

Changing Landscape of Insolvency Professional (IP)



*Insolvency and Bankruptcy Board of India (IBBI) with a view to institutionalize the insolvency profession has allowed Insolvency Professional Entities (IPEs) to act as 'Juristic Insolvency Professional (Juristic IP)' through IBBI (IPs) (Fourth Amendment) Regulations 2022 dated September 28, 2022. As per the Regulation, an IPE which is registered as an IP shall allow only its partner or director who is an IP and holds a valid Authorization for Assignment (AFA), to sign and act on behalf of it. The IBBI also amended relevant Regulations and fixed minimum fee for IP. Besides, it has empowered CoC to provide performance-based incentives for resolution professionals. The article presents a detailed analysis of these landmark reforms. **Read on to know more...***



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1. Introduction

Before the commencement of Insolvency and Bankruptcy Code, 2016 (IBC) in May 2016, corporate insolvency resolution was a remote possibility and virtually non-existent due to multiple legislations governing the same. IBC is an omnibus legislation for the development of insolvency laws in India with an underlying assurance of time-bound and efficient mechanism for distressed entities either to revive or liquidate.

IBC is the supreme law for corporate insolvency in India and overarches every other law in such matters. This puts a halt on all the legal or otherwise proceedings of any manner against Corporate Entity/Debtor pending with any authority and/or forum. The proceeding is termed a Corporate Insolvency Resolution Process (CIRP), which requires primarily the financial creditors' approval and is hence a creditor-controlled model but to be managed solely by the Insolvency Professional (IP) in his capacity as Interim Resolution Professional (IRP) or Resolution Professional (RP) with the aim to protect the interests of all stakeholders as per the given circumstances within the timelines as prescribed in the IBC.

IP thus plays a pivotal role in the CIRP, to manage, protect, preserve, and maximise the value of assets of the

Corporate Debtor (CD) and keep it as a “Going Concern” as per Section 20 of IBC. Meanwhile, he is concomitant as an IRP and RP being a fiduciary for the stakeholders of the CD. From the Panel of IPs provided by the Insolvency and Bankruptcy Board of India (IBBI), National Company Law Tribunal (NCLT) appoints an IP as IRP for the CD at the time of commencement of CIRP which is either confirmed as an RP by Committee of Creditors (CoC) or replaced with another IP on a mutually agreed professional fee.

The IRP/RP typically steps into the shoes of the erstwhile management of the CD undergoing CIRP. As follows in the process, the management ceases to be in power and IRP/RP shoulders every responsibility to ensure the continued normal business operations of the CD in direction of the CoC. As per the IBC, IP means an eligible person:

- i. Enrolled with an Insolvency Professional Agency (IPA) as its member, and
- ii. Registered with Insolvency and Bankruptcy Board of India (IBBI) as an IP.

Once the CIRP is initiated, the existing board of directors of the CD, is suspended and replaced with an individual IP who performs multifarious responsibilities provided under Section 25 of the IBC, such as:

- i. Critical assessment of affairs, analysing records and business
- ii. Ascertaining the realisable value in order to derive the appropriation
- iii. Finding an appropriate but realistic resolution plan
- iv. Coordination with creditors, resolution applicants, management, employees and agencies dealing with valuation, accounting, compliances, legal etc
- v. Augmenting funds to keep the essential activities in up and running condition besides meeting the CIRP expenses
- vi. Completion of CIRP as per IBC

As an “officer of the court” and performing all the tasks mentioned above, the IP is not without encumbrances to his stipulated undertakings.

2. Complexities and Challenges

It's quite evident from above that an individual IP functions under extreme challenging environment not just of generic ones such as strict timeline management, non-accountability of support team and conflict with suspended promoter's etc., but of external ones, which are far more dangerous than procedural lapses and were not envisaged at all. Here are a few of those:

(a) Interpretation difficulties of the IBC

As per IBC, IPs are required to maintain independence and impartiality when functioning as an IRP/RP vis-à-vis the corporate debtors but silent on their relationship with the financial or operational creditors. As legal precedence to this point, National Company Law Appellate Tribunal (NCLAT) had passed a judgement on an appeal filed by the Financial Creditor (FC) in the CIRP of *Metenere Limited* whereby the Appellate Authority directed for the substitution of the IRP proposed in the application based on the fact that he happened to be an ex-employee of the State Bank of India, one of the financial creditors. Here is the peculiar situation created by the IBC:

- i. CoC takes decisions on appointment of IRP/RP who satisfies qualifying criteria, hence proposed to appoint a RP having worked in the Financial Creditor (FC) for 39 years.
- ii. IRP proposed, being ex-employee of FC, was apprehended by the CD as “Interested Person” in the CIRP.
- iii. AA has judicial authority to approve the appointment of IRP, directed the FC for substitution.
- iv. On which SBI appealed to the NCLAT which also upheld the order passed by Adjudicating Authority (AA) rejecting the proposed IRP to be appointed even though was of the view that proposed IRP is not (a) “disqualified or ineligible” to be appointed as an IRP and (b) “interested person” since he is drawing pension and not salary.

While in another case of *SBI Vs. Ramdev International*, the NCLAT held that empanelment of RP as an advocate or Company Secretary or Chartered Accountant with a FC “cannot be a ground to reject the proposal of his

appointment unless there is any disciplinary proceeding pending against him or it is shown that the person is an interested person being an employee or on the payroll of the FC". It leads to a situation of very wide interpretation of legal reasoning and code of conduct.

(b) Mental Trauma

As per Section 217 of the IBC, any person aggrieved by the functioning of IP may file a complaint to IBBI and the Disciplinary Committee (DC) will deal with such complaints and issues orders basis facts and merit of complaints. Yet there have been instances where the IP has been made to go through the horrible unwarranted experience while functioning as IRP/RP. No one would have ever visualised facing arrest and that complaints would be lodged to the Central Bureau of Investigation (CBI) and not with IBBI.

This in fact, has been a reality in a couple of cases (*CIRP of FR Tech Innovations Pvt. Ltd.* and *Adi Ispat India Pvt. Ltd.*) where CBI has arrested IP even though he is not a public servant. It could naturally cause to have discomfort to the creditors on rejecting the claims due to insufficient documentary proof or the clash with suspended promoters of corporate debtors in terms of non-cooperation while functioning as IRP/RP.

In these circumstances, it is hard to fathom how the individual IP would defend himself to fight unforeseen legal battles against arrest by CBI and prove his innocence in the court of law, followed by the IBBI forum. Besides the mental trauma to himself and his family, the IP may end up indenting his professional reputation and shelling out substantial money towards the legal cost which does not form part of CIRP cost.

(c) Responsibility Vs. Remuneration

The IBC regulations define what constitutes CIRP cost which includes the IRP/RP fee basis on "reasonable reflection of his function" and how to deal with it. But the challenge for the IP is that in the absence of any guidelines in the IBC for determining his remuneration makes it openly subjected to the applicant or CoC in commensurate with the time and efforts he has to put in for discharging his functional responsibility as IRP/RP. Here now the classic conflict prevails with the applicant or CoC in that, firstly they are already grappling with distress situation to recover their own stuck amount in the CD, so ideally

would not like to burn further their pocket. On the other hand, the IP expects that the remuneration ought to be reasonable enough to cover the cost of his time and effort.

In one case of CIRP of *Ariisto Developers Pvt Ltd*, wherein NCLAT upheld the order of AA not approving the success fee of 3 cr. though approved by CoC, on the ground that this success fee was in the nature of a contingency and speculative, hence did not form part of the provisions of IBC and its regulations.

3. Changing Framework by IBBI to Mitigate Complexities

Necessarily the expectations from IP so appointed by the AA acting in the capacity of an officer of the court, are enormous, and these can be met with the support of IBBI. It is clearly evident that for any form of differences or disputes, the AA is approached as being the authority to resolve them, beside interpretation issues. This leads to delay in the CIRP timelines and eventually becomes detrimental to the very objective of having a time bound CIRP. The IBBI has been making serious efforts to ensure streamlining of overall processes and making it more transparent and robust. In this attempt, there have been various amendments to make the IBC more efficient and effective and are relevant for the professionals engaged in rendering IP services.

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Further, two recent amendments are aimed to strengthen the IPs and will have far reaching impact on the insolvency process in terms of the manner, format and remuneration going forward. IBBI came up with new policies as a step to address most of above issues (if not all) such as ensuring impartiality of IP acting as IRP/RP, individual relationship with the creditors and fee matters etc. Hence, these amendments are of utmost importance in shaping the insolvency professionals and their services aligning with the global formats while achieving the objectives of IBC in a better way. The details of these two amendments are:

a) Corporatisation of Insolvency Profession

Before the amendment as per IBC, an IP meant an eligible person who possessed professional qualifications of either a Chartered Accountant (CA), Company Secretary (CS),

Cost Accountant (ICWA) or an advocate or MBA with minimum 10 to 15 years of experience in their professional field, having passed the Limited Insolvency Examination (LIE), apply for enrolment with an IPA within a year and subsequently registered with the IBBI as an IP. Besides, he is required to complete certain CPE hours to receive assignments. It is an individual who is able to function as IRP/RP in his individual capacity, but this leads to a complexity for him to cope with the responsibilities within the timelines as per the IBC. Therefore, the IP, in general, resorts to his own or other professional(s) or firm(s) for the required support.

In the context of above, it was the long pending pressing need to reckon Insolvency Professional Entity (IPE) to provide resolution professional services. This is in line with other professional services mentioned in qualifying criteria such as CAs, CSs, and Advocate etc., which are being rendered under the entity's name, where a group of professionals with similar qualification (being individual) come together as either partner or director to act on behalf of the entity.

Finally, this has been addressed and effective from September 28, 2022 – the definition of Professional Member under Section 2(1)(g) of IBBI (IPs) Regulations, 2016 has been amended to “an individual or an IPE recognised by the IBBI under Regulation 13” and has been enrolled as a member of an IPA. With this, an IPE can provide resolution professional services once registered itself as an IP under Regulation 4(2) by making an application to the IBBI in Form AA of Second Schedule along with the requisite fee. Individual IPs can come together to pool their experience and expertise within their respective field to form an IPE. This is a welcome paradigm shift as it will provide a unique platform to pool the IPs which eventually will bring lots of benefits such as:

- i. Hassle free empanelment requirement at the entity level;
- ii. Pooling technical and managerial skills under one roof;
- iii. Efficient mechanism to address the need of capital investment;
- iv. Enabling platform to create desired infrastructure to support the process;
- v. Streamlining compliance and tax structure;

- vi. Added comfort to the CoC and the applicant on the capabilities of IP;
- vii. Continuous up-gradation of professional expertise handling multiple CIRP;
- viii. Creating a strong brand with global tie-ups or overseas presence.

Furthermore, the IPE, and not an individual, to be held accountable and responsible for CIRP and may thus avoid the hardship of being arrested and other legal battles in his individual capacity. It would always be prudent for an IPE to take Directors & Officers Liability insurance for the unexpected liabilities that emerge from managing CIRP and an insurance premium may be part of remuneration or CIRP cost.

(b) Remuneration of IPs

Though there have been many provisions such as Section 5(13) of the IBC, 2016, Regulations 33 and 34 of IBBI (CIRP) Regulations, 2016 and clauses 16, 25, 26 and 27 of the first schedule of IBBI (IPs) Regulations, 2016 covering constitution of CIRP cost including free for IPs. All these provisions define the CIRP cost and how to deal with it but do not specify the benchmark to serve as a guideline for determination of IRP/RP fee, which is entirely left open between the IP and Applicant/CoC and upon their failure to be decided by the AA.

It is difficult to accept the responsibility of IRP/RP without a commensurate fee structure in place and to negotiate for a minimum fee to make up for time and efforts. Therefore, there have been quite a few cases of disputes between RP and CoC on fee and sometimes blames of exorbitant fee as per the latter. The IBBI has also been receiving directions from the AA several times to frame necessary regulations and guidelines with regards to fixation of the fee as per the discussion paper of IBBI which listed many such cases.

Finally, IBBI vide IBBI (CIRP) Regulations, 2016 effective from September 13, 2022, has inserted a new clause i.e., 34B to provide guidance over the remuneration structure comprising of:

- i. Minimum Remuneration
- ii. Performance Linked Incentive
- iii. Period of Remuneration

This amendment provides a regulatory framework of professional fee payable to IPs comprising fixed and

variable fee with a minimum and maximum basis. This not only deals with sustainable basis for protecting interests of all the stakeholders but also will result in reduction of the IP fee disputes, enhance time efficiency including possible reduction of time involved in the CIRP and at the same time, keep the IP motivated by linking his incentive to the maximisation of CD value in whatever expedited timeline basis. Here is the synopsis of the remuneration framework as applicable going forward:

(I) Minimum Fixed Fee to be paid to IRP and RP

The applicant or the CoC will continue and free to decide the remuneration, but the fee of IRP or RP appointed on or after October 01, 2022, cannot be lesser than the slab wise fee specified as below:

Quantum of claims admitted	Minimum Fee PM
<= ₹ 50 Cr	₹ 1 Lakh
> ₹ 50 Cr but <= ₹ 500 Cr	₹ 2 Lakh
> ₹ 500 Cr but <= ₹ 2,500 Cr	₹ 3 Lakh
> ₹ 2,500 Cr <= ₹ 10,000 Cr	₹ 4 Lakh
> ₹ 10,000 Cr	₹ 5 Lakh

(ii) Performance-linked incentive fee

In addition to above fixed remuneration, CoC may decide in its discretion to pay performance-linked incentive fee for (a) the expedited completion of CIRP before 330 days and (b) for the maximisation of realisable value over the liquidation value, but in aggregate not exceeding ₹ 5 Cr for the resolution plan approved by the committee on or after October 01, 2022, as per below slab:

(a) For timely resolution

Time period from commencement date	Fee as % of Realisable Value
<=165 days	1.00%
> 165 days but <=270 days	0.75%
> 270 days but <=330 days	0.50%

(b) For value maximisation

The RP may also be paid the performance-linked incentive fee for valuation maximisation at the flat rate of 1% of difference between realisable and liquidation value, after the approval of the resolution plan. In this case, the realisable value means the sum payable to creditors in the resolution plan approved by the CoC.

With the performance linked incentive, RP will be induced to work to maximise his remuneration by making a sincere attempt to complete the CIRP at the earliest.

Illustration:

If IP submits resolution plan to the AA on the 205th day from the commencement date where realisable and liquidation value is 140 Cr and ₹40 Cr respectively then IP can be paid the performance-linked incentive fee under both categories with an individual cap as under:

For timely resolution (@0.75% of ₹140 Cr)	₹ 1.05 Cr
For value maximisation (@1% of ₹100 Cr (140 Cr - 40Cr))	₹ 1.00 Cr
Total	₹ 2.05 Cr

4. Conclusion

The remuneration guideline offers a win-win situation for all stakeholders and works at par like in other situations such as a CEO, over and above fixed remuneration, and is also eligible for reward in case of better performance. It is always a welcoming step when offered with a balanced environment between efficiency, quality, and effort with least room for ambiguity. The minimum fee criteria will avert the need for hard negotiation and thus in a way will be instrumental in completing CIRP with greater time and cost efficiencies.

Further, we have witnessed so far that CIRP is progressing with a slow pace and in many cases exceedingly even the 330 days period (not necessarily due to IRP/RP inefficiency). With the performance linked incentive, RP will be induced to work to maximise his remuneration by making a sincere attempt to complete the CIRP at the earliest. Since, there is no incentive fee for CIRP, completing post 330 days will trigger an expedited completion subject to other conditions.

The above amendments will pave the way for long-term sustainable growth of the IPs by bringing the improved structural and appropriate format besides being advantageous for corporate debtors undergoing CIRP, the applicant and the AA. As the IBC is maturing, a simultaneous shift in corporate structure, remuneration pattern and better governance will also be in due course.