The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 ("IBC") was promulgated by the President of India on June 5, 2020. The stated objective of the ordinance purports to protect the stressed companies from insolvency proceeding arising out of defaults committed w.e.f March 25, 2020 for a period of 6 months (extendable to one year). However, certain anomalies, unless clarified by the Adjudicating Authority and/or the Courts, can make the IBC, a fertile territory for misuse by wilful defaulters and promoters.

- Mismatch between Objectives and Amendment

  One of the primary objectives behind the amendment is inadequacy of Resolution Applicants ("RA") to rescue a corporate person. That being the intent, then the newly inserted Section 10A fails to meet that objective. The amended provision only bars the fresh initiation of corporate insolvency resolution proceedings ("CIRP") for defaults arising on or after 6 months w.e.f. March 25, 2020 ("COVID related defaults"). What about the cases instituted just prior to the lockdown where the Resolution Plan has not been submitted by the RA? The reluctance of RA's to invest in a going concern in these unprecedented times is unlikely to affected by the date of default by such entity. This would defeat the over-arching objective of the IBC to maximize asset value and push companies, who have committed a default just prior to the lockdown towards liquidation.

- Section 10A and the Proviso

  The wording used in Section 10A and the proviso appended thereto is somewhat baffling. Whilst Section 10A states that no application for initiation of CIRP will be filed for defaults arising on or after March 25, 2020 for a period of 6 months (extendable up to 1 year), the proviso states that for defaults arising in the said period, no application for initiation of CIRP shall ever be filed. This may lead to confusion. The lawmakers could have merely stated that for defaults arising on or after March 25, 2020 upto 6 months/1 year therefrom, no fresh application seeking initiation of CIRP shall be filed.

- The (mis)use of "Default"

  Default as defined under Section 3(12) of the IBC means the non-payment of a debt when the whole or any part or instalment of the

amount becomes due and payable. In the event of a secured loan serviced by a financial creditor, the default would arise on the date the debtor's account is declared as a non performing asset (which is unlikely in view of moratorium announcement made on ___ by the RBI). However, for unsecured loans, usually given by operational creditors, it can be argued that non-payment of instalments since before the operation of the ordinance continuing into the period of the ordinance and even thereafter constitutes a continuing cause of action. Unless this point is clarified by the Courts, this could deprive the debtor of the exemption granted under the ordinance. Another aspect which require clarification is whether the debts accrued during the operation of Section 10A can be added to the debts which accrue after the operation of the ordinance in cases where the contracts are executory in nature and repayment is a recurring obligation.

- Voluntary initiation of CIRP

  Section 10A bars fresh filing of CIRP Applications under Section 7 (by Financial Creditor), Section 9 (by Operational Creditor) as well as Section 10 (by the Corporate Debtor).

  The inclusion of Section 10 Applications within the ambit of the ordinance appears to be unreasonable and constricting. This is likely to hurt companies stuck in debts wanting a viable exit option using the voluntary CIRP mechanism provided under the code.

- The MSME Conundrum

  The ordinance, ex-facie, doesn't align itself to the slew of measures announced by the Government for the protection of MSME's. Whilst the debtor MSME's can take refuge under the revised threshold limits for initiating CIRP (from Rs. 1 lakh to Rs. 1 crore as per the amended Section 4), the creditor MSME's (usually operational creditors) may be left in the lurch as they will be barred from taking recourse under the IBC against defaulting parties. This is likely to encourage wilful non-payment/defaults to MSME's during this period thereby further hurting the MSME sentiment in the country.

- Gateway for Fraud

  Companies and Promoters could use the leeway given under the ordinance and commit intentional/wilful defaults, despite having the capacity to pay. Further, in the absence of moratorium and a Resolution

Professional, promoters may look to enter into preferential and fraudulent transactions to siphon off assets and divert cash flows.

- Token Relief?
  Whilst, remedies under the IBC for COVID related defaults have been shelved but the creditors are not barred from taking recourse to other recovery mechanisms such as arbitrations, summary/commercial suits and even under the SARFESI (for secured liabilities). These courts/tribunals, having sufficient injunctive powers to freeze/status-quo the activities of a business does not augur well for companies who may have defaulted during the COVID period for reasons beyond their control.
  Further, it is unclear whether a decree/award obtained by a creditor from a court/tribunal for a COVID related default by a debtor, can be used after operative period of the ordinance (6 months/1 year) for initiating CIRP against such debtor.

From a macro level perspective, the ordinance may appear to be a much needed respite for stressed companies but the devil always lies in the details. Suspending the operation a successful legislation, or a part significant thereof, without covering all corners may end up being counter-productive. Since a judicial challenge to the ordinance seems imminent, one will have to for the Courts to provide clarity. The ordinance, as it stands, appears more uncertain that the uncertainty it intends to address *vide* its promulgation.