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IBBI INDUCTS MEDIATION FOR SETTLEMENT OF DISPUTES EMANATING FROM THE CODE

15 November 2024 **On BACKGROUND**

The Insolvency and Bankruptcy Code, 2016 (Code), since its inception has aimed for the swift resolution of stressed companies in the Indian economy, coupled with value maximization for all stakeholders. In furtherance of the said objective, the legislature has time and again examined and explored newer framework within the ambit of the Code, so as to overcome practical and procedural hurdles. One such examination was carried out by the Expert Committee constituted by the Insolvency and Bankruptcy Board of India (IBBI), which studied the scope of mediation for various insolvency, bankruptcy, and liquidation processes under the Code and compiled the same in its report titled '*Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016*' dated 31 January 2024 (Report). The Report highlighted that as on 30 September 2023, of the corporate insolvency resolution process(s) (CIRP) initiated by the operational creditors (OCs), more than 53% were closed on appeal, review or withdrawal and accordingly advocated for resolution of OC disputes via voluntary mediation in the pre-commencement stages of a CIRP.

In furtherance of the above recommendation, the IBBI has on 4 November 2024 published '*Discussion paper on Mediation by the operational creditors (OCs) before approaching Adjudicating Authority (AA) for filing Section 9 application*' (Discussion Paper) detailing voluntary mediation by the OCs before initiation of a Section 9 application under the Code and suggested appropriate amendments in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

ISSUES AND PROPOSAL

The Discussion Paper notes that the genesis of majority of Section 9 applications filed under the Code lay in multiple common and recurring disputes which *inter alia* include (a) disagreements on quality or performance of goods / services provided; (b) contractual disputes with respect to allegations of non-compliance of contractual terms; (c) discrepancies on amount owed or alleged underpayment; (d) claims of the corporate debtor against the OC for set off or damages. Further, most OC initiated cases are fuelled by repayment or recovery of money claims rather than aiming for resolution of the corporate debtor. The Discussion Paper supplements the statistics provided by the Report and further underlines that as on 30 April 2024, 21,466 cases initiated under Section 9 were disposed before admission and only, 3818 cases were admitted. Accordingly, the Discussion Paper observes that the settlement rate of CIRP pre-admission matters for OCs has been larger than at any other stages. However, since the adjudicating authority (AA) has to conduct hearings before accepting or rejecting such Section 9 application, majority of which get

settled, the process becomes time consuming and unnecessarily burdens the capacity of the AA.

Hence, the Discussion Paper provides for mediation for earlier resolution of disputes between the OCs and corporate debtors and to facilitate faster adjudication of matters by the AA. It is suggested that a new Regulation 2B may be inserted in the CIRP Regulations which shall provide for mediation as a voluntary option that may be pursued by the OC before initiation of the CIRP. The mediation may be carried out with the aid of a mediator as per the provisions of the Mediation Act, 2023. In the event of failure of mediation, the mediator may prepare a non-settlement report which shall be annexed with the application for initiation of CIRP under Section 9 of the Code.

COMMENTS

The said proposal has the potential to de-clog the AAs of cases emanating solely due to disputes regarding relatively smaller money claims and aimed at recovery. Further, with prior mediation having been conducted, it would also aid the AAs in dispensing swift judgments in applications filed by the OCs, having already had the report from the mediator for reference in their decision making. Having said the above, IBBI may have to watch out for implementation challenges that may crop up especially in the matters of large companies with services being provided by multiple small-time vendors and consequent lack of effective channels for communication for invocation of mediation, service of notice etc. Care must also be taken that the mediators so engaged are well versed with the processes and resolutions under the Code so as to aid and advise the respective parties thoroughly. Further, in the event of breach of such mediation settlement agreement, whether the same shall be first challenged under the Mediation Act, 2003 or used as a ground for initiation of CIRP under Section 9 of the Code is another aspect which may deserve future analysis by the adjudicating authorities.

- *Dr. Siddharth Srivastava (Partner), Mohit Kishore (Counsel) and Shikha Mohini (Associate)*

For any queries please contact: editors@khaitanco.com