

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

CIRCULAR

No. IBBI/IP/013/2018, 12th June, 2018

To
All Registered Insolvency Professionals
All Recognised Insolvency Professional Entities
All Registered Insolvency Professional Agencies
(By mail to registered email addresses and on website of the IBBI)

Dear Madam / Sir,

Sub: Fee and other Expenses incurred for Corporate Insolvency Resolution Process

When a corporate debtor undergoes corporate insolvency resolution process (CIRP), an Insolvency Professional (IP) is vested with the management of its affairs and he manages its operations as a going concern. He complies with the applicable laws on behalf of the corporate debtor. He conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. He needs to be compensated for his professional services commensurate to his ability, duties and responsibilities. He also needs to pay fee or incur other expenses for various goods and services required for conducting the CIRP and or managing the operations of the corporate debtor as a going concern.

2. The relevant provisions of the Insolvency and Bankruptcy Code, 2016 (Code) and regulations made thereunder having a bearing on fee and other expenses of CIRP are at **Annexure A**.
3. An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition. An illustrative list of factors considered in determination of what is reasonable is given in **Annexure B**.
4. Para 16 of the Code of Conduct for IPs in the Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.
5. The IBBI had put out a discussion paper titled “Regulation of fee payable to insolvency professionals and other process costs under Corporate Insolvency Resolution Process” on its web site on 1st April, 2018 seeking comments thereon. The comments received from stakeholders have been considered in consultation with the Insolvency Professional Agencies.
6. Keeping the above in view, the IP is directed to ensure that:-

(a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to

Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;

(b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;

(c) the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;

(d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;

(e) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;

(f) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and

(g) all CIRP related fee and other expenses are paid through banking channel.

7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-

(a) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;

(b) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and

(c) only the IRPC, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.

8. It is clarified that the IRPC shall not include:

(a) any fee or other expense not directly related to CIRP;

(b) any fee or other expense beyond the amount approved by CoC, where such approval is required;

(c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;

(d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;

(e) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP;

[Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

(f) any expense incurred by a member of CoC or a professional engaged by the CoC;

(g) any expense incurred on travel and stay of a member of CoC; and

(h) any expense incurred by the CoC directly;

[**Explanation:** Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]

(i) any expense beyond the amount approved by the CoC, wherever such approval is required; and

(j) any expense not related to CIRP.

9. Further, the IP is directed to disclose fee and other expenses in the relevant Form in Annexure C to the Insolvency Professional Agency of which he is a member:

(a) for all concluded CIRPs by 15th July, 2018, and

(b) for ongoing and subsequent CIRPs within the time as specified in the relevant Form.

10. An Insolvency Professional Agency shall -

(a) disseminate the disclosures made by its IPs on an appropriate electronic platform within three working days of receipt of the same;

(b) monitor disclosures made by its IPs and submit a monthly summary of non-compliance by its IPs with this circular to the IBBI by 7th of the succeeding month;

(c) take appropriate measures to ensure compliance by its IPs.

11. This circular is issued in exercise of the powers conferred under clause (h) of sub-section (1) of section 196 read with regulation 34A of the IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in consultation with all the three registered Insolvency Professional Agencies.

Yours faithfully,

-Sd-

(Dilip Arjun Khandale)
Deputy General Manager
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Annexure A

Provisions and Pronouncements having a bearing on Fee and other Expenses of CIRP

I. The Insolvency and Bankruptcy Code, 2016

Section 5(13) reads as under:

“(13) Insolvency Resolution Process Costs” means –

- (a) the amount of any interim finance and the costs incurred in raising such finance;*
- (b) the fees payable to any person acting as a resolution professional;*
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board;”*

Section 208(2) reads as under:

“208. (2) Every insolvency professional shall abide by the following code of conduct: –

- (a) to take reasonable care and diligence while performing his duties;*
- (b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;*
- (c) to allow the insolvency professional agency to inspect his records;*
- (d) to 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) to perform his functions in such manner and subject to such conditions as may be specified.”.*

II. The IBBI (Insolvency Professionals) Regulations, 2016

Relevant Paras of the Code of Conduct under the Regulations read as under:

“16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

25. An Insolvency Professional must 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.

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.”.

III. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Chapter IX of the Regulations reads as under:

*“Chapter IX
INSOLVENCY RESOLUTION PROCESS COSTS*

Insolvency Resolution Process Costs

31. *“Insolvency resolution process costs” under Section 5(13)(e) shall mean-*

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

Essential supplies.

32. *The essential goods and services referred to in section 14(2) shall mean-*

- (1) electricity;*
- (2) water;*
- (3) telecommunication services; and*
- (4) information technology services,*
to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Costs of the interim resolution professional.

33. (1) *The applicant shall fix the expenses to be incurred on or by the interim resolution professional.*
- (2) *The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).*
- (3) *The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.*
- (4) *The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.*

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.

Resolution professional costs.

34. *The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.*

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.

Disclosure of Costs.

34 A. The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board."

IV. Circulars Issued by the IBBI

The circular No. IP/004/2018 dated 16th January, 2018 provides as under:

"3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account."

Annexure B**What is Reasonable 'Cost' and Reasonable 'Fee'**

I. As regards reasonable costs, the Society for Insolvency Practitioners of India, in its statement of best practices on "PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS" observes:

"Insolvency professionals must ensure that the costs incurred are reasonable. To determine the reasonability of these costs, they should consider if the costs are-

- (a) directly related to the insolvency resolution process,
- (b) necessary for meeting the objectives of the insolvency resolution process, and the Code,
- (c) proportional to the work required to be done and the assets of the corporate debtor, and
- (d) determined on an arms' length basis, in consonance with the requirements of integrity and independence."

[http://www.insolindia.com/uploads_insol/draft_best_practices/files/-1013.pdf]

II. As regards reasonable fee, the Society for Insolvency Practitioners of India, in its statement of best practices on "PAYMENT OF FEE AND REIMBURSEMENT OF OUT-OF-POCKET EXPENSES" suggests:

"Factors to be considered while charging fee

(i) An insolvency professional may charge a fixed or variable fee to reasonably remunerate him/her for the work that he/she necessarily and properly undertakes for an appointment under the Code. In determining what is necessary and proper, the insolvency professional should consider if the work is-

- (a) directly related to the insolvency resolution process,
- (b) in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement, and

(c) in consonance with his/her duties under the Code and the Regulations thereunder.

(ii) An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:

- (a) time based charging,*
- (b) prospective fee (up to a cap),*
- (c) fixed fee,*
- (d) percentage based charging,*
- (e) success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.*

Illustration: X is appointed as an IRP. She can charge a cumulative of fixed fee to suspend the board of directors and have the public announcement made, fee per hour spent on collecting and verifying claims, and a fee based on the percentage of assets handled for running the business as a going concern.

(iii) An insolvency professional should consider the following factors while determining the quantum of fee to charged:

- (a) value and nature of the assets dealt with,*
- (b) time properly given by the insolvency professional and her staff in attending to the affairs of the debtor,*
- (c) the complexity of the case,*
- (d) exceptional responsibility falling on the insolvency professional,*
- (e) the effectiveness with which the insolvency professional carries out her duties.*

Illustration: X, an insolvency professional, may choose to charge higher fee if-

- (a) the properties of the corporate debtor are in multiple locations all over the country (nature of property),*
- (b) key trade suppliers are also unpaid creditors and thus hostile (complexity of the case), or*
- (c) if the existing management is not capable which requires him to expend unusual effort to run the business as a going concern (exceptional responsibility).*
- (iv) An insolvency professional should not increase the fee charged without the prior approval of the authority fixing his/her fee."*

[http://www.insolindia.com/uploads_insol/draft_best_practices/files/-1008.pdf]

III. Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct, which sets forth eight factors to determine what is reasonable fee in the context of lawyers, reads as under:

"Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
- (3) the fee customarily charged in the locality for similar legal services;*

- (4) the amount involved and the results obtained;*
 - (5) the time limitations imposed by the client or by the circumstances;*
 - (6) the nature and length of the professional relationship with the client;*
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;*
and
 - (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.”*
- [<http://www.txcourts.gov/media/1343648/tdrpc-effective-may-1-2018.pdf>]

Annexure C(See attachement)

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