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Ushering a new era of Insolvency Professional

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Background

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), notified by the Central Government in the month of May this year, is a landmark financial reform of India in many decades. The Code is introduced with a motive to provide easy recovery of debts, speedy liquidation of bodies corporate, consolidating the laws relating to insolvency to make the processes simpler, easy exit mechanism for sick and insolvent firms, etc. One of the biggest feature of the Code is resolution before liquidation in a time bound manner.

In all the phases of the process starting from making an application to National Company Law Tribunal (hereinafter referred to as "NCLT") starting from making an application to time bound resolution to completion of liquidation proceedings, Insolvency Professionals has a very important role to play in the whole mechanism. Looking at the trends in the developed countries, a well functioning system of bankruptcy driven by insolvency practitioners enables judiciary to delegate more and more to practitioners, thereby creating the positive externality and better utilization of judicial time.

In this article we analyse how the Insolvency Professional can play the role of a game changer after the introduction of new reform in the form of this Code.

Introduction

If a robust insolvency and bankruptcy regime is put in place, it will help an economy to prompt fair resolution of financial distress. Insolvency practitioners provide specialized skills and services in an insolvency process. The services provided by these professionals are multifarious and can be utilised at various junctures of restructuring activities; whether formal or informal. Owing to these traits, their role can be negated for efficient operation of a country's insolvency regime.

With the recent shift from the high court(s) to the era of tribunalisation, NCLT will now be the preliminary authority for dealing with insolvency and liquidation matters. The foremost reason for doing so is to protect the interest of stakeholders, and therefore increase the credibility of the insolvency process in the country. The term Insolvency Professional has been used interchangeably in the Code and its relevant regulations as Resolution Professional, Insolvency Professional, Interim Resolution Professional and Liquidator.

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Why Insolvency Professional?

The rapid change in global, economic and political graph necessitated the introduction of new professional in the wake of mounting activities increasing regulatory powers. The basic objective of establishing tribunals was to provide parties in dispute with speedy, cheap and decentralized mechanism for resolution of disputes. The tribunals were preliminarily constituted to reduce the huge backlog of cases that were pending in the High Courts and Supreme Court. Insolvency Professionals will play a key role in the transformation in this tribunalisation and more so especially in resolution of disputes.

The process of insolvency takes place through a formal and legally mandated bankruptcy process. Professional services by insolvency professionals can involve constructing, negotiating and mediating deals, and also advising on, or implementing the restructuring and rescue of businesses. This fact alone however, does not necessitate the creation of a regulated profession. The desire to protect the interest of stakeholders is one of the most important goals of creating a regulated profession. The stakeholders in a market cannot easily understand ex ante, the quality of a product particularly where specialised knowledge or skill is involved. By setting minimum standards and entry requirements, the state can ensure that stakeholders receive better quality services from such professionals. The failure to ensure quality increases the potential for low quality services.

Regulating the Insolvency Professional

Pursuant to the provision of section 209 and 210 the Code, a person wanting to work as IP is mandated to obtain dual registration viz. obtain membership from the Insolvency Professional Agency (IPA) and then register himself with the Insolvency and Bankruptcy Board of India (IBBI).

It was on November 23, 2016 when IBBI issued Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (hereinafter referred to as “IP Regulations”); which shall come into force w.e.f. November 29, 2016. The detailed procedure for a person intending to register themselves as an Insolvency Professional is mentioned herein under:

No Examination

Pursuant to regulation 9 of IP Regulations a person can make an application to IPA for registering himself as an IP for a limited period of 6 months. Referring to the regulation, he shall eligible to be registered as an IP for the aforesated period if:

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- ✓ He has been in practice as a CA / CS / CWA or an advocate for a minimum period of 15 years; and
- ✓ Submits an application to register himself as an to IPA for enrolling himself as an IP on or before December 31, 2016.

The application for registration shall be made in Form A to IPA with a non refundable fee of Rs. 5,000/-. The fees is payable to IPA on behalf of IBBI.

The applicant shall submit 2 applications to the any IPA registered with the Board. Of the two applications to be made by the applicant, one application shall be made to IPA for enrolling him as an IP and the other application shall be made to the IBBI, but the same shall be submitted to the IPA. On satisfaction of evaluation, the IPA shall enroll the applicant as an IP and shall forward the second application to the IBBI for registering the applicant.

Limited Insolvency Examination

Pursuant to the provision of regulation 5 of IP regulations, the following individuals are eligible to be registered as Insolvency Professional:

1. Any person who has passed National Insolvency Examinations; OR
2. A graduate who has minimum 15 years of post qualification managerial experience and upon passing Limited Insolvency Examination; OR
3. Chartered Accountants, Company Secretaries, Cost Accountants as well as lawyers with minimum 10 years of experience and upon passing Limited Insolvency Examination.

The Insolvency and Bankruptcy Board of India, on December 01, 2016, issued a press release¹ stating the syllabus, format and frequency of Limited Insolvency Examination. The enrolment for such examination will be open from December 15, 2016 and such examination will be held from December 31, 2016. The Board has planned to conduct an online examination with multiple choice questions pattern. However, the details pertaining to National Insolvency Examinations are yet to be notified by the Board.

As on date², more than 85 individuals who are members of the Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India or Institute of Cost Accountants of India are registered with the Board as IPs for a limited period of six from the date of their respective registration. These individuals have registered themselves as IPs pursuant to Regulation 9 of the IP Regulations.

¹ http://www.ibbi.gov.in/press_release_1dec.html

² <http://www.ibbi.gov.in/ipas.php>

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Recognition given to Insolvency Professional Entities

An analytical study of the Code and especially its areas requiring intervention of IP during the resolution and / or insolvency process, it seems unharmonious for an individual IP to properly and smoothly conduct the role supposedly to be carried by an IP in the spirit of law considering the fact that interest of the company, creditors, debtors, shareholders, regulators and society as a whole is at stake. With thorough recognition to the aforesaid fact, the regulators have ensured that the stake of all the concerned stake holders is protected and with due respect they have allowed entities to be registered as IPs.

Pursuant to the provision of Regulation 12 of the IP Regulations a company, LLP or even partnership firms are eligible to be registered as IP subject to the below mentioned conditions:

- partners of the limited liability partnership or registered partnership firm are registered as insolvency professionals; or
- a majority of the whole-time directors of the company are registered as insolvency professionals.

Any company, LLP or firm satisfying the aforementioned criteria and intending to get registered as an IP shall make an application in Form C to the Board. The Board upon satisfaction of evaluation (case to case basis), shall grant a certificate of registration to the applicant to conduct himself as an IP.

Such IP may use the organizational resource of a recognized IP Entity. However, such use shall be subject to the condition that the entity as well as its IP shall be jointly and severally liable for all acts or omissions of its partners or directors as insolvency professionals committed during such partnership or directorship. Where the Board is of the opinion that sufficient cause exists for de-recognition of an insolvency professional entity, it may do so by passing a reasoned order.

Code of Conduct for IPs

Considering the role and intervention of Insolvency Professional at various junctures of resolution / liquidation, it seems appropriate that there are proper set of rules and regulations in the form of a Code of Conduct that are specified for Insolvency Professionals. Schedule I of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 craves out an exhaustive Code of Conduct for Insolvency Professionals.

Upon being found that in case an Insolvency Professional has breached the obligations mentioned in the Code of Conduct, the Board, after its evaluation, has power to revoke the license of the Insolvency

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Professional. The obligation of the Code of Conduct for Insolvency Professional has been briefed as follows:

- An Insolvency Professional must:
 - act with integrity by being honest, straightforward and forthright in relations with its clients;
 - maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences;
 - maintain and upgrade his professional knowledge and skills to render competent professional service;
 - adhere to the time limits prescribed in the Code and its allied rules, regulations and guidelines there under for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for timely discharge of his duties;
 - not act with *mala fide* intentions or be negligent while performing his functions and duties under the Code;
 - provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations;
 - An Insolvency Professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs or cost of the bankruptcy process, as applicable to all relevant stakeholders, and must endeavor to ensure that such costs are not unreasonable.

Conclusion

Looking at the statistics, on an average it takes around 4.3 years, for completion of liquidation process in India. In the United States of America it takes 1.7 years to conclude a liquidation proceeding and in Canada it takes less than a year to complete a liquidation proceeding. Looking at the shift of the regime from “judicial determination” to “commercial determination”, an Insolvency Professional has a important role to achieve the effectiveness and achieve the goals of the Code. On the global index of ease of doing business, last year India was placed at 142nd position out of 189 countries. The position has marginally improved to 130th position in the current year. The marginal surge in rankings can be attributed to the recent spate of action by way of grant of various exemptions in Companies Act, 2013 like issue of unsecured debentures, fast process for incorporation of a company; Start up India initiative, etc.

With the introduction and enactment of Insolvency and Bankruptcy Code, India is trying to provide possible solution to financial creditors in a simple way and prescribed time period. Further, it also

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attempts to provide fast, time bound and easy closure of business in the country. However, the effective implementation and expectation of Code through different intermediaries, like Interim Resolution Professional, Insolvency Professionals, various government authorities and their effective and efficient discharge of duties will decide the effectiveness of this Code. However, the enactment of the Code will surely improve the ranking in the view of its clear intent of of speedy and easy recovery as well as closure of business.

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