

Insolvency and Bankruptcy Board of India
Discussion Paper

21st June, 2018

Subject: Discharge from Responsibility as Interim Resolution Professional, Resolution Professional or Liquidator of the Corporate Processes under the Code

The Insolvency and Bankruptcy Code, 2016 (Code) consolidates and amends the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 specifically aims to promote resolution over liquidation. These objectives of the Code, particularly resolution, can be achieved only if the insolvency resolution and other processes under the Code are accomplished in a time bound manner. In fact, the ‘time bound’ feature of the Code distinguishes it from the erstwhile legislations in the matter. For example, the Code permits 180 days for completion of corporate insolvency resolution process (CIRP). It permits one-time extension up to 90 days by the Adjudicating Authority in deserving cases.

2. It is important to appreciate the significance of timeline. The corporate debtor was not in pink of its health when it defaulted and hence required resolution. During the CIRP period, an insolvency professional exercises the powers of the Board of Directors and manages the operations of the corporate as a going concern and there is uncertainty about ownership and control of the corporate, post resolution. The enterprise value of the firm reduces exponentially with time, as prolonged uncertainty about its ownership and control and general apprehension surrounding insolvency leads to a flight of customers, vendors, workers, etc. A very long CIRP period is likely to push the corporate towards liquidation. The Code, therefore, mandates closure of the CIRP at the latest by 180th day. The essence of the Code is timeline and in the matter of JK Jute Mills Company Ltd., the NCLAT has held this timeline to be mandatory.

3. Under the Code., an IP plays a central role in resolution, liquidation and bankruptcy processes of persons (companies, LLPs, partnership firms and individuals). He takes important business and financial decisions that may have substantial bearing on such persons and its stakeholders, including the value of the insolvent’s asset, negotiates deals, settles claims, conducts meetings of the committee of creditors, invites and examines resolution plans, reports on the conduct of the directors of the company and discharge other onerous responsibilities . He is responsible for getting the best possible outcome in each case. He is, in fact, the driving force and the nerve-centre in an insolvency proceeding. A whole array of statutory and legal duties and powers is vested in him. A whole array of statutory and legal duties and powers is vested in him. Section 20 of the Code requires him to makes every endeavour to protect and preserve the value of the property of the corporate debtor and manage its operations as a going concern. Section 23 requires him to conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor. He exercises powers of the Board of Directors of the corporate debtor under resolution. The specific duties and responsibilities of an IP during CIRP are detailed in the Code and regulations made thereunder.

4. IP is a key institution of insolvency regime. The Bankruptcy Law Reforms Committee (BLRC) states: *“This entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.”* Given its role, though a client proposes the name of an IP for appointment, he is actually appointed by the Adjudicating Authority. He may be removed from a process by the Adjudicating Authority if it is not satisfied with his performance. The appointment and removal by the Adjudicating Authority secures and sanctifies the position of IP.

5. The European Bank for Reconstruction and Development observes: *“Insolvency process cannot be imagined without the involvement of an IP who in many respects is the lynchpin of the process; the link between the court, creditors, and the debtor.”* As per the Legislative Guide on Insolvency Law, “However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”

6. The law facilitates and empowers the IP to discharge his responsibilities effectively. It obliges every officer of the firm to report and the promoter of the firm to extend all assistance and cooperation to him. There is an assurance of supply of essential goods and services to, and a moratorium on proceedings against, the firm. The Code empowers the IP to appoint professionals to assist him. He can seek orders from the Adjudicating Authority if he comes across any preferential, undervalued, extortionate, or fraudulent transaction. He can take support services from insolvency professional entities. He has protection for actions taken in good faith. His conduct can be investigated only by the IBBI/IPAs which has to follow a due process for the purpose. There is bar on trial of offences against an IP except on a complaint filed by the IBBI.

7. Thus, the Code mandates time bound processes. It assigns this responsibility to an IP. The BLRC observes: *“In the case of insolvency resolution, a failure of the process may result from two main sources: collusion between the parties involved and poor quality of execution of the process itself. Hence, it is important that the professionals responsible for implementing the insolvency resolution process adhere to certain minimum standards so as to prevent failures of the process and enhance credibility of the system as a whole.”* The Code of Conduct requires that an IP must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties. The law does not envisage any discontinuity or break in a process. It does not envisage any break for an IP in a process; nor does it provide time for switchover from one IP to another. When the life of a person undergoing resolution is at a stake, the process cannot have a

break by resignation or otherwise. This is why section 16(5) of the Code mandates the IRP to continue in office till the date of appointment of RP under section 22.

8. There have been a few instances where the Adjudicating Authority has expressed concern about resignation or unwillingness of IPs to continue as RP or act as liquidator:

- a. In the matter of **Arun Kumar Jain v. Maa Tara Industrial Complex Pvt Ltd, C.P. (IB) No. 318/KB/2017** and **Arun Kumar Jain v. Upadan Commodities Pvt Ltd, C.P. (IB) No. 320/KB/2017**, the Hon'ble NCLT, Kolkata observed:

“Let show cause notice be issued against the IRP as to why after accepting the work of resolution professional, he is resigning, without prior permission of the adjudicating authority.”

- b. In the matter of **Indian Bank v. M/s. Athena Demwe Power Ltd., IB NO. (IB)-244(ND)/2017**, the Hon'ble NCLT observed:

“....It is noticed that the period of 180 days for arriving at a Resolution Plan is expiring on 27th March, 2018. It is therefore incomprehensible as to why the RP has waited so long so as to seek a discharge. There is no justification of the work done during the period.....”

- c. In the matter of **M/s Takshill Enterprises v. M/s IAP Company Pvt. Ltd., C. P No. IB-446(ND)/2017**, where CIRP could not start for two months, the Hon'ble NCLT, New Delhi Bench observed:

“...specific relevance is also placed upon consent and Expression of Interest provided by the IRP to be empaneled in the list of IPs or Liquidators as forwarded to this Tribunal and having given his consent to act as a Resolution Professional or Liquidator for a period of 6 months commencing from 01.01.2018 to 30.06.2018, it is stated that the IRP should not be discharged from his duties to act as an IRP in relation to the CD as sought for in the Application and in the circumstances the functions of IRP being of serious nature and in the nature of public functions, the casual attitude should not be entertained.”

9. Keeping in view the time bound nature of the processes and the role of IP in these processes, it is proposed to allow an IP to seek discharge from a process only on one ground, that is, he is incapacitated to continue as IRP, RP or Liquidator. He can be incapacitated only in two ways: (a) physically: he suffers from health problems rendering him unable run the process, to the satisfaction of the Adjudicating Authority, and (b) legally: he becomes ineligible under the law. In either case, the approval of the Adjudicating Authority may be necessary. If an IP seeks discharge from process on any other ground, he may be debarred from taking any fresh assignment for a period of five years.

10. It has been the endeavour of the Board to engage with the stakeholders through public consultation. Accordingly, comments and suggestions are invited at ipmonitoring@ibbi.gov.in by 15th July, 2018.
