'If banks are interested in recovery, IBC is not an option'

Even with the suspension of the Insolvency and Bankruptcy Code (IBC) for six months, the Insolvency and Bankruptcy Board of India (IBBI) has its hands full with cases, designing a special framework for MSMEs, and implementing an individual insolvency process. **M S SAHOO**, chairman of the IBBI, tells **Ruchika Chitravanshi** the best use of the IBC is not using it. Excerpts:

Q&A

M S SAHOO
Chairman, IBBI

How will the role of the IBBI evolve with the latest changes made to the IBC and what will be the priorities?

Our hands are full. In addition to routine work, the priority would include a swift response as the Covid-19 story unfolds, and recalibrating the ecosystem in sync with the "new normal".

We will assist the government in exploring options for resolutions, such as a special insolvency resolution framework for MSMEs and to implement Part III of the Code, which relates to individual insolvency, such as a fresh start.

How do you think the suspension of the IBC affects creditors, especially in the case of wilful defaulters who might misuse the provision?

The suspension affects the rights of lenders in relation to defaults arising during a short window of time. And it is in their interests. Further, the FM has indicated the intention to make available a special resolution framework for MSMEs, which, with the revised definition of MSMEs, probably covers a significant proportion of the corporate world. In any case, the menu for banks in the case of default is long. If they are interested in recovery, the IBC is not an option for them. The debtors and creditors would explore innovative options in these challenging times. One should focus on what one has rather than what one hasn't.

"THE SUSPENSION OF A FEW SECTIONS OF THE CODE FOR COVID-RELATED DEFAULTS WOULD GIVE FURTHER MOMENTUM TO THE INFORMAL OR FORMAL WORKOUTS BETWEEN LENDERS AND CREDITORS OUTSIDE THE CODE"

The IBC deals with default, agnostic of its nature, whether wilful or otherwise. The Ordinance has not changed this position. It has not also changed Section 29A, which makes a wilful defaulter ineligible to be a resolution applicant. There are enough laws to deal with wilful default.

If other options work, how will it affect the IBC?

The IBC is not the first resort for a lender, though it has been effective even from a recovery perspective seen against the pre-IBC recovery rate and timelines. The best use of the IBC is not using it. The suspension of a few Sections of the Code for Covid-related defaults would give further momentum to the informal or formal workouts between lenders and creditors outside the Code.

Will the exemption extend to companies that had given corporate guarantees before March 25 and could not perform their obligations?

The Code provides for initiating insolvency proceedings against a corporate debtor upon default. If it has defaulted prior to March 25 this year, proceedings could be initiated. But one would weigh the underlying situation, the underlying value, and the likely consequence, before initiating insolvency proceedings.

Turn to Page 6

FROM PAGE 1

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Does the insertion of sub-section (3) to Section 66 provide undue protection to the directors of a corporate debtor for any fraudulent transaction undertaken during the period?
Sub-section (3) provides protection to directors in respect of liabilities under sub-section (2), which does not deal with fraud. It deals with exercising due diligence to minimise the creditors' potential loss, while sub-section (1), which deals with fraud, has not been touched. Further, Section 166 of the Companies Act, 2013, which requires a director to discharge his or her duties with due and reasonable care, skill, and diligence, remains unchanged. I do not see any undue protection.

How does the suspension of Section 10, which enables a corporate debtor to initiate insolvency, help?
A key feature of the Code is that it balances the rights and interests of all stakeholders. It creates an imbalance if only the debtor has the right to initiate insolvency proceedings while a creditor does not, and the other way around. Further, irrespective of who initiates the proceedings, the outcome is the same, which is not acceptable. Rescuing firms from death being the prime objective of the Code, it must not be used to take away their lives prematurely.

What is the impact on insolvency professionals, who are the valuers of the suspension?
It does not affect them in terms of work availability. There are more than 10,000 applications on initiating corporate insolvency pending with the Adjudicating Authority at the admission stage. There are more than 2,000 cases of insolvency proceedings going on, more than 1,000 ongoing

corporate liquidations, and 500-plus voluntary liquidations. Fresh applications in respect of defaults that have occurred on or before March 25, 2020, can be filed. A special resolution framework for MSMEs is coming up. Work on operationalising provisions relating to individual insolvency has begun. Besides, these professionals are in huge demand for restructuring and valuation services outside the Code. Thus, what they have on the table is much more than what they can take, given that there are only 3,000 insolvency professionals and 3,000 registered valuers.

What is your view on prepackaged schemes for resolving MSME insolvencies and is it a viable model for other insolvencies too?
While one can consider prepacks for both MSMEs and non-MSMEs in due course, the immediate mandate is to have a special resolution framework for MSMEs. MSMEs are different from other firms in many ways. Among others, the market for resolution plans for MSMEs is local, while the entire globe is the market for bigger firms. Almost every MSME that comes at the lower end of the liquidation waterfall is an operational creditor.

Since the value of an MSME often lies in informal arrangements, a very formal, rigid framework for resolution is not always conducive.

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