INFOLEX
NEWSALERT

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THE INSOLVENCY & BANKRUPCY CODE (AMENDMENT) ACT: RESOLUTION APPLICANTS NARROWED?

1. INTRODUCTION

Earlier in January, the Insolvency and Bankruptcy Code (Amendment) Act (the "**Amendment Act**") came into force[1] amending the Bankruptcy and Insolvency Code, 2016[2] (the "**Code**"), by substantively incorporating changes introduced by the earlier Code (Amendment) Ordinance, 2017 (the "**Ordinance**")[3] issued by the Government and promulgated by the President at the end of November last year.

The Amendment Act adopts nearly all of the amendments introduced by the Ordinance, and essentially, expands the scope of the Code and restricts certain persons from initiating the resolution process.

2. THE AMENDMENT ACT

2.1 Widening of the scope

The Amendment Act expands the scope of the Code by expressly including personal guarantors[4] to the category of corporate debtors, individuals other than personal guarantors to corporate debtors and proprietorship firms under its ambit (as earlier introduced by the Ordinance).

2.2 Resolution applicant

Initially, the Code defined a "**resolution applicant**" as a person who submits a resolution plan to an insolvency professional.

Following the Ordinance, the Amendment Act, defines a "**resolution applicant**" to mean a person who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under the Code. Essentially, this potentially narrows the class of resolution applicants, by inserting the requirement that they must be invited.

Furthermore, note that the new section 25(2)(h) of the Code, inserted by the Amendment Act states that *resolution applicants* will only be invited if they fulfill the criteria laid down by the resolution professional and are approved by the committee of creditors and meet such other conditions as may be laid down by the Insolvency and Bankruptcy Board (the "**Board**") such as, regard to the complexity and scale of operations of the business of the corporate debtor.

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[1] Published in the Gazette of India on 19 January 2018

[2] Insolvency and Bankruptcy Code, 2016, accessible at http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Jul/IBC%202016.pdf

[3] Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, accessible at http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Nov/180404_2017-11-24%2007:16:09.pdf

[4] "**Personal Guarantor**" has been defined as a person who is a surety to a corporate debtor in a contract of guarantee, under Section 5(22) of the Code.

2.3 Resolution plan

The Code originally defined a "**resolution plan**" to mean a detailed description, submitted by a resolution applicant, of how the debt of a corporate debtor can be restructured, which required approval by the committee of creditors (the "**Committee**") by a vote of not less than 75% (seventy-five percent) of the voting share of the financial creditors.

However, Section 5 of the Amendment Act, inserting Section 29A into the Code, broadly limits those persons (and *connected persons*) who are permitted to submit a resolution plan, generally excluding: insolvent entities; willful defaulters; entities having non-performing assets; disqualified directors; those convicted of criminal offences; persons barred by SEBI from trading; promoters of corporate debtors where preferential or fraudulent transactions have been determined by the Adjudicating Authority under the Code; guarantors of creditors of the insolvent entity.

IndusLaw View:

At the end of last year, there has been much discussion in the media as to whether the Ordinance actually disqualified shareholders or promoters of an insolvent company from putting forward a resolution plan.

A plain reading of the new Section 29A of the Code would only exclude promoters or shareholders, to the extent that they fall within one of the categories specified therein.

Perhaps in this context, we should not loose sight of the overall aim of the Code: the recycling of capital at the consent of the creditors.

We would query the rationale for limiting guarantors of insolvent entities from being a potential resolution applicant. While on the one hand, the contingent liability of the guarantor for the liabilities of the insolvent entity is a potential partial discharge of debt to creditors, why statutorily restrict them from putting forward a resolution plan, if the creditors agree?

Potentially limiting those classes of persons who might be able to put forward a resolution plan on grounds *other than* their ability to resolve the situation could restrict an otherwise sensible and pragmatic solution in a market where there may be few viable alternatives.

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