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IBBI's discussion paper on Mediation for Operational Creditors: A New Approach Under the Insolvency and Bankruptcy Code

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In a significant move to simplify the insolvency process in India, the Insolvency and Bankruptcy Board of India (IBBI) has proposed a framework for voluntary mediation for operational creditors (OCs) before they file applications under Section 9 of the Insolvency and Bankruptcy Code (IBC), 2016. This initiative stems from recommendations made by an Expert Committee and the Indian Institute of Insolvency Professionals (IIPI), aimed at addressing the recurring disputes that often arise between OCs and Corporate Debtors (CDs).

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Background and Rationale

The Expert Committee on the 'Framework for Use of Mediation under the IBC' submitted its report in January 2024, advocating for pre-institutional mediation as a preliminary step before filing insolvency applications by operational creditors. This recommendation was further supported by the IIPI in their report submitted in September 2024. The need for such a framework arises from the numerous issues that plague Section 9 applications, which often involve disputes over the quality of goods and services, contractual non-compliance, discrepancies in amounts owed, and claims for set-offs or damages.

Data from the Adjudicating Authority (AA) reveals that a staggering 21,466 Section 9 cases were disposed of before admission as of April 30, 2024, with only 3,818 cases being admitted. This indicates that many disputes could potentially be resolved prior to formal insolvency proceedings, thereby reducing the burden on the AA and expediting the overall process.

The Proposal for Mediation

The proposed framework allows OCs to engage in mediation with corporate debtors before filing for insolvency. Under this framework, OCs can seek the assistance of a mediator as outlined in the Mediation Act, 2023. If mediation fails, a non-settlement report prepared by the mediator will accompany the Section 9 application submitted to the AA. This approach is designed to enable quicker admissions and alleviate the workload of the AA, which often faces delays due to the time-consuming nature of hearings.

Public Participation and Feedback

To refine this proposal, the IBBI is inviting public comments on the draft regulations until November 24, 2024. Stakeholders, including corporate debtors, insolvency professionals, and academics, are encouraged to provide their insights on the proposed mediation framework. The feedback process is structured to allow for both general and specific comments, addressing potential inconsistencies within the regulations or challenges in implementation.

Regulatory Amendments

The proposed amendments will introduce a new regulation (2BA) into the IBC framework, enabling OCs to undergo mediation before filing a Section 9 application. This regulation is expected to come into effect upon publication in the Official Gazette.

Conclusion

The proposed introduction of mediation as a pre-filing step for operational creditors represents a proactive approach to resolving disputes and expediting the insolvency process. By encouraging dialogue and negotiation, this framework aims to reduce the judicial burden and encourage a more efficient resolution of commercial disputes. As the IBBI seeks public input, the success of this initiative will depend on the collaborative efforts of all stakeholders involved in the corporate insolvency resolution process.

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