

A robust insolvency framework is built on the standards and professionalism exhibited by the IP: Dr. Navrang Saini

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Dr. Navrang Saini took charge as WTM, IBBI on 31st March 2017. He has PG degrees in Management and Law along with PhD in Corporate Law and professional qualification as a Company Secretary.

Dr. Saini has served the Ministry of Corporate Affairs in various capacities. During his tenure as Registrar of Companies, Delhi, and Haryana, Dr. Saini implemented the first mission mode e-governance project of the country 'MCA21' as a major pilot project. His last assignment was as Director General at the Ministry.

In IBBI, he is presently looking after Registration & Monitoring Wing comprising Insolvency Professionals, Insolvency Professional Entities, Information Utilities, Insolvency Professional Agencies, Registered Valuers, Registered Valuers Organisations, Inspection, Investigation, Surveillance and Grievance Redressal. In addition, he is in-charge of the Legal Affairs Division and Establishment Division.

*In an **Exclusive Interview** with **IIPI** for **The Resolution Professional**, **Dr. Saini** expressed his views on various issues related to IBC Ecosystem. Read on to know more....*

IIPI: How can the past four years of operation of the insolvency regime in India through the IBC, 2016, be summarized while juxtaposing the same with the previous regime?

Dr. Saini: Since its notification, the Insolvency and Bankruptcy Code, 2016 (Code) has created a cohesive and comprehensive ecosystem that cements the processes and the service providers together towards the achievement of its objectives in a time bound manner.

The Code has rescued 308 Corporate Debtors (CDs) as of December 2020 through resolution plans in which the creditors have realised more than 192 per cent of realisable value of the CDs. Recovery for financial creditors (FCs), as compared to their claims, was found to be more than 43 per cent for all the years since the inception of the Code.

Although the Code has rescued 308 CDs, 1121 CDs went into liquidation. In this context, it is pertinent to note that appx. 74 per cent of cases undergoing liquidation and 33 per cent of cases undergoing resolution were sick or defunct. The value of assets of these CDs had significantly eroded away by the time they entered CIRP. In fact, the CDs rescued had assets valued at ₹ 1.03 lakh crore, while the CDs (for which data are available) referred for liquidation had assets valued at ₹ 0.43 lakh crore when they entered the CIRP. Thus, in value terms, around three fourth of distressed assets were rescued.

By the end of December 2020, CIRPs rescued took on average 441 days for conclusion of the process while CIRPs which ended up in orders for liquidation, took on average 328 days for conclusion. The cost details available for 260 CDs resolved indicates that the cost works out on average 0.79 per cent of liquidation value and 0.42 per cent of resolution value.

The Code has brought about significant behavioural changes among the creditors and debtors thereby redefining debtor-creditor relationship. It encourages the debtors to settle default expeditiously with the creditor at the earliest, preferably outside the Code. Since the enactment of the Code in 2016, of the 18,892 applications that were dealt with, as many as 14,884 cases involving defaults of ₹ 5.15 lakh crore were withdrawn by September 2020 from various benches of the NCLT, before these applications were admitted by the Adjudicating Authority, and 913 processes were closed mid-way by December, 2020.

The above outcomes under the Code show that they are a far cry from the previous regime which yielded a recovery of 25 per cent for creditors through a

process which took about 4+ years and entailed a cost of 9 per cent.

The achievements of the Code have been recognised globally. In the World Bank Group's Doing Business Reports, India's rank moved up from 136 to 52 in terms of 'resolving insolvency' in the last four years. In the Global Innovation Index, India's rank improved from 111 in 2017 to 47 in 2020 in 'Ease of Resolving Insolvency'. India was also awarded the Global Restructuring Review Award for the Most Improved Jurisdiction in restructuring and insolvency regime.

IIPI: Sometimes it is not the fault of the business model or the entrepreneurs but the issues like international relations, economic crisis, natural calamities, and pandemics such as COVID which cause distress. In this backdrop, how would the safeguards in the current framework including those introduced recently, help the industry cope up with the challenges?

Dr. Saini: The COVID-19 pandemic necessitated calibration of the insolvency framework in India to prevent otherwise viable enterprises from being forced into insolvency proceedings on account of COVID-19 induced financial stress. Typically, in normal circumstances, the resolution of insolvency under the Code requires a resolution applicant, to rescue a firm in distress by offering a resolution plan to revive the firm. When the world is in the grip of COVID-19, prospective resolution applicants may themselves be facing liquidity crunch or be in distress. When every other firm is under stress at this time, it is unlikely to find adequate number of resolution applicants to rescue all firms in distress. In response to the ensuing adverse impact of COVID-19 on solvency of businesses, the Government of India vide notification dated March 24, 2020, increased the threshold amount of default required to initiate an insolvency proceeding from Rs. 1 lakh to Rs. 1 crore. Further, the Government suspended initiation of the CIRP of a corporate debtor (CD) under section 7, 9 and 10 for any default arising on or after March 25, 2020. The Government extended this suspension of the Code twice for 3 months each on September 24, 2020 and December 22, 2020 to provide relief to the firms undergoing stress due to ongoing COVID-19 pandemic.

The IBBI also took cognizance of the difficulties for the IPs to continue to conduct the process, for members of Committee of Creditors to attend the meetings, and for prospective resolution applicants to prepare and submit resolution plans, during the period of lockdown. To address these difficulties, IBBI amended the CIRP and Liquidation regulations to provide that the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the timeline for any activity that could not be completed due to the lockdown, in relation to a CIRP and Liquidation process, subject to the provisions of the Code.

IIPI: Insolvency Professionals often highlight avoidable litigations and long pendency of cases with adjudicating authorities as the key reasons for delays in CIRPs which bring disrepute to the profession. What more measures are desirable in order to have an effective delivery system?

Dr. Saini: A number of measures and developments in the near future are envisaged to strengthen the delivery system, making it more efficient, certain and efficacious. One of the important measures would be to strengthen the Adjudicating Authority (AA). The bench capacity needs to increase commensurate with the responsibilities under both the Code and the Companies Act, 2013. The AA should have strong administrative support to manage the cases with the help of information technology that releases members to focus on adjudication. Efforts need to be made to resolve stress by mediation and conciliation or through processes such as pre-pack, which do not use or make minimum use of the AA.

The next important measure would be to strengthen the insolvency profession further. To this end, to take the insolvency profession to the next level, the IBBI has conceived a two-year Graduate Insolvency Programme (GIP) for young and bright minds having a professional qualification or a degree in a relevant discipline but with no experience. On completion of GIP, one would be eligible for registration as an IP. GIP is the first of its kind in the world to create tailor-made IPs and is an endeavour to create insolvency as a discipline of knowledge. The second batch of GIP has commenced at the Indian Institute of Corporate Affairs (IICA) in July, 2020. In addition, several measures, such as advanced training in niche areas, continuing professional education, are being undertaken to build the capacity of insolvency professionals.

As regards the valuation profession, a Committee of Experts has recently recommended enactment of an exclusive statute to provide for the establishment of the National Institute of Valuers to protect the interests of users of valuation services in India and to promote the development of, and to regulate the valuation profession and market for valuation services.

In recognition of the uniqueness of MSMEs and that a typical CIRP style resolution may not be conducive for them, as part of the 'Atma Nirbhar Bharat, Part V: Government Reforms and Enablers', the Government proposed to notify a special insolvency resolution framework for MSMEs. The framework is likely to be a blend of CIRP and individual insolvency as some MSMEs are corporates while others are individuals.

Pre-packs is another area that is gaining traction. A sub-committee of the Insolvency Law Committee has submitted its report proposing a detailed scheme and regulatory framework for implementing pre-packaged insolvency resolution process in India.

IIPI: Under the resolution framework, COC or Committee of Creditors enjoys a pre-dominant role.

While on one hand, this dispensation is welcome in the interest of a market-driven process, concerns have been raised about CoC not being subject to regulatory control, leading to frictions of varied nature. What direction, in your opinion, IBC framework should move forward, to obviate such issues?

Dr. Saini: The IBC framework and jurisprudence that has evolved over time upholds the commercial wisdom of the CoC. The CoC, which comprises of financial creditors (FCs), has responsibility to decide the fate of the firm in distress, whether to rescue or liquidate it. The decisions of the CoC are not generally open to any analysis. The stakeholders, including the Government, are bound by the resolution plan, which is a commercial decision/wisdom of the CoC. A wrong decision can destroy an otherwise viable firm or place the firm in the hands of wrong people. The CoC decides whether the firm is in economic distress and if so, it may release the resources of the firm to other competing uses and the entrepreneur to pursue emerging opportunities. If the firm is in financial distress, the CoC rescues the firm from the clutches of current management and puts it in the hands of a credible and capable management to avoid liquidation. It creates the visibility of the underlying value of the firm and a market for competing, feasible and viable resolution plans from capable and credible people. It assesses feasibility and viability of resolution plans and capability and credibility of RAs. These decisions are not amenable to a mathematical equation and require tremendous business acumen.

The supremacy of the commercial wisdom of the CoC has been upheld by the courts. In the matter of *K. Sashidhar Vs. Indian Overseas Bank & Ors.*,¹ the Supreme Court has held that AA has no jurisdiction to evaluate commercial decision of CoC much less to enquire into the justness of rejection of plan by dissenting FCs.

Further, in the other judgments of the Supreme Court, it has been held that the commercial wisdom of the CoC cannot be interfered with judicially.

Given that the consequences of decisions of the CoC are grave, in order to develop their expertise, IBBI has also been organising CoC workshops to build the capacity of FCs in the area of insolvency and bankruptcy.

IIPI: Going by the international experience, many new features in IBC dispensation are expected to be unveiled viz. pre-pack resolution, frameworks for group and cross-border insolvency, Individual/fast track mechanism, MSME framework. Individual insolvency is also being touted as 'next big thing' in this context. What can be the ideal pace of such developments in near future, from the point of view

1. Civil Appeal No. 10673 of 2018 and other appeals.

2. https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=50949

of priority and suitability to Indian conditions?

Dr. Saini: Due to the current vulnerability pandemic situation caused by the COVID-19, the business in general landed in an unprecedented risky landscape. It is projected in the recent Financial Stability Report released by RBI that GNPA ratio of all SCBs may increase from 7.5 per cent in September 2020 to 13.5 per cent by September 2021². Further, World Economic Outlook – October 2020³ observed that prolonged liquidity shortfalls can readily translate into bankruptcies. Moreover, prolonging existing support to companies could limit insolvencies in the short term, however it is observed in global reports that there is a danger of Zombie Companies⁴, raising the risks of more insolvencies in the medium and long term. The pandemic situation has undoubtedly thrown up multiple challenges, for which an unconventional solution is warranted to mitigate this unprecedented crisis.

In this regard, among all the tools available in the toolkit, of addressing the distressed assets, the idea of Pre-pack that is calibrated to the Indian scenario is worth considering. Similarly, a special framework for MSMEs needs to be rolled out given that liquidity and solvency risks are bound to increase, putting both SME jobs and debt at risk. There is a high possibility that an MSME CD may end up in liquidation if it enters CIRP, in the current situation. This explains the need to enable effective out-of-court restructuring of MSME. As presently there is no set of laws, rules and regulations under the Code to deal with a special situation resolving group insolvency, a feasible model on group insolvency needs to be worked out at the earliest.

With globalization, the investment of different countries in India has also multiplied. Formal cross border insolvency law is quintessential need of the hour to protect the rights of domestic as well as foreign investors. The upcoming model is expected to cover mechanisms to ensure judicial cooperation between bankruptcy courts of different jurisdictions, developed theory of Centre of Main Interest, alignment with best international practices and reciprocal arrangements.

Owing to the recent developments aftermath of the pandemic crisis, it is recommended by various global agencies⁵, that policy measures such as Special out-of-court restructuring frameworks may need to be strengthened (or established) to expedite processing of rising insolvencies. Further, efficient corporate bankruptcy frameworks such as pre-packs and special insolvency framework for MSMEs,

3. <https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020>

4. https://www.allianz.com/en/economic_research/publications/specials_fmo/16072020_Insolvencies.html

5. [file:///C:/Users/Administrator.COM046/Downloads/text%20\(5\).pdf](file:///C:/Users/Administrator.COM046/Downloads/text%20(5).pdf)

6. https://www.allianz.com/en/economic_research/publications/specials_fmo/16072020_Insolvencies.html

will be central in dealing with any backlogs that may arise. As it is further estimated that a stronger rise in insolvencies, will be seen in 2021 than in 2020⁶ - particularly for India, due to the major effects of lockdowns on business courts activity and suspension of insolvency laws playing up to the end of 2020 or even until further notice. Hence considering the grave consequences and to avert the impact of the rising insolvencies, it is important to implement the pre-pack schemes and special framework for MSMEs after weighing the various conditionalities and calibrating to the Indian scenario, for efficient reallocation of resources in the economy.

IIPI: Indian insolvency regime is based on 'Creditors in Control' model of the UK and UNCITRAL, which at times is seen as averse to the interests of entrepreneurs leading to avoidable litigation and delays. In the proposed framework for MSMEs, a variation of the said model is also being tested. One view is that similar (or any other) variation can be introduced even for the larger segment, in the direction of seeking more cooperation from existing business owners while ensuring timely resolution. Would you like to provide any comments?

Dr. Saini: The Hon'ble Minister of Finance and Corporate Affairs, detailing the 'Atma Nirbhar Bharat, Part V: Government Reforms and Enablers' on 17th May, 2020, inter alia proposed that Special insolvency resolution framework for MSMEs under section 240A of the Code is to be notified soon.

The special framework of MSMEs is proposed to be implemented through a notification under section 240A of the Code. This section allows the Central Government, in the public interest, by notification, to direct that any of the provisions of the Code shall: (i) not apply to MSMEs; or (ii) apply to them, with certain modifications. MSMEs, both corporate and non-corporate, are creditors to other CDs. They can initiate insolvency proceedings against CDs for defaults exceeding Rs.1 crore, other than defaults arising during COVID-19 period. Most of the MSMEs are sole proprietorship or partnership firms which constitute around 95.17% of MSMEs, while corporate MSMEs (private company and public limited companies) constitute around 0.8% of total MSMEs. As per MCA 21 database, there are 5,03,324 companies in micro category, 1,06,672 companies in small category and 13,799 companies in medium category, as per the modified definition of MSME.

Regarding *Debtor-in-control Vs Creditor-in-control*, it is pertinent to note that, before the introduction of IBC, India had a debtor in control frameworks, however for various reasons they could not deliver to the desired level of impact. Further, shifting the onus on the creditor from the debtor also gives the creditors an incentive to take a greater interest in developments relating to, and performance of, the debtor. Also, it is even significant to mention that the proposed framework for MSMEs which may be in debtor-in-possession have the merit due to the various unique features the MSMEs hold such as

- almost every MSME debtor is also an operational creditor, MSMEs face issues such as scarcity of working capital, higher interest rates and larger collateral requirements, thus making it difficult to raise finance in situations of financial distress, market for resolution plans for MSMEs is limited and, at best local, while the entire globe is the market for bigger firms, MSMEs may lack sufficient assets to fund a complete CIRP style insolvency procedure, etc.

Considering the various unique features of the MSMEs, particularly in the Indian landscape it is significant to note that the argument of introducing debtor in control model as proposed for MSMEs, even for the larger segment (Non-MSMEs) doesn't hold water.

IIPI: Insolvency profession being a newer evolving profession in India, called a profession of professionals and is often compared to healthcare profession being able to rescue corporate lives. What words of wisdom and guidance, would you like to offer to IPs for becoming a successful professional and being able to serve effectively and fearlessly?

Dr. Saini: Insolvency proceedings require high-end, sophisticated professional services. The Code casts strenuous responsibilities on an IP to run the affairs of the firm in distress. An IP plays a significant role wherein he ought to protect and preserve the value of CD's property, comply with all applicable laws on its behalf, conduct the entire resolution process with fairness and equity, retrieve value lost through avoidance transactions, etc.

As the Code has granted substantial powers, enshrined in the regulations, from time to time, an IP needs to be mindful of the reasons of vesting such powers in her work process, as there exists an equal responsibility of dealing with the distressed CD. As mentioned under regulation 4 of the IP Regulations, integrity is the essential requirement for being a 'fit and proper' person. An IP's integrity is put to test, wherein she makes sure that assets are not stolen from the company and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. A scar or dent on the professional once cast will have a huge impact on the professional and the profession itself. A robust insolvency framework is built on the standards and professionalism exhibited by the IP. While dealing with the resolution of the CD, an IP may experience various unexpected situations, wherein the IP may have to go beyond the call of duty and deliver. She may need to steer through uncertain times. Further, as the objective of the Code is the 'timely resolution' of the CD, an IP needs to adhere and comply with each timeline to prevent further erosion of value of the CD. An IP is expected to communicate fearlessly, whilst being mindful of balancing the interest of all the stakeholders. An IP should have soft skills such as people management, entrepreneurship, emotional quotient, and ethics and integrity beyond doubt.