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# INSOLVENCY PROFESSIONALS: RESCUER OF THE DISTRESSED ECONOMY

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*“An insolvency process cannot be imagined without the involvement of an IP who in many respects is the lynch pin of the process- the link between the court, creditors and the debtors”*

- European Bank for Reconstruction and  
Development

## ABSTRACT

The Insolvency and Bankruptcy code which was notified by the government on may 28 2016, came as a transformational piece of legislation at a very crucial time when Indian financial institutions and other business entities were struggling to cope up with a welter of bad loans. Due to the complexity of multiple laws the entire resolution procedure was fragmented, tedious and expensive with a very low recovery rate. The code revamped the existing legal framework and aims to have an

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overriding effect over the various laws pertaining to insolvency and bankruptcy such as Limited Liability Act 2008, Companies Act 1956, provincial insolvency Act 1920, SARFAESI, SICA etc.

IBC aims at the promotion of entrepreneurship, availability of credit and balancing of stakeholder interests, by facilitating time bound restructuring and bankruptcy of debtors. It is a consolidated and comprehensive piece of legislation for the resolution of insolvency in respect of companies, Limited Liability Partnerships (LLPs), Partnership firms and individuals and most importantly offers an exit plan to all categories of persons.

One of the significant features of the code is that it provides for creation of a very new class of professionals i.e. insolvency professionals. Section 3(19) of I&B code 2016, defines IPs as persons enrolled under sec.206 with an insolvency resolution agency as its members and registered with the Board as an insolvency professional under sec.207. Chapter IV of the code read with I&B code provides for regulations to IPs with respect to

qualifications, experience and thus exercise authoritarian control over them.

IP is a professional endowed with specialized knowledge and training appointed to undertake the insolvency resolution process for all categories of persons in accordance with the provisions laid down in the IBC, 2016. IPs under the code, have been embellished with different names and carry out different roles such as a resolution professional, bankruptcy trustee and liquidator. This paper aims at presenting a judicious study on the role of insolvency professional through discussing their position in the case of insolvency procedure of individuals, partnership firms and companies, their functions, duties and responsibilities and challenges faced by them while assuming this position. It is indispensable to have a study on the role of professionals, as they are pillars of strength who cater to the needs of this institutional infrastructure. The efficiency of the specialized cadre of insolvency professionals will usher in a new era of corporate insolvency in India.

## INTRODUCTION

A person is said to be 'insolvent' when he become incapable of recompensating his debts in the ordinary course of business, or he become incapable of disbursing his debts as they become due ,whether or not , he has committed an act of insolvency<sup>1</sup>.Bankruptcy is a legally declared inability or impairment of ability of an individual or organization to pay its creditors.<sup>2</sup>

The insolvency and bankruptcy code is a unified and comprehensive piece of legislation that overhauls the century old legal framework through major attention on creditor driven insolvency resolution process. The code envisages time bound restructuring and insolvency resolution of corporate person, partnership firms and individuals while balancing the interest of all stakeholders. In addition, the code proposes paradigm shift from the existing model of 'debtor in possession' to 'creditor in control'<sup>3</sup>. Part 2 of Insolvency and bankruptcy code 2016

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<sup>1</sup> See : section 2(8) of Sale of goods act 1930

<sup>2</sup> [http:// www. lexvidhi. com/ article-details/ bankruptcy-law-in-india-443.html](http://www.lexvidhi.com/article-details/bankruptcy-law-in-india-443.html)

<sup>3</sup> [http:// www. imperialjournals. com/ index. php/ IJIR/ article/ view/ 5018](http://www.imperialjournals.com/index.php/IJIR/article/view/5018)

deal with insolvency resolution and liquidation of corporate entities carried out by registered insolvency professionals under the supervision of NCLT and appellate authority NCLAT. The Debt recovery tribunal is the adjudicating authority for insolvency and bankruptcy matters of individual and partnership firms. The final adjudicating authority is the Supreme Court of India. Once the insolvency resolution is initiated, Insolvency Professional is required to form a committee of creditors, and with their concurrence shall bring forth a plan to revive the corporate entity. It last for a period of 180 days and further extendable to a period of 90 days, whereby time bound restructuring or liquidation is ensured. The role of insolvency professionals is indispensable in this regard.

## **HISTORICAL PERSPECTIVE**

Law pertaining to insolvency have, historically, in India as well as in the UK been developed in the context of individuals and later extended to companies<sup>4</sup>. An insolvency resolution process always necessitated an

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<sup>4</sup> [https:// www. icsi. edu/ WebModules/ LinksOfWeeks/ ICSI\\_ CS\\_ Mar\\_ 2017. pdf](https://www.icsi.edu/WebModules/LinksOfWeeks/ICSI_CS_Mar_2017.pdf)

agency to execute the process, but the primary question whether such agency has an officer of the court or an appointee of creditor. The Presidency Town Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 provided for appointment of official assignees/official receivers for carrying out relevant procedures under the Act. The Companies Act 1956 provides for appointment of official liquidators for under taking liquidation of companies under the order of the High Court. In addition, the provisions of SICA provides for an ‘operating agency’ who would aid in the rehabilitation of the sick company. All of these provisions indicate the gradual tendency to enhance professional involvement in the corporate insolvency procedure.

## **NEED FOR A SPECIALIZED CADRE OF INSOLVENCY PROFESSIONALS**

Insolvency professionals are the most important pillar of the frame word of insolvency system. The efficiency of IP’s who are known by different titles in different countries like ‘administrator’, ‘liquidator’, ‘trustee’ etc are critical for the success of this system. It is essential that the

insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime. The need of specialized professionals who carry out the resolution and liquidation process can be understood from the following:

In “Orderly and Effective Insolvency Procedures”<sup>5</sup> by International Monetary Fund, the role of liquidator or an administrator has been appropriately described, however, with a suitable caution - “The liquidator and the administrator play a central role in the effective implementation of the law. Although their respective roles differ substantially, they are similar in one important respect. As court – appointed officials, they have an obligation to ensure that the law is applied effectively and impartially. Moreover, since they normally have the most information regarding the circumstances of the debtor, they are in the best position to make informed decisions. That does not mean, however, they are a substitute for the court: due process requires that a dispute between a

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<sup>5</sup> [http:// www. imf. org/external/pubs/ft/orderly/#institu](http://www.imf.org/external/pubs/ft/orderly/#institu)

liquidator and an interested party be adjudicated by a court of competent jurisdiction. Even in countries where there are serious problems with capacity of the judiciary, there is a limit to the amount of authority that the law can confer upon these officers.”

The Bankruptcy Law Reforms Committee, the recommendations of which has led to the enactment of the Code, in its Final Report, emphasizes the role of an insolvency professional as follows - “In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator? However, there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire.

## **AN OVERVIEW ON THE ROLE OF INSOLVENCY PROFESSIONALS**

The main objective of the code was to create a new institutional framework consisting of Insolvency and Bankruptcy Board ,Insolvency professionals, Insolvency

professional agencies and adjudicating authorities ,thus facilitating simplified and time bound course of businesses .Among this IPs who are registered professionals take up different roles and regulates the entire insolvency and bankruptcy process under the code.IPR driven by the law are having adequate checks, accounting as well as due processes carried out by the IPs

Section 3(19) of Insolvency and bankruptcy code,2016 states insolvency professionals means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the board as an insolvency professional under section 207.

### **QUALIFICATION REQUIRED FOR AN INSOLVENCY PROFESSIONAL**

Following are the qualifications and experience required for an insolvency professional under chapter iii regulation 5 of IBBI (insolvency resolution process for corporate persons) Regulations, 2016

- a. If he has passed the National Insolvency Examination
- b. If he has passed the Limited Insolvency Examination and has fifteen years of experience in management,

after he received a bachelor's degree from a university established by law

- c. If he has passed the limited insolvency examination and has ten year experience as:
- (i) A Chartered accountant enrolled as member of the institute of the Institute of Chartered Accountant of India
  - (ii) A company secretary enrolled as a member of Institute of Company Secretary of India
  - (iii) A cost accountant enrolled as a member of the ICAI
  - (iv) An advocate enrolled with a Bar council.

### **REGISTRATION PROCEDURE FOR INSOLVENCY PROFESSIONALS**

An individual enrolled, as an insolvency professional shall make an application to the board in FORM A of the second schedule along with the non-refundable fee of rupees ten thousand only to the board. The board shall acknowledge the application made by the applicant within seven days of its receipt. Once the board is satisfied after inquiry as it deems necessary that the applicant is eligible, it may grant certificate of registration to the applicant to

carry on the activities of an Insolvency Professional in FORM B of the second schedule, within the 60 days of the receipt of the application excluding the time given by the board for presenting the additional document, information or clarification or appearing in person<sup>6</sup>. If after considering an application, the board is of opinion that the registration ought not to be granted, it shall communicate the reason for forming such an opinion and give the applicant an opportunity to explain why his application should be accepted within 15 days of the receipt of the communication from the Board, to enable it to form a final opinion.

## **ROLE OF INSOLVENCY PROFESSIONAL IN CORPORATE INSOLVENCY RESOLUTION PROCESS**

The adjudicating authority appoints an interim resolution professional within fourteen days from the commencement of insolvency. The IPs then takes over the management of the affairs of the corporate debtor and then finds the financial creditors and constitute a collective

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<sup>6</sup> [https:// www. icsi. edu/ WebModules/ LinksOfWeeks/ ICSI\\_CS\\_Mar\\_ 2017.pdf](https://www.icsi.edu/WebModules/LinksOfWeeks/ICSI_CS_Mar_2017.pdf).

body of the creditors i.e. the committee of creditors, making the resolution a creditor driven process. Since the resolution professional is an appointee of the creditors, and the IP takes over the management and supervision, the business of the company may be said to be in creditor's possession.<sup>7</sup> Section 17 of the code provides for vesting of the management of affairs of the corporate debtor in the hands of interim resolution professional. This clearly portrays the shift from the “Debtor –in –possession” model to the “creditors in control” model. Therefore the Managing Directors who worked under the control of Board of Directors, will now work under the supervision of insolvency resolution process.

However, it shall also be noted that the IP does not enjoy unfettered powers but is subject to the authority of the committee of creditors. Section 17 though provides for suspension of the powers of the Board of Directors yet clearly says that all officers and employees will report to the interim resolution professionals. Section 28 acts as a

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<sup>7</sup> Vinod Kothari and Sikha bansal, Role of insolvency professionals in corporate insolvency Resolution process, Chartered Secretary, issue March 2017

limit to the authority of the interim resolution professional which lists out various acts that shall not be performed without the prior permission of committee of creditors.

### **THE ACTS ARE MAINLY**

- Raising interim finance in excess of limits which is approved by the committee of creditors
- Altering the capital structure of corporate debtor.
- Creating security interest on corporate debtor's assets
- Amending constitutional documents of the corporate debtor and so on.

Section 20 of the code emphasize that the IP shall manage the operations of the corporate debtor on the basis of the principle of “going concern”. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of operations.<sup>8</sup>The guiding principle for IP in the resolution process is this concept of going concern. The interim resolution professional, therefore, shall administer the

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<sup>8</sup> See para 10 of the Accounting Standards (AS) 1 (Disclosure of Accounting policies), issued by the Institute of Chartered Accountants of India

company “as is”, without making any material alterations in the scale of operations of the company or selling off material value of its assets which may endanger any possibility of revival of the corporate debtor.<sup>9</sup>

During the resolution process the management and custody of assets is given to the insolvency professionals. Section 18 requires the interim resolution professional to take control and custody of any asset over which the corporate debtor has ownership rights and section 20 places an obligation on them to make every endeavor to preserve and protect the value of property of the corporate debtor. The basic objective of taking control and custody of the of the assets of the corporate debtor is to maintain adequate monitoring and proper management of the assets. It shall not be misinterpreted as a predisposal measure.

## **CRUCIAL DUTIES OF INSOLVENCY PROFESSIONAL IN CORPORATE INSOLVENCY RESOLUTION PROCESS**

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<sup>9</sup> Vinod Kothari and Sikha bansal, Role of insolvency professionals in corporate insolvency Resolution process, Chartered Secretary, issue March 2017

The role of IP is indispensable that it can be understood from the multifarious duties that are bestowed upon them.

The code confers several duties such as:

- Once an application is admitted by NCLT, required to give public announcement in two newspapers, declaring that insolvency resolution process has been initiated and on IBBI's website and debtor's website.
- Section 21 emphasizes that the interim insolvency professional shall constitute the committee of creditors after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor. In order for the performance of this duty, he should allocate adequate resources for managing which includes receiving of claims ,its comparison with the books of accounts of the corporate debtor ,reconciliation and updation of the claims collected.
- Upon receiving the claims, the IP shall constitute the committee of creditors which consists of financial creditors, within seven days of the

constitution. The IP should convey the date, venue, agenda, notice for information of committee of creditors and thus convene the initial meeting of the committee of creditors.

- He shall also collect information regarding the assets, finances and operation of the corporate debtor, which includes business operation, financial payments and operational payments and list of assets and liabilities. For which he can also seek assistance from valuers and security personnels.
- The agenda for the first meeting of committee of creditors covers mainly two topics :Firstly the proposal to ratify the expenses of the person filing the application and the other is regarding the continuation of the interim resolution professional or his replacement by another IP
- Section 25 of the code states that it shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

- Upon the commencement of the Corporate insolvency resolution process he may have to appoint security consultants to cover integrity of physical assets and appointment of key managerial persons who assist in taking care of production and other technical matters for supervising the activities in the corporate debtor company; as the powers of the Board of Directors stand suspended.
- Section 29<sup>10</sup> requires the resolution professional to prepare an information memorandum in such form and the board for the formulation of the resolution plan may specify manner containing necessary information as. Regulation 36(2)<sup>11</sup> lists out the contents of the information memorandum.
- Section 30 of the code read with regulation 38 of IBBI (insolvency resolution process for corporate persons) regulations 2016 mandates that a resolution plan must confirm to certain minimum requirements. **The insolvency professional must**

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<sup>10</sup> Insolvency and Bankruptcy Code, 2016

<sup>11</sup> IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS,2016

**check through each resolution plan and ensure that it complies with the following requirements:**

1. Provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the corporate debtor and shall also identify the sources of funds to discharge the debts.
2. Also shall provide for the repayment of liquidation value which is due to the operational creditors in priority to the financial creditors within the expiry of thirty days after approval of corporate resolution plan by the adjudicating authority
3. Also the repayment of the value of liquidation which is due to the financial creditors before making of any recoveries by the financial creditors who voted in favor of the resolution plan
4. Also, ensure that the resolution plan provides for the management and control of the affairs

of the corporate debtor after approval of the plan.

5. Does not have any information that contravenes or is inconsistent with the provisions of the law in force.
  - a. The resolution professional shall then submit the resolution plan to the committee of creditors for their approval which complies with the conditions referred hereinabove. Then after receiving their approval its submitted to the adjudicatory authority for their approval Where the resolution plan is accepted by the NCLT, the resolution professional forwards all records relating to the performance of corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board for keeping a database of it as a record. Then the key decision shall be taken as to whether to liquidate the company or to carry out a resolution process. Resolution is the preferred

alternative; liquidation is the ultimate.<sup>12</sup> There is a well-known “vertical test” used by UK courts<sup>13</sup> that in a resolution, a stakeholder shall not be put into a prejudice apropos that he would get in liquidation. Hence, a corporate may vote in favor of the resolution plan, whereby he could get a better deal out of the healthier borrower, or vote in opposition to the plan thereby avail an easy exit on the basis of his value of claim in the liquidation.

- Apart from this he also carry out other activities like filing of necessary information with information utility, examining resolution plans to see whether the resolution plans complies with the stipulations enlisted under section 30(2) of the code, making application for avoidance of preference, undervalued, fraudulent transactions etc.

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<sup>12</sup> [https:// www. icsi. edu/ WebModules/ LinksOfWeeks/ ICSI\\_ CS\\_ Mar\\_ 2017. pdf.](https://www.icsi.edu/WebModules/LinksOfWeeks/ICSI_CS_Mar_2017.pdf)

<sup>13</sup> See T & N Limited 2005 2 BCLC 488

## **ROLE OF INSOLVENCY PROFESSIONAL IN FRESH START ORDER PROCESS**

Under section 80<sup>14</sup> a debtor cannot make an application if his gross annual income exceeds Rs 60000 or the qualifying debts exceeds Rs 35000. IP may initially make an application to the NCLT on behalf of the debtor. Hence initially a debtor who is unable to pay his debts and satisfies the conditions mentioned in section 80(2) of the code shall make an application personally or through an IP. When a debtor through an IP makes an application, the adjudicating authority should direct the Insolvency and regulatory Board of India to confirm that there are no disciplinary proceedings pending against Interim Resolution Professional within seven days of receipt of application. The board may either confirm the appointment or reject the appointment and appoint another IP. IP shall examine the previously mentioned application made by the debtor for fresh start within 10 days of his appointment and submit the same to the adjudicatory authority for either acceptance or rejection of the application. The application should disclose a list of all

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<sup>14</sup> PART III, Chapter 2 of Insolvency and Bankruptcy code, 2016

debts owed by him with details of each debt, securities held by him etc (Section 81(4)). Based on the examination of the application, he shall send a report, which shall contain certain details like qualifying debts and liabilities eligible for discharge under section 92 of the code. On the admission the adjudicating authority passes an order of moratorium under section 85 and IP may file objections regarding the incorrectness in the value of debts and non inclusion of certain debts. The IP then consider all the objections and prepare a final list of qualifying debts and make an application made to the adjudicatory authority for the purpose of issue of discharge order. IP may also submit an application to the adjudicatory authority seeking revocation of the order on admission or rejection of the application for the purpose of fresh start.

### **ROLE OF INSOLVENCY PROFESSIONALS IN INDIVIDUAL INSOLVENCY PROCESS**

An Insolvency Professional may make an application for insolvency resolution process to NCLT, on behalf of the debtor who committed the default

- a. IP shall examine the application for insolvency resolution plan by debtor or creditor within 10 days of his appointment and submit a report to the NCLT recommending for approval or rejection of the application
- b. IP shall register the claim of the creditors and shall prepare a list of creditors
- c. IP shall submit the payment plan along with his report on such plan to the NCLT within 21 days from the last date of submission of claims.
- d. IP shall supervise the implementation of repayment plan. IP shall within the 14 days of completion of the repayment plan , forward to the person who are bound by the repayment plan and NCLT.

## **CHALLENGES FACED BY THE INSOLVENCY PROFESSIONALS**

The IP occupies a unique position in this institutional infrastructure and acts as an intermediary between the debtor and creditors on the one hand and the adjudicating authority on the other and functions under the watchful eyes of the agency and the board. On the commencement

of insolvency resolution process, the Board of Directors is suspended and IP is empowered to exercise the powers of the board of directors. The IP may not be having experience of the business activities of the entity; therefore, it would be very difficult to take proper decision to continue the business activities in a proper manner.

IPs have to constitute a creditor's committee for the effective insolvency resolution. The members of this committee are entitled with voting rights. They can take decision regarding the insolvency resolution by 75% majority vote and can also confirm or change the Interim Insolvency professionals as insolvency professionals. An Insolvency Professional may face challenges in getting approval from the majority creditors and failure to get consensus may result in delay of the resolution process, which is intended to complete in a time bound manner.

Once an insolvency professional takes charge of the debtors, IP may come across several undisclosed contingencies such as environmental violations, transaction with related parties, undisclosed investments etc. Insolvency professionals may face challenges in

understanding these contingencies and resolving the same in a short span of time. Another challenging duty of an IP is that they have to ensure that the officials selected are independent persons with no relationship or interest in the business enterprise and are efficient, competent and honest with good reputation, character, and integrity beyond any doubt.

With the enforcement of the code, it will not only ensure time bound settlement insolvency but will also create a comprehensive insolvency legislation which will enable faster turnaround of companies and business and at the same time revitalize the debilitating corporate market which is much required in the present economic scenario of our country and is indeed a step forward the transformation in the legal era<sup>15</sup>.The Insolvency and Bankruptcy Code assigns to achieve maximum value of the distress business to the Insolvency Professionals and despite the lot of challenges in their way , the IP are trying to achieve the same in the manner as prescribed in the code

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<sup>15</sup> [https:// www. icsi. edu/ WebModules/ LinksOfWeeks/ ICSI\\_ CS\\_ Mar\\_2017.pdf](https://www.icsi.edu/WebModules/LinksOfWeeks/ICSI_CS_Mar_2017.pdf)

## CONCLUSION

The insolvency and bankruptcy code can be considered as a significant legal reform, which is enacted for the orderly resolution of insolvency process. The scattered legislation that existed earlier on insolvency and bankruptcy has revamped by the new Insolvency and Bankruptcy code and consolidated all law under one umbrella. This code promises to bring war footing reforms with the special thrust on creditors driven insolvency resolution in a time-bound manner<sup>16</sup>. The code made the prolonged liquidation process an easier one by vesting the entire management operation of the company to an Insolvency professional. Thus, the Insolvency and bankruptcy code created a special role for insolvency professionals; it brought into being new insolvency procedure aimed to foster a corporate rescue culture and established insolvency work as a reserved activity for authorized insolvency professionals. The code is in its infancy currently, and its success will depend substantially on how well it is implemented and how well the IP's perform their function

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<sup>16</sup> [http:// icsiipa. com/ Portals/ 0/ Articles% 20% 28Sep% 2C% 202016%29.pdf](http://icsiipa.com/Portals/0/Articles%20%28Sep%2C%202016%29.pdf)

under the code. Even a cursory analysis of the SICA experience suggests that the code is a bold and imaginative step forward for insolvency resolution in India.

*“The insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interest of creditors and employees, and to ensure that the law is applied effectively and impartially”.*

- UNICTRAL Legislative Guide on Insolvency Law