

Insolvency Resolution Process, Liquidation and Opportunities for CMAs under IBC, 2016



CMA J K Budhiraja

Senior Director (Technical)
The Institute of Cost Accountants of India
New Delhi

In continuance to my Article: "Opportunities for CMAs in Insolvency and Bankruptcy Code 2016" published in Management Accountant- October 2016 issue, wherein I gave snapshot of provisions of "Insolvency and Bankruptcy Code, 2016" (IBC2016 or Code), reasons why the Government brought IBC 2016, some statistics relating to Bankruptcy in India, roles of Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs), Information Utilities (IUs) etc.

IBC, 2016 was notified by the Government of India on 28th May 2016. The Act consolidates and amends the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of these persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. IBC 2016 also altered the order of priority various payment dues; and put the payments of workmen's dues in foremost priority over Government dues. The payments of Government dues are kept after payment of financial debts owed to unsecured creditors. IBC 2016 provides the complementary ecosystem for the insolvency law, and aims to ensure smoother settlement of insolvency cases, enable faster turnaround of businesses and provide for creating a database of creditors.

Before this Code, there was no single law dealing with insolvency and bankruptcy in India. Liquidation of Companies

is handled by the High Courts; individual cases are dealt with under the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. The other laws which deal with issues include Sick Industrial Companies (Special Provisions) Act (SICA), 1985; Recovery of Debt Due to Banks and Financial Institution Acts, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 and Companies Act, 2013. The Code consolidates these insolvency laws to bring them under one umbrella.

Is meaning of Insolvency and Bankruptcy same?

The meaning of Insolvency and Bankruptcy is not same. "Insolvency" means the situation where an entity (debtor) cannot raise enough cash to meet its obligations or to pay debts as they become due for payment. Symptom of Insolvency may include: poor cash management, increase in cash expenses, or decrease in cash flow etc. "Bankruptcy" occurs when a court has determined insolvency, and has given legal orders for resolution. On declaring the person as bankrupt, the court is responsible to liquidate the personal property of the insolvent and distribute the property amongst the creditors of the insolvent debtors.

Thus Insolvency is a situation where a debtor is unable to meet his obligations and the Bankruptcy is a legal process by which an insolvent debtor seeks relief.

Under IBC 2016, a bankrupt entity is a debtor who has been adjudged as bankrupt by an adjudicating authority that has passed a bankruptcy order. The adjudicating authority under the IBC is “**National Company Law Tribunal (NCLT)**” for Corporate Debtors (Companies & LLPs) and the “**Debt Recovery Tribunal (DRT)**” for individuals and partnership firms.

Snapshot of Insolvency and Bankruptcy Code 2016

1. The Code provides time bound insolvency resolution process– 180 days after the process is initiated, plus a 90-day extension – for resolving insolvency.
2. The Code also provides for FAST TRACK INSOLVENCY RESOLUTION PROCESS– 90 days after the process is initiated, plus a 45-day extension – for resolving insolvency in fast track mode.
3. The following are authorities through which the Insolvency and Bankruptcy Process would be implemented under the Code:
 - (i) Insolvency and Bankruptcy Board of India (IBBI)
 - (ii) Insolvency Professional Agencies (IPAs)
 - (iii) Insolvency Professionals (IPs)
 - (iv) Information Utilities (IUs)
 - (v) Adjudicating Authorities:**
 - (a) For Corporate Persons (Companies & LLPs)-** National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of the corporate person is located.
 - (b) For Individuals and Partnership Firms-** Debt Recovery Tribunal (DRT) having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under IBC 2016 regarding such person.
 - (vi) Appellate Authorities:**
 - (a) For Corporate Persons (Companies & LLPs)-** National Company Law Appellate Tribunal (NCLAT), any person aggrieved by order of NCLT may file appeal to NCLAT within 30 days of such order.
 - (b) For Individuals and Partnership Firms-** Debt Recovery Appellate Tribunal (DRAT), any person aggrieved by order of DRT may file appeal to DRAT within 30 days of such order.
4. **Civil court not to have jurisdiction:** No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT, NCLAT,

DRT and DRAT has jurisdiction under this Code.

5. **Appeal to Supreme Court:** Any person aggrieved by an order of the National Company Law Appellate Tribunal or Debt Recovery Appellate Tribunal as the case may be, may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.
6. **IBC 2016 provides for two categories of Creditors:** financial creditors and operational creditors. The Code provides different process for recovery of debts by these creditors from the debtors;
7. The IBC 2016 deals separately for Corporate Insolvency (Part II of the Code) and Individual and Partnership Bankruptcy (Part III of the Code);
8. Some of the persons as per section 11 of the IBC 2016 are not entitled to initiate insolvency resolution process;
9. When Insolvency Resolution Process (IRP) starts, Adjudicating Authority (NCLT) declares “Moratorium”. Then no suit or other legal proceeding shall be instituted by or against the corporate debtor, restricts transferring the assets of corporate debtors and recovery of any property by an owner or lessor where such property is occupied or in possession of the corporate debtor. Similar process is given for Adjudicating Authority (DRT).
10. Where insolvency process fails, the Adjudicating Authority (NCLT) will pass an order under section 33 of the Code. Subject to section 52 (Secured Creditors in Liquidation Proceedings), when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor;
11. Section 52 (Secured Creditors in Liquidation Proceedings) is unique provision in the IBC 2016 that allows the secured creditor to relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or realise its security interest in the manner specified in this section.
12. The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Who can be Insolvency Professionals under IBC 2016?

Vide Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 issued vide Gazette Notification IBBI/2016-17/GN/REG003 dated 23rd November 2016, to become “Insolvency professional” the following qualifications and experience have been provided:

5. Subject to the other provisions of these Regulations, an individual shall be eligible for registration, if he-
- (a) has passed the National Insolvency Examination;
 - (b) has passed the Limited Insolvency Examination, and has fifteen years of experience in management, after he received a Bachelor’s degree from a university established or recognized by law; **or**
 - (c) has passed the Limited Insolvency Examination and has **ten years of experience as** -
 - (i) a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India,
 - (ii) a company secretary enrolled as a member of the Institute of Company Secretaries of India,
 - (iii) a cost accountant enrolled as a member of the Institute of Cost Accountants of India, or
 - (iv) an advocate enrolled with a Bar Council.

How I can become Insolvency Professional under IBC 2016?

Regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 issued vide Gazette Notification IBBI/2016-17/GN/REG003 dated 23rd November 2016 provides the following eligibility criteria:

4. No individual shall be eligible to be registered as an insolvency professional if he-
- (a) is a minor;
 - (b) is not a person resident in India;
 - (c) does not have the qualification and experience specified in Regulation 5 or Regulation 9, as the case may be;
 - (d) has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:
Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;
 - (e) he is an undischarged insolvent, or has applied to be

- adjudicated as an insolvent;
- (f) he has been declared to be of unsound mind; or
- (g) he is not a fit and proper person;

Explanation: For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-

- (i) integrity, reputation and character,
- (ii) absence of convictions and restraint orders, and
- (iii) competence, including financial solvency and net worth.

To become an Insolvency Professional, the **Regulation 6** of the said Regulations inter-alia states that an individual enrolled with an insolvency professional agency as a professional member may make an application to the Board in Form A of the Second Schedule to the said Regulations, along with a non-refundable application fee of ten thousand rupees to the Board. **Regulation 7** of the said Regulations states that if the Board is satisfied, after such inspection or inquiry as it deems necessary that the applicant is eligible under these Regulations, it may grant a certificate of registration to the applicant to carry on the activities of an insolvency professional in Form B of the Second Schedule to these Regulations, within sixty days of receipt of the application, excluding the time given by the Board for presenting additional documents, information or clarification, or appearing in person, as the case may be.

Is there any transitional period during which I as a Cost Accountant can become Insolvency Professional?

Yes. **Regulation 9** of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 provide for registration of some of the professionals including Cost Accountants. **Regulation 9** inter-alia provides the following:

9(1): Notwithstanding any of the provisions of Regulation 5, an individual shall be eligible to be registered for a limited period as an insolvency professional if he-

- (a) has been ‘in practice’ for fifteen years as-
 - (i) a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India,
 - (ii) a company secretary enrolled as a member of the Institute of Company Secretaries of India,
 - (iii) **a cost accountant enrolled as a member of the Institute of Cost Accountants of India**, or
 - (iv) an advocate enrolled with a Bar Council; and

(b) submits an application for registration in Form A of the Second Schedule to these Regulations to the insolvency professional agency with which **he is enrolled on or before 31st December, 2016 along with a non-refundable application fee of five thousand rupees** which shall be collected by such insolvency professional agency on behalf of the Board.

9(2):The insolvency professional agency shall submit to the Board the fee collected and the details of the applications received under sub-regulation (1)(b).

9(3): An individual referred to sub-regulation (1) **shall be registered for a limited period** upon submission of the details and fee to the Board under sub-regulation (2), **which shall be valid for a period of six months** from the date of such submission.

We have Partnership Firm of Practicing Cost Accountants; can a Firm become Insolvency Professional under IBC 2016?

Yes. **Regulation 12** recognizes some the entities who can become Insolvency Professionals. Provisions of Regulation 12 (1) are as follows:

12(1): A limited liability partnership, a registered partnership firm or a company may be recognised as an insolvency professional entity if-

- (a) a majority of the partners of the limited liability partnership or registered partnership firm are registered as insolvency professionals; or
- (b) a majority of the whole-time directors of the company are registered as insolvency professionals, as the case may be.

Regulation 13(3) provides: An insolvency professional entity shall be jointly and severally liable for all acts or omissions of its partners or directors as insolvency professionals committed during such partnership or directorship.

Shall I as a Professional Member of IPA, liable to Code and Conduct prescribed by the Institute of Cost Accountants of India for its members OR any other Code and Conduct?

As the Institute of Cost Accountants of India is incorporating its separate section 8 company under the Companies Act, 2013 to function as "Insolvency Professional Agency (IPA)" under the provisions of the Insolvency and Bankruptcy Code 2016,

accordingly role and responsibilities of IPA under the IBC 2016 shall be different from the Cost and Works Accountants Act, 1959 and Regulations thereof. Thus the Code and Conduct applicable to Professional Members of IPA shall be those as prescribed under FIRST SCHEDULE of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

What are functions and duties of Insolvency Professionals under IBC 2016?

As per the provisions of Section 208: (1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, **it shall be the function of an insolvency professional** to take such actions as may be necessary, in the following matters, namely:—

- (a) a fresh start order process under Chapter II of Part III;
- (b) individual insolvency resolution process under Chapter III of Part III;
- (c) corporate insolvency resolution process under Chapter II of Part II;
- (d) individual bankruptcy process under Chapter IV of Part III; and
- (e) liquidation of a corporate debtor firm under Chapter III of Part II.

(2) Every insolvency professional shall abide by the following code of conduct:—

- (a) to take reasonable care and diligence while performing his duties;
- (b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- (c) to allow the insolvency professional agency to inspect his records;
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- (e) to perform his functions in such manner and subject to such conditions as may be specified.

Duties of Members (Insolvency Professionals):

Under Clause VII of Schedule- Regulation 13 of the Model Bye-Laws, the following duties of members (Insolvency Professionals) are mentioned:

13(1):In the performance of his functions, a professional member shall-

- (a) act in good faith in discharge of his duties as an insolvency professional;
- (b) endeavour to maximize the value of assets of the debtor;
- (c) discharge his functions with utmost integrity and objectivity;
- (d) be independent and impartial;
- (e) discharge his functions with the highest standards of professional competence and professional ethics;
- (f) continuously upgrade his professional expertise;
- (g) perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code;
- (h) comply with applicable laws in the performance of his functions; and
- (i) maintain confidentiality of information obtained in the course of his professional activities unless required to disclose such information by law.

Who can be appointed as Resolution Professional, Interim Resolution Professional, Liquidator and Bankruptcy Trustee under IBC 2016?

Insolvency Professionals can be appointed as Interim Resolution Professional; Resolution Professional; Liquidator; or Bankruptcy Trustee. *“Interim Resolution Professional”* is appointed by Adjudicating Authority under Section 16 of Code based on the proposal of creditors under Section 9(4) of the Code. *The term (Time period) of “interim resolution professional” shall not exceed thirty days from the date of his appointment.*

As provided in section 22 of the code, the first meeting of the committee of creditors shall be held within *seven days* of the constitution of the committee of creditors. The committee of creditors may in its first meeting either resolve to appoint the *“interim resolution professional”* as a *“resolution professional”* or to replace the interim resolution professional by another resolution professional.

As provided in section 34, where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the *“resolution professional”* appointed for the corporate insolvency resolution process under Chapter II of the Code shall act as the *“liquidator”* for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

As provided in section 125 of the Code, on the directions of the Adjudicating Authority, the Board shall appoint the bankruptcy trustee based on the recommendation of debtor or creditors under section 122 or section 123. Where a bankruptcy trustee is not proposed by the debtor or creditor under section 122 or 123, the Adjudicating Authority shall direct the Board to nominate a

bankruptcy trustee for the bankruptcy process. Accordingly, the Board shall nominate a bankruptcy trustee.

What are the duties and powers of the interim resolution professional?

The interim resolution professional, may, from the insolvency commencement date, require the following persons to report to, take instructions from and extend all cooperation to him, in all matters arising from and in connection with the terms of their engagement with the corporate debtor:

- (a) the board of directors, promoters and the members and partners of the corporate debtor, the personnel, the officers and managers, and any other person associated with the management of the business and operations of the corporate debtor;
- (b) the auditors and other professional advisors, if any, of the corporate debtor; and
- (c) the financial institutions maintaining the accounts of the corporate debtor.

In addition to above, the interim resolution professional shall have the authority to access the books of account, records and other relevant documents and information of the corporate debtor held with:

- (a) any depositories of securities;
- (b) professional advisors of the corporate debtor;
- (c) information utilities;
- (d) any other registry that records the ownership of assets;
- (e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and
- (f) contractual counterparties of the corporate debtor.

The Interim Insolvency Professional shall also appoint two registered valuers to calculate the liquidation value of the corporate debtor in accordance with Regulations.

What are the powers and duties of the resolution professional?

Section 25(1): It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:–

- (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
- (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- (c) raise interim finances subject to the approval of the committee of creditors under section 28;
- (d) appoint accountants, legal or other professionals in the manner as specified by Board;
- (e) maintain an updated list of claims;
- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum in accordance with section 29;
- (h) invite prospective lenders, investors, and any other persons to put forward resolution plans;
- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board.

In furtherance to the duties to be performed by the resolution professional under section 25, the resolution professional shall also undertake the following:

- (1) manage the operations of the corporate debtor as a going concern;
- (2) without prejudice have the authority to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the insolvency commencement date;
- (3) have the authority to do all acts and to execute, in the name and on behalf of the corporate debtor, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the seal of the corporate debtor, if any; and
- (3) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the corporate debtor as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the normal course of its business.

Who can form Insolvency Professional Agency (IPA) under IBC 2016?

Any person can establish Insolvency Professional Agency (IPA) under the IBC 2016 subject to fulfilment of eligibility conditions prescribed under Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016 notified by MCA vide Gazette Notification no. IBBI/2016-17/GN/REG001 dated 21st November 2016. The main conditions for establishing IPA is that it shall have bye-laws and governance structure in accordance with the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies), 2016; have minimum net worth of Rs. 10 crore and have requisite infrastructure.

As per the provisions of Section 204 of the Code: An insolvency professional agency **shall perform the following functions, namely:**—

- (i) grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;
- (ii) lay down standards of professional conduct for its members;
- (iii) monitor the performance of its members;
- (iv) safeguard the rights, privileges and interests of insolvency professionals who are its members;
- (v) suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
- (vi) redress the grievances of consumers against insolvency professionals who are its members; and
- (vii) publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

Duties of the Agency (Insolvency Professional Agency):

Under Clause IV of **Schedule-** Regulation 6 of the Model Bye-Laws, the following duties of Insolvency Professional Agency are mentioned:

- 6. (1)** The Agency shall maintain high ethical and professional standards in the regulation of its professional members.
- (2) The Agency shall -
 - (a) ensure compliance with the Code and rules, regulations and guidelines issued there under governing the conduct of insolvency professional agencies and insolvency professionals;

- (b) employ fair, reasonable, just, and non-discriminatory practices for the enrolment and regulation of its professional members;
- (c) be accountable to the Board in relation to all bye-laws and directions issued to its professional members;
- (d) develop the profession of insolvency professionals;
- (e) promote continuous professional development of its professional members;
- (f) continuously improve upon its internal regulations and guidelines to ensure that high standards of professional and ethical conduct are maintained by its professional members; and
- (g) provide information about its activities to the Board.

To regulate the Professional Members and perform the duties by Agency, what other committees are to be formed by Insolvency Professional Agency (Agency)?

The Insolvency Professional Agency is required to form/constitute the following committees:

- 1. Advisory Committee of Professional Members** to advise the Agency in (a) the development of the profession; (b) standards of professional and ethical conduct; and best practices in respect of insolvency resolution, liquidation and bankruptcy.
- 2. Membership Committee** for examining the applications for enrolment of professional members and granting the membership on being satisfied that the professional member meets the criteria of enrolment and matters connected with the professional members.
- 3. Monitoring Committee** to monitor the professional activities and conduct of professional members for their adherence to the provisions of the Code, rules, regulations, guidelines and directions issued under IBC 2016.
- 4. Grievance Redressal Committee** providing for the procedure for receiving, processing, redressing and disclosing grievances against the Agency or any professional member of the Agency.
- 5. Disciplinary Committee** providing for disciplinary mechanism, issuing show-cause notices against professional members, disposal of cases, issuing necessary orders for expulsion, suspension, admonishment of the professional members, imposition of penalty. The Agency may issue show cause notice: (a) based on a reference

made by the Grievances Redressal Committee; (b) based on monitoring of professional members; (c) following the directions given by the Board or any court of law; or (d) suo moto, based on any information received by the Agency.

- 6. Appellate Panel** to provide for preferring an appeal by an aggrieved person before the Appellate Panel within thirty days from the receipt of copy of the final order from the Disciplinary Committee. Appellate Panel shall dispose of appeal within thirty days of receipt of appeal.

What are the meanings of corporate debtor, corporate person, creditors, financial creditors, operational creditors and operational debt under IBC 2016?

Section 3(8) defines “corporate debtor” means a corporate person who owes a debt to any person.

Section 3(7) defines “corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

Section 3(10) defines “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.

Section 5(7) defines “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Section 5(20) defines “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section (21) defines “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Who can initiate corporate insolvency resolution process?

Where any corporate debtor commits a default, a financial

creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

What is Resolution Plan?

As per Section 30, the Insolvency Resolution Professional (IRP) within the prescribed time i.e. 180 days or in case of extension 270 days, where Fast Track Resolution within 90 days or in case of extension 135 days, is required to submit his Resolution Plan to Adjudicating Authority (NCLT) prepared by him on the basis of information memorandum. The Resolution Plan should provide for: (i) payment of insolvency resolution costs; (ii) repayment of the debts to operational creditors; (iii) management of affairs of the Company after approval of the resolution plan; (iv) implementation and supervision of the resolution plan; (v) does not contravene provisions of the law for the time being in force; and (vi) conforms to such other requirement as may be specified by the Board.

What is process of submission of claims and who shall bear the cost of proving claim of debt?

The process of acceptance of claims for debts of financial creditors, operational creditors and other debts has been given in the "Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016". Where an order for commencement of a corporate insolvency resolution process is passed by the Adjudicating Authority against the corporate debtor, a person claiming to be financial creditors, operational creditors and creditors for other debt of such corporate debtor shall, by the last date mentioned for submitting a proof of claim in the public announcement, submit his proof of claim to the interim resolution professional or the resolution professional, as the case may be, in the prescribed Form.

Every creditor shall bear the cost of proving his own debt including any cost that may be incurred in providing documents or evidence in this regard.

What is Insolvency Resolution Process (IRP) Costs?

Section 5(13) defines "insolvency resolution process costs" means—

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution

professional;

- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board;

In addition to the matters listed in section 5(13) as above, the following shall be included in calculating the amount of "insolvency resolution process costs" under the Code:

- (1) all amounts owed to suppliers which are deemed to be part of insolvency resolution process costs;
- (2) all expenses incurred by or on behalf of the corporate debtor, in running its business and operations as a going concern during the insolvency resolution process period;
- (3) all amounts due to any person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d) of the Code;
- (4) all amounts accruing to the interim resolution professional which are deemed to be part of insolvency resolution process costs; and
- (5) all amounts accruing to the resolution professional.

Who shall pay costs of the Interim Resolution Professional (IRP)?

The person filing an application for initiating the corporate insolvency resolution process shall pay the expenses incurred by the interim resolution professional including the costs of engaging any professional advisors and any other costs arising out of and in connection with discharging his functions under the Code, the Rules and the Regulations. The committee of creditors at its first meeting may ratify the expenses incurred by the applicant. The amount of expenses ratified by the committee of creditors shall be reimbursed to the applicant from the assets of the corporate debtor and shall be treated as insolvency resolution process costs.

However, where the assets of the corporate debtor are insufficient to reimburse the amount so ratified, each financial creditor which is a part of the committee of creditors shall reimburse the applicant to the extent of such shortfall on a pro rata basis.

Further, if expenses incurred by the applicant are not ratified by the committee of creditors in full, the applicant shall not have the right to be reimbursed for such expenses from the assets of the

corporate debtor or by the committee of creditors. However, the applicant who engaged the IRP shall be responsible to reimburse the balance amount, if could not be paid/ reimbursed to him as per the above process.

Who shall fix the remuneration of resolution professional and what shall be basis for such fixation?

The remuneration of the resolution professional shall be fixed by the committee of creditors. In determining the basis of remuneration to be charged, the committee of creditors shall have regard to the following matters:

- (a) the complexity of the case;
- (b) any matters in connection with the business and operations of the corporate debtor with respect to which any responsibility of an exceptional nature falls on the resolution professional;
- (c) the effectiveness with which the resolution professional is carrying out his duties; and
- (d) the value and nature of the assets of the corporate debtor.

Any revision of the basis of remuneration fixed shall be made by the committee of creditors. The remuneration to be paid to the resolution professional shall constitute insolvency resolution process costs.

When does Liquidation Process start under IBC 2016?

Section 33 of the Code provides: (1) Where the Adjudicating Authority, –

- (a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process does not receive a resolution plan; or
- (b) rejects the resolution plan for the non-compliance of the requirements specified therein, it shall—
 - (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in Code;
 - (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
 - (iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order.

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order.

(5) When a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor.

What shall be Remuneration/Fee for conduct of Liquidation Proceedings?

An insolvency professional appointed as a liquidator for the conduct of the liquidation proceedings shall charge remuneration or fee in proportion to the value of assets distributed and realized by the liquidator in the manner laid out in Regulations.

If liquidation order has been passed under sections 33(1)(a) or 33(2) of the Code, the liquidator's remuneration shall be as determined by the committee of creditors.

If liquidation order has been passed under sections 33(1)(b) or 33(3) of the Code, or the committee of creditors under sub-regulation (2) is unable to, or does not determine the remuneration of the liquidator, the Adjudicating Authority shall determine the remuneration of the Liquidator, which shall at the maximum, as specified in the Schedule to the Regulations.

It is clarified that the scale of remuneration as specified in said Schedule shall not be applicable when the creditors determine the remuneration of the liquidator.

What is liquidation estate and property memorandum under IBC 2016?

For the purposes of liquidation, the liquidator shall form

an estate of assets mentioned in section 36(3), which shall be called "Liquidation Estate". The liquidator shall prepare a property memorandum in respect of each property that forms the liquidation estate.

The property memorandum shall include:

- (a) the valuation of the property;
- (b) the price the liquidator estimates will be recovered for that property;
- (c) choice of manner of sale (with reasons);
- (d) choice of mode of sale (with reasons);
- (e) terms and conditions for sale;
- (f) any other information that may be relevant for the sale of the properties.

The property memorandum shall be submitted to the Adjudicating Authority, but shall not be available for inspection by stakeholders.

What is procedure of valuation of property under IBC 2016?

The liquidator is required to obtain the valuation of the property of the corporate debtor done as (a) a going concern value of the corporate debtor or its parts; and (b) individual value of assets, from at least two registered valuers appointed in accordance with the Companies Act, 2013 or Rules made there under. The registered valuers so employed shall determine the valuation as per internationally accepted methodology that is fair, realistic, and calculated on an arm's length basis. The liquidator should take the average of the two values submitted to arrive at the liquidation value.

What are the modes of selling the properties by liquidator?

The manner of selling the properties of the corporate debtor and modes thereof has been provided in the Regulations, 2016. Subject to the provisions of the Regulations, the liquidator may sell the assets of the corporate debtor by means of private sale or auction, in a transparent manner as provided in the Regulations, on arm's length basis, and at prices determined by market factors.

The liquidator may not sell the assets of the corporate debtor by means of private sale except with the prior permission of the Adjudicating Authority. Such permission should also be required for conducting a physical or closed auction (the general norm being an open e-auction).

However no permission of the Adjudicating Authority is required if the property proposed to be sold by means of private sale is: (a) perishable; or (b) likely to deteriorate in value significantly, such that there will be a loss if the property is not sold immediately.

Is it possible that a secured creditor in liquidation proceedings relinquish his security interest?

Yes. The secured creditor may relinquish his security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53 of the code. The value of the secured debt is equivalent to the value of the security. When the valuation of properties is commissioned by the Liquidator, the exact value of securities would be fixed, and the classification of claims as secured and unsecured would be made in accordance with such determination.

In which order of priority, the proceeds from sale of liquidation assets distributed amongst stakeholders?

Section 53 provides:

53(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :-

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following :-
 - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:-

- (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
- (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;
- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

What shall be cost of liquidator?

The cost of liquidation includes the remuneration of the liquidator, and reasonable costs incurred in carrying out the liquidation. This should not include the personal expenses of the liquidator such as cost of premium of any insurance taken by the liquidator.

When liquidation process shall be deemed to be completed and corporate debtor is said to be dissolved?

Section 54(1): Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

(2) The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

Opportunities for CMAs under Insolvency and Bankruptcy Code

As mentioned above also, the following are opportunities available for the Cost Accountants under the Insolvency and Bankruptcy Code 2016:

(1) CMAs can act as **Insolvency professionals:**

(a) As Interim Resolution Professionals (Section 16) and manage the affairs of the Corporate Debtors as “going concern” during the insolvency resolution process in interim period of 30 days;

(b) As Resolution Professional (Section 22), the creditors committee may either appoint the same “interim resolution professional” for preparing the “Resolution Plan” and managing the affairs of the Corporate Debtor as “going concern” during the insolvency resolution process or may appoint other Professional (CMA) in his place;


(c) As Liquidator (Section 33) to be appointed by Adjudicating Authority (NCLT) on the grounds explained in this article under “Liquidation Process”;

(d) As Voluntary Liquidator (Section 59) to be appointed by Corporate Debtors;

(e) Insolvency Resolution Professional (Section 82) by Adjudicating Authority in case of “Insolvency and Bankruptcy for individuals and Partnership Firms”;

(f) As Insolvency Resolution Professional (Section 97) by Adjudicating Authority for initiating the insolvency resolution process by debtor in case of “Insolvency and Bankruptcy for individuals and Partnership Firms”

(g) As insolvency professional as bankruptcy trustee (Section 125) by Adjudicating Authority in case of “Insolvency and Bankruptcy for individuals and Partnership Firms”

(h) As valuer of properties and assets of liquidation estate under the Code and Regulations being framed under the Insolvency and Bankruptcy Code 2016; 

Sources:

1. *The Insolvency and Bankruptcy Code 2016;*
2. *Insolvency and Bankruptcy Board of India (Registration of Insolvency Professional Agencies) Regulations, 2016*
3. *Insolvency and Bankruptcy Board of India (Registration of Insolvency Professionals) Regulations, 2016*
4. *Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016*

technical.budhiraja@icmai.in