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INSOLVENCY PRACTITIONERS GROUP

INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

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FOREWORD

INSOL International's Insolvency Practitioners Group (IPG) has decided to prepare a publication that explores the roles and tasks of insolvency practitioners in various jurisdictions. The result of IPG's research is contained in this publication.

Worldwide, insolvency practitioners have similar objectives: to provide all stakeholders with the best possible outcome from the restructuring / insolvency mandate. Interestingly, however, in practice, the manner in which insolvency practitioners operate can vary significantly from jurisdiction to jurisdiction. For instance, many jurisdictions have a myriad of options available which are geared to achieving a maximum payout to creditors. The question to address is whether these procedures are used regularly and are they effective in practice?

Other distinguishing factors include, the manner in which insolvency practitioners are appointed, to whom these office holders must report and how regularly, the effect that a restructuring would have on employees, suppliers and other related parties, the extent and ability to investigate the management and directors, the manner in which claims are dealt with both locally and cross-border and many other aspects which an insolvency practitioner must deal with in the fulfillment of his / her mandate. Other important aspects include what qualifications an insolvency practitioner must have to be able to practice, the need to belong to an accredited member association and the manner in which practitioners are remunerated.

This publication strives to provide a comprehensive overview of the issues stated above and provide answers to these questions in multiple jurisdictions. We hope the readers will find the information useful in their daily work.

Through its excellent network, INSOL International has identified seasoned experts around the globe who have been willing to contribute to this publication. This publication is the product of their hard work and efforts. A big thank you goes out to all the contributors for making this publication come to fruition. Much gratitude is also owed to Dr Sonali Abeyratne, Sarah Mylott and Jelena Wenlock for their invaluable support and assistance in getting this publication completed.

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INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

INDIA

1. Insolvency procedures

1.1 What drives the decision in your jurisdiction to use certain insolvency procedures?

In India, there are six major processes for corporate insolvency and / or resolution:

- Creditors Schemes of Arrangement (SoA);
- Resolution in terms of the Reserve Bank of India's Prudential Framework for Resolution of Stressed Assets (Prudential Framework);
- Corporate insolvency resolution process, under the (Indian) Insolvency and Bankruptcy Code, 2016 (Code) (CIRP);
- Prepackaged insolvency resolution process under the Code (PPIRP);
- Insolvent liquidation under the Code (Liquidation); and
- Voluntary liquidation under the Code (Voluntary Liquidation).

The key factors driving the decision to use a particular process for resolution / restructuring / wind down include availability of a moratorium, number of creditors interested in the insolvency proceeding, type of creditors, need for extinguishment of past liabilities and the costs involved in resolving the debt. A comparative analysis of the presence of these factors in each of the aforesaid processes is presented below:

Insolvency procedure	Availability of moratorium	No. of creditors	Type of creditors	Extinguishment of liabilities	Costs
SoA	No	Number of creditors may vary. Generally initiated by a class of creditors	All types of creditors are allowed to participate	Not automatically available	Comparatively inexpensive
Prudential Framework	No Creditor banks may contractually agree not to enforce security / take precipitative steps under appropriate inter-creditor arrangements	One creditor/ bank can initiate but requires consensus of 75% in value and 60% by number	Only entities regulated by the RBI are permitted to participate	Not available	Comparatively inexpensive
CIRP	Yes	Generally initiated by one creditor, but interests of all creditors involved	All creditors are allowed to participate	All previous liabilities are extinguished, and the company starts on a clean slate	Expensive

Insolvency procedure	Availability of moratorium	No. of creditors	Type of creditors	Extinguishment of liabilities	Costs
PPIRP	Yes	Generally initiated by the company with consent of 66% unrelated creditors, but interests of all creditors involved	All creditors are allowed to participate	All previous liabilities are extinguished, and the company starts on a clean slate	Expensive
Liquidation	Yes	Generally initiated by one creditor, but interests of all creditors involved	All creditors are allowed to participate	Previous liabilities cease to exist, except when Liquidation is done as a going concern or a SoA is employed in Liquidation	Expensive
Voluntary liquidation	No	Initiated by the company itself, but interests of all creditors involved	All creditors are allowed to participate	Previous liabilities cease to exist	Expensive

1.2 Are certain procedures listed but hardly ever used for a corporate insolvency? If so, what are the reasons for non-use of these procedures?

PPIRP is a corporate insolvency procedure presently available only for entities which are classified as micro, small or medium enterprises (MSMEs). PPIRP was introduced in April 2021. As of 31 March 2023, only four applications for PPIRP appear to have been admitted, out of which one has been withdrawn and only three continue with the process.

PPIRP has not been a popular procedure for resolving corporate insolvency for the following reasons (amongst others):

1) PPIRP has been introduced as a mechanism for the resolution of MSME debtors only. With such debtors having exposure to fewer creditors, it has been observed that bilateral restructuring is more common (and more efficacious and cost effective) for restructuring of such exposures;

2) PPIRP follows a "debtor in possession model" in which the defaulting promoters and board of directors are allowed to manage the day-to-day operations of the company and have control over its assets. This may lead to apprehensions of mismanagement and self-dealing behaviour during the moratorium period; and

3) The process for a PPIRP still requires companies to provide a declaration as to there being no "avoidance" (i.e. preferential, extortionate credit, undervalued and fraudulent) transactions, which several promoters may be apprehensive to provide.

1.3 For those procedures that are used more often, what are the foremost reasons to use the procedures?

- Is it an immediate liquidity event,
- a foreseeable liquidity event (but not yet immediate) or
- do you see other drivers (e.g. incentives for directors to file for administration to avoid insolvent trading liability)?

Of the procedures identified above, the preferred procedures are CIRP and Liquidation. Since the implementation of these processes, a total of 6,567 CIRP processes had been initiated as of March 2023, out of which 4,514 have been concluded. A total of 677 cases have ended in successful resolution of the company and 2030 ended with the Liquidation of the company, which accounts for more than 40% of all closed insolvency processes.[1]

The foremost reasons for the use of CIRP and Liquidation are:

- availability of a court-imposed / statutorily available moratorium, which prohibits any adverse actions against the company;
- provision for reversal of avoidance transactions;
- active involvement of creditors and the ability of creditors to drive the process;
- court sanctioned whitewash of all existing liabilities at the end of the process; and
- appointment of an independent resolution professional (RP) appointed by the Committee of Creditors (CoC) to run the affairs of the company.

1.4 In practice, is the role that the IP has or can play, a factor that is of relevance when determining whether or not to apply for certain types of insolvency procedures?

The IP does not have any role to play in SoA and Prudential Framework processes. While the IP has a substantial role to play in CIRP, Liquidation, Voluntary Liquidation and PPIRP, the basic premise of which remains largely unchanged, irrespective of the process – the role and scope of work of an IP is almost never a factor in determining the type of insolvency procedure which is to be utilised.

2. Appointment

2.1 Aside from formal qualifications, are there any "soft" requirements in order to be able to take appointments as an IP? For instance, does an IP need to have gained prior experience in another field or under the supervision of a more seasoned IP?

The regulations governing IPs prescribe the minimum qualifications and experience required for appointment of an IP. However, there are certain soft requirements, which are considered by creditors when appointing an IP. These soft requirements include commercial considerations such as the track record of the IP, the experience that the IP has, any disciplinary proceeding pending against them, and the number of assignments being handled at a given time.

2.2 Does the appointing body take prior experience into consideration when appointing an IP?

The appointing body, which is the National Company Law Tribunal (NCLT), does not take prior experience into consideration before appointing an IP. It is the creditors who will nominate an IP they believe has the appropriate experience and track record.

1 Pg 13, IBBI Quarterly Newsletter, January-March, 2023, Available at: https://ibbi.gov.in/uploads/publication/51cd3268be50c04f9745bb3959b09a89.pdf

2.3 If stakeholders do not appoint the IP, can stakeholders influence who gets appointed? If so, how does this work in practice?

The applicant creditor typically nominates the IP, which is confirmed by the tribunal (when the CIRP process is commenced). Then the CoC confirms the name of the IP who gets appointed as the RP.

The Code provides that at any time during the continuation of an insolvency process, the creditors may, by passing an appropriate resolution with the requisite majority, make an application to the NCLT for the replacement of the existing IP with another IP.

2.4 How does your jurisdiction safeguard that an IP is impartial? Are there any conflict rules and independence requirements, or restrictions on accepting an appointment? If so, how do they work in practice?

The Insolvency and Bankruptcy Board of India (IBBI) has prescribed a code of conduct in schedule 1 of the IBBI (Insolvency Professionals) Regulations (IP Regulations), which contains provisions for ensuring the independence and impartiality of the IP, which amongst others prescribe that the IP must:

- not cause undue preference or gains for any person(s);
- act with objectivity in all professional dealings without any bias, conflict of interest, coercion, and undue influence;
- conduct the CIRP independently and without external influences;
- not misrepresent any facts or situations and refrain from being involved in any action that would bring disrepute to the profession;
- render competent professional service;
- inform relevant stakeholders of any misapprehension or wrongful consideration of a fact of which they become aware, as soon as may be practicable; and
- not act with *mala fide* or be negligent while performing functions and duties under the Code.

Further, the regulations framed by the IBBI also prohibit an IP from appointing any of his related parties as any of the professionals associated with the insolvency procedure.

3. Dismissal

3.1 Assuming that an IP can be dismissed upon the request of a creditor (or the debtor), in what circumstances can a request be made and how does this practically work?

Where at any time during the CIRP, the CoC is of the opinion that an RP is required to be replaced, it may replace him by passing a resolution with a 66% voting share, which then is required to be confirmed by the NCLT. Similarly, a liquidator can be replaced through a similar process, i.e., the stakeholders' consultation committee (SCC) passing a resolution with a 66% voting share and then subsequent confirmation by the NCLT.

It is the commercial decision of the CoC to replace the RP and there are no reasons specified under the Code. Unlike a RP, the provision for replacement of a liquidator was introduced only in September 2022.

3.2 Does dismissal occur often? If so, what are the consequences (if any) for the IP being dismissed?

For RPs, a perusal of the NCLT orders and public data shows that replacement is not very frequent, and when applications are filed, they are mostly approved as a matter of procedure if the requirements under

the law are met. In most orders, the reason for replacement is not mentioned. In orders where reasons are mentioned, they do not indicate any specific trend. The reasons include the RP not disclosing before the NCLT that they were undergoing contempt proceedings, disagreement over the proposed fee structure, RP being involved in certain malpractices etc.

For Liquidators, the orders which cited reasons included: the Liquidator not acting in the interests of the stakeholders, not possessing a valid 'Authorisation for Assignment' etc.

The consequences of an IP being dismissed as an RP are not specified explicitly under the Code. However, if there have been violations or non-compliance of the provisions of the Code or the regulations, the IBBI may take such actions including discplinary actions and may pass such orders including levy of penalties, as it deems fit. The process for disciplinary proceedings is completely different from replacement of the RP; each can happen without the other, and it is not necessary that replacement will lead to disciplinary proceedings.

3.3 How easy or difficult is it to hold an IP accountable in your jurisdiction and what other measures are available to do so?

Please refer to the response to Question 5.

4. Role of the IP

4.1 Aside from the formal / statutory requirements, how does an IP – in practice – perform their role? Is the IP 'self-starting' with a focus on (for instance) realising assets or is the IP more prone to await and act upon instructions by creditors or the court?

In conducting a CIRP of a company, an IP may act as an Interim Resolution Professional (IRP) or RP. As IRP / RP, a complete range of statutory and legal duties / powers is vested with them. They manage the affairs of the company, exercise the powers of its board of directors and comply with applicable laws on behalf of company. They are entrusted to protect and preserve the value of assets of company, manage its operations as a going concern and facilitate the CoC in taking prudent decisions for resolution of insolvency and also check for preferential, undervalued, fraudulent or extortionate credit transactions. For efficient conduct of the process, an IP is entrusted to perform other key activities including making public announcements, verification of claims, preparation of information memorandum, raising interim finance, appointing valuers, inviting prospective resolution applicants to put forth their resolution plan, etc. The Code empowers an IP to appoint professionals, seek cooperation from personnel of the company and seek orders from the NCLT in case of any preferential, undervalued, extortionate, or fraudulent transaction. An IP acts as a link between the NCLT and CoC as also other stakeholders. Thus, an IRP / RP is tasked with conducting and facilitating the CIRP while attempting to address and balance the interests of all stakeholders. The CoC, has been provided with adequate powers to oversee and influence the process under the Code. Most of the significant decisions in a resolution process cannot be taken without the approval of a majority comprising a 66% voting share of the CoC.

During Liquidation, an IP acts as a Liquidator and has three broad responsibilities of claim adjudication, sale of business / assets and distribution of liquidation proceeds. For performing these functions, a Liquidator is entrusted to make a public announcement inviting claims, verify claims, take into their custody or control the assets of the company, form a liquidation estate and endeavour to sell the assets of liquidation estate through public auction, in consultation with the stakeholders' consultation committee. For efficient reporting, a Liquidator is required to maintain registers and books of accounts of the company, prepare reports and submit before NCLT. The Code empowers a liquidator to appoint professionals, seek direction to secure cooperation from personnel, auditor, promoter, partner, IRP, RP of a company. A Liquidator may also seek orders from the NCLT in case of any preferential, undervalued, extortionate, or fraudulent transaction. Upon realisation of liquidation estate, the Liquidator will distribute the sale proceeds among the stakeholders as per the relevant order of priority. On completion of the Liquidation, the Liquidator applies with the final report to NCLT for closure of the Liquidation and dissolution of the company. The SCC, which is constituted during Liquidation, provides advice to the Liquidator in running the Liquidation.

4.2 Do IPs have much leeway to determine the manner in which they perform their tasks?

An IP in the CIRP and the Liquidation has a great deal of leeway to perform their role as they deem fit within the framework provided under the Code and when read with the regulations made thereunder.

5. Investigations

5.1 Does an IP also have an inquisitive role?

The Code and the regulations made thereunder mandates the IP to determine if the company has been subjected to any avoidance transactions such as preferential transactions, fraudulent transactions, undervalued transactions, and extortionate transactions in the past. Where such transactions are identified, an IP is obliged to file an application before the NCLT for appropriate directions. As of 31 March 2023, around 871 applications have been filed by IPs in various matters, of which around 163 applications have been disposed of. The law enables these proceedings to be continued even after the CIRP and the Liquidation has been completed.[2]

5.2 Does the IP have an obligation to conduct investigations, or is the IP otherwise generally prone to investigate issues surrounding the insolvency and institute claims as a matter of practice? If so, how often does this occur and is an IP often successful?

Please refer to the response to Question 5.1.

6. Supervision

6.1 How on a practical level is supervision of an IP organised?

IPs are (a) enrolled with the insolvency professional agency (IPA) (the front-line regulator registered with the IBBI); and (b) are registered with the IBBI. The IPA as well as the IBBI require the IP to file various forms periodically.

Further, the IBBI has, by way of regulations prescribed a code of conduct for IPs. Failure to comply with the Code and the regulations may result in initiation of disciplinary actions and / or levy of fines against the IP by the IBBI or the IPA, as the case may be.

As of 23 May 2023, the IBBI has concluded 189 disciplinary actions against several IPs on account of failure to comply with the provisions of the Code and in several of these disciplinary actions, the registration of seven IPs has been cancelled through disciplinary actions and the registration of two IPs has been cancelled on account of failing to fulfil the requirement of fit and proper status.[3]

6.2 Is the supervising body sufficiently equipped to perform its role and do IPs experience that they are genuinely supervised?

The quality of supervision by the IPA and the IBBI is high and they are sufficiently empowered under the Code, read with the regulations and by-laws, to monitor any violations and / or non-compliances, if undertaken by the IPs.

The IPAs and IBBI are also empowered to conduct a fair process of determining if the IP has violated the provisions of the Code or the rules and regulations framed thereunder or the code of conduct for IPs through a fair process, and upon establishment of such violation or misconduct may take appropriate actions. The general experience among IPs, therefore, is that they are genuinely supervised.

2 Pg 17, IBBI Quarterly Newsletter January-March, 2023, Available at - https://ibbi.gov.in/uploads/publication/51cd3268be50c04f9745bb3959b09a89.pdf

3 https://ibbi.gov.in/en/orders/ibbi?title=&date=&order=42

6.3 Do stakeholders have sufficient ability to act against or correct the IP if and when this is deemed necessary? If so, how is this achieved?

Stakeholders can act against an IP by filing complaints and grievances with the IBBI or the IPA (with which the IP is registered), as the case may be. The Code allows any person aggrieved with any compelling issue, to file a complaint / and or grievance with the IBBI. A complaint may be filed with a payment of INR 2,500 in the prescribed format provided under the regulations. The regulations also allow for filing of a grievance without any fee. The IBBI has developed a fully online portal enabling stakeholders to file and then track the status of their complaints / grievances. Complaints may also be filed with the IBBI through:

a) the Centralised Public Grievance Redress and Monitoring System (CPGRAMS) portal;

b) references received from other statutory authorities; and

c) emails / letters from stakeholders.

The IBBI may forward grievances to the concerned IPA for appropriate redressal depending on the gravity of the grievance. The IBBI also retains the ability to seek clarifications and reply(ies) from the concerned IP on the allegations made. Based on the reply of the IP, allegations raised in the complaint / grievance are examined. After the examination of the complaint / grievance, a preliminary opinion is formed on whether a case is likely to exist against the IP. The fee of INR 2,500 is refunded to the complainant if the complaint is found not to be frivolous. The outcome of the complaint is also communicated to the complainant. In the event the complainant is unsatisfied with the outcome of the complaint or decision of the IBBI, the complainant may also prefer review of the decision of the IBBI. This review is required to be disposed of with a reasoned order within 30 days. In the event the IBBI observes *prima-facie* contravention by the IP, it will conduct an inspection of the IP in accordance with the regulations. The draft report of inspection is shared both with the IP and the IBBI before finalisation to mitigate the risk of mistakes / omissions. After considering the findings of the inspection / investigation, the IBBI will issue a show cause notice (SCN) to the IP, if any violation of the provisions of the law has been found. In cases where no adverse observations are made in the inspection / investigation report, the IBBI closes the said inspection / investigation. When a SCN is issued to an IP, he is barred from undertaking any new assignments and is required to submit a written defence. The matter is then referred to the Disciplinary Committee (DC) of the IBBI. The DC, after considering the SCN and representation made by the IP, disposes the SCN within 180 days through a reasoned order, after providing an opportunity of a personal hearing to the IP. The order passed by the DC may provide for cancellation / suspension of registration, imposing monetary penalty or any other penalty, issue warning, or any other action deemed appropriate. The DC also has the option to dispose off the matter without any directions.[4]

7. Disclosure obligations

7.1 Assuming that an IP is obliged to make (periodic) public disclosures for the benefit of creditors / interested parties, do these public disclosures provide sufficient insight into how the insolvency matter is developing? Are they sufficiently detailed and accurate?

IPs are required to make periodic public disclosures, based on achieving certain milestones in the CIRP / Liquidation. These disclosures begin with a public announcement within three days of the date of commencement of the CIRP or five days of the commencement of the Liquidation and include public disclosures for invitation of expressions of interest, a list of eligible resolution applicants and a list of the creditors of the company.

These public disclosures are sufficient to give a broad overview of the process and the stage at which the process currently stands. They are also accurate but not very detailed and therefore, taking a detailed view of the insolvency process solely on the basis of these public disclosures may not be advisable.

4 https://ibbi.gov.in/uploads/whatsnew/2022-03-31-175639-ehvtj-7359d4fd688e6b516e5f7a19b8694087.pdf

8. Influence by creditors

8.1 Assuming that creditors' committees can be formed, do they in practice have sufficient ability to oversee and / or influence the process? If so, how?

The Code provides for mandatory formation of the CoC for effectively conducting the CIRP. The CoC consists of all financial creditors of the distressed company.

The CoC has been provided with adequate powers to oversee and influence the process under the Code. Most of the significant decisions in a resolution process cannot be taken without the approval of a majority comprising a 66% voting share of the CoC. These decisions include the issue of the invitation for expressions of interest, determining eligibility criteria, inviting resolution plans, finalising the evaluation matrix, approving a resolution plan, negotiating with potential bidders etc. In certain cases, such as the withdrawal of an application for initiation of insolvency (after such application has been admitted) the approval of a majority of the CoC comprising a 90% voting share is required.

The CoC also has the power to remove and replace the IP in charge of conducting the process. Further, certain decisions such as raising interim finance and the creation of security over assets of the company, which, cannot be undertaken without approval of a majority comprising a 66% voting share of the CoC.

A similar committee, the SCC, is formed during Liquidation. However, the SCC does not have significant control / oversight of the process. The advice given to the Liquidator by the SCC is not binding and the Liquidator is only required to provide valid reasons for not accepting the advice of the SCC.

IPs are additionally regulated by a code of conduct, prescribed in the IP Regulations, pursuant to which they must amongst others:

(i) act with objectivity, without any bias, conflict of interest, coercion, and undue influence;

(ii) not misrepresent any facts or situations and refrain from being involved in any action that would bring disrepute to the profession;

(iii) not cause undue preference or gains for any person / s; and

(iv) not act with mala fide or be negligent while performing functions and duties under the Code.

9. Remuneration

9.1 Is IP remuneration an issue in your jurisdiction? If so, are Ips insufficiently remunerated?

An IP performs two roles during the CIRP, an IRP and RP. An IRP is recommended by the applicant filing the application for initiation of CIRP and is appointed by the NCLT until an RP is appointed by the NCLT, as recommended by the CoC.

The fees of an IRP are fixed by the applicant filing the application or by the NCLT where the applicant has not fixed the fees. However, only such fees are paid from the company as ratified by the CoC. The fees not ratified by the CoC are borne by the applicant. On the other hand, the fee of an RP is fixed by the CoC.

The remuneration payable to IPs is paid from funds available with the company, contributed by the applicant or members of the CoC and / or raised by way of any interim financing. The remuneration of the IP is the highest-ranking claim in the CIRP.

Common issues that arise in relation to IP remuneration include:

(i) disputes in relation to the fixation of fees;

(ii) questions on level of fees sought; and

(iii) delays in payment of fees.

After recent amendments to the regulations, specific guidelines have been established on the minimum fees chargeable by IPs at various stages of the CIRP. The CoC or the applicant has discretion to fix such higher fees as may be agreed amongst them. The CoC or the applicant also has discretion to provide for performance linked incentive fees for timely resolution or value maximisation or any other structure, as may be agreed, but not exceeding INR 50 million.

In addition to the above, in a Liquidation, Liquidators under the regulations may be paid either based on a fee fixed by the CoC or where the CoC has not fixed such fees, based on the certain percentage of the amount realised and linked to events such as the realisation and distribution of assets. In this situation, instances of delayed payment are being faced by Liquidators.

9.2 Are IP fees something stakeholders can object to? If so, does this occur often (and successfully)?

The fees of an IP and the expenses incurred by them are fixed by the applicant or the NCLT or the CoC, as the case may be. Typically, instances where the stakeholders have objected to IP fees are rare, as remuneration is fixed by them.

However, stakeholders have the right to raise objections if, at the time of filing an application, the applicant sets certain fees for an IRP that is later not fully approved by the CoC due to the exorbitant expenses incurred. In such cases, the CoC can object to the fees proposed by the applicant and may agree to ratify only a reasonable amount that appropriately reflects the work performed.

Further, since the IBBI holds regulatory oversight over the working practices of IPs,it has taken a strict stance on IPs charging excessive fees and has implemented certain measures accordingly. Additionally, the IBBI, through the regulations has provided guidance on the process of determining the remuneration of an IP and other professionals appointed by him. It broadly provides that the fees and costs charged by an IP must be transparent and a reasonable reflection of the work necessarily and properly undertaken.

9.3 Are there any means for an IP to obtain state funding for remuneration and / or investigations?

There is no state funding for the lost remuneration of IPs and / or any related investigations provided in this regard. However, as a practice, for pursuing the associated litigation, typically, the CoC agrees to a litigation corpus, which is provided by the successful resolution applicant along with the pay-out to the creditors, to support the pursuit of legal actions.