

From Chairperson's Desk

IBBI: A Regulator Like No Other

Governance through regulators probably constitutes the most significant governance reforms in the recent decades. India has a track record of establishing credible regulators and delivering effective governance through them. The Insolvency and Bankruptcy Board of India (IBBI) is a recent addition to the regulatory state. It is, however, a novel experiment, with no parallel either in the Indian regulatory milieu or in the insolvency space elsewhere. I wish to dwell upon a few facets of IBBI's role and its functioning, as I understand, which make it a regulator like no other.

Facets of role

The IBBI has regulatory oversight over professionals and related institutions - Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs), Insolvency Professional Entities (IPEs) and Information Utilities (IUs) - in the insolvency space. It makes regulations and guidelines on matters relating to insolvency processes - corporate insolvency resolution, pre-packaged insolvency resolution, corporate liquidation, voluntary liquidation, fresh start, individual insolvency resolution and individual bankruptcy - under the Insolvency and Bankruptcy Code, 2016 (Code/IBC). For the time being, it also acts as the authority for valuation profession.

Three-in-one regulator: A regulator of a profession develops and regulates the profession. It does not regulate markets where these professionals serve. Nor does it specify the rules to be followed by them in the market / for transactions. A regulator of markets promotes development of, and regulates, markets. It does not develop and regulate the professionals, who render services in these markets. A regulator of utilities sets standards and fixes tariffs to address competition concerns and attract investment to utilities. The IBBI is different from other regulators as not only does it develop and regulate the insolvency profession, it also specifies the regulations to be followed by IPs in the market / for transactions, and regulates the markets where the IPs serve. It sets standards to ensure quality of services and endeavours to provide a competitive environment. Differently put, the IBBI blends the duties of a regulator of professions, a regulator of markets, and a regulator of utilities, though its role is vastly different from that of any of them.

Ambit of authority: The Securities and Exchange Board of India (SEBI) has statutory objectives to protect the interests of the investors in securities and to promote the development of, and to regulate, the securities market. It has mandate to undertake any measure in furtherance of its objectives. It has authority to make regulations to carry out the purposes of the Act. Its jurisdiction extends over all participants in securities markets, including issuers of securities in relation to issue and trading of their securities. On the other hand, the IBBI has specific statutory functions, subject to general direction of the Government. It has authority to make regulations to carry out the provisions of the Code. Its jurisdiction extends over service providers (IPs, IPAs, and IUs) only. The ambit of authority of IBBI is narrow as compared to that of a market regulator.

Regulator vis-à-vis tribunal: In economic regulations, a tribunal is typically the appellate authority for the quasi-judicial functions of a regulator. A regulator makes subordinate legislation and enforces them in respect of relevant market participants. It applies and interprets the Regulations it has made, through its enforcement and adjudicatory actions. A person aggrieved by such actions and interpretations may prefer an appeal before a tribunal. A decision of the tribunal is binding on the regulator until it is reversed. However, the tribunal has no role as regards quasi-legislative and executive functions of the regulator.

The IBBI is not required to apply and interpret the Regulations it has made, except in relation to service providers. The AA applies and interprets the law, including Regulations, at the first instance, through its decisions, which are appealable before the Appellate Authority. The Code specifies the roles of the AA and IBBI. The IBBI makes IPs available, and the AA appoints them to conduct various processes. It makes regulations relating to processes. The stakeholders and IPs conduct processes in accordance with regulations. Many of these are submitted to the AA for approval. No ecosystem, either in India or elsewhere, has two parallel institutions like IBBI and AA. It required

significant efforts to develop mutual appreciation of each other's role in the initial years.

Unique in insolvency space: Most insolvency jurisdictions have two layers in the hierarchy of regulation, namely, the government department dealing with insolvency and membership organisations regulating insolvency practitioners. Wherever there is another agency in between, such agency is not dedicated to insolvency. In contrast, the Indian jurisdiction has three layers in the hierarchy wherein the IBBI is interspersed between the Government and the IPAs. The IBBI is entrusted with tasks some of which are either in the realm of Government or professional bodies in other jurisdictions. As there is no comparable regulator to learn from, either in India or elsewhere, IBBI is an evolving experimentation in terms of its role.

Facets of functioning

While discharging its statutory duties and functions, the IBBI has charted a slightly different path, as compared to most other regulators, albeit within the permissible boundaries of the statute.

Responsiveness: Speed is the essence of the Code. The IBBI, being a creation of the Code, imbibed speed from day one. It was established on October 1, 2016 and instructed to commence corporate insolvency by December 1, 2016. This required nothing short of a miracle. The immediate tasks included: market volunteering to set up IPAs; individuals with right calibre to enroll with IPAs and seek registration with the IBBI as IPs; regulations relating to IPs, IPAs, corporate insolvency resolution process (CIRP) and liquidation process to be in place; advocacy to spread the message of the Code and make the stakeholders aware of their roles, and the IBBI to have the capacity to work on these. With active support of the Government, the IBBI delivered all these, making roll out of corporate insolvency possible on December 1, 2016. Promptitude has been a part of its work culture since then.

Regulators are created to address the concerns proactively or at least immediately after a concern has surfaced. Two illustrations of proactive actions are: (a) In the CIRP of Jaypee Infratech Limited, public announcement was made on August 10, 2017 seeking claims by August 24, 2017. It was not clear whether an allottee of a real estate project would submit claims as a financial creditor (FC) or an operational creditor (OC). To ensure that claims are submitted by August 24, 2017, the IBBI amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) on August 16, 2017 to enable submission of claims by allottees. In course of time, the Code was amended on June 6, 2018 to explicitly consider such allottees as FCs. (b) The first resolution plan under the Code was approved on August 2, 2017, whereby Synergies Dooray Automotive Limited got amalgamated with a group company, while the creditors took a haircut of 94%. This appeared like rewarding the promoters, who probably drove the company to the ground, at the expense of the creditors. To maintain integrity of CIRP, the IBBI amended the CIRP Regulations on November 7, 2017, requiring disclosure of the antecedents - convictions, criminal proceedings, wilful defaults, debarments - of the resolution applicant and its connected persons to enable an assessment of the credibility of such applicant. Subsequently, the Code was amended on November 23, 2017, prohibiting persons with such antecedents from submitting resolution plans.

The AA appoints an IP to conduct a process. When the stakeholders have identified an IP, the AA needs to verify from the IBBI the credentials of the IP before appointing him. The IBBI makes available the database of all eligible IPs with the AA in advance so that it can appoint the IP instantaneously. Similarly, where the stakeholders have not proposed an IP, the AA needs to make a reference to the IBBI for a recommendation. The IBBI makes available a Panel of recommended IPs with the AA in advance, which serves as instant solution for appointments. The Code initially envisaged 14 days for appointment of an Interim Resolution Professional (IRP). This innovative solution, made in consultation with the AA, made appointment instantaneous. In recognition of this, the Insolvency Law Committee (ILC) recommended doing away with 14 days for appointment and section 16(1) was accordingly amended.

The IBBI has been playing a proactive role from conceptualisation to

implementation of several innovative products, including insolvency framework for resolution of stress of financial service providers, pre-packaged insolvency resolution, and institutional framework for valuation profession. It has conceptualised several innovative solutions such as resolvability of companies, automation of loan contracts, platform for distressed assets, recast of fresh start process and many more, to improve the outcomes of processes and taken up with appropriate authorities.

Governance: There have been concerns emanating from integration of powers in a regulator. Recognising this concern, the IBBI has structured itself into three separate wings, namely, Research and Regulation Wing, Registration and Monitoring Wing, and Administrative Law Wing and each of these wings is headed by a separate Whole-time Member, to avoid intra-institutional and public law concern.

The Code does not explicitly distinguish between the IBBI and its Governing Board (GB). However, in its first meeting held on October 7, 2016, the GB identified the businesses which it alone should transact, pending formal regulations. The formal Regulations were notified on January 31, 2017, earmarking the businesses to be transacted by the GB. The regulations provide for a Charter of Conduct for Members of the GB to ensure that the GB conducts in a manner that does not compromise its ability to accomplish its mandate or undermine public confidence in the ability of Members to discharge their responsibilities. Conceptually, the GB's primary responsibility is to act as a hands-on principal to hold the management accountable. To play this role effectively, the non-executive members of the GB have been meeting stakeholders and officers of the IBBI periodically.

The GB has been conscious of its performance from the very beginning. It has been evaluating itself to assess if it is meeting the expectations of external scrutiny and improving both organisational and board performance and to identify the strengths, weaknesses, and opportunities to improve its performance. The IBBI also evaluates its performance independent of evaluation of the GB. Keeping in view inadequacy of self-evaluation, the National Council of Applied Economic Research has been commissioned to undertake an evaluation of the performance of IBBI, as distinct from that of the Code. The GB is now seized with a desire to reimagine IBBI with changing times and challenges ahead. It is examining afresh the *raison d'être* of IBBI as to whether its continued existence is warranted in the light of the outcomes of the processes being overseen by IBBI and whether these are eventually leading to enhanced economic performance.

The kind of pro-active engagement IBBI has with stakeholders, including through hundreds of roundtables every year, has been unprecedented in many ways. The active role stakeholders have played has been commendable, turning out to be the most valuable resource of the IBC ecosystem. Many believe that IBC has been a reform by the stakeholders, for the stakeholders and of the stakeholders. The IBBI has a standing arrangement to enable any stakeholder to seek any new regulation or suggest any change in any of the existing regulations, throughout the year. This puts every stakeholder into the shoes of a regulator and crowdsources ideas and perspectives. Consequently, the universe of ideas available with the regulator is much larger and the possibility of a more conducive regulatory framework much higher. The IBBI continues to engage with stakeholders even after regulations are made to ensure smooth implementation and reduce cost of compliance.

Building professions: The IBBI has been shepherding two emerging professions, namely, insolvency profession and valuation profession. While using the standard toolbox to build professions, it has made some innovations.

Graduate Insolvency Programme: The IBBI led an industry initiative to conceptualise Graduate Insolvency Programme (GIP) to take the insolvency profession to the next level. It is a one of its kind programme in the world to produce top-quality IPs who can deliver world-class services. It provides an avenue for young professionals, having talent but lacking experience, to take up the insolvency profession. It is a 24-month programme consisting of an intensive residential classroom component of 12 months and a hands-on internship component at the cutting edge of the practice for 12 months. The Indian Institute of Corporate Affairs commenced GIP in the academic year 2019-20. The National Law Institute University, Bhopal is scheduled to commence GIP from academic year 2021-22.

Fit and Proper Person: The credibility of a profession depends upon credibility of its members. A distinct requirement of the insolvency profession (also valuation profession), as compared to most other professions, is that it lets only those individuals in, who the profession would feel proud of, and prevents entry of those individuals, whose antecedents are doubtful or questionable. The IBBI allows entry of only those individuals who are 'fit and proper' and requires them to remain fit and proper as a condition of continued registration. For determining whether a person is 'fit and proper' or not, the IBBI considers various aspects, including but not limited to (a) integrity, reputation, and character, (b) absence of convictions and restraint orders, and (c) competence and financial solvency.

Valuation Profession: A key objective of the Code is maximisation of value of assets of the persons in distress. A critical element towards achieving this objective is transparent and credible determination of value of the assets to facilitate comparison and informed decision making. Valuations serve as reference for evaluation of choices, including liquidation, and selection of the choice that decides the fate of the firm and consequently the stakeholders. If valuation is not right, a viable firm could be liquidated and an unviable firm could be rehabilitated, which are disastrous for the economy. As an interim arrangement, a framework was created under the Companies Act, 2013 enabling IBBI to groom valuation profession. To take the profession to the next level, a Committee of Experts has recommended establishment of National Institute of Valuers to steer regulation and development of valuation profession.

Knowledge organisation: The IBBI strives to be a knowledge organisation given its role in respect of two new professions. In association with IPAs, it has been engaging with researchers, academia, and practitioners to produce and capture emerging knowledge and build capacity of professionals at the time of entry and on a continuing basis. It conducts the valuation examination for three asset classes, namely, land & building, plant & machinery and securities or financial assets and the insolvency examination for entry into the professions. It has made available study material, developed by experts, to help the candidates appearing for these examinations. Of these, the study material for plant & machinery, and land & building materials, developed by Centre for Valuation Studies, Research and Training Association, are used by many valuer organisations across the world. The IBBI and IPAs bring out several publications, and research studies, and actively encourage and support academia to do so.

Institutional legitimacy: What distinguishes an organisation from an institution is its legitimacy. An organisation needs to be accepted by the stakeholders for what it does and how it does, rather than only for its statutory mandate. This requires the organisation to build social capital by consistent conduct and performance over years or even decades. To my understanding, the IBBI has begun the journey of legitimacy.

Perhaps in recognition of its role and performance, the IBBI finds a place in important fora such as Financial Stability and Development Council, Forum of Indian Regulators, Competition Law Review Committee, ILC, and International Association of Insolvency Regulators. It provided leadership to important committees in insolvency space such as Sub-Committee of the ILC on Resolution of Financial Service Providers; Committee of Experts on Institutional Framework for Regulation and Development of Valuation Professionals; and Sub-Committee of the ILC on pre-packaged insolvency resolution process (PPIRP).

Conclusion

A distinguished visitor to IBBI once described it as a 'start-up'. I quite tend to agree and wish it remains so. The IBBI has all the features of a start-up, namely, it is young; it is innovating; it is flexible, it is agile, and it has outcome orientation. Team IBBI, led by its Governing Board, is ever vigilant and available to any stakeholder with a legitimate concern to help address it within the four walls of the legal framework.

In this quinquennial year of the Code and IBBI, I look at the outcomes, the journey of IBBI and my personal journey with IBBI, with a sense of satisfaction and contentment. It has been a well begun reform in the insolvency space in the country and as the proverb goes, 'well begun is half done'. Many milestones have been crossed, but many more lie ahead.

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