

## PIVOTAL ROLE OF RESOLUTION PROFESSIONAL IN CIRP UNDER IBC

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**Abstract** - The paper describes the Insolvency and Bankruptcy Code, 2016 of India and role of resolution professional in the Corporate Insolvency Resolution Process of distressed corporate debtor. It cannot be denied that role of the resolution professional is very important in the success or failure of the CIRP. In all activities starting from the filing of the application for CIRP and till its completion, the resolution professional is involved in one way or the other. An attempt has been made to understand and evaluate as to how and in what manner, the resolution professional helps to achieve the objectives of the IBC and appraises its efficiencies against a number of benchmarks.

**Keywords:** Insolvency, Resolution, Liquidation, haircut, moratorium, Waterfall mechanism;

### INTRODUCTION

IBC is a business-friendly Law. Resolution or 'Revival' is the core of this law; IBC is a huge game changer in the process of managing stressed assets. There is a paradigm shift in the "Debtor in possession" to "Creditor in control" in corporate insolvency resolution where the control of the business of the corporate debtor gets shifted to the creditors. One of the key objectives of the IBC is to revive the business of the corporate debtor keeping in view going concern concept. The revival or resolution of the stressed and ailing business is intended to help grow the national economy. This is the primary duty in 'creditor in control model', Getting all the details of the assets, taking control as well as protection of business value is unique duty for an administrator or Insolvency professional. Since, the resolution depends on these assets, if the entire business is not in control, the going concern will be affected. There may be assets of the company with third party as well as third party assets with company. The assets may also be beyond India jurisdiction alienated. There may be assets in associated/related concern or layers of companies.

The Resolution professional appointed under the IBC is expected to get into the shoes of the CEO/Managing Director and he or she is under obligation to effectively manage the business of the corporate debtor by making efforts to address the difficulties being faced by the corporate debtor and maximize the value of the stakeholders. It has been observed that generally, the time when the resolution professional dons the mantle of the Chief of the business, there are several issues which are to be dealt with by him or her in an effective manner. The resolution professional navigates the process, makes efforts to control the situation and keeps resolving the issues while managing the operations of the Corporate Insolvency Resolution Process (CIRP) so that the same culminates in resolution rather than liquidation as resolution is in the interest of all the stakeholders and liquidation should be the last resort.

Additionally, the task of the Insolvency resolution professional or resolution professional is not limited to just manage the business but also need to and ensure that it continues as a going concern, and think forwards as to how he can arrive at resolution and that too in time bound manner. He or she has to work under the overall supervision of Committee of Creditors and wherever required requisite approvals are required to be taken.

The business which the insolvency resolution professional or resolution professional has to manage is cash starved and managing the affairs of such distressed corporate debtor though for a short period, gives an opportunity to him or her to work on ways to overcome the challenges. During this period, the advantage that the resolution professional has is imposition of moratorium which

includes prohibition on institution of suit or continuation of pending suits, etc. and during this crucial period he or she has to ensure that the business of the distressed corporate debtor is smoothly carried on which can attract prospective resolution applicant for getting successful resolution

#### LITERATURE REVIEW

In the case of **Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited**<sup>1</sup> it has been observed by the Supreme Court of India that the IBC was introduced as a water-shed moment for insolvency law in India that consolidated processes under several disparate statutes such as the Companies Act, 2013, SICA, SARFAESI, Recovery of Debts Act, Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, into a single code. A comprehensive and time-bound framework was introduced with smooth transitions between reorganization and liquidation, with an aim to inter alia maximize the value of assets of all persons and balance the interest of all stakeholders.

In the case of **Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd**<sup>2</sup>. In the scheme of IBC, the script of corporate insolvency resolution process, to a large extent, revolves around the resolution professional. When CIRP gets initiated with admission of the application by the Adjudicating Authority as per Sections 7,9 or 10 as the case may be, an interim resolution professional is appointed by the Adjudicating Authority in terms of Section 13(1)(c) and in the manner laid down in Section 16 of IBC. Collating and admitting the claims of all creditors; appointing and convening the meetings of the Committee of Creditors; and running the business of the corporate debtor as a going concern during the intermediate period are the key tasks assigned to the interim resolution professional, as distinctly appears from Sections 15,17,18 and 20 of the Code. Further in the scheme of IBC, the Committee of Creditors, in its first meeting to be held within seven days of its constitution, has to resolve to appoint the interim resolution professional as a resolution professional or to replace him by another resolution professional (vide Section 22 IBC). In terms of Section 23, the resolution professional is to conduct the entire CIRP and manage the operations of the corporate debtor during the period of CIRP. His duties and responsibilities extend to the conduct of all the meetings of the Committee of Creditors, giving notice of such meetings to the members of CoC, to the members of the suspended Board of Directors and to the operational creditors, if amount of their aggregate dues is not less than 10% of the debt. Akin to the duties of the interim resolution professional under Section 18 of the Code, the resolution professional is also required to preserve and protect the assets of the corporate debtor while continuing with the business operations and while undertaking the actions contemplated by Section 25(2) of the Code. Significantly, the resolution professional is also required to prepare the information memorandum in terms of Section 29 of the Code; invite prospective resolution applicants; and present the resolution plans at the meeting of Committee of Creditors, while examining them as required by Section 30 of the Code. These compliances are duly regulated by Regulations 36,36A and 36B of the CIRP Regulations - Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016- Regulations 35,36-A & 36-B.

In the case of **Swiss Ribbons Pvt. Ltd v. Union of India**<sup>3</sup> it has been held that unlike the liquidator, resolution professional cannot act in a number of matters without approval of committee of creditors under section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance - Thus, resolution professional is really a facilitator of resolution process, whose administrative functions are overseen by committee of creditors and by Adjudicating Authority.

<sup>1</sup> 2021(10)SCALE 488

<sup>2</sup> 2021(5) SCC 624

<sup>3</sup> 2019(4) SCC 17



In the case of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited**<sup>4</sup> it has been held that looking to the legal fictions created by Section 43 and looking to the duties and responsibilities as per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets. One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor, and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

In the next step, the said shortlisted transactions would be scrutinized to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.

In yet further step, such of the scanned scrutinized transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets as per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.

In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43.

After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he or she shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

**S. Rajendran & S. Srinivasan**, *Practical Issues Posing Challenges to the Insolvency Professionals - Does the Code Show the Road Ahead?*<sup>5</sup>, states that The Insolvency & Bankruptcy Code, 2016 ("Code") has been a real game changer in the Indian economy's business reform initiatives in the

<sup>4</sup> 2020(8) SCC 401

<sup>5</sup> S. Rajendran & S. Srinivasan, *Practical Issues Posing Challenges to the Insolvency Professionals – Does the Code Show the Road Ahead?*, Vol 47, No 09, C.S.T.J.F.C.P., 152, 56-58 (2017)

last twenty five years. Ease of doing business is ironically the base premise for enacting this comprehensive Code to exit from the business.

**Delep Goswami & Anirrud Goswami, *Insolvency Resolution Professionals' Predicament against Difficult "Corporate Debtors"***<sup>6</sup>. It states that the Code is enacted to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals alike, in a time-bound manner for maximization of value of the assets of such persons taking into account the interest of all the stakeholders. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code creates a time bound corporate insolvency resolution process (CIRP) for companies and individuals. The most important provision is Section 17 of the Code, which elucidates that from the date of appointment of IRP, the management of the affairs of the CD shall vest with the IRP and the powers of the Board of Directors or the partners of the CD shall stand suspended and be exercised by the IRP and the officers and managers of CD shall report to the IRP and provide access to such documents and records of the CD as may be required by the IRP. Also, the financial institutions maintaining accounts of the CD shall act on the IRP's instructions and shall furnish to the IRP all information relating to the CD.

**D,K.Prahlada Rao, *Role & Responsibility of Insolvency Professionals Under The CODE-An Analysis***<sup>7</sup>. The article deals with insolvency professionals and states that the Code is transformational piece of legislation as it seeks to establish an ecosystem for handling Insolvency & Bankruptcy issues. Most importantly it offers an exit plan to all categories of persons-Corporates, Stakeholders, Individuals and Partnership firms, apart from overhauling century old legal framework. Hence it is a game changer in which the Bankers, Courts, Investors and the initiators of insolvency proceedings will have to work in harmony for devising either a survival plan or liquidation of sick units and others facing debt default.

During more than six years since IBC has been introduced, some Resolution Professionals were able to achieve positive EBIDTA during CIRP which helped in attracting resolution applicants and arrive at the resolution plans. It cannot be denied that the success of resolution professional in operating the distressed corporate debtor effectively depends on personal skill, expertise and understanding the business intricacies and the experience of professionals who had managed corporate entities during their career could also help in dealing the business effectively during CIRP.

**Dr. M. S. Sahoo**, Former Chairperson of Insolvency and Bankruptcy Board of India (IBBI) also echoed the views and explained the role and responsibilities of IP. He stated that "The insolvency profession is in its infancy. It is a stage in which reputation is formed. Once 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 society and inspire the confidence of all the stakeholders. They must justify the exalted status of an institution bestowed on them under the Code."

#### Sub Heading 1

##### Role of Insolvency Professional during CIRP

It is observed that on the admission of the application for commencement of CIRP by the Adjudicating Authority (AA) Interim Resolution Professional is appointed and the management of the affairs of the Corporate Debtor vest in the interim resolution professional and the existing Board of Directors of Corporate Debtor is suspended and the directions are issued to the existing officers and managers of the distressed corporate debtor to report to the interim resolution professional and give him the access to documents and other records. The Interim resolution professional is under obligation to meet all the senior officials of the corporate debtor and make everyone aware that from the date of passing of the order of admission of the application for

<sup>6</sup> Delep Goswami & Anirrud Goswami, *Insolvency Resolution Professionals' Predicament against Difficult "Corporate Debtors"* Vol 47, No 09, C.S.T.J.F.C.P., 152, 61-62 (2017)

<sup>7</sup> D,K.Prahlada Rao, *Role & Responsibility of Insolvency Professionals Under The CODE-An Analysis*, Vol 47, No 03, C.S.T.J.F.C.P., 124, 21 (2017)



commencement of CIRP by the Adjudicating Authority, he or she has replaced the Board of Directors and the affairs of the corporate debtor will be managed by him. It is necessary for him / her to make such announcement and depending on the circumstances, he or she may be required to issue written communication. Besides this, he/she is statutorily required to make Public Announcement in Form A within 3 days as provided in the Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The IBC also gives directions to the banks and financial institutions which maintain accounts of the corporate debtor to act on the instructions of the Interim Resolution Professional in relation to the accounts of Corporate Debtor with them. The financial institutions also need to furnish all information relating to the corporate debtor available with them to the interim resolution professional as may be required by him/ her to carry out the assigned task. After completing the basic requirements, the main and important task of the insolvency resolution professional is to effectively manage the affairs of the corporate debtor besides completing various procedures like inviting claims, formation of Committee of Creditors (CoC) etc. till his appointment is confirmed as Resolution Professional or another person takes charge as resolution professional. It, therefore becomes imperative and essential for him/ her to understand the business of the corporate debtor that he / she is required to handle at macro level and decide course of action he has to take for managing the business during the CIRP period.

The resolution professional is not only required to utilize his /her business acumen but may also need to have sufficient techno commercial skills or may develop such skill for successfully managing the business of the corporate debtor. When the application for commencement of CIRP is admitted by the adjudicating authority, there are apprehensions in the mind of the stakeholders including the customers, vendors and employees. It becomes important for the interim resolution professional to communicate and discuss about the Corporate Insolvency Resolution Process with the stakeholders. The customers need to be assured that they will continue to get their requirements fulfilled and the resolution professional will be making all efforts to ensure that the company operates as a going concern and during this process, the confidence of the vendors has to be won to continue supply of goods and services. They need to be assured and informed that while their dues as on the Insolvency Commencement Date (ICD) will be paid as per the CIRP and the amounts due to the vendors for supplies made by them during the CIRP have the first priority at the time of resolution and will be paid as CIRP costs in priority over the secured lenders. Undeniably, without the support from the vendors, it is practically impossible to continue the business of the Corporate Debtor. To ensure the continuous supply, at times the resolution professional may have to approach the adjudicating authority if there are refusals from suppliers to continue to provide essential supplies such as electricity, power and fuel, water, etc due to non-payment of dues as of the ICD.

**Change creates discomfort of uncertainty so morale building and team building needs to be done on regular basis. Efforts to be made to retain the team members with good skilled sets**

The resolution professional need to understand that the employees are the biggest assets of the business and building trust among employees becomes crucial and they need to be assured that commencement of CIRP is part of resolution process. Equally, it is important for the resolution professional to retain the talent and he or she may ensure the importance of performance oriented working. Besides ensuring nurturing of the good talent and give them opportunity to add value and assist him /her in managing the day to day affairs, it is possible that some key personnel are required to be replaced or fresh recruitment may be made Industry experts may be hired. It is imperative and important to understand that changes in key personnel and engaging industry experts need the approval of the Committee of Creditors.

**One of the major challenges is to get correct and dependable data and information flow of past and current ongoing activities.**

The resolution professional needs to be equipped with the responsibility to collect all the information relating to the assets, financial position of the corporate debtor, including information relating to the business of the corporate debtor. it is important to understand that the Interim





Resolution Professional takes control and custody of all the assets over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry the records the ownership of assets which includes the assets over which the corporate debtor has ownership rights which may be located in a foreign country; assets that may or may not be in possession of the corporate debtor; tangible assets, whether movable or immovable; intangible assets including intellectual property; securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies, assets subject to the determination of ownership by a court or authority; IBC also provides that certain items should not be included as 'assets' while taking control and custody such as assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment; assets of any Indian or foreign subsidiary of the corporate debtor; and such other assets as may be notified by the Central Government in consultation with any financial sector regulator. Apart from various responsibilities delegated to the resolution professional, IBC also provides that the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the insolvency professional as may be required by him in managing the affairs of the corporate debtor.

It has been observed that, the changes are always challenged at first, until the reasoning and logics of changes are properly explained and accepted. Also, it has been observed in few cases, that the Insolvency professional in order to ensure safeguarding of assets of corporate debtor, strengthens controls around dispatches, ensures segregation of duties and verifies effectiveness of the designed controls. The challenges faced by the resolution professional under CIRP are dynamic, complex and difficult. The provisions of IBC are strong and support the resolution professional in his endeavour and give him the required authority and confidence. There are several instances where the Adjudicating Authority comes to the rescue of the resolution professional and help to remove the obstacles faced by him. It needs to be emphasised that while ensuring the management of operations of corporate debtor is maintained as going concern, Section 20 of the Code empowers the interim resolution professional to make every endeavour to protect and preserve the value of the property of the corporate debtor and thereby provides to appoint accountants, legal or other professionals as may be necessary; 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 commencement of corporate insolvency resolution process; to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property; provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt; to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and to take all such actions as are necessary to keep the corporate debtor as a going concern.

Though the resolution professional has been provided with several responsibilities and authority, however for certain actions he has to take prior approval of the Committee of Creditors, such as raising any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting; creating any security interest over the assets of the corporate debtor, change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company; record any change in the ownership interest of the corporate debtor; give instructions to financial institution maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting; undertake any related party transaction; amend any constitutional documents of the corporate debtor, delegate its authority to any other person; dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties; make any change in the management of the corporate debtor or its subsidiary; transfer rights or financial debts or operational debts under material contracts



otherwise than in the ordinary course of business; make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor. The resolution professional while performing his duties, takes guidance of Committee of Creditors (CoC) since its decision making is critical for effective conduct of resolution process. The Insolvency professional represents and acts on behalf of the corporate debtor with third parties and exercises rights for the benefit of the corporate debtor in judicial or arbitration proceedings. Along with managing the operation of corporate debtor, he/she prepares the information memorandum and based on the complexity and scale of operations of the business of the corporate debtor, invites prospective resolution applicants who fulfill such criteria as may be laid down by him with the approval of CoC to submit a resolution plan or plans. It is observed that the regulations of CIRP also mandate that the resolution plan should essentially provide, the term of the plan and its implementation schedule, the management and control of the business of the corporate debtor during its term and adequate means for supervising its implementation.

### **Sub Heading 2**

#### **Role of Insolvency Professional during Liquidation**

For any reason, if resolution plan does not get approval of CoC, the role of Insolvency professional gets converted in the form of Liquidator. As soon as Liquidation order is passed, Liquidator takes charge from Resolution professional, however, the Liquidator is also required to adopt all skills as required by the resolution professional.

The IBC provides powers and duties of liquidator which are more or less similar to that which are there during CIRP. The Liquidator needs to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor. He/she needs to evaluate the assets and property of the corporate debtor and take such measures to protect and preserve the same. His duty is also to carry on the business of the CD for its beneficial liquidation as he considers necessary. The liquidator is under obligation to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or by private sale, and at the same time he needs to ensure that he does not sell the immovable and movable property or actionable claims of the corporate debtor in Liquidation to any person who is not eligible to be a resolution applicant.

The liquidator may sell an asset on a standalone basis, the assets in a slump sale, a set of assets collectively, the assets in parcels, the corporate debtor as a going concern, the business(s) of the corporate debtor as a going concern. If resolution of the Corporate Debtor during CIRP period does not happen probably the last two options are the chances to evaluate enterprise as going concern.

As per IBC, the liquidator is authorized to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability, as if, such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business. He can take out, in his official name, Letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself. The liquidator can appoint professional to obtain any professional assistance from any person in discharge of his duties, obligations and responsibilities. However, Regulation requires to ensure that the professional is independent from him or Corporate Debtor.

#### **Role and Responsibilities of RP as CEO of the Enterprise**

It has been duly understood by all that the role played by a Resolution professional in managing the enterprise of a Corporate Debtor is extremely crucial. This well-known fact was also recognized by Bankruptcy law Reforms Committee in its Report, distinguished law makers and various other



institutions who have made the statements on the prominent role that an Insolvency professional (IP) plays in insolvency resolution process. Some of the extracts are as follows;

**Role and Responsibilities of IP as described by Bankruptcy law Reforms Committee in its Report, November 2015**

The Bankruptcy Law Reforms Committee (BLRC) in its Report has stated that "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 outcome, the role of the IP encompasses a wide range of functions, which include adhering to the 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 way the adjudicator depends on the specialized skills and expertise of the IP to carry out these tasks in an efficient and professional manner. 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 IP 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.'

**Role of Insolvency Representative as described in UNCITRAL Legislative Guide on Insolvency Law**

In the UNCITRAL Legislative Guide on Insolvency Law, the importance of Insolvency Representative has been spelt out as; 'The insolvency representative plays a central role in the effective and efficient implementation of insolvency law, with certain power 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 but also that there is confidence in the insolvency regime.'

**The role of a liquidator as the administrator in effective implementation of the law as described by the International Monetary Fund**

The International Monetary Fund has also held the importance of the role of a liquidator as the administrator and in ensuring effective implementation of Law. It has added that 'As court-appointed officials, they have an obligation to ensure 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.'

**Key Role and Responsibilities of RP as provided in the Code and CIRP Regulations there under**

Essentially, the RP is tasked with facilitating the entire resolution process while attempting to address and balance the interests of all stakeholders. In this regard, Section 23 of the Code requires that Section 23(1): Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period. Section 23(2): The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional

**Sub Heading 3**

**Challenges Faced by RP in managing the Enterprise as a Going Concern**

The Code emphasizes that the IRP/RP shall manage the operations of the corporate debtor as a 'Going Concern' i.e. resolve the insolvency of corporate debtor for revival and prevent it from going into liquidation.





### **What are the challenges?**

There are several challenges faced by an Insolvency professional (IP) in managing the enterprise as a going concern, which may include:

#### **Understanding the reason for the failure of the entity**

There may be various reasons for the failure of the entity, such as Financial Failure, Business Failure etc., and the analysis to understand the reason for failure is important and it may take considerable time.

#### **Diverse objectives of various stakeholders**

The stakeholders include creditors, debtors, employees, workmen, Government and statutory authorities, in addition to the consumers of the entity. All these stakeholders would have diverse objectives and expectations from the process. For example, in a real estate project, the lenders would expect the haircut to be minimal whereas the homebuyers would expect to get their flats as early as possible.

#### **Non-cooperation from certain stakeholders**

There may be very little or no cooperation from certain stakeholders like promoters, suspended Board of Directors, and the employees. Getting information without assistance from these persons may not be possible and it may be time consuming, though time is the essence of the CIRP.

#### **Compliance issues pending on the part of the corporate debtor**

The corporate debtor may or may not be compliant with various laws applicable to it before CIRP. The RP may face a challenge in getting the compliances cleared for the period preceding the CIRP. Moreover, there may be some old pending compliances or legal issues, which may come up during the CIRP and this, the RP may have to look into.

#### **Lack of information/incomplete information**

There may be some information, which may not have been made known to the RP at the time of initiation of the process. It would be a challenge to evaluate such information and to get the details at the earliest.

#### **Disputes/Issues relating to claims of creditors**

There may be a case involving claims and the verification of some of the claims may take longer than expected time. In case of rejection of whole or part of the claim of some creditor, there may be a risk of litigation being initiated against the RP. Moreover, the CoC may have to be reconstituted based on the progress of the claim verification process and there could be cases of delayed claims too.

#### **Timely decision making**

If the decision in the CoC meeting is delayed or confirmed late overall process may be delayed and the timelines may be affected.

#### **Related party Issues**

Identification of related parties and the treatment of their claims are to be carefully looked into by RP.

#### **Existing and fresh litigations by creditors or other stakeholders**

One of the major challenges for an RP would be to manage and handle the litigations-ongoing as well as fresh cases being filed by the aggrieved stakeholders. It requires time, money and efforts in engaging legal counsels and professional and also involves court time.

#### **Delayed or no contribution towards CIRP costs and Raising of Interim Finance**

It is challenging for the RP to continue to run the entity as a going concern if he does not receive contribution towards CIRP costs in time. In case of inadequate funds, interim finance may have to be raised, subject to the resolution and due approval of the CoC.

#### **Frivolous Complaints against the RP**


Perhaps the big challenge for an RP is defending himself in the frivolous complaints filed with various Authorities. The IBC prescribes strict timelines which the RP has to adhere to and with such complaints filed, the process may be affected as it involves time, efforts and money and acts as an impediment to the free flow of the process.

#### **How to overcome these challenges?**



There could be various ways to overcome the challenges faced, which could be based on the specific enterprise and specific to situation, etc. some of the ways to overcome these challenges are mentioned hereunder:

- a) Proper control over the office(s) and site (s) of the corporate debtor should be ensured by the RP and all the records kept therein should be properly kept.
- b) Right from the inception of the process, the RP needs to ensure effective communication with all the stakeholders, in addition to the Committee of Creditors (CoC) as and when constituted. There should be proper communication with proper records and trails being created of the communication exchanged with other parties.
- c) RP may aim for proper balancing of interests of the stakeholders.
- d) An indepth and comprehensive analysis of the corporate debtor including financials, statutory registers and other records may be made, to ascertain the probable causes of the insolvency and non-compliances, if any.
- e) The core duties should be performed by RP himself, but he can take help of professional services by appointing accountants, legal or other professional as may be necessary. However, no duty should be outsourced to any person/professional. Independent professionals for valuation and transaction audit should be appointed and the professionals should be given all the requisite information at the earliest and clear dates should be given by which the report are expected to be issued by the professionals. There should be a proper follow up to ensure that the date committed for the issue of the report is met.
- f) The CoC may be explained about the importance of timely decision making from their side, including the CIRP cost contributions, based on the budget approved by it. The issue relating to raising of Interim Finance may be adequately discussed and deliberated upon before the CoC and their views may be taken, before putting up the matter for voting. All significant developments may be communicated to the CoC at the earliest, without waiting for the next CoC meeting.
- g) In addition to the public announcement, all the statutory authorities to which the corporate debtor is affiliated to or has dealings are to be intimated about the initiation of the process and the statutory authorities to which the corporate debtor is affiliated to or has dealings are to be intimated about the initiation of the process and the consequent moratorium imposed.
- h) The Banks should be intimated about the initiation of the process and all necessary documents should be served upon them. RP should take all the bank accounts under his control.
- i) All the claims received by the RP are to be minutely analysed and verified as soon as possible. In case there is some additional information or records required from the claimant, it could be explained.
- j) Proper compliances should be done on a timely basis with respect to IBBI, Insolvency professional Agency (IPA) (which the RP is registered) and other statutory authorities, as applicable. All the timelines should be closely monitored by the RP and all possible efforts should be taken to ensure that the timelines are met.
- k) Where technical expertise is required to run the affairs of the entity, competent professionals may be appointed to assist the RP with properly defined duties and functions which the professional will be expected to perform.
- l) An opinion should be formed on whether there seem to be any preferential, undervalued, fraudulent or extortionate transactions with respect to the corporate debtor and if so, proper determination should be made of such transactions, followed by necessary application being filed with the Adjudicating Authority.
- m) The erstwhile management is to be explained about their obligation to cooperate with the IRP/RP and in case of non-cooperation, an application may be filed with the Adjudicating Authority under Section 19(2) of the Code. A suitable decision may be taken with respect to the continuation of the services of the employees and workmen of the corporate debtor. The employees and the workmen may be updated about the developments.

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- n) Proper records and accounting of each and every amount expended in the process should be maintained along with all supporting documents and vouchers.
  - o) Professionalism is of utmost importance in the entire resolution process. The RP needs to be constantly updated about the latest developments with respect to the Code. Also, he needs to be aware about various Judicial Pronouncements made by Supreme Court, High Court, NCLAT and NCLT on issues under IBC which are important repository to understand the question of law and the underlying principles.

### CONCLUSION

From the aforesaid understanding and analysis of legal provisions in relation to resolution professional as provided in IBC, it is clear that the entire process of CIRP of distressed corporate debtor revolves around resolution professional. Government of India, IBBI and other domain experts at times have realized the role of resolution professional in the success or failure of the CIRP. Realizing the importance of the role of the resolution professionals in the CIRPs of distressed corporate debtor, the regulator, IBBI has announced a performance-based pay structure for them which may ensure far-reaching changes to recoveries. Nikhil Shah, MD of Alvarez & Marsal (A&M) India has observed that “allowing RPs an incentive based on recovery value aligns with the objective of all stakeholders. Creditors were so far averse to working with a performance-based fee plan and that has led to a decline in the quality of the resolution and as result the recovery value. Incentives will make resolution professionals strive to optimize the value of the corporate debtor,” It has been observed by the consultants and domain experts that the amendments will push creditors to go for better quality professionals and also put the onus on RPs to speed up the process. Another important development is that at present only individuals are being appointed as resolution professional. Bankruptcy proceedings have got a shot in the arm after IBBI permitted Insolvency Professional Entities (IPEs) to act as individual resolution professionals. The move is likely to bring in more domain expertise to distressed asset resolutions in a time-bound manner while facilitating value maximization of assets and paving the way for foreign entities to enter the Indian market.

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