

Ordinance Summary

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

- The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated on June 6, 2018. It amends the Insolvency and Bankruptcy Code, 2016. The Code provides a time-bound process for resolving insolvency in companies and among individuals. Insolvency is a situation where individuals or companies are unable to repay their outstanding debt.
- **Financial creditors:** The Code defines a financial creditor as a person to whom financial debt is owed. Such debt includes any amount raised that has the commercial effect of a borrowing. Financial creditors are a part of the committee of creditors, which is responsible for taking key decisions related to the resolution. The Ordinance clarifies that an allottee under a real estate project will be considered a financial creditor. An allottee includes any person to whom a plot, apartment, or building has been allotted, sold, or transferred by a promoter (real estate developer or development authority).
- **Representative of financial creditors:** The Ordinance allows the financial creditors to appoint authorised representatives in certain cases, such as when the debt is in the form of securities or deposits. These representatives will participate and vote in the committee of creditors as per the prior instructions received from the creditors. If a creditor does not give prior instructions, then the representative will abstain from voting.
- **Voting threshold of committee of creditors:** The Code specifies that all decisions of the committee of creditors be taken by a majority of at least 75% of the financial creditors. The Ordinance lowers this threshold to 51%. For certain decisions of the committee, the voting threshold has been reduced from 75% to 66%. These include: (i) appointment and replacement of the resolution professional, (ii) approval of the resolution plan, and (iii) approval of certain actions of the resolution professional during the insolvency resolution process.
- **Ineligibility to be a resolution applicant:** The Ordinance amends the criteria which prohibits certain persons from submitting a resolution plan. For example, the Code prohibits a person from being a resolution applicant if he has been convicted of an offence punishable with two or more years of imprisonment. Under the Ordinance, this provision will be applicable only for certain specified offences, and will not apply after two years from the date of his release from imprisonment.
- The Code prohibits a person from being a resolution applicant if his account has been identified as a non-performing asset (NPA) for more than a year. The Ordinance provides that this criterion will not apply if such applicant is a financial entity, and is not a related party to the debtor (with certain exceptions). The Code also bars a person from submitting a plan, if he has executed an enforceable guarantee in favour of a person who is a creditor to a defaulter undergoing a resolution process. The Ordinance amends this provision to specify that such a bar will apply if such guarantee has been invoked by the creditor and remains unpaid.
- **Applicability of the Code to Micro, Small and Medium Enterprises (MSMEs):** The Ordinance provides that the ineligibility criteria for resolution applicants regarding NPAs and guarantors will not be applicable to persons applying for resolution of MSMEs. The central government may, in public interest, notify the applicability of certain other provisions of the Code to MSMEs.
- **Corporate resolution:** The Ordinance provides that for a corporate applicant to initiate an insolvency resolution process, they will have to submit a special resolution. The special resolution must have been passed by at least three-fourth of the total number of partners of the corporate debtor.
- **Withdrawal of admitted applications:** A resolution applicant may withdraw an application, filed to initiate an insolvency resolution process, from the National Company Law Tribunal (NCLT), after such process has been initiated. Such withdrawal will have to be approved by a 90% vote of the committee of creditors.
- **Implementation of resolution plans:** The Ordinance specifies that the NCLT must ensure that a resolution plan has provisions for effective implementation, before approving it. Further, once the plan has been approved, the resolution applicant must obtain any necessary approvals, required by law, within a period of one year from such approval.

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