

Discussion Paper

Subject: Engagement of ‘professionals’ in a Corporate Insolvency Resolution Process

This paper discusses the issue of engagement of ‘professionals’ by an insolvency professional (IP) in a corporate insolvency resolution process (CIRP) and solicits comments on the same.

Legal Provisions

2. An IP is a key pillar of insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 (Code). He plays many different roles, namely, Interim Resolution Professional (IRP) or Resolution Professional (RP) in a CIRP, Liquidator in liquidation processes, RP in individual insolvency processes and Bankruptcy Trustee in bankruptcy proceedings. He is the key driver of CIRP - IRP in the initial days of CIRP and then as RP till its completion. As an IRP/RP in a CIRP, he is vested with an array of statutory and legal duties and powers. He exercises the powers of the board of directors of the corporate debtor (CD) and manages its affairs. He runs the operations of the CD as going concern, protects and preserves the value of assets of the CD and ensures compliances with all the laws applicable to the CD and the CIRP. He conducts the entire resolution process and assists the stakeholders to find out the best resolution plan. He is the driving force and the nerve-centre in the resolution process. There are provisions in the law to ensure that the IP discharges his duties and responsibilities with utmost diligence, integrity, independence, objectivity, and impartiality.

3. The law facilitates and empowers the IP to discharge his responsibilities effectively. It provides for a comprehensive moratorium to enable the IP focus on running the business and facilitate resolution peacefully. It mandates that the personnel of the CD, its promoters or any other person associated with the management of the CD to extend all assistance and cooperation to the IRP and the RP, as may be required by him in managing its affairs. Section 20 of the Code requires the IRP to make every endeavour to protect and preserve the value of the property of CD and manage the operations of the CD as a going concern. For this purpose, the IRP has the authority to appoint accountants, legal or other professionals as may be necessary. Similarly, section 25 (2)(d) of the Code requires the RP to preserve and protect the assets of the CD, including continued business operations of the CD. For this purpose, the RP has the authority to appoint accountants, legal or other professionals in the manner as specified by the Board. Further, section 240 of the Code empowers the Board to make regulations to provide for manner of appointing accountants, lawyers, and other advisors under section 25(2)(d) of the Code.

4. The relevant provisions of the Code are as under:

(i) Section 20 of the Code

“20. Management of operations of corporate debtor as going concern.

(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-

(a) to appoint accountants, legal or other professionals as may be necessary;

.... ”

(ii) Section 25 of the Code

“25. Duties of resolution professional.

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

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

.....

(d) *appoint accountants, legal or other professionals in the manner as specified by Board;*

....”

(iii) Section 240 of the Code

“240. Power to make regulations.

(1) *The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.*

(2) *In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely: -*

(a)

...

(s) *the manner of appointing accountants, lawyers and other advisors under clause (d) of sub-section (2) of section 25;*

....”.

5. It is important to note that the Insolvency and Bankruptcy Bill, 2015, as introduced in Parliament, initially provided for the RP to “*appoint accountants, lawyers and other advisors in the manner as specified by the Board*” under section 25(2)(d). The Joint Parliamentary Committee, however, modified this formulation to “*appoint accountants, lawyers and other professionals in the manner as specified by the Board*”. This modification probably clarifies that only professionals, and not advisers, may be engaged by an IP.

6. The Code read with the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 [**CIRP Regulations**] specify the elements of cost which are included in the insolvency resolution process cost (IRPC). In terms of section 30(2)(a) of the Code, such costs have priority in payment vis-a-vis other debts of the CD under the resolution plan. The IRPC includes: (a) the expenses incurred on or by the IRP to the extent ratified under regulation 33 of CIRP Regulations, and (b) the expenses incurred on or by the RP as fixed by the committee of creditors (CoC) under regulation 34 of CIRP Regulations. These regulations clarify that “expenses” so ratified/ fixed by CoC include the fee to be paid to professionals, if any. Regulation 34A of the CIRP Regulations require the IRP/RP to disclose item wise insolvency resolution process costs in such manner as may be required by the Board.

7. The IBBI (Insolvency Professionals) Regulations, 2016 [**IP Regulations**] provide for a Code of Conduct for IPs. An IP must act with objectivity in his professional dealings by ensuring that his decisions are made without any bias and are devoid of any conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not. He must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interests during an assignment. Para 25A of the Code of Conduct requires an IP to 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 (IPA) of which he is a professional member and the agency shall publish such disclosure on its website.

8. An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition. Para 16 of the Code of Conduct provides that an IP must maintain 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.

9. The IBBI, vide a circular dated 16th January, 2018, requires an IP to disclose his relationship, if any, with other professional(s) engaged by him. It also requires him to ensure disclosure of the relationship, if any, of the other professional(s) engaged by him including with himself. The IP shall provide a confirmation to the effect that the appointment of every other professional has been made at arms' length relationship. By another circular of the same date, the IBBI requires that any other professional appointed by an IP shall raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. The IBBI, vide a circular dated 12th June, 2018, directed an IP to disclose fee and other expenses in the specified format to the IPA of which he is a member.

10. Thus, the extant provisions are as under:

- (a) The IRP / RP may appoint a professional to assist him in conduct of CIRP;
- (b) The IBBI may specify the manner of appointing accountants, lawyers, and other professionals;
- (c) The IRP / RP shall appoint any professional at arms' length relationship and for a reasonable fee;
- (d) The IRP / RP must not have any conflict of interest in appointment of any professional and must not appoint a professional under influence of any person;
- (e) The IRP / RP must maintain written contemporaneous records for any decision taken, including appointment of any professional;
- (f) The IRP / RP shall disclose his relationship with the professional and the fee payable to the professional;
- (g) The IRP / RP shall pay the fee of a professional to the bank account of the professional; and
- (h) Such fee to the extent ratified/fixed by CoC may be included in the IRPC.

Clarity Required

11. It is clear that the IP may appoint accountants, legal or other professionals and the IBBI may specify the manner of appointment. Keeping these as the perimeter, the following related aspects require more clarity:

- (a) Who is a 'professional', who can be appointed by an IP?
- (b) Who is an 'other' professional, in addition to accountants and legal professionals, who may be appointed by an IP?
- (c) When should a professional be appointed?
- (d) How should a professional be selected / identified for appointment? How can he be removed?
- (e) How should the fee payable to a professional be determined?
- (f) What should be the term of appointment of a professional?
- (g) When a professional is not eligible for appointment?

(h) Should any stakeholder, particularly, the CoC, have any say in matters listed at (c) to (g) above?

This paper attempts to discuss these issues.

12. Who is a ‘professional’, who can be appointed by an IP?

12.1 The Code or Regulations made thereunder do not define who is a ‘professional’. Black’s Law Dictionary (6th Edition) defines it as a vocation or occupation requiring special, usually advanced, education, knowledge, and skill such as law or medical professions. Profession usually refers to a disciplined group of individuals who possess special knowledge and skills as a recognised body of learning, adhere to ethical and professional standards and render services under the oversight of the regulator.

12.2 In common parlance, a professional is a person, who has a right to practise a profession. A regulator (state, statutory regulator or self-regulator) of the profession confers this right on a person to practise the profession, after following the due process and on being satisfied of the credentials of the person. The person practises the profession under the oversight of the regulator, which can take away the right, if he is found abusing it. The examples are: the Bar Council confers right to practise legal profession, the National Medical Commission confers right to practise medical profession, the Institute of Chartered Accountants of India (ICAI) confers right to practise accountancy profession and so on. All of them can take away the right where the professional abuses the right. It is because the right to regulate practice comes from right of the people to protect themselves¹.

12.4. There is a fundamental distinction between a professional activity and an activity of a commercial character. Professional activity must be an activity carried on by an individual by his personal skill and intelligence.² The profession as distinguished with “commercial” means a person who enters into a profession. It involves certain amount of skill as against commercial activity where it is more of a matter of things or business activity. In commercial activity one works for gain or profit and as against this, in profession, one works for his livelihood.³

12.3. A professional demonstrates his capability to earn the right to practise the profession. He usually undergoes a course that equips him with the knowledge, skills and expertise which a member of the profession must have before it seeks the right.

12.5 One requires to study a course and pass an examination to be eligible to join a profession. Since it is only an individual who can study, only individuals are eligible to join a profession. The law envisages only an individual and not any entity to practise as an Advocate. However, in course of time, the law allows individual professionals to render professional services through an organised group. A CS or a CA may practise in partnership with one or more members of the respective Institute in practice or in partnership with members of other recognised professions. A partnership entity or a company is eligible to be an RV subject to certain norms. It is important to note that even where an entity is allowed to render professional services, the entity itself is also registered with the regulator of the profession.

12.6 Though there is probably no precise definition of what a profession is, it may be possible to have a description of profession as under:

¹ Browne, Lionel, (1935), Regulation of Professions by the State - The Right to Regulate, Reasons Therefor, Methods in Use, and Attitude of Regulatory Bodies and the Courts, with Relation Thereto, California and western medicine, 43(2).

² Supreme Court, Chairman, M.P. Electric Board and On Vs. Shiv Narayan and Anr., Appeal (Civil) No. 1065 of 2000).

³ Supreme Court, L.M. Chitala Vs. Commissioner of Labour (AIR 1964 Madras 131, 133).

- (a) Profession is a vocation or occupation.
- (b) The regulator of the profession confers on a person the right to practise the profession and withdraws the right if the person abuses it.
- (c) A person is granted right to practise a profession when he demonstrates his qualification and experience, and meet other eligibility norms, to the satisfaction of the regulator.
- (d) A professional works for a livelihood and not for profit.
- (e) Most professions allow only individuals to practise it, while some allow partnerships and companies also to practise it subject to certain conditions.

12.7 This makes it clear that a firm, which provides a variety of services such as consultancy or advisory services or carries out certain assignments for a client, can't be termed as a professional. It is not enrolled as a member of any profession; it is not regulated by a regulator of any profession; it does not render professional services under the oversight of a regulator of a profession; and it renders services for profit. However, a firm, which is registered with the regulator of the profession for rendering the professional service, is a professional. The test to determine whether a person is a professional or not is whether the person is permitted by the regulator of the concerned profession to practise the profession under its oversight. If answer is yes, the person is a professional.

12.8 A possible explanation for the substitution of the word 'advisor' by 'professional' in the bill, by Joint Parliamentary Committee, as stated in para 5 above, is that the CIRP must have the benefit of a professional, who, by definition, is qualified and regulated. There are a variety of self-styled advisors, who may not be qualified or regulated. They cannot be hired to serve an ailing CD undergoing CIRP, where the fate of a large number of stakeholders is at stake. Further, a CD, which is in stress, cannot afford to pay the advisors who may be working for profit. The provision of 'professional' in the Code ensures that a person with the required capability and not driven by profit is hired for a CIRP. In case of any misconduct, the person can be called to account. The stakeholders have comfort that an accountable person is serving a CIRP under the oversight of a regulator.

13. Who is an 'other' professional, in addition to accountants and legal professionals, who may be appointed by an IP?

When general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. This is known as the principle of *ejusdem generis*, that is, of the same kind. Going by this, the 'other' professional would mean that the person must be a professional and he must be a professional like an accountant or advocate. Therefore, 'other' professional would mean a professional who is subject to a similar institutional framework as the profession of accountancy or law. The institutional framework for law or accountancy includes arrangements for individuals to acquire the knowledge, expertise and skills required of an accountant / lawyer, and for an authority that grants license to practise the profession of law / accountancy and takes away the license in case of misconduct. Therefore, 'other' professional would include a company secretary, cost and management accountant, doctor, actuary, and such other professional who is regulated by the regulator of the profession. It would not include an advisor, economist, banker, or a sociologist, though many of them are professional in their approach and conduct.

14. When should a professional be appointed?

14.1 The primary objective for the IRP/RP is to protect and preserve the value of the CD and to manage the CD as a going concern. On the other hand, he has to also ensure that the cost of

the insolvency resolution process is reasonable. Thus, a professional should be hired only when it is absolutely necessary and such hiring should be at the minimum cost. The IP must first use the resource and manpower available with the CD. It may hire a professional only when manpower/ resources available with the CD are inadequate and the IRP/RP finds it necessary to have services of a professional. For example, the CD may have personnel qualified in law, who can help him in legal work. They, however, cannot appear before courts of law. Therefore, the IP may engage an Advocate for appearances before the court.

14.2 In the matter of *Ms. Subasri Realty Private Limited Vs. Mr. N. Subramanian & Anr. [Company Appeal (AT) (Insolvency) No. 290 of 2017]*, the Hon'ble NCLAT clarified that after appointment of the RP and declaration of moratorium, the Board of Director of a CD stands suspended, but that does not amount to suspension of Managing Director (MD) or any of the directors or officers or employees of the CD. To ensure that the CD remains a going concern, all the directors and employees are required to function and assist the RP, who manages the affairs of the CD during the CIRP. This makes it clear that the IRP or RP, as the case may be, shall endeavour to make use of resources available within the CD and he may appoint professionals from outside when the situation warrants.

14.3 The Regulations, however, require appointment of a professional for certain services. An IRP/RP is required to appoint two registered valuers for estimation of fair value and liquidation value of the CD. Even if the CD has personnel qualified in valuation, the IP must appoint registered valuers for valuation.

15. How should a professional be selected / identified for appointment? How can he be removed?

15.1 The regulations and circulars require that appointment of any professional must be at arms' length. Neither the IP nor the professional shall have any conflict of interests. The IP must select the professionals on merit and not under influence of any other person. He must maintain written records regarding appointment of any professional.

15.2 In the interest of objectivity and transparency, it is suggested that a professional may be selected through invitation of expression of interest / quotes, keeping in view suitability, expertise, costs, and other relevant parameters. An alternative suggested is to select professionals from a panel of professionals maintained by an IPA.

15.3 There is no explicit provision for removal of a professional. However, it is a contractual arrangement and every client has right to change / dispense with a professional at any time. The IRP/RP needs to take a call on a case-to-case basis and it cannot be formalised.

16. How should the fee payable to a professional be determined?

The code of conduct in the Schedule appended to the IP Regulations requires that an IP must endeavour to ensure that all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, are not unreasonable and he shall disclose all such costs to all relevant stakeholders and therefore, the IP must justify the cost of professional. In terms of circular, the bill for services shall be submitted by the professional and be paid to his account.

17. What should be the term of appointment of a professional?

17.1 The contours of engagement of professionals should be clearly delineated in terms of the scope of work, duties and responsibilities, including confidentiality, remuneration, expenses and period of appointment.

17.2 Presently, an IP determines the terms of appointment of a professional and alters the same as may be required. Since every IP may not be very familiar with contracts of appointment of professionals, in the interest of standardisation, it is suggested that a model contract for appointment of professionals may be made available, with an option to modify it wherever required. This model contract may be developed by the IPAs in consultation with IPs.

18. When a professional is not eligible for appointment?

18.1 The code of conduct as given in Schedule of the IP regulations requires that an IP 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. There is a general provision that an IP shall not have any conflict of interests in whatever he does.

18.2 A professional must not have any conflict of interests. He may not be appointed if he is related to the CD or IP.

19. Should any stakeholder, particularly, the CoC, have any say in matters listed at (c) to (g) of Para 11 above?

19.1 The Code vests the power of appointment of accountants, legal or other professionals with the IRP in terms of Section 20(2)(a) and with the RP in terms of Section 25(2)(d). However, expenses on a professional are included in the insolvency resolution process cost, upon approval of the CoC.

19.2 It is being suggested that in the interest of independence of the IP, the CoC or any other stakeholder may not have any say in whether professional(s) need to be appointed, the choice of the professional IP or the amount of fee to be paid to him. It is also suggested that since the cost of professional is borne by the CD, these matters should be done with the approval or consent of the CoC. The problem arises where the CoC and the IP have opposite/different views. A possible solution is that the IP shall consult the CoC, but is not bound by its advice. He may be required to record the reason if he deviates from the advice of the CoC.

20. Proposed Amendment

It is proposed to specify in the CIRP Regulations the above matters.

21. Economic Analysis

The proposed amendment would help by removing ambiguity in the manner of appointment of '*professionals under CIRP*'. In case of any contravention, the stakeholders can make a complaint to the regulator of the profession for appropriate action against such professional. This would help enhance faith amongst stakeholders in CIRP and reduce cost.

22. Public Comments

The Board accordingly solicits comments on the following:

- a. Whether only a person having an authorisation from the regulator of a profession to practise the profession may be appointed as a 'professional' by an IP in a CIRP?;
- b. Which professionals (other than accountants and advocates, who are allowed by the Code) may be appointed in a CIRP?;

- c. Whether a person (other than a person having an authorisation from the regulator of a profession to practise the profession) may be appointed for rendering professional services for the purposes of section 20 and 25 of the Code? If so, how the quality of service of such person be ensured and misconduct of such person be addressed?;
- d. Whether an IP should first look for professional expertise within the CD before engaging a professional from outside? When an IP should not appoint a professional?;
- e. How should a professional be selected / identified for appointment?;
- f. When a professional should not be eligible for appointment?;
- g. How should the conflict of interests, if any, of a professional be addressed?;
- h. When and how can a professional be removed?;
- i. How should the fee payable to a professional be determined? Should there be 'cap' on fee payable to a professional?;
- j. What should be the term of appointment of a professional?;
- k. Should there be a model contract for appointment of professionals? If so, who should develop it?;
- l. Should any stakeholder, particularly, the CoC, have any 'say' in appointment of professionals?;
- m. Where the IP and CoC have different views on any matter relating to appointment / removal of a professional, how should the difference be resolved?; and
- n. Which of the above (a. to m.) should be specified by the Board through Regulations?

23. After considering the comments, the Board proposes to make regulations under section 240 of the Code, in exercise of its powers and functions under clauses (aa) and (d) of sub-section (1) of section 196 of the Code read with clause (a) of sub-section (2) of section 20 and clauses (d) of sub-section (2) of section 25.

24. Submission of comments

Comments may be submitted electronically by **8th January, 2021**. For providing comments, please follow the process as under:

- (i) Visit IBBI website, www.ibbi.gov.in;
- (ii) Select 'Public Comments';
- (iii) Select 'Discussion paper – CIRP Dec20'
- (iv) Provide your Name, and Email ID;
- (v) Select the stakeholder category, namely, -
 - a) Corporate Debtor;
 - b) Personal Guarantor to a Corporate Debtor;
 - c) Proprietorship firms;
 - d) Partnership firms;
 - e) Creditor to a Corporate Debtor;
 - f) Insolvency Professional;
 - g) Insolvency Professional Agency;
 - h) Insolvency Professional Entity;
 - i) Academics;
 - j) Investor; or
 - k) Others.
- (vi) Select the kind of comments you wish to make, namely,
 - a) General Comments; or
 - b) Specific Comments.
- (vii) If you have selected 'General Comments', please select one of the following options:
 - a) Inconsistency, if any, between the provisions within the regulations (intra

- regulations);
- b) Inconsistency, if any, between the provisions in different regulations (inter regulations);
 - c) Inconsistency, if any, between the provisions in the regulations with those in the rules;
 - d) Inconsistency, if any, between the provisions in the regulations with those in the Code;
 - e) Inconsistency, if any, between the provisions in the regulations with those in any other law;
 - f) Any difficulty in implementation of any of the provisions in the regulations;
 - g) Any provision that should have been provided in the regulations, but has not been provided; or
 - h) Any provision that has been provided in the regulations but should not have been provided.

And then write comments under the selected option.

25. If you have selected 'Specific Comments', please select para number and then sub-para number and write comments under the selected para/sub-para number.

26. You can make comments on more than one para/sub-para, by clicking on more comments and repeating the process outlined above from point 24 (vi) onwards.

27. Click 'Submit', if you have no more comments to make.
