

Insolvency Practitioners- Expectations and Responsibilities



The Insolvency and Bankruptcy Code, 2016 ('Code'), which will determine the fate of many bad loans will be dependent on the proficiency of Insolvency Professionals (IPs). Such professionals will be expected to run businesses, negotiate deals, investigate and advise on the viability of a business and its mode of restructuring. His decisions will impact the prospects of both creditors and debtors. His work will involve dealing with anxious business owners, employees and a range of other stakeholders. He also has to look at creditors' claims and then distribute the money collected after paying costs. This article attempts to bring out the expectations from an Insolvency professional/practitioner in the background of legislative provisions. Read on to know more...

Impact of Insolvency Practitioners/ Professional's on the UK's economy

To understand the magnitude of the impact that IPs can have on an economy we may take the example of the UK, which even though is a more developed economy but the impressive details will help us understand the importance of IPs for a country as a whole. As per a research¹ carried out



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by a leading corporate reputation, public policy and communications research consultancy firm ComRes, UK, it was found that in 2013-2014, insolvency practitioners helped to rescue two-in-five of all insolvent businesses in cases where an insolvency practitioner was appointed (approximately 85% of formal insolvencies). In real terms, this meant that insolvency practitioners helped around 6,700 businesses to continue trading in some way after entering a company insolvency. This resulted in 230,000 jobs across the UK being saved. Further, the research found that 10,400 businesses had continued to operate after working with insolvency practitioners during the course of the year. In total, the businesses that benefited from the professional assistance of insolvency practitioners and continued

¹ Source: <https://www.companydebt.com/news/rescue-news/insolvency-professionals-help-to-rescue-41-of-insolvent-businesses/>

to trade as a result were responsible for employing approximately 540,000 people. On the other hand the research also found that, in 2013-2014 alone, insolvency practitioners were able to help creditors reclaim £5bn of the money they are owed by insolvent companies and individuals.

What do Insolvency practitioners do?

As we have a UK based model for the code, we may refer to the explanation on functions outlined by The Centre for Economics and Business Research², on the role of Insolvency Practitioners. They state that *“The role of the Insolvency Practitioner is to administer an insolvency outcome within the legislation and to ensure a fair, efficient and quick redistribution of assets. In doing this, the regime itself, and the individual practitioners within it, need to strike an appropriate long-term balance between the interests of debtors and creditors [the people who are owed money]. An often overlooked part of the industry is its role in helping businesses and individuals avoid insolvency in the first place, both through providing advice to individuals and businesses as well as through instigating formal ‘rescue procedures.’”*

Creditors drive the insolvency process under the Code

Section 3(10) defines a Creditor as any person to whom a debt is owed and includes a financial creditor, operational creditor, secured creditor, unsecured creditor, and decree-holder. Even though Debtors can also file for insolvency proceedings, the weightage is for ‘Creditors in control’ when it comes to drive the insolvency process. The concept of ‘Creditors in control’ under the Code is in sharp contrast to all the past notions where various laws provided for control to vest with Debtors/Management even when the company was exploring a revival plan. The Code has adopted the pro creditor’s approach as prevalent in the UK and other commonwealth countries. Therefore, if a borrower is in default, a creditor can file an application to the court and start the insolvency process. The creditors are in control in determining the future course of action and appoint

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an IP to rescue the business through an insolvency resolution plan or to close it down when revival is not feasible.

Expectations from IP when appointed to a business

An IP will have to ensure maximisation of returns to creditors. When an IP is appointed to a case, they essentially have to grasp the operations of the business and decide what to do with it. There is no fit for all formula for dealing with a business in this situation; a careful commercial judgement must be made in each case. Faced with a struggling company, an IP is expected to take over the company’s reins, reverse its decline and bring the company back on track and continue trading to increase returns to creditors; or, in cases where the company is extremely weak and cannot survive, close it down.

In practice, an IP has to strive for achieving the best possible price for assets by ensuring exposure to a wide range of potential buyers, or providing regular progress reports to creditors.

Balancing the interests of debtor companies and their creditors can be particularly challenging, but it is an IP’s duty to ensure that all groups of creditors receive the highest possible returns using sound commercial judgement. Investigating the affairs of each company in insolvency is also a major aspect of the IP’s work.

Code of conduct for IPs

The IPs will be regulated by the code set out by Insolvency and Bankruptcy Board of India (IBBI) and the insolvency professional agencies (IPAs).

As per the provisions of Section 208 (2), every insolvency professional is required to abide by the following code of conduct:—

- (a) take reasonable care and diligence while performing his duties;
- (b) comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- (c) allow the insolvency professional agency to inspect his records;
- (d) submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- (e) perform his functions in such manner and subject to such conditions as may be specified.

² https://www.r3.org.uk/media/documents/policy/research_reports/insolvency_industry/R3%20Value%20of%20the%20industry_March%2015th.pdf.

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Duties of the resolution professional

The Model Bye-Laws³ are required to provide that an IP shall also be subject to the following duties:

- (a) act in good faith in discharge of his duties as an insolvency professional;
- (b) endeavour to maximise the value of assets of the debtor;
- (c) discharge his functions with utmost integrity and objectivity;
- (d) be independent and impartial;
- (e) discharge his functions with the highest standards of professional competence and professional ethics;
- (f) continuously upgrade his professional expertise;
- (g) perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code;
- (h) comply with applicable laws in the performance of his functions; and
- (i) maintain confidentiality of information obtained in the course of his professional activities unless required to disclose such information by law.

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In order to achieve the above, the resolution professional shall undertake the following actions, namely:—

- (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
- (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- (c) raise interim finances subject to the approval of the committee of creditors under section 28;

- (d) appoint accountants, legal or other professionals in the manner as specified by Board;
- (e) maintain an updated list of claims;
- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum in accordance with section 29;
- (h) invite prospective lenders, investors, and any other persons to put forward resolution plans;
- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board.

Further, the interim resolution professional is required to collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern in terms of provision in sections 18 and 20 of the code.

Conclusion

On an analysis of the major responsibilities owed by the IPs to the Debtors and Creditors it can be expected that the IPs should be well versed with aspects of Company law, Taxation, Banking/Finance, Stake holder management, Valuation/Sale of assets, Cash flow management, Commercial and business dynamics applicable to a specific sector.

However, one must appreciate the pragmatic approach of the government in bringing in the concept of insolvency professional entities⁴ (registered partnerships, limited liability partnerships and corporate entities) as the responsibilities of an IP could be very onerous and it would be difficult for an individual to possess such multiple skills. Therefore, it can be expected that an entity will have the capacity to offer the diverse skill sets on a single platform to facilitate the Insolvency and bankruptcy practice.

It is pertinent to note that the code will not prevent business failures but if the same is implemented properly by the IP's who are instrumental to its machinery, then it will definitely facilitate failed firms to windup seamlessly and pave the way to resurrection. ■

³ *Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, Clause VII of Schedule- Regulation 13.*

⁴ *Regulation 12, of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.*