



## DISCIPLINARY MECHANISM UNDER INDIAN INSOLVENCY LAW

**Dr. Binoy J. Kattadiyil and CS Anu Sharma**

ICSI IIP, IPA of IBBI, New Delhi

### BACKGROUND

The Insolvency and Bankruptcy Code (IBC) with its enactment on 28<sup>th</sup> May, 2016 created a new profession of Insolvency professionals. An Insolvency Professional is the most important component of Insolvency and Bankruptcy Code who has been entrusted with a wide range of functions so as to effectively strive to maximise the value of assets of debtor during the resolution process. Be it Corporate Insolvency Resolution Process (CIRP) or Liquidation, both the process are largely executed through Insolvency Professionals. He is the fulcrum of the process and link between the Adjudicating Authorities (AA) and Committee of Creditors (CoC) as also other stakeholders.

On initiation of CIRP, National Company Law Tribunal (NCLT), Adjudicating Authority appoints an Insolvency Professional as Interim Resolution Professional, all the powers of the Board/Management of the Corporate Debtor (CD) stands suspended and gets vested to the Interim Resolution Professional. Until the appointment of Resolution Professional, the Interim Resolution Professional manages the affairs of the Corporate Debtor and takes steps for its revival. The Committee of Creditors within 30 days from the commencement of Corporate Insolvency Resolution Process appoints the Interim Resolution Professional or any other Insolvency Professional as Resolution Professional. On failure of resolution of the Corporate Debtor, the Adjudicating Authority may appoint the Resolution Professional or any other Insolvency Professional as Liquidator.

The role of Insolvency Professional is crucial, his conduct may affect the interest of various stakeholders or he may fail to comply with the provisions of the IBC, 2016 rules, regulations, guidelines or orders issued thereunder. Such an important Professional cannot be left unregulated, therefore it is necessary to have an objective, credible mechanism which does not spare any misconduct, while it does not penalize an honest conduct of an Insolvency Professional. We shall now discuss disciplinary mechanism under IBC and the disciplinary actions taken against Insolvency Professionals so far.

### DISCIPLINARY MECHANISM

The IBC consists of four pillars viz.,

- the Adjudicating Authorities (the National Company Law Tribunals and Debts Recovery Tribunals),
- Insolvency Professionals (IPs) and Information Utilities (IUs),
- Insolvency Professional Agencies (IPAs) and
- Insolvency and Bankruptcy Board of India (IBBI).

The IBBI exercises regulatory oversight over IPAs, IPs and IU. IPAs also regulate IPs. **Therefore, the IBC provides for a two-tier regulatory regime for the IPs, the IBBI and the IPAs which are regulated by the IBBI.**

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### Disciplinary Mechanism of IBBI

The process of Disciplining the IPs by IBBI is comprised in Section 217, 218, 219, 220 of the Insolvency and Bankruptcy Code, 2016, IBBI (Inspection and Investigation) Regulations, 2017 and IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017.

Complaint against Insolvency Professional	<ul style="list-style-type: none"><li>Any person aggrieved by the functioning of the Insolvency Professional may make complaint to the IBBI.</li></ul>
Inspection or Investigation	<ul style="list-style-type: none"><li>Where IBBI, on receipt of a complaint or has reasonable grounds to believe that any Insolvency Professional has contravened any provisions of the Code or the rules or regulations made or directions issued by IBBI, it may direct any person to act as an investigating authority to conduct inspect or investigation of the Insolvency Professional.</li><li>A detailed report of inspection or investigation shall be submitted to the IBBI by the Investigating Authority</li></ul>
Show Cause Notice	<ul style="list-style-type: none"><li>On the basis of report submitted by Investigating Authority or other evidences available on record, IBBI may issue show cause notice to the Insolvency Professional.</li></ul>
Disciplinary Committee	<ul style="list-style-type: none"><li>Disciplinary Committee constituted by IBBI considers the report of the Investigating Authority, reply of show cause notice submitted by Insolvency Professional and other evidences available on record. DC shall endeavour to dispose off show cause notice within six months.</li></ul>
Adherence to Principle of Audi Alteram Partem	<ul style="list-style-type: none"><li>The discretion given to Disciplinary Committee is wide, however any decision is taken by the Disciplinary Committee after giving opportunity to the Insolvency Professional to present his case .</li></ul>
Disciplinary Action	<ul style="list-style-type: none"><li>If the Disciplinary Committee is satisfied that sufficient cause exist it may:</li><li>Suspend or cancel the registration of the Insolvency Professional.</li><li>Impose penalty of three times the amount of loss caused or likely to have been caused or three times of the unlawfull gain made on account of such contravention, whichever is higher. Where loss is not quantifiable, the amount of penalty imposed shall not exceed one crore rupees</li><li>Direct the person who has made unlawfull gain or averted loss to disgorge to amount equivalent to such unlawful gain or aversion of loss.</li></ul>

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### **Can IBBI suo moto take cognisance of contraventions of provisions by the IP?**

Recently in a matter before IBBI it was submitted that IBBI cannot suo moto take cognisance without a complaint made under sections 217 and 218 of the Code against an IP. The Disciplinary committee noted that section 218 allows IBBI to order inspection or investigation either on receipt of a complaint or when it has reasonable ground to believe that an IP has contravened any provision of the law. Thus, the Board can take cognisance of a contravention suo moto and order an inspection. The Disciplinary Committee further noted that IBBI is not a Court which takes cognisance of a matter based on a complaint and decides the matter through an adversarial proceeding. It is a regulator having quasi-legislative, executive and quasi-judicial functions to ensure that the regulated entities conduct themselves in accordance with the law.

### **Can IBBI issue show cause notice without conducting Inspection or Investigation?**

A regulatory authority is expected to immediately intervene in any market manipulation and thwart any attempt of IP which can derail entire CIRP. Therefore it is illogical to conduct inspection or investigation when IBBI has evidences on record that the IP has contravened the provisions of Law. Also, Regulation 11(1) of the IBBI (IP) Regulations, 2016 provides that *“Based on the findings of an inspection or investigation, or on material otherwise available on record, if the Board is of the prima facie opinion that sufficient cause exists to take actions permissible under section 220, it shall issue a show-cause notice to the insolvency professional.”*

### **Consequences of Commencement of Disciplinary Proceeding by IBBI**

An IP may be appointed as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee if no disciplinary proceeding is pending against him. However the term ‘disciplinary proceeding’ is not defined under the Code. Therefore, IBBI issued a circular dated 23<sup>rd</sup> April, 2018 wherein it is clarified that a disciplinary proceeding is considered as pending against an IP from the time he has been issued a show cause notice by the IBBI till its disposal by the disciplinary committee.

It further clarified that an IP who has been issued a show cause notice shall not accept any fresh assignment as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee under the Code.

### **Disciplinary Actions taken by IBBI so far**

The Disciplinary Committee of IBBI passed various orders since the inception of the Insolvency and Bankruptcy Code. These orders are reasoned and contain detailed contraventions against IP, submissions made by IP, legal provisions as well as analysis and findings of the Disciplinary Committee. The role of Insolvency Professionals is also discussed in detail in these orders. The following table shows the orders passed by IBBI wherein disciplinary action was taken against the Insolvency Professional.



Date of Order DD/MM/Y	Case No.	Brief Findings	Action taken
27/04/20	IBBI/D C/23/2 020	<ul style="list-style-type: none"> <li>Despite the IBBI Circular dated 12.06.2018 clearly stating that Insolvency Resolution Process Cost (IRPC) shall not include any expense incurred by a member of CoC or a professional engaged by them, the RP charged the fee of lender's legal counsel from the Insolvency Resolution Process Cost.</li> <li>Resolution Professional, on the direction of COC, finalized the appointment of a Professional to conduct second forensic audit. The fees should have been borne by the CoC members themselves but the same was included as IRPC.</li> <li>Resolution Professional shared a confidential document i.e. Information Memorandum prior to the issue of Invitation of Expression of Interest to ensure that they would qualify as eligible prospective resolution applicants.</li> </ul>	<ul style="list-style-type: none"> <li>Suspended the registration of Insolvency Professional for six months.</li> <li>Directed the Resolution Professional to secure reimbursement of the amount which was paid to lender's legal counsel and charged to IRPC.</li> <li>Directed the Resolution Professional to secure reimbursement of the amount which was paid to professional for conducting second forensic audit and charged to IRPC.</li> </ul>
21/04/20	IBBI/D C/22/2 020	<ul style="list-style-type: none"> <li>As per IBBI (CIRP) Regulations, third valuer is to be appointed only if the estimates submitted by the two valuers appointed earlier are significantly different. The Resolution Professional permitted conduct of third valuation upon the desire of CoC despite of the fact that there was no significant difference between the two valuations. He further incurred additional financial costs upon an over-burdened CD.</li> <li>As per IBBI (Liquidation Process) Regulations, 2016, in cases where the Liquidator fees has not been decided by the CoC, then the liquidator is entitled to a fee as per the table provided in the Regulations. The IP continued to charge the same fees during liquidation process which he was charging while acting as an RP.</li> </ul>	<ul style="list-style-type: none"> <li>Directed the Insolvency Professional to deposit the amount in the Liquidation Estate of CD which he has drawn without any authorization while acting as liquidator. However, the IP can claim liquidator fees as per IBBI (Liquidation Process) Regulations, 2016.</li> </ul>
20/04/20	IBBI/D C/21/2 020	The RP had outsourced his duty and engaged IPE for verification of claims. He further included the payment made for the same in the IRPC thereby burdening theiling Corporate Debtor with additional costs.	Imposed monetary penalty of Rs. 1,00,000/- (Rs. One Lakh only).
20/03/20	IBBI/D C/20/2 020	<ul style="list-style-type: none"> <li>The IP (Liquidator) failed to publish the public announcement in the newspapers within the time prescribed.</li> <li>He engaged the services of professional for auditing financial information of Corporate</li> </ul>	Imposed monetary penalty of Rs. 1,00,000/- (Rs. One Lakh only).



		Debtor under voluntary liquidation when they were also the statutory auditors prior to commencement of voluntary liquidation which is in contravention of Regulation 11(2) of Voluntary Liquidation Process Regulations.	
14/11/19	IBBI/D C/15/2 019-20	<ul style="list-style-type: none"> <li>The IP failed to make disclosures with respect to appointment of an LLP (in which he was a partner) as an IPE contravening the directions under the Circular issued by IBBI.</li> <li>The IP allowed charging fee of Rs. 12,09,90,185/- payable to lender's legal counsel as an IRPC and abdicated his authority in favour of CoC. He paid expenses of third party from CD and included in IRPC. He deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose.</li> <li>The IP shared the fee, which can be paid only to an individual acting as an IP, with an LLP (in which he was a partner) against the provisions of the Code and the Regulations.</li> </ul>	<ul style="list-style-type: none"> <li>Imposed penalty of ten percent of the RP's fee</li> <li>Directed the RP to make good the loss by securing reimbursement and deposit the amount of Rs. 12,09,90,185/- in the account of Corporate Debtor.</li> </ul>
17/04/19	IBBI/D C/16/2 019	<ul style="list-style-type: none"> <li>The IP attempted to charge abnormally high fee in relation to the services. Besides, he acted malafide by seeking increase of his fee after approval of fee by the AA.</li> <li>He, then IRP signed the term sheet with the applicant, who is not legally competent to appoint RP or fix his fee, and thereby attempted to deprive the CoC of its legitimate right to appoint a RP of its choice and fix his fee.</li> <li>He did not cooperate with Inspecting Authority</li> <li>He filed applications for initiating CIRP of 14 CDs and proposed to appoint his spouse, as IRP of CIRP of all 14 CDs. He failed to avoid conflict of interest, and act with integrity and independence.</li> </ul>	<ul style="list-style-type: none"> <li>Suspended the registration of the Insolvency Professional for two years.</li> <li>Directed to undergo the pre-registration educational course conducted by Insolvency Professional Agency.</li> </ul>
21/02/19	IBBI/D C/15/2 019	<ul style="list-style-type: none"> <li>The IP consented to act as IRP of 15 CIRPs for which applications were filed by a professional, her husband. In the process, she compromised her independence, integrity and impartiality.</li> <li>The IP consented to act as IRPs of 15 CIRPs simultaneously, even though she has absolutely no experience whatsoever and no capacity;</li> <li>The IP contracted to act as IRPs for exorbitant of fees. It was not reasonable reflection of the work.</li> </ul>	Cancelled the registration of IP and debarred her from seeking fresh registration as an IP or providing any service under IBC for ten years.
28/01/19	IBBI/D C/14/2 018	<ul style="list-style-type: none"> <li>The IP failed to manage the operations of the two Corporate Debtors as going concern. He did not submit progress report to Adjudicating Authority in time, make public announcement in time, appoint registered valuers, prepare and circulate information memorandum, invite resolution plans.</li> <li>He resigned as Resolution Professional without prior permission of the Adjudicating Authority.</li> </ul>	Imposed monetary penalty equal to the total fee payable to Insolvency Professional and directed to undergo the pre-registration educational course conducted by Insolvency Professional Agency.



07/01/19	IBBI/D C/13/2 018	The IP displayed a laid-back attitude, gave up even before trying and practically abandoned the CIRP. During his term as RP, he did not do anything, which an RP is required to do, except having one meeting of the CoC and submitting two progress reports and, therefore, contravened provisions of sections 20 and 23 of the Code.	Imposed monetary penalty equal to the total fee payable to Insolvency Professional as IRP and as RP.
12/11/18	IBBI/D C/12/2 018	The IP connived with sole financial creditor, resolution applicant who was ineligible u/s 29A and allowed 'One Time Settlement' (OTS) in the garb of resolution plan. He did absolutely nothing either to run the business of the CD or to run the CIRP.	Cancelled the registration of the IP and debarred him from seeking fresh registration as an IP or providing any service under the IBC, 2016 for ten years.
15/10/18	IBBI/D C/10/2 018	The IP did not have a single meeting of the CoC in his term as the RP. (there was one when he was IRP). The fact that IP did not receive any resolution plan was not informed to the CoC. Instead of working for resolution of the corporate debtor, he worked for its liquidation	<ul style="list-style-type: none"> <li>Imposed monetary penalty equal to the total fee payable to IP as IRP and as RP.</li> <li>Directed to undergo the pre-registration educational course conducted by Insolvency Professional Agency</li> </ul>
06/09/18	IBBI/D C/09/2 018	An IP misled the stakeholders of the insolvency and bankruptcy by incorporating a LLP by name, "IBBI Insolvency Practitioners LLP". The name of the LLP is misleading as it gave an impression that the LLP is in some way associated with the IBBI.	<ul style="list-style-type: none"> <li>Suspended the registration of IP for three months.</li> <li>Prohibited to take any new assignment till "IBBI Insolvency Practitioners LLP" is removed from the Company / LLP Master Data of the Ministry of Corporate Affairs</li> </ul>
23/08/18	IBBI/D C/08/2 018	The IP had authorized an LLP of which he was a partner to raise invoices of his professional fees, thereby treating the profession of IP as employment under an entity. The IP was appointed and the firm was neither appointed by CoC nor NCLT.	Imposed penalty of one lakh rupees on IP.
23/08/18	IBBI/D C/07/2 018	<ul style="list-style-type: none"> <li>IBBI directed the IP to issue fresh advertisement for expression of interest (EoI) but IP did not comply with the direction.</li> <li>The IP disregarded the directions of NCLAT.</li> <li>He engaged in private communication with a financial creditor for finalizing the eligibility criteria in invitation for expression of interest (EoI) while the law required him to take approval of CoC.</li> <li>He outsourced his responsibility to a third person to certify eligibility of resolution applicants.</li> </ul>	Cancelled the registration of the IP and debarred him from seeking fresh registration as an IP or providing any service under the IBC, 2016 for ten years.



		<ul style="list-style-type: none"> <li>• He did not file applications before NCLT in respect of irregular transactions in CD even after having complete information and direction from the CoC to do so, ignoring statutory obligations.</li> <li>• He abused his authority to appoint valuers and forensic auditors who were not independent of the stakeholders.</li> </ul>	
03/05/18	IBBI/D C/04/2 018	<ul style="list-style-type: none"> <li>• The IP charged exorbitant fees. The same was not reasonable reflection of work done.</li> <li>• She misled an operational creditor to sign term sheet engaging her as RP and fixing her fees even before commencement of the CIRP.</li> <li>• She attempted to misled the stakeholders, IBBI and the Disciplinary Committee</li> </ul>	Suspended the registration of IP for a period of one year.
13/04/18	IBBI/R ef-Disc.C omm./0 2/2018	<ul style="list-style-type: none"> <li>• The IP did not consider the claim of claimant and even failed to respond to claimant despite follow up.</li> <li>• He disregarded the timelines provided under the code.</li> <li>• He disregarded repeated requests of the Board for a response on the complaint.</li> </ul>	Imposed a monetary penalty equal to one tenth of the total fee payable to him as IRP and RP.

### Can Adjudicating Authority quash Disciplinary Proceedings initiated by IBBI?

Recently in the matter of “Insolvency and Bankruptcy Board of India (IBBI) Vs. Shri Rishi Prakash Vats & Ors.” Hon’ble NCLAT held that set aside the last portion of the impugned order passed by NCLT dated 5th February, 2019 relating to quashing of all disciplinary proceedings and held that **once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the Disciplinary Authority, i.e., IBBI to close the proceeding or pass appropriate orders in accordance with law.** Such power having been vested with IBBI and in absence of any power with the Adjudicating Authority/ (National Company Law Tribunal), the Adjudicating Authority cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority/ National Company Law Tribunal.

### Disciplinary Mechanism of IPAs

The three IPAs registered with IBBI namely Indian Institute of Insolvency Professionals of ICAI (IIIPICAI), ICSI Institute of Insolvency Professionals (ICSI IIP) and Insolvency Professional Agency of Institute of Cost Accountants of India (IPAICMAI) are entrusted with the power and authority inter alia to enrol, educate, monitor, and **discipline the Insolvency Professionals enrolled with them.**

The Disciplinary Mechanism of IPAs is governed by the Bye Laws and Disciplinary Policy adopted by them. Broadly, any stakeholder aggrieved by the functioning of IP can file a complaint with the IPA with which the IP is enrolled. The Complaint is then



placed before the Disciplinary Committee constituted by IPA. The Disciplinary Committee based on the documents available on record and facts disclosed may pass an order rejecting the complaint by recording reasons in writing or initiate disciplinary proceedings against the IP by issuing show cause notice.

It is pertinent to mention that filing of complaint is not necessary for initiation of Disciplinary Proceedings by IPAs, Disciplinary proceedings may also be initiated by Disciplinary Committee based on reference made by the Grievances Redressal Committee or the Monitoring Committee constituted by the IPA, following the direction given by IBBI or any court of law or suo moto.

Though the powers of the Disciplinary Committee are wide, the principle of Audi Alteratam Partem is followed by IPAs, the IPs are heard and they are given complete opportunity to present their case. On consideration of documents available on record and after affording an opportunity of hearing to the complainant and the professional member, the Disciplinary Committee may pass any one or more of the following orders:

- reprimand;
- monetary penalty;
- suspension for a period as determined by the Committee;
- expulsion of professional member
- reference of the matter to IBBI
- any other order, as the Committee may deem fit

#### **APPEAL BY INSOLVENCY PROFESSIONALS**

It is interesting to note that there is no appellate authority available for any IP aggrieved by the decision of Disciplinary Committee of IBBI, therefore the only option available to him is to make writ petition to High Court. However, if any person is aggrieved by the decision of Disciplinary Committee of IPAs, an appeal can be made to the Appellate authority.

#### **THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (BLRC)**

The BLRC in its report dated November, 2015, emphasized on IP Regulatory Structure as follows: *“the Committee believes that a new model of “regulated self regulation” is optimal for the IP profession. This means creating a two tier structure of regulation. The Regulator will enable the creation of a competitive market for IP agencies under it. This is unlike the current structure of professional agencies which have a legal monopoly over their respective domains. The IP agencies under the Board will, within the regulatory framework defined, act as self-regulating professional bodies that will focus on developing the IP profession for their role under the Code. They will induct IPs as their members, develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary. These actions will be within the standards that the Board will define. The Board will have oversight on the functioning of these agencies and will monitor their performance as regulatory authorities for their members under the Code. If these*



*agencies are found lacking in this role, the Board will take away their registration to act as IP agencies.”*

## CONCLUSION

On perusal of the orders passed by IBBI, it has been observed that it has considered the fact that the insolvency regime in India is in its emerging phase and the profession of Insolvency Professional is also at a nascent stage, therefore low impact & indeliberate violations of law are generally excused by the regulatory authorities by merely imposing some penalty. However, if certain actions are taken by IP purposefully and it affects the profession, maximization of value of corporate debtor and violates the entire purpose of IBC, the Disciplinary Committee of IBBI took serious actions like cancellation or suspension of their registration as an Insolvency Professional.

It is clearly evident that IBBI and IPAs emphasize on ‘Self Discipline’. Every function which an IP is required to perform as per IBC requires highest level of professional competence including financial engineering and value maximization management. Therefore, an IP is expected to comply with the provisions of the law and ensure utmost integrity, objectivity, independence and impartiality.

## REFERENCES

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