

FEES UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016**Dr. Binoy J. Kattadiyil**

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A Glimpse of the Indian Insolvency law

Insolvency and Bankruptcy Code, 2016 was implemented on May 28, 2016. The Code provides a consolidated single regulatory platform for insolvency of corporate, LLPs individuals and partnership firms. With the advent of the code, there have been unprecedented changes in the landscape of insolvency laws in India. It is considered to be a well intentioned piece of economic legislation as it was implemented to address NPA issues affecting the economy. Since the inception of this ground breaking law there have been hits and misses but the code has brought a sea change in the recovery process.

It has been three years since its inception and with each passing year it has strengthened resolution of insolvencies. Though one of the key features of this law is completion of Corporate Insolvency Resolution Process (CIRP) within the specified timeline but it has not been smooth sailing. Although there has been hits and misses but still the newly implemented law has performed remarkably well. The data presented below gives the glimpse of number of CIRP cases ongoing, admitted, resolved etc. as on September, 2019.¹

Status	No. of CIRPs
Admitted	2542
Closed on Review/Appeal/ Settled	186
Closed by Withdrawal under section 12A	116
Closed by Resolution	156
Closed by Liquidation	587
Ongoing	1497

The Code has been amended thrice to make it more vibrant and effective. The Code with its inception has brought a regulated profession for individuals who are called Insolvency Professionals (IP).

Insolvency Professionals

An Insolvency Professional plays the significant role of cementing together the interests of Corporate Debtor and the creditors.

As per the report of Bankruptcy Law Reforms Committee (BLRC), “*The entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But 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 edifice of the insolvency and bankruptcy resolution process.”¹

An IP may hold any of the following roles under the Code:

- Resolution professional (RP) to resolve insolvency for a firm or an individual;
- Bankruptcy Trustee in an individual bankruptcy process;
- Liquidator in a firm liquidation process;

Fees Charged by Insolvency Professionals

As per Section 5(13)(b) of the code “insolvency resolution process costs” means – the fees payable to any person acting as a resolution professional. However, the code or regulations does not define the quantum of fees to be paid to Insolvency Professionals. Regulation 25 of the IBBI (Insolvency Professionals) Regulations, 2016 stipulates that an RP must provide services for remuneration charged in a transparent manner and is a reasonable reflection of the work which is necessarily and properly undertaken by the RP.

Should there be constraints in the fees of Resolution Professionals? As per the BLRC there should be no constraints on RP fees. In a competitive market for the insolvency professionals, the fees for managing the insolvency resolution process will converge to the fair market value for the size of the entity involved.

The Committee feels it is prudent to allow the market to develop and competition to drive charges of the RP rather than setting these in the Code, or in regulations. In any competitive market, we expect that there will be a range of services available for a range of problems. However, there is one case that will require intervention. When the insolvency is brought for resolution well within time, there is typically a sizeable amount of assets that support the fees of insolvency resolution. On the other hand, this is not the case for an insolvency that is discovered at a late stage. In a typical situation, there will have been a build up of the leverage by the entity borrowing at higher rates to make payments. Or assets may have been sold or pledged for cash to make payments. Experience from other jurisdictions suggest that there will be cases of low or no asset entities which come to the Adjudicator for resolution. In this case, the Adjudicator can approach the Regulator to recommend an RP who will be appointed with the condition that her services will be offered at a minimum charge, paid for by the Regulator. The requirement to offer to serve in a minimum number of such cases will be part of the requirements of continuing registration for the insolvency professional.

-Report of the Bankruptcy Law Reforms Committee, November 2015

An Insolvency Professional (IP) shall ensure that fee payable to him is reasonable, but also other expenses incurred by him are reasonable. Though the code does not sets the

¹ Data as per IBBI Newsletter Jul-Sep-2019



quantum of fees to be charged by the Resolution Professionals but an IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. Insolvency and Bankruptcy Board of India (IBBI) has issued circular² directing Insolvency Professionals to disclose their fee and other expenses of in relevant form for their concluded and ongoing resolution process within a specified timeline.

The circular aims at laying down an indicative set of guidelines to regulate the fees and other expenses incurred during the CIRP of a Corporate Debtor.

Key Highlights of the Circular on Fees and Expenses:

• IP is directed to ensure that the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable.
• IP is directed to ensure that no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the insolvency resolution process cost.
• IP is directed to ensure that written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained
• IP is directed to ensure that approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required
• Insolvency Professionals shall disclose fees and other expenses to the Insolvency Professional Agencies (IPA) of which he is a member
• Insolvency Professional Agency shall disseminate the disclosures made by its IPs on an appropriate electronic platform
• Insolvency Professional Agencies shall monitor the disclosures made by its IPs

The fees charged by Insolvency Professionals monitored well and relevant action is taken for charging exorbitant fees. The other side of the coin reflects Insolvency Professionals struggling for the payment of the services rendered by them. The circular clarifies about the kind of expenses which can be incurred by the Resolution Professional towards the insolvency resolution process cost. The Regulator can take necessary action whenever it comes in the notice that fees charged by the Resolution Professional is not reasonable reflection of work done by the respective professional.

Necessary actions taken against Insolvency Professionals for charging exorbitant fees:

✚ **In the matter of Bhavna Sanjay Ruia :** In one of the matters it was observed by the The fees charged was 5 Cr till first CoC + 1.75 Cr. for subsequent meetings. However, the total outstanding debt was 4.16 Crore only. IBBI vide its order dated 03.05.2018 in the matter of Bhavna Sanjay Ruia held that IPs shall charge

² As per IBBI Circular dated June 12, 2018 on Fee and other Expenses incurred for Corporate Insolvency Resolution Process



reasonable fees which should be the reasonable reflection of work done. They suspended her for 1 year to strengthen her competency and ethical standards.

Additionally, IBBI on 21.02.2019 passed another order against (Bhavana Sanjay Ruia, who consented to act as IRP of 15 CIRPs for which applications were filed by a professional, who is her husband. In the process, she compromised her independence, integrity and impartiality, even though she has absolutely no experience whatsoever and no capacity. While the Code aims to rescue the ailing CDs, such conduct of an IP ensures just the opposite. That is why the law prohibits an IP from taking too many assignments, if he is unlikely to devote time to each of his assignment. IBBI debarred her for 10 years.

- ✚ **In the matter of Punjab National Bank Vs. Divya Jyoti Sponge Iron Pvt. Ltd:** The AA took notice of fixation of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind as regards fate of CD, the volume, nature and complexity of CIRP. It observed that it is time to have legitimate guidelines or regulation in this regard so as to safeguard and to ensure the prospects of revival of a dying CD not be at the highest cost which cannot be affordable by the CD

An International Perspective- Insight into US Bankruptcy Law³

Chapter 11 of the US Bankruptcy Code deals with reorganization which is considered to be like insolvency resolution process in India. A bankruptcy trustee is a person who is appointed by the United States Trustee, an officer of the Department of Justice, to represent the debtor's estate in a bankruptcy proceeding. Bankruptcy trustees evaluate and make recommendations about various debtor demands in accordance with the U.S. Bankruptcy Code.

As per Section 330 of Chapter 11 of US Bankruptcy Code, the Court in determining the amount of reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including:

- the time spent on such services;
- the rates charged for such services;
- whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of a case
- whether the services were performed within a reasonable amount of time commensurate with the complexity, importance and nature of the problem, issue, or task addressed

³U.S. Code Title 11—BANKRUPTCY



- with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field;
- whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners.

Except for reimbursement of actual and necessary expenses, the court shall not allow compensation for:

- unnecessary duplication of services; or
- services that were not: reasonably likely to benefit the debtors estate or necessary to the administration of the case.

As per US Bankruptcy Law in every bankruptcy case, the retention of estate professionals must be approved by the bankruptcy court. Their fees and expenses are paid out of the debtor's bankruptcy estate and are subject to review and approval by the bankruptcy court pursuant to Section 330 of the Bankruptcy Code.

Conclusion

Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process. Since an Insolvency Professional plays a such significant role in reorganisation or resolution of an entity so it should be ensured that rescue plan includes rescue of finances as well. As per the Code of Conduct for IPs in the Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. As Code does not lays down any standard for payment of fees or charging of fees, the act by the Insolvency Professional in this regard should be reasonable. While Insolvency Professional are being punished for the charging of exorbitant amount there should be measures to ensure that professionals who follow ethical standards are paid for the services rendered by them.

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