

Exclusive Interview of Shri Sandip Garg, WTM, IBBI on the Evolving Landscape of IBC



Shri Sandip Garg

Whole Time Member (WTM)

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Shri Sandip Garg took charge as WTM, IBBI on October 27, 2023. He has a multi-disciplinary educational background in Civil Engineering, Industrial Engineering and Management, Law, Finance, and Taxation and allied laws. He has received numerous awards for excellence throughout his academic journey.

Shri Garg served the Indian Railways in Indian Railways Service of Engineers from January 1990. He then served as a member of the Indian Revenue Service from 1992 for over 31 years in various capacities in Income Tax Department and Central Board of Direct Taxes. His last assignments in the Income Tax Department were as Principal Commissioner of Income Tax and Commissioner of Income Tax.

He also served as Executive Director in IBBI wherein he handled a diverse portfolio comprising of Corporate Insolvency, Corporate Liquidation, Individual Insolvency, Individual Bankruptcy and Data Dissemination.

*In an Exclusive Interview with IIPI for The Resolution Professional, Shri Garg shared his views on evolving landscape of the IBC. **Read on to know more....***

IIPI: How will you evaluate the performance of operation of Insolvency and Bankruptcy Code (IBC) specially in light of delay in admission and resolution as against the timelines given in the Code?

Shri Garg: The snapshot of outcomes of IBC is presented in table below:

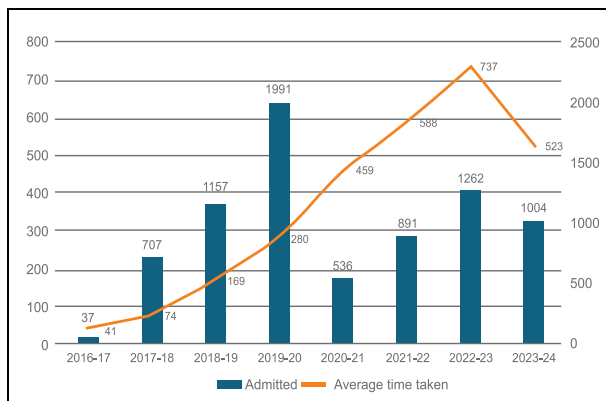
Particulars	Number	Impact
Pre-admission Case Disposal	28,818	₹10,22,485 crore of underlying default addressed
Resolution	1,068	Realizable Value- ₹3,55,375 crore <ul style="list-style-type: none"> • 161% of liquidation value • more than 31 % of claims
Settled/ Withdrawn/ Closed	2,341	₹ 98,845 crore
Liquidation Completed	1,113	₹10,445 crore realized <ul style="list-style-type: none"> • Assets re-allocated to better use
Total Disposal	33,340	Total amount: ₹14,87,150 crore

In the background of above data, the highlight of major achievements of IBC is the resolution of 1068 insolvency cases imparting monetary benefit of realisation of more than ₹3.55 lakh crores to the creditors. This amount does not include CIRP costs and potential future recoveries, such as equity, proceeds from corporate and personal guarantees, funds infused by resolution applicants, and recoveries from avoidance applications. This is apart from the non-monetary benefits also such as preservation of jobs, better utilisation of resources, etc. The recent study by IIM Ahmedabad reflects that the companies once resolved give better outcomes.

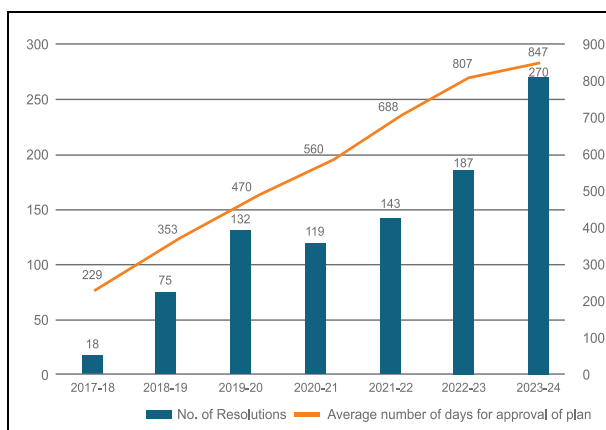
Besides, more than 2300 cases have been settled or withdrawn or closed after admission and amount involved therein is about ₹1 lakh cores. Even, these companies are continuing as going concern after resolution of stress therein. One of the less noted and having substantial impact of the IBC has been the behavioural change towards payment of debts. More than 28,000 cases have been withdrawn before admission where amount involved exceeds ₹10 lakh crores. So, in these cases, threat of insolvency has prompted the settlement of cases even before admission.

The rights provided to the creditors under the IBC, post initiation of insolvency, has resulted in change in the behaviour of the debtor, starting from the time of taking debt, to repayment of such debt and even in dealing with it at the time of stress. There is a fear on part of the debtor to resolve the impending crisis before the same results in an insolvency situation. This has resulted in the declining debt to equity ratio of the Indian companies and sharp reduction in NPAs of Indian banks. The twin balance sheet problem has been tackled to a large extent through advent of IBC.

Even when the application for insolvency is filed, the corporate debtor tries to avoid the initiation of insolvency through out-of-court settlement mechanisms as well as by litigating the matter tooth and nail. This often leads to prolonged delay in admission of insolvency cases. Number of cases admitted to insolvency and resolved in each financial year along with average time taken in days are as below:



Admissions



Resolutions

So, after excluding the data for first year which is not for a complete financial year, average number of cases admitted to insolvency has been around 1000 cases per year and average number of cases in which resolution plan has been approved each year has been about 150 cases per year excluding the first 2 financial years when there were not enough cases for approval of resolution plans. Another thing which can be noted is increasing number of approvals of resolution plans from 2021-22 onwards with substantial increase in last 2 years. We can also observe that the average number of days taken for admission and average number of days in which a case is resolved are increasing over the years.

As per information provided by NCLT in response to a Parliament question, a total of 15,186 cases have been filed in NCLT under IBC from 01.01.2020 to 31.01.2023 involving an amount of ₹13,18,296 crore. If we consider case filings and disposals etc. during the periods thereafter, about 9000 cases will be pending at present. An amount of approximately ₹13 lakh crores can be taken as the amount involved in the NCLT cases.

As of now about 8,000 cases have been admitted and 28,000 cases have been disposed of prior to admission. Though, number of cases disposed of prior to admission is on the decline now because of change in default threshold to ₹1 crore from ₹1 lakh, still we can take on an average about 1000 cases being admitted every year and about 2000 cases being withdrawn prior to admission. With these averages, we will need about 3 years to dispose of the pendency of 9000 cases. This does not consider the number of cases being added every year. Considering this, the average number of days taken for admission is likely to increase unless a greater number of newly filed cases (after increase in default threshold to ₹1 crore) are admitted and more cases filed earlier (before increase in default threshold to ₹1 crore) are dismissed prior to admission which is a likely scenario as the default threshold does reflect on the severity of stress lessening the chances of settlement before admission. This does not reflect very well against the 14 days limit set out in the Code for admission of case.

If we take an amount of approximately ₹13 lakh crores involved in the NCLT cases and recovery rate of 30%, these cases have potential of recovery of approximately

₹4 lakh crores. Delay of a year in recovery of this amount results in opportunity cost of ₹40,000 crores to the creditors considering 10% per annum as the cost of funds. Since, delay is more than a year as against the timelines given in the Code, opportunity cost involved is even higher.

“ Though, every other pillar of IBC has been established after IBC like IBBI, IU, IPA, IPs and has increased its capacity, capacity of NCLT and NCLAT are the same as that before IBC. ”

Considering, this enormous loss of opportunity cost, there is a case for increasing the strength of NCLT members from sanctioned strength of 62 which was sanctioned at the time of formation of NCLT for dealing with cases related to Companies Act only. Actual strength is less than 62 most of the time because of the time lag observed in appointment of members after post falling vacant and relatively shorter tenure of NCLT members. Though, every other pillar of IBC has been established after IBC like IBBI, IU, IPA, IPs and has increased its capacity, capacity of NCLT and NCLAT are the same as that before IBC. Considering the same, Hon’ble Finance Minister has already announced about setting up additional benches in her budget speech in July 2024. So, I am very hopeful that with this increase in strength, capacity issues of tribunals will stand addressed and performance of IBC will become even better, and pendency will come down at a rapid pace.

IIPI: What are main issues causing hindrance in the optimal performance of the IBC ecosystem besides large pendency of cases and what can be done to tackle them?

Shri Garg: It’s a very broad question because there are so many issues. I’ll deal with following five main issues:

- A. Lack of clarity in priority of distribution
- B. Excessive litigation
- C. Non-realisation of optimal value of assets
- D. Resolution of real estate cases
- E. Making monitoring systems more efficient

A. Lack of clarity in priority of distribution

Distribution mechanism should be absolutely clear in theory and free from arbitrariness in practice to avoid disputes as it decides what the creditors will receive and therefore involves substantial rights of creditors. If there is lack of clarity in that mechanism or even perceived arbitrariness in the minds of creditors, they approach tribunal, appellate tribunal and then the apex court leading to excessive litigations we see at present. At present, clarity is missing in three major areas.

First, lack of clarity is in treatment of statutory dues. Apex court in the Rainbow Papers case has held that the statutory dues can be secured creditors as well and where the corresponding statute provides for the claim to have charge on the assets, they will be treated as secured creditors u/s 53(1)(b)(ii). However, apex court in a later case in Paschimanchal Vidyut Nigam Ltd., observed that the statutory dues will be considered lower in the waterfall u/s 53(1)(e)(i) or (f) irrespective of whether they are secured by operation of law. However, review petition filed in Rainbow Paper failed as the apex court held that the scope of review is limited, and no case has been made out to bring it with in those parameters of review. So, there is lack of clarity regarding the place of statutory dues in the waterfall.

Second, lack of clarity is in respect of treatment of priority of charge. In the credit industry, there is well established practice of priority of charge. For creation of second charge on the property, NOC of first charge holder is required and it is given on the basis that first charge holder will get priority in payment of its dues. However, in the matter of Technology Development Board case, the NCLAT has interpreted section 53(1)(ii)(b) to mean that inter-se priorities amongst the secured creditors will not remain valid and will not prevail in distribution of assets in liquidation under section 53. This order is under challenge before the apex court which has granted stay on the operation of the order. So, there is lack of clarity about treatment of inter-se priorities of the creditors while undertaking distribution under section 53.

Third, there is lack of clarity on whether dissenting secured financial creditor is entitled to payment as per the liquidation value of its security interest or all secured

creditors are entitled to be paid as per total security without reference to their individual security interest. As per the DBS Bank case, the Hon'ble SC has said that a dissenting secured financial creditor is entitled to payment as per the liquidation value of its security interest. However, considering the divergent view in the matter of India Resurgence ARC vs. Amit Metaliks case, it has asked for referring the matter to a larger Bench. The matter is yet to be referred to a larger bench.

“Since distribution is dependent on the final word of apex court on these issues, there is lot of uncertainty about the distribution.”

Since distribution is dependent on the final word of apex court on these issues, there is lot of uncertainty about the distribution. So, at present, in whatever way the distribution is decided, the aggrieved party always litigates as the matters have not yet reached finality. Another way to bring certainty on these issues, is through an amendment to the Code to clarify the above issues. Same have also been addressed in the discussion papers floated by Ministry for amendments to the Code.

B. Excessive Litigation

Section 53 provides the waterfall mechanism through which that distribution takes place during liquidation. Section 30 leaves that distribution to the discretion of 2/3rd majority of creditors voting in the committee of creditors (CoC). Section 30(2) provides a safeguard to the minority dissenting creditors (if the distribution is not fair) that they shall not receive an amount less than what they would have received in the eventuality of liquidation of that company. So, normally, the distribution of liquidation value is made to all the creditors. However, the surplus of resolution plan value over liquidation value is at the discretion of the majority of creditors controlling 2/3rd of the vote of CoC. Many times, it leads to unequal treatment of similarly situated creditors leading to excessive litigations.

In one real estate case, resolution plan provided that allottees who have paid less than or up to 20% shall be refunded the amount paid by them. They were denied the allotted real estate unit even when there was no default in

payment by them. While other allottees paying more than 20% were allotted the real estate unit. This effectively created a sub-class within a class of creditors (allottees) and this sub-class has been treated unfairly just because they were in a minority and could not influence the proceedings of CoC. The CoC did not record any reasons for such unjust classification.

Such unjust treatment to a minority category of creditors in the resolution plan has led to incessant litigation by aggrieved party at various fora starting from NCLT and all the way up to the apex court. The litigation creates uncertainty for the resolution applicant as the higher judiciary forum may decide the case either way. Further, it leads to delay in finalisation of claims and implementation of resolution plan. Such uncertainty and delay are counterproductive to the objectives of the Code. Since, creation of such classes among the creditors is not barred under the Code, it leads to unfair treatment of minority creditors. Therefore, there is a need to address this cause of excessive litigation. The proposal in the discussion paper issued by Ministry which proposes for distribution of surplus of resolution plan value over liquidation value between all creditors in the ratio of their unsatisfied claims, may be able to resolve it.

Also, there are litigations by unsuccessful resolution applicants. These litigations can be minimised if committee of creditors uses a transparent challenge mechanism for selection of successful resolution applicant.

Also, it has been observed that promoters, unsuccessful buyers, claimants etc. litigate with no reasonable prospect of success, to stall the process. These proceedings take up a substantial time of the AA, which can be utilised for other matters, resulting in draining of resources for the concerned parties and causing delays. Hence for discouraging these frivolous and vexatious litigations, the discussion paper of the Ministry proposes to empower AA to impose a penalty of not less than one lakh rupees per day, but which may extend to three times the loss caused or unlawful gain, whichever is higher, for such litigations. Linking of such penalty to the loss caused may prove to be effective deterrent for such litigators.

“ It is observed that several objections regarding the distribution of proceeds are raised when the resolution plan is pending approval before the AA. ”

It is observed that several objections regarding the distribution of proceeds are raised when the resolution plan is pending approval before the AA. Since this requirement is a precondition for plan's approval, the process cannot move forward, and the successful resolution applicant cannot take over the stressed assets and make it productive. Therefore, it has been proposed in the discussion paper issued by the Ministry that to segregate the concept of the resolution plan from the manner of distribution of proceeds received from the resolution applicant so that the resolution plan chosen may be approved, and inflow of funds can take place. These funds can be distributed later after AA deals with the objections regarding distribution of proceeds. This will not only solve the problem of excessive litigation at the source but also will deal with the delay in resolution of stressed assets because of litigation.

C. Non-realisation of Optimal Value of Assets

Non-realisation of optimal value of assets is mainly on two accounts. First, uncertainty in information about the assets to their buyers. Second, not segregating/ grouping the assets for better marketability.

C.1 Uncertainty in information about the assets to their buyers

A typical example of uncertainty in information about the assets is 'used car' market where the buyers being uncertain about the user car's quality offer less value. Providing warranty, inspection or more information reduces uncertainty resulting in better offers. So, any effort in the direction of reducing that uncertainty will result in realisation of better value. Here are four situations where we can bring down uncertainty in information about the assets

(a) **Valuation Reports:** At present, the members of CoC are provided fair value and liquidation value

after obtaining confidentiality undertaking and after the receipt of resolution plans. Since this information is primarily available only with the IP and valuers, it creates an information asymmetry. It also dissuades genuine resolution applicants, to participate who fear that some other resolution applicants close to these persons may have better information. So, disclosure of valuation reports with fair value will attract more serious bidders and result in better value. Though IBBI has provided for disclosure of fair value in the IM, the disclosure of all information which is available to the valuers, to the stakeholders in the process through an IT platform, will reduce uncertainty about the second-hand assets, create better confidence among the resolution applicants about sharing of information, and lead to better offer of value in the plans.

(b) **Use of eBKray platform for sale of assets:**

Recently, a module has been developed within the eBKray platform to facilitate the listing and auction of assets under IBC. This centralized platform will list asset memorandum giving detailed information on corporate debtor's assets, including photographs, videos, and geographical coordinates. By enhancing transparency and efficiency through advanced technology, eBKray aims to increase bidder participation, streamline operations, and maximize returns for creditors while improving outcomes for bidders. Since, it will be a single listing platform to host all assets being sold in liquidation cases, it will aggregate all buyers interested in stressed assets and will result in better realisation.

(c) **Making Information Memorandum (IM) public:**

The Information Memorandum, which serves as the best document for informed decision making by prospective resolution applicants, is presently a confidential document which cannot be disclosed without confidentiality undertakings though most of the information in IM is not confidential. Besides, it has been left to the understanding of the person receiving the IM that which portion of it is confidential. To make more information available to wider audience, IM can be divided into two

parts – one part can be disclosed for larger public dissemination and the confidential part can be disclosed upon submission of undertakings. This availability of better information to wider audience can result in drawing more resolution applicants and resultantly better competition amongst them. This idea needs to be debated further.

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(d) Attachments under PMLA: The attachments under the Prevention of Money Laundering Act, 2002 (PMLA) also dissuade prospective resolution applicants because of possible enforcement actions and prolonged legal battle, potentially impacting the value they are willing to offer for the assets. Section 32A protects the assets of the CD which are covered in the approved resolution plan from any attachment, seizure, retention and confiscation in case of change in management. However, the issue is not yet settled as the decision of Bombay HC in Shiv Charan case is under challenge before the apex court. An order of apex court will bring more clarity about immunity from any adverse action and will give confidence to the resolution applicants to offer better value.

C.2 Segregating/ grouping the assets for better marketability

The erstwhile management grow their businesses as per their unique needs and opportunities. They may have entered into diverse set of businesses or in various geographies depending on the management capability available to them in various areas of their liking. For example - a company managed by a family of three brothers may have entered into three unrelated businesses e.g. textiles, tyres and real estate as the three brothers may have interest in these three different areas. These businesses may even be at different locations. But it may be difficult to find a buyer who is interested in all these diverse businesses of the company at different locations.

A recent example can be of Jaiprakash Associates which has diverse businesses – cement, hotels, real estate, power at diverse locations.

Also, a family may also manage the business as a group where land may be owned by one company, or directors/ promoters and factory may have been set up by another company. Now, the Code treats the company as a single unit, but the business which is viable and can fetch ready buyers may be part of a company, or they may span over several entities. So, if the Code can allow these assets to be demerged or merged to find willing buyers, greater value may be realised. There are three proposals in the discussion paper issued by the Ministry which address these issues. If they come through, we may find more buyers and more value for the assets.

One proposal is for empowering the CoC and Adjudicating Authority to approve separate plans for separate business parts of the company in appropriate cases. This proposal will require the manner of distribution to be delinked from the inflow of funds in various plans as the inflow of funds will be for the parts of company and may be at different time periods while the distribution will be to the creditors of the company as a whole.

Another proposal is for resolving inter-dependent entities together using the concept of group insolvency. There are situations where a company is linked to one or more companies in terms of operations and finances and have inter-dependent assets, all of which may be in financial distress. An interlinked third proposal is for resolving the company and guarantors to its loans together if they have interlinked assets for example - land being owned by guarantors while the factory has been set up by the company. If we resolve them together, we may find more buyers.

D. Resolution of real estate cases

Real estate cases involve allottees, many of whom have used their life’s saving for purchasing a home. Therefore, resolution of these cases and protection of their interest within the legal framework is very important. This has prompted measures like clarifying that the allottee is a financial creditor. IBBI has enabled project-wise resolution so that it is easier to resolve them. IBBI has also excluded units in possession of allottees from the

definition of liquidation estate recognising the concept of beneficial ownership. It has protected their interests. IBBI also wants to allow registration of agreements and delivery of possession of units to the allottees as the same are current assets in a real estate case which can be sold or parted with for running the business as a going concern. IBBI has also increased the duties and responsibilities of authorised representative to facilitate the allottees. IBBI also wants to provide for facilitators for representing various sub-classes within the allottees class so that the problems of various sub-classes can be represented in a more efficient and democratic manner. But several problems still remain.

One of the problems frequently faced is that only certain project of real estate company faces stress while other projects are not facing any problems. The admission of such a company to insolvency puts at risk the execution of other projects as well. The judiciary has experimented with the concepts like reverse CIRP and project-wise admission in resolving these cases. Reverse CIRP involves execution of projects by the promoter but under the supervision of a resolution professional and the court. Project-wise admission involves admission of specific project(s) under stress to insolvency while the other projects continue to be executed by the promoter. There is lack of clarity about how the creditors will be identified against these specific projects if the company has certain financial and operational creditors who have supplied money or land or goods to company in general and not to specific project(s). Further, there are issues regarding how compliances of the specific project(s) under insolvency and the company will be dealt with. How will the diversions of money from those specific project(s) but within the company be dealt? How will the issue of security of a creditor who has lent to the company but has security over the assets of specific project(s) be dealt with. I believe, we need to have a framework for dealing with project-wise insolvency instead of dealing with them on a case-by-case basis. The discussion paper issued by the Ministry proposes to have a separate framework for dealing with the same.

Another problem faced is the non-cooperation by authorities in granting renewals of lease, registrations, maps etc. since their past dues have not been paid. These

“ Income tax department has introduced section 156A which provides for reduction of demand for income tax in terms of resolution plan as approved by the AA. ”

in turn reduce the marketability of the projects resulting in plans of lower value. The authorities are still treating the default of their past dues at the time of insolvency as default for withholding these renewals. While departments like Income Tax and GST have come to terms with the operation of IBC and understand the difference between past dues (up to the insolvency commencement date) and current dues, several other statutory authorities still hold up permissions for non-payment of past dues. They fail to understand that past dues will be dealt as per section 53 and section 30, while current dues are treated as CIRP or liquidation cost and are paid in priority. So, permissions should not be withheld for non-payment of past dues if the current dues are being paid. Income tax department has introduced section 156A which provides for reduction of demand for income tax in terms of resolution plan as approved by the AA and as modified by the appellate authorities. Introduction of similar provision by other statutory authorities in their respective statutes will sensitise the officers in those authorities and will help them differentiate between past dues and current dues.

E. Making monitoring systems more effective

As per the Code, resolution professional becomes *functus officio* after approval of resolution plan by the AA as it was envisaged that thereafter successful resolution applicant (SRA) will fulfil its obligations under the plan creditors will get paid, and SRA will assume control of the company. However, in practice, the plans are complex and contain several terms and conditions which involve action on part of several parties over a long term. Besides, at times approval of the plan is challenged in appellate forums. So, implementation of the plan is contingent on several events. Therefore, there is a need of a monitoring committee to supervise and monitor the implementation of plan. The Code does not have any specific provision for monitoring committee. However,

the plan has to have provisions to ensure its effective implementation. So, several plans have the provision of a monitoring committee. However, all plans don't have it. Although, CIRP regulations have provided for the same, but it is optional. In a recent case of Jet Airways, the apex court has commented on the need of a monitoring committee with powers and responsibilities so that there is smooth implementation of plan. The problems, if any, in implementation are brought to the attention of AA and other stakeholders. As directed by apex court, this issue is now being examined in IBBI for further action.

“ After the launch of iPIE, the forms submitting the information of processes to IBBI can also be made more comprehensive. ”

Another monitoring system in IBC ecosystem is that of monitoring the professionals and the processes. IBBI primarily relies on complaints for monitoring, and if many of these complaints are motivated by personal gain or intent to disrupt rather than genuine concerns, this could indeed lead to a significant waste of the IBBI's resources. Development of a system which can assign a credibility score to complainant based on various factors, including their track record of filing accurate complaints, specific details and evidence provided, and the presence of potential conflicts of interest, may result in better outcome. This would allow the IBBI to allocate resources effectively and prioritize investigations based on the credibility of the complainant.

Hon'ble Finance Minister (FM) has recently announced in her budget speech that an Integrated Technology Platform will be set up for improving the outcomes under IBC, thereby ensuring the consistency, transparency, timely processing and better oversight for all stakeholders. In this regard, the iPIE (Integrated Technology Platform for IBC Ecosystem) project has been conceptualised. It aims to enhance the digital processes adoption and facilitate seamless sharing of information among the different pillars of IBC. With the implementation of iPIE project, the existing IT systems of IBC pillars such as NCLT, NCLAT, MCA, IBBI, IU, and IPs, are expected to experience smoother, faster, and more efficient interoperability. After the launch of iPIE, the forms submitting the information of processes to IBBI can also be made more comprehensive so that more structured information is available with IBBI to do preliminary screening of the complaint to weed out the frivolous ones at the threshold. It may also allow the IBBI to detect exceptions where the process is held up because of various reasons or to detect anomalies at an early stage, resulting in a faster response to deal with them.

I'm very hopeful about the outcome of announcements of Hon'ble FM in her budget speech for setting up the integrated technology platform for IBC, appropriate changes to the IBC, reforms and strengthening of the tribunal and appellate tribunals and setting up of additional tribunals. These measures will make IBC ecosystem much more effective and efficient.

