

## Conduct of Insolvency Professionals

[pointers emanating from the orders of disciplinary committee of IBBI]

Contributor: Sumit Binani, Insolvency Professional; sumit\_binani@hotmail.com, +919830810003

### Prologue

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC” or “the Code”) has been hailed as one of the biggest legal reforms in the economic progress of India in the recent times. A key supporting institution under the Code is the insolvency profession. An insolvency professional (IP) exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. He conducts the entire insolvency resolution process: he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors, financial as well as operational, and resolution applicants. The law has casted many duties and responsibilities on the IP and expects him to conduct with the highest level of professional excellence. The law facilitates and empowers the IP to discharge his responsibilities effectively. The Code also has several provisions to ensure his integrity, objectivity, independence and impartiality. It also requires him to be a fit and proper person. It is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.

**The BLRC** in its final report, emphasized the role of an IP as follows: “The 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.... In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realization proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.....This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time.”

It further states: “The IP makes sure that assets are not stolen from the company and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges... These IPs will be delegated the task of monitoring and managing matters of business by the Adjudicator, so that both creditors and the debtor can take comfort that economic value is not eroded by actions taken by the other.”

**The UNCITRAL Legislative Guide on Insolvency Law** spells out the role of an 'insolvency representative' as follows: “[T]he insolvency representative plays a central role in the effective and efficient

implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”

**The International Monetary Fund** described the role of a liquidator and the administrator in effective implementation of the law as follows: “As court-appointed officials, they have an obligation to ensure that the law is applied effectively and impartially. Moreover, since they normally have the most information regarding the circumstances of the debtor, they are in the best position to make informed decisions.”

In order to ensure that an IP performs his role, the law empowers the Insolvency and Bankruptcy Board of India (IBBI) and the Insolvency Professional Agency (IPA), part of a two tier regulatory regime under the Code, to monitor his performance. It provides for appropriate sanctions for any kind of wrongdoing. In the words of Dr M.S. Sahoo, the Chairperson of IBBI, *“The insolvency profession is in its infancy. It is in a stage in which reputation is formed. Once the society forms a perception about a profession, it is very difficult to change it. It is, therefore, incumbent upon the IPs to build and safeguard the reputation of the profession which should enjoy the trust of the society and inspire confidence of all the stakeholders. They must justify the exalted status of an institution bestowed on them under the Code.”*

It is with the above objective, right since the inception of the insolvency profession, the IBBI and IPA have been watchful of the conduct of the IPs on a regular basis. The Code, clearly requires special class of IPs as they are one of the four crucial pillars upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.

The appointment and removal by the Adjudicating Authority secures and sanctifies the position of IP. He has protection for actions taken in good faith. His conduct can be investigated only by the IBBI/IPAs which have to follow a due process for the purpose. There is bar on trial of offences against an IP except on a complaint filed by the IBBI.

Through this article, the author attempts to compile the contraventions by the IP vis a vis the expectations, duties, responsibilities and obligations of an IP as laid down in the various orders of the Insolvency and Bankruptcy Board of India (IBBI) since the inception of the Code. Although I have chosen not to include the specific penalty against each of the specific contravention but for the information of the readers, while imposing penalties (warning/fine/suspension whether temporary or permanent), the Disciplinary Committee (DC) of IBBI has been conscious of the fact that the profession of IP is in a stage in which IPs are striving to learn. Stricter penalties were imposed when DC observed mala-fide intentions. In case of bona-fide conduct, the DC has taken a lenient view while passing its orders and imposing penalty on contraventions.

A table of contraventions with [hyperlinks to the analysis](#) covered in this document is provided below for your ready reference:

Sr No	Nature of Contravention	Page
1	<a href="#">Non acceptance of claim by RP and failure to respond to claimant</a>	4-5
2	<a href="#">IP resigned before completion of CIRP</a>	6
3	<a href="#">IP appointed valuer based on recommendations by one FC</a>	7
4	<a href="#">IP handed over the custody of assets to suspended directors with approval of CoC</a>	8
5	<a href="#">IP failed to appoint an independent forensic auditor and failed to file application for irregular transactions during CIRP</a>	9-10
6	<a href="#">IP failed to act on the directions issued by IBBI</a>	11
7	<a href="#">IP failed to act on order of NCLAT and suppressed it before AA</a>	12
8	<a href="#">IP instructed and allowed payment of his fees during CIRP to his LLP Firm</a>	13
9	<a href="#">IP connived with FC to bail out promoter through OTS during CIRP</a>	14-17
10	<a href="#">IP failed to discharge most of his duties during CIRP</a>	18-19
11	<a href="#">IRP while initiating CIRP against other entities appointed his relative as IRP</a>	20-21
12	<a href="#">IRP contracted with the Applicant for his appointment as RP and fees thereof</a>	22
13	<a href="#">RP charged abnormally high fees &amp; sought to increase his fees approved by AA</a>	23-24
14	<a href="#">RP Included fees of legal counsel of CoC in insolvency resolution process costs</a>	25-26
15	<a href="#">RP appointed valuers to value the properties of guarantors on instructions of COC</a>	27
16	<a href="#">Failure of RP to cooperate and provide information to IBBI</a>	28
17	<a href="#">Abdication of authority by RP in favour of CoC for appointment of professionals</a>	29
18	<a href="#">Delay in issuance of public announcement by Liquidator under voluntary liquidation process</a>	30
19	<a href="#">Continuation of auditor's services under by Liquidator voluntary liquidation process</a>	31-32

**Note: The readers can return back to this table from by clicking on the contravention heading in the analysis section.**

Let us now analyze the above contraventions and findings of the DC of the Board sequentially. In case any reader wishes to read a complete order, one may download the same from the website of IBBI. For the ready reference of the readers, the relevant order number and date of passing is also provided herein. The Code of Conduct for Insolvency Professional stipulated in terms of Regulation 7(2)(h) of the IP Regulations is also enclosed as [Annexure](#) to this document.

### Contravention: Non Acceptance of Claim by RP and failure to respond to Claimant

[IBBI Order No: IBBI/Ref-Disc.Comm./02/2018 dated 13<sup>th</sup> April, 2018]

Brief Facts: RP failed to consider the claim of an OC. He did not respond to the claimant. The claimant resubmitted his claim. It met the same fate. The claimant filed a complaint before IBBI. IBBI issued three communications to RP which he failed to respond. IBBI then issued show cause to the RP. The RP then responded to the Board informing that the claim of the claimant was a subject matter of an ongoing legal proceeding. Therefore, he filed an application before the Adjudicating Authority seeking guidance on admission of disputed claims. Based on the directions of the Adjudicating Authority, he accorded a hearing to the claimant and subsequently admitted his claim. He submitted that he could not respond to the Board previously as he was taking all steps to address concerns and issues raised by claimants.

#### Observations and Findings of the DC of IBBI:

- ✓ The IRP, did not consider the claim of the claimant. He did not even respond to him. He was subsequently appointed as RP. As RP, he did neither considered the claim nor responded to the complainant. He utterly disregarded his statutory duty under section 18(1)(b) of the Code, which mandates him to receive and collate all claims. He contravened the provisions of section 18(1) (b) of the Code.
- ✓ He sent a mail after the estimated closure date of CIRP, to the claimant, based on directions of the Adjudicating Authority. Therefore, he disregarded the timeline provided under the Code and thereby contravened clause 13 of the Code of Conduct which mandated him to adhere to the timelines.
- ✓ He repeatedly failed to respond to the claimant despite follow up. It is no excuse that he was otherwise busy. If he did not have resources to manage a CIRP in time, he should not take up an assignment. Thus, he contravened clause 13 of the Code of Conduct which requires him to promptly communicate to his stakeholders.
- ✓ He also disregarded repeated requests of the Board for a response on the complaint. He responded to the Board only after a show cause notice was issued to him. He made the stakeholder as well as the Board helpless. It is unbecoming of a professional to ignore repeated requests of the claimant and the Board for the entire CIRP period. Therefore, he failed to comply with the provisions of section 196(1)(g) and (h) of the Code which empowers the Board to monitor the performance of an IP and call for information and records from an IP. He also failed to comply with clauses 1 and 19 of the code of Conduct which require an IP to be honest, straight forward and forthright and to provide all information and records, as may be required by the Board.
- ✓ Failure to consider a claim not only deprives the claimant of his rights, but also deprives the potential resolution applicants to have complete information required to submit a complete resolution plan. While implementing the resolution plan, if the resolution applicant discovers a liability to a claimant which has not been factored into the plan, the resolution plan will be

frustrated. This failure on the part of the RP is serious dereliction of the duty cast on an IP under section 23 read with section 25(2)(e) and 29 of the Code and regulation 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This has potential to vitiate the entire CIRP and frustrate the objectives of the Code.

- ✓ The RP is required under section 208(2)(d) of the Code to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board. He did not provide a copy of the proceeding to the Board.
- ✓ Therefore, the RP contravened the following provisions of- (a) Sections 18(1)(b), 23, 25(2)(e), 29, 196(1)(g) and (h) and 208(2)(d) of the Code. (b) Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; and (c) Paragraphs 1, 13, 14 and 19 of the Code of Conduct in First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016.

### **Contravention: IP resigned before completion of CIRP**

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

**Brief Facts:** A RP appointed in multiple CIRPs, tendered his resignations midway from all assignments citing different reasons in each such assignment. The reasons cited by him were a] personal, b] pre-occupation, c] health and d] non-payment of bills of service providers due to non receipt of approval from CoC.

#### **Observations and Findings of the DC of IBBI:**

- ✓ The only hope of a sinking ship is its captain. He cannot runaway leaving the sinking ship in the mid-sea. The Code provides for an IP to run the CD at the time of distress. He cannot run away from the CD when it needs the IP the most. The RP ran away from multiple engagements jeopardizing the life of all such CDs and the interests of their stakeholders.
- ✓ The RP provided different reasons for leaving the assignments at different times and before different fora. For example in one assignments he submitted personal and health issues before the Board but in his resignation to CoC the reason was non-payment of bills of service providers. Whereas before NCLAT he cited preoccupation being the reason. Hence he conveniently changed his stance to suit his requirements.
- ✓ The RP is therefore in contravention of the provisions of Sections 17, 20 and 23 of the Code, Regulation 7(2)(a) of the IP Regulations and clauses 1,2, 3, 12, 14 and 24 of the Code of Conduct.

### Contravention: IP appointed Valuer based on recommendation by one FC

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

Brief Facts: One of the valuers engaged by the RP was based on the recommendation of one of the FC. The RP contended that the Code does not impose any embargo on such appointment.

#### Observations and Findings of the DC of IBBI:

- ✓ “No embargo” does not entitle an IP to do anything that is not explicitly prohibited. There is always an embargo on doing something inappropriate, more so by an IP. He has duty to preserve and protect the value of the assets of the CD and to maintain complete independence in the professional relationship.
- ✓ How does one maximize the value of the assets of the CD which is the solemn objective of the Code, unless one has an objective and credible value of underlying assets? This requires utmost professional independence. Further, CoC did not exist in this matter when the IRP was required to appoint valuers. How did he get a recommendation of a member of the CoC unless there is some private understanding between the IRP and the person who is likely to be a member of the CoC?
- ✓ No single creditor, whether secured or unsecured, irrespective of its voting power or share, can substitute the CoC. The RP must not engage in private communication with a creditor irrespective of its voting power.
- ✓ Ignoring the private understanding for a moment, it is clear that the RP is in contravention of the provisions of Sections 208(2)(a) and (e) of the Code, Regulation 7(2)(h) of the IP Regulations and clauses 1,2, 5, 10, and 14 of the Code of Conduct.

## Contravention: IP handed over the custody of assets to Suspended Directors with approval of CoC

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

Brief Facts: RP handed over the custody of assets of the CD to the suspended Directors of the CD with the knowledge of the CoC.

### Observations and Findings of the DC of IBBI:

- ✓ The RP is duty bound under the Code to take possession of all assets of the CD and preserve and protect their value. It is also the duty of the RP to exercise the powers of the BOD.
- ✓ The Hon'ble Supreme Court in Innoventive Industries observed that *"once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management..."* The RP did exactly what the law prohibits; allowed the suspended directors to regain control over the CD. Further, an act done with the knowledge of CoC does neither make it legal nor does it absolve the RP from his responsibility.
- ✓ The Board later found out that the RP after handing over the control of the assets to the Directors just informed of the same to the members of the CoC in its meeting.
- ✓ Thus the above act of IP is in contravention of the provisions of Sections 17, 18(f), 20 and 23 of the Code, Regulation 7(2)(h) of the IP Regulations and clauses 2, 10, 12, 14 and 24 of the Code of Conduct.



**Contravention: IP failed to appoint an independent Forensic Auditor and failed to file Application for Irregular Transactions during CIRP**

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

**Brief Facts:** The RP continued to use the services of a forensic auditor already appointed by the FC in the same account in which CIRP had commenced. The report submitted by the auditor had adverse findings with respect to preferential, undervalued, extortionate and fraudulent transactions. The RP did not file suitable applications for the same before the AA as stipulated in the Code. CoC in its meeting also directed the RP to file the same but no action was taken by him. The RP contended that he decided to continue with the same auditor as appointing another would entail additional time and costs. Therefore, he extended the scope. Upon receipt of the adverse report, the CoC gave time to the suspended directors to submit their comments. By the time the comments were received, the RP has tendered his resignation and hence no application for irregular/avoidance transactions was filed before AA.

**Observations and Findings of the DC of IBBI:**

- ✓ In terms of Section 25(2)(j) read with Section 43, 45, 50 and 66 of the Code, an IP is duty bound to identify and recover the assets lost in irregular transactions. These are inherent powers of the IP and CoC does not have any role in the same.
- ✓ A forensic audit is conducted to detect and gather evidence of frauds, misappropriation, embezzlement or such other white collar crime and to recover the assets lost through irregular transactions. It is therefore necessary that a person appointed to conduct forensic audit has no conflict of interest whatsoever. It is not in the fitness of the things that the RP engages a forensic auditor who has already been engaged by a FC in the same matter. Such an auditor may not be fair to all the stakeholders. The submission of additional cost and time is not tenable because this can be at cost of vitiating the very purpose of the audit. It is perplexing that saving time at this stage was important for the RP. It was however not material for him to expeditiously file a suitable application before AA for irregular transactions.
- ✓ While one can appreciate that the views of the CoC and the CD are considered before filing the application for irregular transactions, it is difficult to appreciate that CoC would debate, consider and decide the matter in its several meetings, for many months while RP is a silent spectator.
- ✓ The Code puts the RP on the driver's seat as far as irregular transactions are concerned and does not envisage any role of the CoC on the matter. In any case, in this matter, even after the directions of CoC, the RP got 2 months to file the application but instead of filing the same, he as a chairman, anticipated and entertained further deliberation on the transactions in 3 subsequent meetings of the CoC.
- ✓ Strangely he explains that since CoC accepted his resignation and he could not file the application as if the acceptance of his resignation was a unilateral action of the CoC. Further, after his resignation was accepted by CoC, he continued his office till 9 more days as it was then confirmed by the AA. He did not file an application even during this period in utter disregard of

the provisions of the Code and his duties therein. He abdicated his authority in favour of CoC and allowed the CoC to usurp his authority. Further even after the directions of CoC he did not file the same.

- ✓ The IP is the sole authority on taking a view on the irregular transactions and filing applications before the AA seeking appropriate relief. The CoC has no authority to decide the merits of such transactions and whether to file and when to file the application before AA. It can however raise a concern if the RP does not discharge his duties, including his duties in respect of irregular transactions, in accordance with the Code.
- ✓ Thus the actions of IP is in contravention of the provisions of Sections 20, 23, 25(2)(j), 43, 45, 50, 66 and 208(2)(a) & (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations and clauses 2, 3, 5, 10, 12, and 14 of the Code of Conduct.

### **Contravention: IP failed to act on the directions issued by IBBI**

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

**Brief Facts:** The RP did not comply with the directions of IBBI/Board requiring him to issue a fresh invitation for EOI after removing deficiencies observed by the Board. The RP contended that the matter of issue of fresh EOI as directed by IBBI is sub-judice before AA and therefore the action of IBBI proceeding against him tantamount to contempt of court. He also submitted that he placed the revised EOI before the CoC after removing deficiency as observed by IBBI, for consideration before the CoC meeting but the CoC rejected the same.

#### **Observations and Findings of the DC of IBBI:**

- ✓ The submission of RP that the matter is sub-judice is incorrect based on facts verified by IBBI. It was not sub-judice on the date of issue of show cause notice by IBBI to the RP nor on the date of hearing of the matter.
- ✓ The IP must have approval of the CoC for laying down the eligibility criteria under Section 25(2)(h) of the Code. This cannot be a post facto approval.
- ✓ The Board issue directions to RP under Section 196(1)(g) of the Code. The same are not subject to the approval of the CoC. CoC is not a forum to take a view on statutory directions issued by the Board to a registered IP. The contention of the RP on CoC rejecting the fresh EOI reflects poorly on the competence of the RP. This also displays his impulse to disregard the directions of the Board as he once earlier disregarded the directions of NCLAT in another matter.
- ✓ The RP influenced the decision of the CoC by placing a legal opinion that the EOI earlier issued by him was in accordance with law. Probably, the CoC would have decided differently had the RP presented correct position about the issue of fresh EOI as directed by the Board and would not have been influenced by the legal opinion.
- ✓ Thus the actions of IP is in contravention of the provisions of Sections 196(1)(g) and 208(2)(a) of the Code, Regulation 7(2)(h) and (i) of the IP Regulations and clauses 2, 3, 9, 10, 11, 12 and 14 of the Code of Conduct.

### Contravention: IP failed to act on order of NCLAT and suppressed it before AA

[IBBI Order No: IBBI/DC/07/2018 dated 23<sup>rd</sup> August, 2018]

Brief Facts: The RP continued to persuade his submissions before AA by suppressing the directions of the Appellate Tribunal (NCLAT). NCLAT took note of this fact and issued notice on the RP as to why a proceeding of contempt be not initiated against him. He tendered an unconditional and unqualified apology to NCLAT. As a result, said proceeding was dropped by NCLAT.

#### Observations and Findings of the DC of IBBI:

- ✓ Closure of contempt proceedings by NCLAT does not mean that the conduct of the RP was regular and above board.
- ✓ NCLAT did not proceed further without going into the question whether disregard of its order by RP was intentional or not and closed the contempt proceedings with a clear understanding the RP will not act in any manner in violation of any order passed by AA or NCLAT in future. The fact that RP suppressed and disregarded the directions of NCLAT is undisputed.
- ✓ An IP is an empowered, qualified and regulated professional with huge statutory responsibility towards stakeholders. He is an extended arm of the AA and is responsible for all compliances under the Code and other laws applicable to the CD.
- ✓ He cannot, even by an inadvertence or negligence, disregard or suppress an order of NCLAT. There would be anarchy in the society if professionals responsible for upholding the law disregard the same.
- ✓ The above conduct of the RP is unbecoming of the IP and is in contravention of the provisions of Sec 208(2)(a) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations and clauses 1, 2, 12, 14, 15 and 24 of the Code of Conduct.

### Contravention: IP instructed and allowed payment of his fees during CIRP to his LLP Firm

[IBBI Order No: IBBI/DC/08/2018 dated 23<sup>rd</sup> August, 2018]

Brief Facts: IP authorized his firm (LLP) where he was a partner, to raise invoice for his fees and other out of pocket expenses for work undertaken by him for CIRP of a CD. He also directed for the settlement of the said invoices raised by the firm. As per the IP, he intended to use the services of the employees of the firm to assist him to perform his duties and responsibilities. Also, the firm did not permit its partners to earn fee outside its agreement which was binding on him as a partner too. Hence according to the IP, he acted in good faith and not in violations of the provisions of the Code.

#### Observations and Findings of the DC of IBBI :

- ✓ The IP was appointed as the RP in his individual capacity and not as the partner of a firm. Section 3(19) of the Code further defines an insolvency professional as a person enrolled under Section 206 with an IPA as its member and registered with the Board as an insolvency professional under Section 207 of the Code. It is the professional who renders the services under the Code and not the firm. A firm cannot enroll as an IP. The expertise, skills and time of the employees of the firm cannot replace the role assigned to the IP.
- ✓ The raising of bill by the firm and settlement of the bill in favour of the firm is in clear violations of the provisions of the Code and the regulations framed there under. The RP by such act has influenced the decision or the work of the CoC and the debtor.
- ✓ Section 5(13) of the Code defines the expression insolvency resolution process costs, which includes “the fees payable to any person acting as a resolution professional.” Therefore only an IRP/RP is entitled to receive such fees.
- ✓ Raising of invoice by the firm/LLP cannot be sheltered under the LLP Act, 2008 when the Code expressly provide for payment of such fee to the IRP/RP as it has overriding provisions under Sec 238.
- ✓ The IBBI has issued a circular dated 16<sup>th</sup> January, 2018 regarding fees payable to an insolvency professional and to other professionals appointed by the insolvency professional and the above act of IP is also not in consonance with the aforesaid circular.
- ✓ By allowing the firm/LLP to raise bills for his professional fee, the IP has treated the profession of IP as an employment under an entity.
- ✓ An IP must maintain integrity by being honest, straightforward and forthright in all professional relationships. Further, he must maintain complete independence in his professional relationships and conduct the CIRP/Liquidation/Bankruptcy Process, as the case may be, independent of external influences. An IP shall not influence the decision or the work of the CoC and the CD, or other stakeholders under the Code, so as to make unlawful or undue gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means.
- ✓ Thus the IP has violated sections 5(13) and 208 of the Code read with regulations 33 and 34 of the CIRP Regulations, 2016 read with clause 1,5,9, and 25 of the Code of Conduct.

### Contravention: IP Connived with FC to bail out Promoter through OTS during CIRP

[IBBI Order No: IBBI/DC/12/2018 dated 12<sup>th</sup> November, 2018]

Brief Facts: CIRP commenced on 24.08.2017. Admission Order of AA received by RP on 11.09.2017. There were various contraventions in timelines prescribed for specified tasks. a] The RP submitted that the tasks were completed mostly within the prescribed time considering the date of receipt of the order by him as the date of commencement of the CIRP. b] He mentioned that there was however, a slight delay in making public announcement because the CD expressed its inability to make payment for public announcement due to financial constraints. c] RP circulated the EoI via e-mail to the CoC comprising of only one FC who approved the draft EoI through email. Thereafter it was published. RP claimed that it was subsequently ratified in the meeting of CoC which the DC found to be incorrect. d] The RP failed to submit to the Board a copy of the records of every proceeding before the AA. e] The RP permitted a recovery plan/OTS to be considered as resolution plan. According to the RP every resolution plan is an OTS and not only the same was in accordance with the law, but was also approved by the AA. f] The RP sought an extension of time, vide application to the AA, on the ground that he and the promoter were actively seeking out investors to formulate resolution plan and talks were in very advanced stage. g] The RP made a written submission to the AA that Section 29A is not applicable to the CIRP.

#### Observations and Findings of the DC of IBBI (Contravention wise):

- ✓ There has been contravention of the provisions of the Code in a strict sense, as the date of order is the date of commencement of CIRP. Under the circumstances, the DC ignores the contravention as an IRP cannot commence the work unless he receives the order of admission of a CD into CIRP.
- ✓ It is difficult to accept that the CD expressed its inability to make the payment due to financial constraints, particularly when the CIRP was triggered by the CD itself, and after CIRP has commenced, the management of the affairs of the CD vests in the IRP and the powers of the board of directors of the CD are exercised by the IRP. This means that the IRP was not effectively in management and control of the CD after the CIRP commenced and this is in contravention of the provisions of section 17(1) of the Code.
- ✓ Invitation of EoI was approved by the sole FC by e-mail and not by the CoC in a meeting. The Code provides for an institutional mechanism in the form of CoC to take decisions and prescribes that such decisions shall be taken in a meeting of the CoC in accordance with regulations 18 to 26 of the CIRP Regulations. If the law provides for a certain manner of doing something, it must be done in that manner only. If the RP could conduct CIRP through e-mail to the sole FC in the CoC, there was no need for him to have 4 meetings of the CoC.
- ✓ Section 25(2)(h) of the Code requires the CoC to lay down the eligibility criteria for resolution applicant keeping in view the complexity and scale of operations of business of the CD. There is

no evidence of such eligibility criteria in either the mail of RP seeking approval of FC for invitation of EOI or mail of FC approving the invitation of EOI, the invitation of EOI issued or the minutes of the meeting of the CoC held on the next day after issuance of EOI.

- ✓ The conduct of the RP is, therefore, in contravention of the provisions of section 25(2)(h) of the Code, regulations 18 to 26 and 36A of the CIRP Regulations and regulation 7(2)(a) and (h) of the IP regulations read with clauses 1, 2, 3, 10, 13 and 14 of the Code of Conduct appended to the said Regulations.
- ✓ The RP approached the AA for the extension of CIRP period and for approval of the resolution plan. He did not submit copies of these proceedings in contravention of the provisions of section 208(2)(d) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 12 and 15 of the Code of Conduct appended to the said Regulations
- ✓ The Code is not a settlement or recovery plan. In fact, the Code prohibits and discourages recovery in several ways. For example, section 14 of the Code prohibits any action to foreclose, recover or enforce any security interest during CIRP and thereby prevents any creditor from recovering its dues. The AA in many cases have made it very clear that IBC is not a recovery process. It is an Act relating to re-organisation and insolvency resolution of corporate persons.
- ✓ Section 30(4) of the Code requires that the CoC shall approve a resolution plan after considering its feasibility and viability. An OTS does not entail consideration of feasibility or viability of resolution plan. There is nothing whatsoever on record, whether in minutes of the CoC held where the OTS was approved or elsewhere, indicating that the CoC considered the feasibility or viability of any resolution plan of the CD
- ✓ Thus RP has contravened the provisions of section 30(4) of the Code and regulation 7(2)(a) and (h) of the IP regulations read with clauses 10 the Code of Conduct appended to the said Regulations.
- ✓ The Code envisages that the RP invites resolution plans, RAs submit competing resolution plans in response, and the CoC chooses the best of them. It does not envisage a mechanism for any kind of amicable settlement. Further, there is no evidence whatsoever to the effect that either RP or the promoter was seeking out investors to formulate a resolution plan. The fact remains that RP by his conduct and action, allowed the promoter to pursue an OTS with the FC and only after the OTS was approved by FC, he issued EOI. Therefore, he contravened the provisions of sections 25(2)(h) and 208(2)(a) of the Code and regulations 36A and 37 of the CIRP Regulations, and regulation 7(2)(a) and (h) of the IP regulations read with clauses 1, 3, 5, 9, 10, 12, 14, and 15 of the Code of Conduct appended to the said Regulations.
- ✓ The RP sought extension of time only to facilitate the FC and Promoter to arrive at the OTS and also allowed the OTS to be considered as resolution plan. The Evaluation Matrix (EM) and request for resolution plan were approved after the resolution plan was received and considered by the CoC. This is in contravention of every provision of Chapter II of Part II of the Code, including section 30.

- ✓ The EM is required to be provided at least 15 days before submission of resolution plan under regulation 36A(2) of the CIRP Regulations so that the RA can structure its plan to take best advantage of the EM and the CoC cannot tailor-make an EM to select a particular RA. In this case, the OTS was agreed between the parties, the RA and the sole FC earlier only. Since both parties (CoC and RA) considered the OTS as resolution plan, the resolution plan was approved on the day when it was agreed between them for all practical purposes. The RP had committed in the meeting of the CoC that he would explore every possibility to do so and he did it. The actions thereafter such as invitation of EoI, approval of EM, Form G, etc. were only a façade to give an impression that various tasks under the CIRP were carried out. This leaves the DC with the inescapable conclusion that there was meeting of minds of the RA, the sole FC in the CoC and the RP. The conduct of RP is in contravention of provisions of sections 23, 25(2)(h), 30, and 208(2)(a) of the Code, regulations 36A and 39 of the CIRP Regulations and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 3, 5, 10, 11, 12 and 14 of the Code of Conduct appended to the said Regulations.
- ✓ The RP ensured that the promoter who is an undesirable and ineligible under section 29A of the Code, submits a resolution plan and takes over the CD belonging to his wife and son, against the explicit mandate of the Parliament, in flagrant contravention of the provisions of section 29A and 30(2)(e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 3, 5, 12, and 14 of the Code of Conduct appended to the said Regulations
- ✓ The RP sought extension of time to enable the sole FC, and the promoter to work out a settlement. The OTS was approved by the FC. He promised to explore every possibility to treat the OTS as resolution plan and thereby compromised his independence and sided with the parties and vitiated the entire CIRP.
- ✓ It is unfortunate that an ineligible RA, the sole FC and the RP colluded to ensure that the people responsible for insolvency of the CD paid a fraction (33%) of the claim amount to the FC and wrested the control and management of the CD. They misused the CIRP to pass on an OTS as resolution plan and to wipe off claims of creditors, which was not possible otherwise. They did this against the explicit mandate of the Parliament and judicial pronouncements and in contravention of every provision of the Code and regulations relating to CIRP.
- ✓ The RP connived with the parties to allow an OTS in the garb of resolution plan and to allow an ineligible RA to submit the OTS and did absolutely nothing either to run the business of the CD or to run the CIRP. As to how an OTS was considered as resolution plan, the RP justified that even Supreme Court does it in exercise of its powers under Article 142 of the Constitution. As to how an ineligible person explicitly prohibited by law could submit a resolution plan, he justified that the Parliament does not have competence to enact a law to make a person, who was eligible on the date of commencement of CIRP, ineligible on the date of submission of resolution plan.



- ✓ An IRP or RP is appointed by the AA. He is an officer of the Court. He is duty bound to (i) conduct CIRP with fairness and diligence, (ii) confirm that the resolution plan does not contravene any of the provisions of the law for the time being in force, (iii) maintain absolute independence in discharge of his statutory duties, and (iv) assist the AA with the correct perspective of the law, including provisions of section 29A of the Code. The AA relies on the work of an IP, as an insolvency proceeding is mostly not adversarial in nature. It was rightly observed by the AA in the matter of DF Deutsche Forfait AG and Anr. vs. Uttam Galva Steel Ltd. [C.P. No.45/I&BP/NCLT/MAH/2017], *“no pleading or defending party, the terminology like petitioner/respondent or plaintiff/defendant is not present under this Code....”*. In an adversarial proceeding, the opposite party contests actions of the other party and the truth comes out. When there is no opposite party, as in this matter, the IP has a greater responsibility. Taking advantage of absence of an opposite party to the matter, the RP in this matter made misleading submission before the AA.
- ✓ By using the CIRP as a facade and in connivance with the RP, the promoter successfully (a) thwarted actions, liabilities and obligations under the SARFAESI and proceeding before the DRT, released the personal guarantors, and the secured properties, (b) made himself eligible to submit a resolution plan by misrepresentation, (c) passed on an OTS as resolution plan, and (d) used the resolution plan to wipe off claims of various creditors, including 66% of claim of FC. He could not have done any of these if RP played by the rule book and did not *“explore every possibility to address the issue (illegality)”*. He made several misleading and false statements before the DC to justify what he did. Behind the nefarious design of the CD and the promoter in this matter, there is the RP. By his conduct and action, the RP has caused irreparable damage to the reputation of the institution of insolvency profession and rendered himself a person not fit and proper to continue as an IP.

### Contravention: IP failed to discharge most of his duties during CIRP

[IBBI Order No: IBBI/DC/14/2018 dated 28<sup>th</sup> January, 2019]

Brief Facts: The DC observed that IP did not conduct CIRP as required under section 23 of the Code. He did not submit progress report to AA in time, make public announcement in time, appoint registered valuers, prepare and circulate information memorandum, invite resolution plans under section 25(2)(h) of the Code, convene the meetings of CoC with adequate notice, etc. Rather, he invited resolution plan only from the sole member of the CoC, without providing information memorandum, asking him to submit resolution plan in four days. He did not run the CDs as a going concern, as required under section 20 of the Code. He never took over the management of the CDs. He did not seek direction of the AA if he did not receive the required co-operation from the CDs. He resigned as RP in both the CIRPs, without prior permission of the AA, though he consented to act as IRP and as RP in both cases. After he offered himself for appointment as RP in both the CIRPs, the CoC appointed him as RP. The RP however, contended that (a) he did not have funds to make public announcement; (b) he did not get co-operation from the CD; and (c) he was not well for around 50 days during the initial period of CIRP. As regards resignation, he has stated in the letter of resignation that he resigned on personal reasons. Although through his email to IBBI, he mentioned that he resigned because he did not get fee and CD did not co-operate.

#### Observations of the DC of IBBI:

1. The IP has absolutely no defence as to why he did not conduct the CIRP. He has nothing to say as to, for example, why he did not invite resolution plan under the then provisions of section 25(2)(h) from prospective lenders, investors, and any other persons to put forward resolution plans.
2. The sole purpose of CIRP is consideration and approval of resolution plan to resolve insolvency. The heart of the process is resolution plan. He did not invite resolution plans. He did not even prepare or provide the required information to prospective resolution applicants.
3. As regards his excuse of non-co-operation from CDs to manage the operations of the CDs as a going concern, there is absolutely no evidence that he wanted to take over management of the CDs. For the sake of formality, he wrote a few letters to the CDs seeking certain documents. He never brought it to the notice of the AA under section 19 of the Code that he was having any non-co-operation from the CDs. He did not make any effort whatsoever to run the CDs as a going concern.
4. One can consider illness as an excuse. But that does not justify him to cling on to the CIRPs indefinitely till he recovered. The CIRP of one CD was admitted on 8th September, 2017, while the IP claims to be on bed since 4th September, 2017. He could have brought it to the notice of the AA which may have appointed another IRP.
5. His excuse for resignation has also no merit. He has been appointed by the AA with a solemn objective and a statutory responsibility. He cannot run away just because he did not receive fee. Despite having experience of 2-3 months as IRP in both CIRPs, he volunteered to be appointed as RP for both the CIRPs in the meetings of the CoCs held on 19th and 20th November, 2017.

6. The IP has displayed utter misunderstanding of the provisions of the Code and regulations. For example, the regulations required that the IRP shall appoint two valuers within seven days of his appointment. To the allegation that he did not appoint valuers, he has explained that the CoC would not approve resolution process cost, which includes the fees of valuers. The regulations required the IRP to appoint valuers much before the constitution of the CoC. Therefore, the apprehension that CoC would not approve the fee of valuers is misplaced.
7. Similarly, the IP claims that he resigned because the CD did not co-operate. It is difficult to appreciate that the IP was having non-co-operation from CD for the preceding three months before volunteering to be appointed as RP. In fact, it is unimaginable that an IRP, who is in control of the CD for the last four months, suddenly finds that the CD did not co-operate and he had to resign even without using section 19 of the Code.
8. It is preposterous that the IP invited resolution plans from only one operational creditor and allowed it only four days to submit resolution plan, as against statutory requirement of invitation of resolution plans from prospective lenders and investors.

Findings of the DC of IBBI:

- ✓ An IP is not just another professional. He is dealing with a CD in distress. He needs to go beyond the call of duty to address the distress.
- ✓ The DC unfortunately finds that the IP did not discharge any of his statutory responsibilities as IRP or RP either to manage the operations of the two CDs as going concern under section 20 of the Code or to conduct the resolution processes of the two CDs under section 23 of the Code.
- ✓ He has, therefore, violated provisions of sections 18, 20, 23, 25(2)(g), 25(2)(h), 29, 208(2)(a), and 208(2)(e) of the Insolvency and Bankruptcy Code, 2016, regulations 6(1), 19(1), 27 and 36 of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016 and regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clauses 1, 2, 3, 5, 10, 12, 13, 14, and 25 of the Code of Conduct under the said Regulations.
- ✓ It, however, finds in his favour two mitigating factors, namely, (a) IP was not well for some time during the relevant period, and (b) the CDs were practically not going concerns to start with.

## Contravention: IRP while initiating CIRP against other entities appointed his relative as IRP

[IBBI Order No: IBBI/DC/16/2019-20 dated 17<sup>th</sup> April, 2019]

Brief Facts: IRP of a CD filed applications for initiating CIRP of 14 other CDs and proposed to appoint his spouse, as IRP of CIRP of all 14 CDs. IBBI alleged that while IRP appointed his spouse, he failed to avoid conflict of interest, and act with integrity and independence. The IRP contended that he proposed the name of his spouse because she did not demand any upfront fee for the same while all IPs, he had approached, wanted a signing fee and did not agree to fund the expenses for public announcement, checking claims and calling for CoC meetings etc. The IRP further contended that he did this to revive the CD.

### Observations and Findings of the DC of IBBI:

- ✓ The DC finds it difficult to agree with the contentions of IRP that only an IP, who is willing to fund CIRP expenses (expenses for public announcement, checking claims and calling for CoC meetings etc.) should be appointed as IRP. An IP is appointed for his professional competence, not for his ability to fund the CIRP expenses.
- ✓ The DC also finds it difficult to accept the submissions that if IRP's spouse was not an IP, he would fail to appoint IRPs and, therefore, fail to revive the CD.
- ✓ In terms of section 17 of the Code, the management of the affairs of the CD vests in the IRP and the powers of the Board of Directors of the CD is exercised by the IRP. For all practical purposes, the IRP is the alter ego of the CD undergoing CIRP. Every decision of the CD and in respect of the CD is taken by the IRP, on behalf of the CD, dealt with his spouse.
- ✓ It requires no rocket science to figure out why IRP assigned CIRPs of all CDs to one IP, who was his spouse, when 2000+ IPs were competing for an assignment in the market.
- ✓ It is not a coincidence that 15 assignments from one source landed on the table of the spouse of the IRP when she did not have a single assignment otherwise. 15 assignments at one go from one source for an IP having absolutely zero experience establishes that the considerations were something other than merits and there was a deep-rooted conspiracy to bleed the ailing CDs for the benefit of IRP's family. If the conspiracy had materialised, the family would have acted as IRP / RP of CIRPs of 15 CDs. Further, as IRP / RP of these 15 CDs, they would initiate CIRP of their debtors and appoint themselves as IRP / RP of those debtor and so on.
- ✓ When relationship triumphs over merits in professional matters, there is no place for independence, integrity and impartiality. A professional must be not only be impartial, but also appear to be impartial. Does a professional appear impartial if he gives 15 professional assignments at one go to his spouse? Any conduct, whether explicitly prohibited in the law or not, is unfair if it impinges on independence, integrity and impartiality of an IP or inconsistent with the reputation of the profession.
- ✓ Conducting CIRP is a serious responsibility of an IP. Section 20 of the Code obliges the IRP to make every endeavour to protect and preserve the value of the property of the CD and manage the operations of the CD as a going concern. Section 23 of the Code mandates the RP to conduct the entire CIRP and manage the operations of the CD during the CIRP period. It is inconceivable

that an individual (spouse of IRP) who is a novice in the profession and has not handled a single CIRP till date, would act as IRP / RP in 15 CIRPs simultaneously and exercise the powers of Boards of Directors of 15 CDs.

- ✓ While the Code aims to rescue the ailing CDs, assignment of CIRPs of 15 CDs to 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. It is not permissible for an IRP to give 15 assignments to one IP.
- ✓ The IRP also misrepresented that he submitted to the AA in his progress report of 5th CoC meeting that the CoC decided to recuse his spouse, as proposed IRP. However, the Inspecting Authority did not find any such decision in the minutes of the 5th meeting of the CoC. Therefore, the Board has alleged that IRP made a misrepresentation to AA.
- ✓ The DC, therefore, finds that IRP contravened the provisions of sections 20, 23, 208(2)(a) and (e) of the Code regulations 7(2)(a) and (h) of the IP Regulations and clauses 1, 2, 3, 5, 9, 10, 12, 14, 25, and 27 of the Code of Conduct thereof.
- ✓ The DC also observed that during the hearings in this matter and other matters, the IRP often defended himself on pretexts such as typographical error, wrong reporting, wrong classification, mistake, oversight, failure to provide records, reliance on stale information, etc. It is difficult to grant benefit of doubt to him for all such pretexts. If he is an embodiment of all these pretexts, it is doubtful if he deserves to continue as an IP

**Contravention: IRP contracted with the Applicant for his appointment as RP and fees thereof**

[IBBI Order No: IBBI/DC/16/2019-20 dated 17<sup>th</sup> April, 2019]

**Brief Facts:** The IP who is well-versed with the scope of authority of the applicant and of the CoC, knows well that the applicant has no role in the appointment of the RP and in fixation of fee of the RP. Nevertheless, he 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. The RP submitted that he did not conceal anything in this regard. He placed the term sheet, which provides for fee as RP, before the AA.

**Observations and Findings of the DC of IBBI:**

- ✓ Transparency is welcome. But it cannot be used to override the explicit statutory provisions. No amount of transparency can justify illegal conduct. The fact remains that IP signed a term sheet with the applicant which provided for his appointment as RP and his fee as RP. As an IP, he knows well that a RP is appointed only by the CoC. Yet he contracted with the operational creditor, who is not legally competent to appoint RP, to the effect that he would work as RP and he would work for a professional fee of Rs.12.5 lakh per month.
- ✓ This is an attempt to lock in his appointment as RP, before the competent authority, i.e. CoC, is born and denude the competent authority of its rights to choose an IP of its choice as RP and fix his fees.
- ✓ An agreement with the applicant establishes his collusion, indicating compromise of professional independence.
- ✓ Therefore, IP contravened the provisions of sections 22, 208(2)(a) and (e) of the Code, regulations 33 and 34 of the CIRPR and regulations 7 (2) (a) and (h) of the IPR read with clauses 1, 2, 5, 9, 10, 12, 14 and 27 of the Code of Conduct thereof.

### **Contravention: RP charged abnormally High fees & sought to Increase his Fees approved by AA**

[IBBI Order No: IBBI/DC/16/2019-20 dated 17<sup>th</sup> April, 2019]

**Brief Facts:** After his appointment by the AA as per the revised term sheet, which provided a reduced monthly fee of Rs.1 lakh (as compared to Rs 12.5 lakhs in the initial term sheet), the RP repeatedly sought approval of the Committee of Creditors (CoC) for a higher fee of Rs.6 lakhs as IRP and of Rs.4 lakhs per month as RP. He slashed his fee in the revised term sheet to secure his appointment as RP from the AA, only to increase it after such appointment. Also, the revised term sheet provided for Rs.2 lakhs towards reimbursement of expenses on travel and hotel stay of the RP. In the second meeting of the CoC, however, he claimed Rs.3.25 lakhs towards travel expenses, beyond the amount permissible in the revised term sheet. The Board found this conduct of RP to be malafide. RP clarified that the charging of fee is the discretion of the Professional considering the volume of work. After taking over as IRP, he found that the CD has some more creditors and hence he sought approval of CoC for a higher fee. He further clarified that the term sheet provided for Rs 2 lakhs as advance towards reimbursement of expenses on travel and hotel stay. It did not limit the amount of expenditure. Also, he claimed reimbursement of Rs.2.25 lakh only, not Rs.3.25 lakh, which is a typographical error. The DC upon verification was satisfied and noted that the revised term sheet provides for an advance of Rs.2 lakh towards reimbursement of certain expenses and hence claim of Rs.2.25 lakh is not inconsistent with the term sheet. However, other submissions by the RP were not acceptable.

#### **Observations and Findings of the DC of IBBI:**

- ✓ RP emphatically claimed that it is his discretion to charge a fee. Discretion is opposite of indiscretion and does not mean action without rhyme and reason. It means responsible conduct, as a reasonably prudent person would, under similar facts and circumstances. It is difficult to appreciate that any amount of fee can be charged by a professional just because he has discretion. The law [clause 25 of the Code of Conduct for Insolvency Professionals under the First Schedule to the IP Regulations] clearly specifies remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken by an IP. An IP, who exercises the powers of the Board of Directors, cannot feign inability that he does not understand what reasonable reflection of work in the circumstances is.
- ✓ There are several ways to look at reasonableness. It may be looked at with reference to the compensation payable to the MD & CEO of the CD under CIRP, the fee charged by another IP in case of a similar CIRP, the fee earned by himself in a similar CIRP or even his opportunity cost (value from next best alternative).
- ✓ In fact, the AA approved the appointment of the RP after being convinced with the fee in the revised term sheet in relation to his income reflected in his income tax returns. Unfortunately, the RP claims that he slashed his monthly fee from Rs.12.5 lakh to Rs.1 lakh after looking at recent financials of the CD.

- ✓ He did not explain why he used stale financials for fixing fee or how old financials had a bearing on the amount of fee. He slashed the fee to 8% of fee agreed to earlier, not on his own volition, but under compulsion from the AA. Had the AA overlooked the term sheet, the RP would have pocketed the entire amount stated in the initial term sheet. This does not demonstrate his bonafide.
- ✓ Further, after securing the appointment as IRP/RP, he attempted to increase IRP fee by 500% from Rs.1 lakh to Rs.6 lakh, and RP fee by 300% from Rs.1 lakh per month to Rs.4 lakh per month, on the pretext that the CD has a few more creditors.
- ✓ He earlier claimed that the financials are the basis of fee and reduced his fee to 8% based on recent financials. After his appointment, he claims that the number of creditors is the basis of fee and attempted to increase his fee by 500% based on number of creditors. This establishes his malafide, particularly when his appointment along with fee was approved by the AA with reference to his income tax returns for the preceding three years.
- ✓ The DC, therefore, finds that RP 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 and displayed professional incompetence by using stale information for decision making.
- ✓ Therefore, RP contravened the provisions of sections 208(2)(a) and (e) of the Code, regulation 33 of the CIRPR and regulations 7 (2) (a) and (h) of the IPR read with clauses 1, 2, 5, 9, 10, 12, 14, 16, 25 and 27 of the Code of Conduct thereof

In one another matter, the RP contracted a consolidated professional fee of Rs. 50 lakhs plus out-of-pocket expenses, with the applicant who had a claim of Rs. 13.76 lakhs only. It was alleged that this defied logic and indicated intention of RP to inflate expenses. The RP made a bald statement that the amount of fee was clear reflection of work that he has to undertake as an IRP. The same was considered to be in contravention of the Code by the DC.

In one more matter, the RP charged hefty fees for his services and ensured that his related parties got the work without due diligence. The RP contended that there is no provision in the Code for deciding the fees of the IP. Also, when the CoC has approved the fees, it is not open for the Board to pass a value judgment on the same by proceeding against the RP. The DC held RP was in violation of the law. The DC also observed that clause 25 of the Code of Conduct for IPs explicitly requires an IP to provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent of the applicable regulations. Further, absence of law does not entitle an IP to charge any fee as he wishes.



## Contravention: RP Included Fees of Legal Counsel of CoC in Insolvency Resolution Process Costs

[IBBI Order No: IBBI/DC/15/2019-20 dated 14<sup>th</sup> November, 2019]

Brief Facts: Fees of legal counsel of CoC was paid the RP from the accounts of the CD and included it in the list of Insolvency Resolution Process Cost (IRPC). The contention of IBBI is that the said costs does not fall within the meaning of IRPC defined in Section 5(13) of the Code. The RP submitted that Regulation 31(e) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 provides that '*other costs directly relating to the corporate insolvency resolution process and approved by the committee*' shall be included in IRPC. It was believed that as long as the cost is incurred for maximisation of the value of assets, the cost can be included in IRPC. The fee paid to lender's legal counsel was incurred for rendering advice on CIRP and thus, the same was included as a part of IRPC with an undertaking from the members of CoC that if the same is not approved by the Board, the members shall reimburse the same.

### Observations and Findings of the DC of IBBI:

- ✓ The provisions of the Code read with the relevant regulations does not provide for inclusion of fee paid to the lender's legal counsel in the IRPC. Also para 8 clause (f) of the IBBI Circular dated 12<sup>th</sup> June, 2018 state that the IRPC shall not include any expense incurred by a member of CoC or a professional engaged by the CoC....
- ✓ The contention of RP about including the fee of legal counsel of CoC in other costs of IRPC cannot be accepted as the fee paid to legal counsel of CoC that are independent bodies, cannot be said to be directly related to the CIRP.
- ✓ IRPC is an added financial stress on a CD. Therefore, it becomes crucial to monitor the expenses incurred by the RP to ensure that a CD, who is already entangled in a web of unsustainable liabilities is not further over-burdened with exorbitantly high IRPC.
- ✓ 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. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable.
- ✓ The responsibilities of CoC and IP/RP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.
- ✓ It is important to note that the CoC or its members do not own the assets of the company rather they hold the assets as trustees for the benefit of all stakeholders. The gain or pain emanating from the resolution, therefore, needs to be shared by the stakeholders within a framework of fairness and equity.
- ✓ The undertaking given by CoC members as mentioned in the brief facts reveals that there is understanding between CoC and RP to contravene a law and willingness to remedy the situation only if they are caught. Thus, the RP has deliberately compromised his independence

- ✓ Paying for expenses of third party from CD and including in IRPC is amounting to looting the CD and making the CD bleed. The RP did something unlawful because he was indemnified by a party who was interested in that unlawful action and he did this deliberately. Thus, in defiance of statutory duty to preserve and protect the value of CD, he deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose. RP's job is to conduct CIRP. That job does not include hiring legal services of Financial Creditors and definitely does not include paying for legal services.
- ✓ Thus RP has contravened Section 208 (2) (a) of the Code and also Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with Clause 3 and 5 of the Code of Conduct as given in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016

## Contravention: RP Appointed Valuers to Value the Properties of Guarantors on instructions of CoC

[IBBI Order No: IBBI/DC/17/2020 dated 26<sup>th</sup> February, 2020]

Brief Facts: RP appointed registered valuers to determine the fair value and liquidation value of the CD. It has been observed from the appointment letter(s) of the valuers that the RP directed the valuers to also conduct valuation of properties of guarantors along with the properties of the CD. Further, not only were properties of guarantors valued but the cost for the same was also included in the insolvency resolution process costs (IRPC). RP conceded that the same was done at the instructions of the sole member of CoC. However, the payment on account of the valuation of properties of guarantors was reimbursed by CoC to the personal account of the RP from where the RP paid the said sum to the valuers concerned.

### Observations of the Disciplinary Committee (DC) of IBBI:

- ✓ There has been a procedural lapse on the part of the RP by directing the valuation of the properties of the personal guarantor which were not under the control and custody of the RP as well as including the cost of the same into the IRPC.
- ✓ Further, the CoC has also acted beyond the provisions of the Code by directing the RP to get valuation done of properties of the personal guarantors along with properties of the Corporate Debtor.
- ✓ The payments made to the two valuers were reimbursed into the personal account of the RP by Bank of India and thereafter, cheques were issued to the two valuers.
- ✓ Although, it has been submitted that there has been no burden on the Corporate Debtor, it can be observed from the documents that the RP has not acted independently.

### Findings of the Disciplinary Committee (DC) of IBBI:

- ✓ RP has not acted in an independent manner
- ✓ This is in contravention of Section 208 (2) (a) of the Code and Regulation 7 (2) (a), (h) & (i) of IP Regulations read with clause(s) 5, 10 & 14 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 31 of the CIRP Regulations.

### Contravention: Failure of RP to cooperate and provide information to IBBI

[IBBI Order No: IBBI/DC/18/2020 dated 27<sup>th</sup> February, 2020]

Brief Facts: The IP failed to provide some information and records to the Inspecting Authority (IA) under the Code even after reminders. After receipt of reminder, IP advised IA to close the case treating it as too old. In another instance, a copy of Form 2 as sought was provided to the IA after delay. Attachment to the said Form 2 was not provided as the IP could not make it available. IP failed to explain as to why the same was not available. This resulted in delay in submission of certain documents and non-submission of enclosures to the information sought by IA. However, during the personal hearing, the IP submitted that there were no enclosures to Form 2 and hence he could not have been provided by the IP. The same was accepted by the DC after examination of Form 2 submitted by IP to IA.

#### Observations of the Disciplinary Committee (DC) of IBBI:

The Code casts an obligation upon the IP to co-operate with the Board and provide all information and records as may be required by the Board. However, in the present matter the RP, despite reminder, failed to provide documents as sought.

#### Findings of the DC of IBBI:

- ✓ Since RP has provided documents to the IA although after a delay of 19 days, he cannot be strictly held liable for contravention of Regulation 4(4) of Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations 2017.
- ✓ During the CIRP when Board sought certain information/ documents from the RP, he replied by saying that these are too old and may be treated as closed without wasting Board's time and IP's time in creating correspondence, thereby, frustrating the statutory duties of the Board and, therefore, of the Code.
- ✓ Thus, he has acted in violation of the provisions of Regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 read with Clause 19 of the Code of Conduct given in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016.

## Contravention: Abdication of authority by RP in favour of CoC for Appointment of Professionals

[IBBI Order No: IBBI/DC/19/2020 dated 13<sup>th</sup> March, 2020]

Brief Facts: Upon observing the huge difference in stock valuations after initiation of CIRP, the RP appointed a forensic auditor to examine the same after a delay of 2 months and after due consultations with the CoC.

### Observations of the Disciplinary Committee (DC) of IBBI:

- ✓ The responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.
- ✓ Section 25(2)(d) of the Code provides that *“For the purposes of sub-section (1), the resolution professional shall undertake the following actions namely: -...(d) appoint accountants, legal and other professionals in the manner as specified by Board;”*
- ✓ Thus, as per provisions of Section 25(2)(d), the RP shall appoint professionals himself. He is neither permitted to delegate his duties to others nor can he abdicate his authority in favour of CoC. If the law provides for a certain manner to do something, it must be done in that manner only. Thus, the RP shall appoint professionals (including forensic auditor) himself without seeking approval of CoC

### Findings of the DC of IBBI:

- ✓ The RP sought approval of CoC for appointment of forensic auditor in the 5th CoC meeting dated 18.12.2017 and thereby compromised his independence in favor of CoC.
- ✓ However, in the absence of any timeline for appointment of forensic auditor under the provisions of the Code, the RP cannot be held liable for making a delay in the appointment of forensic auditor
- ✓ Since the RP has abdicated his authority in favor of CoC and allowed them to approve appointment and other terms and scope of work of the assignment of forensic audit, he has contravened the provisions contained in Section 25(2)(d) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

In one another matter [Refer IBBI Order No: IBBI/DC/18/2020 dated 27<sup>th</sup> February, 2020], a similar contravention was noticed by the DC. The RP contended that if the fee of forensic auditor is not approved by CoC then the appointment made by the RP will not have any meaning. Even though RP has no intention to seek approval for appointment of forensic auditor, the appointment cannot be done unless fee is approved by CoC. However, the DC was still of the view that RP has abdicated his authority in favor of CoC and allowed them to approve conduct of Forensic Audit, he has contravened the provisions of the Code.

### Contravention: Delay in issuance of Public Announcement (PA) under Voluntary Liquidation Process

[IBBI Order No: IBBI/DC/20/2020 dated 20<sup>th</sup> March, 2020]

Brief Facts: PA for submission of claims to the liquidator under the voluntary liquidation process which is required to be made within 5 days of appointment of the liquidator was made after a delay of 18 months. The Liquidator published the PA on the website of the IBBI within the stipulated period of 5 days but did not publish the same in the newspapers within such time. According to the Liquidator, a] the corporate person did not have any website; b] the corporate person did not have any creditors c] the shareholders of the corporate persons approved its voluntary liquidation process because of not having any commercial and economic viability in the near future and d] except for the 18 months' delay in publication of PA in the newspapers, all the reporting and compliances have been made on time.

#### Observations of the Disciplinary Committee (DC) of IBBI:

- ✓ PA was not made within the time as stipulated under aforesaid Regulation 14(1). Time-bound public announcement in newspapers, as stipulated in Voluntary Liquidation Process Regulations, is critical to the effective liquidation of the corporate person
- ✓ Provision regarding publication has been made to intimate the public at large about the liquidation proceedings of the corporate person so that an opportunity is accorded to all stakeholders to file their claims, if any, as on the liquidation commencement date
- ✓ The submission of Liquidator, that there were no creditors of the corporate person cannot be a ground for not making PA in newspapers
- ✓ Suo moto belated publication in newspaper by the Liquidator cannot hold good for the compliance of the provisions of aforesaid Regulation.
- ✓ This perhaps has happened either due to lack of knowledge or non-serious attitude of the Liquidator towards compliances

#### Findings of the DC of IBBI:

- ✓ An IP must strictly adhere to the timelines prescribed under the provisions of the Code and the regulations made there under.
- ✓ He must act with utmost care and caution and must not be negligent while performing his duties during insolvency resolution or liquidation, as the case may be.
- ✓ Compliance of law after the time prescribed by the Code cannot be treated as compliance of law.
- ✓ Thus the liquidator has violated section 208(2)(a) of the Code, regulations 14(1) and 14(3)(a) of Voluntary Liquidation Process Regulations and regulation 7(2)(a) and (h) of IP Regulations read with clauses 10, 13 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

### **Contravention: Continuation of Auditor's Services under Voluntary Liquidation Process**

[IBBI Order No: IBBI/DC/20/2020 dated 20<sup>th</sup> March, 2020]

Brief Facts: Regulation 11(2) of the IBBI (Voluntary Liquidation Process) Regulation 2017 clearly prohibits the IP from engaging professional who has served as an auditor to the corporate person at any time during the five year preceding the liquidation commencement date. The Liquidator appointed the existing auditor of the corporate person for auditing its books of accounts for the purpose of submitting it along with his final report on completion of the liquidation process of the corporate person. He was of the opinion that members/shareholders has decided to continue with the audit services of existing auditor. Hence, to use the existing auditors for audit services of the company under liquidation no new formal engagement was issued by the Liquidator. During the course of hearing of the matter, the Liquidator was asked by the DC to produce any resolution passed by the members in this regard, however, the Liquidator denied of having any such resolution. Further, during examination of the records, it was apparent that the Liquidator himself requested the auditor concerned to audit the special purpose financial information of the corporate person under voluntary liquidation.

#### Observations of the Disciplinary Committee (DC) of IBBI:

- ✓ An IP must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
- ✓ The members of the corporate person under voluntary winding up may take various decisions, however, it is the duty of the Liquidator to act in accordance with the provisions of the Code and the regulations made there under. Further, the IP must act independently and must not compromise his authority in favor of the members of the corporate person.
- ✓ Section 208(2)(a) of the Code provides that the IP should take reasonable care and diligence while performing his duties. He cannot shirk from his responsibility by putting the onus on the members of the company as it was his duty to ensure compliance with the Code and the Regulations
- ✓ In view of the provisions contained in Regulation 11(2) of the Voluntary Liquidation Process Regulations, it was incumbent upon the Liquidator to discontinue the services of the existing auditor who has been the statutory auditor of the corporate person immediately prior to commencement of liquidation. Such continuation is in violation of the aforesaid Regulation 11(2).

#### Findings of the DC of IBBI:

- ✓ The Liquidator compromised his independence and conceded to the decision taken by the members of the company under voluntary winding up to continue the services of the existing auditors for auditing the financial information of the company under liquidation in disregard to the provisions contained in the Code.

- ✓ The liquidator has displayed utter misunderstanding of the provisions of the Code and Regulations made there under
- ✓ The Liquidator has violated section 208(2)(a) of the Code, regulation 11(2) of Voluntary Liquidation Process Regulations and regulation 7(2)(a) and (h) of IP Regulations read with clauses 3, 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Contributor: Sumit Binani, Insolvency Professional; [sumit\\_binani@hotmail.com](mailto:sumit_binani@hotmail.com), +919830810003

#### Disclaimer by the Author

Although care has been taken to ensure the accuracy, completeness and reliability of the information provided, I assume no responsibility therefore. Users of this information are expected to refer to the relevant existing provisions of the relevant law. The user of the information agrees that the information is not a professional advice and is subject to change without notice. I assume no responsibility for the consequences of use of such information. IN NO EVENT SHALL I SHALL BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL OR INCIDENTAL DAMAGE RESULTING FROM, ARISING OUT OF OR IN CONNECTION WITH THE USE OF THE INFORMATION. This is a write up prepared in my individual capacity as a professional. This write up is dated **16th April, 2020.**



## Annexure

### **CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS**

[Regulation 7(2)(h) of IP Regulations]

#### **Integrity and objectivity.**

1] An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.

2] An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.

3] An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

3A] An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.

4] An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not himself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

#### **Independence and impartiality.**

5] An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

6] In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.

7] An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

8] An insolvency professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.

8A] An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

9] An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

**Professional competence.**

10] An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

**Representation of correct facts and correcting misapprehensions.**

11] An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.

12] An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

**Timeliness.**

13] An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

14] An insolvency professional must not act with mala fide or be negligent while performing his functions and duties under the Code.

15] An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.

16] An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

17] An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.

18] An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled.

19] An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

20] An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

**Confidentiality.**

21] An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

**Occupation, employability and restrictions.**

22] An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

23] An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.

23A] Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.

23B] An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.

23C] An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

Explanation- For the purpose of clauses 23A to 23C, “related party” shall have the same meaning as assigned to it in clause (24A) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.

24] An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

**Remuneration and costs.**

25] An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

25A] An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

26] An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27] An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

**Gifts and hospitality.**

28] An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.

29] An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself