

# Institutional framework for insolvency resolution: role of insolvency professionals

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# Professional services in insolvency proceedings

- ▶ Resolution of insolvency is a complex process. It requires several professional services:
  - ▶ Legal;
  - ▶ Accounting and auditing;
  - ▶ Project appraisal and valuation;
  - ▶ Advisory – restructuring, M&A;
  - ▶ Professional management.
- ▶ Well functioning professional services can:
  - ▶ Enhance the effectiveness of the insolvency proceedings – reduce delays and loss given default (LGD);
  - ▶ Aid negotiation between debtors and creditors; and
  - ▶ Reduce the burden of the courts in dealing with insolvency cases.

# Role of Insolvency Professionals

- ▶ Insolvency Professionals (IP) administer an insolvency outcome within the legislative framework.

This includes *rescue proceedings, liquidation and distribution of assets* and *out of court procedures*.

- ▶ They may also offer advise on how to avoid insolvency.
- ▶ They are typically appointed by courts or dominant creditors or group of creditors.
- ▶ Their primary objective is to *maximise return to creditors*. This also serves the cause of restructuring viable businesses in insolvency.

# Elements of a professional system

- ▶ For insolvency professionals (World Bank Principles D8):
  - ▶ Appropriate powers to discharge duties and responsibilities;
  - ▶ Competence and resources;
  - ▶ Integrity, impartiality and independence in functioning.
- ▶ For regulatory/supervisory bodies for the profession (World Bank Principles D7):
  - ▶ Objective and transparent criteria for licensing and determining competence;
  - ▶ Operating standards and code of conduct that reflect requirements of legislation and public expectations of fairness, impartiality, transparency, and accountability;
  - ▶ Methodology for fixing remuneration that fosters accountability, encourages competition and minimises conflict of interest.

## Country examples: UK

- ▶ IPs regulated under the Insolvency Act, 1986, though the practice existed even earlier.
- ▶ Regulated by the Insolvency Service, an executive agency under the Department for Business, Innovation and Skills.
- ▶ Licensing of practitioners through a qualifying exam. Recognised professional bodies such as the Association of Chartered Accountants, Solicitors Regulation Authority, Law Society and the Insolvency Practitioners Associations given the mandate to license.
- ▶ Licensing bodies act as self regulatory organisations (SRO). Standard operating procedures and code of ethics govern their functioning.

## Country examples: UK

- ▶ IPs act as officers of the court, though they are appointed by creditors who also exercise control over their remuneration.
- ▶ Controls in the IP remuneration regime established by the Enterprise Act, 2002.
- ▶ IPs are required to furnish a security/bond for losses to the insolvency estate caused by fraud or dishonesty by the IP.

## Country examples: Australia

- ▶ Insolvency profession regulated under the Corporations Act, 2001.
- ▶ Regulated by the Australian Securities and Investment Commission.
- ▶ Compulsory registration requirement for liquidators, though no licensing regime. Professionals drawn mainly from accounting and legal services.
- ▶ Insolvency Practitioners Association of Australia and Accounting Professional And Ethical Standard Board act as SROs.
- ▶ Ongoing discussion on the review and modernisation of insolvency practitioners regulation, registration and remuneration regime.

## Country examples: Brazil

- ▶ Legal framework does not provide for an IP. Instead a *Court Trustee* is appointed by the judge.
- ▶ Accountants, lawyers, business managers, economists and even specialised legal entities can be Court Trustees. They perform the following functions:
  - ▶ Assist the judge, establishing a link between debtor, creditors, the court and any other interested parties;
  - ▶ Assess the validity of the credits as stated by the debtor and assessed by creditors;
  - ▶ Supervise the insolvent company's activities and its compliance to the reorganization plan and submit periodic reports to the judge;
  - ▶ In case of a liquidation procedure, carry out company administration and liquidation.

## Country examples: Brazil

- ▶ Court Trustee activities subject to analysis by the Creditors Committee and the judge.
- ▶ In case a company' managers are removed by the court, a *Judicial Officer* is appointed by the judge to replace the management of the company and comply with the recovery plan.
- ▶ Court Trustee remuneration is fixed by the judge. The total remuneration cannot exceed 5% of the total amount of the recovered debt or the market value of the assets to be liquidated.

# Insolvency practitioners in India

- ▶ No organised insolvency practice.
- ▶ Official Liquidator (OL) under the Companies Act, 1956 (CA 1956) and the Operating Agency (OA) under SICA, 1985.
- ▶ Under CA 1956, private professional OLs only permitted for voluntary winding up proceedings. For winding up by court proceedings, only court appointed OLs allowed.
- ▶ Eradi Committee (1999), Mitra Committee (2001), Irani Committee (2005), Rajan Committee (2008) all stressed on the need to reform the current OL framework.

# Provisions of Companies Act, 2013

- ▶ Provides for the OL, Interim Administrator (IA) and Company Administrator (CA).
- ▶ OLs can be appointed from a Central Government database consisting of company secretaries, chartered accountants, cost accountants advocates or firms or bodies corporate consisting of such professionals.
- ▶ The only criterion for membership of the panel is *at least ten years experience in company matters*.
- ▶ IAs and CAs can be appointed by the National Company Law Tribunal (NCLT) from a similar Central Government database except that firms and bodies corporate are not permitted in this case.

# Provisions of Companies Act, 2013

- ▶ Triggers for conflict of interest for an OL or CA not defined in the Act;
- ▶ Consequence of misconduct, fraud, malfeasance, breach of duties or professional incompetence in the form of removal from the Central Government database.
- ▶ Remuneration of OL fixed by NCLT based on task, qualification of the OL and size of the company.

## Way forward

- ▶ A reform of the bankruptcy regime requires reform of institutional mechanisms.
- ▶ The office of the OL and the CA need to be expanded and developed in lines with a professional IP service, as in the UK.
- ▶ This will require a regulatory framework for registration, operating procedures, remuneration, supervision and disciplinary action.

Thank you.

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