

Streamlining Section 29A of IBC

A quick round-up of the amendments proposed by the Insolvency Law Committee

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Section 29A is probably the most substantial and rather most debated provision of the Insolvency and Bankruptcy Code, 2016. The section sought to restrict people who with their misconduct contributed to defaults of companies or who were otherwise undesirable, or could misuse their position due to lack of restriction to participate in the resolution process and regain control of the corporate debtor. However, the intent was somehow lost as the net of section 29A became too wide to intertwine even remotely associated entities; thus narrowing the path of resolution for the corporate debtor. The ineligibility layers stipulated by section 29A has been descriptively covered in *“Ineligibility Criteria u/s 29A of IBC: A net too wide!”*¹

Therefore, the Insolvency Law Committee, which recently submitted its Report², has proposed several amendments in section 29A. The proposals are meant to streamline section 29A by reducing the layers of ineligibility, stipulating relaxations for pure play financial entities, and relieving guarantors of corporate debtors under resolution. Below is a quick round-up of how section 29A (clause-wise) is proposed to be changed –

1. Main Clause: "29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person –"

Proposed Amendment: The reference to "person acting jointly or in concert" to be deleted.

<i>Before</i>	<i>After</i>
Persons acting jointly or in concert ineligible. Since the phrase was not defined in the Code, the same has to be inferred from SEBI (SAST) Regulations, 2011.	The clause will be omitted, thereby reducing one layer of ineligibility. Instead, “connected person” will also include a person who co-operates with the resolution applicant with a common objective, directly or indirectly, formally or informally, so as to acquire control/voting rights of the corporate debtor.

2. Clause (a) – “is an undischarged insolvent”

Proposed Amendment: None.

¹ By Sikha Bansal and Richa Saraf, see: <http://vinodkothari.com/blog/section29a-ibc-a-net-too-wide/>

² http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf

3. **Clause (b) -- “is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949”.**

Proposed Amendment: None.

4. **Clause (c) – “has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:**

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.”

Proposed Amendment: As under.

<i>Before</i>	<i>After</i>
No specific point of time specified at which the NPA is held.	For ineligibility, NPA should be there at the time of submission of resolution plan.
NPA has been classified as such in accordance with RBI issued under the Banking Regulation Act, 1949 only.	NPA classification may be under the Banking Regulation Act, 1949 or guidelines issued by any financial sector regulator in India (e.g. by NHB).
No exemptions for pure financial entities.	“Unrelated” “financial entities” to be exempted. “Financial entity” to be defined in proposed explanation II. Financial entities holding securities of the corporate debtor on account of conversion of debt not to be considered “related”.
Person in management of or in control of a corporate debtor having its account classified as NPA is ineligible to submit resolution plans for other corporate debtors.	Exemption of 3 years proposed for an acquirer who acquired an NPA account under a resolution plan. The period of 3 years to be calculated from the approval of the earlier resolution plan.

5. **Clause (d) – “has been convicted for any offence punishable with imprisonment for two years or more”**

Proposed Amendment: As under. Also, amendment in clause (j) will also have some impact.

<i>Before</i>	<i>After</i>
Person convicted for any offence punishable with imprisonment for 2 years or more. Too	1. To be narrowed down to conviction for offences listed under proposed

broad.	Schedule XII. 2. Disqualification period: 6 years from the date of conviction or from the date of release from imprisonment, whichever is later. 3. Exemption for cases where stay has been granted on the conviction order.
Definition of “connected person” applicable in entirety.	Only sub-clauses (i) and (ii) under the definition of “connected persons” to apply, since a company cannot be a holding/subsidiary/associate of an individual. Also, see notes under Point 11.

6. Clause (e) – “is disqualified to act as a director under the Companies Act, 2013”

Proposed Amendment: None. However, amendment in clause (j) will have the following impact:

<i>Before</i>	<i>After</i>
Definition of “connected person” applicable in entirety.	Only sub-clauses (i) and (ii) under the definition of “connected persons” to apply, since a company cannot be a holding/subsidiary/associate of an individual. Also, see notes under Point 11.

7. Clause (f) – “is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets”

Proposed Amendment: None.

8. Clause (g) -- has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code

Proposed Amendment: As under.

<i>Before</i>	<i>After</i>
Person in the management or control of a corporate debtor in which an order against any kind of vulnerable/fraudulent transaction has been made by NCLT. E.g. NCLT made an order against undervalued transaction in the CIRP of corporate debtor “A”. However, in due course of resolution proceedings, resolution plan submitted by “X” is approved and “X”	Exemption, where the resolution applicant has acquired such corporate debtor pursuant to resolution plan/scheme or plan approved by financial sector regulator or a court, and such order against vulnerable transaction was made before the acquisition. E.g. “X” is now eligible to present plan for “B”

acquired “A”. “X” gets disqualified to present resolution plan for another corporate debtor “B”.	
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9. Clause (h) -- has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code

Proposed Amendment: As under.

<i>Before</i>	<i>After</i>
<p>Guarantor of a corporate debtor who has executed an enforceable guarantee in favour of a creditor of a corporate debtor undergoing/having undergone corporate insolvency resolution process.</p> <p>E.g.: “X” is the surety for the loans taken by “A Ltd.”. “Y” is the creditor. “Y” initiates corporate insolvency resolution process against “A Ltd.”, and the application is admitted by NCLT. “X” is disqualified from submitting resolution plan for another corporate debtor “B”.</p>	<p>Ineligibility will arise only if such guarantee is invoked and the guarantor dishonours the guarantee.</p> <p>E.g.: Mere presence of guarantee is not sufficient. Therefore, “X” will not be disqualified from submitting resolution plan for “B”. However, say if “Y” invokes guarantee but “X” defaults, then “X” becomes ineligible to be a resolution applicant.</p>

10. Clause (i) – “has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India”

Proposed Amendment: “has” to be replaced by “is”.

<i>Before</i>	<i>After</i>
The clause talks about continuing disability, or a disability which existed earlier, but is not present now.	Disability should be there at the time of submission of resolution plan.

11. Clause (j) -- “has a connected person not eligible under clauses (a) to (i)”

Proposed Amendment: As under.

<i>Before</i>	<i>After</i>
No reference to person acting with the resolution applicant with a common objective.	A person who co-operates with the resolution applicant with a common objective, directly or indirectly, formally or informally, so as to acquire control/voting rights of the corporate debtor will also be a “connected person”. This, in a subtle way, compensates for deletion of ineligibility under the main

	clause.
Excludes a scheduled bank, ARC, AIF – proviso to explanation I.	To be broadly defined. Will exclude “unrelated” “financial entities”. Financial entities holding securities of the corporate debtor on account of conversion of debt not to be considered “related”.
Clauses (i), (ii), (iii) applicable in entirety to each preceding clause in section 29A.	For clauses (d) (i.e. convicted persons), and clauses (e) (i.e. disqualified directors), only clauses (i) and (ii) will apply, because a company cannot be a holding/subsidiary/associate of an individual. See notes below.

Notes by authors:

In the context of amendments proposed in the definition of “connected persons”, the following suggestions may be noted in order to rationalise the definition –

- (i) The proposed sub-clause (iv) (i.e. a person who co-operates with resolution applicant) shall also be applicable to each preceding clause of section 29A, in a manner similar to sub-clauses (i) and (ii) as stated above. Only sub-clause (iii) in the definition of “connected persons” should be excluded where the reference in the clauses of section 29A is to an individual.
- (ii) The word “related party” should be separated from sub-clause (iii) and shifted to a new sub-clause.
- (iii) Instead of specifically providing for clauses (d) and (e), the proposed provision may clearly state that wherever the person being disqualified is an individual, sub-clause (iii) of clause (j) will not apply.

12. Other Related Amendments

- (i) *Related party*: “Related party” if used in respect of a company other than the corporate debtor shall be interpreted in terms of the definition of “related party” given under section 2 (76) of the Companies Act, 2013. The Committee proposes that the term related party in relation to an individual must be defined in the Code.
- (ii) *Exemption for MSMEs*: Since usually only promoters of an MSME are likely to be interested in acquiring it, applicability of section 29A is proposed to be restricted only to disqualify wilful defaulters from bidding for MSMEs.
- (iii) *Affidavit confirming eligibility*: A new sub-section (2) is proposed to be introduced under section 29A, which would require the resolution applicant to give an affidavit stating that it is eligible to submit a resolution plan under section 29A. The affidavit must be submitted along with the resolution plan.

Though, as apparent from the perusal of the report, there were several concerns raised by different stakeholders; the Committee thought it fit that those be kept on hold so as to be taken up later after due industry experience. However, the overall scenario which emerges post the amendments are carried out is a welcome move.