Indian Bankruptcy Code—How Does It Compare?

By **SUI-JIM HO** *and* **SURYA KIRAN BANERJEE**

Corporate Insolvency in India

The Insolvency and Bankruptcy Code 2016, implemented in phases since August 5, 2016, was enacted to overhaul the outdated and complex corporate insolvency laws in India to address an economy-wide problem of bad loans, with its resulting impact on the banking sector and access to credit. Even so, the speed and resoluteness with which India's central bank, the Reserve Bank of India, has moved to list delinquent borrowers (and to direct banks to initiate insolvency proceedings against them) is unprecedented and has surprised many. The

> **The speed and resoluteness with which India's central bank has moved to force banks to resolve non-performing accounts is unprecedented and has surprised many.**

most prominent example is that of Essar Steel, which has defaulted on approximately $6.9 billion of loans and is now being sold in a distressed sale under the Code. Given the aggressive application of the Code by Indian banks (on the direction of the Reserve Bank) and the quality of assets on offer, it is essential for overseas debt and equity investors to understand the Code and the resulting challenges and opportunities.

The Code has also materially impacted the rates of default on loan repayments. The Insolvency and Bankruptcy Board of India estimates that the threat of use of the Code has prompted repayment in the last two years of USD 14.2 billion in loans that were otherwise outstanding. In other words, repayment rates have materially improved owing to a fear among controlling shareholders of Indian debtors that they may lose control of their (largely) family owned businesses if placed in insolvency. It is therefore equally important for existing creditors and shareholders to take note of the change in debtor-creditor dynamics introduced by the Code, given that it is now possible for creditors to credibly enforce their rights, including in ways that result in a change in ownership of debtors.

In this article, we explore some of the salient features of the Code, judicial and market practice to date and what can be expected going forward. We also draw a comparison against Chapter 11 of the U.S. Bankruptcy Code and various restructuring processes in the U.K. (in particular, administration and schemes of arrangement) where relevant.

Considerations for Overseas Investors

The Code presents a number of considerations that overseas debt and equity investors should bear in mind.

Goals of the Code

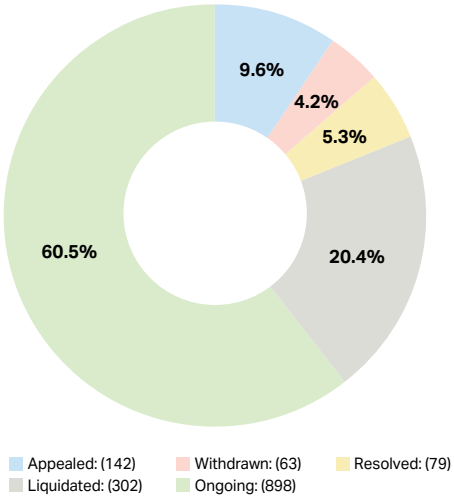
In the U.K., various insolvency proceedings such as company voluntary arrangements, administration and schemes of arrangement can be used to rescue a financially distressed debtor. Several options also exist under Chapter 11 in the U.S. Similarly, the primary objective of the Code is to resolve the insolvency of the corporate debtor (as a going concern, in contrast to liquidation). While the courts have held that a resolution process does not necessarily involve a sale, resolutions to date have almost exclusively done so—often by way of auctions. The emphasis on avoiding liquidation is also demonstrated in the ability of a liquidator to sell the debtor as a going concern in liquidation proceedings that follow a failed resolution attempt.

A rescue is generally more likely if the relevant process is available at an early stage. As in U.S. Chapter 11 and U.K. company voluntary arrangements and schemes, there is no insolvency requirement under the Code—the Code process is available once a debtor is in default. Further, the threshold for filing is low (arguably too low, *see inset below*). However, the focus on rescuing the debtor entity (instead of on the continuity of the debtor's businesses) is counterproductive—allowing sales of attractive assets or business verticals in a resolution process (currently only permitted in liquidation) would help preserve value, and possibly contractual and employment relationships.

RESOLVING INSOLVENCY IN INDIA — BEFORE AND NOW

- — According to 2018 World Bank data, India ranks 108th of 189 countries in insolvency resolution (from 136th in 2016).
- — Historically, creditors recovered 26.4 cents on the dollar on average. This has reportedly gone up to 49.6 cents on the dollar following the implementation of the Code (partly as a result of the introduction of criminal penalties in respect of a related law on the enforcement of security). The rates of recovery in the U.S. and the U.K. are 81.8 and 85.3 cents on the dollar, respectively.
- — Indian insolvency proceedings take 4.3 years on average. The time taken under the Code is yet to be empirically tested, but a drastic reduction is expected.
- — Businesses have historically been sold piecemeal and not as going concerns. The focus, and experience to date, of the Code is to attempt a going concern sale of defaulting debtors.

Is the Code Working?
(as of December 31, 2018)



As with English administration, a secondary objective under the Code is the maximization of the value of assets for the benefit of the creditors. A conflict with the primary objective may arise if the committee of creditors votes to liquidate the

KEY CHANGES INTRODUCED BY THE CODE

- Replaces a patchwork of disparate federal and state laws, and overlaps in the court system, with a single law and forum—the National Company Law Tribunal. Appeals from decisions of the tribunal are heard by the National Company Law Appellate Tribunal. A further appeal to the Supreme Court is available in respect of questions of law.
- Move from '*debtor-in-possession*' to '*creditor-in-possession*' model—suspension of the board of directors of the debtor on filing of petition.
- Insolvency resolution professional appointed by committee of creditors (comprising all 'financial' creditors) to manage the debtor and formulate resolution plan.
- Increased expertise expected to lead to quicker and better outcomes, and reduced scope for appeal.
- Reduced 180-day (plus single 90-day extension) timeline for resolution process.
- Resolution plan requires 66% (value of claims; down from initial 75% threshold) creditor approval, and tribunal sanction.
- Debtor liquidated if resolution process not completed within timeframe, or if plan rejected by tribunal.

corporate debtor (instead of approving a resolution plan)—for example, if the debtor is in economic as opposed to financial distress (i.e., the liquidation value of the debtor is higher than its value as a going concern). The interaction of the two objectives is still to be tested.

Control of the Debtor During Insolvency Proceedings

The powers of the board of directors of the debtor are suspended once an insolvency petition is admitted under the Code, with the debtor being managed by a resolution professional for the duration of the resolution process. While the resolution professional has statutorily defined duties, the Code provides for ultimate control over the resolution process to be exercised by a committee of creditors, comprising all the financial creditors of the debtor. The committee may approve a resolution plan, or alternatively decide to liquidate the debtor, if 66% (contrasted with 75% in the previous version of the Code) by value vote in favor of such action. The committee may also elect to withdraw the debtor from the insolvency process if 90% by value consent to do so. Administrative decisions are made by a 51% majority.

'Financial creditors' are holders of 'financial debt', which includes not only bank debt and bonds, but also certain derivatives and guarantee transactions. Before triggering a resolution procedure, a friendly creditor may want to carefully conduct diligence on the size of the debtor's 'financial debt' within the meaning of the Code. As some of these forms of 'financial debt' may not be evident from the balance sheet of the debtor, there is a risk that any given financial creditor may constitute a smaller than expected part of the complete pool of financial creditors and, consequently, not have the expected level of control in the resolution process. It should be noted that any taxes owed to governmental authorities will not constitute financial debt and, therefore, that the Indian tax authorities will not form part of the committee of creditors or the voting pool of financial creditors.

The Code provides that certain actions may not be undertaken without the prior approval of the creditor committee. The range of matters covers not only material changes that should rightly require the consent of the creditor committee, such as the raising of interim finance and changes to the capital structure, but also certain administrative matters, such as changes to the contract with the auditors and the undertaking of any related party transaction. The requirement for creditor committee consent in such a wide range of matters may be cumbersome in practice and could risk slowing down the restructuring process, especially if the debtor has a disparate group of creditors, making it more challenging to meet the 180/270-day timeline.

The aggressive timeline poses a serious concern as the Code calls for liquidation if a resolution plan is not agreed on time.

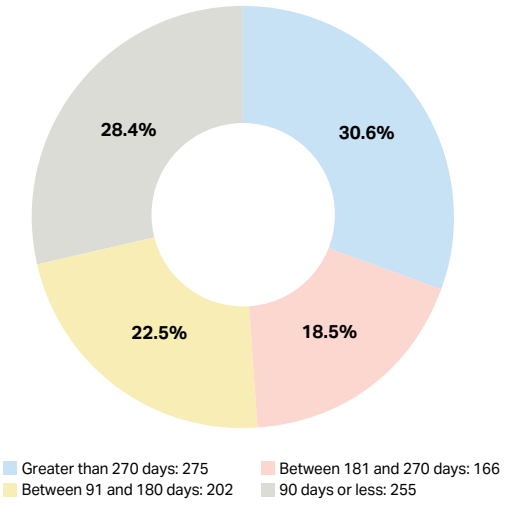
The creditor-led model under the Code can be contrasted with administration in the U.K. (where an administrator is appointed to manage the debtor but without the same level of creditor control), and with the debtor-in-possession model under Chapter 11 in the U.S. The creditor-led approach is not ill-suited to India given the concentrated composition of creditors (largely banks, as opposed to holders of capital markets instruments), which allows for a negotiated resolution plan to be agreed while continuing trading. However, the suitability of the approach may need to be revisited as the ownership of debt becomes more broad-based—interestingly, the Code itself is leading to a broadening of the creditor base beyond banks by creating a rapidly growing market in distressed debt instruments. Arguments in favor of retaining a role for existing directors absent mismanagement or fraud may also receive further attention once the initial set of high profile defaults is resolved, governance standards strengthen further and the performance of insolvency professionals receives scrutiny.

Aggressive Timelines

The 180-day (extendible once to 270 days) deadline set out in the Code may prove to be a double-edged sword. On the one hand, this deadline could encourage a resolution plan to be agreed in a timely manner. On the other hand, it may be unrealistic—it is not uncommon for restructuring talks to stretch beyond a year. This is especially true for larger global businesses with complicated capital structures and is likely to be more so in India given the outsized role of creditor committees in the management of the debtor during the resolution process. By comparison, according to World Bank data, insolvency proceedings in the U.K. and U.S. take approximately a year on average (taking into account the reduced timelines in respect of pre-packaged insolvency resolutions or '*pre-packs*', which are not yet available in India).

The deadline, if adhered to strictly, is likely to pose a serious concern as the Code calls for the tribunal to order the liquidation of the debtor if a resolution plan is not agreed within the deadline. A recent Supreme Court decision has held that the deadline is mandatory, but the scope of any exceptions or '*clock stops*' is still evolving.

Status Check – Pending CIRPs



Intervention by Opportunistic Creditors

The Code prescribes a relatively low threshold for the initiation of a resolution process by a broad range of creditors (*see inset*). Notably, a financial creditor can initiate the process even in relation to a payment default on debt owed to another financial creditor. This allows a go-around for creditors who do not have cross-default clauses in their debt instruments or whose debt is current, who can now use the Code to create an event of default (e.g., an event of default resulting from the commencement of an insolvency proceeding) under their own instruments. The fear of an opportunistic creditor calling a default in such circumstances may reduce the willingness of a sympathetic financial creditor to allow the debtor breathing space or to seek to restructure the debt outside of formal proceedings or at a forum of its choosing.

A practical solution may be for a sympathetic financial creditor to waive a payment default as soon as practicable to limit the scope for an opportunistic creditor that is not part of the same syndicate as the waiving creditor capitalizing on such default by initiating a resolution process.

Scope of Moratorium

Keeping in mind the overarching objective to restructure financial obligations while continuing to trade, a moratorium allows the debtor breathing room and facilitates trading while the debtor undergoes a negotiated process involving participants with often-competing incentives.

The Code envisages an automatic stay or moratorium against the institution or continuation of claims against the debtor, the execution of judgments against the debtor, the alienation by the debtor of its assets and the creation/invocation of security interests pertaining to the debtor (including, importantly, under the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, on which creditors typically rely) while the resolution process is ongoing.

FILINGS: STANDING AND THRESHOLDS

- The resolution process can be initiated under the Code by any financial or operational creditor, as well as by the debtor itself. An application by the debtor itself must be supported by a special resolution of shareholders (i.e., cannot be initiated by the board of directors without shareholder consent).
- No difference in rights under the Code between domestic and overseas creditors.
- *De minimis* threshold of INR 100,000 (~USD 1,500) for entitlement to initiate resolution process. A proposal to increase the threshold tenfold (~USD 15,000) was under consideration.

As in the U.S., the moratorium under the Code is automatic and applies to all legal proceedings against the debtor. While the U.K. government is consulting on a narrower, time-limited (28 days, extendable by another 28 days, and beyond this with majority secured and unsecured creditor consent) moratorium, there is currently no moratorium except in cases of administration (and for small companies, though this is rarely used). This is typically addressed by entering into lock-up or standstill arrangements or, in the case of schemes, a *de facto* moratorium can be put in place by courts using their extensive powers of case management. Practitioners also

sometimes use schemes in tandem with administration to avail of a moratorium.

Unlike in U.K. administration, the U.S. Chapter 11 moratorium precludes counterparties from terminating contracts on the basis of insolvency alone (limited exceptions apply). The U.K. government is considering prohibiting such *ipso facto* clauses—albeit in a restricted form allowing debtor companies to designate certain contracts as essential, and allowing creditors to challenge the designation in court. While the Code expressly sets out a provision preserving the supply of essential goods or services to the debtor, the enforceability of *ipso facto* clauses remains uncertain.

The scope of what is permitted or prohibited by the Code moratorium is in general not entirely clear. For instance, the Code is silent on whether the moratorium restricts set-off rights. Further, it is not clear whether the moratorium will be recognized overseas if the debtor has material assets outside India. This uncertainty can be a cause for concern as (in addition to the commercial implications) the Code prescribes a fine and/or imprisonment of up to five years for a contravention of the moratorium (e.g., by enforcing security furnished by a debtor outside India). However, the contours of the moratorium are gradually becoming clearer as courts pronounce on specific issues and corresponding amendments are made to the Code—for example, it is now clear that the moratorium under the Code does not extend to guarantees given in relation to the debt of the debtor undergoing resolution.

Foreign Proceedings

Importantly for creditors, the moratorium under the Code may not restrict foreign proceedings in relation to foreign law-governed debt depending on the governing law of such debt. For example, in December 2018, the Court of Appeal in the U.K. dismissed a petition by the International Bank of Azerbaijan seeking, in effect, a permanent moratorium against claims by creditors under English law-governed documents. The Court reiterated that the Gibbs rule remains good law and that a foreign process, even where it is the main proceeding, cannot compromise English law-governed debt.

The scope of what is permitted or prohibited by the Code moratorium is in general not entirely clear.

Conversely, under Chapter 15 of the U.S. Bankruptcy Code, U.S. courts will typically recognize the compromise of U.S. law-governed debt in a foreign proceeding, provided that such foreign proceeding functions in accordance with established principles of procedural fairness such as notice and due process, and the substance of the restructuring is not drastically different from what could be achieved under a Chapter 11 plan in the U.S. Interestingly, a U.S. court has recently granted recognition to a Croatian proceeding compromising English-law

governed debt, even though such proceeding would not be recognized under English law.

More broadly, the absence of a robust regime governing cross-border insolvencies is a notable lacuna in the Code. The Code contemplates that the Indian government will agree to bilateral arrangements with other countries (no such arrangements have been agreed) and that the tribunal will issue requests for information and action accordingly. There is no requirement for Indian courts to cooperate with foreign courts as regards concurrent proceedings (e.g., by granting a stay on Indian proceedings). The enforcement of final and conclusive judgments of a limited number of foreign courts can be sought in Indian courts, but additional requirements apply to judgments of most jurisdictions (e.g., the U.S., but not the U.K.), to orders of tribunals/executive bodies, as well as certain types of orders such as administrative and interim orders.

Both the U.S. and the U.K. have adopted the UNCITRAL Model Law on Cross-Border Insolvency (see Chapter 15 of the U.S. Bankruptcy Code and the Cross-Border Insolvency Regulations 2006, respectively), which sets out a model for procedural cooperation between states in cross-border insolvencies. The Insolvency Law Committee on Cross-Border Insolvency in India recommended in October 2018 that India adopt provisions based on the Model Law.

As in the U.S. and the U.K., the Indian model is also likely to broadly provide for the recognition of foreign proceedings as either main or non-main proceedings, and for certain reliefs (e.g., moratoria) to be available depending on the nature of the foreign proceeding. Typically, this would involve an automatic moratorium (though the scope of the relief is narrower in the U.K. than in the U.S., particularly with respect to secured creditors) in the case of foreign main proceedings, and a discretionary remedy in the case of foreign non-main proceedings. Similarly, the Indian model is also likely to allow for the establishment of concurrent proceedings limited in scope to domestically situated assets. An important drawback of the Indian proposal is that it does not propose to tackle issues relating to the enforcement of insolvency judgments/orders at this stage, pending the development of judicial practice on the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

Group Insolvencies

In addition to the cross-border issues identified above with respect to a single debtor having assets and liabilities across multiple jurisdictions, a group insolvency scenario (i.e., insolvency proceedings relating to different members of a group of companies, typically in more than one jurisdiction) should also be considered. The Code is silent on the manner in which group insolvency proceedings are to be administered. This is in contrast to the E.U.'s Recast Insolvency Regulation, which goes beyond the usual main/non-main tiering of proceedings to allow a consolidated group insolvency proceeding to be commenced, involving active cooperation between insolvency professionals and courts across the E.U.. Little progress is expected on this front in the coming months as the Indian Insolvency Law Committee on Cross-Border Insolvency specifically excluded group insolvencies from the purview of its report, noting that it would revisit the subject once there was further international consensus on the subject.

Minority Creditor Protection

In contrast to pure contractual processes such as workouts, a common feature of insolvency processes across jurisdictions is the ability to bind a minority of dissenting creditors and/or equity holders to a plan. This helps prevent a hold-up situation in which one or more creditors threaten to defeat a plan by withholding their consent to such plan in order to negotiate a better deal than they would otherwise obtain. The ability to cram down must be tempered by the ability of creditors to block unsound or discriminatory plans—the generally accepted yardstick for evaluating whether a plan is discriminatory is a comparison against other similarly situated creditors, grouped together as members of a 'class'.

In the U.K., a 'cram down' of secured and preferential creditors is not possible in company voluntary arrangements and in administration. Creditors, including secured creditors, within the same class can be crammed down using a scheme of arrangement. In practice, senior lenders have combined schemes with administrations to cram down entire classes of junior creditors where the value breaks in the senior debt. This is achieved by transferring the business of the company to another entity in which only the senior creditors hold shares. As the rights of the junior creditors are not affected, courts have upheld these schemes. The U.K. government is also considering the introduction of a new insolvency procedure called a restructuring plan, which would allow a cross-class cram down of creditors provided at least one class of impaired creditors votes in favor of the scheme and the absolute priority rule is followed (i.e., a senior class of creditors is paid in full before any junior class receives anything, unless the senior class consents to such arrangement)—however, unlike in the U.S., the court will have the discretion to approve a plan that does not respect the absolute priority rule if the deviation is necessary to achieve the aims of the plan and the plan is just and equitable in the circumstances. A cram down of entire classes of creditors is possible in the U.S. if the bankruptcy court finds that the plan is fair and equitable and does not discriminate unfairly with respect to the dissenting class.

The Code does not require the resolution professional, the committee of creditors or the National Company Law Tribunal to consider the interests of dissenting creditors in proposing and approving a resolution plan. In other words, a cram down not only of dissenting financial creditors but also of entire classes of creditors (e.g., operational creditors) is permitted.

That having been said, a tribunal has recently held that amounts owed to operational creditors should receive similar treatment as amounts owed to financial creditors—that is, the strict priority of payment in liquidation does not apply in a resolution process. A rule permitting the payment of only the liquidation value (possibly nil if the debtor is insolvent) to operational and dissenting financial creditors, generally accepted in the U.S. as a metric of a fair plan, was contemporaneously held to be *ultra vires* under the Code and subsequently deleted by amendment. The tribunal has also held that similarly situated creditors (whether operational or financial) should not be treated dissimilarly. The Supreme Court has also made nonbinding observations that operational creditors be given a more involved role in the formulation and approval of resolution plans. While these observations do not negate the ability to cram down entire classes of creditors, they introduce substantive requirements in relation to the content of the plan

itself. A procedural safeguard under the Code is that it disenfranchises financial creditors that are related parties from voting on a resolution plan.

The Code also contains further safeguards in the form of the involvement of the resolution professional who must comply with statutorily prescribed duties in respect of the conduct of the process. As with schemes of arrangement in the U.K. (and in India in a non-insolvency context), an important minority creditor protection safeguard is the exercise of judicial oversight over the process and discretion in the approval of any plan. For example, in the U.K., the court may refuse to sanction a scheme in which the majority shareholders have a special interest that is separate from that of the minority—for example, if they provided irrevocable undertakings to vote in favor of a scheme in exchange for consideration not available to the minority. The U.S. courts also exercise oversight over proposed plans to ensure that they are feasible, and that they do not discriminate unfairly and are fair and equitable to impaired classes of creditors.

While there is no statutory provision on the point, the tribunals in India are likely to consider, among other factors, whether the statutory majority is acting in good faith and whether the arrangement is one that a creditor would reasonably approve. However, judicial practice on the standard of review by the tribunal, and on the practical implications of such review, is still developing and the position remains unclear. In the limited case law to date, tribunals have required the committee of creditors to consider the interests of all stakeholders (stating that the process is not a recovery proceeding); and for the plan to maximize the assets of the corporate debtor, to be equitable, to not discriminate unfairly and to promote entrepreneurship and the availability of credit.

Pre-Code Procedures

Given the systemic nature of the bad loans problem in India, the specialist tribunals set up to hear insolvency cases are quickly becoming overextended—the Reserve Bank of India has already called for better infrastructure to be put in place. In this context, Indian banks have proposed an alternative called Project Sashakt, which entails medium-sized loans being resolved contractually within a period of 180 days, with negotiations being led by a lead bank appointed by the lenders collectively. The establishment of a bank-funded asset management company, supported by institutional funding, is being contemplated for larger loans.

The voluntary process for medium-sized loans is essentially a contractual workout as it is underpinned by an inter-creditor template clause adopted by the relevant banks (and therefore does not apply to other creditors). The process does not require the involvement of an insolvency practitioner or nominee, and the agreed plan binds dissenting secured and preferential creditors (who have agreed to the template clause). The account is referred to the bankruptcy courts under the

Code as a fallback. However, the success of this program is contingent upon adoption by Indian banks of the template inter-creditor agreement, which has not received a favorable response to date. Further, the scheme arguably runs contrary to the policy objectives of the Reserve Bank of India, which in February 2018 abolished similar schemes allowing lenders to attempt to resolve bad debts outside of the Code process. The scheme has also been criticized as impeding the clean-up of banks' balance sheets attempted by the Code by allowing banks to delay recognizing loans as being in default, and to throw good money after bad. Therefore, there is uncertainty regarding its legal tenability given the broad powers of the Reserve Bank of India in this sphere.

Pre-packs

Another option to reduce the case load of the insolvency tribunals, and to allow for faster, cheaper and less disruptive resolution, is the use of pre-packaged resolution plans or pre-packs. Common in the U.S. and the U.K. (in administration), pre-packs were contemplated by a pre-Code amendment to the Companies Act, 2013, but were never enacted. They did not expressly make their way into the Code, and the consensus is that pre-packs cannot currently be undertaken given the highly prescriptive resolution process that must be followed under the Code.

The proposal in India contemplates the borrower agreeing to a resolution plan with its creditors before initiating insolvency proceedings to obtain formal court approval to cram down dissenting creditors and to override objections from other stakeholders. Unlike in the U.S., it is not clear whether the Indian proposal involves the solicitation of acceptances from creditors before filing, and may depend on the enforceability of lock-up agreements. The Indian proposal also does not contemplate a sale by the insolvency professional without the sanction of the court, as is permitted in U.K. administration. Court scrutiny minimizes the scope for conflicts of interest (an issue which in the U.K. saw the High Court remove administrators in *Vegas Investors v. Shinners* in 2018), and addresses an important criticism of pre-packs—that they lack transparency and often discriminate against unsecured creditors. Given the substantial litigation under the Code alleging discrimination against unsecured and operational creditors, a pre-pack that does not involve court scrutiny is unlikely to be adopted in India—the impact of this process requirement on the efficacy of pre-packs remains to be seen.

In addition to the usual benefits of pre-packs, there is a strong policy objective in favor of allowing pre-packs in the Indian context. The Reserve Bank's reluctance to allow banks to increase exposure to distressed borrowers means that it may be difficult for borrowers to obtain interim finance during the resolution process, possibly forcing a cessation of trading. The speed afforded by pre-packs may materially alleviate this issue.

Interim Finance

The provisions of the Code on interim finance are broadly similar to those in the U.S., with some important differences. On the other hand, the provision of interim finance in the U.K. operates largely as a result of market forces, and a recent consultation by the U.K. government to introduce U.S.-style provisions relating to the granting of super-security or 'priming' were not pursued as a result of negative market feedback.

The Code provides for two regimes governing the raising of interim finance. An interim resolution professional, who is tasked with managing the debtor until a full-time resolution professional is appointed, is permitted to raise interim finance, including the provision of security over unencumbered assets. The charging of encumbered assets requires the consent of the relevant secured lender. A full-time resolution professional is permitted to raise interim finance with the consent of the committee of creditors—this is in contrast to the U.S., where the court can effectively impose interim finance arrangements on existing creditors (subject to certain safeguards), but is consistent with the creditor-driven approach of the Code.

The Code grants super-priority to interim finance providers—along with the potential for 'priming' existing secured lenders, the high rates of interest on offer and the relatively short duration of exposure, this is a growing area of interest for lenders. An interesting point of note is that this market is likely to be supplied by alternate, non-bank providers of finance (including overseas lenders, who would however be constrained by the Reserve Bank's restrictions on external commercial borrowings by Indian borrowers) given the reluctance of Indian banks to lend further to distressed accounts (and the Reserve Bank's preference that they not do so).

Concluding Thoughts

The Code significantly improves India's ability to resolve insolvency efficiently and in a time-bound manner. Despite legal bottlenecks that have considerably delayed the first few cases as nuances in the law are ironed out, the Code is putting an end to the dysfunctional relationship between corporate debtors and lenders who, with no credible insolvency regime in place, were compelled to continue to fund errant debtors indefinitely in the hopes of ultimately recovering their dues. Given the creditor-led approach contained in the Code, lenders are now able to apply substantial pressure on borrowers to restructure their debts in a time-bound manner to increase recoveries. As mentioned earlier, a fear of being placed into a Code proceeding has also prompted debtors and their controlling shareholders to ensure timely compliance with repayment obligations. Viewed in the broader context of the enactment of a nationwide goods and services tax (creating a single Indian market), relaxation of foreign investment norms,

governance reforms and the strengthening of anti-corruption law, the Code is an important milestone in making it easier to do business in India.

> **The Code seeks to put an end to the dysfunctional relationship between borrowers and lenders who, in the absence of a credible insolvency regime, funded errant debtors in the hopes of recovering their dues.**

A related consequence is the growth of the market for corporate debt. Reports indicate a vibrant market in pre-Code rescue finance, largely funded by non-bank finance providers. Further, given the slow progress of the initial few cases, banks are wary of participating in a Code process, and are increasingly looking to sell their exposure to specialist asset reconstruction companies (into which overseas investors can more freely invest).

There are also opportunities for equity investors given the high quality of assets on offer and the historically low recoveries expected by lenders. This is helped by the disqualification of existing controlling shareholders (and other persons who have defaulted on payments to lenders), rendering the process not fully competitive. Financial and strategic investors are also able to submit joint bids, allowing financial investors to participate in large processes and to tap management expertise, and allowing strategic investors to acquire assets that offer synergies at a compelling valuation without overextending their own balance sheets.

However, in addition to teething issues, such as the provision of relevant information to investors in a Code process, that remain to be resolved, some broader concerns remain. In addition to the issues highlighted above, these include the inability of the insolvency professional to sell profitable assets or verticals of the corporate debtor in a resolution process (permitted in a liquidation process). There is also uncertainty around the treatment of past and contingent liabilities, including as a result of a lack of coordination between regulators. For example, a recent decision of the Indian securities market regulator, the Securities and Exchange Board of India, imposed a fine on a debtor for non-compliance with securities laws in the period preceding the Code. This was imposed following the sale of a debtor in a court-approved process under the Code in which the acquirer expressly disclaimed liability for past non-compliance, bringing into question whether the 'whitewash' envisaged under the Code is operationally effective. There is also concern on the scope of the exclusion from participation in a Code process of persons connected to the existing controlling shareholders of the corporate debtor. This is widely believed to be too broad, and difficult to police—which the Indian government accepts and is re-examining. ■

Sui-Jim Ho is a partner based in Cleary Gottlieb's London office. Jim's practice focuses on cross-border finance, restructuring, capital markets and general corporate matters. He has experience representing both borrowers and creditors on a broad range of international finance and restructuring matters and has extensive experience in many cross-border transactions, in particular in the emerging markets. He also has experience in general corporate and M&A transactions and cross-border disputes and investigation matters.

Notably, he is a trusted advisor of many sovereigns and state-owned entities in Europe, Russia/CIS, Africa, Asia and the Americas. He has advised states and SOEs on capital raising, debt management and disputes/investigations, including in relation to bribery, corruption and fraud matters.

Jim received an L.P.C., with distinction, from BPP Law School – Lincoln's Inn Fields, and an LL.B., First Class Honors, from the London School of Economics and Political Science.

Surya Kiran Banerjee is an associate in Cleary Gottlieb's London office, and his practice focuses on cross-border M&A, private equity and restructuring transactions. He has acted for clients across Europe, Asia and the Americas, and has significant experience on transactions involving India.

Surya joined Cleary Gottlieb in 2017, having previously worked at a leading law firm in India. He received a Master in Law and Finance degree from the University of Oxford, and a law degree from the National Law School of India University.