

# Legislative Brief

## The Insolvency and Bankruptcy Code (Amendment) Bill, 2017

The Insolvency and Bankruptcy Code (Amendment) Bill, 2017 was introduced in Lok Sabha on December 28, 2017. It amends the Insolvency and Bankruptcy Code, 2016.

### Recent Brief:

[The Right of Children to Free and Compulsory Education \(Second Amendment\) Bill, 2017](#)  
December 19, 2017

**Vatsal Khullar**

vatsal@prsindia.org

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### Highlights of the Bill

- ◆ The Bill prohibits certain persons from submitting a resolution plan in case of defaults. These include: (i) wilful defaulters, (ii) promoters or management of the company if it has an outstanding non-performing debt for over a year, and (iii) disqualified directors, among others. Further, it bars the sale of property of a defaulter to such persons during liquidation.

### Key Issues and Analysis

- ◆ The Bill prohibits certain persons from submitting resolution plans or participating in the liquidation process. One argument may be that these persons may be considered undesirable to take charge of the company. However, this may reduce competition among applicants and result in lower recoveries for creditors.
- ◆ A company that is liquidated ceases to exist, and the background of persons bidding for its assets may be irrelevant.

## PART A: HIGHLIGHTS OF THE BILL

### Context

The Insolvency and Bankruptcy Code, 2016 was enacted to consolidate insolvency-related laws and provide a time-bound process to resolve insolvency among companies and individuals.<sup>1</sup> Insolvency refers to a situation where a company is unable to repay its debt.

The Code is in its early stages of implementation with the first case resolved in August 2017.<sup>2</sup> Institutions under the Code, such as information utilities (to handle financial information related to debtors) are being set up and insolvency professionals (IPs) are being trained.<sup>3</sup>

Over the last two years, 300 cases have been registered under the Code, some of which have been challenged in courts.<sup>4</sup> In November 2017, a committee was set up to review the Code, identify issues in its implementation, and suggest changes.<sup>4</sup> The committee has been given two months to submit its report. An Ordinance was promulgated on November 23, 2017 to prohibit certain persons from submitting resolution plans to resolve defaulting companies.<sup>5</sup> This Bill replaces the Ordinance with some changes. The Statement of Objects and Reasons of the Bill states that in the absence of restrictions on submitting resolution plans or sale of assets during liquidation, certain undesirable persons may misuse provisions of the Code.

### Process under the 2016 Code:

- Upon default, the insolvency professional manages the defaulter's assets and constitutes a creditors committee.
- Creditors committee decides to either: (i) approve a resolution plan to restructure the defaulter's loans, or (ii) liquidate (sell) its assets to recover the outstanding amount.
- If no decision is taken within 180 days (extendable by 90 days), the defaulter's assets will be liquidated.

### Key Features

The Bill amends provisions related to corporate default to prohibit: (i) certain persons from submitting resolution plans, and (ii) sale of the defaulter's assets to such persons in case of liquidation. A resolution plan contains details which include: (i) the manner of repaying debts of the defaulting company, and (ii) management of the company after the resolution plan is approved.<sup>1</sup>

- **Resolution applicant:** Under the Code, any person submitting a resolution plan to an IP is known as a resolution applicant. These applicants may include lenders or investors, among other persons. The Bill amends this provision to specify that a resolution applicant may submit a plan on being invited by the IP.

- **Ineligibility to be resolution applicant:** The Bill inserts a provision prohibiting certain persons from submitting a resolution plan. A person will be ineligible to submit a plan if: (i) he is an undischarged insolvent (individual unable to repay his debt), (ii) he is a wilful defaulter, (iii) his account has been identified as a non-performing asset (NPA) for more than a year and he has not repaid the amount before submitting a plan, (iv) he has been convicted of an offence punishable with two or more years of imprisonment, (v) he has been disqualified as a director under the Companies Act, 2013, (vi) he has been prohibited from trading in securities by SEBI, (vii) he is the promoter or in the management of a company which has indulged in undervalued, preferential, or fraudulent transactions, (viii) he has given guarantee on a liability of the defaulting company undergoing resolution or liquidation, and has not honoured the guarantee, (ix) he has indulged in these specified activities abroad, or (x) he is connected to any person mentioned above (including promoters, management, or any person related to them).
- **Approving resolution plan:** The Bill prohibits the committee of creditors from approving a resolution plan submitted before the Ordinance was promulgated, if the plan was submitted by a person ineligible to be a resolution applicant.
- **Liquidation:** The Code allows the IP to sell the property of the defaulter in case of liquidation. The Bill prohibits the sale of this property to any person ineligible to be a resolution applicant.

## PART B: KEY ISSUES AND ANALYSIS

### Restricting certain persons from the resolution and liquidation process

Bill:  
Clause 5

The Bill prohibits certain persons from submitting resolution plans or participating in the liquidation process. These include: (i) persons who have indulged in preferential or undervalued transactions, (ii) promoters and management of the company if the company's debt has been an NPA for over one year, or (iii) any person who has committed any of the specified activities abroad. We discuss some issues which may arise out of the provisions of the Bill.

#### *Excluding persons from the process may reduce competition among applicants for the defaulting firm*

The Bill prohibits certain persons from submitting a resolution plan for resolving a defaulting company. One argument to exclude such persons may be that these people have not complied with laws in the past, and therefore could be undesirable candidates to restructure a failing company. Further, promoters and management of a defaulting firm may have been responsible for its failure and it may be improper to allow them to regain control of the company.

However, on the other hand excluding certain people (including persons related to the promoters or management) may result in lower competition among applicants seeking to resolve a company, which may lead to lower recoveries for creditors. Further, in case of some small and medium enterprises, the promoter may be the only person submitting a plan to revive the company. In such cases, the defaulting firm will go into liquidation even if there could have been a viable resolution plan.

#### *Rationale for barring certain persons from the liquidation process unclear*

Bill:  
Clause 7

In case of liquidation, the Bill prohibits the liquidator from selling the assets of the company to any person ineligible to submit a resolution plan. Unlike a resolution, after liquidation the company ceases to exist. Therefore, the background of the person bidding for its assets may not be relevant. Excluding some prospective bidders from the liquidation process may lead to lower recovery from the sale of the assets. On the other hand, it could be argued that certain promoters may deliberately run down the company to buy its assets at a lower price, and therefore there may be reason to exclude them from the liquidation process.

1. The Insolvency and Bankruptcy Code, 2016, <http://ibbi.gov.in/webadmin/pdf/legalframework/2017/Jul/IBC%202016.pdf>.
2. Quarterly Newsletter for Jul-Sept 2017, Insolvency and Bankruptcy Board of India, [http://ibbi.gov.in/IBNNOV2017\\_13.pdf](http://ibbi.gov.in/IBNNOV2017_13.pdf).
3. "NCLT might have more benches for faster NPA resolution: M S Sahoo", The Indian Express, June 16, 2017.
4. 'Constitution of Insolvency Law Committee', Order, Ministry of Corporate Affairs, November 16, 2017, [http://mca.gov.in/Ministry/pdf/constitutionOrder\\_17112017.pdf](http://mca.gov.in/Ministry/pdf/constitutionOrder_17112017.pdf).
5. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, [http://www.prsindia.org/uploads/media/Ordinances/Insolvency%20and%20Bankruptcy%20Code%20\(Amendment\)%20Ordinance.%202017.pdf](http://www.prsindia.org/uploads/media/Ordinances/Insolvency%20and%20Bankruptcy%20Code%20(Amendment)%20Ordinance.%202017.pdf).

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