

## **Analysis of IBC Ordinance, 2020**

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### **Introduction**

The most common way of recovering debts is to take over the assets of the debtor, but what if the debtor's obligation is more than his assets, or if it is a corporate person, what if it is bankrupt? This is the exact need for bringing in the Insolvency and Bankruptcy Code. The main objective behind implementing this particular code is to safeguard the interest of corporate debtors, as well as to rescue the corporate persons who may commit defaults towards the debt obligations. The code is not only limited to corporate persons but it is also provisioned for individuals. It took a great step in settling the legal position with respect to financial failures and insolvency and providing an unproblematic mechanism in cases of insolvency of individuals, as well as corporate persons or companies. Before the enactment of this code, multiple agencies were dealing with matters relating to debts, defaults, and insolvency which led to delays, complexities, and expensive processes of Insolvency resolution. Considering the complexities, the Insolvency and Bankruptcy Board of India (IBBI) has brought in an ordinance which shall be called as the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020. The article will further go into detail with the ordinance.

### **Insolvency and Bankruptcy code, 2016 <sup>1</sup>**

The first Insolvency and Bankruptcy Code was introduced in 2015, and it came into effect in 2016. It is known as Insolvency and Bankruptcy Code, 2016.

The Code provides separate insolvency resolution processes for individuals, companies, and partnership firms. The process can be initiated either by the debtor or the creditor. There is a maximum time limit set for completion of the insolvency resolution process for both corporates and individuals. The highlight of this act is the appointment of Insolvency Professionals. These are licensed professionals who manage the insolvency process. These professionals have control over the assets of the debtor throughout the insolvency process.

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<sup>1</sup> The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

The Code recommends two distinct tribunals to look over the insolvency resolution process for individuals and for companies:

- (i) National Company Law Tribunal for Companies and Limited Liability Partnership firms, and
- (ii) Debt Recovery Tribunal for individuals and partnerships.

### **Ordinance of 2020<sup>2</sup>**

- Inclusion of Section 10A and Section 66(3)

The latest Section 10A provides for the complete suspension of initiation of the Corporate Insolvency Resolution Process ("CIRP") under Sections 7, 9, and 10 of IBC for a period of six months, with effect from 25<sup>th</sup> March 2020. It can further be extended for a period of one year, providing a safe harbor to corporate debtors.

Moreover, the newly inserted Sub-Section (3) under Section 66 of the principal act forbids filing of applications by Resolution Professionals under Sub-Section (2) for such nonpayment against which the initiation of corporate insolvency resolution process is suspended by Section 10A.

Section 66(2) of the IBC, 2016 levies a liability on the director or partner of the corporate debtor to subsidize the debtor's assets on an application initiated by the resolution professional, if they have carried on business with the deliberate intent of defrauding creditors, or if they did not exercise requisite due diligence before the commencement of CIRP. The addition of Sub-Section (3) safeguards the director or partner from liability in case of default when CIRP is suspended under Section 10A.

### **Analysis**

The contemporary amendments adjourned the initiation of CIRP by Operational Creditors under Section 9, and consequently, affected the interests of operational creditors, especially the Micro, Small and Medium Enterprises (MSMEs). The default amount cannot be claimed by the MSMEs even if the edge limit is breached, thereby opening a broad scope of opportunities concerning

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<sup>2</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, No.9, Acts of Parliament, 2020 (India).

willful default by the corporate debtors. Besides, the increased threshold was intended at providing liberation to the MSMEs; nevertheless, the resolution of strained MSME firms has taken a smack as a result of the deferral of CIRP. Therefore, a special regime of debt resolution has to be explored in this concern.

Moreover, the suspension of voluntary insolvency application by the corporate debtor that is Section 10 of the principal act takes away the sovereignty of the company to streamline its debt under financial hardships. This would amplify the distress of the company, further tapering the value of its assets. The creditors would no longer be able to upsurge the worth of their assets through the formulation of the resolution plan. Consequently, it would have been in the interest of the corporate debtor to not suspend the procedure of Section 10 of the IBC 2016.

The amendment to Section 66 of the principal act accommodates a very effortless way out for the directors and partners of the defaulting company or corporation, laying the creditor's money at risk. The directors and partners can now get away with their liability and willfully default the payment of obligations without being held accountable for the default resulting in the accretion of obligations and augmented pecuniary burden.

## **Conclusion**

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 has left us with additional queries. The connotations of protection, compliance, and defaults have become even vaguer than it was before this Ordinance. Meagre drafting of the Ordinance has affected the corporates negatively with its own exceptional repercussions. The corporate debtors will have to find out a few other methods of reorganizing the debts for which an insolvency proceeding cannot be filed. The query will still linger that, even after reorganizing those debts, whether they will continue to be protected under the proviso to Section 10A, or is it beyond its purview. Hence, this is an additional burden on the courts and in the process of corporate insolvency resolution. It is significant to consider the existing provisions of law concerning the resolution of debt that strikes a balance amongst the interests of all the stakeholders and establish new measures to speed up the process of corporate insolvency resolution.