



THE INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) BILL, 2018

Insolvency, in common parlance, is a situation where an individual or a company is unable to repay his/its outstanding debt and the Insolvency and Bankruptcy Code, 2016 (“**Code**”) provides the framework and a time-bound process for resolving insolvency in companies and individuals. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 was introduced on July 23, 2018 by the Minister of Finance and Corporate Affairs, Mr. Piyush Goyal, Interim Finance Minister of India (“**Bill**”). The Bill amends the Code, and replaces the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 that was promulgated on June 6, 2018 (“**Ordinance**”).

❖ 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. The Bill clarifies the understanding and position that an allottee under a real estate project will be considered a financial creditor. An allottee, for the said purpose, shall include 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 Bill specifies that, in certain cases, such as when a debt is owed to a class of creditors, the financial creditors will be represented on the committee of creditors by an authorised representative. These representatives will vote on behalf of the financial creditors based on prior instructions received by them. The Ordinance had provided for the remuneration payable to this representative to be jointly borne by the financial creditors. However, the provisions of the Bill amend the position of the Ordinance to the extent that, such remuneration will form part of the insolvency resolution costs and shall not be borne by the financial creditors.

❖ VOTING THRESHOLD OF COMMITTEE OF CREDITORS

The Code specifies that all decisions of the committee of creditors shall be taken by a majority of at least 75% (Seventy Five percent) of the financial creditors. The Bill lowers this threshold to 51% (Fifty One percent). For certain key decisions, *namely*, (i)

appointment and replacement of the resolution professional; and (ii) approval of the resolution plan, the voting threshold has been reduced from 75% to 66% (Sixty Six percent).

❖ EXCEPTIONS TO RESTRICTIONS

The Code imposes certain restrictions and bar on who may be an applicant and who may submit a resolution plan. The Bill amends and relaxes the restrictions in certain criteria. For instance, 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 Bill provides that this criterion will not apply if such an applicant is a financial entity, and is not a related party to the debtor (with certain exceptions). Secondly, the Code had also barred a guarantor of a defaulter from being an applicant. The Bill specifies that such a bar will apply only if such guarantee has been invoked by the creditor and remains unpaid in full or part.

❖ APPLICABILITY OF THE CODE TO MICRO, SMALL AND MEDIUM ENTERPRISES (MSMEs)

The Bill states that the restriction on NPAs and guarantors from being resolution applicants will not apply to persons applying for resolution of MSMEs. Further the Bill provides that the central government has the power to modify or remove other provisions of the Code while applying them to MSMEs.

❖ CORPORATE RESOLUTION

The Bill provides that for a corporate applicant to initiate an insolvency resolution process, they will have to submit a special resolution passed by at least 3/4th



(three-fourth) of the total number of partners of the corporate debtor.

❖ WITHDRAWAL OF ADMITTED APPLICATIONS

Under the Bill, a resolution applicant may withdraw a resolution application, from the National Company Law Tribunal (“NCLT”), after such process has been initiated. Such withdrawal will have to be approved by a 90% (Ninety percent) vote of the committee of creditors.

❖ IMPLEMENTATION OF THE RESOLUTION PLAN

The Ordinance provides that the NCLT must ensure that a resolution plan submitted by an applicant has provisions for its effective implementation, before approving it. Further, once the plan has been approved, the resolution applicant must obtain any approvals, required by law, within a period of 1 (One) year from the date of approval. The Bill adds another

compliance requirement i.e., in the event the resolution plan contains a provision for acquisition or merger of enterprises, then the resolution applicant will be required to obtain the approval of the Competition Commission of India prior to the approval of the resolution plan by the creditors’ committee.

❖ INELIGIBILITY TO BE A RESOLUTION APPLICANT

The Code prohibits certain persons from submitting a resolution plan. For instance, a person who has been convicted for 2 (Two) or more years of imprisonment, for an offence punishable with imprisonment.

The Bill qualifies this restriction by providing that the restriction will be applicable only for certain specified offences, and will not apply after 2 (Two) years from the date of his release from imprisonment.

ESSENCE OF COMPANIES (SIGNIFICANT BENEFICIAL OWNERS) RULES, 2018

Under the Companies Act, 2013 (“Act”), a registered and beneficial owner is required to file a declaration with the company, if the registered shareholder is not the beneficial shareholder.

The company in turn is required to file a declaration with the Registrar of Companies (“RoC”). However, the provision did not provide a mechanism to identify the ‘Significant Beneficial Owners’, which imposed difficulties on regulatory authorities to verify the identity of individuals who ultimately owned and controlled the company.

In view to remedy the aforesaid situation, the Ministry of Corporate Affairs (“MCA”) has notified Companies (Significant Beneficial Owners) Rules, 2018 which came into effect on 14th June 2018 (“Rules”).

❖ SIGNIFICANT BENEFICIAL OWNER

The Rules defined Significant Beneficial Owner as every individual who holds beneficial interests, of not

less than 25% (Twenty Five per cent) or such other percentage as may be prescribed (reduced to 10% (Ten percent) by Rules), in the shareholding of a company or the right to exercise, or the actual exercise of significant influence or Control (*defined in Section 2 (27) of the Act*) over the company.

Such significant beneficial ownership by an individual acting alone or together, or through one or more persons or trust, and persons resident outside India.

Rule 2(1)(e) of the Rules further explain that “significant beneficial owner” means an individual referred to in Section 90(1) of the Act, (holding **ultimate beneficial interest** of not less than 10% (Ten) per cent) read with Section 89 (10) (right to exercise rights attached to such share or right to receive dividend) of the Act, but whose name is not entered in the register of members of a company as the holder of such shares.



❖ SHARES FOR SIGNIFICANT BENEFICIAL OWNERSHIP

Explanation II of Rule 2(1)(e) clarifies that every instrument in the form of global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures shall be treated as 'shares' for the purpose of considering Significant Beneficial Ownership in a company.

In other words any instrument compulsorily convertible to equity shall be treated as constituting the shareholding for the purpose of Significant Beneficial Ownership and other instrument including optionally convertible instruments shall not be considered as constituting shareholding under this definition.

❖ DETERMINATION OF SIGNIFICANT BENEFICIAL INTERESTS

The question of beneficial interest and significant beneficial interest shareholding of an individual may be settled easily, however the question arises when shares are held by a body corporate, trust or partnership and more so, if in layers. Explanation I of Rule 2(1)(e) provides clarity, in this regard:

- i. Beneficial interest through a company: Where the member is a company, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than 10% (Ten per cent) share capital of the company or who exercises significant influence or control in the company through other means.
- ii. Beneficial interest through a partnership: Where the member is a partnership firm, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than 10% (Ten per cent) of capital or

has entitlement of not less than 10% (Ten per cent) of profits of the partnership.

Where no natural person is identified under (i) or (ii), the significant beneficial owner is the relevant natural person who holds the position of senior managing official of the entity holding the shares.

- iii. Beneficial interest through a Trust: Where the member is a trust (holding shares through a trustee), the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with not less than 10% (Ten per cent) interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.

❖ DECLARATION BY SIGNIFICANT BENEFICIAL OWNER

Every significant beneficial owner shall make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed.

❖ EXEMPTION FROM DECLARATION

Central Government has the power to exempt a class or classes of persons from the requirement to make a declaration.

According to Rule 8, the Rules are not applicable to the holding of shares of companies/bodies corporate, in case of pooled investment vehicles/investment funds regulated under Securities and Exchange Board of India Act, 1992, namely Mutual Funds, Alternative Investment Funds (AIFs), Real Estate Investment Trusts (REITs), and Infrastructure Investment Trusts (InvITs).



LEX REVISORS

SPECIFIC RELIEF AMENDMENT ACT, 2018

The Central Government, on 1st August 2018, notified the Specific Relief (Amendment) Act, 2018 (“Act”), thereby bringing significant amendments to the Specific Relief Act, 1963. One of the major amendments of the Act is that it replaces the discretionary power of the court to enforce specific performance and makes it mandatory for the court to grant specific performance of a contract without the plaintiff having to prove special circumstances. The Act provides that specific performance shall be granted in addition to compensation. Further, the Act revisits and amends several other sections and also provides for expeditious disposal of suits within 12 months from the date of service of summons.

Read More at: www.egazette.nic.in/WriteReadData/2018/187919.pdf

STREAMLINING THE PROCESS OF PUBLIC ISSUE VIDE THE SEBI CIRCULAR DATED 16TH AUGUST 2018

Securities and Exchange Board of India (“SEBI”), in exercise of the powers conferred on it under Section 11(1) of the Securities and Exchange Board of India Act, 1992 has issued a circular dated 16th August 2018 which streamlines the process of public issue under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 and SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015.

As per the circular, for all the securities opening on or after 1st October 2018, the time taken for listing after the closure of the issue will be 6 (Six) working days as against the present requirement of 12 (Twelve) working days.

Read more at: <https://www.sebi.gov.in/legal/circulars/aug-2018/streamlining-the-process-of-public-issue-under-the-sebi-issue-and-listing-of-debt-securities-regulations-2008-sebi-issue-and-listing-of-non-convertible-redeemable-preference-shares-regulations-40004.html>

COMPANIES (PROSPECTUS AND ALLOTMENT OF SECURITIES) SECOND AMENDMENT RULES, 2018

Ministry of Corporate Affairs (“MCA”) has notified Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2018 and substituted existing ‘Rule 14’ related to private placement of Companies (Prospectus and Allotment of Securities) Rules, 2014 *vide* Notification dated 7th August, 2018. The Rule *inter alia* provides additional mandatory disclosures to be made to the explanatory statement annexed to the notice of general meeting such as particulars of the offer including date of passing of Board Resolutions; kind of securities and price of offer; name and address of the valuer; amount the company intends to raise by offer of securities, material terms of raising such securities. Further the timeline for filing return of allotment of securities in Form PAS-3 has been reduced to 15 days from the date of allotment and a company can issue private placement offer cum application letter only after the special resolution or Board resolution has been filed in the MCA.

Read more at: http://www.mca.gov.in/Ministry/pdf/RuleProspectusSecurities07_08082018.pdf



IC UNIVERSAL
LEGAL
Advocates & Solicitors

LEY BOLETIN

AMENDMENT IN RIGHT TO INFORMATION ACT, 2005 (“RTI ACT”)

A notice of intention has been issued to introduce “The Right to Information (Amendment) Bill, 2018” in the Rajya Sabha for consideration and its passage during the current session of Parliament. The purpose of the amendments proposed is to provide for an enabling provision under the RTI Act to frame rules regarding salaries, allowances and conditions of service for Chief Information Commissioners, Information Commissioners and State Information Commissioners appointed under the RTI Act.

Read more at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=180646>

DISCLAIMER: *This document is intended as a news update and is not legal advice to any person or entity. Before acting on the basis of information herein please obtain specific legal advice that may vary per the facts and circumstances presented. IC UNIVERSAL LEGAL, Advocates & Solicitors does not accept any responsibility for losses or damages arising to any person using this information in a manner not intended by the Firm.*

IC UNIVERSAL LEGAL, Advocates & Solicitors

Ahmedabad | Bengaluru | Chandigarh | Chennai | Mumbai | New Delhi

www.icul.in

International Affiliation: CHUGH LLP, Lawyers and Certified Public Accountants

Los Angeles | Santa Clara | New Jersey | Atlanta | Washington