



COC's ROLE IN CIRP UNDER IBC: RECOMMENDATIONS ON BEST PRACTICES

Study By
Indian Institute of Insolvency Professionals of ICAI (IIPI)



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PREFACE

The Study Group constituted by the Indian Institute of Insolvency Professionals of ICAI (IIIP), on the subject of “COC’s Role in CIRP under IBC: Recommendations on Best Practices” is pleased to present this study to the regulator(s) and other stakeholders.

The Committee of Creditors (CoC) and the Interim Resolution Professional (IRP)/ Resolution Professional (RP) have very crucial role under the IBC as even the Supreme Court has reiterated time and again that the commercial wisdom of the CoC is of utmost importance under the Code and should not be interfered with. On the other hand, the IRPs/RPs is regarded as one of the five pillars of the IBC regime. The Apex Court has also upheld the professional sanctity of IRPs/RPs in dealing with insolvency cases. In the matter of the Swiss Ribbons, the Supreme Court has upheld that the IRP/RP is an administrator of the Code and is expected to function under the guidance and the directions of the CoC that controls the CD.

The Study Group has attempted to develop a comprehensive understanding on the subject after elaborate consultation with intra-group and with other professionals/ stakeholders. This Study Group was focused on (i) identifying further challenges, if any, in this crucial interplay between the Members of the CoC and the Resolution Professionals and (ii) recommending best practices in this regard. The key Terms of Reference of this Study was to elicit the views of the Resolution Professionals on the challenges, if any, faced by them in regard to the functioning of the CoC and suggestions, if any, to overcome such challenges to enable the smooth conduct of the Insolvency and Liquidation Processes under the Code and this report encapsulates the key recommendations of the Study Group in this direction, besides suggestions for regulatory intervention.

In pursuant to the terms of reference a survey was conducted among Insolvency Professionals purely on the basis of voluntary participation. The views of participants were collected through a well designed questionnaire based on practical situations encountered by such professionals vis-a-vis the functioning members of the CoC. The survey format also enabled qualitative responses in addition to binary options of Yes or No for the questions raised in the survey. On the basis of the findings and subsequent discussions/deliberations, the Study Group has presented its recommendations on various aspects of the subject i.e. Replacement and Remuneration of Resolution Professional, Data pertaining to Corporate Debtor, Timely approvals to RP, Interim Finance, and Clear Definition of Roles and Responsibilities of members of the CoC.

The Study Group is thankful to IIPI for providing an opportunity to develop the knowhow as above and strengthen the IBC framework. In addition, the group expresses gratitude to several other professionals including experienced IPs, legal experts and other professionals who have contributed directly and indirectly to the development of this research report.

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Background

- 1.1. The Insolvency and Bankruptcy Code 2016 envisages a new ethos of Insolvency resolution with creditor in control regime vis a vis the debtor in possession format of the legacy laws. The Committee of Creditors ("CoC") of the Corporate Debtor ("CD") is hence one of the most crucial pillars of the Corporate Insolvency Resolution process duly aided by the Resolution Professional ("RP"). Given that the law is a time bound mechanism, the importance of seamless functioning of the CoC and the RP cannot be overemphasised.
- 1.2. The RP is an administrator of the Code as observed by the Supreme Court in the case of Swiss Ribbons and he is expected to function under the guidance and the directions of the CoC who control the CD.
- 1.3. An IP, when acting as an Interim Resolution Professional or Resolution Professional, is vested with an array of statutory and legal duties and powers. The Insolvency Professional is tasked with endeavouring to take custody and control of the assets, call for and admit claims, constitute the Committee of Creditors, operate the entity as a going concern and enable Resolution Plan processes. In this regard, the Code sets out the roles and responsibilities of an RP as well as the CoC. These include actions, such as calling for public announcements, determination of claims etc, which should ideally be undertaken by the RP as an independent professional and actions, such as approval of a prospective applicant criteria, actions listed in Section 28 of the Code, approval of Resolution Plans etc, which require the approval of the CoC to be proceeded with.

“Supreme Court judgements have reiterated the innate commercial wisdom and supremacy of the CoC.”
- 1.4. There are also several judicial pronouncements which have enabled greater clarity on the roles of the CoC vis-a-vis the RP and the CIRP process. These decisions have time and again, reiterated, the innate commercial wisdom and supremacy of the CoC.
- 1.5. There have also been significant efforts from the regulator, the Insolvency and Bankruptcy Board of India ("IBBI") to enable a more robust functioning of the Code. In this regard the IBBI had published a Charter

of Responsibilities of the RP (01 March 2019) and the CoC delineating the responsibilities, inter se, of the two key functionaries and offices of public trust under the Code.

- 1.6. We recognise that the Journey of improvement and excellence is a continuing one. The IIIP of ICAI, in order to strengthen the Code framework and the sustained efforts of IBBI, commissioned a Study Group to carry out a study for (i) identifying further challenges, if any, in this crucial interplay between the Members of the CoC and the Resolution Professionals and (ii) recommending best practices in this regard.
- 1.7. The key Terms of Reference of this Study was to elicit the views of the Resolution Professionals on the challenges, if any, faced by them in regard to the functioning of the CoC and suggestions, if any, to overcome such challenges to enable the smooth conduct of the Insolvency and Liquidation Processes under the Code and this report encapsulates the key recommendations of the Study Group in this direction, besides suggestions for regulatory intervention.
- 1.8. We are thankful to the continued support of IBBI in all the endeavours of IIIP of ICAI and hope that the contents of this document would provide additional light on the matters stated herein.

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Methodology of Study

The methodology adopted for the study included the following steps:

- 2.1. A preliminary meeting to understand the Terms of Reference. At this stage it was also desired to conduct a survey to obtain a larger cross section of views from the Resolution Professionals based on practical situations encountered by such professionals vis-a-vis the functioning members of the CoC. The survey was to be based on voluntary participation.
- 2.2. The survey format also enabled qualitative responses in addition to binary options of Yes or No for the questions raised in the survey. 233 participants submitted their responses to the survey containing the below mentioned aspects

S No	Question
1	Whether CoC has been deciding on important matters, in a timely fashion
2	Whether cost cutting measures by CoC is consistent with requirement of IBC
3	Whether replacement of IRP/RP by CoC is transparently carried out
4	Whether timely support from CoC available for appointing professionals during CIRP
5	Whether timely support from CoC available for avoidance/claw back transactions during CIRP/Liquidation
6	Whether timely support from CoC available for arranging interim finance during CIRP
7	Whether infrastructure available (data management, communication, etc.) with CoC members are generally sufficient
8	Do you feel the need of regulating the conduct of CoC through legal provisions
9	Qualitative comments/suggestions on issues and best practices

- 2.3. After receipt of the survey results, the group through multiple discussions among its members, deliberated on the responses to present this Study/ Report including the key recommendations.

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Overall Findings

The overall impression gained from the survey indicated that 90% RPs felt that there needs to be greater clarity in relation to the Roles and Responsibilities of the Members of the CoC in terms of Statutory Regulations to be defined in this regard.

The Study Group took note of this and have proposed that efforts need to be undertaken to sensitize and seek the views of the members of the CoC on their expectation from the resolution process and the role and conduct of RPs which the IIIP of ICAI has agreed to action at the earliest. Most of the recommendations are based on aligning end-objective of IRP/RP and CoC to achieve resolution in a timely manner and to maximize the value of the Corporate Debtor.



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Specific Recommendations

The results and the specific inputs provided by the respondents of the Survey were deliberated upon by the Study Group and certain recommendations to strengthen the functioning of the CoC are as summarised under. The aspects summarised under are largely connected to the interplay of the CoC and the Resolution Professional only. A large number of responses also included suggestions on the safeguards to be exercised as and the best practices on the functioning of Resolution Professionals which can be compiled into separate document(s) as applicable for guidance of RPs.

The Study Group also felt that currently the CoC is an amalgamation of financial creditors who sometimes have different and conflicting interests and expectations. At times it results in friction amongst CoC members and inconsistency of actions. Moreover, the CoC has a much larger role to play in the resolution process as it sits in a fiduciary role of preserving and protecting the interest of all stakeholders and not just itself. It has been noted in IBBI Charter dated March 1, 2019, issued in aid of IPs and CoCs involved in the CIRP, that 'while specifying RPs' and CoC's roles, the Code does not envisage one assuming the role of the other. Given the above, a need is felt to regulate the functioning of a CoC, which may be achieved through self-regulation or a Charter or a code of conduct to which all CoC members subscribe, which may be put in place by IBBI/ IPA or in consultation with each other as may be appropriate.



The other recommendations are discussed below:

Replacement and Remuneration of Resolution Professional

- 4.1. Replacement of an Interim Resolution Professional / Resolution Professional is presently the prerogative of the CoC and no reasons are required to be provided for implementing replacements. This has also been reiterated in several judicial pronouncements. The independence of the RP and the transparency of the process will be strengthened if reasons for replacement are recorded in writing by CoC.

- 4.2. Presently, there are no specific provisions that contemplate and provide safeguards for unjustified removal of a Resolution Professional. Safeguards may be considered to provide such Resolution Professional an opportunity to be heard before decisions are taken. Further, clear guidance in the manner of settlement of fees to the erstwhile RP including defining of time lines would enable ease and certainty in the functioning of RPs.
- 4.3. As one professional is sought to be replaced by another, a No Objection Certificate on the lines of those provided for replacement of Statutory Auditors of entities may be considered as a matter of professional ethics as well as to enable communication between the RP and proposed RP to identify issues and challenges, if any.
- 4.4. Presently, there are no specific time lines which are prescribed for filing of and adjudication of applications pertaining to replacements of Resolution Professionals. The RP sought to be replaced continues in a deemed capacity until such replacement. The applications for replacements are generally preferred by any member(s) of the CoC or by the existing IRP/RP who are sought to be replaced. Incorporating certain timelines in the Regulations for such replacements would expedite the CIRP process especially in the context that it is unlikely that the serving RP, proposed to be replaced, would be able to carry out the actions of the CIRP with the same level confidence (and consent of the CoC) as a continuing RP.
- 4.5. It was also deliberated that in the context where the RP is proposed to be replaced and activities under the Code were held in abeyance or conducted at a slower pace than envisaged under Regulation 40A, guidelines may be provided to ensure that the key actions under the Code may be supported by the CoC in order to maintain the overall timelines under the CIRP process.
- 4.6. The group also discussed the rights to the members of the CoC to replace an RP at any stage of the CIRP process. While the decision on the RP is based on the commercial wisdom of the CoC, some guidelines need to be

“Presently, there are no specific provisions that contemplate and provide safeguards for unjustified removal of RP.”



provided to enable that such replacements are fair, transparent and are actually needed to better accomplish the objectives of the CIRP process.

- 4.7. The Board may also consider providing such guidance to the CoC to impress that RP replacements may be considered in exceptional circumstances in order that the CIRP process may function in an expeditious manner.
- 4.8. There is no uniformity in respect of IRP / RP remuneration. Such remuneration was found to be very low in certain cases which may threaten the very independence of the IRP/ RP. Guidelines may be considered to be issued to RP / CoC to ensure that fees are commensurate with the scale of engagements. An RP should not merely be replaced on ground of cost consideration. This is likely to result in undercutting and unhealthy competition. The incoming RP would need to justify in writing the reasons for reduction in fee.
- 4.9. In certain cases, it was reported that although the remuneration of the RP was agreed to be paid by the members of the CoC, such remuneration was not disbursed or disbursed with delays. Appropriate guidelines may also be considered for release of such remuneration within specified turnaround times of raising of invoices by the Resolution Professional. Implementation of above suggestions will also obviate need for many IRP/RPs to move AA to hear their grievances against CoC and will reduce workload of AA.

“Remuneration was found to be very low in certain cases which may threaten the very independence of the IRP/ RP.”

Data pertaining to Corporate Debtor

- 4.10. There are presently no specific requirements which mandate the members of the CoC to share all past information provided by the Corporate Debtor or any forensic and other audits and inspections conducted by the member(s) of the CoC vis a vis the Corporate Debtor.
- 4.11. In case the member(s) of the CoC have preferred any reports to RBI in pursuance of the Master Directions on Fraud Reporting, these also need to be mandated to be provided to the RP upon commencement of the engagement to enable determination of avoidance transactions.
- 4.12. CoC members also have various expert reports viz., techno-economic feasibility reports, technical reports which should be shared with RP and

resolution applicants (RA) to improve the quality of information available to RA for better bids. CoCs as a Best practice may be guided to provide all such data to the Resolution Professional right at the commencement of their engagement to enable the CIRP to be conducted effectively and efficiently.

Timely approvals to RP

- 4.13. The RP needs specific consent of the members of the CoC in undertaking actions under Sec 28 of the Code, defining the prospective Resolution Applicant criteria (Sec 29), approval of Resolution Plans etc. Additionally, such CoC consent becomes relevant when various professionals are required to be engaged by the RP and the approvals for fees need to be obtained.
- 4.14. While the overall time lines for the conduct of the CIRP process is mentioned in Regulation 40A, the turnaround times expected of the members of the CoC is not defined even in terms of a directory (not mandatory) indication. Suggesting such time lines would enhance the efficiency of the process and enable higher levels of accomplishment of the time lines stated in Regulation 40A. Such directory time lines could at the outset prescribe 7 days for any matters requiring consent of the CoC.

CoC should share all information and reports with RP and RA to improve the quality of information available to RA for better bids.


Interim Finance

The CIRP process considers a definitive Creditor in control engagement. Although Section 28 provides for CoC approvals for interim finance arrangements, there is no mandate in the Code for providing of interim finance by the members of the CoC.

- 4.15. In cases where the Corporate Debtor is dormant and has no free cash flows to support even the legitimate spends required by the RP, provisions may be incorporated to enable basic contribution by the members of the CoC who are benefitted by the CIRP process. Provisions should also be incorporated how a situation of non-contribution by CoC members is to be dealt with.
- 4.16. Sometimes the governing regulator for the member (like, RBI in case of Bank) either does not permit or incentivise interim finance to a CD facing insolvency/resolution. An attempt may be made to seek amendment in

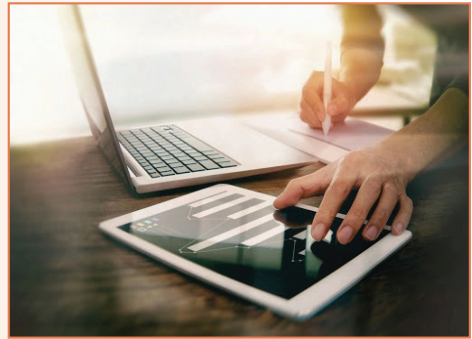
other laws in order to incentivise CoC members to provide interim finance for the revival of the CD. The RBI could consider any interim finance approved by CoC members as 'priority funding' and exclude it from the requirement of mandatory provisions of NPA. Such action is likely to not just increase flow of interim funding but also substantially reduce cost.

Clear Definition of Roles and Responsibilities of members of the CoC

- 4.17. While the Code and the regulations, supported by facilitation notes and guidance issued by IBBI, are fairly well described in terms of Rights, Roles and Responsibilities of the other functionaries such as Adjudicating Authorities, Resolution professionals, Creditors, Corporate Debtor, Information Utilities etc, the provisions of the Code do not clearly indicate the roles and responsibilities of the members of the CoC in an objective manner.
- 4.18. Over a period of time, the role of CoC has been defined clearly by Courts and has assumed importance. In *Swiss Ribbons Vs. Union of India* and *Essar Steel Vs. Satish Kumar Gupta*, the Hon'ble Supreme Court has emphasised on commercial wisdom of CoC in approval of Resolution Plan and various aspects thereof including distribution. The role of the CoC is one of a fiduciary duty with an implied covenant of good faith and fair dealing with all stakeholders. Hence it is imperative that there are adequate safeguards in terms of conduct of such members of the CoC.
 
- 4.19. A fiduciary relationship is one in which the fiduciary owes special duties to another person, and must look out for that other person's interests with special care. And in this case such other persons under the care of the CoC would include the Corporate Debtor as well as the Unsecured creditors and other claimants who would rank lower in the waterfall mechanism under Sec 53 of the Code than the members of the CoC themselves.
- 4.20. The key safeguards that need to be built would include the roles and responsibilities of the CoC in relation to:
 - a. Disclosure of all relevant information which is crucial to the RP understanding of the Corporate Debtor including but not limited to

contractual information, audits and forensic investigations of the Corporate Debtor which may be in possession of the members of the CoC

- b. As the members of the CoC clearly exercise control over the Corporate Debtor during the CIRP process, they must be able to demonstrate unequivocally, through all their actions, that the CIRP process was in-fact, conducted to enable revival and resolution of the Company. And this would include Support in respect of all actions required of them under the Code and the regulations including expeditious approvals and funding of agreed costs



- c. In the matter of approval of resolution plans, where such plan's realizations are lower than Liquidation value, additional safeguards may be incorporated to ensure that the other stakeholders, especially those ranking lower in the priority under Section 53 in the event of Liquidation, have not been impacted and that such approvals of Resolution Plans were inevitable and in keeping with the objectives of the Code and not to defraud any other lower ranked claimants.

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