

The Insolvency and Bankruptcy Code (Amendment) Bill, 2019

March 27, 2020

Source: *PRS India*

UPDATE

In news: The Parliament has passed the Insolvency and Bankruptcy Code (Second Amendment) Bill 2019.

Content:

- The bill proposes to make amendments in the Insolvency and Bankruptcy Code, 2016.
- The second amendment bill **seeks to amend sections 5(12), 5(15), 7, 11, 14, 16(1), 21(2), 23(1), 29A, 227, 239, 240** in the IBC, 2016.
- It **inserts new section 32A** in the code.

Provisions:

- The Code allows creditors to initiate an insolvency resolution process, if a company defaults on its payments. The bill introduces an **additional threshold for certain classes of financial creditors**, including allottees of real estate projects, for initiating the resolution process. **At least 10% of them or 100 such persons have to jointly initiate the process.**
- The bill mandates that the **supplies of goods and services considered critical by the resolution professional cannot be discontinued during the moratorium period** ((refers to the time period during which NCLT prohibits persons from taking certain actions against the corporate debtor, such as filing or continuation of suits, execution of court orders, or recovery of property)). Suppliers of critical goods and

services **can stop supplying if** the debtor has not paid dues arising from the supplies during the moratorium period.

- The bill states that **any existing license, permit, registration, or clearance given by any government authority to the debtor will not be suspended or terminated due to insolvency**. This provision will be applicable as long as the debtor does not default in the payment of current dues arising for the use or continuation of such licenses or permits.
- The bill provides that the **company will not be liable for any offence committed prior to the insolvency resolution process**, if there is a **change in the management** or control of the company. However, officers in default or persons associated with the company and directly or indirectly involved in the offences committed by the company will continue to be liable for those offences.
- Under the Code, the insolvency resolution process commences when the Insolvency Resolution Professional (IRP) is appointed. The bill states that the **IRP must be appointed on the date of admission of the application by NCLT**, which will be **considered as the insolvency commencement date**.

Significance:

- The threshold aims to **prevent potential abuse of the Code by certain classes of financial creditors** by deterring the filing of frivolous applications by a few persons.
- Ensuring the continuation of supply of goods and services, which are critical to the business, may **enhance the earning potential of the company and maximise its value**. This would ultimately benefit all the creditors in the event of sale or liquidation of the company.

- In order to **balance the rights of the suppliers**, the bill provides that suppliers have to continue supplying only if their current dues are paid.
 - The amendments could **ring fence a corporate debtor** resolved under the IBC in favour of a successful resolution applicant **from criminal proceedings against offences committed by previous management**.
 - Thus, the **amendments aim to remove the bottlenecks in insolvency resolution, streamline Corporate Insolvency Resolution Process and protect last-mile funding to boost investment** in the financially distressed sectors.
-

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated on December 28, 2019. The Ordinance amends the Insolvency and Bankruptcy Code, 2016

Proposed amendments under the ordinance are:

- **The minimum threshold for certain classes:** Under the Code, a financial creditor (either by itself or jointly with other financial creditors) may file an application before the National Company Law Tribunal (NCLT) for initiating the insolvency resolution process. **The Ordinance amends this to provide minimum thresholds for certain classes** of financial creditors for initiating the insolvency resolution process. In case of real estate projects, if an allottee (person to whom a plot, apartment, or building has been allotted or sold) wants to initiate the resolution process, the application should be filed jointly by at least 100 allottees of the same real estate project, or 10% of the total allottees under that project, whichever is less.
- **Restriction on persons allowed to make applications:** The Code **restricts certain corporate debtors from making an application to initiate the insolvency resolution process**. These include:

1. Corporate debtors undergoing an insolvency resolution process
 2. Corporate debtors who have completed the resolution process 12 months before making the application
 3. Corporate debtors or financial creditors who have violated terms of the resolution plan, or
 4. Corporate debtors in respect of whom a liquidation order has been passed. The Ordinance clarifies that such corporate debtors will be allowed to initiate the resolution process against other corporate debtors.
- **Debtor's liability for prior offences:** The resolution plan under the Code may result in a change in the management or control of a corporate debtor to other persons. **The Ordinance states that in such cases, a corporate debtor will not be liable** for any offences committed before the resolution process. The liability will cease from the date the plan is approved by the NCLT.
 - **The immunity against prior offences:** The immunity against prior offences will be available if such other person (i) was not a promoter or in the management or control of the corporate debtor, or a related party of such a person, (ii) was not a person against whom investigating authorities have submitted or filed a complaint, or have reasons to believe that the person abetted or conspired to commit the offence.
 - **Permits, licenses and registrations not to be terminated on the ground of insolvency:** The Ordinance states that any existing license, permit, registration, quota, concession, or clearance, given by the government or local authority, will not be suspended or terminated on the grounds of insolvency. **However, there should be no default in payment of current dues for the use or continuation of such grants.**
 - **Supply of critical goods and services not to be**

discontinued: The Ordinance states that the resolution professional may order that the supply of certain goods and services which are critical for the corporate debtor's operations cannot be discontinued during the moratorium period. (The moratorium period refers to the time period during which the **NCLT may prohibit persons from taking certain actions against the corporate debtors**, such as filing of recovery suits.) This provision will not apply if the debtor has unpaid dues to the suppliers, or in certain other specified circumstances.

Note: Similar amendments are proposed in the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, which was introduced in Lok Sabha during the Winter Session 2019. The Bill has been referred to the Standing Committee on Finance.