



Insolvency Code – Ordinance

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Introduction

The Honourable President of India, on 23rd November 2017, promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 which amends the existing provisions of the Insolvency and Bankruptcy Code, 2016, with a view to strengthen the Corporate Insolvency Resolution Process (CIRP). The prima facie requirement was to ensure safeguard to prevent unscrupulous, undesirable persons from misusing the provisions of this new law. This Ordinance ensures that willful defaulters and those associated with non-performing assets are kept out of the ambit of participating in bidding for assets as part of Corporate Insolvency Resolution Process.

Key Amendments

A) In-eligible Resolution Applicants

In order to prevent defaulting promoters from submitting resolution plans and acquiring assets at low valuations and continue to run the business, the Ordinance has laid out conditions and criteria detailing persons not eligible to submit resolution plans, Section 29A has been inserted, which specifies that, *“A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is a promoter or in the management or control of such person”*. List of such persons who are in-eligible are as follows:

- a) Undischarged insolvent
- b) Willful defaulter as per Banking Regulation Act, 1949
- c) The accounts of such persons has been classified as a Non-Performing Asset (NPA) for more than a year and has failed to make payments of such overdues pertaining to the NPA. Period of one year is computed from date of classification as NPA to commencement of CIRP.
- d) Convicted for any offence punishable with imprisonment for 2 years or more
- e) Disqualified to act as Director under Companies Act, 2013
- f) Prohibited by SEBI for securities trading
- g) Such person has indulged in preferential, undervalued or fraudulent transactions wherein an order has already been passed
- h) Guarantor in favour of a creditor, in respect of Corporate Debtor under CIRP or liquidation process under the IBC
- i) Such person is a “connected person” who meets any of the above mentioned criteria
- j) Such person is subject to any disability, under any foreign laws.

“Connected Person” for the purpose of the above clause is defined to mean any person who:

- a) is a promoter or in the management or control of the resolution applicant
- b) who shall be a promoter or control of the business of the Corporate Debtor during implementation of the resolution plan
- c) The holding company, subsidiary company, associate company or a related party of a person referred above

B) Duties of Resolution Professional

The Resolution Professional should ensure that the potential resolution applicants fulfil the criteria laid out by the Committee of Creditors regarding the complexity and scale of operations of the business of the Corporate Debtor.

C) Submission of Resolution Plan

CoC is obligated to consider feasibility and viability of resolution plan in addition to conditions specified by the Insolvency Board, before according approval. It has also been specifically provided that CoC shall reject a Resolution Plan, which is submitted before the commencement of the Ordinance but is yet to be approved, and where the Resolution Applicant is not eligible as per the new Section 29A. In such cases, on account of the rejection, where there is no other plan available with the CoC, it may invite fresh resolution plans.

D) Sale of Property

The sale of immovable property or land or actionable claims of Corporate Debtor is prohibited to a person ineligible to be a resolution applicant, based on provisions of Section 29A. This amendment is aimed at preventing defaulting promoters from acquiring assets at low valuations.

E) Penal Provisions

Where any person contravenes any provision of IBC for which no punishment has otherwise been prescribed under IBC, such person shall be punishable with fine that may range between INR 1 Lakh to INR 2 Crores.

Conclusion

This Ordinance operates retrospectively, limiting time for resolution applicants to assess the appropriateness or their eligibility under the Code. Large number of wishful participants may be disqualified due to the operation of Section 29A. The terminology of “connected persons” is so wide, that evaluation of whether a person is eligible or not would require considerable time and effort. The term related party has also been included in the definition of “connected person”, thereby expanding the ambit of ineligibility. The intent of IBC is resolution and not liquidation. Only time will tell whether the application of Section 29A leads to higher liquidation cases than ultimate resolutions.

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