Inspection of Service Providers - An Insight

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"The eye can't see itself, except by reflection in other surfaces."

Act I Scene II, Julius Caesar

1. The Need For Inspection

1.1 The purpose of inspection is to have an independent perspective of the activities undertaken by a service provider[1]. While the Code provides for inspection of all service providers, in this article, inspection is referred to only in the context of an insolvency professional (IP[2]) in a CIRP[3].

1.2 The BLRC Report[4] while describing the principles behind the design of the Code states that "The (Insolvency) professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process". The IP is the de facto CEO and also has the responsibility of insolvency resolution of the corporate debtor (CD).[5] Inspection ensures that his conduct is subject to scrutiny. Secondly, the Code[6] was uncharted territory for some time, and inspection provided some feedback to the IP about his compliance with the provisions of the Code and the related regulations. For example, in one of the inspections conducted by the author, the IP, appreciated the observations in the inspection report and stated that, he would been happy if the inspection had happened even earlier, as he could have then applied the learnings to his earlier assignments. It is over time that jurisprudence has developed and interpretation of various provisions of the Code/regulations have been provided through decisions of the Adjudicating Authority and the Hon'ble Supreme Court. This aspect has always been taken into account while conducting inspection and when disciplinary action is contemplated or taken against an IP based on the findings in an inspection report.

1.3 The article below is based on the author's personal experience in inspection of IPs under the Code, including the first ever inspection, which was conducted of an IP under the Code.

2. Legal Provisions

2.1 The Provisions related to Inspection in the Code [7]

(*i*) Where the Board, on receipt of a complaint or has reasonable grounds to believe that a service provider has contravened any of the provisions of the Code or the rules or regulations made or directions issued by the Board thereunder, it may, at any time by an order in writing, direct any person or persons to act as an investigating authority to conduct an inspection or investigation of the insolvency professional agency or insolvency professional or an information utility.

(*ii*) The Code provides that inspection or investigation shall be conducted within such time and in such manner as may be specified by the Inspection Regulations[8].

2.2 Inspection by the Board.

The Inspection Regulations provide that the Board shall conduct inspection of such number of service providers every year, as may be decided by the Board from time to time. The Board may also conduct inspection of a service provider under the provisions of the Code. The Board may, by an order, direct an Inspecting Authority[9] (IA) to conduct an inspection of records of a service provider for the purposes which are specified in the order.

2.3 Purpose of Inspection

The purposes of inspection include[10]**:**

(*i*) to ensure that the records are being maintained by a service provider in the manner required under the relevant regulations;

(*ii*) to ascertain whether adequate internal control systems, procedures and safeguards have been established and are being followed by a service provider;

(*iii*) to fulfil its obligations under the relevant regulations;

(*iv*) to ascertain whether any circumstance exists which would render a service provider unfit or ineligible

(*v*) to ascertain whether the provisions of the Code, or the rules, regulations and guidelines made thereunder and the directions issued by the Board, if any, are being complied with;

(*vi*) to inquire into the complaints received from clients or any other person on any matter having a bearing on the activities of a service provider; and

(*vii*) such other purpose as may be deemed fit by the Board in furtherance of the objectives of the Code.

3 Types Of Inspection

3.1 Routine Inspection

This type of inspection is routine in nature and carried out as a sample on the basis of an Annual Inspection Plan, by shortlisting sample of IPs as per the Inspection Policy of the Board.

Routine inspections are planned in advance. They usually cover all processes handled by an IP during the relevant period.

3.2 Event-based Inspection

This is as per the provisions of section 218 of the Code. An event-based inspection may cover a specific process, or a specific part of a process, or any combination depending on the facts of the case. The Board may decide to conduct an inspection of an IP in the following circumstances:

(*a*) It has reasonable grounds to believe, based on the analysis of a complaint received under section 217 of the Code or otherwise, that the insolvency professional has contravened any of the provisions of the Code or the rules or regulations made, or directions issued by the Board;

(*b*) On receipt of any order of court or tribunal that directs inspection or makes adverse observations / remarks against the insolvency professional;

(*c*) Such other event as may be deemed fit by the Board.

3.4 Service of Notice

As provided in the Inspection Regulations, IA serves a notice of ten days on the IP before the commencement of inspection. However, in the case of event-based inspection, the IA may dispense with the notice of inspection if it is satisfied that the notice will cause undue delay in inspection or there is an apprehension that the records of the IP may be destroyed, mutilated, altered, falsified or secreted. The IA shall record the reasons for the dispensation in writing. Further, the IA may require the IP to submit such documents, records, statements etc within such time as required by the IA.

4. Procdeure for Carrying out Inspection

4.1 Notice of Inspection

On receipt of an order for inspection, the IA serves a notice of inspection to the IP at least ten days before the commencement of inspection, the notice can however be dispensed with, in exceptional circumstances, which are recorded therein.

The IA provides the following to the IP along with the notice of inspection:

(*i*) A control sheet in which the IP is required to give the details of assignments undertaken by him. The details of assignments could include corporate insolvency, liquidation, voluntary liquidation and fast track insolvency.

(*ii*) A check list comprising of the areas which the IA would examine during the course of inspection. This is to ensure that the IP can be prepared and organise his documents/information accordingly.

(*iii*) A comprehensive list of all documents to be submitted by the IP for the purposes of inspection, the intent of the IA is to give all the requirements at one instance, subsequent queries, if any to the IP would be, to the extent possible, based on the documents already submitted.

The scope of the inspection is specified in the notice.

4.2 Time provided to submitted documents

The IA provides a reasonable time period to the IP to provide the documents required for inspection. As inspection is a time bound exercise, the time provided by the IA would depend on the complexities of the case and the volume of documents. A flexible approach is adopted by the IA in this regard keeping in view the overall time available to the IA to submit the draft inspection report. However, if the inspection is under section 218 of the Code, the IA may require the IP to adhere to time lines as may be required to complete the inspection.

4.3 Feedback of IP on Observation of IA

The IA prepares a summary of findings based on the information provided by the IP, during the site visit, these findings are discussed with the IP and, if still necessary, these form part of the draft Inspection report submitted to the IP. The IA, wherever feasible, would incorporate the circumstances in which the IP took the necessary action and also gives the IP's perspective in the draft inspection report. The IP therefore has the opportunity to give his opinion on the observations of the IA at least at three stages. Firstly, during discussions with the IA and before submission of the draft inspection report. Secondly, when the IA sends him a copy of the draft inspection report, and he is required to give his comments within fifteen days. Finally, after submission of Inspection Report (Final) to the Board and, if the Board decides to take further action based on the inspection report, it will seek a response from the IP. Even subsequently, and if action is warranted based on the findings in the inspection report, the Disciplinary Committee (DC)[11] provides an opportunity of personal hearing to the IP and submit other relevant information, before issuance of an order. The IP is however encouraged to provide all the information at the first stage itself, unless some developments take place at a later stage.

4.4 'Faceless' Inspection

The inspection usually envisages scrutiny of relevant documents, accordingly, it has recently been decided to dispense with the onsite inspection unless it's absolutely necessary. Henceforth, inspection would be a 'faceless' exercise based on examination of documents and other information submitted by the IP. This would ensure optimal utilisation of time and costs especially when an onsite inspection requires the IA to travel to an outstation location. Further there would be no scope for personal biases and egos to come in the way of an objective assessment during the inspection of the IP.

5. Obligations of the IA

5.1 Confidentiality and least burden:

(*i*) The information regarding inspection of an IP could easily be misinterpreted by stakeholders as a reflection on the competence or integrity of the IP. However, even in trigger based inspection, due procedure has to be followed in taking action against the IP based on the findings of the inspection and not all inspections lead to a disciplinary action against the IP. The IP also submits many documents to the IA which are sensitive in nature and could be put to wrong use if it comes in the possession of any third person. It is therefore important to keep the entire process confidential.

(*ii*) Inspection involves submission of multiple documents to the IA and is an addition to the routine work of the IP. Every effort is therefore made by the IA to cause the least disruption to the business of the IP under inspection. Further, to the extent feasible, inspection is scheduled as per the convenience of the IP and keeping in view his commitments especially visa-vis the Adjudicating Authority.

5.2 Professionalism: The relationship between IA and the IP should be that of mutual respect. The IA is the representative of the Board and an IP is an officer of the Court and takes important business and financial decisions that may have critical ramifications for the company and all its stakeholders. Hence the IA should be professional and business like, civil but firm in his dealings with the IP.

5.3 Cordial Relations: It is important that cooperation be obtained from the IP and his staff, and cordial working relations are established. This can best be accomplished by using diplomacy, tact and persuasion.

5.4 Transparency and fairness: The IA shall strive to conduct inspections in a fair, unbiased, impartial and transparent manner. The endeavour would be to have a dialogue with the IP to convey concerns, if any and understand the IP's point of view.

5.5 Knowledge: The IA is not expected to have a reservoir of extraordinary knowledge and skills. He brings an independent perspective, the experience of other inspections conducted and uses established jurisprudence and orders of the Disciplinary Committee of IBBI in similar situations, to frame his observations.

5.6 Follow procedures: Inspection constitutes the exercise of authority to step into private businesses and the IA shall therefore strive to ensure compliance with laid down procedures when conducting inspections and conduct verification in an efficient and effective manner.

5.7 Not to seek unnecessary information: The IA shall only seek information which is absolutely necessary for the purpose of inspection.

5.8 Original Documents: In general original documents shall be examined and returned to the IP. In exceptional circumstances if these need to be taken, an acknowledgement is provided by the IA.

6. Obligations of the IP

As provided in the Inspection Regulations, it is the duty of the IP is to produce before the IA such records in his custody or control and furnish to the IA such statements and information relating to its activities within such time as the IA may require.

It shall also be the duty of the IP and an associated person to give to the IA, all assistance which the IA may reasonably require in connection with the inspection.

7 Some of the Findings During the Inspection Conducted by the Board

7.1 Providing Information sought for by the Board/IA

As per the Code of Conduct[12], IP is duty bound to provide all information and records as may be required by the Board. As per the IBBI order dated 27th February, 2020[13], the Board sought clarifications from an IP along with necessary documents, which was provided. The Board thereafter sought certain additional documents but the IP failed to provide the documents to the Board within the stipulated time. A reminder was also sent to the IP, however, instead of providing documents, the IP advised the Board to close the case treating it as too old. The IA also sought certain documents from the same IP for inspection which was provided with delay. The IA requested the IP to submit certain documents, to which the IP replied that they were not available. The IP failed to explain why these documents were not available.

Similarly, in IBBI order dated 17th April, 2019[14], the DC observes that

> "2.3.1.1 The Inspecting Authority sought a copy of the term sheet in respect of YYY, Mr. XXX did not provide the same. Therefore, the Board held the view that Mr. XXX did not co-operate with the inspection.
>
> 2.3.1.2 Mr. XXX has admitted that he failed to submit it. He has now enclosed a copy of the term sheet.
>
> 2.3.1.3 The DC finds as under: (a) Admittedly, Mr. XXX failed to provide material called upon by the Inspecting Authority. This amounts to non-cooperation with the Authority and hindrance to the work of the Board."

7.2 Seeking postponement of Inspection

In an inspection conducted by the Board[15], the IP sought postponement of the inspection four times and this was agreed to by the IA. Finally, the IA informed the IP that further extension in date for the conduct of inspection will not be granted. In general, the IA will schedule the inspection keeping in view the commitment of the IP especially visa-vis the Adjudicating Authority or before any other judicial authority or if the insolvency resolution process is nearing completion or any similar circumstances. However, if it's an inspection under section 218 of the

Code, the IA takes a decision based on the circumstances of the case. As inspection is a time bound exercise, the IP should facilitate its completion at the earliest, unless force majeure prevails.

7.3 Comments on Draft Inspection Report

The Regulations provide that the IA shall send a copy of the draft inspection report to the service provider requiring comments of the service provider within fifteen days from the receipt of the draft inspection report. This is an opportunity for the IP to provide his opinion on the observations of the IA and should be made use off. The IA often receive requests for extension of time, unfortunately there is no such provision in the regulations. The IP should make use of the opportunity to give his view on all the observations of the IA and if the IA accepts all or some, these do not find a place in the Inspection Report (final) prepared by the IA and submitted to the Board.

7.4 Dealing with Complaints

The nature of job of the IP is such that, in many circumstances, complaints are unavoidable. During a recent visit to the UK, the author had discussions with RPBs (equivalent of IPAs), wherein the RPBs echoed a similar view and said that most complaints tend to be without substance. While it's not possible to satisfy every complainant, it is important to respond to him/her.

The IP must maintain a dossier of all complaints received and keep a record of the attempts which were made by him to resolve them. This is not just for the purposes of inspection but also to ensure that there is no escalation of such complaints to the Board/IPA. The complaints which are received from the Board or the IPA, must be investigated and a response provided within reasonable time. The usual trigger for the Board to order an inspection under section 218 of the Code is the analysis of the information provided in a complaint or based on any information that there is a contravention of the Code/Regulations.

7.5 Verification of Claims

Most of the complaints received from stakeholders are in respect of claims not being accepted. Accordingly, the IP must display the status of claims on the website of the CD along with other requirements, in the manner provided in the[16] regulations. In many cases the CD may not have a website, in such cases and especially if there a large number of creditors, it may be advisable to have a website for this purpose. This would go a long way in allaying the apprehensions of creditors and reduce the number of complaints.

The IP must follow a transparent manner of verification of claims. Claims should be verified wherever possible from the books of accounts, however where the books of accounts are not available, as is often the case, the IP has to rely on documents submitted by the creditor. In one case, a creditor submitted as proof of claim, copy of books of accounts of the CD, which gives rise to the question as to how the creditor had such access to such a document. Similarly in another case, the IP had completely outsourced claim verification to an IPE to the extent that the minutes recorded the fact that "claims were verified by XYZ IPE".

Similarly, the IP should follow due diligence and avoid undue haste in admitting a claim, and reconstituting the COC, especially in case of large claims which may have an impact on voting share in the COC .

In NCLAT New Delhi Company Appeal (AT) (Insolvency) No. 633 of 2018, the order states

From the discussions as made above, while we hold that there is a dispute as to whether AAA comes within the meaning of 'Financial Creditor' or not, we hold that after constitution of the 'Committee of Creditors', without its permission, the 'Resolution Professional' was not competent to entertain more applications after three months to include one or other person as 'Financial Creditor'. Further, once a decision was taken by the 'Committee of Creditors' to call for a meeting for removal of Mr. AAA as an 'Resolution Professional', it was improper for him to include AAA as 'Financial Creditor' of the Member of the 'Committee of Creditors'.

7.6 Manner of dealing with preferential transactions.

The BLRC Report[17] while describing the insolvency resolution process states that

> "The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges."

The Code provides for the IP to identify transactions which are preferential, undervalued, extortionate and fraudulent and make an application to the Adjudicating Authority for reversal of these transactions. During the inspection of IPs, the approach of some of the IPs was found lacking in many cases. The most common deficiency was not identifying or not taking steps to identify such transactions within reasonable time, as a result, in a few cases, the COC has given directions to the IP to take suitable action in respect of such transactions.

In IBBI order dated 23rd August, 2018[18], the DC observed as under

> "An IP is duty bound under Section 20 of the Code to protect and preserve the value of the assets of the Corporate debtor. He is also duty bound under section 25(2) (j) read with section 43, 45, 50 and 66 of the Code to identify and recover the assets lost in irregular transactions. These are inherent powers of the RP and the Code does not envisage any role of the COC in irregular transactions."

Prior to Third Amendment to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016(CIRP Regulations), no time was prescribed for filing an application before Adjudicating Authority for seeking appropriate relief. The provision on model timeline for CIRP prescribing a period of 135 days for filing such an application has been inserted vide Third Amendment w.e.f. 3rd July 2018 which shall apply to CIRP commencing on or after 3rd July 2018. With the insertion of these provisions, the IP has to form an opinion on preferential and other transactions within seventy five days and file applications to Adjudicating Authority for appropriate relief within 135 days of commencement of CIRP. Accordingly, for CIRPs after 3rd July, 2018, these timelines would be considered for ascertaining compliance with the CIRP Regulations.

Another related issue is related to the appointment of forensic auditor. In IBBI order dated 23rd August 2018 the DC has stated that

> "A forensic audit is conducted to detect and gather evidence of frauds, misappropriation, embezzlement or such other white collar crime and to recover the assets through irregular transactions. It is therefore necessary that a person appointed to conduct forensic audit has no conflict of interests whatsoever. It is not in the fitness of things that the RP engages a forensic auditor who has already been engaged by one of the stakeholders in the same matter. Such a an auditor may not be fair to all stakeholders, the submission that MR XXX appointed the auditor who was already engaged by a financial creditor to save time and cost is not tenable as this can be at the very cost of vitiating the very purpose for which a forensic audit conduct is conducted."

The Code casts a duty on the IP to preserve and protect the assets of the CD and appoint professionals who do not have a conflict of interest. Further the role of the COC is limited to fix the expenses to be incurred or by the resolution professional. The role of the COC and the IP are clearly demarcated by the Code. The IP must not compromise his independence in favour of the COC by taking services of a professional, at the behest of the COC or who has already provided services to a member of the COC in the same matter.

7.7 Treatment of claims

As per IBBI order dated 14th November, 2011[19], the minutes of the COC recorded the opinion of lenders legal counsel that if the legal costs of the lenders are not included in insolvency resolution process cost and paid, the lenders would file additional claims against the company to the extent of such cost. The IP did not provide a clarification that all claims are as on the insolvency claim date as provided in Form C for submission of claim by Financial Creditors.

Similarly, in another case, payments to one financial creditor continued even after commencement of insolvency proceedings and the financial creditor (FC) was permitted to revise its claim to the extent of such payments. Section 14 prohibits transfer of the assets of the CD during the

CIRP. However, the IP made the payments of EMIs out of the cash flow of CD to one of the FCs during CIRP period with the approval of the CoC. This is in violation of section 14 of the code and IP should have brought this to the notice of the CoC.

In a similar case, the FC accepted payments from the directors of the CD and filed revised claims with the IP which was accepted. In the meantime, the IM was prepared with the original claim and prospective resolution applicants filed their resolution plan in accordance with the IM. The resolution plan thus proposed payment to FC which was more than its claim amount whereas significant haircuts were proposed for operational creditors and workmen.

7.8 Control and custody over assets

The duties of the interim resolution professional are provided in section of the Code. It provides, inter alia that, the IRP shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor.

In IBBI order[20] dated 23rd August 2018 the DC states that

> "Mr XXX handed over custody of the assets of the CD to the members of the suspended board of directors ignoring his statutory duties."

The DC further states that

> "It is the duty of the IRP/RP under the code to take custody of all assets of the CD and preserve and protect their value. It is also the duty of the IRP/RP to exercise the powers of the board of directors. The Hon'ble Supreme Court in the matter of Innoventive Industries Ltd vs ICICI Bank and Amr(2017) SCC 407 observed "According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors are no longer in management." Mr XXX did exactly what the law prohibits, allowed the suspended board of directors to regain control over the CD."

In a few cases the IP have given their opinion that Section 18(f)[21] places an inherent obligation on the Resolution Professional conferred by the Code. The same has to be adhered to by the resolution professional all times during his appointment as a resolution professional and the same is not recorded in the meeting of the CoC.

In general, the IA would treat the following as compliance with the above provisions of the Code:

a. The IP provides the details of all the locations at which the assets of the CD are located.
b. The IP confirms that security is adequate at all the places where the assets of the CD are located, if the existing security arrangement is seen to be inadequate, he may engage security agency as per the provisions of the Code.
c. Finally, he ensures and confirms that the management of the CD

is reporting to him and accountable for their actions and suspended Board of Directors have no role in the activities of the CD.

d. All the above are recorded in the minutes of the COC or in any other manner evidencing that the same has been done.

7.9 Fees and other issues in relation to appointment of IRP/RP/Professionals.

The Board has not specified an indicative table of fees linked to any parameter, which would determine the fees payable to IP for a corporate insolvency resolution process. However, the Board has, through the IBBI (Insolvency Professionals) Regulations, 2016 [IP Regulations][22], circulars[23] and orders, provided guidance in the matter of fixation of remuneration of IP and other professionals appointed by him. It broadly provides that the fees and costs charged by an IP must be transparent and a reasonable reflection of the work necessarily and properly undertaken.

The experience of the IA is that in a few cases, the fees are disproportionate in relation to work involved and hence cannot be described as reasonable as provided in the regulations. The usual defence taken in such cases is that no fees are prescribed in the Code/Regulations. However, this cannot be accepted as an IP is a professional and has to apply the test of, 'remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken', as provided in the IP Regulations.

In the IBBI order[24] dated 3rd May, the DC states that

> "Ms. XXX has very emphatically claimed that the legislature has not limited the fee payable to an IRP / RP. It is difficult to appreciate that any amount of fee can be charged by a professional just because the law does not limit it. The law [Clause 25 of the Code of Conduct for Insolvency Professionals under the First Schedule to the IBBI (Insolvency Professionals) Regulations, 2016] clearly specifies 'remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken' by an IP.
>
> It is neither feasible nor desirable to define what is 'reasonable'. At least an IP, who exercises the powers of the Board of Directors, cannot feign inability that she does not understand what is 'reasonable' in the circumstances."

Similarly in the matter of ICICI Bank vs Geetanjali Gems Limited the Adjudicating authority has stated vide its order[25]

> "In my Prima facie opinion, it appears that the claimed amount as Corporate Insolvency Resolution Process cost of ₹3,57,47,494/- is an exorbitant claim considering the totality of the circumstances. This view is in conformity with two orders passed by IBBI, New Delhi bearing Ref. No.: IBBI/DC/15/2019 and IBBI/DC/16/2019 dated 21.02.2019 and 17.04.2019 respectively, wherein on the ground of unrealistic and exorbitant fees / expenses demanded by the RP their

> licenses were suspended to act as RP. Since a regulatory authority is keeping an eye and watching the conduct of Resolution Professionals, therefore, it is expected that before making such type of submission due care and professional ethics ought to be observed".

Another usually taken by an IP, when the fees are perceived to be high by the IA is that the fees have been approved by the COC. In the IBBI order[26] dated 14th November, 2019 the DC has stated that

> "It is important to note that the CoC or its members do not own the assets of the company rather they hold the assets as trustees for the benefit of all stakeholders. The gain or pain emanating from the resolution, therefore, need to be shared by the stakeholders within a framework of fairness and equity."

Similarly In the matter of *Punjab National Bank* v. *Divya Jyoti Sponge Iron Private Limited* [CP(IB) No. 363/KB/2017], Adjudicating authority stated that

> "22. However, before parting with, it is time to take judicial notice of fixation of exaggerated insolvency resolution cost inclusive of fixation of fees of resolution professional in a lump sum manner by the CoC applying its mind in regards the fate of corporate debtor, the volume, nature and complexity of CIRP. In many cases I have taken note of fixation of cost and fees without looking into the volume nature and complexity of the CIRP of a dying corporate debtor"

Accordingly, approval of COC does not justify the fees, which do not pass the test of being reasonable, as provided in the IP Regulations. The CoC has a statutory role. It discharges a public function. It must, therefore, apply the highest standards of duty of care. It must not only follow the due process, but also be fair towards all stakeholders and transparent in discharge of its responsibilities for maximising the value of the assets of the company.

The other issue is the appointment of related parties as professionals by the IP in a manner which compromises his independence and is also a violation of various provisions of the Code of Conduct[27] for insolvency professional.

In the DC order dated 17th April, 2019 the DC states that

> "In terms of section 17 of the Code, the management of the affairs of the CD vests in the IRP and the powers of the Board of Directors of the CD is exercised by the IRP. For all practical purposes, the IRP is the alter ego of the CD undergoing CIRP. Every decision of the CD and in respect of the CD is taken by the IRP. Mr. XXX, on behalf of the CD, dealt with Ms. XXX, his spouse. It requires no rocket science to figure out why Mr. XXX assigned CIRPs of 15 CDs to one IP, namely, Ms. XXX, when 2000+ IPs were competing for an assignment in the market. It is not a coincidence that 15 assignments from one source landed on the table of Ms. XXX, when she did not have a single assignment otherwise. 15 assignments at one go from one source for an IP having absolutely zero experience establishes

> that the considerations were something other than merits and there was a deep-rooted conspiracy to bleed the ailing CDs for the benefit of XXX family. If the conspiracy had materialised, the family would have acted as IRP / RP of CIRPs of 15 CDs. Further, as IRP / RP of these 15 CDs, they would initiate CIRP of their debtors and appoint themselves as IRP / RP of those debtor and so on. When relationship triumphs over merits in professional matters, there is no place for independence, integrity and impartiality."

The amendment to the Code of Conduct[28] now provides that 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.

8. Positive Experiences Emerging out of Inspection

8.1 There have been instances of IPs proposing or charging exorbitant amount of fees, which has prompted the Adjudicating Authority to take notice. IBBI had also initiated disciplinary action against an IP on account of such transgression. The IA was however pleasantly surprised to notice during the course of an inspection the extraordinary lengths to which an IP went to reduce the insolvency resolution process costs. He claimed hotel fees of only Rs 500 in one case. On further examination, it came to light that in order to reduce costs, the IP travelled by an overnight train to his destination, used the hotel facilities @ Rs 500 for just having a bath and change of clothes before proceeding to his destination for the proposed meeting. Further, the IP incurred a cost of only Rs 10000 for issuance of public announcement in two newspapers. While this was not found acceptable as it did not comply with the regulatory requirement of publication of the public announcement in newspapers with wide circulation, the intent of the IP to minimise costs was noted.

8.2 The author, as the IA tried to take a feedback from the IP on every observation even before submitting the draft report. It has been observed that IPs have been forthcoming in explaining the circumstances of the case along with providing supporting documents. Most IPs have also cooperated with the IA in submission of documents within the agreed and in general IPs have been punctual during meetings which helps in optimum utilisation of available time. The discussions have also been cordial with mutual understanding of the requirement of inspection. The IA has tried to incorporate, wherever feasible, the submissions of the IP in the draft report to give a perspective as to the circumstances in which the stated non compliances took place.

8.3 During the inspection of an IP of a large CD, the IA came to know of the enormous challenges which the IP had to overcome and the extraordinary application and efforts made by the IP and his team to keep CD as a going concern and eventual submission of resolution plan by the RA and approval by the Adjudicating Authority. The IA felt that this experience should be disseminated so that that the profession could benefit from such an experience and requested the IP and the IPA to take this forward. Subsequently, this was published as a case study by an IPA.

8.4 The IA did the inspection of two large CDs which were similar in every respect including the line of activity. Both were running businesses with positive cash flows. In one case resolution took place followed by change in management and smooth transition to new promoters. In the second case, there were reports of various irregularities during CIRP, numerous complaints were received and ultimately an inspection under section 218 of the Code was conducted. Subsequent to the inspection, a show cause notice was issued to the IP and disciplinary action followed. While the allegations were regarding a wide variety of issues, the DC found that only some of these allegations could be substantiated. This CD has still not seen resolution. The learning from this experience is that IP has not only to be fair, but should also be seen to be fair to all stakeholders. If stakeholders lose their trust in the IP, they would be compelled to take legal course, which could drag on for years, causing erosion of value for all concerned. The IP might benefit by way of continued remuneration if proceedings continue, however there is reputation loss and of course there is the opportunity cost. The IP should rather focus on concluding proceedings, enhance his reputation and get more assignments with the experience garnered.

9. Learnings for IA

9.1 In the initial years jurisprudence had not developed and certain provisions of the Code/regulations were open to interpretation. The IA had to understand every situation and correlate to the provisions of the Code/regulations. For example Section 25 (2) (d)[29] of the Code was sometimes interpreted to mean that the IP could only appoint professionals to preserve and protect the assets of the CD and not to facilitate CIRP. However, now the IA is guided by available jurisprudence or decisions taken by the DC of IBBI in similar situations. Thus the process of inspection is progressively become more objective and predictable.

9.2 IA comes to know of the ground realities only through inspection. For example, the ICD[30] cannot be used strictly for assessing compliance with timelines provided in the Code, as there is always a time lag between ICD and the actual receipt of the Order, which could even be a month.

9.3 Inspection must be thorough and must cover all aspects of the CIRP and other processes of the IP. Ongoing CIRPs and other processes like liquidation etc also come under scrutiny of the Adjudicating Authority, usually, based on a petition filed by a stakeholder. On one occasion, the Adjudicating Authority has detected irregularities and made adverse observation in respect of the CIRP proceedings, subsequent to the conduct of inspection. The IA had of course commented on these issues in his inspection report, but the IA has to be alert so that so all non-compliances are brought out, so that the objectives of conducting an inspection are achieved.

10. Advice for Insolvency Professionals

10.1 Positive Approach to Inspection An inspection provides an independent and impartial feedback on the compliances by the IP with the provisions of the Code, or the rules or the regulations or the directives given by the board thereunder, while undertaking CIRP/Liquidation processes, etc. If the CIRP/Liquidation processes are ongoing, the IP can take immediate remedial action. Even otherwise, he can apply the learning to future assignments and ensure compliance with Code and regulations. He can thus avoid complaints or adverse comments by the Adjudicating Authority and achieve the desired outcomes of the Code. Accordingly, he should welcome an inspection, even if it involves some extra efforts in the short term.

10.2 Provide documents and support to the IA

Inspection is a time bound process, so all possible support should be provided by the IP to facilitate the inspection. An inspection process once initiated has to be completed and therefore unavoidable. Accordingly, it is always advisable to cooperate, by way of provision of information or documents required by the IA within the timelines provided by the IA, so that inspection can be conducted in a smooth and timely manner. The sooner the inspection is completed, the IP can go on with his normal functioning. Moreover, if the IA feels that there is non-cooperation on the part of the IP, this will be a violation of the Code, and this will be an additional issue to respond to, if the Board decides to issue a Show Cause Notice (SCN), based on the findings in the inspection report.

10.3 Provide for all information at first instance

There is often a tendency of the IPs to not take the inspection seriously in the initial stages and not submit all documents required to justify ones action. It is always advisable to submit all documents at the initial stage itself, even before submission of the draft inspection report, because, if the IA is satisfied, these issues do not appear in the draft inspection report. Similarly, the responses to the draft inspection report should be based on all documents available with IP at the relevant time. While the IP also has an opportunity to give his response later, if the Board decides to issue a SCN, based on the findings of the inspection report, this takes up time of all concerned and issue of a SCN means commencement of disciplinary proceedings, which has its attendant implications.

10.4 Keep supporting documents/evidence for decisions taken

In respect of routine inspection, in general all assignments since inception are examined by the IA, it may not be possible for any person to remember details of all such transactions. Accordingly it useful to keep a record of all decisions taken, as also the rationale for taking such decisions. One way this can be achieved to record decisions and the justification behind them, wherever feasible, in the minutes of the COC. The minutes of COC can be easily traced and can be produced when sought for, say by the IA.

10.5 Maintaining channels of Communication with all stakeholders

An IP is seen to be the care giver, he addresses stress of distressed persons. He is the beacon of hope for the person in financial distress and its stakeholders. Accordingly when stakeholders do not get appropriate response, desperation sets in and the matter gets escalated. If a creditor does not get an appropriate response he will approach the Board or even the Adjudicating Authority. If the Board or the IPA do not get a response or based on the response provided, it is of the opinion that there is a contravention of provisions of the Code or the rule or regulations or directions issued by the Board thereunder, it may order an inspection. Accordingly, the IP should be prompt in responding to issues raised by all stakeholders, whether it is a complainant, a creditor who has filed claims, the IPA or the Board. If the information is not available or the IP feels that it would take some time to compile the same, then an interim reply can be sent, which reassures all concerned that necessary action has been initiated. Any information which is of interest to all stakeholders, like the status of claims can be put up on the website of the CD.

(This article reflects the personal views of the author and not that of IBBI)

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1. As per regulation 2(j) of IBBI(inspection and investigation) Regulations, 2017, service provider means Insolvency professional, insolvency professional agency or information utility
2. Section 3(19) of the Insolvency and Bankruptcy Code, 2016 provides that insolvency professional means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207
3. Corporate insolvency resolution process as defined under Regulation 2(1) (e) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
4. The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015
5. As per Section 3(8) of the Insolvency and Bankruptcy Code, 2016, corporate debtor means a corporate person who owes a debt to any person
6. Insolvency and Bankruptcy Code, 2016
7. Section 218 of Insolvency and Bankruptcy Code 2016
8. IBBI(inspection and investigation) Regulations, 2017

9. Regulation 2(f) of the IBBI(Inspection and Investigation) Regulations, 2017.
10. Regulation 3(4) of the IBBI(Inspection and Investigation) Regulations, 2017
11. Section 220(1) of the Code provides that the board shall constitute a disciplinary committee to consider the reports of the investigating authority submitted under sub-section(6) of section 218
12. Clause 19 of Code of Conduct provided in first schedule of the IBBI(Insolvency Professional) Regulations, 2016
13. IBBI DC order No No. IBBI/DC/18/2020 dated 27th February,2020
14. IBBI DC order No. IBBI/DC/16/2019 dated 17th April, 2019
15. IBBI/Ref-Disc.Comm./03/2018 dated 18th April, 2018
16. Regulation 13 of IBBI(Insolvency Resolution process for Corporate Persons) Regulations, 2016
17. The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015
18. IBBI DC order No IBBI/DC/07/2018 dated 23rd August, 2018
19. IBBI DC order No. IBBI/DC/15/2019-20 dated 14th November, 2019
20. IBBI DC/07/2018 dated 23rd August, 2018
21. Section 18(f) of the Code
22. Paragraphs 25, 26 and 27 of Code of Conduct in the First Schedule of IP Regulations
23. Circular No. IP/005/2018 dated 16th January, 2018, on "Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional and Circular No. IBBI/IP/013/2018 dated 12th June, 2018 on "Fee and other Expenses incurred for Corporate Insolvency Resolution Process"
24. IBBI/DC/04/2018 dated 3rd May, 2018
25. NationalCompany Law Tribunal, Mumbai bench MA 1520/2019 in MA 254/2019 in CP. 3585(MB)/2018 5
26. IBBI DC order No. IBBI/DC/15/2019-20 dated 14th November, 2019
27. Clauses 5 to 9 of the Code of conduct for Insolvency Professionals provided in the First Schedule of the IBBI(Insolvency Professionals), 2016
28. Clause 23 B of the Code of Conduct provided in the First Schedule of the IBBI(Insolvency professionals) Regulations, 2016
29. Section 25(2) states that fFor the purposes of subsection (1), the resolution professional shall undertake the following actions, namely:-

   ...

   (d) Appoint accountants, legal or other professional in the manner as specified by the Board.

   ...

30. As per Section 5(12) of the Code, Insolvency Commencement Date(ICD) means the date of admission of an application for initiating corporate insolvency process by the Adjudicating Authority under sections 7, 9 and 10 as the case may be