

Insolvency and Bankruptcy Code Update



August 2019

The Insolvency and Bankruptcy Code, 2016 (**Code**) was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution in a time-bound manner for maximisation of value of assets, to promote entrepreneurship, availability of credit and balancing the interests of various stakeholders. The Code and its corresponding rules and regulations have been amended from time to time to address deficiencies and fine tune the Code for effectiveness and achieving its objectives.

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (**Amendment Act**) is the latest amendment to the Code. The Amendment Act received Presidential assent on August 5, 2019. The effective date of the Amendment Act has been notified as 16 August 2019.

To access the Amendment Act, click [here](#).

The key amendments to the Code are as follows:

Definition of resolution plan to include provisions for corporate restructuring

An explanation has been inserted in the definition of resolution plan to clarify that a resolution plan proposing the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger. The amendment would enable the market to come up with dynamic resolution plans for value maximisation.

National Company Law Tribunal (NCLT) to record reasons for delay in disposing an application for initiation of Corporate Insolvency Resolution Process (CIRP)

The Code stipulates that the NCLT must dispose of an application for initiation of CIRP within a period of 14 days from receipt of such application. However, there have been instances where NCLTs have taken over 14 days in deciding such applications. Therefore, in interest of speedy disposal and value maximisation of assets of the corporate debtor, a proviso has been inserted which requires that NCLT record its reasons in writing in case an application for initiation of CIRP is not disposed within the stipulated time of 14 days.

CIRP to be completed within 330 days

The Code mandated completion of CIRP within 180 days, with a one time extension of 90 days. However, the Courts have allowed exclusion of certain periods, such as time spent in litigation, from the mandatory completion period which has resulted in a number of unresolved CIRPs well beyond the timelines prescribed in the Code.

The Amendment Act mandates that the CIRP be completed within 330 days including any extension of time granted and time taken under legal proceedings. The Amendment Act further provides for completion of CIRP within 90 days from the date of commencement of the Amendment Act in case of pending CIRPs that have been ongoing for over 330 days.

Voting by authorised representative representing a class of financial creditors

In order to facilitate decision making in the Committee of Creditors (**CoC**), especially when financial creditors are a large and heterogeneous group (for example in case of CIRP of a real estate company wherein homebuyers are financial creditors and constitute CoC), the Amendment Act provides that an authorised representative representing a class of financial creditors shall

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vote on behalf of all the financial creditors he/she represents in accordance with the decision approved by more than 50% of such financial creditors. This principle however would not be applicable in case of voting for withdrawal of CIRP.

Amount payable to operational creditors and dissenting financial creditors

The Amendment Act provides that the operational creditors will be paid at least the amount payable to them in the event of liquidation of the corporate debtor or the amount payable to them if realisations under the resolution plan were distributed in accordance with the priority in the liquidation waterfall, whichever is higher. The Amendment Act also provides that dissenting financial creditors will be paid at least the amount payable to them under liquidation waterfall.

The foregoing provisions of the Amendment Act will also apply in cases of CIRP of corporate debtor where:

- ⇒ a resolution plan has not been approved or rejected by NCLT
- ⇒ an appeal is pending at National Company Law Appellate Tribunal or Supreme Court
- ⇒ a legal proceeding has been initiated in any court against the decision of the NCLT in respect of a resolution plan

CoC to consider manner of distribution proposed in the resolution plan

In addition to the existing requirement of approval of resolution plan after considering the feasibility and viability of the resolution plan, the Amendment Act requires that the CoC consider the manner of distribution proposed in the resolution plan by taking into account the order of priority amongst creditors, as set forth in sub-section (1) of Section 53 which relates to liquidation waterfall, including the priority and value of the security interest of a secured creditor.

Resolution plan approved by NCLT binding on the Central Government, State Government or any local authority to whom corporate debtor owes a statutory debt

The Amendment Act has amended sub-section (1) of Section 31 by way of insertion to clarify that a resolution plan approved by the NCLT is also binding on the Central Government, any State Government and any local authority to whom a corporate debtor owes a debt in respect of payment of dues arising under any law. Earlier the Code provided that the approved resolution plan was binding only on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan which resulted in instances where the Government followed up for the balance dues after approval of resolution plan.

Liquidation after constitution of CoC

The Amendment Act clarifies by way of an explanation, under sub-section (2) of Section 33 which deals with liquidation, that the committee of creditors may take the decision to liquidate the corporate debtor any time after the constitution of the committee of creditors until the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. The foregoing amendment is relevant as there have been instances where NCLTs have insisted that a liquidation order may be passed only after failure of the CIRP even though an early liquidation would have resulted in value maximization.

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