

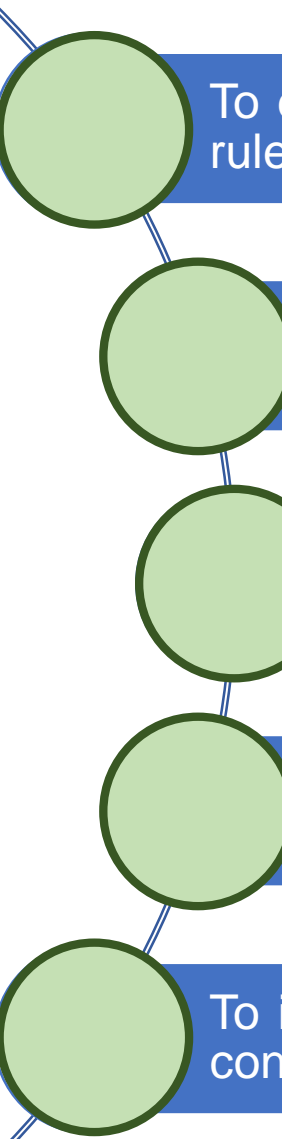
**COMMON ISSUES OBSERVED
DURING INSPECTIONS OF
INSOLVENCY PROFESSIONALS**

BACKGROUND

- Clause 18 (e) of Bye-Law VIII of IBBI (Model Bye-Laws & Governing Board of Insolvency Professional Agencies) Regulations, 2016 read with Bye-Laws of Insolvency Professionals Agencies (“IPAs”) and Monitoring Policy of IPAs provides for evaluation of the performance of the members through Desktop Surveil and On-Site Visits which includes inspection of the Insolvency Professionals (“IPs”).



OBJECTIVE OF CONDUCTING INSPECTION



To ensure that IP complies with the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") and rules and regulations made thereunder in true letter and spirit.

to ascertain whether adequate internal control systems, procedures and safeguards have been established and are being followed by a service provider to fulfil its obligations under the relevant regulations

To ensure that requirements of record maintenance as required under the Code and rules and regulations made thereunder are duly complied and IP has worked keeping in consideration the interest of all the stakeholders at large.

To strengthen the regulatory framework for IPs by identifying, and responding appropriately to misconduct and poor performance.

To increase the confidence in insolvency framework and regulatory regime and to ensure better and more consistent outcomes for all stakeholders.

PROCESS OF INSPECTION

Constitution of Inspection Authority (IA)



Issuance of notice of inspection to IP along with Pre Inspection Questionnaire



Desktop monitoring of the assignments to be inspected



On site visit to IP's office for physical verification of records



Submission of Interim Inspection Report to MD of IPA for review and thereafter issuance to respective IP for his comments (if any)



Issuance of Final Inspection Report to IP after including the comments (if any) provided by IP on Interim Inspection Report



Placing of Final Inspection Report before Monitoring Committee of IPA for further action (if any)

ERRORS AND OMISSIONS OBSERVED DURING INSPECTION

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Public Announcement in newspaper	Regulation 6 of IBBI (CIRP) Regulations,2016	Public Announcement made in the regional newspaper is in English language instead of regional language.	The purpose of publishing public announcement in 2 newspapers (English & regional language) is to reach majority of stakeholders even those who do not understand English language. Publishing of public announcement in English language in regional newspaper is invalidating the intent of the regulations which should not be followed.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Verification of Claims	Regulation 13 of the IBBI (CIRP) Regulations,2016	List of claimants is not maintained properly. Many important fields like date of receipt of claim, type of claim, date of verification of claim, security interest (if any) is missing.	IP should update list of claimants on regular basis as and when any claim is received and should duly record date of acceptance and verification of claim, reason of rejection of claim, type of claimant, form pursuant to which claim is received, mode of receipt of claim, security interest (if any) and any other important field (if any).
Sharing of notice of CoC meeting via e-mail	Regulation 20 of the IBBI (CIRP) Regulations,2016	Subject line of sharing notice and agenda of CoC meeting not in accordance with the format specified in CIRP regulations.	Subject line in e-mail sharing notice of CoC meeting shall state the name of the corporate debtor, the place (if any), the time and the date on which the meeting is scheduled.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Declaration of confidentiality from CoC members	Regulation 27 and 36 of IBBI (CIRP) Regulations,2016	Non obtaining of declaration of confidentiality from CoC members while sharing Information Memorandum and fair and liquidation value of the corporate debtor.	RP shall mandatorily obtain declaration of confidentiality from the CoC members before sharing Information Memorandum and fair and liquidation value of the corporate debtor.
Consent to act as Resolution Professional	Regulation 31(IA) of the IBBI (CIRP) Regulations,2016	Assignments where Interim Resolution Professional is continuing as Resolution Professional is not providing their consent to act as the same in the manner provided in the Code.	Interim Resolution Professional before continuing as Resolution Professional shall duly provide its consent in Form AA as provided in respective regulations.
Compliance of Companies Act, 2013 during insolvency process	Section 17(2)(e) of the Code	In many cases the MCA compliances i.e. filing of financial statements, annual returns, other ROC related forms have not been complied by IP.	The Insolvency professional shall make every endeavour to keep the company going concern with all possible compliances.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Non maintenance of website during CIRP	Regulation 6(2)(b)(ii), 13(2)(c), 36A(2)(ii) of IBBI (CIRP) Regulations, 2016 and Clause 21 of Code of Conduct of IBBI (IP) Regulations,2016	Non updation of the website of the Corporate Debtor w.r.t. ongoing CIRP process despite of having the website.	Corporate debtors who do not have the website, may engage some agency who can provide temporary website to host details of CIRP. Further, IBBI is also working to develop functionality for the benefit of all the stakeholders. IP must ensure that confidentiality of the information relating to the insolvency resolution process is maintained at all times.
Exorbitant Fees charged by the Authorised Representative (AR)	Regulation 16 A of the IBBI (CIRP) Regulations,2016	Irrespective of specific fees stipulated in the regulations for AR, the AR was charging much higher fees which even got the approval of the resolution professional. AR are allowing home buyers to attend CoC Meetings.	IPs acting as AR should charge fees in accordance with the amount mentioned in specified CIRP Regulation and AR role is only limited to attend and vote meeting of committee of creditors on behalf of class of creditors.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Compliance with timelines	Regulation 40 A of IBBI (CIRP) Regulations,2016 and Regulation 47 of IBBI (Liquidation Process) Regulations,2016	In many cases IPs do not adhere with the timelines prescribed under the Code and regulations. For example: circulation of notices, minutes, Invitation of Expression of interest, determination of fraudulent and other transactions etc. are generally being delayed by the IPs.	An IP must strictly adhere to the timelines prescribed under the provisions of the Code and the regulations made thereunder. He must act with utmost care and caution and must not be negligent while performing his duties during insolvency resolution or liquidation, as the case may be.
Outsourcing of duties	Section 18 and 25 of the Code read with IBBI Circular dated 3 rd January 2018	It has been observed the scope specified in the engagement letter issued to the professional is regarding the assistance to be provided to IP with regard to the core duties and responsibilities, performance of which is the sole responsibility of IP.	IP shall not outsource any of his core duties and responsibilities otherwise the essence of the Code and importance of the profession of an IP will be defeated.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Appointment of Registered Valuers	Regulation 27 of IBBI (CIRP) Regulations, 2016	IPs are appointing registered valuers duly registered with IBBI however providing them engagement letters in the name of their firms/companies which are not IBBI Registered Valuer Entity.	IP should ensure that the engagement letter (in writing) is issued to either IBBI Registered Valuer/Registered Valuers Entity clearly defining their name, address, IBBI registration number, their scope of work, fees and timeline within which report has to be provided.
Reporting requirements of IPs under Code, Regulations and Circulars	Section 208 (2)(d) of the Code read with IBBI Circular dated 16 th January 2018, 12 th June 2018 and 14 th August 2019 and Monitoring Policy of IPA	IPs are not complying with the reporting compliances of IPAs/IBBI with accuracy and within defined timelines. Lapse of information has been observed while filing disclosures and CIRP forms on IBBI Portal.	Before submitting any information to IBBI/IPA, IPs should cross check the information with the supporting documents as many information provided is available for public view on IBBI/IPA website. Providing wrong information may pose difficulty for IPs. IPs should have a mechanism in place to periodically check the status of compliances.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Appointment of others professional for assistance	Section 20(2)(a) of the Code read with Regulation 33(4) of IBBI (CIRP) Regulations, 2016 and Code of Conduct provided under IBBI (IP) Regulations, 2016	<ul style="list-style-type: none"> a) Non providing of a defined engagement letter to the appointed professionals and also non obtaining of declaration of independence from the appointed professional. b) Incomplete recording in minutes with regard to the engagement of other professionals. c) Unavailability of invoices on part of services obtained from the appointed professionals. 	<ul style="list-style-type: none"> a) Before engaging any professional, IP should obtain declaration of independence from the concerned professional in terms of IBBI Circular dated 16th January 2018. b) Engagement letter (in writing) should be issued to every appointed professional clearly mentioning the scope of work, fees, time period within which assignment is to be completed and maintenance of confidentiality with regard to the information shared and engagement should be properly recorded in minutes of CoC meeting. c) IP should make payment to professional only after receipt of invoice with regard to the services.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Appointment of common professionals by IPs for their multiple assignments	Clause 3 and 3A of Code of Conduct specified under IBBI (IP) Regulations, 2016	IPs have appointed common professionals in most of their assignments which may depicts presence of biasness, conflict of interest, coercion or undue influence of any party, whether connected to the insolvency proceedings or not.	<p>a) IP should invite any professional after duly inviting quotations from multiple professional and then analysing scope of work with the proposed fee.</p> <p>b) IP must ensure that the professionals appointed should not have any conflict of interest. Further, if common professionals are being appointed in every case it will lead to some indirect sort of connection/undue influence.</p>
Appointment of suspended directors as KMP of the corporate debtor during CIRP	Section 17 of the Code	a) In many cases it is observed that IPs appoint suspended directors of the corporate debtor as KMP for the purpose of assisting them in managing the operations of the corporate debtor.	a) It is sole responsibility of IP to take over the charge of the management of the corporate debtor undergoing insolvency process.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Handover of charge by IRP to RP	Section 23(3) of the Code	In many cases handover of records to the succeeding IRP/RP was not in proper manner. The insolvency professional did not provide the complete records of the CIRP which hampers the work of succeeding IP and which is against the code of conduct.	It is the duty of the IRP/RP to handover the complete records, details, information to the succeeding resolution professional.
Mentioning of voting share in CoC Minutes	Regulation 23(3)(c) of the IBBI (CIRP) Regulations, 2016	IPs are not indicating the voting share of CoC members in the minutes of CoC meeting and also against the agenda item which requires voting on part of CoC members. IPs are mentioning only pass/fail against the resolution.	It is recommended to include list of creditors along with their voting share and change in list of creditors/voting shares (if any) in the minutes of CoC meeting. IP should mention the percentage of voting by which any resolution stands pass/fail.

PARTICULARS	PROVISION	ERROR OBSERVED	ADVISABLE PRACTICE
Conduct of CoC Meeting	Regulation 18 to 26 of IBBI (CIRP) Regulations, 2016	<ul style="list-style-type: none"> a) Notice enclosing agenda do not provide segregation of the item to be voted upon in the CoC meeting and option to participate via video conferencing or other audio/visual means. b) Absence of attendance sheet or incomplete signing on part of attended. c) Non circulation of minutes of CoC meeting within 48 hours from the conclusion of meeting. d) Minutes of CoC meeting do not specify the mode of participation of CoC members. 	<ul style="list-style-type: none"> a) Notice of CoC meeting enclosing agenda should separately record the items to be discussed and items to be voted upon in the meeting for better understanding as a whole. b) Attendance sheet should be complete in all respect and signing should be ensured within the meeting itself. c) IP should circulate the draft minutes of the concluded meeting within 48 hours for inviting comments (if any) of CoC members on the draft minutes thereby specifying the days within which comments have to be provided. d) Minutes shall specifically disclose the particulars of the participants who attended the meeting in person, through video conferencing or other audio and visual means.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

INTEGRITY AND OBJECTIVITY

In the matter of IP Mr. Mukesh Mohan, IBBI vide its order stated dated 18th April 2018 held that an IP should not mislead the CoC, NCLT and IBBI during CIRP and RP cannot make false claims in the Expression of Interest (EoI) and cannot take post facto approval of the CoC. Also IP has been debarred for 10 years to practice the profession of IP.

Background of the case:

The CoC approved the draft advertisement for EoI and that draft did not contain the requirement of a CA certificate for determination of eligibility of the resolution applicants. The minutes of the meeting of the RP with Forensic Auditors and PNB held on 21.12.2017 show that an officer of the PNB, who is one of the creditors, made changes in the draft advertisement for EoI and finalized the draft, incorporating the requirement of CA certificate. This change did not have approval of the CoC. Therefore, an IP cannot act beyond his authority. The IP further appointed a registered valuer on the recommendation of one of the influential Financial Creditors thereby violating his independence in the matter. He shall not be biased in favour of an influential financial creditor.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

INTEGRITY AND OBJECTIVITY

In the matter of IP Mr. Martin Golla, IBBI vide its order stated dated 13th November 2018 held that an IP shall not make any misleading statement while handling any assignment under the Code.

Background of the case:

An ineligible Resolution Applicant, the sole FC and the RP colluded to ensure that the people responsible for insolvency of the CD paid a fraction (33%) of the claim amount to the FC and wrested the control and management of the CD. They misused the CIRP to pass on an OTS(One Time Settlement) as resolution plan and to wipe off claims of creditors, which was not possible otherwise. **CIRP was not conducted in fairness and diligent manner as he compromised his independence and sided with the parties to facilitate his favored financial Creditors to arrive at the agreement (settlement) and vitiated the entire CIRP.**

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

INDEPENDENCE AND IMPARTIALITY

(1) In the matter of ICICI Bank Limited v/s Essar Power Jharkhand Ltd., NCLT vide its order dated 16th January 2018 advised that IRP should not certify in Form 2 that application is true, accurate, complete and default has occurred as it will hamper the independent fair play of an IP. The IP shall not fill up such performa as it should be wholly alien as per the principle to act fairly. IBBI was directed to relook on this part. Petitioner was directed to name another IRP.

(2) In the matter of Mr. Dinkar T. Venkatasubramanian, IBBI vide its order dated 23rd August 2018 imposed a penalty of Rs. 1 Lakh since the professional fees of IP was paid to E&Y Ltd. instead of his own personal account. IBBI directed that an RP cannot authorize a firm/company to raise invoices for his professional fee on his behalf. He shall not raise the bill towards the fees of IRP/RP through another firm. An IP shall be independent of external influences and he shall not influence the decision or the work of the committee of creditors for undue or unlawful gains. As an outcome of this, IBBI issued a circular on 16th January, 2018 stating that the fees should be the true reflection of his work and should be paid to his bank account only.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

OCCUPATION, EMPLOYABILITY AND RESTRICTIONS

- (1) In the matter of IDBI Bank Ltd. v. Lanco Infratech Ltd., NCLT vide its order dated 7th August, 2017 held** that an IP must refrain from accepting too many assignments, if he is unable to devote adequate time to each of his assignments as per Clause 22, Schedule I of the Code of Conduct for Insolvency Professionals. In this case, IRP was already handling 2 large companies i.e. Binani and Bhushan Steel already.
- (2) In the matter of Apna Scientific Supplies (P) Ltd,** NCLT directed IBBI to remove the name of IP from its panel of Insolvency Professionals list on account of non-appearance on three occasions, despite service of notice. In this case, NCLT observed that IRP is flouting the orders of the Tribunal wilfully, intentionally and avoiding personal appearance. NCLT concluded this as abdication of the duties by the IRP, which is serious in nature. Therefore, the IRP is held to be an unfit person for being given any assignment under the provisions of the Code . The NCLT also imposed a cost of Rs. 20,000/- on the said IRP for his wilful disobedience of the Tribunal's orders and directed him to hand over all relevant records of the Corporate Debtor to the newly appointed RP within a week's time.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

REMUNERATION AND COST

- (1) In the matter of Punjab National Bank Vs. Divya Jyoti Sponge Iron Pvt. Ltd**, NCLT vide its order dated 13th March 2018 held that the Adjudicating Authority has taken a judicial notice of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind with regard to the fate of the corporate debtor, the volume, nature and complexity of CIRP. It observed that it is time to have legitimate guidelines or regulation so as to safeguard and to ensure the prospects of revival of a dying CD.
- (2) In the matter of Shri Srikrishna Rail Engineers Private Limited**, NCLT vide its order dated 22nd November 2017 held that the fees charged by IRP (Bhavana Sanjay Ruia) was quite exorbitant and the same shall be referred to IBBI. The fees charged was Rs. 5 Crores up till first CoC meeting and Rs. 1.75 Crores for subsequent meetings. However, the total outstanding debt was Rs. 4.16 Crores only. Accordingly, IBBI in the said matter suspended her for one year to strengthen her competency and ethical standards. Additionally, IBBI also passed another order against the said IP, who consented to act as IRP of 15 CIRPs for which applications were filed by a professional, who is her husband. In the process, she compromised her independence, integrity and impartiality, even though she has absolutely no experience whatsoever and no capacity. While the Code aims to rescue the ailing CDs, such conduct of an IP ensures just the opposite. Therefore law prohibits an IP from taking too many assignments, if he/she is unlikely to devote time to each of his assignment. IBBI has now debarred her for ten years to practise the profession of IP.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs



TIMELINES

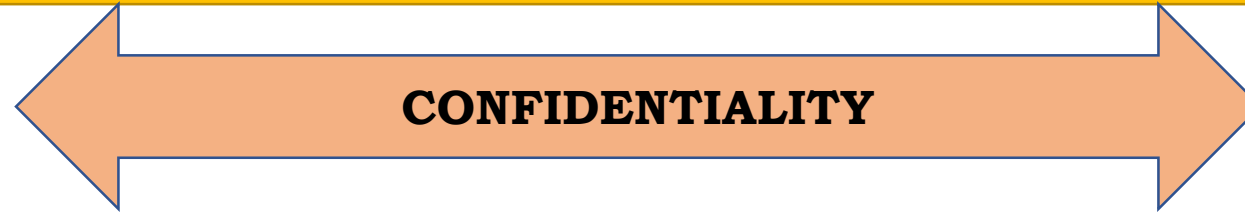
- (1) In the matter of LML Limited**, NCLT vide its order dated 23rd March 2018 held that the RP failed to submit the Progress Report and Resolution Plan within the stipulated 270 days. On the request of the Resolution Professional the time was extended and he did not complete resolution process within time, it was duty of the Resolution Professional to submit the progress report to enable the Adjudicating Authority to pass appropriate order at appropriate stage. As admittedly, the Resolution Professional had not submitted the progress report within 270 days. The RP was not careful in following the timeline prescribed under the Code, and therefore, it was not proper to appoint the RP as liquidator in the case. It directed the RP to handover all the documents to the liquidator to be appointed for not being careful in following the timelines of the Code.
- (2) In the matter of Mr. Dhaivat Anjaria**, IBBI vide its order dated 13th April, 2018 held that the RP should consider the claims he received and should follow the timelines for the CIRP. Failure to consider a claim not only deprives the claimant of his rights, but also deprives the potential resolution applicants to have complete information required to submit a complete resolution plan. While implementing the resolution plan, if the resolution applicant discovers a liability to a claimant which has not been factored into the plan, the resolution plan will be disturbed. He disregarded repeated requests of the Board for a response on the complaint by the claimant. He responded to the Board only after a show cause notice was issued to him. IP made the stakeholder as well as the Board helpless and stated that he was occupies in other engagements.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs

INFORMATION MANAGEMENT

- (1) In the matter of Vijay Kumar Jain v. Standard Chartered Bank and Ors**, Hon'ble Supreme Court vide its order dated 31st January 2019 held that it was noted that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed. Obviously, resolution plans are “matters to be discussed” at such meetings, and the erstwhile Board of Directors are “participants” who will discuss these issues. The expression “documents” is a wide expression which would certainly include resolution plans.
- (2) In the matter of Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors.**, NCLAT vide its order dated 15th May 2018 held that the RP is not only required to give notice of the meeting to the members of CoC, but also to the members of suspended Board of Directors or partners of the corporate person, as the case may be.
- (3) In the matter of IP Mr. Mukesh Mohan**, IBBI held that the RP must not engage in private communication with any member of the CoC.

BEST PRACTICES EMERGING FROM CODE OF CONDUCT FOR IPs



In the matter of Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors., NCLAT vide its order dated 15th May 2018 held that the Resolution Professional is required to examine whether resolution plan confirm the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(s), who has submitted the resolution plan. The resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.