

# Regulating IPs under the IBC: Tracing pathways to regulation based on a study of professional development

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# Part I

## Motivation and Objectives

# Issues

- 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.
- How will the somewhat exceptional development of IPs as a profession impact the accountability mechanisms?
- What are the internal and external factors within the insolvency industry that are likely to exert accountability on IPs as a profession (other than IBBI)?
- How do we think of IBBI's impact and role within this broader framework?

## Part II

# IPs as envisaged by BLRC

- BLRC envisaged the IPs as a separate profession as a mechanism of accountability.
- Existing professions (lawyers, accountants) not well regulated.
- BLRC recommended a tripartite regulatory structure where IPs would be regulated by multiple SROs who in turn will be regulated by the IBBI.
- IBC accepted the recommendations of BLRC in this regard.

# IP regulation under IBC

- Unlike other professions in India, no single SRO has legal monopoly over the development and self-regulation of IPs. 3 registered IPAs are now operational.
- IBC lays down clear objectives of regulation aimed at consumer protection.
- IBC gives a well defined mandate to the IBBI to regulate the IPs as well as IPAs.

# Part III

## Development of professions

# Creating a new profession

- The very manner in which the IP profession has come about makes its development exceptional.
- Literature on professions highlights the gradual and organic development of professions, with state recognition and regulation coming into the picture at an advanced stage of professional development.
- In case of the IPs, the profession itself has been created by the state.
- The entire regulatory apparatus governing the IP profession has also been laid out in the primary law.
- Useful point of departure in understanding the factors shaping the development of the IP profession.



# Professions and Professionalisation: Abbott, 1988

- **Professions:** Organised bodies of experts who apply esoteric knowledge to specific cases.
- **Professionalisation:** Process of pursuing, developing and maintaining monopoly over occupational jurisdictions.
- **Jurisdiction:** Link between professions and the work they do.
- Professions develop when jurisdictions become vacant or are newly created.
- They go through distinct stages of institutionalisation and formalisation (licensing, training, examination, associations, ethics code, state recognition).

# Professions and Professionalisation: IPs in India

- IP profession under IBC has been created by the state to fill up a newly framed jurisdiction.
- 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.
- Also shape professional attitude since peer pressure or interprofessional competition could be a less important factor.

## Part IV

# Factors affecting development of IP profession

# Nature of work

- Nature of work is such that the IP is accountable to multiple entities despite having a single client.
- CoC, NCLT, Debtors, Interested third parties: market forces
- Different from other professions such as lawyers and doctors where the client alone holds them accountable.
- Professional development can help fill up the gaps in case these accountability mechanisms fail.
- Role for the IPAs in professional development.
- IBBI steps in when IPAs fail to perform this role.

# Competition

The ability to defend and expand one's jurisdiction is crucial to professionalisation

- Inter-professional competition can play an important role in enforcing accountability which in the case of IPs may not work.
- IPs have an exclusive domain of work under the IBC.
- There is therefore little threat to the jurisdiction of IPs.
- There could however be internal threats to jurisdiction.
- This however depends on whether IBBI licenses more IPAs. IBBI is therefore a key gatekeeper in determining how the jurisdiction of IPs is determined.

# Demand for the profession

## Will the profession see continuous demand?

- The insolvencies of the large firms has created an immediate and urgent demand for IPs.
- What happens when this wave big insolvencies is over? A reduction in demand for IPs could make them more entrepreneurial.
- Things may also change with the notification of the personal insolvency related sections of IBC. This will create the demand for IPs with different profile and expertise.
- Amendment to IBC (or a new law) to resolve cross-border insolvencies will also play a role. Entry of foreign insolvency professionals.
- Consequences of high demand: can be an accountability diluting factor in such an exceptional environment at present and can settle towards an equilibrium going forward.
- Regulatory intervention can distort the accountability arising out of market demand.

# Associational features

- Another aspect of the nature of work that affects professionalisation is the organisational milieu in which professionals work.
- Professions that work in firms where their expertise is substitutable see a dilution of relative expertise.
- It is harder to retain monopoly over expertise.
- IPs are so far organised in both forms, as exclusive firms of IPs, as well as IPs working within firms with other professionals.
- For IPs in IP firms, there are additional layers of accountability.
- Peer pressure/competition – substitutability of work in a firm or dependency– interdependent ecosystem.

# Abstraction

- One of the key determinants of a profession is its ability to develop abstract rules for its work.
- Abstraction acts as a method of retaining control over jurisdiction. So it is a product of competitive market forces.
- Not necessary if protection from competition is assured e.g. legal monopoly.
- Corollary, lack of organic competition hinders abstraction.
- IPs are already legally protected, their scope of work is well defined in the IBC.
- Abstraction is not likely to be a critical factor in imposing accountability in the case of IPs.



# Role of state

- State (IBBI, MCA, NCLT and other courts) 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.
- It can exercise forbearance in favour of market-led development, or be interventionist.

Depends on the comparative strengths of market-led forces

# Part V

## Accountability

# Accountability: State vs. Market

- A key aspect that enhances accountability within markets is the price signal, i.e. the risk of loss ensures people compete to provide better services.
- Market led system maybe better because of the signalling factor wheras state led system is more top down and can be distortionary.
- Market led system can evolve with changing dynamics of the landscape whereas state led system can be more rigid.
- So far fairly substantial market led mechanisms of accountability are present in the IP profession.

# Conclusion

- IPs are a product of law, not market-forces. They are held responsible by multiple accountability mechanisms.
- IBBI has to evaluate the relative strengths of different accountability mechanisms in the market.
- As the profession develops further, IBBI may need to exercise greater forbearance in favour of market led accountability mechanisms.
- IBBI can also facilitate the development of market accountability forces, for example through the IPAs.

# Future work

- Studying examples of professional development from other jurisdictions.
- Qualitative information gathering through conversations with IPs, IPAs and IBBI.

Thank You.

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