

Insertion of Section 10A Less of Amendment more of Confusion

(Author [Nishant Mishra](#), Associate Company Secretary)

Today, on 05th June, 2020 the Government of India issued an ordinance, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, to amend the Insolvency and Bankruptcy Code, 2016 to protect the Indian Corporate from being dragged into the insolvency proceeding in already tough situation caused due to the pandemic and nationwide lockdown. Apart from this, other reasons for bringing such amendments are COVID-19 has created uncertainty and stress for business for reasons beyond their control, and in the current situation it might be difficult to find the adequate number of resolution applicants required to rescue the debt-ridden companies.

Through this amendment, Government inserted the new section in Insolvency and Bankruptcy Code, 2016 i.e. Section 10A and added new subsection i.e. subsection (3) to section 66.

[Section 10A](#) read as follows

“Notwithstanding anything contained in section 7, 9, and 10, no application for initiation of corporate insolvency and resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

Provided that no application shall ever be filed for initiation of corporate insolvency and resolution process of corporate debtor for the said default occurring during the said period.

Explanation- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

To understand Section 10A, we need to go through the preamble of the ordinance which provides the background of the current affair of the Indian economy due to which the Section 10A is introduced. As per the preamble of the ordinance, Section 10A was introduced to solve the below threefold problem caused by the global pandemic COVID-19.

- a. It is difficult to find an adequate number of resolution applicants to rescue the corporate debtors.
- b. To prevent the industries from being pushed into insolvency for sometime in the already distressing situation.
- c. To exclude the default arising on account of COVID-19 situation from the insolvency proceeding.

So let's analyze Section 10A in above light and see whether Section 10A answer above issues. So as per Section 10A, no application for CIRP shall be filed for any default arising on after 25th March, 2020. So the question arises whether new CIRP can be initiated for default occurred before 25th March, 2020 and explanation to Section 10A provides that provision of this section shall not be applicable for default occurred before March 25th, however, if so, then its defeat one of the

objectives of the ordinance to prevent the industries from being pushed into insolvency for sometime in an already distressing situation.

Section 10A further provides that CIRP application not to be filed for six months or such further period, not exceeding 1 year from such date, as may be notified in this behalf. So question arise what is “Such Date”, here we have three options, one is such date will be notified by the government, or take 25th March, 2020 as such date, or date on which it is signed by the His Excellency President of India i.e. 05th June, 2020 to be taken as such date, however, the section is very ambiguous in this regard and we might have to see what honourable NCLTs’ stand on this.

Further, one proviso is also attached to this section, which provides that no application shall ever be filed for initiation of corporate insolvency and resolution process of corporate debtor for the said default occurring during the said period. Here we are not clear what is “said default occurring during the said period” means, even if we believe that said default is default occurred under Section 7, 9, and 10 and said period is period starting from 25th March, 2020 and ending after 6 months or such further period, not exceeding 1 year from such date as may be notified even then we don’t know what exactly the logic behind putting this proviso since it is contradictory to the main section because the main section restricts the proceeding for 6 months which maximum can be extended till 1 year, however, proviso seems to restrict the new application for such default sine die.

Moreover, the proviso is also silent about continuing defaults that is where part of default occurred during “said period” and partly afterwards. We actually don’t know if application will be allowed in this case or not.

The ordinance also inserts subsection (3) in Section 66 of the IBC, 2016, Section 66 deals with the fiduciary duty of the director during the twilight period and subsequent power of the Resolution Professional to apply to adjudicating authority to pass such order as adjudicating authority deems fit. However, newly inserted subsection (3) prohibits any such application in respect of the default for which initiation of CIRP is suspended; however, it is not clear that whether such protection is only during the time Section 10A is in force or till perpetuity.

In conclusion, we can deduce that where the ordinance was introduced keeping in mind the practical problem which the economy is facing and will continue to face in coming times, however, but due to ambiguous drafting, the ordinance might not be able to fulfil the objective specified in preamble and we have to wait for clarification from the Government in respect of the ordinance and also the stand which NCLTs will going to take in future.

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