

# Regulating IPs under the IBC

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## Part I

# **Why regulate IPs?**

# Need for creating a new profession

- Consumer protection
- Information asymmetry
- Problems with regulation of existing professionals
- A new accountability mechanism was required

## What this paper studies

- Motivation for creating IP profession was accountability. Examining the role of state vs. market in enforcing accountability on IPs.
- This helps us think about how should IPs be regulated. Studying the process of professionalisation provides some answers.
- We study how IBBI is regulating this sector, how IPAs are regulating IPs, and how this regulatory structure is likely to impact the development of the profession.

## Part II

# **IP regulation: From BLRC to IBC**

## Summary of BLRC Recommendations

- BLRC envisaged the IPs as a separate profession as a mechanism of accountability.
- Two-tier structure of regulation. New model of “regulated self-regulation”.
- BLRC recommended:
  - self-regulation through IPAs
  - IBBI to regulate IPAs and exercise oversight over functioning of IPs.
- The regulator will enable the creation of multiple, competitive IP agencies under it.
- Competition among the IP agencies will lead to better standards and rules and better enforcement.
- To become a member of an IPA, an individual will need to clear an IP exam. Each IPA can conduct its own IP entry exam.
- IPAs to have well defined executive, legislative and quasi-judicial powers.

## IP regulation under IBC

- IBC accepted the recommendations of BLRC in this regard.
- But IBC also created conflicting and overlapping powers between IBBI and IPAs.
- Section 200 provides for indirect regulation of IPs by IBBI: promote professional development and regulation of IPs, ensure good professional and ethical conduct among them.
- Section 196 provides IBBI the power to register IPs and IPAs: *lay down the minimum curriculum for exams for IP membership with IPAs.*
- Both IBBI and IPAs have the power to monitor the performance of IPs and also suspend IPs and cancel their membership.
- IBC provides broad guidelines about the registration, functions and obligations of the IPs and IPAs, leaves details to subordinate legislation.

## Creating new IPAs and IPs: Context

- IBC was enacted under high pressure to resolve the banking crisis, and improve ease of doing business.
- Necessity for IPs and IPAs to be in the market within a short period of time.
- Regulations developed within the first two months.
- Affected regulatory choices - haste in creating industry of professionals.

## Part III

# **Current regulatory structure and market**

# IBBI regulations

- IBBI was set up in October 2016. First set of IP regulations came into force in November 2016.
- IPs: Required a combination of prior experience, clearing a qualifying examination, and membership of pre-existing professional bodies (ICAI, ICSI, ICWAI, BCI)-subsequently amended to include management professionals as well.
- IPAs: Required high financial assurances, domestic ownership and control, and that the IPAs be not for-profit companies.
- IPEs: Insolvency Professional Entities (IPEs) were recognised in March 2018. Partnership firms or companies where IPs hold majority of the shares or capital contributions. Work exclusively to service their member or director IPs.

- 3 professional bodies, ICAI, ICSI and ICWAI formed independent, non-profit companies that have been recognised as IPAs by the IBBI.
- Membership of these bodies is open to persons outside the original membership of the parent IPA.
  - Regulatory framework for IPs was established within less than 2 months of the establishment of IBBI.
  - IPAs had to be Section 8 companies under the Companies Act, 2013.
  - High entry barriers-minimum net worth of Rs 10 crore and paid-up share capital of Rs 5 crore.
- The existing professional bodies were best placed to apply for an IPA registration.

## IPAs: legislative and executive functions

- BLRC envisaged that each IPA could conduct its own entry-level IP exam, IBBI in its regulations mandated a centralised insolvency exam to be conducted by itself or any other designated agency.
- All 3 IPAs have adopted the same code of conduct as in the IBBI regulations and have identical bye-laws as per the model bye-laws published by IBBI.
- They have the same eligibility criteria for IP membership as laid down by the IBBI.
- Multiple IPAs without any element of competition.

## IPAs: Quasi judicial powers

- BLRC envisaged that disciplinary actions taken by the IPAs against their members would be published on their respective websites. Not in subordinate legislation. Orders against IPs are published on IBBI's website.
- Sequence of events when an IP is found to have violated either the law or the regulations or the IPA's bye-laws is not clear.

## Part IV

# **State vs Market**

# Professional development

- Market based forces of accountability and competition incentivise professionals to associate, determine rules of membership and conduct and create a self-regulatory framework for their profession.
- They go through distinct stages of institutionalisation and formalisation (licensing, training, examination, associations, ethics code, state regulation).
- IP: All stages in the institutionalisation and formalisation of the profession have happened at the same time and have occurred in a top-down manner through state regulation, and not through organic market forces.
- This is likely to affect the development of the profession and the degree to which it can discipline itself.

# IBBI regulation crowding out the development of IPA regulation

- BLRC envisioned professional development among IPs as largely market determined, with the IBBI playing the role of the overseer of the market.
- Development of the profession has so far been driven largely by IBBI.
- Entry barriers exist with regard to IPAs in the form of net-worth requirements and domestic ownership.
- Undifferentiated IPAs with no regulatory role.
- IPAs exist as training and educational centres.
- Instead of market-determined, self-regulation through IPAs, the regulatory structure seems to be one of state-led regulation with IPAs playing a secondary role.

## Market forces shaping accountability

- The CoC is a significant, non-state institution of accountability of the IPs.
- Also accountable to courts, corporate debtor, resolution applicants etc.
- Affected parties are sophisticated consumers who can make informed decisions and can judge the quality of the service the professional is providing.
- Market forces impose accountability on the IP from many different sources, unlike other professions.
- When these market based accountability mechanisms fail, professional development facilitated by the IPAs can fill up the gaps.

## Learnings from conversations

- Regulatory roles of the IPAs is not clear.
- Often times the jurisdictions of IBBI and IPAs seem overlapping (example asking for information from IPs).
- IPAs are responsible for conducting training workshops.
- Majority of the IPs do not possess the requisite skills and capacity to deal with IBC cases.
- IPs need a lot of support. IPE is a step in the right direction but limited in scope and high entry barriers.
- Firms can also get licensed as IPs. Not clear why both IP firms and IPEs are needed.

## Part V

# **Rethinking IP regulation**

## Re-envisioning the role of IBBI

- State (IBBI) can exercise coercive power to:
  - create more competition or reduce competition
  - discipline misconduct
  - create rules of conduct
  - become an agent for interest groups, if captured
- State is a powerful stakeholder - high impact.
- It can increase accountability to the state at the cost of self-regulatory accountability, or vice-versa.
- This may not be sustainable in the long-run from the point of view of development via self-regulation.
- IBBI has to adopt a view on where forbearance is essential vis-a-vis pro-active regulation.

Thank You.

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