



Amendment to the Insolvency and Bankruptcy Code, 2016

Introduction

The President of India gave his assent to the ordinance to amend the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) on 23 November 2017 vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (“**Ordinance**”). The President gave his assent as the Parliament was not in session and the President was satisfied that circumstances existed which rendered it necessary for him to take immediate action to amend the IBC.

Validity of Ordinance

The Ordinance is effective from 23 November 2017 and will be in force till:

- (a) 6 weeks from the re-assembly of the Parliament or,
- (b) if before the expiration of such period of 6 weeks, resolutions disapproving it are passed by both houses of Parliament, upon the passing of the second of those resolutions.

The winter session of the Parliament commenced from 15 December 2017¹ and hence the Ordinance will be valid for a period of 6 weeks from 15 December 2017.

Amendments to IBC

The Ordinance has made the following amendments to the IBC:

1. Section 2(e)

Section 2 lists out the persons to whom the IBC applies in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy. Prior to the amendment, sub-section (e) read as “*partnership firms and individuals*”. Pursuant to the Ordinance, Section 2(e) has been substituted and the IBC is now applicable to (amongst others):

¹ <http://www.prsindia.org/parliamenttrack/parliament-updates/parliament-session-alert-winter-2017-4992/>

*“(e) personal guarantors to corporate debtors;
(f) partnership firms and proprietorship firms;
(g) individuals, other than persons referred to in clause (e).”*

2. Sections 5(25) and 5(26)

Prior to the Ordinance, Section 5(25) stated that:

“resolution applicant means any person who submits a resolution plan to the resolution professional.”

This section has been amended to provide better clarity and it shall now be read as:

“resolution applicant means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to invitation made under Section 25(2)(h).

Consequently, in Section 5(26) which defines the term “*resolution plan*”, the words ‘*any person*’ have been replaced with the words “*resolution applicant*.”

3. Section 25(2)(h)

Section 25 explains the duties of the resolution professional.

Earlier Section 25(2)(h) provided for one of the duties of a resolution professional to invite prospective lenders, investors and any other persons to submit resolution plans. It has now been amended to enable the resolution professional, with the approval of Committee of Creditors (“**COC**”) to specify eligibility conditions while inviting resolution plans from prospective resolution applicants keeping in view the scale and complexity of operations of business of the corporate debtor to avoid frivolous applicants.

4. Section 29A

A new Section 29A has been inserted in the IBC to make certain persons ineligible to submit a resolution plan, which include the following persons:

- (a) an undischarged insolvent;
- (b) person identified as a wilful defaulter;
- (c) those who have their accounts classified as Non Performing Acts for one year or more and are unable to settle their overdue amounts before submission of the Resolution Plan;
- (d) has been convicted for any offence punishable with imprisonment for two years or more;
- (e) has been disqualified to act as a director under the Companies Act, 2013;
- (f) has been prohibited from trading in securities by the Securities Exchange Board of India;
- (g) has indulged in preferential, undervalued or fraudulent transaction for which an order has been made from the Adjudicating Authority under IBC;
- (h) those who have executed an enforceable guarantee in favour of a creditor, in respect of a Corporate Debtor;
- (i) any **connected person** meeting the criteria from (a) to (h);
- (j) has been subject to any disability, corresponding to (a) to (i), under any law in a jurisdiction outside India.

“**Connected person**” has been defined as:

- (i) any person who is a promoter or in the management or control of the business of the resolution applicant;
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan;
- (iii) holding, subsidiary or associate company or related party of the above referred persons in point (i) and (ii) above.

5. Section 30(4)

Section 30 of IBC talks about the submission of the resolution plan.

Section (30)(4) mentions that the COC may approve a resolution plan by vote of minimum 75% of voting shares of the financial creditors. It has now been amended to impose an additional obligation on the COC to consider the feasibility and viability of the resolution plan in addition to such conditions as may be specified by Insolvency and Bankruptcy Board of India (“IBBI”), before according its approval.

6. Section 35(1)(f)

Section 35 of the IBC explains the powers and duties of the liquidator.

According to Section 35(1)(f) of IBC, the liquidator has the power to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by a public auction or a private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified. After the amendment, a proviso has been added in this section which restricts the sale of immovable and movable property to a person who is ineligible to be a resolution applicant under section 29A.

7. Section 235A

This is a new section which has been inserted through the amendment providing for residuary penalty of INR 1,00,000 which may extend to INR 2,00,000 where no specific penalty or punishment has been provided in the IBC.

8. Section 240

Section 240 of IBC gives power to the IBBI to make regulations consistent with IBC. Consequential amendments in this section have been made to enable IBBI to make regulations under Section 25(2)(h) and Section 30(4) for effective regulations of such amended sections.

ALMT Analysis

The Ordinance has been passed in order to strengthen the insolvency resolution process, prohibit certain persons from submitting a resolution plan which may impact the credibility of the process and also to introduce certain additional requirements of submission of resolution plan before its approval by the COC.

It has introduced two new sections in the IBC i.e Section 29A and Section 235A as follows:

- (a) Section 29A makes certain persons ineligible to submit a resolution plan such as persons who have wilfully defaulted for example the promoters or the directors or guarantors, along with their related parties of the corporate debtors from filing

resolution plans and regaining control of their assets at a subsidised rate, thus, getting benefits/ undue advantage out of their own misconduct.

- (b) Section 235A imposes a residuary penalty to ensure effective compliance of all provisions of the IBC.

Further, the provisions of Part III of the IBC (which deal with insolvency and bankruptcy of individuals and partnership firms) will now extend to personal guarantors to corporate debtors and proprietorship firms in addition to individuals and partnership firms.

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