

THE ROLE OF INSOLVENCY PROFESSIONALS

WITH SPECIAL REFERENCE TO THE INSOLVENCY AND BANKRUPTCY CODE 2016

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ABSTRACT

The Indian Banking Industry has always grappled with the issue of Insolvency. Ensuring an optimum cash flow is crucial for the banking sector to function productively satisfying the various stakeholders. This is one of the main reasons as to why we need to maintain financial soundness in the market economy and contain the weed of Insolvency.¹ Though various codified laws like SARFAESI², RDDB³ etc. have governed the recovery of debts, the system of dealing with insolvency underwent a drastic change with the enactment of the Insolvency and Bankruptcy (I&B) Code

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¹ [http:// www. newindianexpress. com/business/2016/dec/11 /insolvency -professionals-1547809-1.html](http://www.newindianexpress.com/business/2016/dec/11/insolvency-professionals-1547809-1.html)

² Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act

³ The Recovery of Debt Due to Bank and Financial Institutions Act

enacted on the 30th day of November 2016. The I&B Code is an Act consolidating and amending the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms & individuals in a time bound manner and for ensuring smoother settlement of Insolvency litigations by various adjudication authorities like Debt Recovery Tribunals and creation of data base of creditors. The Code provides for certain authorities through which the Insolvency and Bankruptcy process are carried out such as:

- Insolvency and Bankruptcy Board of India (IBBI).
- Insolvency Professional Agencies.
- Insolvency Professionals.
- Information Utilities.

Our paper will focus on the Role of Insolvency Professionals. Insolvency Professionals are registered members of Insolvency Professional Agencies (IPAs) under the IBBI governing the Insolvency Resolution process of corporate , individuals and partnership firms⁴. Part IV, Chapter IV of the I&B Code deals with Insolvency

⁴ [http:// m. economicstimes. com/industry /services/consultancy/-professionals-in-high-demand-cas-cost-accountants-and-company-secretaries-rush-to-get-qualified/articleshow/59624405.cms](http://m.economicstimes.com/industry/services/consultancy/-professionals-in-high-demand-cas-cost-accountants-and-company-secretaries-rush-to-get-qualified/articleshow/59624405.cms)

Professionals and Section 206 under Chapter IV of the Code mandates for compulsory registration of Insolvency Professionals. They are persons possessing qualifications and expertise in the field of finance, law, management and other specializations deemed for by the IBBI. The role of an Insolvency Profession arises wherever there is an Insolvency Resolution⁵, fresh start process⁶, liquidation or bankruptcy process⁷. An Insolvency Professional aids both corporate and individuals for insolvency resolution process under various provisions of the I&B Code.

The I&B Code, 2016 operates as a consolidated law governing insolvency and thereby avoiding the conflict of various other laws dealing with insolvency. The I&B Code has through its various provisions have taken the lead in regulating various insolvency and bankruptcy proceedings by providing for the establishment of various authorities like the Insolvency Professionals, Information Utilities etc. Since these mechanisms are required for the effective implementation of the Code, the importance of the

⁵ Chapter III Insolvency and Bankruptcy Code

⁶ Chapter II Insolvency and Bankruptcy Code

⁷ Chapter IV Insolvency and Bankruptcy Code

authorities regulating insolvency proceedings requires detailed study⁸. Insolvency Professionals are one such specialized authority who deals with creditors and perform their roles like insolvency resolution processes, fresh start process and liquidation proceedings through Insolvency Professional Agencies which in turn is working under the agencies of the IBBI. Hence, their role as an authority regulating insolvency, as an initiator and approver insolvency proceedings should be studied.

⁸ [http:// www. uncitral. org/ pdf/english/text/insolvent/05-80722-Ebook.pdf](http://www.uncitral.org/pdf/english/text/insolvent/05-80722-Ebook.pdf).

INTRODUCTION

The insolvency and bankruptcy code 2016 is the single law dealing with insolvency and bankruptcy in India. There were only few acts like Presidency Towns insolvency Act 1909 and Provincial Insolvency Act 1920. For dealing with insolvency of individuals there are provisions in the CPC⁹ and for dealing with the insolvency of the business enterprises there are special provisions in the Companies Act.

Insolvency is a financial and accounting concept wherein an entities liability exceeds its assets. Bankruptcy is a legally declared inability of an individual or organization to pay his creditors. One of the most common solutions for insolvency is bankruptcy. Bankruptcy is legal declaration of an inability to pay off debts. There are two main form of bankruptcy:

- Reorganisation bankruptcy that is debtors restructure repayment plans ensuring availability of cash.

⁹ Code of Civil Procedure 1908

- Liquidation Bankruptcy that is debtors sell certain assets in order to repay the creditors.

Bankruptcy occurs when a court has determined insolvency and has given legal orders for resolution. On declaring a person as bankrupt, the court is responsible to liquidate the personal property of the insolvent and distribute property amongst the creditors of the insolvent debtors this insolvency is a situation where a debtor is unable to meet his obligations and bankruptcy is a legal process by which an insolvent debtor seeks relief.

BACKGROUND

The Non-Performing Asset refers to a classification for loans in the books of financial institutions that are in default or in arrears on scheduled payments of principal or interest. A debt is said to be non-performing when loan payments have not been made for a period of 90 days.¹⁰ The main object of the code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a

¹⁰ Report of the bankruptcy law reforms committee dated 4th November 2015

time bound manner for maximization of value of assets of these persons, to promote entrepreneurship, availability of credit and balancing the interest of all the stakeholders.

The I&B Code is largely modelled on US Bankruptcy Law. The Code is considered as one of the major economic reform of Narendra Modi government. It is one of the Corporate Laws governing insolvency unlike the Act like SARFERASI that is mostly based on disciples of economics. A World Bank report says it takes 4 years to close down (lawfully) in India. The IB Code will make easier for the Companies to close down a business smoothly and safely sans humiliation and minimum financial loss.

NEED FOR AN EFFECTIVE INSOLVENCY AND BANKRUPTCY REGIME

The business failure affects all the stakeholders of a corporate including its lenders, shareholders, creditors, suppliers, customers, workers and central and state governments very adversely. It is, therefore, essential that the valuable resource including capital, manpower, machinery and management, are pulled out the unviable

business at earliest and are deployed in other profitable ventures.

In a situation of a corporate insolvency, the stakeholders can make rational and quick decisions to deal with the said situation that is; the decision about continuation of business, its re-organisation or its closure, a law to deal with the insolvency situation and the intervention of the courts may not be required. However, it has been observed that the stakeholders fail to take such decision to deal with the insolvency situation and the intervention of the corporate insolvency law.

An economy needs an effective Bankruptcy Law to deal with the situation where in the case of inability of a debtor to make the payment to its creditors as per the payment schedule, the right of the creditors to get the control over the affairs of the defaulting debtor does not get effected and that the debtor continues to have control over the affairs of the defaulting debtor continues to have control over the business of the defaulting debtor, however, due to inefficiency of the prevailing legal system, they are not able to get the said control without the intervention of the court. In case, the legal system provides for adequate penalty and

punishment for those who violate these contractual obligations, the intervention of the courts or the tribunals in these matters can be minimized.¹¹

It is often said that “in the absence of a bankruptcy law a firm’s assets would be sold as scrap and value would be lost”¹². As such , the law to deal with corporate insolvency and bankruptcy enables an economy to rescue the viable business and to pull out the valuable economic resources out of the unviable business through the liquidation process at the earliest without further depletion in the value of the asset so that the same can be deployed in other profitable economic activity.

THE REGISTRATION PROCESS AND QUALIFICATIONS REQUIRED FOR INSOLVENCY PROFESSIONALS

An IP is defined by section 3(19) of the Code as a person enrolled under Section 206¹³ with an IPA as its member and

¹¹ [http:// www. mlaw. gov. sg/ content/io/en/corporate-insolvency/who is or.html](http://www.mlaw.gov.sg/content/io/en/corporate-insolvency/who_is_or.html)

¹² Technical Manual of insolvency service- [http:// www. insolvency direct. bls. gov. uk/ technical manual /ch 49-60/ chapter% 2055/chapter55.html](http://www.insolvencydirect.bls.gov.uk/technicalmanual/ch49-60/chapter%2055/chapter55.html)

¹³ Insolvency and Bankruptcy Code 2016

registered with the IBBI as an IP under Section 207¹⁴. Under the IB Code, Insolvency Professionals consist of resolution professional, interim resolution professional liquidator and bankruptcy trustee. Interim Resolution Professionals is appointed by adjudicating authority under Section 16 of the IB Code based on the proposal of creditor. Under Section 9 (4) of the IB Code, the term of Interim Resolution Professional shall not exceed time of appointment. Under Section 34 of IB Code, where the adjudicating authority passes an order for liquidation of the corporate debtor, the resolution professionals appointed for the corporate insolvency resolution process shall act as the liquidator for the purposes of liquidation unless replaced by the adjudicating authority.

Resolution professionals are those professionals under the IB Code, who initiates the corporate resolution plan by creating a resolution plan or the resource plan to preserve and protect the assets of the corporate debtor including the continued business operations of the corporate debtor. Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations came into effect on

¹⁴ Insolvency and Bankruptcy Code 2016

23rd November 2016. This Board is empowered to conduct insolvency examination on its own or through a designated agency; the National Insolvency Examination or the Limited Insolvency Examination as the IBBI deems fit. The main aim of both the examination is to test the knowledge and the practical skills of individuals in the areas of Insolvency, bankruptcy and allied subjects.

Regulation 4 of Chapter III of IBBI Regulation¹⁵ provides for Registration of Insolvency Professionals; should not be a minor, should not be a person resident in India, should have the qualification and experience specified in regulation 5 or regulation 9 as the case may be, should not have been convicted by any competent court for an offence punishable with imprisonment for a term exceeding 6 months or for an offence involving moral turpitude and a period of five years has not elapsed from the date of expiry of the sentence, should not be an un discharged insolvent or has applied to be adjudicated as an insolvent, should have been declared to be of unsound mind or should be a fit and proper person. For determining whether an insolvency professional is fit

¹⁵ Insolvency and bankruptcy code 2016 and the regulation notified there under.

and proper, an inclusive criteria consisting of parameters like integrity, reputation and character, absence of convictions and restraint orders and competency including financial solvency and net worth.

Regulation 5 of Chapter III provides for qualifications and experience of Insolvency Professional like passing National Insolvency Examination, passing Limited Insolvency Examination and has fifteen years of experience in management, has received a Bachelor's degree from a university established or recognised by law or has passed the Limited Insolvency Examination and has 10 years of experience such as a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India, a Company Secretary enrolled as a member of the Institute of Company Secretaries of India, is a cost accountant enrolled as a member of the Institute of Cost Accountants of India or an advocate enrolled with a Bar Council. After conducting various exams and going through the qualifications and experience. Regulation 6 and 7 of the Code provides for the application and certificate of registration of Insolvency Professionals like submission of an application for registration to the insolvency professional

agency which will in turn submit the application along with the prescribed application fee to the board which shall be valid for a period of six months from the date of such application. Regulation 10 of the Code provides for temporary surrender of an insolvency professional or for shifting his professional membership from one IPA to another after obtaining prior permission from the board which should be approved by it within from 7 days of application.

CODE OF CONDUCT OF IPs

The Insolvency Professionals is required to abide by the Code of Conduct and bring to bear in the practice of profession. Under section 208(2) the IB Code clearly lays down five important code of conduct and they are:

- To take reasonable care and diligence while performing his duties.
- To comply with all requirements, terms, and conditions specified in the insolvency professional agency of which he is a member.
- To allow the insolvency professional agency to inspect his records.

- To submit a copy of records of every proceedings before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member.
- To perform his functions in such manner and subject to such conditions as may be specified.

Besides these requirements great emphasis is given to the integrity, objectivity, independence, impartiality, professional competency, representation of correct facts and correcting misrepresentation, observance of timelines, ability in respect of information management, observance of confidentiality etc of the insolvency professional¹⁶.

ADJUDICATING AUTHORITY UNDER INSOLVENCY AND BANKRUPTCY CODE

National Company Law Tribunal (NCLT) is the adjudicating authority under IB Code for corporate debtor. Similarly, Debt Recovery Tribunals (DRT) is the adjudicating authority for individuals. The final adjudicating

¹⁶ <http://www.muchshelist.com/knowledge-center/article/powers-and-duties-of-a-chapter-7-bankruptcy-trustee>

authority under the Code is the Supreme Court of India. The main objective of IB Code to empower finance creditors to approve resolution plans by forming a committee of creditors and the insolvency professional and reaching a consensual decision with respect to an ideal resolution plan within 180 days time and securing 75% votes of the committee; if rejected the adjudicating authority which will order for the liquidation of the insolvent corporate debtor. Section 233¹⁷ provides that no suit, prosecution or any other legal proceeding shall lie against an insolvency professional or liquidator if it is done in good faith under the code or with the frame work of rules and regulation.

LIQUIDATION AND RESOLUTION PROCESS

INSOLVENCY PROFESSIONALS AND DEBT RESTRUCTURING

IPs work hand in hand with the corporate debtor and helps in repayment to its creditors by way of debt restructuring by initiating liquidation and resolution process. In a liquidation

¹⁷ Insolvency and Bankruptcy Code 2016

proceeding the insolvency professional as liquidator sells assets of the insolvent company and uses the proceeds to pay off all its creditors in resolution process or rescue process the insolvency resolution professional gathers financial information about the debtor, verifies the claim of the creditors ,constitute a committee of creditors on the basis of creditors exposure, safeguards the estate of the debtor ,runs the business of the debtor a helps in reaching a reliable and practical resolution plan. The Code provides for a time bound mechanism for resolution of in solvency and in case of exigencies when require IP is vested with the management of affairs of the company and acts as the interim CEO of the company. He becomes custodian of the property of the company and manages the affairs of the company.

INSOLVENCY PROFESSIONAL AND FRESH START ORDER PROCESS

Fresh start order process is dealt under chapter III of the IB Code. An IP make application on behalf of the debtor, who is unable to pay debt and fulfils the conditions specified in section 80 of the Code for fresh start for discharge of his

debt. IP examines the application made by corporate debtor for fresh start up within 10 days; he submits a report to NCLT either recommending acceptance or rejection of application. He also considers the suggestions and objections made by the creditors .Then he prepares a list of qualifying debt for purpose of discharge order.

INSOLVENCY PROFESSIONAL AND INDIVIDUAL INSOLVENCY PROCESS

The IB Code provides for certain procedure for the individual insolvency process .The IP may an application for insolvency resolution process on behalf of debtor who committed default to NCLT. Then he examines the application for insolvency resolution plan by debtor or creditor within 10 days of his appointment and submits a report, the NCLT recommending for approval or rejection of the Application.

Later IP shall register the claim of the creditor and prepare a list of creditors on the basis of information of claim of creditor registered. Then he submits a repayment plan along with his report on such plan to the NCLT within 21 days

from the last date of submission of claims. After conducting a meeting with the creditors, once the plan is approved he starts the implementation and supervision of the repayment plan. Finally after the completion of repayment plan within 14 days he forwards the plan to the person who is bound by the repayment plan and the NCLT.

CHALLENGES AND OPPORTUNITIES OF INSOLVENCY PROFESSIONALS

Although the Board exercises control over the IPs through IPAs various provisions of the IB Code stipulating for a Code of Conduct and following the basic principles of fair exercise of authority, the IPs are not free from challenges to its functioning. Their challenges need attention because they deal with lakhs of rupees entrusted to them during corporate resolution process. IPs need to operate in an environment that protects loss making business undertakings and commercial enterprises. So the primary loss making entities could not be identified and which may lead to an ineffective corporate insolvency resolution process.

The IPs need to be very versatile as they should deal with insolvent debtors requiring different kinds of enterprise, manpower and expertise in the field of finance, manage valuation of assets, securities enforcement, taxation etc. The Indian law prescribes the concept of creditor -in-control where IP will act as interim CEO and take over the management of the insolvent company.¹⁸ The takeover of the management of the company becomes cumbersome especially when the insolvent enterprise does not land cooperation to the IPs thus hindering the accountability, effectiveness and practical feasibility of a consultative Corporate Insolvency Resolution Process (CIRP). The IPs need internal inputs of the company to formulate a resource plan rather than brainstorming with their own brains; thus the need to enforce a more effective consultation process. The appointment of an interim IP requires that the IBBI certify that there are no disciplinary proceedings against the IP and give specific approval for appointment of IP.¹⁹

Further disciplinary proceedings may be initiated against the IP based on an application by the creditor in cases where

¹⁸ [http:// finmin . nic. in/report/BLRC Report Vol_04112015.pdf](http://finmin.nic.in/report/BLRC_Report_Vol_04112015.pdf)

¹⁹ [http:// www. imf. org/external/pubs/ft/orderly/#institit](http://www.imf.org/external/pubs/ft/orderly/#institit)

under value transactions are not reported by them. These provisions may raise questions as to whether the IPs are exercising their role ethically as there is a chance of misuse of pecuniary assets of the corporate debtor. The burden to ensure transparency within the framework of the Code by ensuring honesty integrity and reputation of the Insolvency Professionals is also a challenge.

One important aspect of undertaking responsibility as an insolvency professional as an insolvency professional is that the responsibility for operating the enterprise is of the IP and not the creditor at whose instance the IP and not the creditors at whose instance the IP is appointed. Hence, if there is a loss due to lack of timely sales of goods with a limited shelf-life or environmental damage as a result of leakage, the liability will be of the IP as the person in charge of the business enterprise .IPs will, therefore, need to empanel managerial experts in different field who can entrusted with the functions of a business enterprise.²⁰

²⁰ [http:// www. thecompaniesact2013. com/uploads/1481524464-ibc%20Article](http://www.thecompaniesact2013.com/uploads/1481524464-ibc%20Article)

One of the eligibility criteria is that the IP should be a person resident in India; a foreign insolvency professional residing in India can be an IP if he had been residing in India for a considerable time. As more and more foreign professionals residing in India will apply for becoming an IP, the Indian manpower becomes underutilised and will lead to brain drain of Indian human resource possessing the requisite qualifications for an IP under the Code. Also the remuneration for insolvency professionals provided under the code seems to be fixed by the board without any standards of pay scale and merely based on quantum of work thus the need for a more effective pay scale fixation is necessary to ensure the accountable functioning of the Board as a regulator of the IPAs and IPs under the Code.

The insolvency professional cannot proceed against a cross-border insolvent under the Code. In the present form, the Code is not equipped to deal with cases such as of Kingfisher Airlines Chief where the debt defaulted has assets abroad. Cross Border Insolvency Proceedings would require Resolution Professionals, even if not from foreign companies to participate in proceedings in India. Whereas an insolvent debtor, even if not an Indian, so long as his

assets are in India, Insolvency Professionals can proceed against such property.²¹

Recognising the complex nature of work to be handled by an IP the Regulation provide for training of his staff including subject knowledge by the Agency. The Agency is also entrusted with the task of developing the insolvency profession of its members by organising educative programmes. This will keep the members updated on national and international development on continuous basis in the field of solvency and related issues. In this task the agency is ably assisted by an Advisory Committee of professionals and ethical conduct and observance of best practice in relation to insolvency resolution, liquidation and bankruptcy. Hence, these are the various challenges and opportunities open to the Insolvency Professionals.

CONCLUSION

The evolution of the code is the historical development for economic reforms in India, its effect will be seen in due

²¹ <http://www.ey.com/Publication/vwLUAssets/ey-interpreting-the-insolvency-bankruptcy-code>

course when the institutional infrastructure and implementing rules as envisaged under the code are formed. The effective role of insolvency professionals calls for multiple skills in the field of finance management and law. This requires a right team with combination of experts under the overall supervision of insolvency professional more over the insolvency resolution process is highly time bound and the herculean task of completing the same with the team of experts and with the corporation of debtor and creditor is going to leave a very positive impact on the overall economy in times to come .The regulators adjudicating authorities and the insolvency professionals are still in the learning stage as the law is still at infancy stage.