

Application of Global Ethical Principles related to Insolvency Professionals in Indian Context



*Ethics is an important aspect of any profession so is true for insolvency profession. Wherever the law is silent, or ambiguous, the ethical principles provide a way out. These principals play a crucial role during an evolving insolvency framework and also act as torch for insolvency professionals and other stakeholders. The ethical principles related to insolvency profession exist at national as well as international level. However, the international ethical principles of insolvency profession are not intended to supersede any local rule. Moreover, it has been provided that in case of any conflict with such local laws, the local laws would prevail. In the following article, such principles are consolidated and compared in-line with the global principles and checked for their application in Indian context. **Read on to know more...***



Anuj Maheshwari

The author is a Chartered Accountant.
He can be reached at
iiipi.journal@icai.in

1. Introduction

आचारः फलते धर्ममाचारः फलते धनम्।
आचाराच्छ्रियमाप्नोति अचारो हन्त्यलक्षणम्॥

~Ethics helps in performing duties. Ethics makes you successful in earning wealth. On account of ethics a person attains prosperity. Ethics destroys evil quality.

Insolvency & Bankruptcy Code, 2016 (IBC or Code) was enacted with objective for maximisation of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders connected thereto.

The Standing Committee of Parliament on Finance in its 32nd Report has analysed the implementation of the IBC¹. It mentioned four pillars of the Code, which aid and abet each other and act collectively to hold the objectives of the Code to the position it has. The four pillars mentioned in the report are: Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs), Information Utilities (IUs), Adjudicating Authorities (AAs) i.e., National Company Law Tribunals (NCLTs) and Insolvency and Bankruptcy Board of India (IBBI). Out

¹ STANDING COMMITTEE ON FINANCE, 32nd Report of the Committee on Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions, Ministry of Corporate Affairs (August 2021)

these, IPs are recognized as key pillar of Indian insolvency ecosystem. As officers of the Court, IPs has been provided some authority but with equally high responsibilities which a professional should always be aware about and follow his duties diligently.

It is very interesting to note that, in India, only few professions, one of them being the profession of IPs has the concept of “Two-Tier Regulators”; one being the IBBI and other, the IPA to which an IP is registered with.

Moreover, the superior regulator, i.e., IBBI has underlined certain ethical principles which an IP must comply with. The IPAs have their respective Model Code of Conduct for the members to adhere to and the deviations are monitored to maintain the desired ethical standard. Following such ethical principles would result in higher efficiency and effectiveness in their respective assignments and would also protect the professional from strict disciplinary and penal action against him.

2. INSOL International Ethical Principles for IPs

a) Interaction with Legislation and Regulation

The principles of INSOL International provide guidance based on international standards of conduct. They are not a restatement of applicable legislation, regulations, and judicial pronouncements. Wherever the law is silent, or ambiguous, these principles provide a way to work through. They are not intended to supersede any local rules or laws. Moreover, it has been provided that in case of any conflict with such local laws, the local laws would only prevail. The principles were established to enhance and protect the integrity of the insolvency profession, and to create a fair, effective, practical and readily understood framework.

b) Principles-Based

The practice of insolvency or restructuring and turnaround services is often complex and varied. An IP has to perform his duties in a very dynamic environment. It has to operate in various difficult circumstances involving various parties to deal with, meet the timelines, understand the complex legal, financial and factual issues, or probably run a business which he never thought about. Hence, it is nearly impossible to conceptualise and codify every

possible situation or scenario. Accordingly, the ethical principles are merely an attempt to establish broad standards of practice that can be applied to every situation in broad perspective rather than in specific situation in detail.

As statements of principle are unavoidably general, explanatory guidance is provided-but the principles themselves (and not only the specific guidance) are there to assist in guiding professional members' decisions and actions. In addition to assisting professional members, the guidance may also assist stakeholders in setting reasonable expectations by better understanding certain limitations of insolvency advisors and / or officeholders in carrying out their duties.² Professional Members should also be able to use their professional and commercial judgment; when in doubt, they should seek legal or other advice, or the assistance of the applicable court, before proceeding.

c) The Principles are not Mandatory

The principles do not impose any mandatory requirements on IPs; however, it is expected that they would find them useful to implement and be guided by the principles in their professional practice. Thus, they just act as a “torch in a dark road”. The principles use a two-level hierarchy of wording to describe and explain their application:

- i. recommended behaviours to achieve best practice (should / should not); and
- ii. permissive statements where greater discretion is available (may).

d) Regulators and Courts

The regulation of the insolvency profession varies in different jurisdictions, and the conduct of insolvency practitioners may be subject to review by disciplinary tribunals and Courts in accordance with local requirements, such as in India it is regulated under First Schedule of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 and subject to review by the Disciplinary Committee formed under Section 220 of IBC. It is intended that the principles may be used by regulators, tribunals, and courts to assist with the identification and enforcement of acceptable

² INSOL INTERNATIONAL, Ethical Principles for Insolvency Professionals (October 2018)

The principles are intended to be a resource and guide for such bodies, not a directive and always remain subject to applicable law and judicial or regulatory authorities.

insolvency practices and professional standards. The principles are intended to be a resource and guide for such bodies, not a directive and always remain subject to applicable law and judicial or regulatory authorities.

e) Other Professional Standards

Many Members may also be members of other professional agencies/ associations, which may have guidelines or requirements that are similar to the principles, as in India, like IPAs. Moreover, in duties of such IPAs set out in Regulation 6 of Schedule to IBBI (Model Bye- Laws and Governing Board of IPAs) Regulations, 2016, it is clearly mentioned that “the Agency shall maintain high ethical and professional standards in the regulation of its professional members.”

Where applicable, professional members should comply with applicable regulatory guidance promulgated by local regulators. To the extent that following the principles would impose a higher standard on professional members than applicable law, regulations, or rules published by other associations, professional members should still have regard to the principles. To the extent that applicable law, regulations, or association rules impose a higher standard on applicable professional members, that higher standard will apply and compliance with the principles does not supersede any local requirements.

3. What the IBC provides?

(a) Section 208³ read along with Section 93, 120 and, 143 of the IBC, 2016

It provides that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of the appointed IP to take such actions as may be necessary, for resolution of various corporate persons under various processes.

The law also provides that every IP shall abide by the following code of conduct (which is apart from the Code of Conduct as in IP Regulations):

- i. Take reasonable care and diligence while performing his duties under the Code;
- ii. Comply with all requirements and terms and conditions specified in the bye-laws of the IPA of which he is a member (IIPI, ISCI IIP, or IPA ICAI);
- iii. Allow the IPA to inspect his records related to work performed by him;
- iv. Submit copy of the records of every proceeding before the AA to the IBBI as well as to the IPA of which he is a member so as to make the regulators aware of the proceedings; and
- v. Perform his functions in such manner and subject to such conditions as may be specified [Specified in IBBI (Insolvency Professionals) Regulations, 2016].

(b) Regulation 7(2)(h) of the IBBI (IPs) Regulations, 2016

The Regulation provides that the Certificate of Registration granted to an IP shall be subject to the conditions that such IP shall abide by the Code of Conduct specified in the First Schedule to the Regulations.

The First Schedule specifies a Code of Conduct for IPs which is derived from the Ethical Principles (Mandates for IPs) recommended in the report of the Bankruptcy Law Reforms Committee (BLRC)⁴. The Mandates for IPs recommended in BLRC Report are as under:

- i. An IP will act independently, objectively, and with impartiality;
- ii. An IP will carry out his tasks diligently;
- iii. An IP will treat the assets of the debtor with honesty, and transparency;
- iv. An IP will avoid all possible conflicts of interest and if he comes to know of any such conflict, he will disclose the same immediately to the creditor committee;
- v. An IP will maintain confidentiality of information acquired as a result of professional relationships;

³ Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India)

⁴ T K VISWANATHAN COMMITTEE, The Report of the Bankruptcy Law Reforms Committee (November 2015)

- vi. An IP will act in a fiduciary capacity towards the debtor, and the creditors as a whole, when appointed in any capacity in an insolvency and bankruptcy resolution proceeding;
- vii. An IP will not commit fraud or abuse, or exert undue influence on, or on behalf of his clients.”⁴

All the mandates as recommended by BLRC were tried to be incorporated in the Code of Ethics so as to enable successful implementation of the IBC as the IPs had to play a major role in turning the fate of the law.

IBC assigns various duties to IPs. The possible reasons for that could be to establish a well-functioning system of the process of insolvency and bankruptcy driven by insolvency practitioners, enabling Courts/ Tribunals to delegate more and more to practitioners, thereby in a positive way, allowing better utilisation of judicial time and furthermore to achieve the overall objective of the Code, that is, “Time-Bound Resolution”. It establishes an inverse relationship between performance of IPs and intervention of Courts/ Tribunals i.e., the worse the performance of IPs, the more the AA will intervene in supervising the process.

IBC and Regulations made under it establishes an inverse relationship between performance of IPs and intervention of Courts/ Tribunals i.e., the worse the performance of IPs, the more the AA will intervene in supervising the process.

For that, they needed to ensure that IPs should be more inclined towards following ethical principles and practices rather than indulging in malpractices. Therefore, the ethical principles were made more rigid leaving no scope for making errors by the IPs. Some professionals may be of a view that the Code of Conduct should not be so much rigid; but, to answer them, it would defeat the sole objective of enabling Courts/ Tribunals to delegate more and more to practitioners.

(c) Key areas of common objectives between IBC and International Insolvency Association in terms of ethics

Although the IBC's Code of Conduct for IPs has incorporated all the guided ethical principles into the code of conduct; however, there are differences as compared to INSOL Ethical Principles and certain addition/ deletion/

alteration is done so as to match and make it more feasible in the Indian context. Moreover, Code of Conduct under IP Regulations are in more detail clarifying the said Ethical Principles maintaining the essence of their broad heading.

Thereby, the said Code of Conduct has 43 clauses (Numerically 29) under 10 broad heads describing the ethical practices that an IP has to follow:

Broad Headings			
	IP Regulations		INSOL Ethical Principles
1	Integrity and objectivity Independence and impartiality	1	Integrity Objectivity, Independence and Impartiality
2		2	
3	Professional competence	3	Professional / Technical competence
4	Representation of correct facts and correcting misapprehensions	4	Professional Behaviour
5	Timeliness		
6	Information management		
7	Confidentiality		
8	Occupation, employability, and restrictions	6	Practice Management
9	Remuneration and costs	5	Remuneration
10	Gifts and hospitality		

4. Practice in the United Kingdom

In the UK Insolvency law practice, there are five fundamental principles of ethics for insolvency practitioners⁵ which are also an adopted version of INSOL International Ethical Principles. Moreover, on detailed study of the Code of Ethics, it was observed that all the respective ethical principles are completely in line with the IBC's Code of Ethics. This implies that the profession has developed so much that all of the functions are already inter-connected among various countries thereby paving a way for IPs becoming “Global Professionals” ready to deliver their services beyond the borders of their respective countries. The five fundamental principles as mentioned in ICAS Code of Ethics are as follows:

- a) **Integrity:** it is expected from a practitioner to be straightforward and honest in all his professional and business relationships.
- b) **Objectivity** – A practitioner shall not compromise professional or business judgments because of any bias, conflict of interest or undue influence of others.

⁵ ICAS CODE OF ETHICS, Part 5 – Insolvency Practitioners (May 2020)

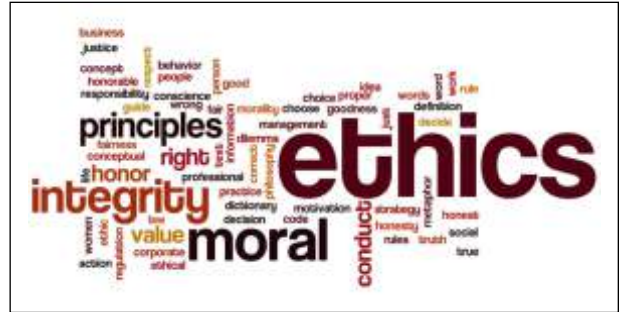
c) **Professional Competence and Due Care:**

- I. To attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organisation receives competent professional service, based on current technical and professional standards and relevant legislation; and
 - ii. To act diligently and in accordance with applicable technical and professional standards.
- d) **Confidentiality** – to respect the confidentiality of information acquired as a result of professional and business relationships.
- e) **Professional Behaviour** – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession.”ⁱⁱ

5. Conclusion: A way forward

It is thus observed that the broad objectives of the ethical standards or Code of Conduct for the IPs in India and the principles of ethics as enumerated by INSOL or as per the UK laws of insolvency are having the same objective in general. IPs in India and in other countries as well are expected to maintain a high standard of ethical practice with integrity, timeliness and with an objective to fulfil the stakeholders' interests.

Insolvency profession was created under IBC separate from all the existing professions acting as an add-on qualification for the professionals. In simple words, the entire regulatory mechanism has been clearly laid out in the law and related rules and regulations instead of getting it evolved gradually along with jurisprudence. This is understood that the ethical practices cannot be put for later date, the law might gradually evolve but the ethical standards have to be in place from the very inception of the law. This probably is a reason for which it is observed a rigidity in the manner the IPs are regulated today. The expectations are not just some sentences written under the Code but are the factors shaping the development of this profession in India and further helping us draw lessons for possible recommendations in the future.



This is the result of the vision of BLRC to create a model of “regulated self-regulation” which they considered optimal for the IP profession. It may be summarised that the principles of ethics are the same as followed across the countries but the regulation and monitoring of the practice of the Code of Ethics have variations in comparison to different geographies. In current industry scenario, market forces are also likely to contribute significantly to the development of the profession, especially in understanding the expectations of the stakeholders. This constant interaction and feedback mechanism will play a critical role in shaping the profession.

The greater role of the IPAs in this field besides the enhanced role of IPEs as per the latest amendments will also facilitate a better monitoring of the ethical practices by IPs in India.

As the profession develops further, IBBI may need to exercise greater oversight to the professionals and let the IPAs play a more important role in regulating the IPs. The regulatory control will definitely contribute to the raising of the bar in terms of IPs embracing the ethical standards set by the IBC. The amendments in the IBC and Regulations concerned will also be conducive to this development. The greater role of the IPAs in this field besides the enhanced role of IPEs as per the latest amendments will also facilitate a better monitoring of the ethical practices by IPs in India. The role of Insolvency agencies in UK can be taken as an instance of such practice of monitoring the IPs by them. Similarly in USA, one of the oldest insolvency and bankruptcy law is being practised with systematic rules and monitoring of the member IPs of the prescribed ethical parameters. This would also result in reducing the burden that IBBI's Disciplinary Committee has and shift the same to IPAs.

ⁱ Box 4.17: Mandates for IPs, T K VISWANATHAN COMMITTEE, The Report of the Bankruptcy Law Reforms Committee (November 2015)

ⁱⁱ 2100.1A1, INSOLVENCY CODE OF ETHICS, The Institute of Chartered Accountants in England and Wales (ICAEW)