As we move forward, stakeholders can expect a thoughtful and consultative approach to the development of the guidelines defining the Code of Conduct for CoC: Shri Sudhaker Shukla, WTM, IBBI

The intention is not to impose stringent rules that might constrain the commercial judgements of the CoC but to provide a set of principles that guide its actions, ensuring that decisions are made in a manner that is fair, transparent, and in the best interest of all parties involved.

Shri Sudhaker Shukla
Whole Time Member (WTM)
Insolvency and Bankruptcy Board of India (IBBI)

Shri Sudhaker Shukla joined the Insolvency and Bankruptcy Board of India (IBBI) as a Whole Time Member (WTM) on 14th November 2019. He is currently looking after Research and Regulation Wing comprising Corporate Insolvency, Corporate Liquidation (including Voluntary Liquidation), Individual Insolvency and Individual Bankruptcy, Research & Publication, Data Management & Dissemination and Advocacy. In addition, he is also handling Human Resources, National Insolvency & Graduate Insolvency Programmes, Continuing Professional Education and Knowledge Management & Partnership divisions in the IBBI.

Shri Shukla served as a member of the Indian Economic Service (IES) for over 34 years in various capacities across Ministries and Departments of the Government of India. His last assignment was as Chief Economic Adviser in the Ministry of Rural Development. Earlier, he served as Adviser in African Development Bank. He has wide experience in dealing with various regulations.

In an Exclusive Interview with IIIPI for The Resolution Professional, Shri Shukla shared his views on various aspects of the IBC particularly resolution of real estate sector companies, Committee of Creditors, etc. ***Read on to know more....***

IIIPI: In the past over seven years, the IBC (Insolvency and Bankruptcy Code, 2016) regime in India has witnessed several highs and lows and achieved many accolades. How would you like to summarize the journey so far?

Shri Shukla: The journey of the Insolvency and Bankruptcy Code (IBC/ Code), 2016, over the past seven-plus years has been both challenging and rewarding, marking a significant shift in India's approach towards 'freedom to exit' which is a necessary pre-condition for fostering risk taking society. In addition, the IBC is envisioned as a transformative tool designed to streamline and expedite the insolvency process, thereby inculcating a culture of financial discipline in the country. It is reported in large number cases, corporate debtors are preferring to settle before a credible threat of IBC being invoked and over 27000 cases involving amount of about ₹ 10 Lakh crores have been withdrawn before admission; this is a conclusive pointer towards behavioural change among the debtors as "debtors' paradise" is well and truly lost.

It is being duly acknowledged that the IBC has fundamentally altered the creditor-debtor relationship, bringing about a paradigm shift where the control shifts from the debtor to the creditor, thereby instilling a greater sense of accountability and discipline in financial dealings. The accomplishments have not only bolstered investor confidence but have also contributed to the stabilization of the banking sector by reducing non-performing assets. With net NPA falling below 1%, it can be safely concluded that 'twin balance sheet problem' is non-existent now.

With focus on reorganization and resolution, IBC showcases significant departure from earlier insolvency regimes where focus was primary on recovery. In this context, 2023 has been the watershed year as 268 resolutions were approved in the calendar year 2023, which depicts significant upswing in comparison to earlier years. With over ₹ 72,000 crore as realizable

amount in 2023, percentage of realization to the claims works out to be about 36%. Results for the financial year 2023-24 depicts similar buoyancy as till February 2024, 250 cases have already yielded resolution: with 4 weeks to go, in all likelihood, resolutions will be setting a significant landmark. Furthermore, during April 2023 to February 2024, 539 corporate insolvency resolution process (CIRPs) have been closed as going concern and liquidation orders were passed in 405 cases. Thus, going concern to liquidation, ratio works out to be 133 %. This literarily debunks the hypothesis that IBC is pushing more and more corporate debtors towards liquidation.

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On the accolades front, the global recognition of our efforts in improving the insolvency framework is a testament to the robustness and effectiveness of the IBC. International forums and financial institutions have lauded India for its rapid strides in reforming the bankruptcy landscape, which has been reflected in our improved rankings in ease of doing business indices.

However, the journey has not been without challenges. The implementation of the IBC has faced several teething issues, including legal challenges, procedural delays, infrastructural constraints, and the need for constant amendments to address unforeseen complexities. The process has been a learning curve, requiring continuous adaptation and fine-tuning of the framework to align with the evolving economic landscape and stakeholders' expectations.

In summary, the journey of the IBC regime in India so far has been a blend of significant achievements and valuable learnings. As we move forward, our focus remains on enhancing the efficiency of the insolvency resolution process and making the ecosystem more inclusive and accessible.

IIIPI: The demand is growing for industry specific resolution frameworks rather than following "one size does not fit all" approach, particularly in 'real estate sector'. Moreover, some provisions of Real Estate Regulatory Authority (RERA) seem to be overlapping with the IBC. How, in your view, these wrinkles can be smoothened on the way to alleviate concerns of homebuyers who invest their hard-earned money in housing projects?

Shri Shukla: At, the Insolvency and Bankruptcy Board of India (IBBI), we recognise the unique sector specific challenges, and several steps are on anvil to address them. To foster a sense of sector specific specialization, IBBI website displays information regarding insolvency professionals (IPs), category-wise, in terms of assignments handled. Further, in the calendar year 2023-24, 12 amendments to the regulations and model bye laws were carried out thereby, effectuating 86 changes in the regulatory framework. These interventions, in general, reflect sand-box approach under which apart from targeting process efficiency, several sector specific steps have been taken.

Real estate sector peculiarities create unique challenges in insolvency cases. In this segment, on one hand allottees (homebuyers) often prioritize property possession over financial settlements and on the other, divergent interests between allottees and financial creditors like banks complicate resolutions. The valuable insights gathered from the Amitabh Kant Committee's recommendations, and the Colloquium on the Functioning and Strengthening of the IBC Ecosystem held during November 2022 highlight key areas for reform and improvement, focusing on ensuring the efficacy of insolvency processes for real estate projects. Further, a Study Group was constituted by Indian Institute of Insolvency Professionals of ICAI (IIIPI) which has submitted its report, titled, 'Improving Real Estate Resolutions under IBC and Coordination with RERA'. The report provides a well-researched framework and will serve better in tackling the issues for resolution of real estate companies.

The initiatives like implementation of project wise project-wise CIRPs and reverse CIRPs by the Adjudicating Authority (AA) are pivotal steps towards a more effective resolution mechanism tailored to the real estate sector's complexities. The recent regulatory reforms, like the clarification regarding invitation of separate resolution plan for each project and separate bank accounts for each project enhance the legal framework in this regard.

Moreover, the exclusion of property in possession of homebuyers from the liquidation estate and the emphasis on allowing homebuyers to play a more significant role in the resolution process are critical for safeguarding their interests. These measures not only address the immediate concerns of homebuyers who invest their life savings in properties but also contribute to the overall stability and trust in the real estate market.

The above-mentioned regulatory amendments and clarifications aim to bridge the gaps between RERA and IBC, ensuring a harmonious and effective regulatory framework that adequately addresses the unique challenges of the real estate sector. As we move forward, it is imperative to continue engaging with stakeholders, including homebuyers, developers, financial institutions, and regulatory bodies, to refine these proposals further and ensure they effectively address the sector's needs.

IIIPI: The discussion on 'Mediation process' is gaining momentum as a complementary mechanism for resolution of disputes around the processes under IBC. Recently a committee constituted by IBBI has released its recommendations on the subject. What, in your view, does the future hold for adopting 'Mediation process' actively within the scope of IBC?

Shri Shukla: A famous quote of Abraham Lincoln "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time" sums up the benefits of out of court restructuring. Echoing similar sentiments, Harvard Professor Frank Sander introduced the "multi-door courthouse" and encouraged looking for "alternative doors" which would lead to the same result in terms of efficiency gains, albeit with lessor cost and time. The Code has no explicit mention of out of court work-outs or mediation, however, implicitly spirit is visible in large number of cases being withdrawn before admission, Section 12 A of the Code and cases settled through inherent power of the AA, too, have semblance of negotiations. To ward off eminent disastrous effects of COVID particularly on MSMEs, PPIRP (prepack) was notified with inherent scope of purposeful negotiation between debtors and creditors prior to admission. Furthermore, to remove the requirement of admission altogether and enhance the scope of the out of court work-outs, the Creditor Led Resolution Approach (CLRA) is under discussion.

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In Modern times to keep pace with the global preference for out of court work-outs, the Government of India has taken several Legislative measures to promote Mediation in the Country. For instance, Section 442 of the Companies Act, 2013, provides for referral of company disputes to Mediation by the National Company Law Tribunal (NCLT) and Appellate Tribunal read with the Companies (Mediation and Conciliation) Rules, 2016 (notified on September 9, 2016). Further Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006 mandates conciliation when disputes arise on payments to MSMEs. More recently overarching Mediation Act has been notified which does not exclude IBC from the mediation framework.

As already mentioned, the Code does not contain any provision relating to mediation. However, the NCLT has been exercising inherent powers from time to time in cases where the creditors and suspended board members want to settle the matter after initiation. The NCLAT in the matter of Intec Capital Ltd. & Anr., December 6, 2019, allowed mediation plea by the Corporate Debtor and appointed Hon'ble Justice (Retd) A. K. Sikri as a mediator. Further, NCLT Bengaluru bench in the matter of Chemizol Additives Pvt Limited held that even the NCLT can invoke the power under Section 442 of the Companies Act, 2013 and refer the matter for mediation. However, consistent approach towards mediation is lacking across the jurisdictions of the AA.

The future of adopting a 'Mediation process' actively within the scope of the IBC looks promising and dynamic, based on the recent recommendations by the Expert Committee constituted by IBBI. The Committee's report underscores a forward-thinking approach by proposing the integration of mediation as a complementary mechanism for dispute resolution within the IBC framework. The mediation framework as recommended by the Expert Committee is designed to operate within the existing structure of the IBC, ensuring that the core objectives of time-bound reorganization and maximization of value are not compromised. The introduction of a voluntary mediation process, aligned

with the Mediation Act, 2023, represents a strategic move to enhance the efficiency and effectiveness of insolvency resolutions by providing parties with an autonomous 'out-of-court' option for dispute settlement. The phased implementation of voluntary mediation as envisaged by the Committee suggests a careful and balanced approach to integrating this mechanism into the IBC. This strategy allows for the preservation of the IBC's timelines while introducing a flexible and independent framework that can adapt based on implementational feedback.

> **"The Expert Committee constituted by IBBI provides a strategy to incorporate mediation process within the IBC that allows for preservation of the IBC's timelines while introducing a flexible and independent framework that can adapt based on implementational feedback."**

In essence, the future of mediation within the IBC context is set to offer a more nuanced, flexible, and efficient pathway for dispute resolution. This innovation not only aims to preserve the integrity and objectives of the IBC but also enhances the overall effectiveness of the insolvency resolution process, making it a highly anticipated development in the realm of insolvency law in India.

IIIPI: The claw-backs under PUFE or Avoidance transactions so far, have been sub-optimal. Given the value maximizing potential of such proceedings, what more, in your opinion, could be done by the stakeholders to improve the outcomes?

Shri Shukla: The effectiveness of clawbacks under Preferential, Undervalued, Fraudulent and Extortionate (PUFE) transactions within the framework of the IBC has indeed been a focal point for enhancing the value maximization potential of insolvency proceedings.

The effort to tackle avoidance transactions within the IBC has seen a significant level of activity, as evidenced by the applications filled and disposed of until December 2023. A total of 1,106 applications across various categories—Preferential, Undervalued, Fraudulent, Extortionate, and Combination transactions—were filed, involving a staggering amount of approximately ₹ 339,149.40 crore. Out of these, 255 applications have been disposed of, dealing with an amount of ₹ 47,345.66 crore and successfully clawing back ₹ 6,319.27 crore.

However, the path to identify and adjudicate these transactions is fraught with challenges, including the difficulty in obtaining reliable information and quality data from the corporate debtor or third parties. This is further compounded by physical access issues to underlying assets and a general time crunch that puts pressure on both IPs and Transaction Auditors, potentially compromising the thoroughness of their analysis. Additionally, the classification of transactions into multiple categories sometimes overlaps, leading to confusion and complicating the adjudication process. These hurdles underscore the complexities involved in navigating avoidance transactions and highlight the critical need for continued attention and refinement of processes to enhance the efficacy of the IBC's mechanisms in this area.

The ruling in Venus Recruiters Private Limited Vs. Union of India & Ors., posited that the approval of a resolution plan by the AA effectively ends the CIRP, thus precluding the Resolution Professional (RP) from pursuing avoidance applications. This interpretation suggested that once the CIRP concluded with the approval of a resolution plan, the RP lost the authority to act further, including moving forward with avoidance applications. However, the Division Bench's decision in Tata Steel Vs. Venus Recruiters overturned this understanding by explicitly allowing for the pursuit of avoidance Applications even after the conclusion of the CIRP.

Recognizing this, the IBBI, in collaboration with the IIIPI and other IPAs, has been proactively working towards improving the outcomes of such proceedings. One significant initiative in pipeline is the development and dissemination of standardized templates for the documentation and filing of cases pertaining to avoidance transactions. This endeavour aims to streamline and simplify the process for stakeholders, thereby facilitating more informed and efficient decision-making. The creation of such templates will be a step towards addressing the challenges faced in the effective implementation of claw-back provisions under the IBC. By standardizing the documentation and filing process, the IBBI and IIIPI are making strides in reducing the complexities and ambiguities that may hinder the optimal realization of assets from avoidance transactions.

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In sum, a multi-pronged approach involving enhanced education, regulatory support, and the adoption of international best practices could significantly contribute to improving the outcomes of clawbacks under PUFE or avoidance transactions, ultimately benefiting the insolvency resolution process and the stakeholders involved.

IIIPI: An 'Integrated Software Solution' for the IBC ecosystem on the lines of MCA 21, for managing the processes, interfaces, and compliances, could go a long way in assuaging concerns of various stakeholders. How do you visualize the said solution upending the current way of working, while indicating the expected timeline for the same?

Shri Shukla: The efficiency and efficacy of case management systems both at process level and judicial pronouncements in addressing the issues of delays is well known. The envisioned Integrated Software Solution for the IBC ecosystem, akin to MCA 21, symbolizes a transformative shift towards a more streamlined, efficient, and user-friendly process management system. The development of the iPIE (Integrated Technology Platform for IBC Ecosystem) project heralds this shift, aiming to significantly enhance digital process adoption and facilitate seamless information sharing among the critical pillars of the IBC ecosystem, including NCLT, NCLAT, MCA, IBBI, IU, and IPs.

The approach taken in the design and development of iPIE prioritizes user-centricity, modular architecture, and scalability, promising a robust and agile platform that adapts to the evolving needs of stakeholders. By addressing current challenges like manual data sharing and limited analytical insights, iPIE aims to provide operational excellence, enhanced security, and better decision-making capabilities. This integrated platform is expected to revolutionize the way stakeholders interact with the IBC ecosystem, offering a single source of truth, reducing redundancy, and improving the user experience across different interfaces.

While the timeline for full implementation of iPIE is subject to the completion of developmental stages and stakeholder adoption, the progress made so far suggests a promising future for the IBC ecosystem. The successful implementation of iPIE will surely result in a paradigm shift in how insolvency and bankruptcy processes are managed in India, setting a benchmark for digitalization and efficiency in legal and financial ecosystems across the jurisdictions world over.

IIIPI: Cross-border and Group insolvency are futuristic frameworks and may require significant amendments in law and regulatory regime. Request you to reflect upon the criticality and readiness of the ecosystem for introducing such frameworks.

Shri Shukla: The contemplation of integrating Cross-Border and Group Insolvency frameworks into the existing IBC through jurisprudence, signifies an important step towards aligning India's insolvency regime with global practices. At policy level, to integrate the concepts and framework essential for addressing the complexities of modern business structures that often operate across national boundaries and within conglomerate setups, the Ministry of Corporate Affairs (MCA) had floated a discussion paper dated January 18, 2023, which underscores government's proactive approach in considering significant amendments to the IBC.

The criticality of introducing such frameworks cannot be overstated. They hold the potential to significantly improve the efficiency and effectiveness of the insolvency resolution process for entities with cross-border operations and group companies. This not only aligns with the principle of maximizing the value of assets but also ensures a holistic resolution approach that takes into account the interconnectedness of group entities and the intricacies of international insolvency.

The introduction of Cross-Border and Group Insolvency provisions will necessitate not only legislative amendments but also a bolstering of the regulatory regime, judicial infrastructure, and professional capacity. It involves harmonizing laws with international standards, such as the UNCITRAL Model Law on Cross-Border Insolvency and creating mechanisms for cooperation between Indian courts and foreign jurisdictions. While large number of jurisdictions across globe adopted cross border regime, however, on public policy exception issue there is large variation in approach. Further, there is no research work worth the name which can highlight potential benefits associated with the adoption of model laws in any jurisdiction. This necessitates a cautious

approach on the issue. Furthermore, the wisdom as emanating from the colloquium held in November 2022, highlights the importance of introducing Group Insolvency into the Code, prior to opening the Code to address Cross Border Regime.

Reflecting upon these considerations, it is clear that while the introduction of Cross-Border and Group Insolvency frameworks is a forward-looking initiative, it requires a phased, cautious and well-coordinated approach.

IIIPI: The Delhi High Court, in a recent judgement has advised the Regulator, inter alia, to formulate a Code of Conduct for CoC. In the context of balancing interests of stakeholders, how important is the said development and what more can be expected on this front?

Shri Shukla: The recent order of the Hon'ble Delhi High Court for the formulation of a Code of Conduct for the Committee of Creditors (CoC) is a significant development in the evolution of insolvency resolution processes under the IBC which otherwise, relies heavily on the 'commercial wisdom' of the CoC. This guidance from the judiciary underscores the importance of establishing clear ethical and procedural standards for the CoC, which plays a pivotal role in the decision-making processes affecting the resolution of insolvency cases.

While the specifics of the Code of Conduct are currently under study, it is anticipated that the guidelines will strike a delicate balance. The intention is not to impose stringent rules that might constrain the commercial judgements of the CoC but to provide a set of principles that guide its actions, ensuring that decisions are made in a manner that is fair, transparent, and in the best interest of all parties involved. This approach acknowledges the complexity of insolvency resolutions and the need for the CoC to navigate these challenges with a degree of flexibility, while also adhering to a standard that promotes confidence in the IBC process.

As we move forward, stakeholders can expect a thoughtful and consultative approach to the development of the guidelines defining the code of conduct.

IIIPI: Insolvency Professionals are an important pillar of the IBC regime. What words of wisdom and guidance would you like to offer to IPs so that they could contribute their best in strengthening the IBC ecosystem?

Shri Shukla: The IPs indeed form a cornerstone of the IBC regime, playing a pivotal role in navigating complex insolvency processes. Their expertise, integrity, and professionalism significantly contribute to the effectiveness and credibility of the IBC ecosystem.

In guiding IPs towards further strengthening the IBC ecosystem, it's crucial to emphasize the importance of continuous learning, upgradation of skill set and adaptation. The insolvency landscape is dynamic, with frequent legal updates, emerging market trends, and evolving best practices. IPs should commit to ongoing education and training to stay abreast of these changes, ensuring their approach remains both effective and compliant with current standards.

Ethical conduct and transparency must underpin every action taken by IPs. The responsibilities entrusted to them require a steadfast adherence to the highest standards of integrity and fairness. Upholding these principles not only enhances the trust stakeholders' place in the IBC process but also contributes to the overall reputation and reliability of the insolvency framework.

Collaboration and stakeholder engagement are also key areas where IPs can make a significant impact. By fostering open lines of communication and working cooperatively with all parties involved, IPs can navigate complex negotiations and resolutions more effectively. Understanding the perspectives and concerns of each stakeholder allows for more informed decision-making and can lead to outcomes that are more equitable and sustainable.

Lastly, IPs should embrace innovation and technology, which are increasingly becoming integral to the insolvency process. Leveraging digital tools and platforms can enhance efficiency, accuracy, and accessibility, streamlining processes and improving outcomes for all parties involved.

In conclusion, the role of IPs is critical to the success of the IBC regime. By focusing on continuous improvement, ethical practice, stakeholder collaboration, and technological adaptation, IPs can significantly contribute to the strength and effectiveness of the IBC ecosystem. Their dedication and expertise are essential in navigating the challenges of insolvency proceedings, ultimately fostering a more robust and resilient financial and corporate environment.