]Public Notice dated 20.06.2018, *available at* http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

above an insolvency process in a foreign court, still takes precedence (the "**Gibbs Rule**").

**CROSS-BORDER INSOLVENCY SCENARIOS**

Before we plunge into an analysis of the Notification and its implications, it's worthwhile noting that cross border insolvency issues could be triggered by a number of circumstances, and in particular, in the Indian context:

(a) where creditors of an Indian debtor wish to enforce their rights over the assets of an Indian debtor, which are located overseas;

(b) where the creditors of a foreign debtor wish to enforce their rights over the assets of that foreign debtor in India; and

(c) where Indian creditors to a foreign debtor, wish to enforce their rights over the assets of that foreign debtor in a foreign jurisdiction.

Note that a foreign creditor can already initiate (or be a part of any) insolvency proceedings against an Indian debtor, initiated under the Code in India.

The issues stemming out of these scenarios are complex and cross border insolvency, inevitably throws up a panic amongst creditors across jurisdictions over how *their* individual claims may be compromised by the initiation of insolvency (or restructuring proceedings) against the debtor in its *centre of main interests*.

Forefront in the mind of the creditor is whether the law of the main proceeding will essentially subordinate its claim, forcing it to participate in that main proceeding and any restructuring plan that may arise from it.

Conversely, in the context of the insolvency professional appointed to administer the debtor, the question arises to what extent it can seek relief before foreign courts in relation to assets which may be located in that jurisdiction, firstly, preventing the sale of those assets, preserving value for the liquidation estate; and secondly, preventing foreign creditors in that jurisdiction, from exercising their rights against the debtor (and its assets located in that jurisdiction) in parallel to, or otherwise, outside of the process initiated in debtor's *centre of main interest*.

**THE THEORY**

Cross border insolvency, in essence, can be distilled down to three key questions: *which* law should be applied; *who* has jurisdiction to administer the insolvency process; and *how* are judgments asserting control over assets enforced?

The treatment of financially distressed debtors, with assets across jurisdictions has two main theoretical approaches, and a third, more practical model. Firstly, there is the *territorial* approach, which broadly sets out that each jurisdiction applies its own laws over assets located in that jurisdiction, to the exclusion of other jurisdictions. Secondly, there is the *universalist* approach, with a single administrator applying a single global regime over assets, across borders. Thirdly, there is the *hybrid* approach, where jurisdictions try and work out the most relevant centre for conducting the proceedings, with co-operation from other jurisdictions in relation to assets that may be located there.

**THE UNCITRAL MODEL LAW**

The UNCITRAL Model Law attempts to deal with the complexities outlined above through rationalizing the *process* in dealing with cross-border

insolvency, but it should not be mistaken for creating a *substantive*, *unified* insolvency law.

It does this by providing a framework for *access* to insolvency appointed professionals in the courts of other jurisdictions, permitting them to participate or commence proceedings in that particular jurisdiction, though in the Indian context, this may need to be modified, on the basis of *locus standi* in the Indian courts, requiring foreign insolvency professionals to appoint an Indian insolvency professional to represent them in Indian proceedings.

It also lays out principles for *where* insolvency proceedings should be initiated. The UNCTRAL Model Law sets out a principle for identifying the most appropriate jurisdiction for commencing insolvency proceedings (the *main proceeding*) and ensures that the resolution professionals appointed in that jurisdiction are granted recognition and access in proceedings in *other* jurisdictions, where the insolvent entity may have assets (the *non-main proceeding*).

In essence, the UNCITRAL Model Law sets out the principle of *centre of main interests* (commonly referred to as "**COMI**") in deciding *where* the *main proceeding* should be commenced. Interestingly, COMI is not given a definition in the UNICTRAL Model Law. It broadly implies that it is the seat of a corporate entity's major stakes, whether that is in terms of control or the location of its assets and its significant operations. COMI is determined by factors, both objective and ascertainable by third parties, especially creditors and potential creditors.[6]

Essentially, the *command* and *control* test is the commonly applied test to determine the COMI of an entity.[7]There is a presumption in favour of the place of its registered office, which normally corresponds to the head office of the company[8] and this presumption has worked well where there is no serious controversy.[9] In effect, the registered office, or the place of incorporation serves as proof of *existence* of a corporate entity.

The registered office, however, does not otherwise have special evidentiary value and does not shift the burden of proof away from the foreign representatives seeking recognition as a main proceeding.[10] Courts generally take into account other factors, such as the location of the debtor's *headquarters*; the location of those who actually *manage* the debtor (which could possibly be the headquarters of a holding company); the location of the debtor's *primary assets*; the location of the majority of the debtor's *creditors* or of a majority of the creditors who would be affected by the case; and the jurisdiction whose law would apply to most disputes.[11]

In the Indian context, the initiation of proceedings against an Indian corporate entity when the COMI lies in India itself, makes such proceedings the "*foreign main proceedings*"[12] (under the UNCITRAL Model Law) for a foreign creditor. Recognition of the proceedings as a *main proceeding* will result in

[6]In *re Stanford International Bank*, 2010 Bus LR 1270 [at ¶ 56]

[7]Ian F. Fletcher, Insolvency in private international Law, Second Edition, 2005 at p. 390.

[8]Article 16(3) Model law; see also Virgos, Miguel, and Schmit, Etienne. (1996) Report on the Convention on Insolvency Proceedings, EU Council Document 6500/96 DRS 8 (CFC).

[9]H.R. Rep. No.31, 109th Congress, 1st Session, at para 114.

[10]In *Re Tri-Continental Exchange Ltd* 349 B.R. 627 (2006) at p. 635.

[11]In re S*phinX, Ltd.*, 371 B.R. 10 (S.D.N.Y.2007)

[12]Article 2(b), UNCITRAL Model Insolvency Law, 1997

automatic relief such as a*stay* or *moratorium* on domestic proceedings in relation to the debtor, and the Indian insolvency professional would, presumably be afforded rights as a foreign representative of a foreign main proceeding before the courts of contracting states to the UNCITRAL Model Law, in any application to stay parallel main proceedings, or otherwise, to commence secondary proceedings in relation to the Indian debtor's assets which may be located overseas.

In the event that it is possible that the COMI of an *Indian* debtor is determined to fall outside India (lets say, Mauritius for example), *foreign main proceedings* shall ensure in that*proceedings* shall ensue in that jurisdiction, and the Code, having no extra-territorial effect as of now, shall cease to apply. In such circumstances, relief available to Indian creditors in that jurisdiction will be subject to the laws of where the foreign main proceedings are initiated and the provision of the Code, shall be applicable, only in so far as it is consistent with, or otherwise, at the discretion of the court, in whose jurisdiction the foreign main proceedings are commenced.

It should be stressed that the UNCITRAL Model Law does not import the *substantive* law of the foreign system into the insolvency system of the enacting state, nor does it apply the relief that would be available under the enacting state in any foreign proceedings. It does however, grant recognition and assistance to foreign representatives of an insolvency resolution process in applying for interim relief and automatic stays, where available in that particular jurisdiction where such relief is sought.

**THE CURRENT LEGAL FRAMEWORK IN INDIA**

Sections 234 and 235 of the Code deal with cross border insolvency in a *cursory* manner, empowering the government to make treaties and further empowering the Adjudicating Authority under the Code, to issue a letter of request to a court in a country, with which an agreement has been entered into, to deal with the assets in a specified manner (presumably, in accordance with the provisions of the Code). Theoretically, this should also provide a framework for *foreign representatives* to apply to the Indian courts to deal with assets in India in a manner consistent with the insolvency laws of the jurisdictionwhere *foreign main proceedings* have been initiated, in relation to a debtor, with assets in India.

For foreign proceedings to be recognized in India, the process set out under the Civil Procedure Code, 1908 will be applicable, together with English common law principles, though it should be noted that it is not broad enough to cover some insolvency related proceedings.

Likewise, for Indian proceedings to be recognized abroad, the procedural rules of that foreign jurisdiction will apply. Those countries that have adopted the UNCITRAL Model Law (which include most industrialized countries) are required to provide recognition, assistance, cooperation and appropriate relief in relation to insolvency proceedings commenced in India, *except* where that country has otherwise required reciprocity.

As of June 2018, 44 states have adopted the UNCITRAL Model Law, including the United States, the United Kingdom and Singapore. Note, however, that certain countries that have adopted it

may have made reservations to it and may require *reciprocity*.[13]

Clearly, while the Code permits the government to enter into treaties to implement the UNCITRAL Model Law, negotiating up to 200 separate bilateral treaties in a relatively short space of time is just not practical, and it would further complicate matters, with the Indian courts having to take into account the nuances of each treaty in any cross border insolvency matter. Surely, the simplest solution would be for India to simply sign and ratify the UNCITRAL Model Law and then incorporate that into the Code.

While the Notification proposes to essentially adopt the UNCITRAL Model Law, there are a couple of key nuances and it appears to apply only to *corporate* insolvency, and not in relation to the insolvency of *individuals*. There is a general *public policy* restriction, which essentially says that India will not give effect to the treaty provisions if it violates public policy, though it should be noted that this reservation is a common one amongst most contracting states and the nuance is how the courts in India might interpret the principle, and whether they will accord it narrow, or broad status, potentially frustrating the rights of foreign representatives in actions before the Indian courts.

**SUBSTANTIAL ASSETS OVERSEAS?**

Insolvent entities (or those which are being restructured) might have substantial assets outside of its COMI (for example, the entity itself might be the legal registered owner of *property*). It may also have *shares* in foreign subsidiaries or other group companies, and these *share certificates*, are essentially moveable property (though they are likely to be pledged to any lender of the subsidiary or the group company as security for any loan).

However, it needs to be underlined, that the *assets* of any *foreign subsidiary or Group Company* are *not* the assets of the insolvent parent company (*other* than the *shares* held by it in any such foreign subsidiary or Group Company). This is a cardinal principle of limited liability and the courts will only lift that veil on the ring fencing of liabilities in exceptional circumstances.

As mentioned above, the Code already permits foreign creditors to apply to the *Adjudicating Authority* for either the initiation of insolvency proceedings against the Indian entity *or* to be a part of the ongoing proceedings, in the same manner as Indian creditors, with the same rights. The Code, by virtue of including a "*person resident outside India*" in the definition of "**persons**",[14] rightly underlines the principle of *neutrality*towards the identity of the corporate debtor's creditors.

However, the Code had fallen short in addressing situations where Indian creditors sought to enforce rights over an Indian debtor with assets overseas and also, where Indian creditors sought to enforce rights over a foreign debtor with assets overseas, wherein there is neither a provision for *automatic attachment* over assets situated overseas *nor* for parallel simultaneous proceedings against the corporate debtor in more than one jurisdiction.

In non UNCITRAL Model Law contracting states, the principles of private international law essentially

[13]For a further discussion of the principle and implications of reciprocity, see *'Should Reciprocity Be a Part of the UNCITRAL Model Cross Border Insolvency Law?'* by Keith D. Yamauchi (2007), International Insolvency Review Vol. 16., pages 145-179.

[14]Sec. 3(23)(g), Insolvency & Bankruptcy Code, 2016

govern cross-border insolvency, and a formal application will need to be made by the appointed Indian insolvency resolution professional to attach those assets in the court of the relevant foreign jurisdiction where the Indian debtor may have assets.

In UNCITRAL Model Law contracting states (and those contracting states that accept applications from insolvency professionals in *non-contracting* states), generally, co-operation, assistance and recognition of foreign law proceedings will be afforded.

It's perhaps pertinent to now turn to the question of how other jurisdictions approach the problem of *locus standi* in the context of foreign insolvency proceedings and orders from foreign courts or tribunals?

The United Kingdom, for example, although it does not recognise India as a "*relevant country*" under the provisions of Section 426 of the Insolvency Act of 1986[15], it does, however, provide an *insolvency professional* the right to approach the English Courts to either request r*ecognition* of insolvency proceedings under which it has been appointed, so as to ensure that assets located in the UK become part of the Indian insolvency proceedings, or, otherwise, be a part of insolvency proceedings initiated by a creditor in the UK.

**THE RULE IN *GIBBS***

But what about contracts between an Indian debtor and foreign creditors, which are governed by English law? Will those foreign creditors be subject to (and bound by) the Code in the event that an insolvency resolution process is triggered in India against the Indian debtor? Will those foreign creditors need to prove their debts through the process in India and does the *moratorium* under the Code apply to parallel proceedings by foreign creditors before foreign courts, seeking enforcement of any local security interests?

There is a long-standing principle of English law that a debt governed by English law cannot be discharged by a foreign insolvency proceeding, unless that creditor submits to those foreign proceedings, derived from the decision by the English Court of Appeal in *Anthony Gibbs and sons v La Société Industrielle et Commerciale des Métaux*.[16]

The Gibbs Rule was recently put to test by English courts in the case of the *Bakhshiyeva v Sberbank of Russia & Ors [2018] EWHC 59 (Ch)*. In this case, the court considered an application by a foreign representative to the English court on behalf of the International Bank of Azerbaijan (the "**Debtor**") for a permanent stay on a creditors' enforcement of claims in England under English law contracts, contrary to the foreign insolvency proceeding, to which the creditors of the Debtor were *purportedly* bound.

In this case, the foreign insolvency proceedings had been initiated in Azerbaijan against the Debtor and a restructuring plan had been agreed by nearly all of its creditors (the "**Restructuring Plan**"), which had been approved by the Azeri courts (the "**Approving Order**") and the question arose as whether they should be recognised in England under the Cross Border Insolvency Regulations, 2006 (the

[15]Sec. 426, Insolvency Act 1986 stipulates an obligation on part of the British Courts to assist the foreign representatives from relevant countries in the insolvency proceedings involving attachment of assets situated in their jurisdiction.

[16]*Gibbs & Sons v. Societe Industrielle Des Metaux*, [1890] 2 QBD 399.

"**CBIR**", which broadly, implement the UNCITRAL Model Law).

The judgment is quite an interesting one, because there are essentially three issues at stake: *firstly*, whether a moratorium can be extended *indefinitely* (when it appears that the *moratorium period* under local law seems to be on the brink of expiry); *secondly*, whether creditors with rights under foreign law documents, who did not participate or agree to the restructuring plan are bound by it; and *thirdly*, whether the *Gibbs Rule* is still good law.

Turning to the brief facts of the case, *Sberbank* had lent USD 20 million to the Debtor, pursuant to English law financing documents and another creditor, Frankin Templeton, was the beneficial owner of USD 500 million of notes, issued by the Debtor and also governed by English law (*Sberbank* and Frankin Templeton together, being the "**Respondents**").

The Respondents did not participate in the Restructuring Plan and did not consent to it. At first instance, the English court granted the representative of the Debtor the relief sought, imposing a moratorium, preventing creditors in general, and the Respondents in particular, from commencing or continuing any action against the Debtor.

The Respondents appealed the decision, arguing that the foreign restructuring proceedings under Azeri law came to an end at the end of January 2018 and further, it did not bind them, relying on the *Gibbs Rule.*

It was cited in the judgment that many English law insolvency academics now consider the Gibbs Rule as an *anachornism*, with some going so far as to say that the "*Gibbs doctrine belongs to an age of Anglocentric reasoning which should be confined to history*."[17] It was also pointed out in the proceedings that in the case of *Pacific Andes Resource Development Ltd*, the Singapore High Court[18] chose not to be bound by the Gibbs Rule, finding that:

"*In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.*"

The *Gibbs Rule* is not doubt problematic: on the one hand, it does not recognise foreign insolvency or restructuring proceedings taking precedence over an English law debt; yet on the other hand, the English courts generally expect a foreign court to recognise its *own* judgements in relation to a restructuring in England, over and above foreign creditor's rights under a foreign law loan agreement. This appears to be a *paradox*.

On the question whether the *Gibbs Rule* had been *eroded* by the adoption of the UNCITRAL Model Law (incorporated under the CBIR), some academics have pointed out that:

"*In situations where a restructuring is on foot in the foreign jurisdiction, the foreign representative can seek recognition in England pursuant to Article 15 of the [Model Law]. (One is obviously dealing with a situation where the foreign representative*

[17]Professor Ian Fletcher, quoted in paragraph 49 of the judgment

[18]*Pacific Andes Resource Development Ltd* [2016] SGHC 210 at 48.

*does not wish to proceed with a parallel scheme of arrangement in England and creditors have not sought to invoke the English court's insolvency jurisdiction.) Provided the foreign representative was appointed in foreign main proceedings, i.e. where the debtor has the centre of its main interests, the mandatory consequences of recognition include, under Article 20(1), the staying of both creditor actions and executions against the debtor's assets ...*"

Furthermore, the effect of this for foreign creditors who do not agree to any restructuring plan initiated in the debtor's COMI should become obvious:

"*Hence the foreign representative can stymie a hold-out creditor who might be minded to ignore the foreign restructuring and proceed instead to bring an action or to seek to execute in England, relying upon a debt that arose under an English contract. By applying for a stay the foreign representative may not have to deal, at least not immediately, with the substantive question of whether the English debt will ultimately be discharged by the foreign proceedings.*

*However, the application of Article 20 in respect of a foreign restructuring is not wholly free from complexity. The reference in Article 20(2)(a) to 'as if' a winding-up order had been made raises some uncertainty. For there is, of course, no discharge in a winding up.*

*Thus one may ask: what will happen in England in respect of the stay once the foreign restructuring plan has been approved, the corporation resumes trading outside bankruptcy protection and the foreign proceedings are formally closed by the foreign court?*"

Nevertheless, pursuant to the definitions of a *foreign proceeding*[19] and a *foreign representative*[20] under Article 17(1) of Schedule 1 to the CBIR, the court must recognise a foreign insolvency proceeding if:

(a) The foreign insolvency proceeding constitutes a "*foreign proceeding*" as defined by Article 2(i) of Schedule 1 to the CBIR;

(b) The applicant is a "*foreign representative*" within Article 2(j) of Schedule 1 to the CBIR; and

(c) The application satisfies the evidential requirements set out in Article 15 of Schedule 1 to the CBIR.

Where a foreign *liquidation* is recognised by the English court as a *foreign main proceeding*, under the CBIR, then the debtor benefits from an *automatic stay* in England.[21] However, the situation is slightly different in the context of a foreign *restructuring* where an *administration moratorium* is granted.

In considering a similar case, based on similar facts to the *Sberbank* case, the English court, in *Re BTA Bank JSC [2012]*,[22] granted a stay order for two principle reasons:

"*first, the relief is appropriate because it enables the English court to cooperate with the financial court in Almaty City in subjecting the bank's assets and claims to a single regime for the benefit of the general*

[19] Article 2(i) of Schedule 1 to the CBIR defines a *foreign proceeding* as:
"*... 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 reorganisation or liquidation.*"

[20] Article 2(j) of Schedule 1 to the CBIR defines a *foreign representative* as:
"*... a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.*"

[21] Article 2(j) of Schedule 1 to the CBIR defines a *foreign representative* as:
"*... a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.*"

[22] *Re BTA Bank JSC* [2012] EWHC 4457 (Ch)

*body of claimants. Secondly, I consider the relief appropriate because there plainly should not be an unseemly scramble for English assets by English claimants to the possible prejudice of the general body of claimants, but there should be an ordered approach to such English claims as might survive the Kazakh insolvency process."*[23]

Notwithstanding the decision in *Re BTA Bank JSC*, the court held that the UNCITRAL Model Law and the CBIR does not empower an English court to vary, or discharge rights granted under English law, or otherwise, essentially conform the rights of creditors under English law, with the rights that they have under foreign law (and have otherwise, not consented to).

What appears to be a critical emphasis in the judgment is the distinction between *insolvency* (and the distribution of assets) and *restructuring* (and the variation or removal of rights). Although they are both *collective* proceedings (involving the debtor's creditors), the first process relates to the removal of assets from the grasp of a single (or class of) creditor in a particular jurisdiction (for the collective benefit of the creditors as a whole), while the second process relates to the denial of contractual rights, if that creditor has not consented to a restructuring plan.

The *Sberbank* judgment further seems to underline that the English courts will not apply foreign law, or apply English law in such a manner that replicates or achieves the intended relief that may be available under foreign law, if such a result could not be achieved under English law.

So to what extent does the Code and the proposed incorporation of the UNCITRAL Model Law address the *lacuna* of the *Gibbs Rule* and what, in the context of the *Sberbank* judgment, might happen if an Indian debtor undergoing the corporate insolvency resolution process in India under the Code had foreign creditors pursuant to English law financing documents?

In these circumstances, would an English court admit the insolvency resolution professional's application as a *foreign representative* to stay any action by those creditors until the moratorium period had expired under the Code? Can it already do this by virtue of the CBIR incorporating the UNCITRAL Model Law, *without* further legislative action required in India, adopting the UNCITRAL Model Law as part of the Code?

In the absence of any *reservation* made by the United Kingdom in relation to *reciprocity* for its insolvency representatives in India, granting it rights under the UNCITRAL Model Law, it is reasonable to conclude that the answer to that question would be *yes*.

Secondly, would an English court *reject* any application for a *permanent* stay or moratorium made by the Indian *foreign representative* in connection with foreign creditor's rights under English law financing documents and the Indian debtor's assets located in the United Kingdom?

What can we take away from the *Sberbank* judgement is that an application for *permanent* relief that goes *beyond* the moratorium period of the restructuring process in India, will likely be struck out by an English court. But that's a different conclusion from *temporary* relief, preventing creditors from asserting their rights under English law documents against the Indian debtor in the UK during

[23] *Ibid. See paragraph 13 of the judgment by Norris J.*

the *moratorium period* under the Code in India; and such temporary relief is likely to be granted by an English court.

It's worth re-iterating that the Code enables the Adjudicating Authority to send a *Letter of Request* to an appropriate Court of the country with which a bilateral treaty has been entered into under Section 234, for recognition of proceedings, though theoretically, such a request is still subject to the discretion of the English court and the application of the Gibbs Rule, *notwithstanding* the provisions of the UNCITRAL Model Law and the incorporation of it under English law through the CBIR.

Finally, it should be noted, in the context of the *Sberbank* case, that the *Azeri* law has been amended to extend the *moratorium* period, potentially, indefinitely, and this raises the question to what extent any temporary relief granted in the English courts is necessarily required to be extended, until the *moratorium* allowing the restructuring, comes to a close? It remains to be seen how that question will be dealt with.

**CONCLUSION**

The Notification, setting out the draft chapter on cross-border insolvency (essentially adopting the UNCITRAL Model Law) is to be welcomed, though it is assumed that it paves the way for India's accession to the UNCITRAL Model Law (as amended), rather than the laborious alternative of having to enter into bilateral arrangements with other jurisdictions.

However, as the complexity of the foregoing discussion should highlight, simply *adopting* the cross-border insolvency regime should not be mistaken to mean that the provisions of the Code will be imported, or its *intent* applied in *foreign* jurisdictions.

What should be clear, if anything, is that the *Gibbs Rule* remains good law and foreign creditors will retain their rights under English law financing agreements, notwithstanding an Indian restructuring, assuming of course, that they have not participated in the restructuring or consented to the restructuring plan.

Further, it is unlikely that a *permanent* stay on proceedings before the English courts will be granted to a foreign representative of an Indian debtor in the context of a restructuring that has not been implemented within any time bound requirement.

**Author**: Ran Chakrabarti

## 2.2. SUPREME COURT REFUSES TO STAY BAN ON DEALING WITH VIRTUAL CURRENCIES

**INTRODUCTION**

In April this year, the RBI issued a notification prohibiting the use of virtual currencies, preventing entities regulated by the RBI from dealing with virtual currencies or providing services facilitating any person or entity to deal or settle virtual currencies (the "**Notification**").

Pursuant to the Notification, entities were prohibited from maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts on exchanges dealing with virtual currencies and transferring or receiving money in accounts relating to the purchase or sale of virtual currencies.

RBI regulated entities, providing any of the above-mentioned services were given 3 (three) months to exit their commercial relationships.

On May 22, 2018, the Internet and Mobile Association of India (the "**IAMAI**"), an industry body representing the interests of online and mobile value-added service providers filed a writ petition in the Supreme Court of India (the "**Supreme Court**") demanding a stay on the Notification (the "**Petition**").

Noting the urgency of the matters raised in the Petition, the Court posted the hearing for the matter on July 3, 2018 and passed an order thereafter(the "**Order**").

**THE ORDER**

The key aspects of the Order are summarized below.

**Tagged with Siddharth Dalmia Case**

The Supreme Court tagged the Petition with the case of Siddharth Dalmia & Anr. v. Union of India & Ors. (the "**Siddharth Dalmia Case**").

In this case, the petitioners moved the Supreme Court to:

(a) declare as illegal and ban all illegal virtual currencies, cryptocurrencies or decentralised digital (currencies) such as, Bitcoins, Litecoins, bbqcoins, dogecoins and investigate, fix accountability and responsibility for the sale and purchase of such virtual currencies, and prosecute the offenders;

(b) declare illegal and ban all websites, web links and mobile applications, being used to buy, sell or deal in any manner whatsoever, virtual currencies; and

(c) require the government to publicize the illegality of the sale, purchase and dealing of virtual currencies by the general public in India.

The Supreme Court granted the petitioners permission to submit a representation to the RBI and further directed that no High Court shall entertain any petition relating to the Notification. The Supreme Court intends to analyse the validity of the Notification in this matter and has already joined similar matters challenging the Notification with this matter.

There are at least two other matters with similar points of contention, which have previously been joined with the Siddharth Dalmia Case, including Dwaipayan Bhowmick v. Union of India & Ors. (the "**Dwaipayan Bhowmick Case**"), where the Ministry of Finance, the Ministry of Law & Justice, the Ministry of Electronics and Information Technology, the Securities & Exchange Board of India, the RBI, the Income Tax Department and the Enforcement Directorate have been made parties.

In this case, the petitioner moved the Supreme Court to direct the respondents to:

(a) regulate the flow of Bitcoin (and other crypto currencies) ensuring accountability to exchequer;

(b) constitute a committee for framingappropriate mechanisms to regulate the flow of Bitcoin, ensuring accountability to the exchequer; and

(c) constitute a committee of experts to consider the prohibition or regulation of Bitcoin and other crypto currencies.

**RBI directed to dispose of any representations filed by IAMAI**

By way of an interim measure, the Supreme Court directed the RBI to dispose of any representations filed by the IAMAI within a week from the date of the Order, where the disposal of the representation shall contain reasons.

**INDUSLAW VIEW**

The Order does not, in itself, definitively declare crypto currency and related services illegal, though it does maintain the existing regulatory prohibition, subject to the framing of a regulatory framework ensuring accountability.

Nevertheless, the Supreme Court has upheld the Notification and all RBI regulated entities are now expressly prohibited from dealing with virtual currencies or providing services for facilitating such dealing.

The RBI seems to have taken a rather totalitarian approach. Instead of taking a holistic approach to curb potential misuse of virtual currencies, the RBI has taken a broad-stroke approach of altogether prohibiting its use and the provision of related services.

The Siddharth Dalmia Case has been listed for hearing by the Supreme Court on July 20, 2018 and the final order is still pending.

At this point, it may be premature to assume that the Supreme Court is supporting the RBI imposed ban on virtual currencies. The Ministry of Finance has also not taken a final view on whether to ban or regulate virtual currencies in India. In this context, it should be noted that a committee was set up in early 2018 to provide recommendations on regulating virtual currencies.

The committee's report is expected soon and the virtual currency industry, in its nascent stage in India, is hopeful that it will provide some relief to virtual currency platforms and users in India.

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2.3. **MINISTRY OF CORPORATE AFFAIRSNOTIFIES SECTION 20 OF THE COMPANIES (AMENDMENT) ACT, 2017.**

Vide notification dated July 05, 2018, the Ministry of Corporate Affairs has notified section 20 of the Companies (Amendment) Act, 2017.

Section 20 of the Companies (Amendment) Act, 2017 relates to the intimation of satisfaction of charge by the companies under section 82 of the Companies Act, 2013. The amendment has the effect of permitting the companies or the charge holder to make such intimation within a period of 300 days from the payment or satisfaction on payment of additional fees, as opposed to the statutory standard period of 30 days.

The notification for the amendment is available at http://www.mca.gov.in/Ministry/pdf/CommencementNotification05_06072018.pdf

2.4. **MCA NOTIFIES AMENDMENTS TO THE COMPANIES (ACCEPTANCE OF DEPOSITS) RULES, 2014**

The Ministry of Corporate Affairs (the "**MCA**") has notified amendments to the Companies (Acceptance of Deposits) Rules, 2014, which cameinto force from August 15, 2018.

The amendment includes the requirement of a certificate by a statutory auditor to the circular inviting deposits, deletion of the requirement of

deposit insurance, and the revision to the minimum threshold of the remaining deposits from 15% to 20% of the amounts of deposits maturing in the financial year.

The amendments are available at http://www.mca.gov.in/Ministry/pdf/CompaniesAcceptanceDepositsAmendmentRules_06072018.pdf

2.5. **MCA NOTIFIES AMENDMENTS TO THE COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTOR) RULES, 2014**

The MCA has notified amendments to the Companies (Appointment and Qualification of Director) Rules, 2014, which came into force from July 10, 2018. The amendments include the deactivation of director identification numbers ("**DINs**")for those persons failing to notify required information relating to their DINs in form DIR-3-KYC, and other provisions for the introduction of DIR-3-KYC.

The amendments are available at http://www.mca.gov.in/Ministry/pdf/CompaniesAppointmentQualificationRules_06072018.pdf

2.6. **SEBI[24] ISSUES CIRCULAR RELATING TO ALTERNATE INVESTMENT FUNDS**

SEBI issued a circular[25]dated July 3, 2018 relating to Alternate Investment Funds ("**AIFs**").

**New Framework:** In consultation with the RBI, it has now been decided to enhance the limit of overseas investments by AIFs and Venture Capital Funds ("**VCFs**")to USD 750 million.

**Previously**: SEBI had previously allowed overseas investment by AIFs and VCFs to the extent of USD 500 million.[26]

**Impact**: In order to monitor the utilization of overseas investment limits, SEBI has decided that AIFs and VCFs shall mandatorily disclose the details stated in the circular

The circular can be accessed at https://www.sebi.gov.in/legal/circulars/jul-2018/overseas-investment-by-alternative-investment-funds-aifs-venture-capital-funds-vcfs-_39424.html

2.7. **COMMITTEE CONSTITUTED TO REVIEW OFFENCES UNDER THE COMPANIES ACT, 2013**

**New Framework:** The Central Government has constituted a committee to review offences under the Companies Act, 2013.[27]

**Impact**: Offences under the Companies Act, 2013 will be examined by the Committee, which may also suggest changes to the law.

The order can be accessed at http://www.mca.gov.in/Ministry/pdf/OrderCommitteeOffences_13072018.pdf

3. **INFORMATION TECHNOLOGY**

3.1. **TRAI ISSUES RECOMMENDATIONS ON PRIVACY, SECURITY AND OWNERSHIP OF DATA IN THE TELECOM SECTOR**

The Telecom Regulatory Authority of India (the "**TRAI**")[28] has issued recommendations on Privacy, Security and Ownership of Data in the Telecom

[24]*The Securities and Exchange Board of India or **SEBI** was established to protect the interests of investors in securities and to promote the development of, and to regulate the securities market in accordance with the provisions of the Securities and Exchange Board of India Act, 1992.*
[25]SEBI/HO /IMD/DF1/CIR/P/2018/103/2018

[26]Pursuant to circular no. CIR/IMD/DF/7/2015 dated October 1, 2015
[27]Pursuant to an order dated July 13, 2018
[28] *The Telecom Regulatory Authority of India or TRAI is a statutory body set up by the Government of India under section 3 of the Telecom Regulatory Authority of India Act, 1997. It is the regulator of the telecommunications sector in India.*

Sector. The TRAI has made certain recommendations:

(c) Initiaing a study to formulate the standards for anonymisation and de-identification of personal data generated and collected by digital entities; and

(d) Privacy by design principle coupled with data minimization should be made applicable to all digital entities.

The relevant press note can be accessed at https://trai.gov.in/sites/default/files/PRNo7816072018.pdf

3.2. **THE MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY HAS RELEASED A REPORT ON 'A FREE AND FAIR DIGITAL ECONOMY - PROTECTING PRIVACY, EMPOWERING INDIANS'**

The Ministry of Electronics and Information Technology has released a report on 'A Free and Fair Digital Economy - Protecting Privacy, Empowering Indians' by the Committee of Experts under the Chairmanship of Justice B.N.Srikrishna.

A summary and analysis of the report is available at https://induslaw.com/app/webroot/publications/pdf/alerts-2018/Personal_Data_Protection_Bill_2018.pdf

The report is available at http://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report-comp.pdf

4. **EMPLOYMENT**

4.1. **MINISTRY OFLABOUR PROPOSES CHANGES TO THE TRADE UNION ACT, 1926**

The Ministry of Labour and Employment has proposed changes to the Trade Unions Act, 1926 with the intention of giving trade unions wider recognition at the central and state level.

The ministry has invited comments on the draft Trade Unions (Amendment) Bill, 2018.

The draft bill can be accessed at: https://labour.gov.in/whatsnew/trade-unions-amendment-bill-2018

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