

The New Threshold of IBC in the Time of COVID-19 - an Impact

Analysis

The COVID-19 pandemic has pushed Governments across the world in a frenzy to grapple with the situation not only at the health and medical frontier but to also recuperate with cascading financial implications as well.

In these challenging times, the Indian Government has through a recent gazette notification^[1] raised the pecuniary threshold for initiation of proceedings under the Insolvency and Bankruptcy Code, 2016 (“the Code”) to Rs. One Crore as the minimum amount of default from the existing threshold of Rs. One Lakh. From what can be gathered from the speech of the Finance Minister on 24.03.2020^[2], the present notification has been introduced to safeguard and protect the Micro, Small & Medium Enterprises (‘MSMEs’) from being pushed into insolvency during these trying times. The Finance Minister also indicated the possibility of suspension of certain provisions of the Act for a period of 6 months if the situation persisted.

Though the law is settled on the proposition that any amendment to a legislation shall be prospective in nature unless specified as has been held in the case of **S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India and Anr.**^[3] and **Director General of Foreign Trade and another v. Kanak Exports**^[4], however the intricacies of the far reaching implications of the notification would reveal themselves with time and application in the varied scenarios. One such apparent ambiguity is the fate of the cases in which notices have been issued by the Operational Creditors under the Code prior to the notification however, not filed due to the intervening COVID-19 outbreak and the cases filed but pending admission.

The enhancement of pecuniary limit is being welcomed since it reduces the burden on the National Company Law Tribunals (“NCLT”) across the country and also emancipates entities from insolvency proceedings for paltry sums. However, the ramifications of this ambiguous increase in pecuniary limit are far and wide.

The Code was the preferred remedy due to the summary nature of proceedings and overall effectiveness. With the substantial increase in pecuniary jurisdiction to safeguard MSMEs, the same MSMEs might be gravely prejudiced as Operational Creditors since the pecuniary jurisdiction for the debt might not be within their reach being Micro, Small & Medium Enterprises. This is a cause of concern since the problem of delayed payments remains unresolved despite amendments to the Micro, Small & Medium Enterprises Development Act, 2006 due to the lack of availability of infrastructure and the teeth that the legislation requires. The other remedy available to the MSMEs would be the civil courts of law which are notorious for the longevity of the litigation and the multiple appellate levels.

This view has been echoed in the judgment of Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.^[5] wherein the Hon’ble Supreme Court while interpreting the Code made it clear that the threshold to trigger insolvency was intentionally kept low so that small individuals may also trigger the Code along with banks and financial institutions to whom large sums of money may be due. It is therefore doubtful whether the increase in threshold ultimately serves the purpose of benefit to MSMEs that the Ministry is seeking to achieve.

Due to the increase in threshold for instituting proceedings under the Code, it exposes the vulnerability of the MSMEs wherein the bigger fish in the corporate sea would be encouraged to default in their payments and coerce them to settle at meagre amounts which would be counter-productive to the whole ethos of the notification. The notification further prejudices other Operational Creditors such as employees and other workmen, whose claims are generally much below the new threshold, who would not be able to initiate any proceedings under the Code due to the enhanced pecuniary limits.

Involuntarily, due to the ambiguity, it appears that the ultimate beneficiaries of the notification are the Financial Creditors such as Banks and other Financial Institutions who are as it is better placed and would have the debt to satisfy the enhanced pecuniary limit.

A possible alternative to protect the MSMEs from these concerns and the impact of COVID19 is making the notification applicable only for the prescribed time of crisis as has been done by Singapore in their urgent legislation brought into immediate effect titled COVID-19 (Temporary Measures) Act, 2020^[6]. Another possible alternative may be that the Ministry clarifies that the enhanced pecuniary limit is applicable only to cases where the Corporate Debtor is an MSME. Alternatively, in exercise of its powers under Section 240A (2) of the Code, the Ministry may by Notification direct that the provisions of the Code would apply to MSMEs subject to certain amendments, as may be specified. These issues require urgent clarification by the Ministry so that the legal ambiguity can be addressed and the claim of bonafide creditors are not lost.

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Reference:

[1] <https://www.ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>

[2] <https://pib.gov.in/PressReleaseDetail.aspx> Press Release Posted On: 24 MAR 2020 5:10PM by PIB Delhi

[3] (2006) 2 SCC 740

[4] (2016) 2 SCC 226

[5] Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors. [(2019) SCC OnLine SC 1005]

[6]

[https://www.parliament.gov.sg/docs/default-source/default-document-library/covid-19-\(temporary-measures\)-bill-19-2020.pdf](https://www.parliament.gov.sg/docs/default-source/default-document-library/covid-19-(temporary-measures)-bill-19-2020.pdf)

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