Asia-Pacific Restructuring Review

2023

Overview of India’s Insolvency and Bankruptcy Code
Asia-Pacific Restructuring Review 2023

The Asia-Pacific Restructuring Review 2023 contains insight and thought leadership from 13 pre-eminent Asian figures. Across 75 pages, their articles comprise an invaluable retrospective on the year just gone. All contributors are vetted for their standing and knowledge before being invited to take part. Together, they capture and interpret the most substantial legal and practice-related developments of the year just gone, complete with footnotes, relevant charts and statistics.

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Overview of India’s Insolvency and Bankruptcy Code

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Summary

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In summary

This article contains a summary of the most significant developments in Indian insolvency and bankruptcy law since August 2021. Where possible, the legislative changes and relevant case law are discussed simultaneously to give the reader an understanding of the letter of the law and its interpretation. Some trendsetting judgments are also discussed in this article. The article also includes a brief summary of legislative changes in the pipeline.

Discussion points

- Insolvency and Bankruptcy Code amendments and subordinate regulations
- Whether the commercial wisdom of the committee of creditors is unassailable
- Withdrawal or modification of resolution plans
- Jurisdiction of NCLT with respect to proceedings against personal guarantors
- Changes to Indian insolvency law expected in the coming year

Referenced in this article

- Insolvency and Bankruptcy Code 2016
- Bank of Maharashtra v Videocon Industries Ltd
- Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta
- Consolidated Construction Consortium v Hitro Energy Solutions Pvt Ltd
- Dena Bank (now Bank of Baroda) v C Shivakumar Reddy and Anr
- Ebix Singapore Pvt Ltd v Committee of Creditors Educomp Solutions Limited
- Gujrat Urja Vikas Nigam Limited v Amit Gupta
- Gurmeet Sodhi v Union of India
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- Mahendra Kumar Jajodia v State Bank of India Stressed Asset Management Branch
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Introduction

The Insolvency and Bankruptcy Code 2016 (IBC) was intended to be a transformative piece of legislation. It sought revolutionary and cultural transformation in the insolvency and bankruptcy landscape by (i) creating a comprehensive code for insolvency and bankruptcy for corporates and individuals; (ii) establishing a new architecture, comprising a committee of creditors (COC) and dedicated adjudicating authorities (AA) for insolvency resolution and liquidation; and (iii) bringing judicial discipline in the process.

Each of the three elements was intended to address the problems that affected the bankruptcy regime in India. Although the Companies Act 1956 and the Companies Act 2013 contained provisions for winding up companies, they were found to be inadequate. The Sick Industrial Companies (Special Provisions) Act 1985 (SICA), which provided an insolvency resolution framework for sick industrial undertakings, had failed to deliver. The insolvency and bankruptcy regime for individuals was based on colonial legislation that needed to be revamped to be in sync with 21st-century requirements.

In this context, the IBC was groundbreaking. Besides prescribing a legislative framework for insolvency resolution and bankruptcy, it established the Insolvency and Bankruptcy Board of India (IBBI) as the regulator, which can proactively respond to the changing realities through its regulatory powers. The IBC has succeeded in establishing distinct jurisprudence for insolvency resolution. The government and the IBBI have also been proactive in clarifying and resolving issues as and when they appear through the implementation of the legislation. This explains frequent amendments to both the IBC and the various regulations issued under it; however, the fact that the IBC is not yet fully operational despite it being almost six years since its enactment raises a few red flags.

The National Companies Law Tribunal (NCLT), which existed as a forum for adjudication of disputes for companies, became the AA for corporate insolvency resolution and liquidation. Since the IBC came into force, the NCLT has become pre-eminently a forum for insolvency resolution and liquidation, with its caseload predominantly comprising insolvency cases. According to the annual report of the Ministry of Corporate Affairs for 2021–2022, a total of 9,653 fresh cases were filed at various benches of the NCLT, of which 4,640 were filed under the IBC. Similarly, of the total 9,362 cases disposed of by various NCL T benches, 4,142 were under the IBC.

A large caseload, particularly at the NCLT benches in Delhi and Mumbai, has often led to delays in the adjudication of disputes. While the setting-up of regional benches across various states and an increase in bench strength at the Delhi and Mumbai benches were intended to improve the pendency issues, the reality is different. At present, against the sanctioned strength of 63 members, there are 22 judicial members and 25 technical members. This implies that about one-fourth of the bench strength is yet to be filled. Out of the current members, 10 judicial members and 16 technical members are going to retire in 2022, which raises concerns about whether the appointments made during 2021 would be sufficient to deal with the exploding docket. Further, through a notification dated 12 May 2022, the bench strength in the National Company Law Appellate Tribunal (NCLAT) has been increased from seven to 12 with the addition of three judicial members and two technical members. Despite some appointments in September 2021, many regional benches of the
NCLT are not fully functional, leading to the diversion of the resources of other benches. Unless such structural issues are resolved, the number of pending cases under the IBC will only rise, leading to delays in resolutions.

Enforcing judicial discipline in insolvency resolution was one of the principal objectives of the IBC. In this respect, although the IBC has fared much better than its predecessor, SICA, many argue that its record is far from satisfactory. The IBC imposed a strict timeline of 180 days for the corporate insolvency resolution process (CIRP), which is extendable by another 90 days, at the discretion of the AA. This was further extended to 330 days through an amendment to the IBC in 2019.

According to the data released by the IBBI, the average time taken for CIRPs that resulted in resolution plans is 581 days (after excluding time permitted by AAs). Further, the CIRPs that ended up in liquidation took an average of 654 days for conclusion.

Many cases take much longer (Essar Steel’s CIRP took as long as 866 days to complete).

The delays have resulted in eroding value for creditors, and they may arguably have contributed to larger haircuts by all stakeholders. The number of days taken for the CIRPs has also swelled owing to the disruptions caused by the covid-19 pandemic and the resultant circuit breaker measures adopted by the Indian government. Further, as per the data released by the IBBI, a total of 5,258 CIRPs commenced under the IBC until 31 March 2022. Of those, 1,852 are ongoing.

The trend of more corporate debtors choosing liquidation instead of resolution plans continues. According to available data, of the 3,406 CIRPs closed, AAs passed orders for liquidation in 47 per cent of the CIRPs. The number of corporate debtors going forward with a resolution plan was a low 14 per cent.

In most cases, the disruption of timelines is attributable to judicial intervention. The courts have been liberal in interpreting the boundaries set by the timelines, which has led to the timelines being construed as merely advisory in nature. The government and Parliament’s attempts to fix the timelines have been repeatedly thwarted by the courts. The Supreme Court, in the case of Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta, has held the timeline of 330 days (inserted by way of an amendment in 2019) to be advisory and not mandatory, holding that the word ‘mandatorily’ is unconstitutional.

The government has largely played a constructive role in facilitating the implementation of the IBC. It has successfully aligned the banking regulator, the Reserve Bank of India (RBI), to push the banking system into using the IBC as the principal mechanism for resolving debt. This approach has predictably suffered certain setbacks owing to the covid-19 pandemic. Where challenges have been faced in IBC implementation, the government and the IBBI have stepped in to amend the legislation and the regulations. While, by and large, the amendments have made the implementation smoother, there have been instances where frequent amendments have caused confusion.

Recent legislative amendments

The IBC is perhaps the most frequently amended legislation in recent years, and some of the changes were necessary to avoid unintended consequences. In the past year, the legislative changes to the IBC have focused on the timely conclusion of the CIRPs.
The 2021 Amendment

On 12 August 2021, the government enacted the Insolvency and Bankruptcy Code (Amendment) Act 2021, after it had promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 in April 2021 for introducing the pre-packaged insolvency resolution process (PPIRP) for micro, small and medium-sized enterprises (MSMEs) as defined under the Micro, Small and Medium Enterprises Development Act 2006. This amendment was felt to be necessary to help MSMEs tide over widespread distress induced or exacerbated by the pandemic.

To initiate the PPIRP, the corporate debtor requires the approval of its members by special resolutions or three-quarters of its partners, and the approval of unrelated financial creditors representing 66 per cent of the debt (or approval of the operational creditors where there are no unrelated financial creditors).

Upon initiation of the PPIRP, a resolution professional proposed by the financial creditor representing at least 10 per cent of the debt and approved by unrelated financial creditors representing at least 66 per cent of the debt is appointed to manage the process. The corporate debtor must submit a base resolution plan for approval of the COC, which may approve the base plan if it does not impair the claims of the operational creditors. If the base resolution plan is not approved by the COC or if it impairs the claims of the operational creditors, other resolution plans may be invited to compete with the base resolution plan.

The amended IBC also provides a shorter timeline of 120 days for completion of the PPIRP. The PPIRP enables an MSME to work on a resolution plan while the corporate debtor and its management stays in possession of the company (ie, debtor-in-possession model as opposed to the creditor-in-control model for the CIRP). As per the latest data available, two applications were admitted up to 31 March 2022 for pre-pack insolvency.[7] It is still early days to decide whether the amendments work or some changes are necessary.

Key regulatory changes

While the IBC contemplates the insolvency and bankruptcy regime for individuals, it has not been fully notified as yet. The same was notified in a limited manner with effect from 1 December 2019, insofar as it applies to personal guarantors of corporate debtors.

The notification of those provisions was challenged as being unconstitutional on the basis that there was no intelligible basis to the difference between individuals per se and individuals who had issued guarantees in respect of the debt of corporate entities. The Supreme Court of India in Lalit Kumar Jain v Union of India[8] dismissed the challenge and upheld the notification. It also held that if a resolution plan is approved in respect of a corporate debtor, it does not absolve the personal guarantor of his or her liability that arises out of a separate contract.

To give effect to the provisions, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations 2019 were also notified. This allowed creditors to initiate and maintain proceedings against both the corporate debtor and the guarantor of the corporate debtor in the NCLT.
As anticipated, there has been an increase in insolvency proceedings against personal guarantors with a view to improving recovery for banks and financial institutions. Until 31 March 2022, 926 applications were filed against personal guarantors. Out of these 926 applications, 908 have been before the NCLT and 18 before the Debt Recovery Tribunal (DRT). Further, 844 applications out of these 926 were filed by creditors and the rest by debtors under sections 94 and 95 of the IBC.

Other changes to deal with stressed assets

The Finance Minister during her budget speech in 2021 had announced the government’s plan to set up a ‘bad’ bank for taking over the stressed assets of banks. Accordingly, the National Asset Reconstruction Company (NARCL) was established to take over the non-performing accounts of more than 50 million Indian rupees from banks. The NARCL is expected to take over the first set of non-performing accounts of banks soon. Similarly, the government set up the India Debt Resolution Company Ltd (IDRCL) for handling the debt resolution process for such non-performing assets. The NARCL and the IDRCL will help banks clean up their balance sheets by transferring their bad loans so that the banks can focus on their core business of taking deposits and lending money.

IBBI (Insolvency Resolution Process of Corporate Person) (Third Amendment) Regulations 2016

Recently, there has been a lot of confusion regarding the powers of the COC to run the affairs of the corporate debtor and its discretion to allow the resolution applicants to make changes in their plan multiple times. The recent amendment, IBBI (Insolvency Resolution Process of Corporate Person) (Third Amendment) Regulations 2016 vide notification dated 30 September 2021, tries to bring some clarity to these issues. Following the amendment, revisions can only be made once to the request for resolution plans, the evaluation matrix and the resolution plan. It is plausible that this amendment has been brought to mitigate delays owing to the COC and the resolution applicants engaging in multiple revisions of the plans. The amendment also prohibits the COC from considering plans: (i) received after the timeline decided by it; (ii) received from a person who does not appear in the final list of prospective resolution applicants; or (iii) not complying with the provisions of section 30 of the IBC.

To maximise the assets of the corporate debtor, the amendment also provides that the resolution professional can use a ‘challenge mechanism’ to enable resolution applicants to improve their plans. This challenge mechanism would allow other parties to provide a plan with better recoveries for the creditors, and the original applicant would have to match or improve its plan accordingly. The amendment does not specify any particular method by which the plan may be improved; but, perhaps, this will result in greater adoption of the Swiss challenge method in the future.

IBBI (Voluntary Liquidation Process) Amendment Regulations 2022

There have been multiple instances of substantial delay in the completion of the voluntary liquidation process. To avoid such delays, the government shortened the timelines for
various steps in a voluntary liquidation process in the IBBI (Voluntary Liquidation Process) Amendment Regulations 2022 as amended on 5 April 2022. The time period for distribution of the proceeds from realisation has been reduced from six months to 30 days. Further, the time period for submission of the final report has been reduced from one year to: (i) 270 days from the date of the initiation of the process in cases where claims have been received from creditors; and (ii) 90 days from the date of the initiation of the process in cases where no claims have been received from any creditor.

Trendsetting judicial developments

The Supreme Court passed certain landmark judgments recently, thereby adding to the rapidly evolving jurisprudence of the IBC.

Withdrawal or modification of Resolution Plans

In *Ebix Singapore Pvt Ltd v Committee of Creditors Educomp Solutions Limited*, the Supreme Court held that under the IBC, a resolution applicant is not entitled to withdraw or modify its resolution plan once it has been approved by the COC, even while it is pending for approval before the NCLT. Keeping in view the significant delays and time limitations in the Code, the Apex Court held that in the absence of a clear provision, the AA could not allow such withdrawals.

The principle laid down in *Ebix Singapore* was followed by the NCLAT in *Union of India v Kapil Wadhwan* to overturn the AA’s direction to the COC to consider the resolution plan submitted by the erstwhile promoter, while another resolution plan was pending approval before the AA. The NCLAT held that there was no scope for negotiations between the parties once the COC approved a resolution plan.

NCLT’s discretionary power to admit application under section 7 of IBC

In *Vidarba Industries Power Limited v Axis Bank Limited (Vidarba)*, the Supreme Court held that the NCLT has the discretion to reject an application filed by a financial creditor under section 7 of the IBC for initiation of CIRP against a corporate debtor. Prior to the judgment, if the debt and default were established, the NCLT admitted such applications mandatorily except where there were defects in the application. However, in *Vidarba*, the Court held that the NCLT may examine the overall financial health and viability of the corporate debtor and then apply its mind to examining the relevant circumstances behind such default. Further, use of the word ‘may’ instead of ‘shall’ (which has been used in section 9 for operational creditors) shows that the NCLT’s power regarding admission under section 7 of IBC is discretionary. The Supreme Court also held that initiation of insolvency proceedings when the corporate debtor has good overall financial health amounts to penalising the solvent companies temporarily defaulting in repayment of their financial debts. The implications of this case are very wide, but it is hoped that this judgment will be read narrowly given the peculiar facts of this particular case.

Termination of contract
In *Gujrat Urja Vikas Nigam Limited v Amit Gupta*,[12] the SC analysed the law on the validity of ipso facto clauses globally and concluded that if the corporate debtor is continuing to perform its obligation (in this case, power supply), then the power purchaser could not have terminated the power purchase agreement. The first 2020 amendment also extended the scope of the moratorium under section 14 of the IBC to provide that licences, permits, concessions and clearances, etc, issued by a government authority must not be suspended or terminated on the ground of insolvency during the moratorium period if current dues are being paid. Furthermore, the supply of goods or services critical to maintaining the corporate debtor’s going concern status must not be suspended if the current dues are being paid during the moratorium period.

The Supreme Court in *TATA Consultancy Services Ltd v Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt Ltd*,[13] following the precedent set in *Gujrat Urja*, clarified that the jurisdiction of the AA under the IBC cannot be invoked by the corporate debtor if the termination of a contract by a third party takes place on grounds unrelated to the insolvency of the corporate debtor. The appellant had terminated the contract on the grounds that the corporate debtor had failed to perform its obligations, and this was evident from the communications between the appellant and the corporate debtor prior to initiation of the CIRP.

**Jurisdiction of NCLT with respect to proceedings against personal guarantors**

The Supreme Court and NCLAT have provided much need clarity with respect to the jurisdiction of NCLT for proceedings against personal guarantors. The Madras High Court-[14] and the NCLT, Mumbai,[15] had laid down that insolvency proceedings against personal guarantors to corporate debtors (which are not undergoing CIRP) can be initiated only before debt recovery tribunals. The NCLT, Delhi,[16] had held that in cases where the application in relation to the corporate debtor for initiation of CIRP is pending at the NCLT, initiation of CIRP of the corporate debtor is not a prerequisite for the maintainability of an application for initiating insolvency proceedings against personal guarantors before the NCLT.

Ultimately, the NCLAT in *State Bank of India v Mahendra Kumar Jajodia*[17] held that an application filed for the initiation of insolvency proceedings against personal guarantors before the NCLT cannot be rejected solely because no liquidation or CIRP is pending before the NCLT. This decision of the NCLAT was upheld by the Supreme Court in *Mahendra Kumar Jajodia v State Bank of India Stressed Asset Management Branch*.[18]

Further, in *Gurmeet Sodhi v Union of India*,[19] which is a plea challenging the constitutional validity of provisions relating to insolvency of individual, the Supreme Court issued a notice in the matter. Therefore, the law on personal insolvency is evolving, and much is contingent on the outcome of this case.

**Treatment of advance money given for goods or services as operational debt**

The Supreme Court, in *Consolidated Construction Consortium v Hitro Energy Solutions Pvt Ltd*,[20] held that any advance payment given to the provider of goods or services would come under the definition of ‘operational debt’ under the IBC, as operational debt includes a debt arising from a contract in relation to the supply of goods or services from the corporate debtor. It elaborated its reasoning by stating that section 5(21) defines ‘operational debt’ as
a ‘claim in respect of the provision of goods or services’. The judgment clearly mentions that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver.

This judgment has created new jurisprudence in the IBC by including the advance money given for goods or services in the definition of operational debt.

Status of governmental land owner clarified

The Supreme Court in New Okhla Industrial Development Authority v Anand Sonbhadra,[21] has held that a lease is considered a financial lease if the lease term is for the major part of the economic life of the underlying asset. The Supreme Court stated that the economic life of land (underlying asset) is not limited and, as the lease deed was for 90 years, this lease deed cannot be considered a financial lease. Accordingly, such a lessor would be an operational creditor and not a financial creditor. This issue was required to be resolved as NOIDA – a government land-owning authority – was claiming the status of financial creditor in the insolvency of a number of real estate companies.

Applicability of limitation law on IBC proceedings

The Supreme Court, in Dena Bank (now Bank of Baroda) v C Shivakumar Reddy and Anr,[22] while referring to its multiple earlier judgments with respect to the applicability of limitation law on IBC proceedings, held that an application under the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the corporate debtor as a non-performing asset, if there was an acknowledgement of the debt by the corporate debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

Commercial wisdom of the COC

The Supreme Court reiterated that the principle of non-interference by the NCLT in the commercial wisdom of the COC in Vallal RCK v M/s Siva Industries and Holdings Limited and Ors,[23] stating that in a case where 90 per cent of COC members permit settlement and withdrawal of CIRP, NCLT and NCLAT cannot sit in an appeal over the commercial wisdom of the COC. This may settle the debate with respect to the approval of resolution plans by the COC in which the creditors take large haircuts. The NCLT, in the Videocon Industries matter, had raised concerns with regard to the approval of the resolution plan in which the creditors were taking a 96 per cent haircut. The concern raised by NCLT had made creditors apprehensive of approving the plan that provided for large haircut. However, the reiteration of the principle of commercial wisdom of the COC by the Supreme Court ruling in Siva Industries provided much needed clarification regarding the powers of the COC.

The NCLAT in Bank of Maharastra v Videocon Industries Ltd[24] reiterated the principle of non-justifiability of the commercial wisdom of the COC and held that the NCLT and the NCLAT can send back the resolution plan to the COC for reconsideration even in cases where the creditors are taking a large haircut.
Cross-border insolvency

The Report of the Working Group on Cross-Border Insolvency noted that the existing provisions in the IBC (sections 234 and 235) do not provide a comprehensive framework for cross-border insolvency matters.\[25\] The proposal to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 has been pending for some time. As per some reports, the government is expected to introduce the bill for cross-border parliament during the upcoming monsoon session.\[26\]

While amendments to the IBC are awaited, the NCLAT advised a framework of cooperation between the administrator appointed by a Dutch court in respect of Jet Airways (having its regional hub in Amsterdam) and the resolution professional appointed by the AA in a petition filed by a financial creditor.\[27\] The protocol was designed on the principles of the UNCITRAL Model Law and provides a robust framework for cross-border coordination, maintaining respect for independent jurisdictions of the Dutch court and the NCLAT. As Jet Airways was an Indian company with its centre of main interest in India, the IBC proceedings in India were the main insolvency proceedings, and the Dutch proceedings were non-main proceedings.\[28\]

In the case of Videocon Industries, the AA in India permitted the inclusion of the foreign assets held through other companies to be included in the resolution process. Further, the AA also declared that the moratorium under section 14 of the IBC is applicable to those foreign assets.\[29\] However, in the absence of a clear framework, these matters have to be dealt with on a case-by-case basis.

Conclusion

Insofar as any legislation can have a transformative effect, the IBC has achieved that objective. Unlike its predecessor regimes, the IBC has been adopted well by the system. When compared to SICA, the IBC has also resulted in better value realisation by various stakeholders.

The government has been proactive in ensuring that problems are dealt with, and the courts have also (with the exception of some occasional stray orders) refrained from overturning the decisions of the COC. For international lenders and stakeholders, this is good news as it also points to the robustness of the IBC to meet evolving challenges.

The covid-19 pandemic and its resultant economic stress on certain businesses is likely to result in a greater number of IBC proceedings. The government will do well to fill the vacancies in the NCLT in time to enable the judicial system to rise to the occasion.

Notes


[28] ibid.


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**INTRODUCTION**

The Insolvency and Bankruptcy Code 2016 (IBC) was intended to be a transformative piece of legislation. It sought revolutionary and cultural transformation in the insolvency and bankruptcy landscape by (i) creating a comprehensive code for insolvency and bankruptcy for corporates and individuals; (ii) establishing a new architecture, comprising a committee of creditors (COC) and dedicated adjudicating authorities (AA) for insolvency resolution and liquidation; and (iii) bringing judicial discipline in the process.
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**RECENT LEGISLATIVE AMENDMENTS**

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**The 2021 Amendment**

On 12 August 2021, the government enacted the Insolvency and Bankruptcy Code (Amendment) Act 2021, after it had promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 in April 2021 for introducing the pre-packaged insolvency resolution process (PPIRP) for micro, small and medium-sized enterprises (MSMEs) as defined under the Micro, Small and Medium Enterprises Development Act 2006. This amendment was felt to be necessary to help MSMEs tide over widespread distress induced or exacerbated by the pandemic.

To initiate the PPIRP, the corporate debtor requires the approval of its members by special resolutions or three-quarters of its partners, and the approval of unrelated financial creditors.
representing 66 per cent of the debt (or approval of the operational creditors where there are no unrelated financial creditors).

Upon initiation of the PPIRP, a resolution professional proposed by the financial creditor representing at least 10 per cent of the debt and approved by unrelated financial creditors representing at least 66 per cent of the debt is appointed to manage the process. The corporate debtor must submit a base resolution plan for approval of the COC, which may approve the base plan if it does not impair the claims of the operational creditors. If the base resolution plan is not approved by the COC or if it impairs the claims of the operational creditors, other resolution plans may be invited to compete with the base resolution plan.

The amended IBC also provides a shorter timeline of 120 days for completion of the PPIRP. The PPIRP enables an MSME to work on a resolution plan while the corporate debtor and its management stays in possession of the company (i.e., debtor-in-possession model as opposed to the creditor-in-control model for the CIRP). As per the latest data available, two applications were admitted up to 31 March 2022 for pre-pack insolvency. It is still early days to decide whether the amendments work or some changes are necessary.

**Key Regulatory Changes**

While the IBC contemplates the insolvency and bankruptcy regime for individuals, it has not been fully notified as yet. The same was notified in a limited manner with effect from 1 December 2019, insofar as it applies to personal guarantors of corporate debtors.

The notification of those provisions was challenged as being unconstitutional on the basis that there was no intelligible basis to the difference between individuals per se and individuals who had issued guarantees in respect of the debt of corporate entities. The Supreme Court of India in *Lalit Kumar Jain v Union of India* dismissed the challenge and upheld the notification. It also held that if a resolution plan is approved in respect of a corporate debtor, it does not absolve the personal guarantor of his or her liability that arises out of a separate contract.

To give effect to the provisions, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations 2019 were also notified. This allowed creditors to initiate and maintain proceedings against both the corporate debtor and the guarantor of the corporate debtor in the NCLT.

As anticipated, there has been an increase in insolvency proceedings against personal guarantors with a view to improving recovery for banks and financial institutions. Until 31 March 2022, 926 applications were filed against personal guarantors. Out of these 926 applications, 908 have been before the NCLT and 18 before the Debt Recovery Tribunal (DRT). Further, 844 applications out of these 926 were filed by creditors and the rest by debtors under sections 94 and 95 of the IBC.

**Other Changes To Deal With Stressed Assets**

The Finance Minister during her budget speech in 2021 had announced the government’s plan to set up a ‘bad’ bank for taking over the stressed assets of banks. Accordingly, the National Asset Reconstruction Company (NARCL) was established to take over the non-performing accounts of more than 50 million Indian rupees from banks. The NARCL is expected to take over the first set of non-performing accounts of banks soon. Similarly,
the government set up the India Debt Resolution Company Ltd (IDRCL) for handling the debt resolution process for such non-performing assets. The NARCL and the IDRCL will help banks clean up their balance sheets by transferring their bad loans so that the banks can focus on their core business of taking deposits and lending money.

**IBBI (Insolvency Resolution Process Of Corporate Person) (Third Amendment) Regulations 2016**

Recently, there has been a lot of confusion regarding the powers of the COC to run the affairs of the corporate debtor and its discretion to allow the resolution applicants to make changes in their plan multiple times. The recent amendment, IBBI (Insolvency Resolution Process of Corporate Person) (Third Amendment) Regulations 2016 vide notification dated 30 September 2021, tries to bring some clarity to these issues. Following the amendment, revisions can only be made once to the request for resolution plans, the evaluation matrix and the resolution plan. It is plausible that this amendment has been brought to mitigate delays owing to the COC and the resolution applicants engaging in multiple revisions of the plans. The amendment also prohibits the COC from considering plans: (i) received after the timeline decided by it; (ii) received from a person who does not appear in the final list of prospective resolution applicants; or (iii) not complying with the provisions of section 30 of the IBC.

To maximise the assets of the corporate debtor, the amendment also provides that the resolution professional can use a ‘challenge mechanism’ to enable resolution applicants to improve their plans. This challenge mechanism would allow other parties to provide a plan with better recoveries for the creditors, and the original applicant would have to match or improve its plan accordingly. The amendment does not specify any particular method by which the plan may be improved; but, perhaps, this will result in greater adoption of the Swiss challenge method in the future.

**IBBI (Voluntary Liquidation Process) Amendment Regulations 2022**

There have been multiple instances of substantial delay in the completion of the voluntary liquidation process. To avoid such delays, the government shortened the timelines for various steps in a voluntary liquidation process in the IBBI (Voluntary Liquidation Process) Amendment Regulations 2022 as amended on 5 April 2022. The time period for distribution of the proceeds from realisation has been reduced from six months to 30 days. Further, the time period for submission of the final report has been reduced from one year to: (i) 270 days from the date of the initiation of the process in cases where claims have been received from creditors; and (ii) 90 days from the date of the initiation of the process in cases where no claims have been received from any creditor.

**Trendsetting Judicial Developments**

The Supreme Court passed certain landmark judgments recently, thereby adding to the rapidly evolving jurisprudence of the IBC.

**Withdrawal Or Modification Of Resolution Plans**

In *Ebix Singapore Pvt Ltd v Committee of Creditors Educomp Solutions Limited*, the Supreme Court held that under the IBC, a resolution applicant is not entitled to withdraw or modify its resolution plan once it has been approved by the COC, even while it is pending for approval before the NCLT. Keeping in view the significant delays and time limitations in the Code, the Apex Court held that in the absence of a clear provision, the AA could not allow such withdrawals.
The principle laid down in *Ebix Singapore* was followed by the NCLAT in *Union of India v Kapil Wadhwan*[^11] to overturn the AA’s direction to the COC to consider the resolution plan submitted by the erstwhile promoter, while another resolution plan was pending approval before the AA. The NCLAT held that there was no scope for negotiations between the parties once the COC approved a resolution plan.

**NCLT’s Discretionary Power To Admit Application Under Section 7 Of IBC**

In *Vidarbha Industries Power Limited v Axis Bank Limited (Vidarbha)*[^390x669], the Supreme Court held that the NCLT has the discretion to reject an application filed by a financial creditor under section 7 of the IBC for initiation of CIRP against a corporate debtor. Prior to the judgment, if the debt and default were established, the NCLT admitted such applications mandatorily except where there were defects in the application. However, in *Vidarbha*, the Court held that the NCLT may examine the overall financial health and viability of the corporate debtor and then apply its mind to examining the relevant circumstances behind such default. Further, use of the word ‘may’ instead of ‘shall’ (which has been used in section 9 for operational creditors) shows that the NCLT’s power regarding admission under section 7 of IBC is discretionary. The Supreme Court also held that initiation of insolvency proceedings when the corporate debtor has good overall financial health amounts to penalising the solvent companies temporarily defaulting in repayment of their financial debts. The implications of this case are very wide, but it is hoped that this judgment will be read narrowly given the peculiar facts of this particular case.

**Termination Of Contract**

In *Gujrat Urja Vikas Nigam Limited v Amit Gupta*,[^12] the SC analysed the law on the validity of ipso facto clauses globally and concluded that if the corporate debtor is continuing to perform its obligation (in this case, power supply), then the power purchaser could not have terminated the power purchase agreement. The first 2020 amendment also extended the scope of the moratorium under section 14 of the IBC to provide that licences, permits, concessions and clearances, etc, issued by a government authority must not be suspended or terminated on the ground of insolvency during the moratorium period if current dues are being paid. Furthermore, the supply of goods or services critical to maintaining the corporate debtor’s going concern status must not be suspended if the current dues are being paid during the moratorium period.

The Supreme Court in *TATA Consultancy Services Ltd v Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt Ltd*[^13] following the precedent set in *Gujrat Urja*, clarified that the jurisdiction of the AA under the IBC cannot be invoked by the corporate debtor if the termination of a contract by a third party takes place on grounds unrelated to the insolvency of the corporate debtor. The appellant had terminated the contract on the grounds that the corporate debtor had failed to perform its obligations, and this was evident from the communications between the appellant and the corporate debtor prior to initiation of the CIRP.

**Jurisdiction Of NCLT With Respect To Proceedings Against Personal Guarantors**

The Supreme Court and NCLAT have provided much need clarity with respect to the jurisdiction of NCLT for proceedings against personal guarantors. The Madras High Court[^14] and the NCLT, Mumbai[^15] had laid down that insolvency proceedings against personal guarantors to corporate debtors (which are not undergoing CIRP) can be initiated only before
debt recovery tribunals. The NCLT, Delhi,[16] had held that in cases where the application in relation to the corporate debtor for initiation of CIRP is pending at the NCLT, initiation of CIRP of the corporate debtor is not a prerequisite for the maintainability of an application for initiating insolvency proceedings against personal guarantors before the NCLT.

Ultimately, the NCLAT in *State Bank of India v Mahendra Kumar Jajodia*[17] held that an application filed for the initiation of insolvency proceedings against personal guarantors before the NCLT cannot be rejected solely because no liquidation or CIRP is pending before the NCLT. This decision of the NCLAT was upheld by the Supreme Court in *Mahendra Kumar Jajodia v State Bank of India Stressed Asset Management Branch*. [18]

Further, in *Gurmeet Sodhi v Union of India*, [19] which is a plea challenging the constitutional validity of provisions relating to insolvency of individual, the Supreme Court issued a notice in the matter. Therefore, the law on personal insolvency is evolving, and much is contingent on the outcome of this case.

**Treatment Of Advance Money Given For Goods Or Services As Operational Debt**

The Supreme Court, in *Consolidated Construction Consortium v Hitro Energy Solutions Pvt Ltd*. [20] held that any advance payment given to the provider of goods or services would come under the definition of ‘operational debt’ under the IBC, as operational debt includes a debt arising from a contract in relation to the supply of goods or services from the corporate debtor. It elaborated its reasoning by stating that section 5(21) defines ‘operational debt’ as a ‘claim in respect of the provision of goods or services’. The judgment clearly mentions that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver.

This judgment has created new jurisprudence in the IBC by including the advance money given for goods or services in the definition of operational debt.

**Status Of Governmental Land Owner Clarified**

The Supreme Court in *New Okhla Industrial Development Authority v Anand Sonbhadra*, [21] has held that a lease is considered a financial lease if the lease term is for the major part of the economic life of the underlying asset. The Supreme Court stated that the economic life of land (underlying asset) is not limited and, as the lease deed was for 90 years, this lease deed cannot be considered a financial lease. Accordingly, such a lessor would be an operational creditor and not a financial creditor. This issue was required to be resolved as NOIDA – a government land-owning authority – was claiming the status of financial creditor in the insolvency of a number of real estate companies.

**Applicability Of Limitation Law On IBC Proceedings**

The Supreme Court, in *Dena Bank (now Bank of Baroda) v C Shivakumar Reddy and Anr*, [22] while referring to its multiple earlier judgments with respect to the applicability of limitation law on IBC proceedings, held that an application under the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the corporate debtor as a non-performing asset, if there was an acknowledgement of the debt by the corporate debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

**Commercial Wisdom Of The COC**
The Supreme Court reiterated that the principle of non-interference by the NCLT in the commercial wisdom of the COC in *Vallal RCK v M/s Siva Industries and Holdings Limited and Ors.*

stating that in a case where 90 per cent of COC members permit settlement and withdrawal of CIRP, NCLT and NCLAT cannot sit in an appeal over the commercial wisdom of the COC. This may settle the debate with respect to the approval of resolution plans by the COC in which the creditors take large haircuts. The NCLT, in the *Videocon Industries* matter, had raised concerns with regard to the approval of the resolution plan in which the creditors were taking a 96 per cent haircut. The concern raised by NCLT had made creditors apprehensive of approving the plan that provided for large haircut. However, the reiteration of the principle of commercial wisdom of the COC by the Supreme Court ruling in *Siva Industries* provided much needed clarification regarding the powers of the COC.

The NCLAT in *Bank of Maharastra v Videocon Industries Ltd* reiterated the principle of non-justifiability of the commercial wisdom of the COC and held that the NCLT and the NCLAT can send back the resolution plan to the COC for reconsideration even in cases where the creditors are taking a large haircut.

Cross-border Insolvency

The Report of the Working Group on Cross-Border Insolvency noted that the existing provisions in the IBC (sections 234 and 235) do not provide a comprehensive framework for cross-border insolvency matters. The proposal to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 has been pending for some time. As per some reports, the government is expected to introduce the bill for cross-border parliament during the upcoming monsoon session.

While amendments to the IBC are awaited, the NCLAT advised a framework of cooperation between the administrator appointed by a Dutch court in respect of Jet Airways (having its regional hub in Amsterdam) and the resolution professional appointed by the AA in a petition filed by a financial creditor. The protocol was designed on the principles of the UNCITRAL Model Law and provides a robust framework for cross-border coordination, maintaining respect for independent jurisdictions of the Dutch court and the NCLAT. As Jet Airways was an Indian company with its centre of main interest in India, the IBC proceedings in India were the main insolvency proceedings, and the Dutch proceedings were non-main proceedings.

In the case of *Videocon Industries*, the AA in India permitted the inclusion of the foreign assets held through other companies to be included in the resolution process. Further, the AA also declared that the moratorium under section 14 of the IBC is applicable to those foreign assets. However, in the absence of a clear framework, these matters have to be dealt with on a case-by-case basis.

CONCLUSION

Insofar as any legislation can have a transformative effect, the IBC has achieved that objective. Unlike its predecessor regimes, the IBC has been adopted well by the system. When compared to SICA, the IBC has also resulted in better value realisation by various stakeholders.

The government has been proactive in ensuring that problems are dealt with, and the courts have also (with the exception of some occasional stray orders) refrained from overturning the decisions of the COC. For international lenders and stakeholders, this is good news as it also points to the robustness of the IBC to meet evolving challenges.
The covid-19 pandemic and its resultant economic stress on certain businesses is likely to result in a greater number of IBC proceedings. The government will do well to fill the vacancies in the NCLT in time to enable the judicial system to rise to the occasion.

Endnotes

1  https://www.mca.gov.in/bin/dms/getdocument?mds=OoAPyJJe9QRULR80SKCTw%253D%253D&type=open (last accessed: 16 June 2022).


3  ibid.


5  ibid.


7  Supra at 4.

8  2021 SCC OnLine SC 396.

9  Supra at 4.


11  2021 SCC OnLine NCLAT 190.


14  Rohit Nath v KEB Hana Bank, 2021 SCC OnLine Mad 2734.


16  PNB Housing Finance Ltd v Mohit Arora and Ors, 2021 SCC OnLine NCLT 488.

17  2022 SCC OnLine NCLAT 58.

18  Civil Appeal No. 1871-1872 of 2022.
19 W.P.(C) No. 307/2022.  

20 2022 SCC OnLine SC 142.  


22 2021 SCC OnLine SC 543.  

23 2022 SCC OnLine SC 717.  

24 2021 SCC OnLine NCLAT 245.  

25 Report of Insolvency Law Committee on Cross-Border Insolvency (October 2018).  


28 ibid.  
