

Insolvency and Bankruptcy Board of India

Discussion Paper

1st April, 2018

Regulation of fee payable to insolvency professionals and other process costs under Corporate Insolvency Resolution Process

The Insolvency and Bankruptcy Code, 2016 (Code) provides for a class of regulated professionals, namely, Insolvency Professionals (IP), who constitute one of the four key pillars of the insolvency regime, other three being the Adjudicating Authority, the Insolvency and Bankruptcy Board of India (Board), and the Information Utilities. The IPs play an important role in resolution, liquidation and bankruptcy processes of companies, LLPs, partnership firms and individuals. For example, when a company undergoes corporate insolvency resolution process (CIRP), an IP is vested with the management of its affairs and he manages the operations of the company as a going concern. He conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence and integrity. Keeping in view the job responsibilities of an IP, the law (Code, rules and regulations made and circulars and guidelines issued thereunder) provide that an individual with ten years of experience as a member of the Institute of Chartered Accountants of India, Institute of Company Secretaries of India, Institute of Cost Accountants of India or a Bar Council or with 15 years of experience in management is eligible for registration as an IP on passing the Limited Insolvency Examination.

2. An IP needs to be compensated for his services commensurate with his qualification, experience and responsibilities. The law does not specify the amount of fee to be paid to an IP for his services in a particular process. It is partly because of contemporary economic thought that market should determine the fee and partly because of practical difficulties that no two CIRPs require the same quality and quantity of services or no two IPs render homogenous service. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Code, considered this issue at length. It felt that the fee charged by a resolution professional (RP) would be as an outcome from market forces, and not set in the Code or provided in regulations. It dealt with fee for various processes under the Code. This note, however, limits discussion mostly to fee for CIRP.

3. The BLRC observed: *“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. For example, the fees charged by the professional is collected as part of the records of the IRP, which is maintained in a public database by the Regulator. Since this will be recorded and disseminated for all professionals across all resolution cases, the potential customers can compare fees across professionals, along with all the other performance measures that are also maintained. This includes size of the insolvency being resolved, the days taken for resolution, the frequency with which entities are resolved and turn out to be successful turnarounds and the frequency with which entities are resolved but eventually turn up for liquidation. Then, customers will be able to carry out a fee-performance when choosing among professionals to engage for other cases.”*

4. In terms of section 5(13) of the Code, ‘the fees payable to any person acting as a resolution professional’ is included in ‘insolvency resolution process cost (IRPC)’, which needs to be paid in priority. Any payment of fees for the services of an IP to a person other than the IP does not form part of the IRPC. Section 5(13) of the Code reads as under:

“(13) insolvency resolution process costs means -

- (a) the amount of any interim finance and the costs incurred in raising such finance;*
- (b) the fees payable to any person acting as a resolution professional;*
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board;”*

5. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deal with costs and fee related to CIRP in greater detail. The relevant provisions are:

a. Regulation 31

“31. Insolvency resolution process costs under Section 5(13) (e) shall mean

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

b. Regulation 33

“33. Costs of the interim resolution professional.

- (1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.*
- (2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).*
- (3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.*
- (4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.*

Explanation- For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.”

c. Regulation 34

“34. Resolution professional costs.- The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation-

For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”

d. Regulation 34A

“34A. Disclosure of Cost.- The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board.”.

e. Regulation 38 (1)

“38. Mandatory contents of the resolution plan.

(1) A resolution plan shall identify specific sources of funds that will be used to pay the-

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;

.....”

6. The Code of Conduct for IPs under the IBBI (Insolvency Professionals) Regulations, 2016 casts a duty on an IP to render services for a reasonable fee and to endeavour to ensure IRPC reasonable. The relevant provisions are as under:

“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 endeavour to ensure that such costs are not unreasonable.”

7. There have been a few instances where the Adjudicating Authority has expressed concern about the fee charged by an IP in CIRP as under:

a. In the matter of Shri Shrikrishna Rail Engineers Private Limited vs. Madhucon Projects Limited [CP(IB) SR No. 4322/9/HDB/2017],

“3. The Adjudicating Authority was alarmingly shocked/surprised to notice that the Professional fee quoted by the IRP is Rs. 5 Crores till the First Committee of Creditors Meeting. Further it is noticed that fee for the subsequent months as IRP/RP on a per month basis is R. 1.75 Crores. The Adjudicating Authority has also noted that total outstanding debt amount from the Corporate Debtor is only Rs. 4.16 Crores (including interest and retention money). It is also observed that the fee proposed by IRP works out to Rs. 14.00 Crores approx., apart from other incidental expenses.

4.

5. The Adjudicating Authority is of the considered view that remuneration quoted by the IRP is quite exorbitant and the same needs to be referred to IBBI. Though there are no prescribed set of Rules and Regulations/Guidelines at present with regard to the fee payable to the IRP/RP, the Adjudicating Authority is of the considered view that the fee quoted by the professionals should be reasonable, commensurate with work to be handled. In view of the above we recommend the matter to IBBI for taking appropriate action/remedial measure against the proposed IRP including disciplinary action if any, as deemed fit.”

b. In the matter of Raj Steel v. Sanjay Strips Private Ltd. [CP(IB) No. 218/9/HDB/2017],

“6. During the hearing held on 3rd November 2017, the Adjudicating Authority was shocked to notice the abnormally high fee structure of the proposed IRP ...

*.....
8..... From the above fee structure of the IRP it is noted that originally he proposed total fee of Rs. 85,50,000 (approx.) for the initial six months period in addition to actual cost of public announcement to be made, cost of valuation by two valuers, cost of appointment of Advocate/Solicitor etc. as per his initial term sheet. However, when the revised fee structure was submitted, it was substantially reduced to only Rs. 9,00,000/- in addition to other actual cost of public announcement etc. as mentioned above....”*

- c. In the matter of Punjab National Bank vs. Divya Jyoti Sponge Iron Private Limited [CP(IB) No. 363/KB/2017],

“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 with out 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

23. ...

24.

25.....In the said background of fixation of cost of resolution and fees of RP it appears to me that it is time to have a legitimate guidelines or regulation in this regards so as to safeguard and to ensure the prospects of revival of a dying corporate debtor not to be at a highest cost which cannot be affordable by the corporate debtor. Hopefully IBBI would consider the above said factors and would frame necessary regulations or guidelines in regards fixation of fees and resolution cost by a resolution professional.”

8. There have also been instances of abnormally low fee charged by an IP. The Board had invited expression of interests from IPs to act as IRP in cases where the operational creditor has not proposed any IRP. In certain matters (Applied Electro Magnetics Pvt Ltd., Sanwud Shoppe Pvt. Ltd., etc.), the IPs quoted a fee of Re.1 to act as IRP. In a few other matters (Rajesh Gems and Jewels Pvt. Ltd., Fenace Auto Limited, etc.), the IPs quoted a fee of Rs.1000 to act as IRP.

9. In the matter (Metal Gems Vs. Saranya Forgings & Engineers India Pvt. Ltd.), the Hon’ble NCLAT directed the Adjudicating Authority to fix the fee of the IRP, which shall be paid by the corporate debtor. Accordingly, the Adjudicating Authority fixed a fee. However, the corporate debtor has challenged the amount of fee before the Hon’ble NCLAT.

10. It is thus clear that fee is an important component of the IRPC. It gets priority in payment over any other dues of the corporate debtor. The fee is paid for services of IPs and other professionals. These services are not standardised. The amount of effort required in a CIRP is quite different from that in another CIRP. It is difficult to prescribe a standard fee for the services of a professional. It is expected that the market would determine the fee for a particular IP. The market outcome in certain circumstances, however, has not been efficient (as high as Rs.5 crore to as low as Re.1 for services of an IRP). Either very high fee and very low fee is not in the interest of corporate debtor, the professional services industry and the insolvency regime.

11. The Society for Insolvency Practitioners (SIPI) has developed 'Statement of Best Practices: Payment of Fee and Reimbursement of Out-of-Pocket Expenses' [https://www.insolindia.com/uploads_insol/draft_best_practices/files/-1008.pdf] for the use of registered insolvency professionals being appointed as IRP or RP. This provides guidance on the factors to be considered by an IP while charging fee, factors to be considered for reimbursement of out-of-pocket expenses, provision of information before and after determination of fee, etc. For example, it provides that an insolvency professional should consider the following factors while determining the quantum of fee to be charged: (a) value and nature of the assets dealt with, (b) time properly given by the insolvency professional and her staff in attending to the affairs of the debtor, (c) the complexity of the case, (d) exceptional responsibility falling on the insolvency professional, (e) the effectiveness with which the insolvency professional carries out her duties.

12. One undertakes a transaction only if it is beneficial to him after meeting the associated costs. Theoretically, a market is most efficient when there is no transaction cost or transaction cost is negligible and the stakeholders have complete information. The first step to minimise the cost is identification of the elements of the cost associated with CIRP. An attempt has been made to identify these elements, which is at Annexure 1. The next step is to make the data about cost and fee available in public domain for the market forces to determine the fees. The next step could be promotion of best practices. Thereafter specific regulatory intervention may be required to regulate the costs and fee to the extent required to address market failure, if any.

13. Internationally, different approaches are followed to ensure an insolvency friendly, competitive fee. The practices in three matured jurisdictions are presented here:

A. Australia

Australian Securities and Investment Commission has issued 'Approving Fees: A guide for Creditors' [http://download.asic.gov.au/media/1310767/Approving_fees_guide_for_creditors.pdf]. The salient features of the guide are:

- a. A liquidator, voluntary administrator or deed administrator is entitled to be paid reasonable fees, or remuneration, for the necessary work he properly performs, once the fee has been approved by creditors, a committee of inspection or a court, and to be reimbursed for out-of-pocket costs incurred in performing his role.
- b. Out-of-pocket costs that are commonly reimbursed include external services (legal fees; valuer's, real estate agent's and auctioneer's fees; travel and accommodation, etc.) and internal services (stationery, photocopying, telephone and postage costs; retrieval costs for recovering the company's computer records; and storage costs for the company's books and records).
- c. An external administrator's fees are approved by (i) a resolution of creditors, (ii) a committee of inspection (if there is a committee of inspection) if no resolution has been passed by creditors, or (iii) the court if neither the creditors nor a committee of inspection have passed a resolution.
- d. Fees may be calculated using one of a number of different methods, such as: (a) on the basis of time spent by the external administrator and his staff; (b) a quoted fixed fee, based on an upfront estimate; and (c) a percentage of asset realisations.
- e. Charging on a time basis is the most common method. If an external administrator seeks approval for charging wholly or partly on a time basis, and the work is yet to be carried out, the approval sought must include a maximum limit ('cap') on the amount of remuneration the external administrator is entitled to receive. The external administrator and his staff record the time taken for the various tasks involved, and a record is kept of the nature of the work performed. External administrators have a scale of hourly rates, with different

rates for each category of staff working on the external administration, including the external administrator.

B. United Kingdom

The basis for fixing the administrator's remuneration is set out in Rule 2.106 of the Insolvency Rules 1986, which states that it shall be fixed: (a) as a percentage of the value of the property which the administrator has to deal with, (b) by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration, or (c) as a set amount. Any combination of these bases may be used to fix the remuneration, and different bases may be used for different things done by the administrator. Where the remuneration is fixed as a percentage, different percentages may be used for different things done by the administrator. The said Rule says that in arriving at its decision the committee shall have regard to the following matters: (a) the complexity (or otherwise) of the case; (b) any responsibility of an exceptional kind or degree which falls on the administrator; (c) the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties; (d) the value and nature of the property which the administrator has to deal with. "A Creditors' Guide to Administrators' Fees" [https://www.r3.org.uk/media/documents/publications/professional/Guide_to_Administrators_Fees.pdf] helps creditors to be aware of their rights under the legislation to approve and monitor fees, explains the basis on which fees are fixed and how creditors can seek information about expenses incurred by the administrator and challenge those they consider to be excessive.

C. United States of America

Section 330 of Chapter 11 of the US Bankruptcy Code [<https://www.usbankruptcycode.org/chapter-3/subchapter-ii-officers/section-330-compensation-of-officers/>] provide for the following:

- i. In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
 - a. the time spent on such services;
 - b. the rates charged for such services;
 - c. whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
 - d. whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
 - e. with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
 - f. whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
- ii. The court shall not allow compensation for unnecessary duplication of services; or services that were not reasonably likely to benefit the debtor's estate; or necessary to the administration of the case.

14. It has been the endeavour of the Board to engage with the stakeholders through public consultation. It believes that public consultation enables collective choice and imparts legitimacy to decisions. In this spirit, the Board invites comments as under:

- i. Whether the elements of costs listed in Annexure-1 are comprehensive? Are the elements of costs / fee classified / grouped appropriately? Please suggest modifications.
- ii. Should the elements of the IRPC, including fee payable to IPs, Insolvency Professional Entities (IPEs) and other Professionals, be regulated?

- iii. Should the fee be disclosed by IRP/ RP, and then published on the web site of the respective Insolvency Professional Agency or the IBBI? Is disclosure of fee good enough for regulation of fee?
- iv. Should the industry and /or the Board promote development of best practices in respect of fee of the IRP and the RP and other fee associated with CIRP? What should be the elements of best practice? Should best practice for determination of fee good enough for regulation of fee?
- v. Should the fee payable for various services under CIRP be further (beyond disclosures and best practices) regulated? If so, how should the fee payable to the IRP/RP, IPE and professionals engaged under CIRP be regulated? Should there be a ceiling, a floor or a band for fee payable to the IRP/RP, IPE and other professionals. Should it be a percentage linked to some variable of the corporate debtor? Should it be decided based on estimation of man hours of services required in a CIRP? Please elaborate.
- vi. How should the fee and costs associated with CIRP be ascertained and minimized?
- vii. Is there any further suggestion / comment on costs and fee associated with CIRP?

15. The comments and suggestions may please be mailed at **feedback@ibbi.gov.in** latest by **20th April, 2018.**

Cost Sheet for Insolvency Resolution of Corporate Debtor (write the name here)

**Part 1: Details of Corporate Debtor Undergoing Insolvency Resolution Process
(To be submitted by the IRP within seven days of his demitting office as IRP)**

Sl. No	Particulars	Description
1	Name of the Corporate Debtor	
2	CIN of the Corporate Debtor	
3	Date of CIRP Commencement	
4	Assets (Rs. crore) as on the last balance sheet date (write date here)	
5	Turnover (Rs. crore) in the last financial year (write year here)	
6	No. of workmen as on the date of commencement of CIRP	
7	No. of employees as on the date of commencement of CIRP	
8	Number of Claimants	
8	Total amount of claims (Rs. crore) admitted	
9	Name of IRP	
10	IP Registration No. of IRP	
11	Name of RP	
12	IP Registration No. of RP	

**Part 2: Insolvency Resolution Process Cost of Corporate Debtor (write the name here)
for the period under IRP**

(To be submitted by the IRP within seven days of his demitting office as IRP)

Activity	Expense Major Head	Expenses	Amount of Expense (Rs.)	Approved by CoC (Yes / No)
Running Process	IRP	Fee Payable to IRP		
		Other Expenses on / for IRP (travel, stay, security, etc.)		
	IPE	Fee, if any, Payable to an IPE for support services		
	Other Professional	Fee Payable to Accounting and Finance Professional		
		Fee Payable to Audit Professional		
		Fee Payable to Legal Professional		
		Fee Payable to any other Professional		
		Other Expenses on / for Professionals (travel, stay, security, etc.)		
	CoC	Expense for Meeting Venue		
		Expense for Electronic Voting		

		Expenses on Travels, etc.		
	Other Expenses	Expenses on Public Announcement		
		Expenses for Filings before Adjudicating Authority		
		Expenses for Verification of Claims		
		Other expenses, if any		
Running Business	Essential Services	Electricity		
		Water		
		Telecommunication Services		
		Information Technology Services		
		Other Essential Services, if any		
	Other Services	Other Supplies		
		Employees and Workmen		
		Penalties, if any, Payable for Non-compliance		
Other Expenses, if any				
Other Expenses, if any				

(Name and Signature of IRP)
IP Registration No

**Part 3: Insolvency Resolution Process Cost of Corporate Debtor (write the name here) for the period under RP
(To be submitted by the RP within seven days of his demitting office as RP or of expiry of CIRP period, whichever is earlier)**

Activity	Expense Major Head	Expenses	Amount of Expense (Rs.)	Approved by CoC (Yes / No)
Running Process	RP	Fee Payable to RP		
		Other Expenses on / for RP (travel, stay, security, etc.)		
	IPE	Fee, if any, Payable to an IPE for support services		
	Registered Valuer	Fee Payable to Valuer 1		
		Fee Payable to Valuer 2		
		Fee Payable to Valuer 3, if any		
		Other Expenses related to Valuation		
	Other Professionals and Services	Fee Payable to Accounting and Finance Professional		
		Fee Payable to Audit Professional		
		Fee Payable to Legal Professional		
		Fee Payable to any other Professional		
		Other Expenses on / for Professionals (travel, stay, security, etc.)		
		Expense for Data Room, if any		

	CoC	Expenses for Meeting Venue		
		Expense for Electronic Voting		
		Expense on Travels, etc.		
		Other related Expenses		
	Examination of Transactions	Expense related to Preferential Transactions		
		Expense related to Under/Over-valued Transactions		
		Expense related to Extortionate Transactions		
		Expense related to Fraudulent Transactions		
	Resolution Plan	Expense related to Invitation of EoI		
		Expense related to Identification of Prospective Resolution Applicants		
		Expense relating to Invitation of Resolution Plans		
	Other Expenses	Expenses related to Filings before Adjudicating Authority		
		Any other expense related to Process		
	Running Business	Essential Services	Electricity	
Water				
Telecommunication Services				
Information Technology Services				
Other Essential Services, if any				
Other Services		Other Supplies		
		Employees and Workmen		
		Penalties Payable for non-compliance		
		Other Expenses		
Interim Finance		Amount of Interim Finance		
		Expenses for Raising Interim Finance		
		Interest Payable on Interim Finance		
Other Costs / Expenses directly related to CIRP				
Amount due to Prejudicially Affected Persons				
Others	Costs by or for Creditors, if any, included in IRPC			
	Other Expenses, if any, related to CIRP			

(Name and Signature of RP)
IP Registration No.....

Part 4: Other Costs related to CIRP, but not included in Insolvency Resolution Process Cost

(To be estimated by the IBBI / Researcher)

Type	Who bears	Cost Head	Sub-head
Explicit costs	Applicant	Initiating CIRP	Court fee
			Legal costs
			Cost of sending demand notice, if applicable
			IRP fee and costs to the extent not approved by CoC as part of IRPC.
	Claimants	Proof of claims	Cost of documentation
			Cost of Professionals engaged, if any
		Participation in CoC (if participating)	Travel
			Accommodation
			Cost of Representation in CoC, if any
	Resolution Applicants	Response to RFP	Legal fee
			Fee for Professionals
			Application fee/ Cost of furnishing Earnest Money Deposit, if any
		Submission of Resolution Plan	Due Diligence
			Legal fee
			Other professional fee
	Other Stakeholders	Any other explicit costs	Bank guarantees and other financial fee
	Society	Adjudicating Authority	IBBI
			Central Government
			Courts
Others	Other costs, if any		
Implicit costs	Applicant	Initiating CIRP	
	Corporate Debtor	Initiation of CIRP	Disruption of operations
			Reputational costs
	Claimants	Proof of claim	
		Participation in CoC	
Resolution Applicants	Submission of plan		
