

INSOLVENCY AND RESTRUCTURING: KEY JUDGMENTS AND UPDATES FOR THE YEAR 2021



The Insolvency and Bankruptcy Code, 2016 (**Code**) was enacted to revamp the insolvency and bankruptcy laws and resolve problems being faced by creditors due to non-repayment of outstanding dues by corporate borrowers. Since our [2020 snapshot](#) on 15 key developments in insolvency law, the Code has been further refined and amended in line with the object of the Code and taking into account the COVID 19 pandemic. The insolvency courts have also played their part in the development of the Code considering the business realities and practical considerations.

We have enumerated below some significant developments in the field of insolvency law in India in the year 2021. These include orders of the National Company Law Tribunal (**NCLT**), National Company Law Appellate Tribunal (**NCLAT**), the Supreme Court (**SC**) and changes proposed by the Union Government.

1. SC upholds validity of amendment to the Code (January)

The Code was amended to introduce two major changes (i) a threshold mandating a minimum number of allottees of a real estate project to jointly apply for corporate insolvency resolution process (**CIRP**) and (ii) extinguishment of the liability of a corporate debtor if a resolution plan gets approved by the NCLT and a new management takes over. These amendments were challenged. In *Manish Kumar v. Union of India*, the SC appreciating the rationale behind introduction of a threshold and noting that a bidder must be protected from any misdeeds of the past management, upheld the validity of the amendment.

2. Transactions between the corporate debtor and related parties that are collusive in nature do not qualify as financial debt under the Code (February)

In *Pheonix ARC Private Limited v. Spade Financial Services Limited*, the SC opined that the parties had entered the transaction with an ulterior motive of ensuring that the related parties would be a part of the committee of creditors (**CoC**). Taking note of the close relationship of key managerial person of the corporate debtor and the related parties, the SC held that allowing such persons would affect the other independent financial creditors.

3. Tax cannot be deduced and paid to the income tax authority in priority to other creditors (February)

In *Om Prakash Agarwal, Liquidator of S Kumar Nationwide Limited v. Chief Commissioner of Income Tax & Anr.*, the NCLAT held that the deduction of tax at source cannot be paid to the income tax authority in priority to other creditors. The income tax department can be paid based on the order of priority provided under the Code.

4. Moratorium imposed under the Code bars parallel proceedings against corporate debtor under the law governing negotiable instruments (March)

In *P. Mohanraj & Ors v. Shah Brothers Ispat Pvt. Ltd.*, the SC held that all ongoing proceedings against corporate debtor, including criminal proceedings in a cheque dishonour case under the negotiable instruments law, is stayed during the moratorium period.

5. Person ineligible to submit resolution plan under the Code barred from proposing a scheme of compromise and arrangement (Scheme) during liquidation (March)

In *Arun Kumar v. Jindal Steel Power Ltd. and Anr.*, the SC held that the conditions of Code will not apply to a Scheme where it is not the subject of a process under the Code. But, when the process of invoking the provisions related to a Scheme traces its origin to the liquidation proceedings under Code, it becomes necessary to read both laws in harmony.



6. Arbitration not maintainable if it is filed after petition is admitted before NCLT (March)

In *Indus Biotech Pvt Ltd v. Kotak India Venture Fund*, the SC held that the NCLT is duty bound to decide the CIRP application initiated by financial creditor under the Code which will have priority over any other law. Arbitration is not maintainable if it is filed after the corporate debtor is admitted in CIRP.

7. No creditor can initiate proceedings to recover claims which are not a part of resolution plan, once approved by the NCLT (April)

In *Ghanshyam Mishra v. Edelweiss Asset Reconstruction Company & Ors.*, the SC held that once a resolution plan is approved by the NCLT, the same will be binding on all parties including the government. All claims that are not a part of the resolution plan will be extinguished, and no person will be entitled to initiate or continue any proceedings concerning that claim.

8. Spectrum is an intangible asset that can be subjected to insolvency / liquidation proceedings (April)

In *Union of India v. Vijaykumar V. Iyer*, the NCLAT held that spectrum, which is an intangible asset of telecommunication companies, can be subjected to insolvency / liquidation proceedings under the Code. However, telecommunication companies cannot use or transfer the spectrum license under the Code without settling government dues. Further, it also noted that the dues of the government, including deferred spectrum payments, would qualify as an 'operational debt' and not as a 'financial debt'.

9. SC upholds validity of the notification allowing banks to proceed against personal guarantors for recovery of loans (May)

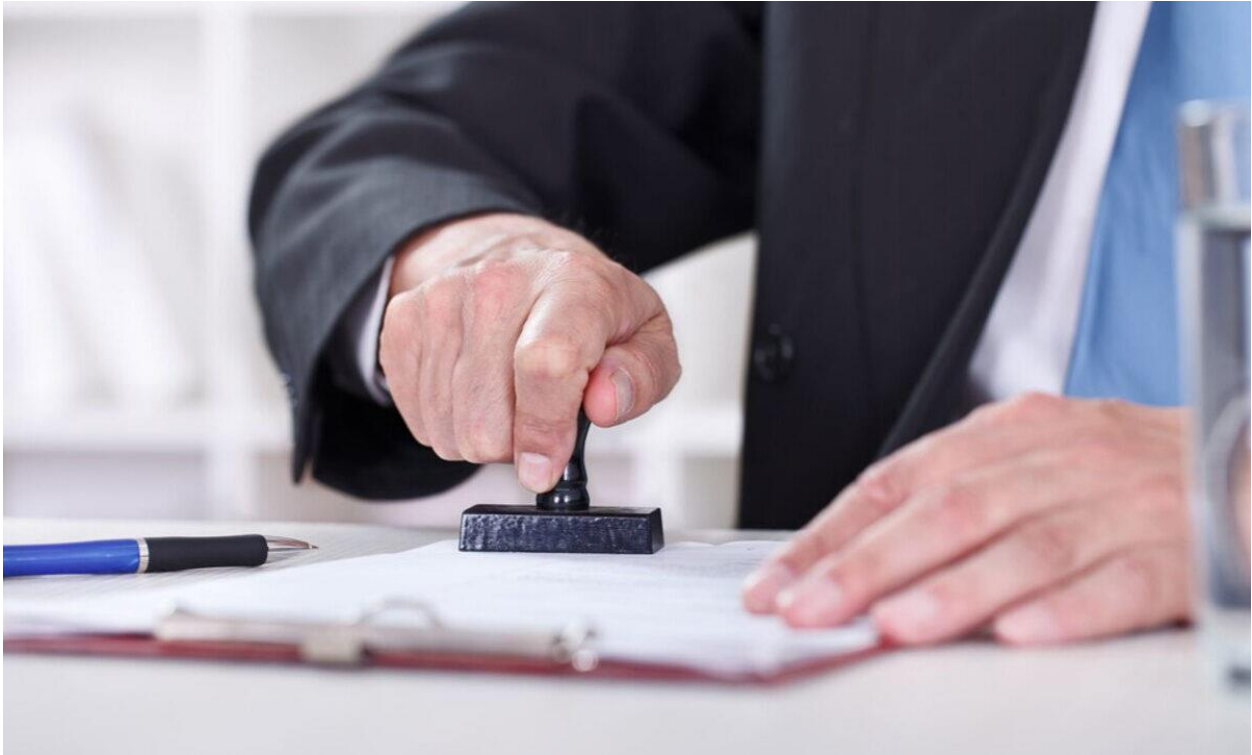
A notification was issued under which the assets of the personal guarantors and corporate debtor could be dealt with in an identical manner during the insolvency proceedings. It also mentioned that the resolution plan does not absolve personal guarantor from its liabilities. The SC in *Lalit Kumar Jain v. Union of India & Others* upheld the validity of this notification.

10. Ineligibility to submit resolution plan under the Code is applicable at the time when the resolution plan is submitted by the resolution applicant (June)

In *Martin S.K. Golla v. Wig Associates Pvt. Ltd.*, the NCLAT held that merely because a resolution applicant was eligible as a resolution applicant on the date of the admission of CIRP cannot be an excuse to ignore later amendments to the Code. Certain amendments were introduced to the Code which made the resolution applicant ineligible at the time of submission of the resolution plan.

11. On approval of the resolution plan by the NCLT, all dues will stand extinguished (July)

In *Piramal Capital & Housing Finance Ltd. v. The Administrator, Dewan Housing Finance Corporation Ltd.*, the NCLAT noted that all the dues including the statutory dues owed to the government authorities will stand extinguished if not part of the resolution plan. No proceedings in respect of such dues for the period prior to such approval can continue.



12. Inadequacy of stamping cannot be a ground for non-admission of corporate debtor into CIRP where other documents exist (July)

In *Ashique Ponnamparambath v. The Federal Bank Ltd.*, the NCLAT observed that the financial creditor had not only relied upon the loan agreement but also on the demand promissory note, a certified copy of the bank statement, and many other documents. Therefore, even if the loan agreement is inadequately stamped, the debt and default were proved beyond doubt.

13. Entries in balance sheet, financial statements and offer for settlement constitute acknowledgement of debt (August)

In *Dena Bank (now Bank of Baroda) v. C. Shivkumar Reddy and Anr.*, the SC held that the balance sheet, financial statements of the corporate debtor and offer for one time settlement can be construed as acknowledgment of debt. It also held that a judgement for money in favour of a financial creditor gives rise to a fresh cause of action.

14. Withdrawal of the CIRP without settlement of claims of all the creditors cannot be allowed (August)

In *Milan Sanyasi v. Rolta BI & Big Data Analysis Pvt. Ltd.*, the NCLT held that when the interim resolution professional received claims post admission into CIRP, withdrawal without settlement of claims of all the creditors cannot be entertained.



15. Insolvency proceedings cannot be initiated against personal guarantor unless the corporate debtor is undergoing insolvency or liquidation (August)

In *Insta Capital Pvt. Ltd. v. Ketan Vinod Kumar Shah*, the NCLT held that when an insolvency or liquidation proceeding against a corporate debtor is pending, an application against the personal guarantor could be filed. NCLT further opined that filing of an application against the personal guarantor without the corporate debtor undergoing CIRP would vest jurisdiction on two forums i.e., the NCLT and the Debt Recovery Tribunal.

16. Government rolls out pre-packs for micro, small and medium enterprises (MSME) (August)

Pre-packaged insolvency process (**Pre-Packs**) is a restructuring plan which is agreed among the corporate debtor and its creditors prior to any insolvency filing. Pre-packs have the advantage of being a more informal process and the possibility of resolving the financial problems of a corporate debtor in a shorter period. Effective from 04 April 2021, the Code allows Pre-Packs for MSMEs. The highlights of Pre-Packs under the Code is available [here](#).

17. No scope of withdrawal of the resolution plan once approved by the CoC (September)

In *Ebix Singapore Pte Ltd v. Committee of Creditors of Educomp Solutions Ltd. and Ors.*, the SC observed that the Code does not provide for withdrawals or modifications of resolution plans once approved by the CoC. Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the NCLT would create another tier of negotiations which will be wholly unregulated by the Code, and therefore, cannot be allowed.



18. Government amends the regulations relating to CIRP (September)

Through this amendment, modifications in the invitation of expression of interest, the request for resolution plan, the evaluation matrix, and the resolution plan will now only be permitted once. Further, the amendments mandate that the CoC cannot consider resolution plans that are received (i) beyond the specified period or (ii) received from someone outside the final prospective applicants' list or (iii) is not in accordance with law. A detailed article on the proposed amendments is available [here](#).

19. Government amends the regulations relating to liquidation process (September)

The regulations relating to the liquidation process was amended. The amendments largely increase the scope of the role played by the Stakeholders Consultation Committee (**SCC**) during the liquidation process. Pursuant to the amendment, a representative in the SCC will be selected by a majority vote of present and voting stakeholders of that class. Further, certain conditions with respect to the participation fee and earnest money deposit requirements have also been introduced. A detailed article on the proposed amendments is available [here](#).

20. No fresh plans can be entertained once a resolution plan is approved by the CoC (October)

In *Amanat Randhawa Hotels Pvt. Ltd. v. Shashi Kant Nemani and Ors.*, the NCLAT observed that the resolution plan has already been approved by the CoC by 100% voting share. The NCLAT

opined that granting of any relief to the unsuccessful resolution applicant would delay the timelines under the Code. Accordingly, the NCLAT upheld the NCLT's order refusing to entertain any late unsolicited bids after approval by CoC.

21. CIRP against corporate debtor which is a government company is permissible (November)

The NCLT in *ATE Projects Pvt. Ltd. v. Rajasthan Drugs and Pharmaceuticals Ltd. and Ors.* noted that corporate debtor has not been performing any governmental functions or the functions of state. Thus, it cannot be immune to insolvency proceedings merely on the ground of being a government company. NCLT observed that a 'government company' is covered under the definition of a 'company' under company law.

22. Foreign award is not sufficient to initiate CIRP against a corporate debtor (November)

In *Jaldhi Overseas Pte. Ltd v. Steer overseas Private Ltd.*, the NCLT held that a foreign award is not a decree and mere production of a foreign award does not give an effect to it. The NCLT further clarified that the NCLT does not have powers of a civil court and cannot execute of a foreign award.

23. Government proposes framework for cross-border insolvency (November)

The Code, at present, does not regulate cross-border insolvency. To address the need of cross-border insolvency, the government constituted an insolvency law committee which proposed a framework for cross-border insolvency. The government proposed modifications to the framework recommended by the insolvency law committee and sought public comments.



24. Share application money is treated as financial debt on non-allotment of shares (*December*)

In *Kushan Mitra v. Amit Goel & Anr.*, the NCLAT noted that under law the concerned person would get compensation for the time value of money given by him to the company. This changes the nature and character of the money so given to the company. Thus, the amount has statutorily been given the character of loan with interest. Accordingly, it qualifies under the definition of 'financial debt' as per the Code.

25. Government proposes changes to the Code for time bound resolution of stressed assets (*December*)

Government has proposed amendments to the Code to facilitate swift admission process, streamline provisions concerning avoidable transactions and wrongful trading, and promote timely approval of resolution plans. A detailed article on the proposed amendments is available [here](#).

Our thoughts

The distress caused to businesses, especially MSMEs, due to the emergence of COVID 19 pandemic has been significant. However, the timely action taken by the regulator by increasing the threshold limit for initiation of CIRP is indication of the evolving distressed asset management landscape in India. The introduction of pre-packs framework for MSMEs is also testament to the insolvency regulator's proactive approach in introducing the global best practices.

Despite the measures taken by the regulator and the stakeholders, timelines for resolving distressed assets seem to be an issue. CIRP's which yielded a resolution plan (*as of September 2021*) on average took 428 days (*IBBI Quarterly Newsletter*). The SC has reiterated that CIRP must be completed within 330 days and that the insolvency courts must comply with the timelines under the Code. The insolvency regulator has also proposed reduction of timelines for voluntary liquidation process as well. Recently, the finance minister in the budget speech for 2022 stated that the Code will be amended to enhance the efficacy of the resolution process.

Taking note of the realities and the difficulties faced during the implementation, the government, and the regulator along with the judiciary appear to be actively attempting to create and sustain interest amongst investors to resolve the distressed assets investment market.

The information contained in this document is not legal advice or legal opinion. The contents recorded in the said document are for informational purposes only and should not be used for commercial purposes. Acuity Law LLP disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.