

Common Issues Identified by IIIPI during Inspection

The IIIPI while conducting inspection of Insolvency Professionals (IPs) has witnessed various defaults committed by IPs during conduct of Corporate Insolvency Resolution Process (CIRP). Here we are presenting the common issues found in the records of IPs so that the IPs could avoid them in their future assignments and crosscheck their documents before submission.

Background

Insolvency Professional Agencies (IPAs) are self-regulated professional bodies that focus on developing the profession of insolvency professionals. The Insolvency and Bankruptcy Board of India (IBBI) has oversight over the functioning of IPAs who in turn regulate the functioning of Insolvency Professionals and monitors their performance and conduct as per the provisions of Insolvency and Bankruptcy Code (IBC), 2016. IPAs carry out functions in furtherance of their powers as envisaged by the Code, including:

Regulatory functions, such as drafting of detailed standards and code of conduct that are made public and are binding on all the members of IPA;

Executive functions, such as monitoring, inspecting and investigating members, gathering information on the performance of insolvency professionals;

Quasi-judicial functions, such as addressing grievances of aggrieved parties, hearing complaints against members and taking appropriate action.

The Model Bye-Laws of an IPA requires the IPA to continuously improve upon its internal regulations and guidelines to ensure that high standards of professional and ethical conduct are maintained by its professional members.

IPAs develop professional standards and code of ethics under the Code and audit the functioning of their members, discipline them and take actions against them if necessary.



The Code mandates monitoring of the performance of IPs with respect to legal compliance and empowers IPAs to call for information and records. Provisions of Section 208(2)(c) of the Insolvency & Bankruptcy Code, 2016 (“Code”) read with Clause 18 of the Code of Conduct provided under First Schedule of IBBI (Insolvency Professional) Regulations, 2016 and adopted by Indian Institute of Insolvency Professionals of ICAI (IIIPI) is authorised to conduct the inspection of IPs enrolled with it.

These deficiencies in concurrence often put the Corporate Debtors at risk and renders loss to the corporate debtor and Indian economy. In some cases, misinterpretation, or non-compliance of the provisions of the Code may lead to the different outcome of the resolution process.

The objective of Inspection of IPs is to ascertain whether the conduct of IPs is in overall interest of the stakeholders, corporate debtor as going concern and to ensure that the position of trust held by IPs is not abused by them and in cases where it is, to ensure appropriate action is taken. The purpose of inspection is to gather sufficient & relevant information on the conduct and performance of the IPs.

The IIIPI while conducting inspection of IPs have witnessed various deficiencies in the Insolvency

Resolution Process of Corporates undertaken by IPs. In general, the Insolvency Professionals do not comply with the provisions of the Code or does not exercise due diligence and reasonable care while discharge of his duties or powers. These deficiencies in concurrence often put the Corporate Debtors at risk and renders loss to the corporate debtor and Indian economy. In some cases, misinterpretation, or non-compliance of the provisions of the Code may lead to the different outcome of the resolution process. The lapses may be due to lack of clarity of the Laws and its provisions and amounts to inadvertent mistakes. These may be escaped with reasonable care and exercising due diligence while performing duties by the IPs and thereby preventing the IPA to initiate any disciplinary action.

It is observed that list of claimants is not maintained properly, as many important fields like date of receipt of claim, type of claim, date of verification of claim, security interest (if any) are missing.

I. Claims of Creditors.

As per the Section 25(2)(e) of the Code read with Regulation 13 of the IBBI (Insolvency (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the IRP/RP should verify all claims and update the list of claimants on structured basis, as and when any claim is received and should duly record the date of acceptance and verification of claim, reason of rejection of claim, type of claimant, form pursuant to which the claim is received, mode of receipt of claim, security interest (if any) and any other important field (if any). It shall form an agenda item in the notice of the meeting of committee of creditors (CoC) and the list of creditors shall be available for inspection by the members meeting of committee of creditors. It is observed that list of claimants is not maintained properly, as many important fields like date of receipt of claim, type of claim, date of verification of claim, security interest (if any) are missing. Further, it is observed that the IPs

do not intimate the reasons in writing for rejection or part admission of claim amount to the claimants.

II. Sharing of Information Memorandum (IM)

As per the Regulation 36 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the resolution professional shall share the Information Memorandum (IM) after receiving an undertaking from a members of the committee of creditors to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or advantage to itself or any other person and comply with the requirements given under section 29(2) of the Code. It is observed that the Information Memorandum have been placed before the CoC without obtaining confidentiality undertaking from the recipients of IM. Further, it is suggested that the IPs shall minutise the fact that Information Memorandum have been shared with the members of committee of creditors or prospective resolution applicants, as the case may be and declaration of confidentiality has been received from the recipients prior to sharing of the aforementioned document. Disclosure required to be submitted by IPs with IBBI after sharing of Information Memorandum with the CoC members in the prescribed format (CIRP 3) shall contain all the relevant facts and information, and the IPs shall attach the support documents while filing the form.

III. Disclosure of Costs of the Interim Resolution Professional/Resolution Professional

As per the Regulation 33, 34 and 34A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read with the circular No. No. IBBI/IP/013 dated 12th June, 2018 states that the expenses incurred or to be incurred by IP shall be ratified or approved by the committee of creditors with the requisite voting percentage as directed by the Code, as only the ratified or approved costs or expenses shall form part of the insolvency resolution process costs.

It is generally observed that the costs disclosed in Form II, Form III, CIRP 2 and CIRP 5 are mismatched with respect to the costs appearing in the minutes of the meetings of CoC. Further, the bifurcation of out-of-pocket expenses or other expenses are not provided in minutes of the CoC meetings. The costs ratified/ approved by the COC members should be properly disclosed in the minutes and the percentage (%) of voting by which it was approved shall also form part of the minutes. It is the duty of an IP to disclose the fee payable to him as well as the fee payable to professionals engaged by him while performing the duties as an IP. This ensures conduct of the CIRP process in a transparent manner.

In event of 12A withdrawal before constitution of CoC it has been observed that the IPs does not submit cost details as required by Form II to be submitted with IIIPI.

IV. Appointment of Registered Valuers

As per the Regulation 27 IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that IPs should ensure that the engagement letter (in writing) is issued to either IBBI Registered Valuer/Registered Valuers Entity specifying their name, address, IBBI registration number, class of asset to be valued, their scope of work, fees and timeline within which report to be provided. It has been observed that IPs has issued the engagement letters in the name of firms/LLPs/ companies which are not IBBI registered valuer/ registered valuer entity and later on have disclosed the relationship disclosures on the website of the IPA in the name of individual registered valuer registered with IBBI, being partners of the firms so appointed by the IPs. The minutes of the CoC meeting, disclosures with IIIPI, forms submitted with IBBI shall contain the details of registered valuer, its IBBI registration number and class of asset for which it is appointed, in a uniform manner.

V. Outsourcing of Duties/ Appointment of Insolvency Professional Entity During CIRP

As per the Section 18 and 25 of the Code read with IBBI Circular No. IP/003/2018 dated 3rd January 2018 states that the insolvency professional shall not outsource any of his core duties and responsibilities. It is observed that the scope specified in the engagement letter issued by the insolvency professional to the professionals appointed contains the scope of work which reflects delegation of duties rather than assistance.

IPs can engage insolvency professional entity (IPE) to obtain their support services during corporate insolvency resolution process (CIRP). However, it is noted that in some cases IPs have made appointment of IPE at multiple times with varied scope and additional fees for tasks which shall be included in the scope of support services itself.

In some cases, IPs have made appointment of IPE at multiple times with varied scope and additional fees for tasks which shall be included in the scope of support services itself.

VI. Payment to Creditors during CIRP

As per the Section 14 of the Code prohibits settlement of any such claim during CIR process and requires the resolution plan to deal with them together in the manner decided by the Committee of Creditors subject to the provisions of section 30(2) of the Code. Section 53 of the Code provides a waterfall mechanism for distribution of liquidation proceeds to the stakeholders if the corporate debtor goes into liquidation. It is observed that the resolution professional has allowed payment of dues outstanding as on the insolvency commencement date to some creditors during CIRP. This not only impacts the interests of remaining creditors but also put a question to the independence and integrity of the insolvency professional.

VII. Consent to act as a Resolution Professional

As per the Regulation 3(1A) of the IBBI (Insolvency (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that interim resolution professional (IRP) before continuing as resolution professional (RP) shall ensure to submit consent to be appointed as resolution professional in the prescribed Form AA as provided in Section 22(3)(a) of IBC, 2016. It has been observed that in many cases that where IRP is appointed as RP, the IRP has not given consent to act as the RP in the prescribed manner as provided by the Code.

VIII. Shortcomings while Preparing/Maintaining Records of the Committee of Creditors' (COC) Meetings

Referring Section 24, 25 of the Code and Regulation 18 to 26 of IBBI (Insolvency (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

a) Notice

- With reference to the provisions of Regulation 21 of IBBI (Insolvency Resolution Process for corporate persons) Regulations, 2016, the notice for the meeting of committee of creditors should enclose agendas to be discussed and items to be voted upon in a distinguished manner for better understanding. It is observed that notice enclosing agenda do not provide segregation of the item to be discussed at the meeting and the issues to be voted upon in the meeting of committee of creditors.
- The first meeting of the committee of creditors shall be held within 7 days of filing of the report certifying constitution of the committee of creditors, by giving prior notice for at least five days. It has been observed in many cases that the IP has not convened the first COC meeting within the timeline prescribed under regulation 40A read with regulation 19(2) of IBBI (Insolvency resolution process for corporate persons) Regulations, 2016 and section 22(1) of the IB Code. Further, it has

been noticed that the first meeting has convened without giving five days' notice or at a shorter notice to the CoC members. The copy of correspondence serving notice to every participant which evidences the delivery of notice giving 5 days should be preserved and maintained as record for future reference.

Subject line in e-mail sharing notice of meeting of creditors shall state the name of the corporate debtor, the place (if any), the time and the date on which the meeting is scheduled.

- Subject line in e-mail sharing notice of meeting of creditors shall state the name of the corporate debtor, the place (if any), the time and the date on which the meeting is scheduled. It has been observed that the contents of the notice are deficient in line with the provisions of the regulation 20(2) of IBBI (Insolvency resolution process for corporate persons) Regulations, 2016 such as the place, time and the date on which the meeting is scheduled are not mentioned in the subject line.
- The resolution professional shall give notice of each meeting of the CoC to the members of suspended board of directors or the partners of the corporate debtor in compliance of the provisions of section 24(3)(b) of the IB Code, 2016. It has been observed that copy of communication is not preserved as record serving the notice of CoC to the of suspended board of the directors or the partners of corporate debtor.
- In light of regulation 21(4) and 26(1) of IBBI (Insolvency resolution process of corporate persons) regulations, 2016; it has been observed that the notice of the meeting did not contain the information which state the process and manner of voting by electronic means and the time schedule, including the time period during which the votes may be cast, does not provide the login ID and the details of a facility for generating password and for

KNOW YOUR IIPCI

keeping security and casting of vote in a secure manner and does not provide contact details of person who will address the queries connected with the electronic voting.

- The notice for convening the meeting of the committee does not provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with the regulation 21(2) of IBBI (Insolvency resolution process of corporate persons) regulations, 2016.
- It is generally observed that the voting item contains the discussion and details but the resolution put to vote does not form part of the notice.

b) Minutes

The resolution professional shall keep and preserve the minutes of all meetings of CoC. It has been observed that IPs are not maintaining the records related to correspondences pertaining to notices and minutes of the CoC meetings. In pursuance to above, below are the instances which have been observed during inspection.

- Circulation of the minutes of the meeting of committee of creditors is not done within 48 hours (including Holidays) from the conclusion of meeting of CoC.
- The minutes do not disclose the particulars of the participants who attended the meeting in person, through video conferencing or other audio and visual means or through authorised representatives.
- The minutes of meeting does not contain information stating the voting share of each member of committee of creditors.

c) Voting by COC Members

- IRP/ RP should give his/her independent deliberations on each voting item, based on the which the CoC members shall vote. The deliberations of the chairperson of the CoC



meeting should form part of the minutes/records of the meeting. This will ensure recording of the justification for the decisions taken by the CoC members, along with related records. Since decisions under CIRP are based on the deliberations of the chairperson and commercial wisdom of the members; therefore, these decisions should be well reasoned and should be recorded in the minutes in a detailed manner. Hence, the minutes should be such that are self-explanatory in nature.

- In many cases, the IPs have sought voting through email in place of the electronic voting through secured system as provided in regulation 26 of IBBI (Insolvency resolution process for corporate persons) Regulations, 2016.
- It has been observed that the minutes of the meeting do not contain the outcome of the physical voting citing the names of the members of committee, their voting share and their voting decision (voted for/ against/ abstained from voting).

IX. Retention of records relating to Corporate Insolvency Resolution Process (CIRP)

As per Regulation 39A of of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 The interim resolution professional or the resolution professional shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate

debtor as per the record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies. It is commonly seen that the records pertaining to CIRP are not being maintained and preserved or maintained in an incomplete manner.

It has been observed that the minutes of the meeting do not contain the outcome of the physical voting citing the names of the members of committee, their voting share and their voting decision (voted for/ against/ abstained from voting).

IBBI issued a circular IBBI/CIRP/38/2021 dated January 06, 2021: An IP shall preserve - (a) an electronic copy of all records (physical and electronic) for a minimum period of eight years, and (b) a physical copy of physical records for minimum period of three years, from the date of completion of the CIRP or the conclusion of any proceeding relating to the CIRP, before the Board, the Adjudicating Authority (AA), Appellate Authority or any Court, whichever is later. However, it is advised that IPs shall **maintain and preserve all records.**

X. Non- Compliance with timelines as per regulations

As per the Regulation 40 A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the IP must strictly adhere to the timelines prescribed under the provisions of the Code and the regulations made thereunder. He should act with professional skepticism and must not be culpably careless while performing his duties during insolvency resolution. It has been observed that the IPs do not adhere with the timelines prescribed under the Code and regulations. For example: publication of public announcement, circulation of notices, minutes, invitation for expression of interest by prospective

resolution applicants, appointment of valuers, determination of preferential, undervalued, fraudulent, and extortionate transactions, preparation and submission of IM to CoC etc. are largely being delayed by the Ips.

XI. Disclosure of Relationship to IPA

As per IBBI circular No. IP/005/2018 dated 16th January 2018, the IRP/RP is to disclose his/her relationship with (i) the corporate debtor, (ii) other professional(s) engaged by him, (iii) financial creditor(s), (iv) interim finance provider(s), and (v) supply of IM to prospective resolution applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified. It is also his duty to disclose the relationship he has with the professionals engaged by him.

It has been observed that the disclosures are not filed on timely basis or disclosed with wrong or incomplete information. While submitting relationship disclosures for registered valuers, disclosures are made in the joint names of valuers appointed, it is required to file disclosure for each valuer separately.

While submitting relationship disclosures for registered valuers, disclosures are made in the joint names of valuers appointed, it is required to file disclosure for each valuer separately.

Further, it has been observed that IPs do not disclose the complete particulars such as name of registered valuer or professional appointed or prospective resolution applicant, date, professional membership number, class of asset for which valuer has been appointed, etc. in the disclosure. The correct disclosure purpose should be selected from the drop-down menu available while submitting disclosures.

XII. Non-Compliance with Orders

The Adjudicating Authority (AA) issues directions from time to time to facilitate smooth conduct of CIRP for the applications filed with AA by the parties. The proceedings before the AA are judicial proceedings and its directions are orders of the Court. Any non-compliance with any of their orders amounts to contempt of court.

“In many cases, it has been observed that the IP has failed to comply with the directions of the AA. Such disregard of the order of the Adjudicating Authority may lead to jeopardize the CIRP and consequently impact the interests of stakeholders.”

In many cases, it has been observed that the IP has failed to comply with the directions of the AA. Such disregard of the order of the Adjudicating

Authority may lead to jeopardize the CIRP and consequently impact the interests of stakeholders.

XIII. Assignment/s undertaken without holding valid Authorisation For Assignment (AFA)

Regulation 7 A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) requires that an IP shall not accept or undertake any assignment, including CIRP, unless he holds an authorization for assignment (AFA) on the date of such acceptance or commencement of such assignment. The IBBI has made available through its website to apply for the issuance or renewal of AFA and the IPAs to issue or renew AFAs in a time bound manner. There are, however, instances where an IP has undertaken assignments including voluntary liquidation without having an AFA which is in contravention of the provisions of law.

