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Insolvency Professional Under The Insolvency and Bankruptcy Code, 2016 – Duties And Extent of Liability

■ **Jayashree Shukla Dasgupta & Swati Sharma**



The Insolvency and Bankruptcy Code, 2016 (IBC) was introduced to consolidate laws relating to insolvency resolution of corporate persons, firms and individuals.

While the Code in itself is quite elaborate and provides for a detailed mechanism of insolvency resolution, the duty, and responsibility of an Insolvency Professional/Resolution Professional (IP/RP) cannot be overlooked. It is pertinent to state that without there being an IP/RP; no insolvency resolution can take place. Keeping in view the responsibility of an IP/RP, the qualification and experience for appointment have also been provided under the Code and Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. A cursory glance at the provisions of the Code illustrates that a role of an Insolvency Professional commences with the filing of the application for initiation of Corporate Insolvency Resolution Process (CIRP) under Chapter I of the Code. It defines Financial Creditor's authority to initiate CIRP under Section 7 of the Code. The Operational Creditor(s) can initiate CIRP under Section 8 of the Code and the Corporate Debtor/Applicant may initiate the CIRP under Section 10 of the Code.

When a Financial Creditor (FC)/ Corporate Applicant (CA) initiates CIRP, it is mandatory for such FC/ CA to furnish the name of the RP

proposed to act as an Interim Resolution Professional (IRP). However, in the case of an Operational Creditor (OC), the requirement to furnish such detail is not mandatory in nature. In any circumstances, IRP is appointed within 14 days from the date of commencement of insolvency. Immediately on the appointment of IRP, the management of the Corporate Debt or affairs vests with the IRP. IRP is primarily obligated to take over the management of the Company and to collate all information regarding assets, finances, and operations of the Company, to formulate a Committee of Creditors ("CoC"), to conduct CoC Meetings, appoint valuers and auditors and to receive and collate or admit claims of various creditors. In the said process, the personnel of the Company is under an obligation to extend complete co-operation to the IRP for running the Company as a going concern.

Another primary duty of the IRP is to constitute a CoC which shall comprise of all FCs of the Corporate Debtor (CD) and in case there are no FCs, then the CoC will be formed comprising only OC. The Code mandates that the CoC in its first meeting shall resolve to appoint or replace the IRP as the Resolution Professional.

The credentials of an Insolvency Professional are ascertained at various stages. An Insolvency Professional is appointed as the IRP by the Adjudicating Authority only after ascertaining his eligibility. There should be no disciplinary proceedings pending



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against him. Thereafter, when a resolution is passed to appoint the IRP as the Resolution Professional, even at that stage one can say that the credentials of an Insolvency Professional are ascertained. Despite such checks, there have been instances where it has been observed by the Insolvency and Bankruptcy Board of India (“IBBI”) that the IPs have contravened the provisions of the Code and have tried to overreach their powers.

Before dealing with such instances, it is essential to point out the duties of the RP in the CIRP. Section 25 of the Code provides for duties of RP. A detailed reading of the said provision and

regulation clarifies that RP is to take control and manage the assets along with the business of the CD. And RP is obligated to represent and protect the interest of the CD. It is also a duty of the RP to raise interim finances for the CD and to take all the measures for inviting and putting before the CoC, the Resolution Plans. RP is also empowered to appoint accountants, legal or other professionals for assistance in the process of CIRP. However, actions of RP are subject to approval from the CoC.

Once measures for the invitation of a Resolution Plan are taken and Resolution Plans are received, it is also the duty of the RP to examine the Resolution Plans

received by him and then to submit the same post approval of CoC before the Adjudicating Authority for its approval or rejection, as the case may be.

It may be construed that the role of the Resolution Professional comes to an end on approval of a Resolution Plan by the Adjudicating Authority; however, in the event of rejection of the Resolution Plan, the process of liquidation of the CD is initiated. The Code provides for the appointment of the same Resolution Professional as the Liquidator subject to written consent of the Resolution Professional. The Adjudicating Authority may also replace the Resolution Professional in case the Resolution Plan

submitted by the Resolution Professional is rejected by the Adjudicating Authority or in case IBBI recommends such replacement or in case the Resolution Professional fails to submit his written consent. As a Liquidator, the Insolvency Professional has been conferred with various powers and duties towards the company including but not limited to verification of claims custody of the assets of the Company and sell assets in liquidation by public auction or private contract.

With additional responsibility enumerated at all stages, a question that comes up for consideration is what if the IP falters and fails in due compliance of his duties as per the provisions of the Code and Regulations.

To deal with such situations, the Code has laid down various provisions wherein complaints against an IP can be made to the IBBI. Once a complaint is received from any person, an investigation is conducted by an Investigating Authority and thereafter a show cause notice is issued to such IP against whom the complaint is received thereafter, a disciplinary committee is formulated by IBBI to look into the complaints against the Insolvency Professional. The disciplinary committee created by IBBI is empowered to impose a penalty, suspend or cancel the registration of the Insolvency Professional.

In a recent case, IBBI found the RP guilty of contravening the provisions of the Code and also found him guilty of conniving with the CD to obtain a Resolution Plan from a dubious Resolution Applicant and IBBI canceled the registration of the Resolution Professional and also debarred him from seeking fresh registration as an Insolvency Professional

for the next 10 years. In a similar case, the IBBI has exercised its powers to cancel the registration of the Resolution Professional after finding him guilty of misleading the CoC and the Adjudicating Authority alike.

IBBI is also taking cognizance of cases related to misconduct by Insolvency Professionals. In a few cases, the monetary penalty has been imposed on the Insolvency Professionals with certain other observations. Similarly, in a few cases, only registration of the Insolvency Professional has been suspended.

It is interesting to note that neither the Code nor any Regulation provides for any mechanism for Appeal against an order passed by IBBI. In such a scenario, an IP has no alternative remedy, but to invoke the Writ jurisdiction under the provisions of Articles 226 and 227 under the Constitution of India.

In view of the aforementioned facts and legal position, it can be summarised that although the Insolvency Professionals have been granted powers under the Code to deal with, manage and take control of the affairs and management of a Corporate Debtors; however, such power is not unfettered. The IBBI, as well as National Company Law Tribunals, have been mindful of the fact that the Insolvency and Bankruptcy Code, 2016 is a relatively new enactment and the persons including the IPs are evolving with changes and developments in this field. Since the inception of the Code in the year 2016, IPs have worked towards Resolution of an insolvency process. Approximately, 40 cases have seen Resolution Plans to date, which has enabled creditors to recover huge amounts of money. Therefore, the expertise and efforts of IPs have to be acknowledged. [w](#)



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