

A Study of Insolvency Professionals in India

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The enactment of the Insolvency and Bankruptcy Code in 2016 (IBC/Code) led to the establishment of Insolvency Professionals (IPs) as a new class of regulated professionals in the market. This article attempts to understand the selection process, general profile of candidates entering the profession and an assessment of the assignment and earnings. An analysis of the eligibility criteria and selection process shows that they are robust in terms of role expected of the professionals under the Code. The general profile indicates that the profession predominantly constitutes of Chartered Accountants, males and concentrated in metropolitan cities. It is seen that professionals are engaged gainfully; however, a gender pay gap is evident. The article also attempts to understand the challenges faced by IPs and provide suggestions.

INSOLVENCY LAWS AND INSTITUTION OF INSOLVENCY PRACTITIONERS

The origin of insolvency laws can be traced back to the famous Magna Carta proclaimed in England in AD 1215¹. It had a clause that protected people's lands from being seized by the Crown if they had no money to repay their debts. The change in socio-economic conditions driven by the Industrial Revolution and the deteriorating public opinion on debtors' prisons created the need for change. A more humane approach was developed in the Bankruptcy Act of 1705 and later the State (Lord Chancellor) discharged defaulting debtors without permission of creditors. A person being responsible for administering and managing insolvency proceedings is as old as insolvency laws itself. When insolvency/bankruptcy laws were implemented through the State machinery, officers were appointed to conduct such proceedings. Later, as laws evolved, the Courts were vested with the responsibility of these proceedings. The affairs being administered/managed by the State or the Court lead to delays and higher transaction costs in resolving matters. Such delays and costs adversely affected the outcomes of the process and went against the very objective, of rescuing the enterprise, which the laws aimed.

As an alternative, the system of appointing a person - one of the State or a private individual to carry out proceedings was established. Some jurisdictions provided for corporations or other separate legal entities also to be appointed. This provided for the conduct of proceedings with lesser delays but with supervision. Insolvency laws refer to such person/entity as administrators, trustees, liquidators, supervisors, receivers, curators, official or judicial managers or commissioners etc. Such persons/entities have clearly defined roles and functions under the laws along with ways for monitoring and supervision of their actions and performance. Their relationship with the Courts, creditors and debtors vary with the approach of the law.

Recommendations of a Committee under Chairmanship of Kenneth Cork², (famously called the Cork Committee Report, 1982) established two primary principles in insolvency matters. One, the need to rescue viable businesses and two, the need for regulation of private practitioners dealing in insolvency

matters and more say to creditors in choosing such professionals. Consequently, the Insolvency Act of 1986 introduced the appointment of administrators and receivers to insolvent companies. It was done to ensure that managers of insolvent companies would act in the interests of all the creditors and directors failing to do so attracted disqualification under Companies' Directors Disqualification Act, 1986.

INSOLVENCY PROFESSIONALS IN INDIA

The earliest provision dealing with insolvency/ bankruptcy in India can be traced back to sections 23 and 24 of the Government of India Act, 1800. It was followed by Statute 9 enacted in 1828, the Indian Insolvency Act, 1848, the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920³. In post independent India, the Companies Act, 1956 (CA, 1956) was the only law dealing with corporate insolvency for all practical purposes and it provided for a process of 'winding up' of a company. The Sick Industrial Companies Act (SICA) enacted in 1985 aimed at identifying sickness in industrial companies and reviving them. In the 1990s and 2000s, the policy focus shifted to protecting creditors' rights towards which the Recovery of Debts and Bankruptcy Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This multitude of laws lead to significant litigation and less than optimal legal and economic outcomes for corporates seeking resolution and for creditors seeking recovery. The Bankruptcy Law Reforms Committee⁴ (BLRC) recommended the enactment of a single, comprehensive, and internally consistent law leading to enactment of the Code.

The CA, 1956 provided for an Official Liquidator (OL). The OL, appointed by the Central Government, under section 448 is under the administrative charge of the Regional Director, Ministry of Corporate Affairs and is functionally attached to the jurisdictional High Court. The OL was entrusted with conducting affairs of the companies under liquidation. With the enactment of the Code and amendments to the Companies Act, 2013 OLs are not being entrusted with fresh matters since December 31, 2016⁵. As of October 31, 2018, there were 4,865 companies undergoing liquidation, 92 per cent of which were 'winding up by the Courts' cases involving appointment of OLs by the Central Government to assist the Courts. The Companies (Winding up) Rules, 2020 provides that the provisional liquidator or company liquidator appointed by the Tribunal shall be an Insolvency Professional registered by the Insolvency and Bankruptcy Board of India (Board).

The SICA established an institutional arrangement under the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction. The role of BIFR⁶, a Board of experts, was to manage the process of timely detection of sick and potentially sick companies, determination of appropriate measures and their expeditious enforcement. An analysis of BIFR cases, (Sengupta et al., 2016⁷) between 1987 to 2014 shows that a total of 5,800 cases were reported to the BIFR. 53 per cent of these cases were either dismissed or abated, 22 per cent of the cases were recommended for liquidation and in 9 per cent of the cases a rehabilitation plan was implemented. The average time taken for the closure of a case in the BIFR was around 5.8 years. After enactment of the Code, cases pending with the BIFR were transferred to the National Company Law Tribunal (NCLT).

Learning from past experiences and in line with international best practices, the BLRC recommended for *'an industry of regulated professionals who will be delegated the task of monitoring and managing matters of business by the Adjudicator, so that both creditors and the debtor can take comfort that*

economic value is not eroded by actions taken by the other. BLRC envisioned the role of professionals as *'critical to ensure a robust separation of the Adjudicator's role into ensuring adherence to the process of the law rather than on matters of business, while strengthening the efficiency of the process'* and hence as one of the four key pillars of the Code.

The Code provided for the IP – as a person enrolled under section 206 with an Insolvency Professional Agency (IPA) as its member and registered with the Insolvency and Bankruptcy Board of India (IBBI) as an IP under section 207. These professionals are a presently part of corporate insolvency and bankruptcy processes. IPs act as Interim Resolution Professional (IRP)/ Resolution Professional (RP)/ Liquidator according to the process which they are part of.

Qualifications for IPs

The UNCITRAL Legislative Guide on Insolvency Law while emphasising the role of an 'insolvency representative' indicates that, *'... it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only effective and efficient conduct of the proceedings but also that there is confidence in the insolvency regime'*. The BLRC, emphasising the role of IPs states that, *'the adjudicator depends on the specialised skills and expertise of the IPs to carry out these tasks in an efficient and professional manner'* making it clear the need for high standards in these professionals in terms of knowledge, skill and character. The Code provides for all this through the eligibility conditions for registration as an IP.

The Board through the IBBI (Insolvency Professionals) Regulation, 2016 (IP Regulation) notifies the qualifications, experience etc., required for professionals to register as an IP. The role of an IP requires understanding legal processes and to deal with economic and financial aspects of businesses. The Code recognises five classes of career professionals, namely Chartered Accountants (CA), Company Secretaries (CS), Cost Accountants (CoA), Lawyers, and persons with managerial experience as being eligible for registration as IP. These professionals are expected to possess knowledge dealing aspects of law, finance, company affairs and economics. This knowledge offers the plank, on which the additional knowledge required for insolvency practice is sought to be built and they are best placed to have the necessary knowledge required in the implementation of the Code. The kind of hard and soft skills required to perform the role of IP with any degree of success is immense. The years of experience criteria – 10 years of experience as a member of the ICAI, ICSI, ICMAI or a Bar Council or 15 years of experience in management is expected to have built this in the professionals.

The Limited Insolvency Examination

The Limited Insolvency Examination covers areas of economics, finance, accounts, law in general, company affairs etc., and in depth understanding of the Code and its operation. The requirement for clearing the examination within the last one year to be eligible for registration is essentially a test of knowledge of the Code and the latest developments in processes and jurisprudence in the field. The examination acts as a filtration mechanism that assesses an individual's understanding and clarity about latest developments in the field.

The examination commenced on December 31, 2016 and has completed four phases – each one with an updated syllabus in line with the changes to the Act and jurisprudence. By end of March, 2020, 11,451 candidates appeared in the examination and 4147 were successful (36 per cent), of which 428 were women (10 per cent) and over half of them are 40-60 years old. The age, though higher than in any other profession, reflects the years of experience required to qualify and that experienced professionals

are able to perform better in the examination. The average number of attempts to clear the examination was 5.6. Around 38 per cent of these candidates are from the North India and 60 per cent are based in a metropolitan city.

The Code also provides for successful completion of the Graduate Insolvency Programme (GIP) as an alternative qualification. The Board approved the delivery of this course in the Centre for Insolvency and Bankruptcy, Indian Institute of Corporate Affairs. Post-graduates with major subjects in Economics, degree in Finance, Commerce, Management and Insolvency, CA, CS, CoA, Advocate, B.E/B.Tech degree is eligible to pursue the course. The course is designed to attract young talent, not above 28 years of age, into the insolvency profession and includes experiential learning through internships.

Registration of IPs

The registration of IPs is the entry point for all eligible professionals. The number of professionals registered was 96 as of March 31, 2017 and has steadily grown to 3014 by March 31, 2020. Of the 4147 professionals who cleared the examination in the same period, only 3014 have registered as IPs (73 per cent). It is seen that 55 per cent of the registered IPs are CAs followed by CSs (18 per cent) and persons with managerial experience (15 per cent). IPs are also professional members of IPA⁸. Of the three IPAs, IPA - ICAI has about 62 per cent of the registered IPs as its members followed by IPA-ICSI with 30 per cent and the IPA- ICAI (Cost) with 8 per cent of the registered IPs as members. There is a general tendency of professionals to choose the IPAs of their parent professions to enrol as a member. Advocates seem to prefer the ICSI Institute of Insolvency Professionals, and professionals with managerial experience are mostly registered with ICAI IPA or the ICSI IPA.

Only 36 per cent of women professionals who appeared were successful (whereas 43.8 per cent of men who took the exam succeeded). Amongst registered IPs, the number of women was 275 i.e., 9 per cent. Women participation was lowest amongst IPs from managerial background (4 per cent) and participation was highest in IPs with Company Secretaries background (12 per cent). Women participation amongst IPs seem to reflect the participation rates in the parent professional streams.

Qualities of an IP

Successful administration of any insolvency resolution process depends on the economic actors who conduct it (Cork Committee, 1982). The responsibilities of an IP begin with the application being admitted by the adjudicating authority. The powers of erstwhile board of the corporate debtor (CD) stand suspended and managing the affairs of the company is vested with the IP. The task for a board of directors must now be done by the IP, albeit with and often without, support from the suspended management and employees. In his endeavour to preserve the value of the corporate debtor he/she must take custody of assets, raise funds as needed, appoint professionals, and ensure running of day to day operations. He/ She is key to balancing interests of the various stakeholders – he/she must remain unbiased for this to be achieved. The BLRC report identified two sources for an insolvency resolution to fail: One, collusion between parties involved and the other, poor quality of execution itself. It is, therefore, imperative that IPs maintain the highest levels of professional standards.

The first test of an individual's character is assessed at the time of registration. The IP Regulation [Regulation 4 (g)] requires that for registration as IP individuals need to be 'fit and proper'. For determining whether an individual is fit and proper under these Regulations, the Board may take into account any criteria as it deems fit, including but not limited to the following criteria-

- integrity, reputation, and character,
- absence of convictions and restraint orders, and
- competence, including financial solvency and net worth.

The Board has time and again reiterated and upheld this concept of 'fit and proper' as can be seen in various orders⁹ passed by it. Application for registration as IPs have been rejected in cases where criminal case¹⁰ have been filed for failing to comply with orders of Company Law Board, for being party to a conspiracy to cheat the Government, for offences like cheating, dishonesty as reflected when papers were signed without contents being verified. The conduct of the professional in the personal fronts are also accounted for. Rejections have occurred where allegations/cases are pending in matters like Dowry or outraging the modesty of a women.

Once registered, the IP is bound by the Code of Conduct while on or off assignments. The IPAs and the Board have the mandate to monitor the conduct of IPs and have instituted due processes to investigate any misconduct by the IP [Regulation 11 of IP Regulations]. The Code provides penalties for certain actions of the IP which are not in conformity with the Code [Chapter VII of the Code] and acceptable standards of behaviour.

The Courts have also clarified that the Board is competent to constitute a disciplinary committee, constitute Investigating Authority [Section 220 of the Code] and if after such investigation the Board finds that a criminal case has been made out against the insolvency resolution professional then IBBI has to file a complaint in respect of the offences committed by him.

Workload and earnings for IPs

As of March, 2020, there were 3774 corporate insolvency resolution processes (CIRP) that had commenced. Each CIRP provides two assignments – one as IRP and one as RP. The same IP could serve as both IRP and RP or there could be a change. As of March 2020, there were 914 liquidation orders and each liquidation provide one assignment for an IP to serve as Liquidator. The total assignment available during the three years since enforcement of the Code for IPs was 8,462. The IPs in addition to the above roles envisaged in the Code have been providing advisory and consultancy services. At least 155 IPs disclosed providing such services in the year 2018-19.

The Adjudicating Authority (AA) has noted that the workload of the IP is a factor that will affect the progress of the time-bound resolution process. In the Lanco Infratech Limited case¹¹, the AA did not approve appointment of one IRP with an observation:

Therefore, we agreed with the submissions of the respondents considering his previous three assignments to large companies and the current corporate debtor itself is a large company we are of the prima facie view that the proposed IRP would not find sufficient time to act as IRP for the respondent Company. Most of the activities prescribed in the IBC code are time bound. Therefore, we had suggested to change the aforesaid IRP, accordingly the financial Creditor viz. IDBI proposed another IRP and accordingly, we appointed him as an IRP for the Corporate Debtor.

A similar observation was also made in the LML Limited case¹². The Board has observed that '*a few IPs are handling too many assignments under the Code, which is detrimental to the institution of IP in the long run*¹³ and has opened consultations¹⁴ to answer relevant questions on restriction on number of cases handled by an IP at a time, criteria for such restrictions and the threshold for such restrictions etc.

The IPs are required to disclose their fees after the completion of every assignment and annually. Information available from such disclosures¹⁵ for the year 2018-19 show that the average earnings per assignment for an IRP was Rs. 5.20 lakh, for a RP was Rs. 31.6 lakh and for a Liquidator was Rs. 10.2 lakh. Average earnings from advisory and consultancy services was Rs. 9.43 lakh in the year 2018-19.

Earnings of IPs is highly skewed in favour of male IPs as against female IPs. It can be seen that while a male IP, on an average, earned Rs. 5.35 lakh for an assignment as an IRP a female IP earned just Rs. 3.85 lakh on average. Similarly pay gaps are visible in roles of RP and liquidator. The Monster Salary Index¹⁶ published in March 2019, women in India earn 19 per cent less than men. IT services showed a sharp pay gap of 26 per cent in favour of men, while in the manufacturing sector, men earn 24 per cent more than women. In the case of IPs the pay gap (based on average earnings for all assignment) is 37 per cent in favour of men.

In the eyes of the Courts

The role of IPs has been under scrutiny and have seen both praise and criticism from several quarters. The Courts have noted on record its praise for the professionals¹⁷, viz.

The CoC has expressed its gratitude to the resolution professional for his hard work and congratulated him for his efforts to complete the CIRP within the extended period of 270 days. We also do not find any adverse remarks against the resolution professional but would like to endorse the view expressed by the CoC as this is a unique case wherein a Farm dealing with Poultry has been successfully run by him enabling him to get a resolution applicant to take over the assets above the fair market value and the financial creditors have voted the resolution plan with 100%.

and its disapproval¹⁸, as:

The very object of the Code is to revive a company under the CIRP and not to liquidate it. In the instant case it is clear that the resolution professional has omitted to perform his statutory duties and responsibility nor the COC seems to have shown much interest and made efforts to achieve the object of the Code for exploring the possibilities for revival of the company.... it is amply clear that the Resolution Professional has not invited prospective resolution applicants as per Section 25 of the IB Code...

CHALLENGES AND SUGGESTIONS¹⁹

Challenges faced by IPs in their role as RPs start from the time, they take over the CD. The IP has no time to develop any understanding about the CD's business but is expected to make meaningful decisions to keep the business operational. Factors influencing the recommendation of an IP for a particular assignment are not clearly identifiable but experience of a professional in the specific sector/industry should be a consideration. The Board provides a panel of IPs eligible to take up assignments across 15 zones for use by the AA but does not include information regarding relevant experience²⁰. Information regarding specialisation/ relevant experience of the IP, if made available in public domain will enable creditors/AA to make more appropriate recommendations.

The cooperation of earlier management and employees of the CD with the IRP/RP, is required to keep the business operations smooth, ensure statutory compliances, ensure availability and accuracy of information etc., and is mandated under the Code. There have been several cases²¹ where the courts

have come in aid of the IPs to ensure cooperation of the promoters of the CD, erstwhile management, employees etc. It has been, *'...clarified that IRP is acting as a Court Officer and any hindrance in the work of CIRP will amount to contempt of court. It is further directed to the promoter/director, officials and auditor of the company to fully co-operate the RP in the completion of CIRP'* and the AA also directed police assistance so that the RP can take full control of the company without any interference from ex-Director's or his officials.²² However, such cooperation is often not forthcoming and enforced through an order of the AA such *'coerced support is not as valuable and expedient as voluntarily given support'* (Iyer and Sood, 2019²³). Meetings of the committee of creditors (CoC) is the decision-making forum in a CIRP but also the working of which enables *'the balancing of interests of stakeholders'*²⁴. The Code enables participation of management and representatives of employees of CD to participate without voting rights. The IP should encourage their participation and engagement in these meetings to keep them part of the process while remaining cautious about their vested interests in the CD from hampering the process. The hallowed process of the CoC meetings must be harnessed for achieving the objectives of the Code.

The IRP/RP is vested with powers and responsibility of the Board of the CD and management of its affairs immediately after appointment. The Code enables him to appoint accountants, legal or other professionals to preserve and protect the assets of the CD, including the continued business operations of the CD [Section 25 of the Code]. There is lack of clarity on who can be appointed, what should be the nature of such appointments, their fee/remuneration etc which has been a constraint for the RPs. The Board may consider providing guidelines on such appointments to enable harnessing this provision efficiently and to ensure transparency in such appointments.

As streams of insolvency and bankruptcy processes evolve there is a need for professionals to specialise. The exam and registration system would have to accommodate such specialisation in order to ensure that processes under the Code find the professional best suited for the purpose. Several countries, including the UK have partial / separate licences for personal and corporate insolvencies and evaluation systems also vary accordingly. The current examination scheme has been successful in kick-starting the profession but has scope for further improvements. Being based on objective type questions it emphasises assessment of theoretical knowledge. The limited weightage for case studies constrains evaluation of situational understanding of the candidates performing in real life conditions. An examination that is based on scenario analysis and case studies can be a better way of assessing professionals. The examination system in the UK is an open book examination involving case analysis.

Insolvency regime in India is evolving at a fast pace which brings forth opportunities and challenges. Developments include the operationalisation of individual insolvency including a fresh start process, a separate track for dealing with insolvency resolution of MSMEs, cross border insolvency and group insolvency measures under the Code. IPs have been steadfast in their role as a key pillar to the Code so far and need to be prepared to hold the mantle into a more challenging future.



NOTES

¹ Louis Edward Levinthal (1919), “The Early History of English Bankruptcy”, University of Pennsylvania Law Review and American Law Register, Vol. 67, No. 1, pp. 1-20.

² Report of the Review Committee on Insolvency Law and Practice (1977).

³ The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 continue to be in force for insolvency of individuals and partnerships.

⁴ The Report of the Bankruptcy Law Reform Committee, 2015.

⁵ Annual Report 2019-20, Ministry of Corporate Affairs.

⁶ Board for Industrial and Financial Reconstruction, internet archive at <http://bifr.nic.in/aboutus.htm>.

⁷ Sengupta Rajeswari, Sharma Anjali and Thomas Susan (2016), “Evolution of the insolvency framework for non-financial firms in India”, Working Paper, Indira Gandhi Institute of Development Research, June.

⁸ IPAs are registered under section 201 of the Code and are frontline regulators of IPs. There are three IPAs namely, (s) Indian Institute of Insolvency Professionals of ICAI, (b) ICSI Institute of Insolvency Professionals and (c) Insolvency Professional Agency of Institute of Cost Accountants of India. These have been established, by the professional institutes regulating the professions of accountancy, company secretaries and cost accountancy.

⁹ Orders of the Disciplinary Committee, IBBI.

¹⁰ *M/s Alchemist Asset Reconstruction Co. Ltd. v. M/s Hotel Gaudavan Pvt. Ltd.*, [CP/CA. No.-(IB)-23(PB)/2017].

¹¹ *IDBI Bank Limited v. Lanco Infratech Limited*, [CP (IB) No. 111/7/HDB/2017].

¹² *Anil Goel v. LML Ltd.*, [CP No. (IB)55/ALD/2007 with CA No.73/2018].

¹³ Discussion paper on the issue of number of assignments handled by Insolvency Professionals, https://ibbi.gov.in/DiscussionPaper_Restrictingthe

numberofassignmentstobehandledbyIP_Final_new.pdf .

¹⁴ Open for public comments till 25th July 2020.

¹⁵ Disclosures with Insolvency Professional Agencies –<http://ipaicmai.in/IPANEW/Disclosure.aspx>.

<http://icsiip.com/Authorisation-for-Assignment/Disclosures>.

https://www.iiipicai.in/index.php?option=com_content&view=article&id=105:knowledge-partnership-iiipi-and-icaew-3&catid=23:scroller&Itemid=243.

¹⁶ Monster Salary Index Survey, http://media.monsterindia.com/logos/research_report/MSI_FINAL.pdf.

¹⁷ *Shri Krishna Agri Projects Private Limited v. Feedatives Pharma Private Limited*, [CA(IB) No. 194/KB/2019, 964 & 848/KB/2019 in CP (IB) No. 187/KB/2018].

¹⁸ *Sunrise Polyfilms Pvt. Ltd. v. Punjab National Bank* [Inv P.5 of 2018 in IA 27 of 2018 in C.P. (I.B) No. 89/7/NCLT/AHM/2017].

¹⁹ These are personal opinions of the authors and do not reflect the position of the Board.

²⁰ The panel is provided on the website of the IBBI twice a year.

²¹ *M/s. Subasri Realty Private Limited v. Mr. N. Subramanian & Anr.*, [Company Appeal (AT) (Insolvency) No. 290 of 2017]; *State Bank of India v. Essar Steel India Limited*, [CP No. 40/7/NCLT/AHM/2017]; *Bank of India v. Tirupatu Infraprojects Pvt Ltd.*, [CP No. IB 104(PB)/2017].

²² *Shivam Water Treaters Pvt. Ltd.*, [CP (IB)-1882-MB-2018].

²³ Iyer, Vijaykumar and Sood, Abhishek (2019): ‘Role of Resolution Professionals’, Insolvency and Bankruptcy Code: A Miscellany of Perspectives, IBBI.

²⁴ It is a stated objective of the Code. Preamble to the IBC.