

Discussion paper on Mediation by the operational creditors (OCs) before approaching Adjudicating Authority (AA) for filing Section 9 application

1.1 The Expert Committee on the 'Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016' constituted by Insolvency and Bankruptcy Board of India (IBBI) submitted its report in January, 2024. The report suggested a pre-institutional mediation, as a preliminary step before the filing of insolvency applications. This suggestion was further complemented by The Indian Institute of Insolvency Professionals of ICAI (IIPI) in their report "*Key Recommendations for the Amendments in Insolvency and Bankruptcy Code, 2016*" submitted to the IBBI on 21st September, 2024.

1.2 In light of the above recommendation, this discussion paper deals with voluntary mediation by operational creditors before initiating an application u/s 9 before AA.

1.3 Problem Statement

There are several recurring issues in Section 9 applications, particularly disputes between OC and Corporate Debtor (CD). Common issues include (i) **Disagreements on Goods/Services** regarding the quality or performance of goods and services provided (ii) **Contractual Disputes** having allegations of non-compliance with contractual terms by either party (iii) **Discrepancies** over the exact amount owed or alleged underpayment (iv) **Claims of the** CDs against the OC for set-offs or damages. These issues are time consuming and eventually unnecessarily burden the limited judicial capacity.

1.4 In most of the OC-initiated insolvency cases, they are more interested in repayment of money claims rather than admission or resolution of the corporate debtor. According to the AA's data upto (30.04.2024), 21,466 cases under section 9 were disposed before admission and only, 3818 cases were admitted. Therefore, a large number of section 9 cases were settled before admission and the settlement rate of CIRP pre-admission for OCs has been larger than at any other stages. Further, the AA is required to conduct hearings before accepting or rejecting an application, and the process often becomes time-consuming.

1.5 Thus, in order to resolve disputes between the OC and corporate debtor at the earliest stage, and facilitate faster admission by AA, mediation as an option may be considered as an effective tool.

1.6 Proposal:

It is proposed to have that an option of mediation can be exercised by the operational creditors before filing insolvency applications under Section 9 of the IBC. The operational creditor can undergo mediation with the aid of mediator, as provided under the Mediation Act, 2023 In case of failure of mediation settlement, the mediator will prepare a non-settlement report which shall be annexed with the application for initiation of CIRP before the AA. The proposal aims to reduce the burden on the AA and thereby expediting admissions.

1.7 Public comments

The Board accordingly solicits comments on the proposal discussed above and the draft regulations placed in the Annexure. After considering the comments, the Board proposes to make regulations under clauses (aa) and (t) of subsection (1) of section 196 of the Code.

1.8 Submission of comments

Comments may be submitted electronically by 24th November, 2024. For providing comments, please follow the process as under:

- i. Visit IBBI website, www.ibbi.gov.in;
- ii. Select 'Public Comments';
- iii. Select 'Discussion paper on Mediation by Operational Creditors before filing Sec 9 application'
- iv. Provide your Name, and Email id;
- v. Select the stakeholder category, namely, - a) Corporate Debtor; b) Personal Guarantor to a Corporate Debtor; c) Proprietorship firms; d) Partnership firms; e) Creditor to a Corporate Debtor; f) Insolvency Professional; g) Insolvency Professional Agency; h) Insolvency Professional Entity; i) Academics; j) Investor; or k) Others.
- vi. Select the kind of comments you wish to make, namely, a) General Comments; or b) Specific Comments.
- vii. If you have selected 'General Comments', please select one of the following options:
 - a. Inconsistency, if any, between the provisions within the regulations (intra regulations);
 - b. Inconsistency, if any, between the provisions in different regulations (inter regulations);
 - c. Inconsistency, if any, between the provisions in the regulations with those in the rules;
 - d. Inconsistency, if any, between the provisions in the regulations with those in the Code;
 - e. Inconsistency, if any, between the provisions in the regulations with those in any other law;
 - f. Any difficulty in implementation of any of the provisions in the regulations;
 - g. Any provision that should have been provided in the regulations, but has not been provided; or
 - h. Any provision that has been provided in the regulations but should not have been provided.
- viii. And then write comments under the selected option.

1.9 If you have selected 'Specific Comments', please select para number and write comments under the selected para number.

1.10 You can make comments on more than one para, by clicking on more comments and repeating the process outlined above from point 1.8 (vi) onwards.

1.11 Click 'Submit' if you have no more comments to make.

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

NOTIFICATION

New Delhi, the___, 2024

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2024.

No. IBBI/2024-25/GN/.— In exercise of the powers conferred by clause (t) of sub- section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to further amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:-

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2024.
- (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as 'the principal regulations'), after regulation 2B, the new regulation 2BA shall be inserted as under:

An operational creditor may undergo mediation with the corporate debtor for resolving the disputes of commercial nature in accordance with the provisions of the Mediation Act, 2023, before filing application u/s 9 and thereafter, file the application under Section 9 along with the report of the mediator.

RAVI MITAL, Chairperson
[ADVT.-_____]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published vide Notification No. IBBI/2016-17/GN/REG004, dated 30th November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 on 30th November, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2024 published vide notification No. No. IBBI/2024-25/GN/REG116, dated 24th September, 2024 in the Gazette of India, Extraordinary, Part III, Section 4, No. 752 on 24th September, 2024.
