

Regulatory Hotline

January 24, 2018

BANKRUPTCY CODE AMENDMENT: PARLIAMENT CONFIRMS BIDDING RESTRICTIONS

INTRODUCTION

In order to address the vexed issue of eligibility of certain class of promoters to bid for projects, Government of India promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 ("IBC Ordinance"). An ordinance was promulgated as Parliament was not in session. The ordinance amended the Insolvency and Bankruptcy Code, 2016 ("Bankruptcy Code") and, amongst other things, ostensibly put certain safeguards to prevent unscrupulous persons from misusing or vitiating provisions of the Bankruptcy Code. Please refer to our analysis on the IBC Ordinance [here](#).

Since an ordinance ceases to operate at the expiration of six weeks from the reassembly of the both Houses of the Parliament and as certain representations had been made on the IBC Ordinance, the Government introduced the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 ("IBC Bill"). The IBC Bill was passed by Lok Sabha on December 29, 2017 and Rajya Sabha on January 2, 2018 and presidential assent was received on January 18, 2018 ("Amendment Act"). Recently, apprehensions had been raised on the Bankruptcy Code on the ground that it restricts or bars certain specified persons and / or prescribing certain eligibility criteria from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation¹. The Amendment Act has been passed to address these apprehensions and imposes restrictions on persons (who have demonstrated misconduct or are otherwise undesirable) to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. Accordingly, the objectives of the Amendment Act are, among others, as follows: (i) to facilitate phased implementation of the provisions for corporate persons, individuals and partnership firms; (ii) to provide clarity on persons who can submit a resolution plan; (iii) to enable the resolution professional, with the approval of the committee of creditors, to specify the eligibility conditions for submission of eligibility conditions etc.

The Amendment Act has repealed the IBC Ordinance and will be deemed to come force on November 23, 2017 i.e. the day on which the IBC Ordinance was promulgated. Our analysis of the changes introduced by the Amendment Act vis-a-vis the IBC Ordinances are as under:

ANALYSIS:

Our analysis on the Amendment Act can be found [here](#).

CONCLUSION

The Amendment Act and the IBC Ordinance were designed to strengthen the insolvency resolution process and bar certain ineligible persons from participating in the resolution process. However, the market's reaction to the Ordinance and several challenges indicate that stringent provisions of the Ordinance may be counter-productive².

While exclusion of AIFs from the definition of connected persons may hint at the legislature's intent of excluding financial / strategic investors, the inclusion of PAC under Section 29A may have far reaching consequences on such investors. The Government has also formed a committee to further review and improve the implementation of the Bankruptcy Code and further changes in the Bankruptcy Code to provide for operation ease and clarity is expected.³

The Insolvency Ordinance has already been challenged before the Punjab and Haryana High Court⁴ and Gujarat High Court⁵ where the courts have read down provisions of the IBC Code to uphold its constitutionality. Given the very clear economic objective behind IBC and the growing NPAs, it will be interesting to see if the Amendment Act opens gates to litigation in near future. Further, clarity on operational aspect of the Amendment Act vis-a-vis micro, small and medium enterprises is still awaited.

— Swati Sharma, M.S. Ananth & Sahil Kanuga
You can direct your queries or comments to the authors

¹ <http://www.livemint.com/Industry/Bmk1Tp5GVXWU2R6ePIYoM/IBC-ordinance-may-bar-clean-bidders-too-say-stakeholders.html>

² <http://www.thehindu.com/business/Economy/ibc-ordinance-will-affect-pending-suits/article20724711.ece>

³ <http://www.livemint.com/Industry/i417k3rY025x0eT0NAa2H/IBC-ordinance-Govt-asks-panel-to-review-amendment-to-Insolv.html>

⁴ <http://www.livemint.com/Companies/osFPCEM3hJGRtqimibYvUL/Insolvency-code-Recorders-and-Medicare-Systems-challenges-o.html>

⁵ Shivam Water Treaters Private Limited vs. Union of India & Ors. Special Civil Application No. 19808 of 2017

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