

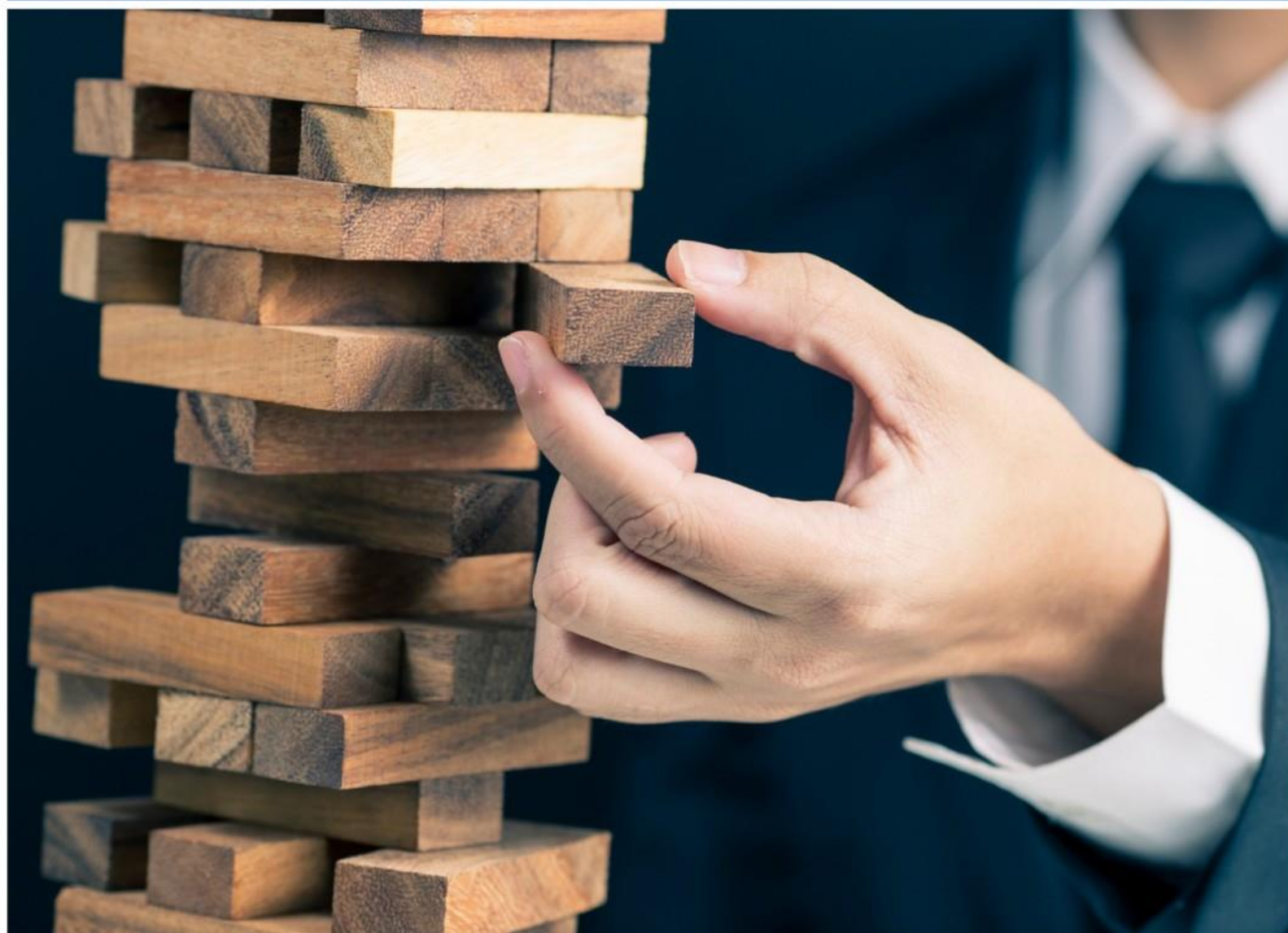


भारतीय दिवाला और शोधन अक्षमता बोर्ड  
Insolvency and Bankruptcy Board of India

 UK Government

# Handbook on Ethics for Insolvency Professionals

## Ethical & Regulatory Framework



# **Handbook on Ethics for Insolvency Professional**

## **Ethical and Regulatory Framework**



## PROLOGUE

The profession of Insolvency Professionals (IPs) has evolved considerably in the short span of 4 years since December, 2016 with almost 3,200 IPs as on 30<sup>th</sup> September 2020 registered with the Insolvency and Bankruptcy Board of India (“IBBI” / “Board”).

An IP is pivotal to the creditor-in-control process and acts as a bridge between the Adjudicating Authority, the CoC and other stakeholders. Being vested with the power of board of directors and responsible for the management of affairs of the corporate debtor, an IP plays a key role in the lifecycle of corporate insolvency resolution process (CIRP).

While the powers vested with the IP are necessary to conduct an effective creditor-in-control bankruptcy process to maximize the enterprise value, it is also essential to administer discretion in the use of such powers to ensure that the CIRP is run in a fair and unbiased manner to protect the commercial interests of all stakeholders. The strength and efficiency of a bankruptcy regime in India will remain undiluted only if the IPs observe high standards of professional ethics. A profession, eventually, is only as good as its members.

The Insolvency Professional Agencies (IPAs) under the Insolvency & Bankruptcy Code, 2016 (“Code”) are professional bodies mandated to promote the professional development and first-tier regulation of IPs. The IPAs develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them, and take actions against them, if necessary. IPAs are also entrusted with the responsibility to make bye-laws consistent with the model bye-laws as specified by the IBBI.

Currently, the IPs are governed by the Code of Conduct as defined under the IBBI (Insolvency Professionals) Regulations, 2016 (“IP Regulations”). All IPs are required to adhere to the Code and in particular to the spirit of the Code in all their professional activities.

The Code of Conduct is generally derived from the Codes of ethics. These ethical norms are benchmark of right actions at a given point of time which the society or the system expects from an individual and are responsible for strengthening the legal system.

As far as the IPs are concerned, the code of conduct has been codified in writing and enforced with penalties in various countries. The code of ethics aims to help IPs or practitioners meet their professional obligations.

In the United Kingdom (UK), the Code of Ethics for insolvency practitioners details how the code should be applied in specific circumstances. It lays down five fundamental principles which guide how IPs should act in the course of their work:

- IPs should be straightforward and honest in all professional and business relationships (Integrity);
- IPs should not allow any bias or conflict of interest or any undue influence to cloud their decisions (Objectivity);
- IPs have a duty to attain and maintain professional knowledge and skill based on the latest developments in practice, legislation and techniques (Professional competence and due care);
- IPs should respect the confidentiality of the information acquired as a result of professional and business relationships and not disclose such information to third parties (Confidentiality);
- IPs should comply with relevant laws and regulations and conduct themselves with courtesy and consideration when performing their work (Professional behavior).

Therefore, the IPs are to work to the highest standards of professionalism, to attain the highest levels of performance, and at all times comply with the provisions of the Code and regulations made thereunder as also terms and conditions specified in the bye-laws of the IPAs of which they are professional members and take reasonable care and diligence while performing their duties.

## FOREWORD

In the past over four years, since the enactment of the Code, the success of the insolvency and bankruptcy regime hinges, to a large extent, on the quality, commitment, and conduct of the professionals associated with the insolvency ecosystem. Despite the fact that the IBC regime is comparatively new, yet there is a sense of accomplishment in terms of attaining systemic maturity and extraordinary outcomes.

As an important stakeholder of the ecosystem, the Insolvency professionals are required to maintain fine balance between high degree of proficiency and ethical standards. Ethical standards largely entail commitment to excellence, preservation of reputation, and requires stringent compliance to statute without any consideration of undue favours or moral turpitude. The IP is expected to act in good faith in discharge of his dues, with utmost integrity, objectivity, independence, impartiality and should make earnest efforts to maximize the value of assets of the debtor. An IP needs to ensure that the Corporate Insolvency Resolution Process is run in a fair and objective manner in the best interest of the stakeholders. Thus, it is of utmost importance that the IPs maintain high standards of professional ethics, so as to maximise value for all stakeholders. The professionals are also expected to maintain the highest standards of professional competence and professional ethics while discharging their duties.

It is against this background, that the Insolvency and Bankruptcy Board of India has brought out this '*Handbook on Ethics*', to stimulate the highest standards of ethics and professionalism among the IPs, together with British High Commission, who facilitated in obtaining inputs on the best practices followed by Insolvency Practitioners in UK. The book details several aspects of professional ethics, including conflict of interest, independence, impartiality, objectivity and timelines in a comprehensive manner, for achieving the highest level of effectiveness, and compliance with the provisions of the Code in letter as well as spirit. Further, it also contains various conceptual and fundamental principles, in line with best practices, emulated by the IPs in the UK. This Handbook serves as a ready reckoner and a tool to assist the insolvency professionals and all other stakeholders in the insolvency ecosystem, for practising an ethical code of conduct.

I sincerely believe that this Handbook is in line with the ground realities of the Indian Insolvency Ecosystem and would serve as a practical guide for IPs in discharging of their duties ethically and effectively. It would also aid in development and percolation of standards of professional and ethical conduct for IPs and enable proactive compliance with the existing regulatory provisions, with utmost care and diligence, to improve and sustain highest levels of performance.

Dr. Navrang Saini

Whole Time Member

Insolvency and Bankruptcy Board of India

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**Note: The paragraphs marked with bookmark  reflect the practice in the United Kingdom.**

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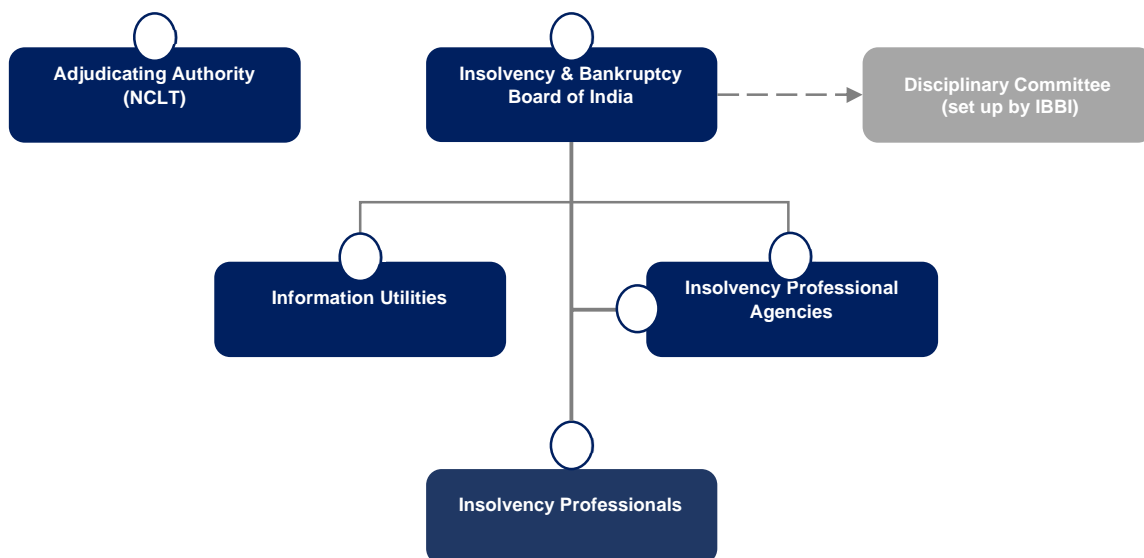


***OVERVIEW OF THE EXISTING ETHICAL &  
REGULATORY FRAMEWORK FOR  
INSOLVENCY PROFESSIONALS***

The provisions of the Insolvency & Bankruptcy Code lay down an effective ecosystem for implementation of its provisions which consists of four pillars:

- a) Adjudicating Authorities (the National Company Law Tribunals), where corporate insolvency matters shall be heard;
- b) IBBI, which has regulatory oversight over insolvency professionals and insolvency professional agencies;
- c) Insolvency Professionals who play a key role in the efficient working of the insolvency and bankruptcy process under the IBC; and
- d) Information Utilities (IUs) which electronically store facts about lenders and terms of lending and evidence of default

Apart from the above, the Disciplinary Committee set up by the IBBI and the Insolvency Professional Agencies also play a crucial role in ensuring that the IPs adhere to ethical standards and the Code of Conduct.



## A. Insolvency and Bankruptcy Board of India (IBBI)

- The IBBI is a key pillar of the insolvency and bankruptcy institutional infrastructure. It was envisioned as the supervisor of the institution of insolvency professionals, as well as other regulatory entities, for the overall insolvency and bankruptcy process in the country.
- It is the custodian of the IBC law and is responsible for consolidation and amendment of the law, as required, and has regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities, and Information Utilities. It also acts as a regulator that writes down the norms by way of regulations for the insolvency and bankruptcy process but does not per se partake in the process.
- The processes under the Code are private affairs of corporates and individuals. IBBI does not get into any financial or strategic business decisions of either the persons in distress or the ones whose financial exposure is in distress. However, it facilitates smooth conduct and processes for the stakeholders by making regulations, within the secondary legislative powers offered by the Code. By registering the professionals and monitoring their performances during the processes, IBBI exercises executive functions. It carries out investigation and inspection of the insolvency professionals and professional entities for alleged violations of the law, thereby discharging adjudicatory functions. While disciplining the professionals who contravene the regulations during the process, IBBI assumes quasi-judicial functions as well. Needless to mention that the IP should, at all times, expedite co-operation and timely provision of information as required by the IBBI.
- The Board largely performs 3 key functions:
  - **Executive:** Registering and regulating the service providers for the insolvency process and taking measures for professional development and expertise for the market players through education, examination, training, and continuous professional education.
  - **Quasi-judicial:** Adjudication of service providers for ensuring their orderly growth, development, and functioning.
  - **Legislative:** Making regulations for market intermediaries (service providers) and processes.

**IBBI is the key pillar of the insolvency and bankruptcy institutional framework**

## B. Insolvency Professional Agencies (IPAs)

- IPAs are self-regulating professional bodies that focus on developing the profession of insolvency professionals. The IBBI has oversight over the functioning of IPAs who in turn regulate the functioning of Insolvency Professionals and monitors their performance under the IBC<sup>1</sup>. IPAs carry out functions in furtherance of their powers as prescribed in the IBC, including<sup>2</sup>:
  - **regulatory functions**, such as drafting detailed standards and codes of conduct that are made public and are binding on all members;
  - **executive functions**, such as monitoring, inspecting and investigating members, gathering information on the performance of insolvency professionals;
  - **quasi-judicial functions**, such as addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions.
- The Model Bye-Laws of an IPA require the IPA to continuously improve upon its internal regulations and guidelines to ensure that high standards of professional and ethical conduct are maintained by its professional members. It further recommends the IPAs to form an Advisory Committee of professional members of the IPA to advise the IPA on the matters related to standards of professional and ethical conduct.
- At present, there are 3 IPAs promoted by the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India, and the Institute of Cost Accountants of India respectively.
- IPAs develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary.
- The Code mandates monitoring of the performance of IPs with respect to legal compliance and empowers IPAs to call for information and records.
- As part of this, an IP, inter alia, is required to file the following key disclosures with respect to each of his on-going assignments:
  - Month end disclosures on the status / progress of CIRP (progress reports)
  - Relationship disclosures (vide IBBI Circular no. No. IP/005/2018) with legal counsel, financial creditors, resolution applicants, valuers, other appointed professionals etc, at various milestones of the CIRP

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<sup>1</sup> Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015.

<sup>2</sup> *Ibid*

### C. Insolvency Professional (IPs)

- An IP is a person who is enrolled with an IPA as a member and registered with the IBBI after qualifying Limited Insolvency Examination. Any eligible person having the required experience and qualifications including a chartered accountant, cost accountant, company secretary, advocate, managerial person can seek registration with an IPA and IBBI after meeting the requirements of the regime.
- The Code has provided for a two-tier regulation of IPs:
  - The first-tier regulation of IPs is steered by the IPAs who administer the registration of IPs and promote and supervise their continuous development
  - The second-tier regulation is steered by the IBBI which maintains a panel of IPs who have no disciplinary proceedings pending or against them and who hold Authorisation for Assignment or consented for assignments. This saves judicial time in appointments.
- Thus, an IP is a crucial pillar responsible for the effective, timely and credible functioning 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 general management and finance related functions.
- The IP is required to adhere to a strict code of conduct while performing his obligations under the Code and also ensuring there are adequate procedures and policies laid down and implemented by his team deployed on any ongoing CIRP.

### D. Information Utilities (IU)

- The IBC has introduced a new competitive industry of IUs to provide core services and other services and discharge such functions as may be necessary for providing these services. Accordingly, the Code defined the term core services as services rendered by an IU for; (a) acceptance of electronic submission of financial information; (b) safe and accurate recording of financial information; (c) authentication and verification of financial information; and (d) providing access to information stored with the IU to persons as specified by the IBBI. In addition, an insolvency professional may submit reports, registers and minutes in respect of any

**There is only 1 IU so far namely National e-Governance Services Ltd (NeSL)**

insolvency resolution, liquidation or bankruptcy proceedings to an IU for storage, and the IU in turn holds the information as a custodian.

- Thus, the primary function of IUs is to provide high-quality and authenticated information about debts and defaults, potentially making them the backbone of a time-bound and effective insolvency process.
- Information available with the utility can be used as evidence in bankruptcy cases before the National Company Law Tribunal. Moreover, the database and records maintained by them would help lenders in taking informed decisions about credit transactions. It would also make debtors cautious as credit information is available with the utility.
- While Section 215(2) of the Code stipulates that a financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, Section 215(3) of the Code suggests that operational creditors may also submit financial information to the IU.
- Vide regulation 38(1) of the IBBI (Information Utilities) Regulations, 2017 an IP may also submit reports, registers and minutes in respect of any insolvency resolution, liquidation or bankruptcy proceedings to an IU for storage.
- The details of information filed with the National e-Governance Services Limited (NeSL), registered as the first IU by the IBBI, show a growing trend of use of IUs by creditors. In the quarter ending March 2019, 173 financial creditors entered into agreement with NeSL and 15,085 were registered as users, up from 108 and 10,247 respectively one quarter earlier. Further, as on September 30, 2020, a total of 1,86,091 loan records have been authenticated by debtors. Increased use of IUs is expected to eliminate information asymmetry and improve implementation timelines under the IBC.

#### **E. Disciplinary Committee**

- The conduct of insolvency professionals is overseen by the IBBI. Any person aggrieved by the functioning of an insolvency professional can file a complaint with the insolvency regulator. The IBBI, on receipt of a complaint, may cause for an inspection or investigation of the insolvency professional to be conducted within a fixed period of time in accordance with the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 with effect from June 12, 2017. Consequently, a disciplinary committee will be constituted to consider the results of such an inspection or investigation. If the disciplinary committee is satisfied that sufficient cause exists, it may impose a penalty on,

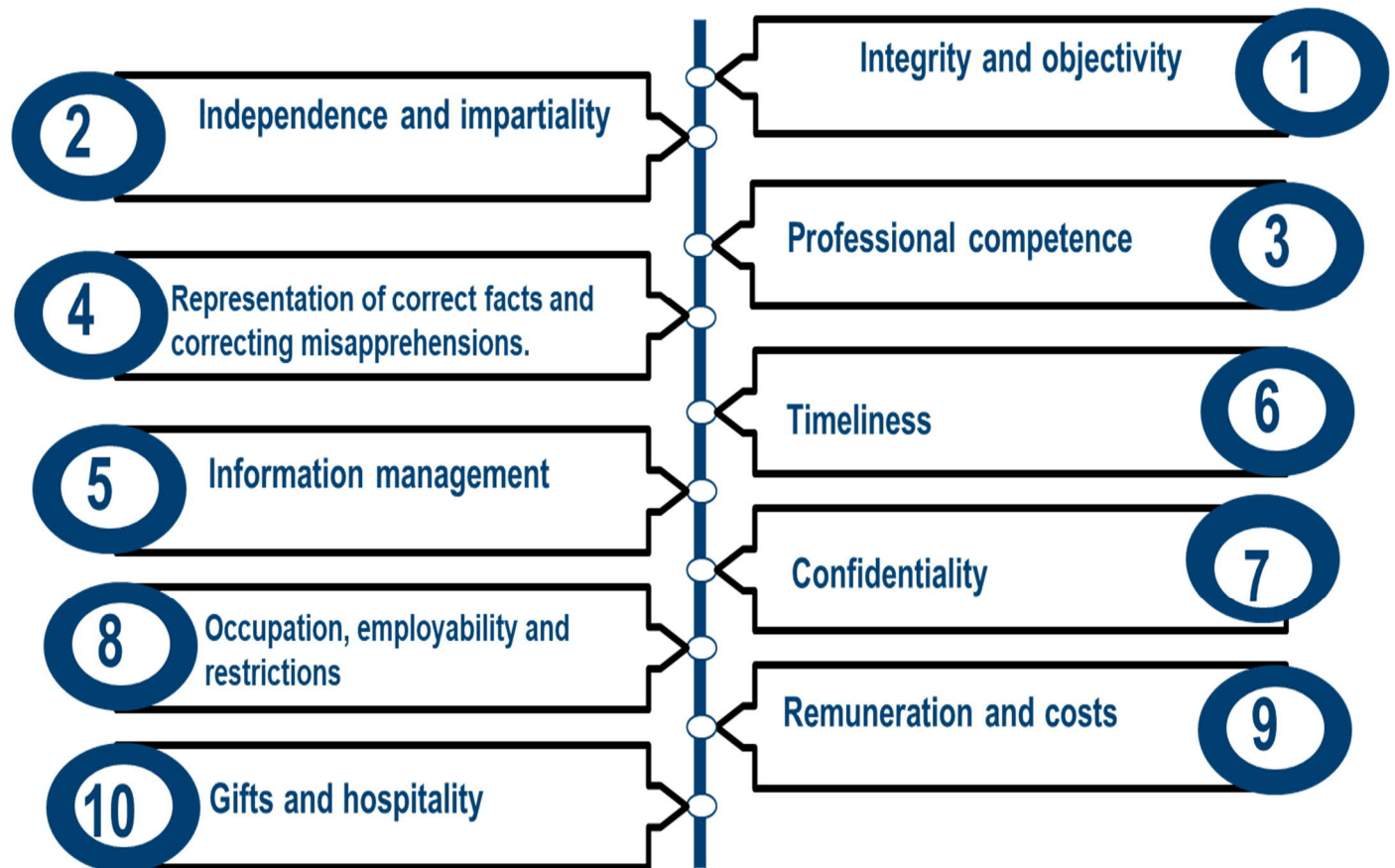
or suspend or cancel the registration of, the insolvency professional. The IBBI is also empowered to direct any person who has made an unlawful gain or averted loss by indulging in any activity in contravention of the IBC to disgorge an amount equivalent to such unlawful gain made or loss averted.

- IBBI has constituted a Disciplinary Committee to consider and evaluate any contravention of the Code by IPs, IPAs or IUs. No authority except the disciplinary committee appointed by IBBI is authorised to initiate, hear and dispose of disciplinary proceedings against professionals and professional entities.
- These committees are constituted under various provisions of the Code and have the power to impose penalties or suspend or cancel the registration of the IPs/ IPAs/ IUs as the case may be.
- The Disciplinary Committee shall act on the basis of the findings of an investigation or inspection conducted by the Investigating Authority. IP is duty bound to provide appropriate documentation / information and timely responses to the Show Cause Notices issued by the Disciplinary Committee with respect to any matter being investigated / inspected.

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



The First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides for the Code of Conduct for Insolvency Professionals, as reproduced below. The detailed code of conduct has been included as an Annexure to this handbook.



***INTERPRETATION AND  
BEST PRACTICES FOR  
INSOLVENCY PROFESSIONALS***

## INTEGRITY AND OBJECTIVITY

Integrity and Objectivity are among the fundamental principles of ethics for Insolvency Professionals. As per the First Schedule of the IP Regulations, an IP is required to:

- Maintain integrity by being honest and straight forward in all professional relationships
- Not misrepresent facts and refrain from actions that bring disrepute to the profession
- Be objective in his dealings i.e. decisions be made without conflict of interest, bias, coercion, or undue influence of any party, whether direct or indirect
- Disclose conflict of interest as soon as he comes to know of it
- Refrain from himself acquiring, whether directly or indirectly, the assets of the CD or knowingly permit his relatives to do so

**Integrity** envisages being straightforward and honest in all professional and business relationships. It implies fair dealing and truthfulness. The most important attribute of a professional for which he is accountable is integrity in character and conduct.

Integrity, reputation and character are also pre-requisites for being considered as 'fit and proper' for registration as IP under regulation 4 of the IP Regulations. A profession is only as good as its members. Thus, it is necessary to ensure that a person with clean hands only can enter this profession to manage the operation of the CD and conduct the insolvency resolution process.

In the matter of rejection of application for registration as an IP on the ground that the applicant is not a fit and proper person as criminal proceedings were pending against him, the Board observed<sup>3</sup>:

*"... What is material is that what others feel about the applicant who has been charge sheeted for offences such as criminal conspiracy, cheating ... Does such a person inspire confidence of the stakeholders who can entrust him with property of lakhs of crores for management under corporate insolvency resolution process? Pendency of serious criminal proceedings against the applicant adversely impacts his reputation and makes him not a person fit and proper to become an IP."*

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<sup>3</sup> Order dt. 26.02.2018 passed by Whole Time Member of IBBI

A professional's reputation once dented, not only impairs his own ability to render professional services, but also tarnishes the image of the entire profession. Accordingly, while every profession should have tight entry criteria which allow only 'fit and proper' persons to become its members, it should also have procedures in place to regularly screen its members to determine whether they continue to meet the 'fit and proper' criteria.

**An IP should consider himself an ambassador of the ecosystem as a whole and perform his duties towards his clients, being mindful of his larger responsibility towards the ecosystem. At no point should his individual interests or the interests of his clients, or any stakeholder involved be placed above the letter and spirit of the standards and laws governing the profession.**

■ The IPs should not bring disrepute to the profession when undertaking marketing or promotional activities, ensuring honesty and truthfulness, and shall refrain from:

- Charging exaggerated claims for the services offered, or the qualifications or experience of, the IP; or
- Disparaging references or unsubstantiated comparisons to the work of others.<sup>4</sup> ■

## Five Commandments

*Regulation 7(2) of the IP Regulations provides that the registration of an IP is subject to the conditions that the IP shall:*

*A) at all times abide by the code, rules, regulations, and guidelines thereunder and the bye-laws of the IPA with which he is enrolled;*

*B) at all times continue to satisfy the requirements under Regulation 4;*

*C) undergo continuing professional education;*

*D) not outsource any of his duties and responsibilities under the code, except those specifically permitted by IBBI; and*

*E) abide by the code of conduct.*

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<sup>4</sup> Ethics Code for Members issued by the Insolvency Practitioners Association of UK, dated March 2020 (Insolvency Practitioners Association March 2020)

**Objectivity** requires IP not to compromise professional or business judgements because of bias, coercion, conflict of interest or undue influence of others, whether directly or indirectly. The IP must visibly demonstrate his impartiality and lack of bias by:

- being transparent in all his interactions and decisions,
- being collaborative and consultative with all participants of the CoC, and
- ensuring that all decisions are arrived at by active consensus and are not bull-dozed by a dominant participant or by the IP himself.

**An IP shall not undertake a professional activity if a circumstance or relationship unduly influences the IP's professional judgement regarding that activity**

- Ethics Code for Members, Insolvency Practitioners Association of UK, March 2020

All actions of the office of the IP must speak for themselves as being honest, without fear and favour and keeping the best interests of all concerned.

This was also aptly captured in the Order of the Disciplinary Committee of IBBI, dated April 17, 2019<sup>5</sup>, where the Committee opined that:

*"When relationship triumphs over merits in professional matters, there is no place for independence, integrity and impartiality. A professional must not only be impartial, but also appear to be impartial... 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."*

■ A conflict of interest creates threats to compliance with the principle of objectivity. An IP should not allow a conflict of interest to compromise his professional or business judgement. The environment in which IPs work and the relationships formed in their professional and personal lives can also lead to threats to the fundamental principle of objectivity. Objectivity may also be threatened if:

- any individual within the firm,
- the close or immediate family of an individual within the firm or
- the firm itself,


has or has had a professional or personal relationship which relates to the insolvency appointment being considered.

<sup>5</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019

It is therefore necessary that before accepting an insolvency appointment, an IP takes reasonable steps to identify circumstances (including any relationships) that might create a conflict of interest, and therefore a threat to compliance with objectivity or other fundamental principles of the Code of Conduct. Such steps shall include identifying:

- the nature of the relevant interests and relationships between all stakeholders; and
- the nature, extent and timing of any prior work for the entity or connected entities and its implication for all stakeholders.

Timely disclosure of any conflict identified above, whether identified prior to appointment or during the performance of duties under the appointment to all stakeholders is critical. This might also require consent from various stakeholders such as CoC, creditors, etc to continue the appointment.

Upon appointment, if the IP realises assets or sells business of the CD shortly after his appointment on pre-agreed terms, this could also lead to an actual or perceived threat to objectivity. The sale could be seen as a threat to objectivity by creditors or others not involved in the prior agreement. It is therefore important for the IPs to ensure that their decision-making processes are transparent, understandable and readily identifiable to all third parties who could be affected by a sale or proposed sale. 

## **THREAT FOR NON-COMPLIANCE**


There are several factors and circumstances that could lead to threat for the IP to uphold his integrity and objectivity. While an exhaustive list of circumstances cannot be produced, it is necessary for the IP's to actively assess and identify such circumstances and the IP's response / actions towards them.


An IP faces several challenges in fulfilling his duties prescribed under the Code. While due powers are vested with the RP in this regard, there could be instances where lack of support or undue influence or coercion of other interested parties could compel the IP to act in a manner that could pose a threat to his integrity and objectivity.

In cases where operating cash flows are not sufficient to meet operating expenses, the IP may often face a challenge in prioritising expenditure, especially employees' salaries. This could result in lack of active support from the employees of the CD, and the IP might resort to making false promises or seek coerced support or deal with employees in a manner which is not straightforward.

Likewise, the IP could act with bias against top management and suspended directors suspecting they would continue to remain loyal to promoters and create circumstances posing difficulties for the IP to operate the business of CD.

An IP is also responsible to ensure all regulatory compliances by the CD. However, he could be faced with lapses in past compliance in certain matters which pose a hurdle in fulfilling his duties towards ongoing compliance. While IP should seek support from existing employees and concerned directors, the IP may face undue influence from interested parties and act under threat of adverse actions.

 Examples of circumstances that might create a conflict of interest include where a significant relationship has existed with the entity or someone connected with the entity, or where an IP:

- has to deal with conflicting or competing interests between entities over whom he, or another IP in their firm, is appointed.
- or another insolvency practitioner in their firm has previously acted as an insolvency office holder to a company with a common director, or common directors. Where the IP has been appointed officeholder to a number of insolvent companies with the same director or directors, there will be an increased risk of a conflict of interest arising.
- has, or others in their firm have, previously carried out one or more assignments for an entity and / or its wider group and they are appointed as an insolvency office holder to the entity or its connected entities.
- has, or others in their firm have, previously carried out one or more assignments for an entity's charge holders or stakeholders and the insolvency practitioner is appointed as an insolvency office holder to the entity or its connected entities. 

## CASE ILLUSTRATIONS

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### Case Illustration I

Resigned as RP after various non-compliances under the Code and without permission of AA<sup>6</sup>

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#### Contravention

- IP did not conduct the CIRP as required under the Code. He did not make public announcement. Convened the CoC meeting with inadequate notice and invited resolution plan only from the sole member of the CoC, without providing information memorandum, asking him to submit resolution plan in four days.
- IP did not run the CDs operations as going concern, neither did he take over the management of the CD nor seek directions from AA if he did not receive co-operation from the CD.
- IP resigned as RP from the two CIRPs without prior permission of the AA.

#### Submission by IP

- The IP submitted that he did not have funds to make public announcement, he did not get co-operation from the CD and he was not well.
- As regards resignation, he has stated in the letter of resignation that he resigned on personal reason while in his response to the AA he mentioned that he resigned because he did not get fee and CD did not co-operate.

#### Findings

- Excuses towards non-cooperation from CD are not acceptable as there was no evidence that the IP wanted to or tried to take over the management of the CD. Nor was this brought to the notice of the AA for any appropriate directions.
- While prolonged sickness could be an excuse, it is not justified to indefinitely delay the CIRP until the IP recovers. Further the sickness could be communicated on time to the AA which may have appointed other IRP.

**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**

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<sup>6</sup> IBBI Disciplinary Committee Case No. IBBI/DC/14/2018; Order dt. January 28, 2019



- The IP's excuse for resignation also had no merit. He had been appointed by the AA with a solemn objective and a statutory responsibility. He cannot run away just because he did not receive a fee.
- Accordingly, the IP has violated provisions of sections 18, 20, 23, 25(2)(g), 25(2)(h), 29, 208(2)(a), and 208(2)(e) of the Code and regulation 7(2)(a) and 7(2)(h) of the IP Regulations and had failed to maintain integrity and did not act with objectivity.

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### Case Illustration II

#### Appointment of third valuer at the instance of CoC<sup>7</sup>

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#### Contravention

- RP appointed a third valuer to determine fair value and liquidation value of the CD at the desire of the CoC.

#### Submission by IP

- The RP submitted that the third valuation was done for the satisfaction of the stakeholders only.
- The decision of the CoC to get a third valuation done was in exercise of its commercial wisdom to better equip the CoC to take a final call on resolution plans.
- That the conduct of the third valuation at the desire of the CoC does not invalidate the decisions or actions taken by the RP and has not, in any way, affected the acceptance or rejection of the resolution plan.

#### Findings

- As per regulation 35(1) of the CIRP regulations, the third valuer is to be appointed only if, in the opinion of the RP, the estimates submitted by the two valuers appointed earlier are significantly different.
- Thus, the act of RP in appointing a third valuer at the instance of the CoC shows that he abdicated his authority in favour of the CoC. Further, the fee incurred on the third valuer is an added financial burden on an already ailing CD which is entangled in a web of debts.
- Accordingly, the RP has violated Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 2 of the Code of Conduct under the said Regulations and failed to act with objectivity by taking decisions under the influence of the CoC.

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<sup>7</sup> IBBI Disciplinary Committee Case No. IBBI/DC/22/2020; Order dt. April 21, 2020

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### Case Illustration III

#### Continuing to draw same remuneration even during liquidation<sup>8</sup>

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##### Contravention

- The IP continued to draw the same remuneration in his capacity as the liquidator as he did in his capacity as the RP even after the CD is taken into liquidation.

##### Submission by IP

- The IP submitted that the fee as RP was charged only until the units of the CD were kept as going concern and no fee has been charged as RP post the units were closed and that the IP reserved the right to charge the remaining fee to be reimbursed out of the Liquidation Estate.

##### Findings

- In cases where the fee of liquidator has not been decided by the CoC, the liquidator should draw fee in accordance with the table provided in Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016
- The claim of the RP was immaterial as the provision of the Regulation clearly provides for a separate structure of fees for the Liquidator.
- Accordingly, the RP has violated Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations and had contravened Clause 2 of the Code of Conduct.

**The RP(s) have been given immense powers under the Code, but they also have the corresponding responsibility to abide by the Code, rules, regulations and guidelines at all times.**

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### Case Illustration IV

#### Failure to represent on behalf of the CD in an arbitration proceeding<sup>9</sup>

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##### Contravention

- Arbitration petition was filed by an insurance company against the CD. Matter was heard during CIRP and was awarded in favour of the CD. Consequently, the insurer handed a cheque of ~INR

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<sup>8</sup> IBBI Disciplinary Committee Case No. IBBI/DC/22/2020; Order dt. April 21, 2020

<sup>9</sup> *ibid*

8.3 crs in the hands of the ex-director of the CD, who accepted it as full and final settlement of the claim (thus foregoing an amount of ~INR 2.3 crs)

- The amount of INR 8.3 crs was duly deposited by the ex-director in the accounts of the CD. Only after the Investigating Authority raised its concern in this issue the RP filed application before NCLT claiming an additional amount of INR 2.3 crs from insurer and initiated appropriate actions against the ex-director and promoter of the CD u/s 66 and 67 of the Code

### **Submission by IP**

- The IP submitted that the ex-director and promoter never informed the RP regarding settlement of the insurance claim and had filed necessary affidavits in this regard in a wrongful and clandestine manner keeping the RP in dark. Dealings with the insurer in this regard were without the prior knowledge, consent or permission of the RP.
- Upon being aware of the claim settlement, RP took necessary actions to file claims against the insurer and promoter and ex-director, claiming the amount of INR 2.3 crs.
- That the amount of INR 8.3 crs was deposited by the ex-director in the company's account without RP's knowledge and the entire sum so received by the CD was utilised to maintain going concern.

### **Findings**

- Section 17 of the Code vests the management and control of the CD with the RP and Section 25(2)(b) of the Code obligates the RP to represent and act on behalf of the CD with third parties, exercise rights on behalf of CD in judicial, quasi-judicial or arbitration proceedings.
- There was no reasonable ground as to why arbitration proceeding was not within the knowledge of the RP as the notices / order / correspondence in the matter would be addressed to the CD at its registered address as against the residential address of its ex-director or promoter.
- RP having taken effective control on the records and documents of the CD cannot assert that proceedings were kept away from him in a wrongful or clandestine way.
- That the RP was ignorant of the award of insurance claim when an amount of INR 8.3 crs was received in the bank account was unfathomable and reflects that RP failed to take due diligence in finding the reasons for the receipts, which is per se untenable under provisions of the Code
- This issue was called for further investigation.

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## Case Illustration V

IP made a third-party entity, which is not IPE, as one of the beneficiaries of insurance policy<sup>10</sup>

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### Contravention

- An IP purchased two IP insurance policies from an insurer and made another entity, which is not an IPE, as beneficiary in the same.
- Cost incurred by IP in providing insurance to such entity was done in the violation of Section 5(13) of the code.

### Submission by IP

- IP submitted that no insurance policies were exclusively available of individuals and had to be taken only in the name of entities. Also, the cost of insurance was found to be lower if the policies were issued in the name of an entity/company.
- The coverage amount of IP was INR 70 crores but coverage of such entity was INR 10 crores only.

### Findings

- The expenditure approved by CoC towards an IP insurance policy was INR 29 lakhs, for one policy. However, the IP purchased two insurance policies, both issued in the name of a third party entity, while covering the RP to the extent of INR 70 crores.
- That the IP's submission on non-availability of an individual insurance policy was factually incorrect. The individual insurance policy was available in the market.
- IP created an additional burden on the ailing CD by unnecessarily extending benefits to a third party and hence, IP failed to act in a forthright manner.

## RESPONSES TO THREATS

Where an IP identifies or determines any threat or event of non-compliance or breach of integrity or objectivity, he should take necessary action to:

- Eliminate the circumstances, including interests or relationships, that are creating threats; or
- Apply safeguards, where available and capable of being applied, to reduce the threats to an acceptable level.

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<sup>10</sup> IBBI Disciplinary Committee Case No. IBBI/DC/26/2020; June 8, 2020


In cases where an IP determines that the threats of non-compliance or breach cannot be eliminated or the safeguards available are not adequate to reduce the threats to an acceptable level, the IP should not accept the insolvency appointment or undertake appropriate measures to disclose the issues and dissociate from / terminate the appointment.

It may be noted that consultation with various stakeholders does not relieve the IP from his responsibility to exercise professional judgment to resolve the threat or, if necessary, and unless prohibited by law or regulation, disassociate from the matter creating the threat.

Examples of actions that might be safeguards to address threats to objectivity towards assets of the Corporate Debtor include:

- obtaining an independent valuation of the assets or business being sold;
- considering other potential purchasers.

An IP shall always consider the aspect of perception while determining a threat to his integrity or objectivity in an insolvency appointment. The IP should consider, if a reasonable and informed third party would weigh up all the specific facts and circumstances of the IP and consider it as a threat to his integrity and objectivity. Accordingly, the IP should document:

- the facts,
- any communications with, and parties with whom the matters were discussed,
- the courses of action considered, the judgements made and the decisions that were taken,
- the safeguards applied to address the threats when applicable,
- how the matter was addressed, and
- where relevant, why it was appropriate to accept or continue the insolvency appointment 

## INDEPENDENCE & IMPARTIALITY

The Code of Conduct for Insolvency Professionals under the Code read with the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, provides that in the performance of his functions, a professional member shall inter alia; be independent and impartial with the highest standards of professional competence and professional ethics. As per the First Schedule of the IP Regulations, an Insolvency Professional (IP) is required to:

- maintain complete independence in his professional relationships & conduct the liquidation or bankruptcy processes independent of external influences.
- ensure that the IP or his relatives do not knowingly, whether directly or indirectly, acquire assets of the CD, unless it is evidenced that there was no impairment of objectivity, independence and impartiality and necessary approval is obtained from the Board.
- avoid assignment where he or his relative or the IPE of which he is a partner or director or the partners or directors of such IPE are not independent of the CD and its related parties.
- disclose to the applicant, CoC and the person proposing appointment, as to whether any pecuniary or personal relationship with any of the stakeholders entitled to distribution under the Code exists as soon as the IP becomes aware of it.
- disclose to the COC, and the IP's IPA as to whether he was an employee of or has been in the panel of any financial creditor of the CD.
- not influence the decision or the work of the COC or other stakeholders to make any undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

The Interim RP before accepting the appointment needs to ensure that he has submitted his consent in Form 2 to the Creditors for onward submission before the Adjudicating Authority and that he is having valid registration with the Board, including Authorisation for Assignment to act as the RP/IP. He further needs to ensure that:


- his appointment is properly approved by the applicant;
- his remuneration has been approved by the applicant and that the applicant confirms that it will pay the same from its own funds;
- he has made disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.

- he is eligible for appointment as the Resolution Professional under Regulation 3 of a corporate debtor, if he and all partners and directors of the IP entity of which he is a partner or director, are independent of the corporate debtor.

Any non-compliance of the regulatory requirement could lead to the breach of Independence and Impartiality principle.

### THREAT FOR NON-COMPLIANCE

The environment in which insolvency practitioners work and the relationships formed in their professional and personal lives can lead to threats to the fundamental principle of impartiality.

An IP may encounter situations in which no or no reasonable safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level. In such situations, the relationship in question will constitute a significant professional relationship or a significant personal relationship. 

Example: the principle of impartiality may be threatened if any individual within the practice, the close or immediate family of an individual within the practice/firm or the practice itself, has or has had a professional or personal relationship which relates to the insolvency appointment being considered. Where this is the case, the IP should conclude that it is not appropriate to take up the insolvency appointment. The substance of every such relationship should be considered.

**An IP shall not accept multiple appointments in cases where he has dealt with claims between the separate and conflicting interest of entities over which he is appointed, unless he is satisfied that he would be able to take steps to minimize potential conflicts and that his overall integrity and objectivity would be seen to be maintained.** For example, the IP must be

### PROFESSIONAL / PERSONAL RELATIONSHIPS OF IP CAUSING THREAT TO INDEPENDENCE & IMPARTIALITY

- *The entity; senior management or any director or shadow director of the entity; shareholders or Persons of Significant Control of the entity; any principal or employee of the entity; business partners of the entity*
- *Companies or entities controlled by the entity; companies which are under common control*
- *Potential purchasers*
- *Creditors*
- *Funders; including shareholders; private equity houses and debenture holders of the entity; debtors of the entity*
- *Close or immediate family of the entity (if an individual) or its officers (if a corporate body)*
- *Others with commercial relationships with the firm or personal relationships with an individual within the firm.*

aware of the difficulties likely to arise from the existence of inter-company transactions or guarantees in group, associated or “family-connected” company situations.

Thus, an Insolvency Professional should not accept an appointment in connection with the estate if his (or a related party’s) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

There is a succession of or sequential appointments, for example: The Interim Resolution Professional is continued as a Resolution Professional and then is further continued as Liquidator in liquidation proceedings and hence, such IP has to be conscious of the role he plays as a IRP or RP or Liquidator, as the case may be.

**It is likely that there will be a perception that independence and / or impartiality has been breached, even if it has not in fact been breached. Hence, Independence should be considered both as a matter of fact and from the perspective of an informed observer. It should be considered with reference to jurisdictional guidance, whether legislative, professional or code-based, but the key tenet underlying the principle of independence should be ensuring that Insolvency Professional’s conduct is seen to be, not unfairly or improperly biased towards any party<sup>11</sup>.**

## CASE ILLUSTRATIONS

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### Case Illustration I

#### Inclusion of fee payable to lender’s legal counsel in IRP Cost<sup>12</sup>

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#### Contravention

RP included the fee payable to lender’s legal counsel while calculating IRPC.

#### Submission by IP

- The RP cited his reservation on the aspect of fees of lender’s legal counsel forming part of CIRP Cost in the 18<sup>th</sup> CoC meeting, but the CoC decided to route the appointment of such legal counsel

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<sup>11</sup> Ethical Principles for Insolvency Professionals, INSOL International, October 2018 Edition

<sup>12</sup> IBBI Disciplinary Committee Case No. IBBI/DC/15/2019-20; Order dt. November 14, 2019



and payment thereof through the RP with an assurance that upon receipt of resolution plan, the fees payable to lender's legal counsel will be negotiated with the resolution applicant.

- Part of the payment to legal counsel pertained to services rendered by the lender's legal counsel for the period prior to the Insolvency Commencement Date (ICD).
- Resolution was passed by members of the CoC that if IBBI does not allow this arrangement, the amount will be recovered on pro rata basis from upfront cash recovery amount, to be paid to lenders, and CoC may negotiate with resolution applicant to pay the fee amount out of their cash flows.

### Findings

- In view of admission by RP of having charged lender's legal counsel fee from IRPC and specifically for the services rendered prior to the Insolvency Commencement date of CD, RP has contravened Section 5 (13) and Section 208 (2) (a) of the Code and also Regulation 7(2)(a) and 7(2)(h) of the IP Regulations and had failed to maintain complete independence in his professional relationships and during his conduct in the insolvency resolution process.

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### Case Illustration II

IRP entering into term sheet with CIRP Applicant (OC, in this case) for appointment as RP<sup>13</sup>

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### Contravention

- The IRP signed a term sheet with the applicant of the CIRP knowing very well that such applicant, being an operational creditor, neither has a role in the appointment of the RP nor in fixation of fee of the RP; thereby attempting to deprive the CoC of its legitimate right to appoint a RP of its choice and fix the remuneration.

### Submission

- It was submitted by the RP that he did not conceal anything in this regard. He placed the term sheet, which provides for fee as RP, before the AA.
- 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.

**Transparency is welcome. But it cannot be used to override the explicit statutory provisions. No amount of transparency can justify illegal conduct.**

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<sup>13</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; Order dt. April 17, 2019

## Findings

- 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. This is an attempt to lock in his appointment as RP before the competent authority, that is, 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, the IP contravened the provisions of sections 22, 208(2)(a) and (e) of the Code, regulations 33 and 34 of the CIRP and regulations 7 (2) (a) and (h) of the Insolvency Professional Regulations, 2016 and had not maintained complete independence in his conduct during the CIRP and was dependent on external influences so as to make any undue or unlawful gains for himself or his related parties and had adopted illegal or improper means to achieve mala fide objectives.

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### Case Illustration III

#### Failure to publish invitation for EoI<sup>14</sup>

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## Contravention

- The RP failed to publish brief particulars of the invitation for expression of interest (EoI) in Form G of the Schedule to the CIRP Regulations, as required under regulation 36A(5) of the said Regulations.

## Submission by IP

- It was submitted by the RP that the requirement of Form G came into effect from February 6, 2018. The requirement of publishing Form G was not applicable to the ongoing CIRP, where less than 37 days were available for submission of resolution plans as on 6 February, 2018. Therefore, the allegation is not tenable.

## Findings

- The RP cannot assert that the requirement of Form G was not applicable, yet he sought approval of the CoC for the same. His conduct implies that the requirement of Form G was applicable.

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<sup>14</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

- Further, basis the examination of the facts the submission that less than 37 days were available for submission of resolution plans is not correct and the requirement of Form G was squarely applicable in this matter.
- Thus, the RP contravened the provisions of section 25(2)(h) of the Code, regulation 36A of the CIRP Regulations, and regulation 7(2)(a) and (h) of the IP Regulations and had not maintained complete independence in his conduct during the CIRP and was dependent on external influences so as to make any undue or unlawful gains for himself or his related parties and had adopted illegal or improper means to achieve mala fide objectives.

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### Case Illustration VI

#### Collusion of RP with CoC and RA<sup>15</sup>

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#### **Contravention**

- RP sought extension of time to enable FC and RA to work out a settlement. The OTS was approved by the FC on March 27, 2018 and RP issued notice the next day to hold the 3<sup>rd</sup> meeting of the CoC on April 5, 2018.
- 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.

#### **Submission by IP**

- The insolvency of a CD has the most chance of being resolved if the RP, the CoC and the RA work closely to identify common ground and the best way forward.
- Acting with the stakeholders cannot be called as 'siding with the parties' or compromising independence.

#### **Findings**

- The RP did nothing till expiry of normal IRP period. He obtained extension of time as the approval of the OTS by the CD was under process. Thus, the resolution plan was approved even before invitation for EoI was drawn up and the steps taken after the approval of resolution were mere formality. It is not just lack of independence as a RP; it is active collusion of RP with the RA and the CoC to vitiate the process and frustrate the solemn objective of the Code.
- Therefore, RP contravened the provisions of sections 208(2)(a) and regulation 7(2)(h) of the IP Regulations read and had not maintained complete independence in his conduct during the CIRP

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<sup>15</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

and was dependent on external influences so as to make any undue or unlawful gains for himself or his related parties and had adopted illegal or improper means to achieve mala fide objectives.

## **RESPONSES TO THREATS**

If the IP or the firm has a relationship with the third party, for example a family connection or an automatic referral arrangement, there are clear self-interest or familiarity threats and the connection shall be disclosed. The disclosure shall include any potential benefit, whether direct or indirect, they, or others will receive.

**Instance:** Business or personal relationships

- When taking steps to assess the nature of any such relationship, the IP should have regard to conflicts of interest and professional and personal relationships.
- While the IP might regard a relationship as not being a cause for concern, the perception of others could differ. It is necessary to consider perception on the basis of a reasonable and informed third party, weighing up all the specific facts and circumstances available to the IP at that time.
- The requirement to disclose includes situations where in substance there is a one-to-one relationship between the IP and the third party (for example, the IP is the only IP in the area and the third party is the only solicitor), as this implies automatic referral. 

**Recommendatory Practices** an IP should follow in parallel the following to avoid any conflict of interest and at the same time maintain transparency:

- An IP should take reasonable steps to identify the circumstances that could pose a conflict of interest as wherever the conflict of interest arises, preservation of confidentiality will be of paramount importance there.
- An IP should have procedure in place to check that no conflict of interest exist between the professionals appointed for assistance and other stakeholders of the Corporate Debtor.
- IP should obtain Declaration of Independence from the appointed professionals.
- In case of large corporate groups, an IP should identify if there is any possibility of conflict of interest with the parent company and other companies of the group.
- An IP shall exercise transparency throughout his/her appointment.
- An IP should engage independent professionals for his assistance in fair and transparent manner and such appointments shall be at arm's length price.

- In case of existence of any kind of relationship between IP and other professionals or between the other professionals and corporate debtor, IP shall at the earliest report such relationship to the Insolvency Professional Agency with whom he/she is enrolled, IBBI and the Committee of Creditors of the corporate debtor.
- IP should be vigilant throughout the process to identify fraudulent, preferential, onerous and extortionate credit transactions and reporting of the same to Adjudicating Authority.
- IP should record details of every meeting conducted with any stakeholder(s) of the Corporate Debtor.
- IP should not take advantage of staff discounts or special payment terms, as doing so may impair, or be perceived to impair, independence. Bribery or payment or receipt of secret commissions in order to receive work or provide work to others should be unacceptable.

Thus, every professional must, to the best of his abilities, avoid any and all conflicts of interest. Even the barest hint of conflict may taint his reputation as a professional and, by extension, that of his profession. A professional must not only be independent, impartial and free of any conflict, he must also demonstrably appear to be so.

Every professional must be held accountable to the highest standards of independence with respect to the matter at hand. It is the professional's responsibility and duty to not only actively and consciously meet such standards, but to also ensure that no aspersion can be cast on him or his profession.

## REPRESENTATION OF CORRECT FACTS AND CORRECTING MISAPPREHENSIONS

A Resolution Professional (RP) assumes the powers of the Board of Directors of the corporate debtor and hence becomes akin to key information pertaining to the corporate debtor. The Code mandates the RP to prepare an Information Memorandum which will help the prospective resolution applicants to make an informed decision. Apart from this, the RP shall also act as the Chairperson of the meeting of CoC where the RP brings to the table certain information to obtain various approvals from CoC. In addition to this, the RP also files various forms with the IBBI to keep it informed of the developments in the CIRP of the corporate debtor and to ensure transparency of the process. From this, we can infer that various stakeholders rely on the information disseminated by the RP.

However, during the CIRP either on the own analysis of the RP or on the forensic audit report submitted by the forensic auditor, the RP may become aware of any misapprehension or wrongful consideration of any fact. In that case, as per the code of conduct, the RP is expected to duly inform the same to the concerned stakeholder. Also, while disseminating

**While there is no bright line rule as to what information is considered as “material information”, it can be explained as such information which would cause a substantial impact on the decision making of the user of such information**

information to stakeholders like CoC, RA, IBBI etc. the RP shall not conceal any material information or make any misleading statements. As an Officer of the Court, the RP is expected to be unbiased and diligent.

As per the First Schedule of the IP Regulations, an IP is required to:

- Inform of a misapprehension or wrongful consideration of a fact of which he becomes aware to such persons under the Code as may be required, as soon as practicable.
- Must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder.

## THREAT FOR NON-COMPLIANCE

The following circumstances may create threat for non-compliance / breach of code of conduct pertaining to representation of correct facts and correcting misapprehensions:

- RP along with the CoC hides material facts to get better offers from resolution applicants
- RP not initiating applications for avoidance transactions to gain personal favours from the promoters or concerned stakeholders
- Not disclosing the red flags raised in the forensic audit report to the CoC

The RP should not become a scapegoat in such circumstances and rather show his integrity and objectivity to disclose the material information to the concerned stakeholders and not hide / conceal such information from their reach.

## CASE ILLUSTRATIONS

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### Case Illustration I

Used the word “IBBI” as part of LLP name<sup>16</sup>

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#### Contravention

- An IP incorporated an LLP with the name “IBBI Insolvency Practitioners LLP” and its website “www.ibbi-ip.com” without any prior authorisation from the Board and gave a misleading impression that LLP has been incorporated by IBBI or in some way related to IBBI.

#### Submission by IP

- The IP submitted that use of the words “IBBI” was without any intention or motive to gain material benefits

#### Findings

- Such act was prima facie not acceptable from a qualified Chartered Accountant and a registered IP as he is well aware of the implications of using the name IBBI which has been used to refer to the Board, a statutory body, for any purpose under the code by custom and practice.

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<sup>16</sup> IBBI Disciplinary Committee Case No. IBBI/DC/09/2018; Order dt. September 6, 2018

- Thus, the IP had violated provisions of section 208 of the Code read with regulations 7(2)(a) and 7(2)(b) of the IP Regulations and had attempted to misrepresent by failing to change the name of the LLP even after repeated intimations by the Board. The IP was further ordered not to accept any assignments without change in name of the LLP and his registration has been suspended for three months.

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## Case Illustration II

### Misrepresented facts on company website<sup>17</sup>

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#### Contravention

- A director of a company had applied for IP registration with IBBI and during the scrutiny of testimonials pertaining to his experience, it was found that the Company's website stated, "*We are promoted by qualified Insolvency Professionals with accreditation from Insolvency and Bankruptcy Board of India*" and "*Empanelled with top financial institutions of India for recovery and insolvency related matters*" which was misrepresentation of facts as none of the directors had obtained for IP registration.

#### Submission

- The respective director submitted that the website was undergoing change and managed by a new vendor who uploaded trial versions directly on the website during the development stage for testing the user interface without any consent of directors.
- The website was to come live only after successful IBBI registration and declared that the erroneous statement caused no commercial gains or losses to the company.

#### Findings

- In absence of registration of any of the directors of the said company as an insolvency professional and the IBBI not being accrediting agency, the aforesaid statement on the website is obviously misleading and prima facie misrepresentation.
- The profession of IP is of recent origin unlike other professions as medical, hence vendor promoting website cannot make such a statement on his own unless specifically instructed.

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<sup>17</sup> Disciplinary Committee Order No. IBBI/ Disc. Com./2017/1 (F. No. IBBI/IP/DC/2017/29/1)



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### Case Illustration III

#### Submission of different excuses for resignation as RP before different fora<sup>18</sup>

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##### Contravention

- The IP resigned as RP from the CD. Before the IBBI, he submitted that his resignation was on account of personal and health issues, whereas, in his resignation to the CoC it was stated that he was resigning as his bills towards the services provided remained unpaid. Contrariwise, before the NCLAT he stated that he was resigning due to preoccupation.
- He resigned from four CIRPs almost at the same time.

##### Submission by IP

- The RP submitted that he resigned from the CD only due to his personal and health issues and that his resignation was accepted by the AA without any adverse comments on his professional capacity.

##### Findings

- The RP ran away from all the four CIRPs jeopardising the life of four corporate debtors and the interests of their stakeholders. The act of the RP in misleading different fora by stating different excuses is found to be in contravention of Sections 17, 20 and 23 of the Code, regulation 7(2)(a) of the IP Regulations and the Code of Conduct.

**The only hope for a sinking ship is its Captain. He cannot run away leaving the sinking ship in the mid-sea. The Code provides for an IP to run a CD in distress. He cannot run away from the CD when it needs the IP the most.**

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### Case Illustration IV

#### Misleading IBBI and Adjudicating Authority (“AA”)<sup>19</sup>

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##### Contravention

- The RP issued invitation for EoI with a requirement that the eligibility of resolution applicants shall be certified by a Chartered Accountant (“CA”). However, such a requirement was never approved by the CoC but was approved by only one financial creditor holding 83% voting share.

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<sup>18</sup> IBBI Disciplinary Committee Case No. IBBI/DC/07/2018; Order dt. August 23, 2018

<sup>19</sup> *ibid*

## Submission by IP

- The RP submitted that the Creditors who constitute CoC have given post-facto approval after issue of invitation for EoI and that law does not require prior approval of invitation for EoI.
- The approval of the only secured financial creditor with 83% voting power is adequate.
- In support of his argument that requiring a CA certificate certifying eligibility of resolution applicants is the best market practice, the RP submitted the invitations for EoI of Essar Steel India Limited, Ferro Alloys Corporation Limited, Admiron Lifesciences Private Limited, James Hotels Limited and Monnet Ispat and Energy Limited.

## Findings

- The Code and regulations made thereunder does not empower a secured creditor or a creditor with a certain threshold of voting power to substitute the CoC.
- The Code provides for an institutional mechanism in the form of CoC to take decisions and prescribes that such decision shall be taken in a meeting of the CoC.
- The action of the RP is such that he has sided with the largest financial creditor and termed its decision as the decision of the CoC.
- With respect to the requirement of CA certification, none of the invitations for EoI of the above stated corporate debtors require any certification from a CA for eligibility of resolution applicants.
- The above acts of the RP are attempts to mislead the IBBI and the AA and hence is in contravention of sections 25(2)(h), 29A and 208(2)(a) of the Code, regulation 7(2)(h) of the IP Regulations and the Code of Conduct.

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### Case Illustration V

Approval sought for extension of IRP period by making false statement to AA<sup>20</sup>

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## Contravention

- RP sought an extension of time 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.
- However, there was no such talk except the effort by the RA to reach an OTS with sole FC. Therefore, RP obtained approval for extension of time by making a false statement to the AA.

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<sup>20</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

### Submission by IP

- The RP submitted that he had taken all steps to lead to an amicable resolution of the insolvency of the CD.

### Findings

- 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 he or the promoter was seeking out investors to formulate a resolution plan, contrary to the contention of RP.
- Therefore, RP 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.

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#### Case Illustration VI

RP's submission to AA that S.29A of the Code is not applicable<sup>21</sup>

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### Contravention

- In the written submission before the AA, RP submitted that section 29A is not applicable to the CIRP.

### Submission by IP

- The RP submitted that the AA has treated his submission as correct in law, and that this cannot be visited in disciplinary proceeding.
- RP submitted before the AA that section 29A was inserted into the Code through the Insolvency and Bankruptcy Code (Ordinance), 2017 (Ordinance) promulgated on 23 November, 2017 to provide for ineligibility at the time of submission of resolution plan.
- He further submitted that it is not possible for the legislature to make a law that affects the rights that accrued to the parties on the date of commencement of CIRP, before the promulgation of the Ordinance.

### Findings

- Section 29A of the Code prohibits an ineligible person from submitting a resolution plan.

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<sup>21</sup> *Ibid*

- The RP not only rejected the explicit unambiguous mandate of the law, but also questioned the authority of legislature to make such a law.
- Thus, RP ensured that RA, who is 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, thereby contravening the provisions of section 29A and 30(2)(e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations.

## TIMELINES

As per the First Schedule of the IP Regulations, an IP is required to:

- Adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.
- Not act with mala fide intentions or be negligent while performing his functions and duties under the Code

The legal framework for insolvency and bankruptcy prior to the enactment of the Code was inadequate and ineffective. There have been undue delays in resolution of issues despite special laws being in place for the recovery actions by creditors, for example, in case of corporates, the Recovery of Debts Due to Banks and Financial Institution Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interests Act, 2002, the Sick Industrial Companies (Special Provisions) Act, 1985 and the winding up provisions under the Companies Act, 2013, and also the non-statutory corporate debt restructuring mechanism, such as Strategic Debt Restructuring (SDR), Corporate Debt Restructuring (CDR) and Joint Lenders Forum , while in case of individuals, the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 had been enacted.

The Code was enacted to deal effectively with insolvency and bankruptcy and as also for development of credit markets in the country and improving ease of doing business to facilitate investments. Time is the essence of the processes under the Code as outcomes are calculated in terms of time, value and money. The Bankruptcy Law Reforms Committee provides the rationale as:

*“Speed is of essence for the working of the bankruptcy code, for two reasons.*

*First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer.*

*Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern.*

*Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."*

According to a World Bank Report of 2014, the time taken in recovery of debts and rate of recovery is a matter of grave concern while determining ease of doing business in any place. The Code is India's answer to these concerns which contemplates special class of Insolvency Professionals from various streams of professions to form an effective pillar in realisation of this goal.

The institution of IP stands on conduct and capability of the professionals. The capability needs to be enhanced continuously because of evolving legal and regulatory framework as also jurisprudence and evolution of best practices including use of technology. Every function which an IP is required to perform under the Code requires highest level of professional excellence including financial engineering and value maximising management.

**The role of the Insolvency Practitioner is to administer an insolvency outcome within the legislation and to ensure a fair, efficient and quick redistribution of assets.**

- Centre for Economics and Business Research, UK

At several points IBBI has noted that compliance of law after the time prescribed by the Code cannot be treated as 'compliance' of law. An IP is not just another professional. They are dealing with a corporate debtor in distress and need to go beyond the call of duty to address the distress. IPs must endeavour to build and safeguard the reputation of the profession which should enjoy the trust of the society and inspire confidence of all the stakeholders.

Section 12 of the Code thus mandates that the CIRP of a CD must conclude within 330 days from the insolvency commencement date. This period of 330 days includes the following:

- (a) normal CIRP period of 180 days
- (b) one-time extension, if any, up to 90 days of such CIRP period granted by the Adjudicating Authority, and
- (c) the time taken in legal proceedings in relation to the CIRP of the CD

Besides an overall timeline for the process, the Code also mandates a timeline for various sub-processes such as, inter alia, publishing a public announcement of insolvency, conducting valuation of the corporate debtor, conducting transaction audit of the corporate debtor.

Bye-law 13 of the Model Bye-laws of an IPA, as specified by the IBBI under Schedule to Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, states that an IP must perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code.

Resolution process requires consensus among multiple stakeholders such as creditors, resolution applicant, Adjudicating Authority which can become a challenge in a strict timeframe. **In order to ensure timeliness, an IP needs to run a tight process with adequate preparedness and handholding at all levels to ensure value of the asset is preserved and maximised. Any negligence of duty can impact going concern and thus compromises both value of the and integrity of the IP.**

## **THREATS FOR NON-COMPLIANCE**

While time is considered to be the essence of the Code, it has been observed that during the journey of three years since the Code was enacted, there have been situations where meeting the laid down timelines has been a challenge.

With a new law in vogue, stakeholders have frequently knocked the doors of the judiciary seeking clarifications and decisions on various aspects of the Code. While these litigations have brought about clarity in interpretations of various provisions of the Code, it has also resulted in some delays in approval of resolution plans. Extension of timeline in the CIRP, under the Code, due to exclusion of time spent in litigation and consideration of the timeline provided in the Code as a directory provision, has also resulted in delays in admission. The pronouncement by the Apex Court that the timelines provided in sections 7, 9 and 10 of the Code, for deciding a matter within 14 days as well as the time to remove a defect within 7 days, are directory and not mandatory<sup>22</sup>, brought about a big shift in adherence of timelines provided in the Code.

Delay of over 450 days has been observed on account of litigation in several marquee cases, it must be noted that litigation (not withstanding its major role) is not the sole reason for the delay in the

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<sup>22</sup> M/s Surendra Trading Company Vs. M/s Juggilal Kamlatpat Jute Mills Company Ltd. & Ors. (Civil Appeal No. 8400/2017)

CIRP. Sometimes lack of adequate planning and deploying enough resources within timelines by the IP (as noted in several cases) may also impede the chances of an effective resolution. Delay caused at any stage due to even a minor negligence at the end of the IP can cause an adverse domino effect on the timelines of the entire CIRP. Therefore, lack of knowledge of the requirements of the Code or professional competence, integrity and intent in the IP are all the right ingredients for non-realisation of the goals of the Code.

## CASE ILLUSTRATIONS

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### Case Illustration I

#### Delay in making public announcement by Liquidator<sup>23</sup>

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#### Contravention

- The Voluntary Liquidation of the CD commenced on January 15, 2018 while the liquidator made the public announcement in newspapers on June 27, 2019 i.e. after a delay of 18 months (approx.) and hence failed to adhere to prescribed timelines.

#### Submission by IP

- The Liquidator admitted that he inadvertently missed making the public announcement in the newspapers.

#### Findings

- An IP is required to conduct the entire CIRP/ Liquidation proceedings following his appointment for the benefit of all stakeholders. He must diligently perform his duties and must adhere to the timelines prescribed under the provisions of the Code and the regulations made thereunder.
- As per Regulation 14(1) read with Regulation 14(3)(a) of IBBI (Voluntary Liquidation Process) Regulation 2017, liquidator is required to make public announcement within five days from his appointment in one English and one regional language newspaper.
- The Liquidator displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder.

**Compliance of law made after the time as stipulated by the Code cannot be treated as 'compliance' of law in the strict sense.**

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<sup>23</sup> IBBI Disciplinary Committee Case No. IBBI/DC/20/2020; Order dt. March 20, 2020



- The Liquidator was imposed a penalty of INR 1,00,000/- and he is debarred from performing any action under the code until the penalty was deposited.

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### Case Illustration II

Appointment of RP and Fixation of RP's proposed as two separate resolutions before CoC<sup>24</sup>

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#### Contravention

- The IP sought approval from CoC for two resolutions, namely, (a) appointment of self as RP, and (b) the amount of fee to be paid to him as RP. Resolution (a) was approved, while resolution (b) was not.
- Consequently, there was no decision and repeated meetings and waste of resources.

#### Submission by IP

- There was no precedent at the relevant time, and he felt it better to have debates in the CoC on two different aspects of a proposal.

#### Findings

- If only one resolution proposing Mr. X as RP along with fee was submitted, the CoC would have either approved or rejected it. Therefore, the IP wasted resources and pushed the timelines for CIRP.
- This was left to market practice, though breaking a substantive resolution into many resolutions is not encouraged which has the potential to create indecision, delay and wastage of resources.

**The IBBI is extremely particular about judicious use of time and resources of all stakeholders involved in the CIRP and expects diligence of highest level from IPs at all times.**

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### Case Illustration III

Taking extra-ordinary time to file an application under section 66 of the Code<sup>25</sup>

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#### Contravention

- In the 3rd CoC meeting dated November 16, 2017, it was decided that forensic audit should be conducted to find out the money trail of the CD.

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<sup>24</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; April 17, 2019

<sup>25</sup> IBBI Disciplinary Committee Case No. IBBI/DC/18/2020; February 27, 2020

- The forensic auditor was appointed on April 5, 2018 (i.e. approximately 4 months later) and the forensic audit report was submitted on July 6, 2018. Thereafter the application under section 66 was filed on October 29, 2018 i.e. after 115 days from receiving the forensic audit report.
- Thus, the application under section 66 of the Code was filed after 412 days from the date of commencement of CIRP i.e. 12.09.2017.

### **Submission by IP**

- The RP submitted that the application u/s 66 of the Code cannot be filed on mere suspicion of fraud and took reasonable time to find onerous agreements and thereupon immediately filed the application before the Adjudicating Authority.
- The RP further contended that the timelines prescribed in the Code are only directory in nature and it lies in the discretion of the IP to file an application under section 66 of the Code when he deems fit.

### **Findings**

- The RP took extra-ordinary time to file an application under section 66 of the Code after the forensic audit report was submitted to him even though an RP has the highest professional responsibility during CIRP.
- However, in the absence of any statutory mandate prescribing definite timelines for filing application under section 66 of the Code, the RP could not be held liable for filing the application belatedly. However, it cannot be disputed that he acted negligently and failed to acknowledge the importance of timelines during CIRP.

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### **Case Illustration IV**

#### **Non-Consideration of claims and failure to respond<sup>26</sup>**

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### **Contravention**

- The CIRP of the corporate debtor commenced on July 21, 2017 and the IRP issued a public announcement on July 21, 2017 inviting claims by August 4, 2017.
- In response to the public announcement, a proprietorship firm, submitted a claim on August 16, 2017. The IRP neither included the claim in the list of operational creditors nor did he respond to the claimant. The claimant resubmitted the same claim on October 3, 2017 and met the same fate.

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<sup>26</sup> IBBI Disciplinary Committee Case No. IBBI/Ref-Disc.Comm./02/2018; April 13, 2018

- The IRP failed and neglected to consider the claim and that led the claimant to file a complaint with the Board seeking a direction under section 196(g) of the Code.

### **Submission by IP**

- The IRP submitted that the claim of the claimant was a subject matter of an ongoing legal proceedings and he filed an application on January 9, 2018 before the Adjudicating Authority seeking guidance on admission of disputed claims.
- Based on the directions of the Adjudicating Authority, the IRP admitted the claim.

### **Findings**

- The IRP did not consider the claim of the claimant. He did not even respond to him. He was subsequently appointed as RP on August 21, 2018. As RP, he neither considered the claim nor responded to the complainant and by that act he disregarded the claim of the claimant and remained incommunicative.
- Further the CIRP was estimated to close on January 16, 2018 and the RP only sent a mail on January 22, 2018 that is, after the estimated closure date of CIRP, to the claimant, based on guidance of the Adjudicating Authority.
- 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.
- The IP disregarded his statutory duty under section 18(1)(b) of the Code, which mandates him to receive and collate all claims and the timeline provided under the Code and thereby contravened clause 13 of the Code of Conduct which mandates him to adhere to timeline. This failure on the part of the IRP was considered serious dereliction of the duty cast on an IP and a penalty equal to one tenth of the total fee payable to him as IRP and RP in the case is imposed.

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## Case Illustration V

### Delay in taking action against an unauthorised transaction<sup>27</sup>

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#### Contravention

- The RP had not taken any action for 245 days towards correcting the unauthorised transaction until the Inspecting Authority pointed out the issue and no discussions before CoC were held regarding such unauthorised transaction of transfer of money to a group company post insolvency commencement date or any action to be taken thereof.
- Further the RP did not mention the unauthorised transaction in the scope of the Forensic and Transaction Audit Agreement either.

#### Submission by IP

- The IP submitted that the transaction was unauthorized and required to be refunded by the group company of the CD and that he had notified the group company in this regard by way of an email.
- It was further submitted that the IP was awaiting the report from the Auditor which was appointed to conduct transactional audit so that such unauthorised transfers, if any, brought to notice, could be included in one application instead of filing separate applications under Section 43 of the Code.

#### Findings

- The RP has shown a casual attitude towards his responsibilities and adequate measures were not taken to reverse the transaction and hence he acted in violation of Sections 25 (1), 208(2)(a) & (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 14 of the Code of Conduct.

#### RESPONSES TO THREATS

An IP is an officer of the court and an effective resolution of a CIRP rests on his shoulders. Accordingly, an IP is duty bound to implement all possible safeguards to complete the process effectively within set regulations and timelines. A few safeguard measures to achieve the same are as follows:

- a. Understand the requirements of the Code and ensure that adequate time is available to perform duties under the Code prior to accepting appointment

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<sup>27</sup> IBBI Disciplinary Committee Case No. IBBI/DC/25/2020; Order dt. June 2, 2020

- b. Since a resolution process is dependent upon many stakeholders, an IP must maintain effective and timely communication with all of them and set expectations at the time of accepting the appointment to avoid any delays at a later point
- c. Continuously update all stakeholders including regulators on the progress in the matter and seek assistance as necessary to ensure strict adherence to timelines
- d. Avoid litigation as much as possible and rely upon existing jurisprudence to avoid consuming significant CIRP time in court room battles

## PROFESSIONAL COMPETENCE

The Oxford Dictionary of English defines a profession as 'a paid occupation, especially one that involves prolonged training and a formal qualification'. Hence, the word profession is derived from the notion of an 'occupation' that one 'professes' to be skilled in.

An IP shall self assess his competence to handle that particular assignment in terms of infrastructure, manpower, technology, skill set, professional bandwidth and sectoral knowledge in which corporate debtor is working in order to efficiently handle a particular case. An IP shall not accept an assignment in case of inadequate infrastructure.

Apart from the above an IP shall maintain his professional competence through continuous awareness and understanding of the developments in insolvency regime, prevailing critical issues and ideal safeguards to address the same.

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

Insolvency professionals play the role of regulator's 'eyes and ears' into the workings of the assignments and thus shoulder immense responsibility and are accountable not only to the immediate user of their services but also to a wider stakeholder group, including regulators and the society as a whole.

### **Attributes of Insolvency Professionals:**

The quality of any insolvency profession and its membership is influenced by the criteria for qualification and continuance as a professional. Only 'fit and proper' persons should be admitted as members of any IPA. A professional is also expected to employ 'state-of-the-art' tools in delivering his services.

He is accountable for discharging his services effectively and efficiently. This would include the use of the latest and best knowledge of management to keep himself abreast of the current developments. Further, he should be technologically 'literate' and avoid being 'technology myopic' and should not underestimate the capacity of technology to disrupt his profession.

The number of assignments a professional takes up should be within his capacity so as to enable him to effectively deliver his services. The quality of his services delivered would be affected if he accepts too many assignments that are beyond his capacity to complete.

Every profession should institute capacity building measures to ensure that the profession is equipped to meet the expectation of its users. Whilst building capacity, measures must also be taken to ensure proliferation of healthy competition within a profession to provide wider choices to its users. Competition stimulates and sustains quality as users of professional services will have the opportunity to seek the best service provider rather be compromised in accepting from a limited choice.

In summary, every professional should be endowed with the requisite 'Mindset, Skillset and Toolset'. He should possess a high-quality service mindset with attributes of empathy and understanding of his users' needs, contemporary skills required by his profession and a repertoire of tools to efficiently and effectively deliver his services.

### **THREAT FOR NON-COMPLIANCE (UNDER THE UK REGIME)**

In UK the fundamental principles of Professional Competence and Due Care are as follows:

- Attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organization receives competent professional service, based on current technical and professional standards and relevant legislation; and
- Act diligently and in accordance with applicable technical and professional standards.<sup>28</sup>

Insolvency Professionals are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

The fundamental principle of professional competence and due care requires that an Insolvency Professionals only accepts an insolvency appointment when the insolvency practitioner has or can acquire sufficient expertise.

For example, a self-interest threat to the fundamental principle of professional competence and due care is created if the insolvency practitioner or the insolvency team does not possess or cannot acquire the competencies necessary to carry out the insolvency appointment. Acquiring in this context includes obtaining the expertise from elsewhere by employing experts or additional resources.

This section sets out specific requirements and application material relevant to applying the conceptual framework in such circumstances.

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<sup>28</sup> Fundamental General Principles, Insolvency Practitioners Association - Ethics Handbook - UK – May 2020

- An insolvency practitioner shall not intentionally mislead an employing organisation as to the level of expertise or experience possessed.
  - The principle of professional competence and due care requires that an insolvency practitioner only undertakes significant tasks for which the insolvency practitioner has, or can obtain, appropriate training or experience.
  - A self-interest threat to compliance with the principle of professional competence and due care might be created if an insolvency practitioner has:
    - insufficient time for performing or completing the relevant duties;
    - incomplete, restricted or otherwise inadequate information for performing the duties;
    - insufficient experience, training and/or education;
    - inadequate resources for the performance of the duties.
  - Factors that are relevant in evaluating the level of such a threat include:
    - the extent to which the insolvency practitioner is working with others;
    - the relative seniority of the insolvency practitioner in the firm;
    - the level of supervision and review applied to the work.
  - Factors to be considered in evaluating expertise include:
    - an appropriate knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities;
    - an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed;
    - knowledge of relevant industries and subject matters;
    - possessing or obtaining experience of relevant regulatory and reporting requirements;
    - availability of sufficient staff with the necessary competencies;
    - access to experts where necessary;
    - complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.
  - Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments.
  - Examples of actions that might be safeguards to address such threats include:
    - obtaining assistance or training from someone with the necessary expertise.



- ensuring that there is adequate time available for performing the relevant duties.
- If a threat to compliance with the principle of professional competence and due care cannot be addressed, an insolvency practitioner shall determine whether to decline to perform the duties in question or accept or continue the insolvency appointment. If the insolvency practitioner determines that declining to accept the insolvency appointment is appropriate, the insolvency practitioner shall communicate the reasons.
- The insolvency practitioner shall keep under review the expertise required throughout the insolvency appointment.<sup>29</sup>

**“The success of the process is contingent upon the competence of the IRP and the CoC.”**

- Supreme Court of India

The Hon'ble Supreme Court observed<sup>30</sup>:

*“... this Court should follow the discipline of the IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The Court should not take upon itself the burden of supervising the intricacies of the resolution process.”*

## CASE ILLUSTRATIONS

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### Case Illustration I

#### Issue of EoI without the approval of CoC<sup>31</sup>

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#### Contravention

- The RP issued the invitation of EoI without the approval of the CoC.

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<sup>29</sup> Acting with sufficient expertise- professional competence, Requirements and Application Material, Insolvency Practitioners Association - Ethics Handbook - UK - May2020

<sup>30</sup> Chitra Sharma and Ors. Vs. Union of India and Ors. [WP (Civil) No. 744 of 2017 & connected WPs & SLPs]

<sup>31</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

## Submission by IP

- The RP circulated the EoI via e-mail to the CoC which has only one FC and the only FC, approved the draft EoI. The same was published and was ratified in the meeting of the CoC.

## Findings

The DC finds the submission of the RP as untenable:

- The minutes of the meeting of the CoC has no mention whatsoever of invitation of EoI. The submission that the EoI was ratified is false.
- The submission of Mr. RP that he sent an e-mail to the CoC is misleading. The 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.
- The conduct of RP is 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.
- Further, the RP has contravened the code of conduct principle of the professional competence and due care while handling the CIRP of the CD.

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### Case Illustration II

#### Charging abnormally high fees<sup>32</sup>

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## Contravention

- The RP contracted a consolidated professional fee of INR 50 lakh plus out-of-pocket expenses, with the applicant who had a claim of INR13.76 lakh only. It was alleged that this defied logic and indicated intention of Insolvency Professional to inflate expenses.

## Submission

- The RP stated that the amount of fee was clear reflection of work that he was to undertake as an IRP.

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<sup>32</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; Order dt. April 17, 2019

## Findings

- The RP attempted to charge abnormally high fee in relation to the services. Besides, his act was mala fide wherein he sought an increase of his fee after approval of fee by the AA and displayed professional incompetence by using stale information for decision making.
- Therefore, RP violated sections 20, 208(2)(a) and (e) of the Code, regulation 33 of the CIRPR and regulations 7 (2) (a) and (h) of the IP Regulations and had also contravened the code of conduct principle of the professional competence and due care while handling the CIRP of the CD.

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### Case Illustration III

#### Failure to publish invitation for EoI<sup>33</sup>

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## Contravention

The RP failed to publish brief particulars of the invitation in Form G of the Schedule to the CIRP Regulations, as required under regulation 36A(5) of the said Regulations.

## Submission by IP

- The requirement of Form G came into effect from 6<sup>th</sup> February, 2018. The requirement of publishing Form G was not applicable to the ongoing CIRP, where less than 37 days were available for submission of resolution plans as on 6<sup>th</sup> February 2018. Therefore, the allegation is not tenable.

## Findings

- The submission of RP is not consistent with his conduct. He cannot assert that the requirement of Form G was not applicable, even while he sought approval of the CoC for the same.
- Form G carries brief particulars of invitation of resolution plans. As per regulation 36A(1) of the CIRP Regulations, the RP needs to allow at least one month from the issue of Form G to prospective RAs to submit resolution plans. The CoC approved Form G, obviously to receive resolution plans at the earliest.
- The submission that less than 37 days were available for submission of resolution plans is not correct and the requirement of Form G was squarely applicable in this matter.

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<sup>33</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

- Thus, the IP contravened the provisions of section 25(2)(h) of the Code, regulation 36A of the CIRP Regulations, and regulation 7(2)(a) and (h) of the IP Regulations.
- Further, the RP failed to comply with clauses 1, 2, 3, 5, 9, 10, 13 and 14 of the code of conduct principle of the professional competence and due care while handling the CIRP of the CD.

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#### Case Illustration IV

#### List of creditors presented in a wrong format to the CoC<sup>34</sup>

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#### Contravention

- The list of creditors provided by the IP to the CoC were not prepared in accordance to regulation 13 of CIRP regulations. In some lists only claimed amount was specified while in other lists only admitted amount was mentioned.
- Further, RP also failed to specify the interest applied for computation of claims w.r.t class of creditors in violation to regulation 16A (7) of the CIPR Regulations since financial creditors also consisted of homebuyers.

#### Submission by IP

- The IP denied the allegation and submitted the list of creditors as per the prescribed format to the Inspecting Authority.

#### Findings

- The list of creditors submitted before CoC do not contain the complete details as required by the Regulations.
- This act of the IP is in violation of Section 208(2)(a) & (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 13 of CIRP Regulations, 2016 and had also failed to upgrade his professional knowledge and skills to render competent professional service and acted negligently while performing his functions and duties under the Code, thus contravening the code of conduct.

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<sup>34</sup> IBBI Disciplinary Committee Case No. IBBI/DC/25/2020; June 2, 2020

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### Case Illustration V

Allowing an unregistered valuation firm to continue till it got registered with IBBI<sup>35</sup>

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#### Contravention

- The RP had appointed two unregistered entities as Registered Valuers of the CD and on discovering his mistake, he appointed two registered valuers in place of one of the unregistered entities but allowed the other unregistered entity to continue for another 6 months till they got registered as registered valuer.

#### Submission by IP

- RP submitted that both the firms at that point of time represented that they have registered valuers as their partners and an impression was taken that such appointment letters could be issued.
- Neither any report was obtained nor any monies paid to them. However, timelines did get breached in the process, for which the IP sincerely apologized.

#### Findings

- Continuing the appointment of the firm which is not registered with IBBI is a violation of Section 208(2)(a) and (e) of the Code, Regulation 27 of the CIRP Regulations, Regulation 7(2)(a), 7(2)(h) and 7(2)(i) of the IP Regulations , IBBI Circular IBBI/RV/019/2018 dated 17.10.2018. The RP also failed to upgrade his professional knowledge and skills to render competent professional service and acted with negligence while performing his functions and duties under the Code thus contravening the code of conduct.

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### Case Illustration VI

Letterhead of IP reflected profession as lawyer and not insolvency professional<sup>36</sup>

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#### Contravention

- IP communicated with various stakeholders during the course of CIRP while using the letterheads indicating his profession as a lawyer and not that of an insolvency professional.

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<sup>35</sup> IBBI Disciplinary Committee Case No. IBBI/DC/25/2020; June 2, 2020

<sup>36</sup> *ibid.*

## Submission by IP

- After advised by the inspecting authority, the RP started using letter heads mentioning profession as “Insolvency Professional”.

## Findings

- IBBI Circular dated 03rd January, 2018 provides that an insolvency professional in all his communications as an IP must provide: (i) his name, address and email, as registered with IBBI; (ii) his Registration Numbers as an IP, and (iii) the capacity in which he is communicating.
- Such an act of the IP in reflecting his profession in the letter heads as lawyer instead of an insolvency professional, is in violation of Section 208(2)(a) & (e) of the Code and Regulation 7(2)(a), 7(2)(h) and, 7(2)(i) of the IP Regulations, read with clause(s) 2, 10, 12 and 14 of the Code of Conduct and the IBBI Circular dated 03rd January, 2018.

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### Case Illustration VII

#### Failure to invite resolution plans and other non-compliances<sup>37</sup>

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## Contravention

In two insolvency resolution cases with the same IP, the following requirements of IBC were not complied with / were complied with after the prescribed time limit:

- Submit a complete progress report to Adjudicating Authority
- Make public announcement
- Appoint registered valuers
- Prepare and circulate information memorandum
- Invite resolution plans under section 25(2)(h) of the Code; rather, he invited resolution plan only from the sole member of the CoC, without providing information memorandum, asking him to submit resolution plan in 4 days.
- Convene the meetings of CoC with adequate notice, etc.
- Take over management of the corporate debtor and run it as a going concern
- Resignation from the case without prior permission of the Adjudicating Authority
- Co-operate with the subsequent IP in terms of sharing data of the corporate debtor

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<sup>37</sup> IBBI Disciplinary Committee Case No. IBBI/DC/14/2018; Order dt. January 28, 2019

## Submission by IP

The IP submitted the following in his defence:

- he did not have funds to make public announcement
- he did not get co-operation from the CD
- he was not well for some time during the CIRP

## Findings

- The sole purpose of CIRP is consideration and approval of resolution plan to resolve insolvency and the IP failed to invite resolution plans and did not even prepare or provide the required information to prospective resolution applicants.
- 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.
- The RP 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.
- 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.
- The RP was directed to undergo the pre-registration educational course to enhance his understanding of the Code.

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### Case Illustration VIII

#### Missed recording of facts in Minutes of the CoC Meeting by oversight<sup>38</sup>

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## Contravention

- The CD initiated CIRP against its debtors for their defaults. The RP of the CD proposed to appoint his wife as IRP in all the 15 CIRP Applications. Upon being investigated for this decision of the RP, it was submitted by him to the AA that the CoC decided to recuse his wife as proposed IRP in some of the matters if majority of them were admitted. However, the Inspecting Authority did not find any such decision in the minutes of the CoC.

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<sup>38</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; Order dt. April 17, 2019

### **Submission by RP**

- The RP submitted that he missed to record this decision of the CoC in the minutes by oversight and he has apologised for the same.

### **Findings**

- IP is often defending 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 the IP for all such pretexts and if the IP is an embodiment of all these pretexts, it is doubtful if he deserves to continue as an IP.
- The RP is said to have contravened Section 208(2)(a) and (e) of the Code, regulations 7(2)(a), (b) and (h) of the IP Regulations and had breached the Code of Conduct.

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### Case Illustration IX

#### Outsourcing the responsibility of Verification of Claims<sup>39</sup>

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### **Contravention**

- The RP outsourced this responsibility of verifying claims of creditors to another firm.

### **Submission by IP**

- The RP submitted that he did not outsource work of verification of claims to another entity and only obtained support services/assistance from the entity.
- He further stated that the same was only recommendatory in nature and that upon receipt of claims, they were examined by him as to their validity and correctness and thereafter, were sent to the other entity.

### **Findings and conclusion**

- The appointment letter of the other entity, the minutes of the CoC meeting as well as an email dated March 1, 2020 sent by the other entity to the RP proves the fact that the former was appointed for verification of claims, which was the core duty of the RP.
- Further, it was observed that payment of Rs. 3,00,000/- plus GST has been paid for verification of claims which could have been saved, had the verification been done by the RP himself.

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<sup>39</sup> IBBI Disciplinary Committee Case No. IBBI/DC/21/2020; Order dt. April 20, 2020



- Pursuant to regulation 13 (1) of the CIRP Regulations, it is the duty of the IP to verify every claim received by him. An IP cannot outsource any of his duties and responsibilities under the Code as per IBBI Circular dated January 3, 2018.
- An IP can take support by appointing accountants, legal or other professionals as may be necessary. However, he cannot outsource duties assigned to himself under the regulations.
- A penalty of INR 1,00,000 was imposed on the IP.

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### Case Illustration X

#### Holding CoC meetings after filing of liquidation application with Adjudicating Authority<sup>40</sup>

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#### Contravention

- The CIRP period was over and the liquidation application was filed by the IP. Even after the filing of application, the IP conducted two more CoC meetings in violation of sec 5 (14) and 12 of the code.
- As CIRP period was over and liquidation application was filed, extra expenses were incurred by the RP in conducting the said meetings.

#### Submission By IP

- IP submitted that with a view to avoid any adverse impact on the CIRP, it was considered important for RP to continue till the liquidation order was passed.
- Also, it was submitted that the reason behind conducting the CoC meeting was that, there were many expenses required to be approved by the CoC members.
- It was further mentioned that as per the amendment made to Section 23 of the code, IPs to continue and manage the operation of a corporate debtor till the resolution plan is approved or liquidator is appointed.

#### Findings

- The amended Section 23(1) of the Code provides that a resolution professional may continue to manage the operations of the corporate debtor until an order approving the resolution plan under Section 31 of the Code or appointing a liquidator under Section 34 of the Code is passed by the adjudicating authority. However, in the present case, liquidation application

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<sup>40</sup> IBBI Disciplinary Committee Case No. IBBI/DC/26/2020; Order dt. June 8, 2020

has been filed before the commencement of the Amendment and thus, the same shall not be applicable to the facts of the present case.

- It was further observed that the IP convened the meetings of the CoC post the completion of the CIRP period not only to ratify the expenses incurred by the RP but also for the items beyond the ratification of expenses.
- The idea for conducting the CoC meeting was also for discussion on agenda item beyond the same which do not explicitly fall under the ambit of “managing the operation of the corporate debtor”

Conducting two COC meetings beyond the CIRP period and discussing agendas other than as directed by AA are beyond the provisions of the code.

## **RESPONSES TO THREATS**


The fundamental principle of professional competence and due care imposes an obligation on an insolvency professional to only accept an appointment that the insolvency professional is competent to perform. For example, a self-interest threat to professional competence and due care is created if the insolvency team does not possess or cannot acquire the competencies necessary to properly carry out the appointment. Expertise will include appropriate training, technical knowledge, knowledge of the entity and the business with which the entity is concerned.

If any appointment necessitates the employment of agents, an insolvency professional shall exercise care to retain overall control of the conduct of the engagement.

An insolvency professional shall not accept any insolvency or liquidation work as agent of another insolvency professional unless satisfied that he has been employed on this basis and the other insolvency professional has retained overall control of the conduct of the engagement.

Prior to accepting an appointment an insolvency professional, to the extent reasonably possible, shall ensure that the following matters have been taken into consideration:

- Obtaining knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities.
- Acquiring an appropriate understanding of the nature of the entity’s business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.
- Acquiring knowledge of relevant industries or subject matters.

- Possessing or obtaining experience with relevant regulatory or reporting requirements.
- Assigning sufficient staff with the necessary competencies.
- Using experts where necessary.
- Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently. 

Maintaining and acquiring professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments, including:

- An IP 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.
- An IP must provide all information and records as may be required by the Board or the IPA with which he is enrolled and must co-operate and be available for inspections and investigations carried out by the Board or such IP agency.
- An IP 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.
- An IP must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession or brings disrepute to the profession.
- An IP must provide services for remuneration which is a reasonable reflection of the work necessarily and properly undertaken.

### **Requirements under the UK regime**

- Professional competence requires the exercise of sound judgement in applying professional knowledge and skill when undertaking professional activities.
- Continuing professional development enables an insolvency practitioner to develop and maintain the capabilities to perform competently within the professional environment.
- Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.
- In complying with the principle of professional competence and due care, an insolvency practitioner shall take reasonable steps to ensure that those working in a professional

capacity under the insolvency practitioner's authority have appropriate training and supervision.

- Where appropriate, an insolvency practitioner shall make users of the insolvency practitioner's services or activities or their employing organisation aware of the limitations inherent in the services or activities.<sup>41</sup>

Moreover, every individual that earns his bread from this ecosystem, should feel personally responsible for cultivating and improving the ecosystem further to keep the ball rolling. Any professional rendering a service should consider himself as an ambassador of the ecosystem as a whole, and perform his duties towards his respective clients, being mindful of his larger responsibility towards the ecosystem. At no point should his individual interests or the interests of his clients, or any stakeholder involved be placed above the letter and spirit of the standards and laws governing his profession. Each professional is responsible and accountable to each stakeholder who may be affected or impacted by his actions.

## **ASSET MANAGEMENT**

### **Role of the Insolvency Professional during Asset Management**

While handling an insolvent company, the IP becomes the nodal agency to ensure the going-concern nature of the insolvent during the resolution process, preserves assets and enhances the value of assets by challenging questionable transfers of assets or creation of obligations.

The UNCITRAL Legislative Guide on Insolvency Law recognizes the role of an “insolvency representative” as follows:

*“However appointed, the 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.”<sup>42</sup>*

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<sup>41</sup> Requirements under the Professional Competence and Due Care, Insolvency Practitioners Association - Ethics Handbook - UK - May2020

<sup>42</sup> UNCITRAL Legislative Guide on Insolvency Law

Section 18 requires the interim resolution professional to take control and custody of any asset over which the corporate debtor has ownership rights and section 20 obliges the interim resolution professional to make every endeavour to protect and preserve the value of the property of the corporate debtor. Further, section 25 states that 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. The Code has also amended section 429 (1) of the Companies Act, 2013 empowering the NCLT to pass instructions to executory authorities for taking control and custody of assets, in case the RP is facing difficulties in doing so.

### **Objective of the Provisions**

The custody and control of the assets needs to be moved from the directors to the IRP/RP for the purpose of adequate monitoring and not as a pre-disposal measure and to keep the assets of the debtor with honesty and transparency.<sup>43</sup>

It is pertinent to mention that “Due Diligence” is a key challenge when acquiring an asset under Insolvency and Bankruptcy Code. During Due Diligence process, the RP must take stock of the Asset by looking at the company data, walking around sites and doing third party diligence which is considered not only as one of the most critical areas of any CIRP, but also as very customary and hence left to advisers.

For an effective resolution, assembling the assets of the CD is a principal task. In this respect, the Code provides enough protection to the assets of the CD. During the process of resolution, a 'moratorium' on proceedings against the CD is afforded, providing a 'calm period' for a resolution to be explored. While such a 'stay' is secured, no assets of the CD can be invaded upon or attached by any authority. Also, when an order for liquidation of a CD has been passed, no legal proceeding can be instituted by or against the CD. Moreover, during liquidation, the liquidator is expected to take into custody or control all the assets, property, effects and actionable claims of the CD. The applicability of moratorium and the overriding powers of the Code have been one of the most debated provisions of the Code. It is a useful shield to the CD against individual enforcement actions by the financial creditor (FCs).

In the matter of Swiss Ribbons, the SC observed that ‘...*the moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process.*<sup>44</sup>

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<sup>43</sup> Clause 4.4 of the Report of Bankruptcy Law Reforms Committee, November 2015 (BLRC Report)

<sup>44</sup> Swiss Ribbons Pvt. Ltd. & Anr. Writ Petition (Civil) No. 99 In Special Leave Petition (Civil) No. 28623 of 2018\_2019

## **Suggestive Best Practices for Insolvency Professional during Asset Management:**

- Upon appointment as an Interim Resolution Professional/Resolution Professional/Liquidator, the asset class should be reviewed and the potential threat and risk to the assets should be identified and safeguarding measures should be taken.
- IP through appointment of registered valuer(s) should carry out physical verification of the assets of the corporate debtor and should obtain exceptional reporting from the registered valuer(s) to ensure reconfirmation of asset size vis-à-vis the books of accounts of the company.
- If nature of asset is such that it requires extra protection, then IP should engage the services of relevant security agencies or if needed, assistance of local police can also be obtained by approaching the Adjudicating Authority.
- In case of factory operations, if there is risk perceived regarding unauthorized movement of goods, CCTV camera can be installed if not already installed and footage might be reviewed at regular interval.
- IP should institute the process of change in authorised signatories of bank account(s) of the corporate debtor in order to ensure effective management of cash and bank balance.
- IP should scrutinize the current assets of the corporate debtor as stated in the audited balance sheet of the company and should evaluate if any legal action is necessary towards the realization of the same.
- IP should get the records and registers pertaining to the assets of the corporate debtor completed at the earliest in order to understand the actual position of the assets of the corporate debtor (if not completed)<sup>45</sup>.

Key Judgments wherein the IRP/RP is ***seeking assistance from the Adjudicating Authority in order to preserve the asset of the Corporate Debtor:***

While performing his duties, the IRP/ RP may approach the adjudicating authority i.e. the NCLT for seeking any assistance during the CIRP.

In ***Central Bank of India and the State Bank of India v. M/S. Ashok Magnetics Ltd.***<sup>46</sup> the IRP made efforts to take charge of the assets of the corporate debtor, but there was stout resistance from the corporate debtor. He, therefore, prayed for police assistance to discharge his functions as

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<sup>45</sup> Statement of Best Practices for Insolvency Professionals, IPA ICAI

<sup>46</sup> CP/551(IB)/CB/2017

IRP. The NCLT directed the Superintendent of Police in whose jurisdiction the Registered Office and the factory of the Corporate Debtor were located to give proper Police assistance and personal security to the IRP to enable him to take charge of the assets of the corporate debtor and perform the functions as per the provisions of the Code.

In ***Punjab National Bank v. Divyajyoti Sponge Iron Pvt Ltd.***<sup>47</sup> the RP sought for necessary assistance and security for himself to visit the factory premises of the corporate debtor to carry out statutory duties and obligations peacefully. Keeping in view the threats by the corporate debtor, the NCLT ordered the Superintendent of Police and the in-charge of the concerned police station to provide proper and effective assistance to the resolution professional.

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<sup>47</sup> CA (IB) No. 570/KB/2017 in C.P (IB) No. 363/KB/17

## CONFIDENTIALITY

The fundamental principle of confidentiality is that 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.

The principle of confidentiality is not only to keep information confidential, but also to take all reasonable steps to preserve confidentiality. Whether information is confidential or not will depend on its nature.

Personal information acquired by the Insolvency Professional, both before and during an appointment, that is not directly relevant to the insolvency or commercial information relating to the affairs of third parties, should be kept confidential, unless it is expected that the information is not confidential.

Confidentiality should be maintained in respect of the resolution plan for the restructured company, and in respect of the negotiations conducted to reach the resolution plan. Confidentiality is key to a successful restructuring, especially as the resolution plan provides whether all or part of the employees and/or all or part of the assets of the restructured company will be preserved.

The Insolvency Professional is entitled to any information relating to the Corporate Debtor which the Corporate Debtor itself would have been entitled to and from anyone who holds such information.

Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the Insolvency Professional or third parties

### **THREAT FOR NON-COMPLIANCE (UNDER THE UK REGIME)**

There are circumstances where insolvency practitioners are or might be required to disclose confidential information or when such disclosure might be appropriate:

- a) Disclosure is required by law, for example:
- producing statutory reports for the creditors of the insolvent;
  - submitting reports on the conduct of directors of an insolvent entity;
  - production of documents or other provision of evidence in the course of legal proceedings;
  - or
  - disclosure to the appropriate public authorities of infringements of the law that come to light;



- b) Disclosure is permitted by law and is authorised by the employing organisation; and
- c) There is a professional duty or right to disclose, when not prohibited by law:
  - To comply with the quality review of an authorising body;
  - To respond to an inquiry or investigation by an authorising body or the oversight body;
  - To protect the professional interests of an insolvency practitioner in legal proceedings; or
  - To comply with technical and professional standards, including ethics requirements.

In deciding whether to disclose confidential information, factors to consider, depending on the circumstances, include:

- Whether the interests of any parties, including third parties whose interests might be affected, could be harmed if the client or employing organisation consents to the disclosure of information by the insolvency practitioner.
- Whether all the relevant information is known and substantiated, to the extent practicable. Factors affecting the decision to disclose include:
  - Unsubstantiated facts.
  - Incomplete information
  - Unsubstantiated conclusions.
- The proposed type of communication, and to whom it is addressed.
- Whether the parties to whom the communication is addressed are appropriate recipients.<sup>48</sup>

### **Significant Situations to Preserve Confidentiality:**

- The information relating to the Corporate Debtor and its affairs during the CIRP may be commercially sensitive, confidential or subject to obligations owed to third parties such as trade secrets, research and development information and customer information and therefore, any use of such confidential information needs to be carefully considered by the Insolvency Professional and must be used only in accordance with law.
- Resolution Plans received by the IP from different parties should be kept confidential and the same shall only be shared with the Committee of Creditors.
- In cases or situations where a conflict of interest arises, the preservation of confidentiality will be of paramount importance; therefore, the safeguards used should generally include the use of effective information barriers.

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<sup>48</sup> Fundamental General Principles- Confidentiality, Insolvency Practitioners Association - Ethics Handbook - UK - May2020

- Insolvency Professionals should also be careful not to enter into new obligations of confidence, such as non-disclosure agreements, that might have an impact on transparency in information sharing or communication with interested parties, other than as commercially reasonable and in accordance with law.<sup>49</sup>

## **RESPONSES TO THREAT:**

- An IP shall maintain strict confidentiality with regard to the information received about the corporate debtor through business/professional relationship.
- IP shall not disclose any information acquired through business/professional relationship to any third party and shall only make disclosure if required by law or Adjudicating Authority and shall not use it for any personal benefit.
- Resolution Plans received by the IP from different resolution applicant should be kept confidential and the same shall only be shared with the participants of the Committee of Creditors.
- In case for the receipt of information, IP has to enter into Non-Disclosure Agreement, then IP shall carefully review the terms and condition of the agreement and shall avoid signing off to any terms and conditions which may impact any of his duties or responsibility under the Code.
- IP should have systems and procedures in place to prevent access to confidential information to any unauthorized person.
- Confidentiality should be maintained by the IP when hiring external advisors/professionals
- Confidentiality or Non-Disclosure Agreement may be entered into with such external advisors/professionals to the extent applicable.
- In case of conduct of meeting of Committee of Creditors through video-conferencing or through any other online mode, IP shall ensure the authenticity of the system

The Code and regulations made thereunder contain specific provisions for keeping the information confidential or for providing information to stakeholders under confidentiality agreement. Accordingly, vide a Circular dated 23 February, 2018, the IBBI clarified that the disclosure of information, except as provided for in the Code, or rules, regulations or circulars issued thereunder, is restricted.

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<sup>49</sup> [http://www.insolindia.com/uploads\\_insol/draft\\_best\\_practices/files/confidentiality-1012.pdf](http://www.insolindia.com/uploads_insol/draft_best_practices/files/confidentiality-1012.pdf)

Unauthorised access to or leakage of such information has the potential to impact the processes under the Code. An IP, whether acting as IRP, RP or Liquidator, except to the extent provided in the Code and the rules, regulations or circulars issued thereunder, shall:

- keep every information related to the CD as confidential; and
- not disclose or provide access to any information to any unauthorised person.

In the matter of *Vijay Kumar Jain Vs. Resolution Professional and Ors.*<sup>50</sup> a member of the suspended Board of Directors of the CD filed an application seeking confidential information as stated in regulation 35 of the CIRP Regulations, which requires the RP to provide fair value and liquidation value to every member of the CoC. The AA disposed of the application with liberty to the applicant to attend CoC meetings but *not to insist upon the CoC or the RP to provide information which is considered confidential.*

### **Safeguards to Maintain Confidentiality**

- The Insolvency Professional may enter into non-disclosure agreements, subject to the condition that the non-disclosure agreement would not in any manner lead to non-compliance with the General Principles stated above and in carrying out duties as required under the Code.
- The Insolvency professional should make best endeavours to document all initial assessments, investigations and conclusions, including any conclusion that determines that further investigation or action is not required or feasible, and also any other decision.
- Post appointment, the Insolvency Professional should ensure there are procedures in place to prevent access to confidential information (for instance, strict physical separation of insolvency teams, and confidential and secure data filing).
- The Insolvency Professional should ensure there are clear guidelines for individuals including key managerial personnel within the company on issues of security and confidentiality, including requiring such key managerial personnel to sign confidentiality agreements.
- Confidentiality should be maintained by the Insolvency Professional when hiring external advisors including registered valuers, lawyers or any other professionals. Confidentiality or non-disclosure agreements may be entered into with such advisors.
- Liquidation valuation report by the two registered valuers should only be shared with the Committee of Creditors and the contents of the report shall be treated as confidential information. Further, the Insolvency Professional shall maintain confidentiality by ensuring that the two

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<sup>50</sup> MA 518/2018 in CP (IB) 1371 (MB)/2017

valuers are independent of each other and in no manner discuss with each other the valuation report.

- The video-conferencing, etc. provided by the Insolvency Professional for meetings of the Committee of Creditors should be through secured/protected computer systems. The Insolvency Professional shall also ensure that the identification and authorization of persons is checked before they can participate in the meetings of the Committee of Creditors.<sup>51</sup>

The Supreme Court in the case of *Ruchi Soya Industries*<sup>52</sup> held that the scheme of the Code makes it clear that the directors, though not members of the Creditors Committee, have a right to participate in every meeting of the Creditors Committee. In addition, it was also held that for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the Creditors Committee. Any concerns over breach of confidentiality may be alleviated by the Insolvency Professional obtaining a confidentiality undertaking from the directors, which may also contain an indemnity to the Insolvency Professional against any breach. The Supreme Court further opined as follows:

*“... So far as confidential information is concerned, it is clear that the resolution professional can take an undertaking from members of the erstwhile Board of Directors, as has been taken in the facts of the present case, to maintain confidentiality. The source of this power is Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with paragraph 21 of the First Schedule thereto. This can be in the form of a non-disclosure agreement in which the resolution professional can be indemnified in case information is not kept strictly confidential.”*

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<sup>51</sup> [http://www.insolindia.com/uploads\\_insol/draft\\_best\\_practices/files/confidentiality-1012.pdf](http://www.insolindia.com/uploads_insol/draft_best_practices/files/confidentiality-1012.pdf)

<sup>52</sup> *Vijay Kumar Jain v. Standard Chartered Bank and Others* (Civil Appeal No. 8430 of 2018; Order dt. January 31, 2019)

## OCCUPATION, EMPLOYABILITY AND RESTRICTIONS

An insolvency professional cannot play two roles viz. 'profession' and 'employment' simultaneously. It is similar to the requirement that a person in employment cannot practice as an advocate and vice versa. The sole objective behind such a requirement is that a professional must have undivided loyalty and unflinching attention towards his professional obligations. According to the ethical principle of Professional / Technical Competence followed in UK, accepting cases where a member cannot give them the level of attention or technical expertise required to deliver the best result for stakeholders may bring such member and the profession into disrepute.

Further, the current regulatory framework not only seeks to address conflict of interests arising from past and present relationships of an IP, but also takes care of any future threats. This is because an IP may compromise his position in promise of a return in future, after he completes a process or after he ceases to be an IP. For example- he may take up an employment or have a professional association with the corporate debtor, successful Resolution Applicant, Creditors and their related parties. The restriction on an IP and his relatives to seek assignment or employment with the stakeholders of the processes handled by him seeks to mitigate attempts by stakeholders to lure the IP by offering assignment/employment post completion of processes, leading to non-realisation of the objectives of the Code.

As per the Code of Conduct, an IP shall not engage in the following activities:

- Accept too many assignments if he is unlikely to be able to devote adequate time to each of his assignments
- Engage in any employment when he holds a valid authorisation for assignment or when he is already on an assignment
- 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 10% voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of 1 year has elapsed from the date of his cessation from the CIRP under him
- Engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignments
- Provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

- Conduct business which in the opinion of the Board is inconsistent with the reputation of the profession

An IP is also expected to not engage his relatives or related parties on any work related to his assignments and vice versa to ensure that his independence and integrity is not threatened while he is delivering his duties as an IP. To ensure compliance to this, insolvency professional agencies mandate the IP to self-declare his relationship with all stakeholders such as creditors, corporate debtor, resolution applicants, legal counsels, any other service providers involved in the assignment within specified timelines to the insolvency professional agency.

According to the **ethical principle of Objectivity, Independence and Impartiality followed by practitioners in UK**, members should avoid circumstances likely to result in a conflict of interest and should not be unjustly enriched, for example, by receiving secret kick-backs or commissions. A Member should also not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

As per Regulation 2(aa) of the IBBI (IP) Regulations, from January 1, 2020, the IBBI has further tightened the regulatory regime for IPs by introducing the concept of **Authorisation for Assignment** besides holding a valid registration as an IP. According to the new regulation, an IP cannot undertake any new assignment unless he or she holds an 'Authorisation for Assignment' issued by the insolvency professional agency concerned. This would be applicable for an individual acting as an interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the code.

Before an IPA issues an Authorisation for Assignment, it is required to check an IP's eligibility as per Model Bye-laws. This ensures continuous compliance by an IP with eligibility requirements such as, inter alia, not having any disciplinary proceedings against him, not being debarred by its insolvency professional agency or the Board, not being formally employed.

This amendment also aims to enable an individual to seek registration as an IP even when he is in employment. He must, however, discontinue employment when he wishes to have an Authorisation for Assignment.

## **THREAT FOR NON-COMPLIANCE**

An IP may encounter several instances before, during, and after any of his assignments pertaining to his occupation. It may not be possible to make an exhaustive list of instances wherein an IP may

face a threat for non-compliance, however before agreeing to accept any insolvency appointment (including a joint appointment), an IP shall determine whether acceptance would create any threats to compliance with the fundamental principles pertaining to his occupation and employment.

During the course of any insolvency assignment, an IP performs a balancing act among various stakeholders namely corporate debtor, creditors and resolution applicants amidst tough timelines with the objective of an effective resolution. However, an IP may be presented with a situation seeking to compromise his objectivity and causing a breach of this code of conduct in the form of a future gain in terms of an assignment or employment. For example, the offer of employment, outside of the normal recruitment process, to the spouse of the insolvency practitioner by a creditor in an insolvency might indicate such a threat.

An IP occupies a position of power having the ability to recommend or influence appointment of various service providers such as legal counsels, valuers, auditors etc for the corporate debtor even though these may require ratification and approval by the Committee of Creditors. Occupying such a position may present various conflicts of interests in terms of appointing a relative or a related party on one of his assignments. While this threat continues to exist, an IP should always be wary of this and not allow any bias or conflict of interest to cloud his decisions.

While a trivial relationship of an insolvency professional with the insolvent entity / concerned creditor is not a bar for being appointed as an insolvency professional for that insolvent entity, for instance having personal banking relations with the financial / operational creditor, consideration should always be given to the perception of others when deciding whether to accept an appointment. Whilst an insolvency practitioner may regard a relationship as not being significant to the appointment, the perception of others may differ and this may in some circumstances be sufficient to make the relationship significant.

## **CASE ILLUSTRATIONS**

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### Case Illustration I

#### Giving consent to act as IP in multiple CIRPs at the same time<sup>53</sup>

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#### **Contravention**

- A husband and wife were insolvency professionals registered with the Board. The husband, in the capacity interim resolution professional (IRP) of the Corporate Debtor, filed applications for initiating Corporate Insolvency Resolution Process (CIRP) of 14 corporate

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<sup>53</sup> IBBI Disciplinary Committee Case No. IBBI/DC/15/2019-20

debtors (CDs). His wife consented to act as IRP for CIRPs of all 14 CDs simultaneously, even though she has absolutely no experience whatsoever and no capacity.

### Submission by IP

- At the time of giving consent, the IRP's wife did not have any assignment in hand. Therefore, she consented to all 15 CIRPs. If she got 2-3 CIRPs, she would recuse herself from other CIRPs by filing withdrawal letter.

### Findings

- 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.
- While the Code aims to rescue the ailing CDs, such conduct of an IP ensures just the opposite. That is why the law prohibits an IP from taking too many assignments, if he is unlikely to devote time to each of his assignment. The argument that the IP in question would withdraw her consent, after she gets a few assignments, is mischievous. Assuming for the sake of argument that she really meant to withdraw her consent, she must not forget the cost of such withdrawal to the insolvency regime and the hardships the CDs and their stakeholders would suffer on account of withdrawal.

**It is inconceivable that an individual 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.**

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### Case Illustration II

Ex-employee of the Financial Creditor proposed as IRP<sup>54</sup>

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### Facts

- The Financial Creditor proposed the appointment of an IP who was its ex-employee having worked there for 39 years and was drawing a pension from the financial creditor, to act as IRP. The corporate debtor objected the application of the Financial Creditor apprehending bias and plausible inability of the IRP to act fairly as an Independent Umpire.

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<sup>54</sup> State Bank of India Vs. M/s. Metenere Ltd. [2020] 114 NCLAT



- The same was admitted by the Hon'ble NCLT and was appealed against by the financial creditor in the Hon'ble NCLAT.

### **Contraventions**

- The proposed IRP had a long relationship with the Financial Creditor, spanning around four decades, and was currently a pensioner drawing pension as a benefit earned for the past services in terms of the relevant Service Rules which he was getting independent of the benevolence of the ex-employer.
- The Financial Creditor restricted its choice to propose Mr. X as IRP having regard to past loyalty and the long services rendered by the latter. This is further reinforced by filing of instant appeal by the 'Financial Creditor' who was upset with the impugned order directing him to substitute the name of Mr. X with another IRP.

### **Submission by Appellant**

- The Financial Creditor submitted that an IRP is not required to act as an 'Independent Umpire' between the 'Financial Creditor' and the ex-management of the 'Corporate Debtor' or decide any conflicting issues between them.
- It is further submitted that the RP has no adjudicatory powers and only acts as a facilitator in the CIRP as all major decisions are taken only with the approval of the Committee of Creditors. It is further submitted that the Financial Creditor also plays part only to the extent of its voting share as a member of Committee of Creditors. Therefore, merely because the proposed IRP happens to be an ex-employee of the Financial Creditor cannot be a ground to allege bias against him.
- Lastly, it contended that the proposed IRP is not on any panel of the Appellant Bank or handling any portfolios and has no role in decision making committee of the Appellant Bank besides being fully competent by all regulations to act as an IRP.

### **Findings and conclusion of the NCLAT**

- The Hon'ble NCLAT dismissed the appeal of the financial creditor for disallowing substitution of the IRP observing the following:

*"In the given set of circumstances, we are of the considered opinion that the apprehension of bias expressed by the 'Corporate Debtor' qua the appointment of Mr. X as proposed 'Interim Resolution Professional' at the instance of the Appellant- 'Financial Creditor' cannot be dismissed offhand and the Adjudicating*

*Authority was perfectly justified in seeking substitution of Mr. X to ensure that the 'Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. X was not disqualified or ineligible to act as an 'Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- 'Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."*

## **RESPONSES TO THREATS**

An IP needs to take reasonable steps to identify possible threats and in particular threats in existence at the time of or immediately preceding the acceptance of an appointment. In reality this means having in place systems to ensure that any threat to the fundamental principles are identified and evaluated properly before accepting the assignment.

Some examples of the safeguards would be having:

- Policies and procedures to implement and monitor conflict of interest in engagements.
- Policies and procedures to prohibit individuals who are not members of the insolvency team from inappropriately influencing the outcome of an insolvency appointment.
- A disciplinary mechanism to promote compliance with policies and procedures.
- Published policies and procedures to encourage and empower individuals within the practice to communicate to senior levels within the practice and/or the IP any issue relating to compliance with the fundamental principles that concerns them.

Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance; therefore, the safeguards used should generally include the use of effective information barriers.

An insolvency practitioner may encounter situations in which no or no reasonable safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level.<sup>55</sup> In such a situation appropriate course would be

- Withdrawing from the insolvency team

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<sup>55</sup> <https://www.icaew.com/-/media/corporate/files/technical/insolvency/regulations-and-standards/insolvency-licensing-regulations-and-guidance/overview-of-the-insolvency-code-of-ethics.ashx>

- Terminating (where possible) the financial or business relationship giving rise to the threat.

## INFORMATION MANAGEMENT

The Code casts this duty on the IP to organise all information relating to the assets, finances and operations of the firm, receives and collates the claims, prepares information memorandum, and provides access to relevant information, so that there is complete symmetry of information among the entitled stakeholders, while maintaining confidentiality.

**The First Schedule detailing the Code of Conduct for IPs on Information Management as follows:**

- 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.
- 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.
- 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.
- 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.
- An insolvency professional must appear, co-operate and be available for inspections and investigations carried by the Board, and also provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.
- An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

### **Regulatory requirements**

The following table depicts the regulatory requirement for an IP in handling wide range of information accessible to the IP throughout the CIRP of a CD by ensuring dissemination of material information to relevant stakeholders, preservation of such information, filing of such information before the Adjudicating Authority, IBBI and the IPA, etc.

Regulation	Requirement
7(2) (g) of IP Regulations	<b>maintain records of all assignments undertaken for at least three years</b> from the completion of such assignment.
39A of the CIRP regulation	IRP/RP <b>shall preserve a physical as well as an electronic copy of the records relating to CIRP of the corporate debtor</b> as per the record retention schedule.
5(2) of Liquidation Regulations <sup>56</sup>	<b>liquidator shall preserve a physical as well as an electronic copy of the reports and minutes</b>
6 of Liquidation Regulations, 2016 <sup>57</sup>	<b>liquidator shall maintain the following registers and books</b> , as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor
41 of Voluntary Liquidation Regulations <sup>58</sup>	<b>liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account</b> for at least eight years after the dissolution of the corporate person, either with himself or with an information utility.
Section 208 (2)(d) of the Code	IP shall submit a <b>copy of the records of every proceeding before the Adjudicating Authority to the Insolvency and Bankruptcy Board of India (IBBI)</b> as well as to the Insolvency Professional Agency of which he is a member
Clause 16 of the Schedule: Model Bye-Laws <sup>59</sup> prescribed under	<b>a professional member shall submit information, including records of ongoing and concluded engagements as an IP</b> , in the manner and format specified by the respective Insolvency Professional Agency at least twice a year.

Hence, the Code read with the regulations casts obligations on an IP to:

- forward all records relating to the conduct of the CIRP and the resolution plan;

<sup>56</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

<sup>57</sup> *Ibid*

<sup>58</sup> Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017

<sup>59</sup> Insolvency and Bankruptcy Board of India (Model Bye-Laws & Governing Board of Insolvency Professional Agencies) Regulations, 2016

- submit a copy of the records of every proceeding before the AA, to the Board.

In order to facilitate submission of records and information by IPs as well as for monitoring of the processes and performance of IPs, IBBI, in consultation with stakeholders and the IPAs, has devised a set of seven Forms.

It has also developed, in consultation with the IPAs, an electronic platform for filing of the Forms. It has reiterated that the Authorization of Assignment shall be issued by the IPAs only to those IPs, who have filed all the Forms that have become due on the date of issue of authorisation.

## **CASE ILLUSTRATIONS**

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### Case Illustration I

#### Delay in submission of documents to IBBI<sup>60</sup>

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#### **Contravention**

- The RP failed to provide the documents to the Board within the stipulated time and instead of providing documents, the RP vide email advised the Board to close the case treating it as too old.

#### **Submission by IP**

- The time taken by RP was not to avoid the response but to prepare a proper and complete response with all documents.
- There was lack of intention to delay the report since the RP was not informed about the inspection and he was acting under the belief that it is a routine collection of information.
- The RP admitted that the language used by RP, in his communication with the Board was inappropriate, however, the RP never had the intention of not supplying the information desired by the Board.

#### **Findings**

- 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.

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<sup>60</sup> IBBI Disciplinary Committee Case No. IBBI/DC/18/2020; Order dt. February 27, 2020

- Thus, acted in violation of the provisions of Regulation 7(2)(h) of IP Regulations and had failed to provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

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#### Case Illustration II

Failure of RP to submit to the Board a copy of the records of every proceeding before the AA<sup>61</sup>

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#### Contravention

- The RP failed to submit copies of the records of proceedings before the AA, with the IBBI.

#### Submission by IP

- There were no proceedings before the AA that were required to be reported to the Board. Only miscellaneous application was filed by him for approval of resolution plan.

#### Findings

- As evident from records, 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 Insolvency Professional Regulation, 2016 read with clauses 12 and 15 of the Code of Conduct appended to the said Regulations and had failed to make efforts to ensure that all communication was made to the Board.

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#### Case Illustration III

Failure to respond to claimants and IBBI<sup>62</sup>

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#### Contravention

- The IRP neither included the claim of one of the claimants in the list of operational creditors nor did he respond to the claimant. Upon such negligence of the IRP, the claimant submitted a complaint to the Board seeking a direction under section 196(g) of the Code.
- The RP 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

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<sup>61</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2020

<sup>62</sup> IBBI Disciplinary Committee Case No. IBBI/Ref-Disc.Comm./02/2018; Order dt. April 13, 2018

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.

- 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.

### **Findings**

- As evident from records, the RP contravened the provisions of section 208(2)(d) of the Code and regulation and had failed to provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

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### Case Illustration IV

#### Sharing of Information Memorandum (IM) before publication of EOI<sup>63</sup>

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### **Contravention**

- The IP shared a copy of IM discretely with one of the prospective resolution applicants vide an email on July 10, 2018 in priority to all other resolution applicants with whom it was shared from September 10, 2018 onwards.

### **Submission by IP**

- IP submitted that NDA was signed with such prospective resolution applicant before sharing the IM with him. The purpose of sharing the IM was to get an understanding of Education sector to attain value maximisation from an industry expert.

### **Findings**

- Regulation 36B of the CIRP Regulations was inserted w.e.f. July 3, 2018 and was made applicable to CIRP commencing on or after July 3, 2018. The CIRP in the present matter commenced on 25.04.2018 i.e. before the above amendment was introduced. In such circumstances, Regulation 36B of the CIRP Regulations shall not be applicable to the facts of the present case.
- However, Form G calling for Invitation of Expression of Interest was issued on July 18, 2018 while the RP had shared the IM with such prospective resolution applicant on July 10, 2018 i.e. before they submitted their Expression of Interest and before the RP conducted due diligence to

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<sup>63</sup> IBBI Disciplinary Committee Case No. IBBI/DC/23/2020; Order dt. April 27, 2020



ensure if they would qualify as eligible prospective resolution applicants. Section 208(2)(a) of the Code and Regulation 7(2)(h) of the IP Regulations was violated.

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#### Case Illustration V

#### Failure to submit records of every proceeding before the AA<sup>64</sup>

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##### **Contravention**

- The IP as an RP of one of the Corporate Debtors had approached the AA for extension of the CIRP period and for approval of resolution plan, however he did not submit copies of these proceedings with IBBI.

##### **Submission by IP**

- The IP submitted that there were no proceedings before the AA that were required to be reported to the Board. Only miscellaneous application was filed by him for approval of resolution plan.

##### **Findings**

- The IP acted in violation of Section 208(d) of the code which states that every IP shall submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the IPA of which he is a member.
- Also, the IP made misleading statements to the Board during investigation knowing very well that he approached the AA for extension of CIRP period but failed to submit such proceedings with the Board.

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#### Case Illustration VI

#### Failure to make disclosure to IPA with respect to appointments of professionals<sup>65</sup>

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##### **Contravention**

- The RP failed to disclose the appointments of professionals including IPE to the IPA within the stipulated timelines as per the IBBI Circular dated January 16, 2018.

##### **Submission by IP**

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<sup>64</sup> IBBI Disciplinary Committee Case No. IBBI/DC/12/2018; Order dt. November 12, 2018

<sup>65</sup> IBBI Disciplinary Committee Case No. IBBI/DC/15/2019-20; Order dt. November 14, 2019

- The RP submitted that as per the IBBI Circular, RP is required to disclose 'relationship' if any with the parties prescribed and since the appointment did not fall under the definition of 'relationship' he was not required to submit any disclosure to IPA.
- It was further submitted that the approval of CoC for appointment of IPE was unanimous and was done along with the appointment of IP.

### **Findings**

- The act of non-disclosure to the IPA about taking services from an LLP of which RP was a partner is in violation of Section 208(2)(a) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations and he made misleading statements to the Board by submitting that such appointment was not in contravention of IBBI Circular.

## REMUNERATION AND COSTS

The Code introduced a market driven mechanism for resolution of corporate persons and the profession of IPs was introduced in order to achieve this objective. The role of an IP is that of an officer of the Court<sup>66</sup> and hence that demands integrity and accountability. Given that, the monetary incentive for managing such insolvency resolution process is the professional fee charged by the IP, i.e. the remuneration.

The Code provided for the following multiple roles for the Insolvency Professionals:

1. As a Resolution Professional<sup>67</sup> during Corporate Insolvency Resolution Process (“CIRP”)
2. As a Liquidator during liquidation process.
3. As a Resolution Professional during Individual Insolvency.
4. As a Bankruptcy Trustee during bankruptcy process.

The sections governing individual insolvency and bankruptcy are not yet notified and hence, the discussion will be limited to the first two roles of the Insolvency Professional.

### **Insolvency Professional as a Resolution Professional**

Before we take a look at the legal provisions governing the remuneration drawn by Resolution Professionals (“RP”), it is important to take note of the following view of the Bankruptcy Law Reforms Committee (BLRC):

*“The Committee is of the view that there should be no constraints on RP fees. In a competitive market for the insolvency professionals, the fees for managing the insolvency resolution process will converge to the fair market value for the size of the entity involved. While the market is evolving, the Code tries to ensure that there is as much transparency about the behaviour and the performance of individual insolvency professionals that the professional, creditors and debtors are incentivised to behave optimally.*

...

*The Committee feels it is prudent to allow the market to develop and competition to drive charges of the RP rather than setting these in the Code, or in regulations.”*

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<sup>66</sup> ARCIL vs. Shivam Water Pvt. Ltd., NCLT (Mumbai Bench) (C.P. No.(IB)1882(MB)/2018)

<sup>67</sup> Wherever the term Resolution Professional (“RP”) is used it is deemed to include a reference to Interim Resolution Professionals

Hence, neither the Code nor the Regulations stipulated any basis for fixing of remuneration for the services of the IPs unlike the UK where the Insolvency (England and Wales) Rules, 2016 stipulate the principles for fixing the basis of remuneration<sup>68</sup>.

Section 5(13) of the Code defines “Insolvency Resolution Process Costs” which include fees payable to any person acting as a Resolution Professional. Regulation 34 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 stipulates that the committee of creditors (“CoC”) shall fix the fee to be paid to resolution professional. There is no mention of any limitations, principles or basis for fixing such fee to resolution professional in these regulations. However, the code of conduct for the IPs state the following with respect to the remuneration drawn by IPs:

- Remuneration shall be charged in a **transparent manner**
- It shall be a **reasonable reflection** of his/her work
- It shall **not be inconsistent** with the applicable regulations
- **Adequate disclosures** shall be made to the Insolvency Professional Agency (IPA) as to the fee payable to him/her, to IPE and to the professionals engaged by him/her.
- **No other fee** shall be charged other than that which is disclosed and approved by the persons fixing his/her remuneration
- The IP shall **disclose** the details of the CIRP costs, liquidation costs and bankruptcy costs and must endeavour that such costs are not unreasonable.

**The fee quoted by the professionals should be reasonable, commensurate with work to be handled**

- NCLT, Hyderabad  
Shri Shrikrishna Rail Engineers Pvt.  
Ltd. vs. Madhucon Projects Ltd.  
(CP(IB) SR No. 4322/9/HDB/2017)

Keeping the above in view, the IBBI issued a Circular No. IBBI/IP/013/2018 dated June 12, 2018 wherein the IPs are directed to ensure that:

- the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;
- the fee or other expenses incurred by him are directly related to and necessary for the CIRP;

<sup>68</sup> [Rule 18.16 of the Insolvency \(England and Wales\) Rules, 2016](#)

- the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;
- written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;
- supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;
- approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and
- all CIRP related fee and other expenses are paid through banking channel.

### **Insolvency Professional as a Liquidator**

Section 34(8) of the Code stipulates that:

*"An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board."*

Regulation 39D of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that while approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the CoC in consultation with the resolution professional shall fix the fee payable to the liquidator, if an order for liquidation is passed under section 33.

In case the remuneration is not fixed by the CoC, then Regulation 4(2) of the IBBI (Liquidation Process) Regulations, 2016 shall apply pursuant to which the liquidator shall be entitled to a fee at the same rate as the RP for the initial period of 90 days where the liquidator endeavours to enter into a scheme of compromise or arrangement. For the balance period of liquidation, the liquidator's fee shall be as a percentage of the amount realised net of other liquidation costs, and of the amount distributed<sup>69</sup>.

The Bankruptcy law Reforms Committee had given the following rationale behind the fee structure of the Liquidator:

*"In fact, it has been found that often the Liquidator has the incentive to prolong the Liquidation process purely as a mechanism to seek rents from the creditors. They*

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<sup>69</sup> Refer table given under Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016 for different percentages prescribed for fee calculation based on time consumed by the liquidator in disposing the assets

*earn rents either by deploying the capital realised, or differentiating payouts to those who can pay for it. The Committee agrees that the Code and the regulations thereunder should incentivise good behaviour by the Liquidator by imposing a structure on fees charged in Liquidation. An ideal structure will be one that incentivises the Liquidator to preserve time value of transactions in Liquidation.*

*The fees that the Liquidator can charge must be a decreasing function of time. Under such a fee structure, the same realisation obtained in the second year will mean a smaller fee for the liquidator than the fee for the realisation in the first year. The precise function can be specified by the Regulator, and can vary from case to case in regulations. However, irrespective of the variations, because fees earned must be lower in a later year than in an earlier year, the Liquidator is motivated to realise value sooner rather than later."*

## **DETERMINANT OF FEE**

An insolvency professional should consider the following factors while determining the quantum of fee to be charged:

- value and nature of the assets dealt with;
- time properly given by the insolvency professional and her staff in attending to the affairs of the debtor;
- the complexity of the case;
- exceptional responsibility falling on the insolvency professional; and
- the effectiveness with which the duties are carried out by the insolvency professional<sup>70</sup>.

## **THREAT FOR NON-COMPLIANCE**

Even though the code of conduct for IPs stipulated for various requirements in terms of drawing of remuneration by the IP, there might be certain circumstances creating threat for non-compliance / breach, as follows<sup>71</sup>:

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<sup>70</sup> IBBI Circular No. IBBI/IP/013/2018 dated June 12, 2018

<sup>71</sup> It is an indicative list of circumstances and not exhaustive. There can be multiple other circumstances which portray threat to the non-compliance or breach of the code of conduct.

- **When IP is associated as an ex-employee, consultant, supplier, customer or in any other capacity to the Financial Creditor (“FC”) / Operational Creditor (“OC”) / Corporate Debtor (“CD”)**

There is a scope of bias by the IP towards the FC, OC or CD as the case may be and in return for such bias, the IP may be offered a handsome remuneration which might not actually reflect the work undertaken by such IP.

- **Where the IP quotes “ZERO” remuneration**

It is a unique case where an IP quotes zero remuneration and the CoC appoints such IP. Zero remuneration is definitely not reasonable nor is commensurate with the work to be handled. Also, it may lead to the RP delegating many of his duties to other firms / service providers with whom the RP can have financial arrangements. This ultimately leads to exploitation of the value of assets of the corporate debtor.

- **Outsourcing of duties to related parties of IP and additional remuneration**

The IP may outsource essential duties to related parties and not disclose the fact that such parties are related. It can lead to a situation where additional remuneration is paid indirectly to the IP which is against the Code of Conduct.

- **Where the IP takes undue advantage of the Creditors**

There can be situations where the corporate debtor is situated in a remote location with less value of assets and not many IPs show interest in such assignment. Taking this as an undue advantage, an IP can quote higher remuneration which is not commensurate with the work to be handled nor a reasonable reflection of the work to be undertaken.

- **IP attempting to increase the fee after securing the appointment as RP**

After being appointed as a RP, the IP may time and again burden the CoC to increase the remuneration and this can be adverse towards the CIRP as that shows disinterest of the said IP in continuing his services with the existing remuneration.

## CASE ILLUSTRATIONS

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### Case Illustration I:

Charging remuneration more than the claim of the applicant<sup>72</sup>

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#### Contravention

- The RP charged an unreasonable professional fee of Rs.50 lakh plus out-of-pocket expenses, with the applicant (operational creditor) who had a claim of Rs.13.76 lakh.

#### Submission by IP

- The RP submitted that the amount of fee charged by him was clear reflection of work that he has to undertake as an IRP and that the charging of Fee is the discretion of the Professional considering the volume of work.

#### Findings

- The IRP acted in violation of the code of conduct by claiming unreasonable CIRP costs and also, the fee claimed by the RP do not reflect the work to be undertaken.
- The registration of the RP as an insolvency professional is suspended for two years and the RP is directed to work for at least six months as an intern with a senior insolvency professional, at any time during the period of suspension, to improve his understanding of the Code and the regulations made thereunder.

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### Case Illustration II:

Authorising the LLP where IRP is a partner to raise invoices for IRP Fee<sup>73</sup>

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#### Contravention

- The IRP authorised an LLP, where the IRP is a partner, to raise invoices for IRP fees and other out of pocket expenses for work undertaken by the IRP.

#### Submission by IP

- The IRP submitted that the fee arrangement he had with the LLP where he is a partner is entered in good faith. As per the terms of the LLP agreement which bind him, he is not permitted to earn fee outside of the LLP.

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<sup>72</sup> IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; Order dt. 17<sup>th</sup> April, 2019

<sup>73</sup> IBBI Disciplinary Committee Case No. IBBI/DC/08/2018; Order dt. 23<sup>rd</sup> August, 2018



- It was further submitted that he is in full compliance of the IBBI Circular dated January 16, 2018 after the issue of the circular till which time there is no clarity as to how and to whom fee shall be paid for his professional services.

### **Findings**

- The IRP has violated item 9 and 25 of the code of conduct since the mode of charging remuneration is inconsistent with the applicable regulations.

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### **Case Illustration III**

Drawing same remuneration as was paid in the capacity of RP in the absence of any approval by CoC with regard to fee payable to liquidator<sup>74</sup>

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### **Contravention**

- During liquidation, the liquidator continued to draw the same remuneration as was paid to him in the capacity of RP.

### **Submission by IP**

- The liquidator submitted that the remuneration as was payable to RP was charged only till units were kept as going concern during liquidation and that all the four units were being run as during CIRP by the full involvement of all the team members, which required hectic movement from unit to unit, taking decisions regarding purchase and sale, recovery of book debts, statutory compliances, legal and NCLT cases, maintenance of machinery, security arrangements, handling of staff/workers etc. Further, no fee has been charged after the units were closed.
- It was also submitted that the fee charged by the RP is far lesser than the amount payable to him as per table given in Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016.

### **Findings**

- The liquidator has acted in contravention of Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016 wherein it is clearly stated that in the event where remuneration of liquidator is not decided by the CoC, the same shall be paid in accordance with the table provided in the said regulation and consequently breached clause 25 of the Code of Conduct by charging remuneration inconsistent with the regulations.

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<sup>74</sup> IBBI Disciplinary Committee Case No. IBBI/DC/22/2020; Order dt. 21st April 2020

- The RP is directed to deposit the amount continued to be drawn during liquidation as was paid to him in the capacity of RP, in the liquidation estate of the corporate debtor with the liberty to draw remuneration as per Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016.

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#### Case Illustration IV:

#### Payment of exorbitant fee to the professionals during the conduct of CIRP<sup>75</sup>

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##### **Contravention**

- The RP appointed various law firms and advocates paying them exorbitant fees when a law firm was already appointed for legal assistance at exorbitant cost.

##### **Submission by IP**

- The RP submitted that all the appointments are justified and that they are made to address certain sensitive issues and hence the high professional fee and the same had the approval of the CoC.

##### **Findings**

- The RP has been able to provide satisfactory justification for the CIRP costs incurred by the corporate debtor for the appointment of various professionals and hence the IP is not liable for payment of exorbitant fee to the professionals during the conduct of CIRP.

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#### Case Illustration V:

#### Appointment of forensic auditor based on the decision of CoC<sup>76</sup>

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##### **Contravention**

- The RP appointed a firm to conduct forensic audit of the corporate debtor which submitted its report. Thereafter, the same firm was again appointed to conduct Forensic Audit with an enhanced scope of five years upon the directions of CoC.
- A large amount has been cumulatively paid for conduct of two forensic audits (i.e. Rs. 17,00,000 + Rs.50,74,000 = Rs. 67,74,000/-) despite the fact that the initial bid made by the firm was Rs.28,50,000 with taxes for a review period of 5 years.

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<sup>75</sup> IBBI Disciplinary Committee Case No. IBBI/DC/23/2020; Order dt. April 27, 2020

<sup>76</sup> IBBI Disciplinary Committee Case No. IBBI/DC/23/2020; Order dt. April 27, 2020

### **Submission by IP**

- The RP submitted that based on the findings of serious and significant nature in the transaction audit conducted by the firm, the CoC sought a larger audit on an enhanced scope of forensic audit to be conducted in relation to the affairs of the corporate debtor and that the RP agreed with the same.
- It was further submitted that taking a principle direction from CoC is not a contravention and it was an act of taking additional approval along with RP's own satisfaction. He added that reporting to the CoC does not amount to abdicating his authority in favour of the CoC.

### **Findings**

- The RP is required to take an independent decision on whether there was a need to get forensic audit of the corporate debtor again rather than abdicating the authority in favour of CoC and allowing them to usurp RP's authority.
- Also, since it is the CoC and not RP who decided to conduct the forensic audit again, the cost of the second audit should not have been made a part of CIRP cost in accordance to IBBI Circular dated June 12, 2018.
- The fee charged for the second forensic audit of Rs. 50,74,000/- shall be excluded from the CIRP costs and the same be borne by the CoC members themselves.
- The RP has contravened the Code of Conduct by allowing appointment of the forensic audit firm on the basis of a decision of the CoC and at unreasonable cost.

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### **Case Illustration VI**

Charging of hefty fee by the RP and appointing related parties without any due diligence<sup>77</sup>

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### **Contravention**

- The RP charged hefty fees for his services as RP / IRP and ensured that his related parties get the works during CIRP without any due diligence.

### **Submission by IP**

- The RP submitted that there is no provision in the Code and Rules and Regulations made thereunder for deciding the professional fee of an IP and where the CoC has approved the fees of a RP, it is not open to the IBBI to pass a value judgement on the same.

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<sup>77</sup> IBBI Disciplinary Committee Case No. IBBI/DC/07/2018; Order dt. August 23, 2018

## Findings

- Absence of law does not entitle an IP to charge any fee he wishes and hence the RP is in contravention of clause 25 of the Code of Conduct for charging such fee which is not a reasonable reflection of the work undertaken by him.

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### Case Illustration VII

Appointment of an entity, which is not an IPE, to provide support services to IRP/RP<sup>78</sup>

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## Contravention

- RP appointed a company to provide support services during the CIRP of three assignments. Such company is not recognised as an IPE with IBBI.

## Submission by IP

- The Code provides for appointment of IPE which can only be a company, partnership firm or LLP and hence, it clearly provides support to the approach adopted in appointing a company to provide support services.
- The appointment of RP and the company was envisaged collectively and was duly approved by the CoC(s) on the collective strength and credentials of the RP and such Company.

## Findings

- Such company cannot be termed as “professional” as per the IBBI Circular No. IBBI/IP/013/2018 dated June 12, 2018, since it does not have any authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession.
- Appointment of such company is in contravention of Section 20(2) of the Code.
- Fee paid to such Company in one of the CIRPs is 19 times of the fee payable to the RP which cannot be said to be reasonable.
- Thus there is contravention of Sections 20 (2) (a), 25 (1), 208 (2) (a) & (e) of the Code, Regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and IBBI Circular dated 12th June 2018.

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<sup>78</sup> IBBI Disciplinary Committee Case No. IBBI/DC/26/2020; June 8, 2020

## PRACTICES IN THE UK

In the UK, Rule 18.16 of the Insolvency (England and Wales) Rules, 2016 prescribe the following principles for determining the basis of remuneration of the office-holder<sup>79</sup> by the Committee of Creditors:

- The complexity (or otherwise) of the case;
- Any respects in which, in connection with the company's or bankrupt's affairs, there falls on the office-holder, any responsibility of an exceptional kind or degree;
- The effectiveness with which the office-holder appears to be carrying out, or to have carried out, the office-holder's duties; and
- the value and nature of the property with which the office-holder has to deal.

Also, the same rule stipulates the following three bases of remuneration or combination thereof, to be fixed for office-holder:


- As a percentage of the value of the property with which the administrator has to deal, or the assets which are realised, distributed or both realised and distributed by the liquidator or trustee; or
- By reference to the time properly given by the office-holder and the office-holder's staff in attending to matters arising in the administration, winding up or bankruptcy; or
- As a set amount

In addition to the above, where the basis of remuneration is not fixed by the Committee of Creditors, then the office-holder has the right to apply to the Court to get it to be fixed and **Part VI of the Practice Direction for Insolvency Proceedings in UK** stipulate the following guiding principles to assist the Court in fixing the basis of remuneration of the office-holder:

- **Justification:** The office-holder shall justify his/her claim for a particular remuneration
- **Benefit of doubt:** In case of any doubt as to the appropriateness, fairness or reasonableness of the remuneration sought or to be fixed, such element of doubt will be resolved by the Court against the office-holder.
- **Professional Integrity:** Giving weight to the fact that the office-holder is a member of a regulated profession and is an officer of the Court.

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<sup>79</sup> Office Holder includes administrator, liquidator and trustee in bankruptcy

- **Value of the service rendered:** Remuneration should reflect the value of the service rendered.
- **Fair and Reasonable:** The amount and basis of the remuneration should represent fair and reasonable remuneration for the work undertaken or to be undertaken.
- **Proportionality of Information:** The office-holder shall provide such information about the assets dealt with or the nature, extent and complexity of the work proportionate to the remuneration sought.
- **Proportionality of Remuneration:** The remuneration sought by the office-holder shall be proportionate to:
  - the nature, extent and complexity of the work
  - the value and nature of assets / liabilities to be dealt with
  - the nature and degree of the responsibility
  - the nature and extent of the risk (if any) assumed
  - the efficiency (in respect of both time and cost) with which the office-holder has completed the work undertaken.
- **Professional Guidance:** The Court may also have regard to the relevant and current statements of practice promulgated by any relevant regulatory and professional bodies in relation to the fixing of the remuneration.
- **Timing of Application:** The Court will take into account whether any application should have been made earlier and if so, the reasons for any delay. 

## GIFTS AND HOSPITALITY

Being an Officer of Court, an IP is expected to portray utmost integrity and is entrusted with the responsibility to effectively manage the corporate debtor as a going concern. The Code further entrusted various responsibilities to the IP which, *inter alia*, includes verification / admission / rejection of claims, holding of CoC meetings, appointment of professionals, taking possession of assets, disposal of assets etc. In exercising these responsibilities, there is a possibility that the IP or his/her relative, may be offered gifts and hospitality. Such an offer ordinarily gives rise to threats to compliance with the other principles of code of conduct like objectivity and integrity.

In this regard, the IBBI stipulated the following in the Code of Conduct with respect to the principle on gifts and hospitality:

- An IP or his relative must not accept gifts or hospitality which undermines or affects his/her independence as an insolvency professional.
- An IP shall not offer gifts or hospitality or 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.

### THREATS FOR NON-COMPLIANCE

The following circumstances may cause threat for non-compliance / breach of code of conduct<sup>80</sup>:


- Accepting the hospitality of financial creditor
- Accepting Diwali gifts from suppliers of the corporate debtor
- Offering gifts to government officials for obtaining their support in concealing certain non-compliances by the corporate debtor during CIRP
- Offering gifts / hospitality to the representatives of prospective resolution applicants inducing them to give false due diligence reports to their superiors.
- Accepting gifts / hospitality from creditors whose claims are subject to verification and admission by the RP / Liquidator, as the case may be.
- Accepting gifts / hospitality from the corporate debtor, apart from the remuneration drawn, can cause serious threat to the independence of the IP.

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<sup>80</sup> It is an indicative list of circumstances and not exhaustive. There can be multiple other circumstances which portray threat to the non-compliance or breach of the code of conduct.

## Practices in UK

The Code of Ethics for Insolvency Practitioners in UK stipulate the following with respect to the acceptance or offering of gifts and hospitality as a threat the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour:

- An Insolvency Practitioner, or a close or immediate family member, may be offered gifts and hospitality. In relation to an insolvency appointment, such an offer will give rise to threats to compliance with the fundamental principles. For example, self-interest threats may arise if a gift is accepted and intimidation threats may arise from the possibility of such offers being made public.
- The significance of such threats will depend on the nature, value and intent behind the offer. In deciding whether to accept any offer of a gift or hospitality the Insolvency Practitioner should have regard to what a reasonable and informed third party having knowledge of all relevant information would consider to be appropriate.
- If an Insolvency Practitioner encounters a situation in which no or no reasonable safeguards can be introduced to reduce a threat arising from offers of gifts or hospitality to an acceptable level, he should conclude that it is not appropriate to accept the offer.
- An Insolvency Practitioner should also not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles. 



# ***GLOBAL BEST PRACTICES (UK LAWS)***

The Code of Ethics in UK sets out the obligations of insolvency practitioners to meet the ethical requirements expected of them. Requirements and application material are to be read and applied with the objective of complying with the fundamental principles and applying the conceptual framework.

## Requirements:

- 1. In order to protect and promote the public interest, an insolvency practitioner shall observe and comply with this Code. If an insolvency practitioner is prohibited from complying with certain parts of this Code by law or regulation, the insolvency practitioner shall comply with all other parts of this Code.**

The Code establishes the fundamental principles of ethics for insolvency practitioners and provides a framework for insolvency practitioners to:

- identify threats to compliance with the fundamental principles;
- evaluate the significance of the threats identified; and
- apply safeguards, where available and capable of being applied, to reduce the threats to a level at which an insolvency practitioner using the reasonable and informed third party test would likely conclude that the insolvency practitioner complies with the fundamental principles.

- 2. An insolvency practitioner shall use professional judgement in applying this framework.**

The Code also describes how the ethical framework applies in certain situations. It provides examples of actions that might be appropriate to address threats to compliance with the fundamental principles. It also describes situations where no action can address the threats, and consequently, the circumstance or relationship creating the threats needs to be avoided.

- 3. Insolvency practitioners shall ensure that the Code is applied at all times in relation to the conduct of an insolvency appointment or circumstances which might lead to an insolvency appointment.**

4. **Insolvency practitioners shall follow the fundamental principles, apply the conceptual framework and specific requirements of the Code in all their professional and business activities whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the insolvency profession.**
5. **Insolvency practitioners shall be guided not merely by the terms but also by the spirit of the Code.**

The Code provides examples of matters to take into account when insolvency practitioners are considering their position, but ethical considerations are not limited to the examples. It is necessary for insolvency practitioners to take into account how their conduct might be perceived by a reasonable and informed third party.

6. **Insolvency appointment will be personal to the insolvency practitioner rather than their firm or employing organisation. Insolvency practitioners shall ensure that work for which they are responsible, which is undertaken by members of the insolvency team on their behalf, is carried out in accordance with the requirements of this Code.**

## FUNDAMENTAL PRINCIPLES

There are five fundamental principles of ethics for insolvency practitioners:

- **Integrity** – to be straightforward and honest in all professional and business relationships.
- **Objectivity** – not to compromise professional or business judgements because of bias, conflict of interest or undue influence of others.
- **Professional Competence and Due Care** – to: i. Attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organization receives competent professional service, based on current technical and professional standards and relevant legislation; and ii. Act diligently and in accordance with applicable technical and professional standards.
- **Confidentiality** – to respect the confidentiality of information acquired as a result of professional and business relationships.
- **Professional Behaviour** – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession.

**An insolvency practitioner shall comply with each of the fundamental principles.**

- The fundamental principles of ethics establish the standard of behaviour expected of an insolvency practitioner. The conceptual framework establishes the approach which an insolvency practitioner is required to apply to assist in complying with those fundamental principles.
- An insolvency practitioner might face a situation in which complying with one fundamental principle conflicts with complying with one or more other fundamental principles. In such a situation, the insolvency practitioner might consider consulting, on an anonymous basis if necessary, with:
  - others within the firm or employing organisation
  - those charged with governance
  - another insolvency practitioner from a different firm
  - a professional body
  - an authorising body
  - legal counsel

However, such consultation does not relieve the insolvency practitioner from the responsibility to exercise professional judgment to resolve the conflict or, if necessary, and unless prohibited by law or regulation, disassociate from the matter creating the conflict.

## INTEGRITY – REQUIREMENTS

- A. An insolvency practitioner shall comply with the principle of integrity, which requires an insolvency practitioner to be straightforward and honest in all professional and business relationships. Integrity implies fair dealing and truthfulness.
- B. An insolvency practitioner shall not knowingly be associated with reports, returns, communications or other information where the insolvency practitioner believes that the information:
- Contains a materially false or misleading statement;
  - Contains statements or information provided recklessly; or
  - Omits or obscures required information where such omission or obscurity would be misleading.
- If an insolvency practitioner provides a modified report in respect of such a report, return, communication or other information, the insolvency practitioner is not in breach of this paragraph.
- C. When an insolvency practitioner becomes aware of having been associated with above described information, the insolvency practitioner shall take steps to be disassociated from that information.

## **OBJECTIVITY – REQUIREMENTS**

- A. An insolvency practitioner shall comply with the principle of objectivity, which requires an insolvency practitioner not to compromise professional or business judgement because of bias, conflict of interest or undue influence of others. Objectivity is the state of mind which has regard to all considerations relevant to the task in hand but no other.
  
- B. An insolvency practitioner shall not undertake a professional activity if a circumstance or relationship unduly influences the insolvency practitioner's professional judgement regarding that activity.

## **PROFESSIONAL COMPETENCE AND DUE CARE - REQUIREMENTS**

- A. An insolvency practitioner shall comply with the principle of professional competence and due care, which requires an insolvency practitioner to:
- Attain and maintain professional knowledge and skill at the level required to ensure that a competent professional service is provided, based on current technical and professional standards and relevant legislation; and
  - Act diligently and in accordance with applicable technical and professional standards.

Professional competence requires the exercise of sound judgement in applying professional knowledge and skill when undertaking professional activities. Maintaining professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development enables an insolvency practitioner to develop and maintain the capabilities to perform competently within the professional environment. Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

- B. In complying with the principle of professional competence and due care, an insolvency practitioner shall take reasonable steps to ensure that those working in a professional capacity under the insolvency practitioner's authority have appropriate training and supervision.
- C. Where appropriate, an insolvency practitioner shall make users of the insolvency practitioner's services or activities or their employing organisation aware of the limitations inherent in the services or activities.

## CONFIDENTIALITY - REQUIREMENTS

- A. The principle of confidentiality is not only to keep information confidential, but also to take all reasonable steps to preserve confidentiality. Whether information is confidential or not will depend on its nature.
- B. An insolvency practitioner in the role as office holder has a professional duty to report openly to those with an interest in the outcome of the insolvency. An insolvency practitioner shall always report on their acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable bearing in mind the expectations of others and what a reasonable and informed third party would consider appropriate.
- C. An insolvency practitioner shall comply with the principle of confidentiality, which requires an insolvency practitioner to respect the confidentiality of information acquired as a result of professional and business relationships. An insolvency practitioner shall:
- Be alert to the possibility of inadvertent disclosure, including in a social environment, and particularly to a close business associate or an immediate or a close family member;
  - Maintain confidentiality of information within the firm or employing organisation;
  - Maintain confidentiality of information disclosed by the employing organisation;
  - Not disclose confidential information acquired as a result of professional and business relationships outside the firm or employing organisation without proper and specific authority, unless there is a legal or professional duty or right to disclose;
  - Not use confidential information acquired as a result of professional and business relationships for the personal advantage of the insolvency practitioner or for the advantage of a third party;
  - Not use or disclose any confidential information, either acquired or received as a result of a professional or business relationship, after that relationship has ended; and
  - Take reasonable steps to ensure that personnel under the insolvency practitioner's control, and individuals from whom advice and assistance are obtained, respect the insolvency practitioner's duty of confidentiality.

There are circumstances where insolvency practitioners are or might be required to disclose confidential information or when such disclosure might be appropriate:

- Disclosure is required by law, for example:
  - producing statutory reports for the creditors of the insolvent;



- submitting reports on the conduct of directors of an insolvent entity;
- production of documents or other provision of evidence in the course of legal proceedings; or
- disclosure to the appropriate public authorities of infringements of the law that come to light;
- Disclosure is permitted by law and is authorised by the employing organisation; and
- There is a professional duty or right to disclose, when not prohibited by law:
  - To comply with the quality review of an authorising body;
  - To respond to an inquiry or investigation by an authorising body or the oversight body;
  - To protect the professional interests of an insolvency practitioner in legal proceedings; or
  - To comply with technical and professional standards, including ethics requirements.

In deciding whether to disclose confidential information, factors to consider, depending on the circumstances, include:

- Whether the interests of any parties, including third parties whose interests might be affected, could be harmed if the client or employing organisation consents to the disclosure of information by the insolvency practitioner.
- Whether all the relevant information is known and substantiated, to the extent practicable. Factors affecting the decision to disclose include:
  - Unsubstantiated facts
  - Incomplete information
  - Unsubstantiated conclusions
- The proposed type of communication, and to whom it is addressed
- Whether the parties to whom the communication is addressed are appropriate recipients.

D. An insolvency practitioner shall continue to comply with the principle of confidentiality even after the end of the relationship between the insolvency practitioner and an employing organisation. When changing employment or accepting an insolvency appointment, the insolvency practitioner is entitled to use prior experience but shall not use or disclose any confidential information acquired or received as a result of a professional or business relationship.

## **PROFESSIONAL BEHAVIOUR - REQUIREMENTS**

An insolvency practitioner shall comply with the principle of professional behaviour, which requires an insolvency practitioner to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession. An insolvency practitioner shall not knowingly engage in any business, occupation or activity that impairs or might impair the integrity, objectivity or good reputation of the insolvency profession, and as a result would be incompatible with the fundamental principles.

Conduct that might discredit the insolvency profession includes conduct that a reasonable and informed third party would be likely to conclude adversely affects the good reputation of the profession. The concept of professional behaviour implies that it is appropriate for insolvency practitioners to conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

## THE CONCEPTUAL FRAMEWORK

The circumstances in which insolvency practitioners operate might create threats to compliance with the fundamental principles. This section sets out requirements and application material, including a conceptual framework, to assist insolvency practitioners in complying with the fundamental principles and meeting their responsibility to act in the public interest. Such requirements and application material accommodate the wide range of facts and circumstances, including the various professional activities, interests and relationships, that create threats to compliance with the fundamental principles. In addition, they deter insolvency practitioners from concluding that a situation is permitted solely because that situation is not specifically prohibited by the Code.

The conceptual framework specifies an approach for an insolvency practitioner to:

- identify threats to compliance with the fundamental principles;
- evaluate the threats identified; and
- address the threats by eliminating or reducing them to an acceptable level.

### General

The insolvency practitioner shall apply the conceptual framework to identify, evaluate and address threats to compliance with the fundamental principles. An insolvency practitioner shall take particular care to identify the existence of threats that exist prior to or at the time of taking an insolvency appointment or which at that stage, it might reasonably be expected could arise during the course of the insolvency appointment.

In taking steps to identify any threats, an insolvency practitioner shall have regard to relationships whereby the firm is held out as being part of a network. When dealing with an ethics issue, the insolvency practitioner shall consider the context in which the issue has arisen or might arise. Where an insolvency practitioner is performing professional activities pursuant to the insolvency practitioner's relationship with the firm, whether as a contractor, employee or owner, the individual shall comply with the provisions of this Code.

When applying the conceptual framework, the insolvency practitioner shall:

- exercise professional judgement;
- remain alert for new information and to changes in facts and circumstances; and
- use the reasonable and informed third party test.

## **Exercise of Professional Judgement**

Professional judgement involves the application of relevant training, professional knowledge, skill and experience commensurate with the facts and circumstances, including the nature and scope of the particular professional activities, and the interests and relationships involved. In relation to undertaking professional activities, the exercise of professional judgement is required when the insolvency practitioner applies the conceptual framework in order to make informed decisions about the courses of actions available, and to determine whether such decisions are appropriate in the circumstances. An understanding of known facts and circumstances is a prerequisite to the proper application of the conceptual framework. Determining the actions necessary to obtain this understanding and coming to a conclusion about whether the fundamental principles have been complied with also require the exercise of professional judgement.

In exercising professional judgement to obtain this understanding, the insolvency practitioner might consider, among other matters, whether:

- There is reason to be concerned that potentially relevant information might be missing from the facts and circumstances known to the insolvency practitioner.
- There is an inconsistency between the known facts and circumstances and the insolvency practitioner's expectations.
- The insolvency practitioner's expertise and experience are sufficient to reach a conclusion.
- There is a need to consult with others with relevant expertise or experience.
- The information provides a reasonable basis on which to reach a conclusion.
- The insolvency practitioner's own preconception or bias might be affecting the insolvency practitioner's exercise of professional judgement.
- There might be other reasonable conclusions that could be reached from the available information.

## **Reasonable and Informed Third Party**

The reasonable and informed third party test is a consideration by the insolvency practitioner about whether the same conclusions would likely be reached by another party. Such consideration is made from the perspective of a reasonable and informed third party, who weighs all the relevant facts and circumstances that the insolvency practitioner knows, or could reasonably be expected to know, at the time the conclusions are made. The reasonable and informed third party does not need to be an

insolvency practitioner, but would possess the relevant knowledge and experience to understand and evaluate the appropriateness of the insolvency practitioner's conclusions in an impartial manner.

## Identifying Threats

The insolvency practitioner shall identify threats to compliance with the fundamental principles. An understanding of the facts and circumstances, including any professional activities, interests and relationships that might compromise compliance with the fundamental principles, is a prerequisite to the insolvency practitioner's identification of threats to such compliance. The existence of certain conditions, policies and procedures established by the profession, legislation, regulation, the firm, or the employing organisation that can enhance the insolvency practitioner acting ethically might also help identify threats to compliance with the fundamental principles.

Below there are examples of such conditions, policies and procedures which are also factors that are relevant in evaluating the level of threats (see also Professional and personal relationships:

- leadership of the firm that stresses the importance of compliance with the fundamental principles;
- policies and procedures to implement and monitor quality control of engagements;
- documented policies regarding the need to identify threats to compliance with the fundamental principles, evaluate the significance of those threats, and apply safeguards to eliminate or reduce the threats to an acceptable level;
- documented internal policies and procedures requiring compliance with the fundamental principles;
- policies and procedures to identify the existence of any threats to compliance with the fundamental principles before deciding whether to accept an insolvency appointment;
- policies and procedures to identify interests or relationships between the firm or individuals within the firm and third parties;
- policies and procedures to prohibit individuals who are not members of the insolvency team from inappropriately influencing the outcome of an insolvency appointment;
- timely communication of a firm's policies and procedures, including any changes to them, to all individuals within the firm, and appropriate training and education on such policies and procedures;
- designating a member of senior management to be responsible for overseeing the adequate functioning of the firm's quality control system;

- a disciplinary mechanism to promote compliance with policies and procedures;
- published policies and procedures to encourage and empower individuals within the firm to communicate to senior levels within the firm any issue relating to compliance with the fundamental principles that concerns them.

Threats to compliance with the fundamental principles might be created by a broad range of facts and circumstances. It is not possible to define every situation that creates threats. In addition, the nature of engagements and work assignments might differ and, consequently, different types of threats might be created.

Threats to compliance with the fundamental principles fall into one or more of the following categories:

- **Self-interest threat** – the threat that an individual within the firm or a close or immediate family member of an individual within the firm will inappropriately influence the insolvency practitioner’s judgement or behaviour with respect to financial or other interests of the firm,;
- **Self-review threat** – the threat that the insolvency practitioner will not appropriately evaluate the results of a previous judgement made or service performed by an individual within the firm, on which the insolvency practitioner will rely when forming a judgement as part of providing a current service;
- **Advocacy threat** – the threat that an individual within the firm will promote a position or opinion to the point that the insolvency practitioner’s objectivity is compromised;
- **Familiarity threat** – the threat that due to a long or close relationship, an individual within the firm will be too sympathetic or antagonistic to the interests of others or too accepting of their work; and
- **Intimidation threat** – the threat that an insolvency practitioner will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the insolvency practitioner.

The following are examples of facts and circumstances within each category of threats that might create threats for an insolvency practitioner:

#### **Examples of circumstances that might create self-interest threats**

- an individual within the firm having an interest in a creditor or potential creditor with a claim which requires subjective adjudication, or having an interest in a party to a transaction;

- an individual within the firm having a close business relationship with a creditor, potential creditor or a party to a transaction;
- the insolvency practitioner discovering a significant error when evaluating the results of a previous service performed by an individual within the firm;
- concern about the possibility of damaging a business relationship;
- concern about future employment.

#### **Examples of circumstances that might create self-review threats**

- accepting an insolvency appointment in respect of an entity where an individual within the firm has recently been employed by or seconded to that entity;
- an insolvency practitioner or the firm having previously carried out professional work of any description, including sequential insolvency appointments, for an entity.

#### **Examples of circumstances that might create advocacy threats**

- acting in an advisory capacity for a creditor of the insolvent entity;
- acting in an advisory capacity to an entity prior to its insolvency;
- acting as an advocate for a client of the firm in litigation or a dispute with the insolvent entity.

#### **Examples of circumstances that might create familiarity threats**

- an individual within the firm or a close or immediate family member having a close relationship with a director, officer, employee or any individual having a financial interest in the insolvent entity;
- an individual within the firm or a close or immediate family member having a close relationship with a potential purchaser of the insolvent entity's assets and/or business or any individual having a financial interest in the potential purchaser. In this regard a close relationship includes both a close professional relationship and a close personal relationship.

#### **Examples of circumstances that might create intimidation threats**

- an individual within the firm being threatened with dismissal or replacement;
- an individual within the firm being threatened with litigation, complaint or adverse publicity;
- an individual within the firm being threatened with violence or other reprisal.

## **Evaluating Threats**

When the insolvency practitioner identifies a threat to compliance with the fundamental principles, the insolvency practitioner shall evaluate whether such a threat is at an acceptable level.

### **Acceptable Level**

An acceptable level is a level at which an insolvency practitioner using the reasonable and informed third party test would likely to conclude that the insolvency practitioner complies with the fundamental principles.

### **Factors Relevant in Evaluating the Level of Threats**

The consideration of qualitative as well as quantitative factors is relevant in the insolvency practitioner's evaluation of threats, as is the combined effect of multiple threats, if applicable.

Examples of certain conditions that are relevant in evaluating the level of threats include:

- corporate governance requirements
- educational, training and experience requirements for the profession
- professional standards
- effective complaint systems which enable the insolvency practitioner and the general public to draw attention to unethical behaviour
- an explicitly stated duty to report breaches of ethics requirements
- professional or regulatory monitoring and disciplinary procedures
- external review by a legally empowered third party of the reports, returns, communications or information produced by the insolvency practitioner.

### **Consideration of New Information or Changes in Facts and Circumstances**

If the insolvency practitioner becomes aware of new information or changes in facts and circumstances that might impact whether a threat has been eliminated or reduced to an acceptable level, the insolvency practitioner shall re-evaluate and address that threat accordingly. Remaining alert throughout an insolvency appointment assists the insolvency practitioner in determining whether new information has emerged or changes in facts and circumstances have occurred that:

- impact the level of a threat; or
- affect the insolvency practitioner's conclusions about whether safeguards applied continue to be appropriate to address identified threats.
- If new information results in the identification of a new threat, the insolvency practitioner is required to evaluate and, as appropriate, address this threat.



## **Addressing Threats**

If the insolvency practitioner determines that the identified threats to compliance with the fundamental principles are not at an acceptable level, the insolvency practitioner shall address the threats by eliminating them or reducing them to an acceptable level. The insolvency practitioner shall do so by:

- eliminating the circumstances, including interests or relationships, that are creating the threats;
- applying safeguards, where available and capable of being applied, to reduce the threats to an acceptable level; or
- declining or ending the insolvency appointment.

## **Actions to Eliminate Threats**

Depending on the facts and circumstances, a threat might be addressed by eliminating the circumstance creating the threat. However, there are some situations in which threats can only be addressed by declining or ending the insolvency appointment or resigning altogether from the firm or the employing organisation. This is because the circumstances that created the threats cannot be eliminated and safeguards are not capable of being applied to reduce the threat to an acceptable level.

## **Safeguards**

Safeguards are actions, individually or in combination, that the insolvency practitioner takes that effectively reduce threats to compliance with the fundamental principles to an acceptable level.

Safeguards vary depending on the facts and circumstances. Examples of actions that in certain circumstances might be safeguards to address threats include:

- Assigning additional time and qualified personnel to required tasks when an insolvency appointment has been accepted might address a self-interest threat.
- Having an appropriate reviewer who was not a member of the team review the work performed or advise as necessary might address a self-review threat.
- Involving another insolvency practitioner to perform or re-perform part of the engagement might address self-interest, self-review, advocacy, familiarity or intimidation threats.
- Disclosing any referral fees or commission arrangements received for recommending services or products might address a self-interest threat.

## **Consideration of Significant Judgements Made and Overall Conclusions Reached**

The insolvency practitioner shall form an overall conclusion about whether the actions that the insolvency practitioner takes, or intends to take, to address the threats created will eliminate those threats or reduce them to an acceptable level. In forming the overall conclusion, the insolvency practitioner shall:

- review any significant judgements made or conclusions reached; and
- use the reasonable and informed third party test.

## **Breaches of the Code**

An insolvency practitioner who identifies a breach of any other provision of the Code shall evaluate the significance of the breach and its impact on the insolvency practitioner's ability to comply with the fundamental principles. The insolvency practitioner shall also:

- take whatever actions might be available, as soon as possible, to address the consequences of the breach satisfactorily; and
- determine whether to report the breach to the relevant parties.

Relevant parties to whom such a breach might be reported include those who might have been affected by it, or an authorising body.

## **Record Keeping**

It will always be for the insolvency practitioner to justify their actions. An insolvency practitioner will be expected to be able to demonstrate the steps that they took and the conclusions that they reached in identifying, evaluating and responding to any threats, both leading up to and during an insolvency appointment, by reference to written contemporaneous records.

The insolvency practitioner shall document:

- the facts
- any communications with, and parties with whom the matters were discussed
- the courses of action considered, the judgements made and the decisions that were taken
- the safeguards applied to address the threats when applicable
- how the matter was addressed
- where relevant, why it was appropriate to accept or continue the insolvency appointment

The records an insolvency practitioner maintains, in relation to the steps that they took and the conclusions that they reached, are expected to be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of their actions.

### **Ethical Conflict Resolution**

An insolvency practitioner might be required to resolve a conflict in complying with the fundamental principles. When initiating either a formal or informal conflict resolution process, the following factors, either individually or together with other factors, might be relevant to the resolution process:

- relevant facts
- ethical issues involved
- fundamental principles related to the matter in question
- established internal procedures
- alternative courses of action.

Having considered the relevant factors, it is necessary for an insolvency practitioner to determine the appropriate course of action, weighing the consequences of each possible course of action. If the matter remains unresolved, the insolvency practitioner might wish to consult with other appropriate persons within the firm for help in obtaining resolution. Where a matter involves a conflict with, or within, an entity, an insolvency practitioner will need to decide whether to consult with those charged with governance of the entity, such as the board of directors or senior management team. The insolvency practitioner shall document the substance of the issue, the details of any discussions held, and the decisions made concerning that issue.

The insolvency practitioner is expected to be seen to act in such a way that threats to the fundamental principles are adequately addressed. Therefore, it is important that the insolvency practitioner considers disclosure, for example, to the court or to the creditors and other interested parties of the existence of any threat, together with the safeguards identified and applied.

If a significant conflict cannot be resolved, an insolvency practitioner might consider obtaining advice from their authorising body or from legal advisors. The insolvency practitioner generally can obtain guidance on ethical issues without breaching the fundamental principle of confidentiality if the matter is discussed with their authorising body on an anonymous basis or with a legal advisor under the protection of legal privilege.

If, after exhausting all relevant possibilities, the ethical conflict remains unresolved, an insolvency practitioner shall, where possible, refuse to remain associated with the matter creating the conflict. The insolvency practitioner shall determine whether, in the circumstances, it is appropriate to withdraw from the insolvency appointment, or to resign altogether from the firm or the employing organisation.

## ABBREVIATIONS

AA	Adjudicating Authority
Board / IBBI	Insolvency and Bankruptcy Board of India
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
CIRP Regulations	IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code
DRT	Debt Recovery Tribunal
EoI	Expression of Interest
FC	Financial Creditor
IP	Insolvency Professional
IPE	Insolvency Professional Entities (IPEs)
IP Regulations	IBBI (Insolvency Professionals) Regulations, 2016
IPA	Insolvency Professional Agency
IRP	Interim Resolution Professional
IU	Information Utilities
OC	Operational Creditor
RA	Resolution Applicant
RP	Resolution Professional

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Code of Ethics for Insolvency Practitioners, UK

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Ethics Handbook - UK – May 2020

Insolvency (England and Wales) Rules, 2016 (UK)

Practice Direction for Insolvency Proceedings in UK

Orders of the Disciplinary Committee of the IBBI (***updated till June 2020***)

Supreme Court Orders:

- Chitra Sharma and Ors. Vs. Union of India and Ors. (WP (Civil) No. 744 of 2017)
- Vijay Kumar Jain v. Standard Chartered Bank and Others (Civil Appeal No. 8430 of 2018)
- M/s. Surendra Trading Company Vs. M/s Juggilal Kamalapat Jute Mills Company Ltd. & Ors. (Civil Appeal No. 8400 of 2017)

NCLT Orders:

- Central Bank of India and the State Bank of India v. M/S. Ashok Magnetics Ltd. (CP/551(IB)/CB/2017)
- Punjab National Bank v. Divyajyoti Sponge Iron Pvt Ltd. (CA (IB) No. 570/KB/2017 in C.P (IB) No. 363/KB/17)
- Shri Shrikrishna Rail Engineers Private Limited vs. Madhucon Projects Limited (CP(IB) SR No. 4322/9/HDB/2017)
- ARCIL vs. Shivam Water Pvt. Ltd., NCLT (Mumbai Bench) (C.P. No.(IB)1882(MB)/2018)

***ANNEXURE  
(CODE OF CONDUCT)***

## **ANNEXURE (Code of Conduct)**

### **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.

### **Information management.**

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 endeavor 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.