**THE COCKAMAMIE**

*The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017*

**Background**

The Central Government, in somewhat hurry, as it looked like from the actions, issued an ordinance to amend the independent India's one of the greatest reforms i.e. The Insolvency and Bankruptcy Code, 2016 (IBC). To put it other way around, Hon'ble President of India promulgated an ordinance to amend the IBC being satisfied that circumstances exist (which rather should) which render it necessary for him to take immediate action in this behalf.

Now putting the above again the other way around, on 23rd of November, 2017 (just 3 weeks before the scheduled onset of the winter session of parliament as it is expected to start from 15th of December, 2017), the Central Govt. advised the Hon'ble President of India to make the exigency of issuing such ordinance to amend the IBC.

The above remarks could be treated as a matter gratuitous sarcasm to put a circuitous censure on the Govt. machinery to act in this behalf. No wiles on the fact that the independent India has been suffering from the lack of action of the Govt. machinery including the bureaucrats to act swiftly and logically on any matter of concern.

However, acting in such a manner always puts a qualm on the already ailing machinery.

**The Amendment**

The Central Govt. has conceptualized the amendment to put forward a straight message to the system; which in this case includes the Public Sector Banks, defaulting promoters and other advisors, consultants, lawyers and now so called Insolvency Professionals; that no matter what, nothing doing, if there is a default, because of any god damn reason, the father of the baby (being the promoter) has to stay out of it.

In brief, the promoters of the defaulting company, which has been referred to Hon'ble NCLT under the IBC, shall never again be allowed to take helms of the affairs of the company.

Let us now discuss the major amendments that have been put forward. Before we discuss any of them, let us also be clear of the fact that this is by way of an ordinance, implying thereby that it has to be approved by Parliament in session, within 6 months, unless further extended by Hon'ble President of India, looking again at exigency of the same. In other words, the executive has once again tried to coup the legislature, by way of this ordinance.

*Amendment of the applicability of the provisions of the Code – Section 2*

There is not much change in the above. The only text that has been amended is now to specifically distinguish "personal guarantors" from any other individual, which are governed by the provisions of this Code. This could have been done keeping in mind the applicability of Section 60 which specifically takes away the jurisdiction of personal guarantors of corporate debtors from DRT to NCLT. Probably, this change may not lead to anything major, unless avoiding any unnecessary litigation which could happen in future when the provisions of individual bankruptcy will be brought into operation.

Another noticeable amendment that this brings into force is now to specifically include sole proprietorships into its ambit, which earlier was missing. However, not going into details of this, Section 78 itself still does not talk about coverage of sole proprietorships. We do not discuss this

further as still this has not been notified and has no relation with the matter under discussion in this paper.

*Amendment of the definition of "resolution applicant" – Section 5*

Before the amendment, a resolution applicant was supposed to be a universal person who could put forward his intent of resolving the ailing company/ asset under default, subsequent to a public announcement by way of an Information Memorandum, made by the Resolution Professional in this behalf. Any person could claim by way of a resolution plan to resolve/ revive the ailing company/ asset.

However, the change, which otherwise seems to be of minor importance, has added the words "pursuant to the invitation made" in this behalf by the Resolution Professional.

The message put forward by this amendment is that now it would be considered to be a restricted entry party, whereby, any *Tom Dick or Harry*, cannot stake claim to revive the ailing company/ asset. The original intent of the legislature seemed to be quite logical that after the event of default by the corporate debtor, the company/ asset is up for grab. This leads to a universal bid program which helps in actual price discovery of the company/ asset.

However, post this amendment, this would now be restricted to an invitation to be made by Resolution Professional, only then, one can put forward his claim/ interest of reviving/ takeover of the ailing company/ asset.

The actual impact of this amendment can be perceived only that now it would be the call of the Committee of Creditors only, that who actually can offer his/ her interest in putting forward a resolution plan. This would have been a good idea, had the whole process of Corporate Insolvency Resolution Process (CIRP) been a close room call of the Committee of Creditors, keeping at par with the Joint Lenders' Forum Meeting (JLF Meeting) under the guidelines of RBI. Now, this CIRP being a statutory process, being overlooked by judiciary (NCLT), making this a restricted affair is actually not fair. In a way, the executive is trying to empower the creditors, to make the rules of the game now in their favour, which sound good only when they themselves takeover the company/ asset.

*Amendment of process of inviting resolution applicants – Section 25(2)(h)*

The original draft of the legislature under the duties of the Resolution Professional u/s 25 says that it is the duty of the Resolution Professional to invite prospective lenders/ investors/ any other persons to forward their resolution plans for revival of the ailing company/ asset.

The amendment now takes away the character of universality of resolution applicants who now have to go through detailed testing and verification process to put forward their intents for any resolution plan.

It cannot professed whether the creditors would be actually glad with this amendment or not, however, what this leads to is putting further constraints on the whole process which is already short on time, resources, viability, feasibility or any other characteristics which are required to sail smoothly.

A normal business transaction in our day to day life which may include buying any asset, business or company, would take sufficient time to garner the above said characteristics. However, the legislature in its original draft was already so very confident that every type of corporate debtor be it a small scale unit (not legally) or a large multinational corporation, would be able to sail through the whole process within a period of 180/ 270 days. This amendment adds another feather to the cap of

confidence of the system that putting additional test parameters would also be covered within the same amount of time. Keeping aside the trial, testing and error time it would take to litmus test the eligibility of resolution applicant.

*Insertion of the eligibility requirements of the resolution applicant – Section 29A*

This is a bumper draw in the whole amendment. No thoughts or awards for the fact that who would have put forward this idea of putting a whole new section in this behalf. Not putting any scorn on the fact that the intent of this section is no doubt wonderful, but the way this has been brought forward may lead to aggravation of further nuisance.

Without any scope of arguments or judgements in this behalf, errant promoters should in any case be barred from the whole process. But actually implementing this is as difficult as extrication of the water from the milk. Can this be done? Well, doubts do prevail.

In any case, another major thing which is further observed from this whole new section is the fact that rather than putting the eligibility requirements of a resolution applicant, this section details out the ineligibility requirements. This is actually easier to do, but in fact makes a negative impact on the whole IBC. The closest example of this which comes to mind is that denying justice to a person only because of the fact that his counsel was not in the court determined attire at the time of hearing in the court room. It might be right in doing so, keeping the decorum of the temple of court room, at the same time, the person who pleaded for justice (corporate debtor in this case) has no wrong doing in the whole scenario. This example could be weird, but this is what which comes to the mind.

The bullet ineligibilities of persons to be resolution applicant are as below:

- An un-discharged insolvent
- An identified wilful defaulter
- A person whose account is NPA for more than 1 year and has not repaid the overdues
- Convicted for offences with punishment of 2 years or more
- Disqualified to be a director under Companies Act, 2013
- Prohibited by SEBI from trading or accessing the securities markets
- Indulged in Preferential/ Undervalued/ Fraudulent transactions
- Guarantors to any Corporate Debtor under CIRP or liquidation under IBC
- Connected persons with the above
- Persons with same disqualifications in any jurisdiction outside India

All of the above have their own legal complexities or debates undergoing associated with them. For example, just to share the intricacies of each of the point mentioned above:

- How to ensure that resolution applicant does not become bankrupt within months?
- What about the wilful defaulters already under litigations staying their classification?
- Who would qualify for this NPA account (personal accounts or corporate accounts)?
- Convictions in this country are always challenged, and for years and years
- We already have shell companies' directors' disqualifications under writ with the court
- SEBI may scrutinize the same transaction 2 years down the line and then disqualify. What then?
- Whether any allegation by auditor for Preferential/ Undervalued/ Fraudulent transactions would fall into this category?
- What is the sense behind barring all the Guarantors, whether related to the particular case or not? Is it like telling not to convey the Guarantees anymore?
- Who will ensure the reliability of a connected or un-connected person? The Creditors/ Resolution Applicant/ Resolution Professional/ NCLT/ What?

- How are credentials of a foreign resolution applicant verified? If verification gone wrong, who would be held liable?

All in all, it is a brilliant idea and thought process, but this could be as catastrophic as the demonetisation. Again an example out of way, but a way to think.

*Amendment of Section 30 – The Retrospective effect*
We, in India, have had the retrospective effect of the Independence too; to divide the country into two and ask the population to relocate which was not done for centuries.

We have had the wrath of GAAR with retrospective effect too.

Have we learnt anything, if at all?

We see judiciary putting its legs into executive every other day, the executive putting its legs into legislature every other day, and here we are, another example.

This amendment implies only one thing, litigation.

*Amendment of Section 35 – Covering Liquidation*
Naturally, the whole concept cannot be restricted to CIRP only; it has to cover liquidation too. So, no further points to discuss here, except the fact that now it would seem inevitable to reach liquidation, once the Corporate Debtor is into CIRP.

*Punishment where no specific penalty or punishment is provided – Insertion of Section 235A*
This could be the outcome of some intelligent litigation claiming that he cannot be punished because no punishment was written in law. Punitive actions are required for such litigants.

*Smoothening impact – Amendment of Section 240*
The Insolvency and Bankruptcy Board of India has been empowered/ instructed to frame out further detailed guidelines by way of regulations, to make the implementation of this amendment as smooth as a winter moisturizing cream. After all, winters do have arrived.

**Comments and Conclusions**
There is a lot to discuss and comment upon, even after yelling so much in the foregoing sections. However, will try to just say the below:

Sick Industrial Companies Act (SICA), Debt Recovery Act (RDDB), SARFAESI, Corporate Debt Restructuring (CDR), Strategic Debt Restructuring (SDR) and the list continues. Time and again, we have tried to throw out promoters out of their own businesses; none have been successful till date. How come this IBC is expected to do so, that too in a time span of 180/ 270 days. It could prove right for some large size corporate debtors, where the debt size is more than the book size of some of the banks in India, but what about other corporate debtors. Can we compare a horse with a mule? If yes, the amendment is going to prove a boon, else, the list (SICA, DRT, SARFAESI, CDR, SDR...) still continues.

Thanks !!!

**(Reach out for the comments on this at: *thakralsunny@gmail.com*)**