

Discussion paper on appointment of RP, sharing of report prepared by the RP with the personal guarantor and mandating summoning of meeting of the creditors

This discussion paper solicits comments on following three issues, namely: -

- (i) Appointment of RP in the insolvency resolution process of personal guarantors (PGs) to corporate debtors (CDs);
- (ii) Sharing of report prepared by the resolution professional (RP) under section 99 of the Code with the PG and the creditors; and
- (iii) Mandating summoning of meeting of the creditors under section 106 of the Code in case of insolvency resolution process of PGs to CDs.

Background:

2.1. The Insolvency and Bankruptcy Code (Code/ IBC) plays a pivotal role in providing a structured framework for insolvency resolution processes, ensuring fairness and transparency. The Code makes several improvements over the existing legislation on individual insolvency and adopts a more benign approach. The focus is on rehabilitation of the debtor as opposed to adjudging him as insolvent. The Code provides an objective trigger for initiation of insolvency resolution process instead of relying on the commission of an ‘act of insolvency’. It also mandates a moratorium which provides a breathing space for the debtor and creditors to negotiate a repayment plan. Further, it enables automatic discharge instead of requiring that discharge be granted by the Adjudicating Authority (AA) on the satisfaction that the insolvent has conducted himself well in the run up to and during insolvency.

2.2. As per the provisions under the Code, the insolvency resolution process of the PGs to CDs is initiated by an application by the PG himself or by the creditor under section 94 or 95 respectively. Either the PG himself or the creditor(s) may file an application or through an RP. If the application is filed through an RP, then AA appoints him as the RP. If the name of the RP is not proposed, then the AA appoints the RP from the panel shared by the Board.

2.3. The AA appoints an independent RP directing him to submit a report under section 99 within 10 days from the date of his appointment. The RP examines the application with respect to the eligibility of the PG or creditor, as the case may be, for initiation of insolvency resolution process, qualifying debt etc, and submits a report to the AA recommending acceptance or rejection of the application along with the reasons for the same. During the examination of the application, the RP collects necessary material or evidence on behalf of the AA.

A. Appointment of RP in the insolvency resolution process of PGs to CDs

Statement of Problem:

3.1. Regulation 4 (1)(a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (PGCD Regulations) specifies that an insolvency professional (IP) shall be eligible to be appointed as RP if he is independent of the PG. Explanation gives several instances where the RP is considered independent of the PG. One of the clauses in the explanation specifies that the IP shall be treated as independent of the PG if he has not acted or is not acting as interim resolution

professional (IRP), RP or liquidator during the corporate insolvency resolution process (CIRP) or liquidation process of the CD, as the case may be. However, there are no plausible reasons for inferring any possible conflict of interest between the PG and the IP running the insolvency processes of the CD for which he is a PG.

3.2. As per the information available with the Board, as of June 2023, 2039 applications have been filed for the initiation of insolvency resolution process of PGs. It has been observed that on numerous occasions, the appointed RPs encounter significant challenges in submitting the report under section 99, primarily due to the lack of cooperation from the PGs. As the RPs appointed in the PG matters have limited access to the financial records of the PGs, it becomes exceedingly complex to perform their duties diligently as provided under the Code, the Rules and the Regulations made there under.

3.3. It is relevant to note that the interrelatedness and close proximity of PGs and CDs would justify that the same IP may be appointed to run both the processes. As the IP in the CIRP or liquidation process would be better placed with respect to the information of the CD as well as the PG, his appointment in the PG matter may expedite, restructure and maximise the assets of CD and to discharge the PG of his liability. In fact, section 60(2) of the Code provides for the same NCLT bench to deal with the case of CD and its PG. So, the aspect of increased efficiency due to better coordination has been given due weightage wherein the same bench hearing the matters of the CD and its PG is envisaged.

3.4. Further, the aspect of increased efficiency due to better coordination has also been tested in some of the CIRP cases (Videocon Industries Ltd and Adel Landmarks Ltd.), where one RP was appointed for all the group entities and was the crucial reason for effective coordination.

3.5. It may further be noted that the same IP appointed as RP in the PG cases and CIRP of the concerned CD will harmonize the claims and realisation in both the processes. The aspect of increased efficiency due to better coordination will require that cases of CD and PG may be handled by the same IP if so desired by the CoC members in their commercial wisdom.

3.6. The IRP, RP or the liquidator of the CD is an independent professional and conducts the process of the CD in a professional capacity. The IP, who conducts the corporate process of the CD may be the better suited to act as the RP in the PG matters.

Proposal:

3.7. The bar provided under clause (i)(c) of Explanation to sub-regulation (1) of regulation 4 of the PGCD Regulations may be omitted. This will enable the creditors of the CD to appoint the IRP/ RP/ liquidator of the CD as RP in the PG matter for enhanced harmonization of both the processes. Even in the case of replacement of the IRP/ RP/ liquidator of the CD, the CoC in its commercial wisdom may appoint a common IP in both the processes.

Amendment Regulation:

3.8. A draft of the amendment regulations is given in Annexure.

B. Sharing copy of report of RP with the debtor and the creditor

Statement of problems:

4. 1. Sub-section (10) of section 99 mandates the RP to share a copy of the report to the debtor or the creditor, as the case may be. Therefore, the provision empowers the debtor or the creditor to receive a copy of the report prepared by the RP under sub-section (7) of section 99 of the Code.

4.2. A strict interpretation of sub-section (10) of section 99 may mean that the RP shall give the copy of the report to either the debtor or the creditor, as the case may be. In other words, the RP shall share the copy of the report to the debtor when the application is filed by the debtor and the copy of the report will be shared with the creditor when the application is filed by the creditor.

4.3. Where the application is filed by the creditor, the debtor gets a copy of the same under section 95(5). The RP submits a report to the AA under section 99 recommending for approval or rejection of the application. As per section 99(2), RP may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing evidence, etc. At this stage the debtor gets an opportunity to make submission whether there is any default and if he is able to prove that there is no default in making payment of debt, RP cannot recommend admission of the application and has to recommend rejection under section 99(7).

4.4. Section 100 of the Code provides for judicial evaluation by the AA. At this stage AA, passes an order either admitting or rejecting an application filed under section 94 or 95 of the Code. Section 100(1) provides that the AA shall pass an order either rejecting or admitting an application filed under section 95 or 94 of the Code, within a period of 14 days from the date of submission of report under section 99 by the RP. Thus, the debtor gets sufficient opportunities before the RP and also the AA at the time of proceedings under Section 100(1).

4.5. A conjoint reading of sub sections (6) and (7) of section 99 indicate that the RP examines the application and ascertain whether the application satisfies the requirement set out in sections 94 and 95 and whether the applicant has provided information and explanation sought for by the RP under sub-section (4). After examination of the application RP makes recommendations regarding acceptance or rejection of the application in his report. As per sub-section (9) the RP is required to record reasons in both eventualities either recommending acceptance or rejection of the application. In terms of sub-section (10) the RP shall give a copy of the report so prepared to the debtor or to the creditor, as the case may be. Once a report is submitted by the RP under section 99(1) of the Code, the AA exercises judgement to such a report and hears objections raised by the debtor under section 100(1).

4.6. Although it is settled that under the scheme of the Code that the purpose of proceedings under section 95 to 99 is merely to collect evidence for the AA to form its opinion under section 100(1), however, RPs in many cases are asked to provide copies of the report under section 99 to the PGs. The Board has observed in many cases that the reports are being provided both to the debtor and creditor. The evidence of sharing the copy of the reports is being submitted to the AA along with the report by the RP. In some cases, it has been found that AA asks to issue notice to both the parties while deciding the application u/s 100, and the notices are served to the parties along with the reports submitted by the RP. Therefore, though both parties are served with the copy of reports prepared by the RP under section 99 sometimes while submitting the

copy to AA and sometimes while the matter is being heard by AA, it is felt necessary to clarify the provisions that such reports should be shared with both the parties to expedite the process.

Proposal:

4.7. Hence, it is considered necessary to provide that RPs may in all cases, provide the copy of report under section 99 to both parties. It is proposed to clarify the requirement for the RP to share the report of recommendations prepared under section 99(7) with the debtor and the creditor in all cases. This will ensure that debtor and the creditor are well-informed about the evaluation and recommendations made by the RP, thereby promoting transparency and informed decision-making.

Amendment Regulation:

4.8. A draft of the amendment regulations is given in Annexure.

C. Making meeting of the creditor's mandatory u/s 106 in case of insolvency resolution process of PGs to CDs

Statement of Problem:

5.1. The insolvency resolution process is a vital mechanism for the effective and equitable resolution of financial distress faced by individuals and entities alike. In this context, the inclusion of PGs within the framework of insolvency resolution processes has been a significant step towards enhancing the comprehensiveness of the insolvency regime. However, the specific dynamics and complexities associated with PG cases necessitate a re-evaluation of certain procedural aspects to ensure optimal outcomes.

5.2. Under the extant provisions, a PG submits a repayment plan under section 105 to the RP. Subsequently, the RP assesses the viability of the repayment plan and compiles a report on the payment proposal. Along with the report, the RP recommends the calling of the meeting of the creditors, if necessary. Where the RP recommends that meeting of creditors is not required to be summoned, the RP is required to state the reasons for the same. While the provision was intended to provide speedy resolution of matters in low-value cases, it is felt that the meeting of the creditors should be necessary in the case of PGs as such cases are complex in comparison to other cases of individual insolvencies.

5.3. The existing provisions, while well-intentioned, fall short in acknowledging the intricacies surrounding PG cases. Unlike other individual insolvency cases, PG matters often involve complex financial interdependencies, multiple creditors, and a broader impact on the overall insolvency resolution process. The interconnectedness of the PG's obligations with those of the CD, coupled with the potential repercussions on the business's financial health, underscores the need for a more rigorous approach.

Proposal:

5.4. The proposed amendment seeks to mandate the convening of a meeting of creditors in all PG insolvency matters, irrespective of the amount defaulted. This approach ensures that the collective voice of creditors is factored into the resolution process, providing a more holistic perspective on the repayment plan. By making the meeting of creditors mandatory, the proposed amendment facilitates the active involvement of creditors in the resolution process, fostering a sense of ownership and collaboration among stakeholders. The proposed amendment to mandate the meeting of creditors in PG cases is a step towards addressing the

unique challenges associated with such cases. This move aligns with the broader objective of promoting a robust and comprehensive framework for resolving financial distress in a manner that is both efficient and just.

Amendment Regulation:

5.5. A draft of the amendment regulations is given in Annexure.

6. Public Comments

It is considered necessary to solicit public comments on following points relating to the afore stated issues:

- (i) Whether the IP who has acted or is acting as IRP, RP or liquidator in respect of the CD be allowed to be appointed as RP in the matter of PG to CD? (Issue 1)
- (ii) If yes, whether the proposal in para 3.7 is adequate or any change is required? (Issue 1)
- (iii) Whether you agree that the report prepared by the RP shall be shared with PG and creditors in all cases? (Issue 2)
- (iv) If yes, whether the proposal in para 4.7 is adequate or any change is required? (Issue 2)
- (v) Whether you agree with the proposal to mandate the meeting of the creditors in the insolvency process for the PG to CD? (Issue 3)
- (vi) If yes, whether the proposal in para 5.4 is adequate or any change is required? (Issue 3)

7. The Board accordingly solicits comments on the following: -

- (i) discussions points mentioned in Para 6 above; and
- (ii) any specific regulations in the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2023, placed at Annexure.

8. After considering the comments, the Board proposes to make regulations under clauses (aa) and (t) of subsection (1) of section 196 of the Code.

9. Submission of comments

9.1. Comments may be submitted electronically by 19th October, 2023. 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 – PGCD Sep 23'
- (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.

And then write comments under the selected option.

9.2. If you have selected 'Specific Comments', please select para number and then sub-para number and write comments under the selected para/sub-para number.

9.3. You can make comments on more than one para/sub-para, by clicking on more comments and repeating the process outlined above from point 9.1.(vi) onwards.

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

10. This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018.

GAZETTE OF INDIA
EXTRODINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION
New Delhi, the -----, 2023

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) (Amendment) Regulations, 2023

No. IBBI/2023/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 further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Persons) Regulations, 2019, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2023.

(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 Personal Guarantors to Corporate Debtors) Regulations, 2019 (hereinafter referred to as ‘the principal regulations’), the following explanation of regulation 4 (chapter II) of principal regulation shall be omitted, namely: -

“Clause (i)(c) of Explanation to sub-regulation (1) regulation 4 shall be omitted.”

3. In the principal regulations, after regulation 4, the following shall be inserted, namely: -

“4A. Providing copy of the report to the stakeholders.

For removal of doubts, it is clarified that the resolution professional shall give a copy of the report prepared under sub-section (7) of section 99 to the debtor and creditor.”

4. In the principal regulations, after regulation 10 (of chapter III), the following shall be inserted namely: -

“10A. Mandatory meeting of the creditors.

Where the repayment plan is in respect of a personal guarantor to the corporate debtor, the resolution professional shall summon the meeting of the creditors by issuing notice in writing specifying therein the date, time and place of the meeting.”

Mr. RAVI MITAL, Chairperson
[ADVT.]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Regulations, 2019 were published *vide* Notification No. IBBI/2019-20GN/REG050, dated 20th November, 2019 in the Gazette of India, Extraordinary, Part III, Section 4, No. 300 on 20th November, 2019.