

A Comparative Analysis of Legal Frameworks of Insolvency Law in India, USA and the UK

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Abstract: *The economy of the market depends upon the companies or entities. Some companies will be viable enough to make the profit and pay off their liabilities; whereas, some of them fail miserably. Recently, due to competition in the market, many enterprises are not able to match the pace of the market. Hence, we are witnessing loads of Insolvency cases in India.*

Insolvency does not only effect on the companies or enterprises but it adversely effects on shareholders, employees, workers, etc. Liquidation remains the only option to incur heavy losses of the enterprise. Over the last years, major difficulty has faced by the Insolvency laws in India due to frequent changes and amendments. There has been no uniform law to deal with Insolvency, many cases are piled up before the Tribunals and High Courts, Cross Border issues has not yet recognized. Even after recent development and enactment of code, about 1852 application for corporate insolvency resolution process and more than one thousand cases are under liquidation process as per recent data published by IBBI in 2022. Policy makers must concentrate as how the Insolvency laws in other countries are successful and our country is facing several challenges.

Keywords: crime, corporate, insolvency, bankruptcy, liability, liquidation

I. INTRODUCTION

Any legal person who is unable to pay off all of their debts when they fall due is said to be insolvent. The ailment of having extra obligations (liabilities) than total assets that might be used to fulfil them, even if assets were mortgaged or sold, is known as being insolvent.¹ Insolvency is a process where the person or a company failed to repay their debts or liabilities. The main reason of Insolvency is poor economic management. If debts are not paid, legal action may be taken against a person or the entity. Liquidation plays an essential role in Insolvency proceeding, assets are liquidated to pay off the debts.

Bankruptcy and Insolvency are commonly used as a synonym, but the two terms are opposite to each other. Bankruptcy is the order of the court, where it directs the insolvent person or entity to pay the outstanding debts by selling the assets. In India, there have been various Insolvency laws which has been effective as well as ineffective such as Companies Act, 1956² (CA, 1956), Companies Act, 2013³ (CA,13), Sick Industrial Companies Act, 1985⁴ (SICA), Recovery of Debts Due to Banks and Financial Institutions Act, 1993⁵ (RDDBFI), Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁶ (SARFAESI), etc. The term 'insolvency' is not used or defined

¹ West's Encyclopedia of American Law, 2nd Edition, (2008).

² The Companies Act, 1956, No. 1, Acts of Parliament, 1956, (India).

³ The Companies Act, 2013, No. 18, Acts of Parliament, 2013, (India).

⁴ The Sick Industrial Companies (Special Provisions) Act 1985, Acts of Parliament, 1985 (India).

⁵ The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993, (India).

⁶ Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002, (India).

but according to Section 433 (e) of Companies Act, 1956⁷ defines that if a company is unable to pay debts, then such a company may be wound up by the court. The CA, 13 also provides the provision of winding up in Section 271 of the Act which has now omitted by section 255 of the code.⁸

After various attempt by legislature for adequate and effective Insolvency laws in India, the Bankruptcy Law reform Committee drafted Insolvency and Bankruptcy Code, 2016⁹ (IBC) to deal with both an individual as well as an entity in the same code. A default occurs when a debtor or corporate debtor fails to pay an obligation after it becomes fully or partially due and payable. Insolvency is not specified in the new legislation.¹⁰ Under Section 7 to 9 of the code, the corporate insolvency resolution process may be initiated, if there is a default by the party. According to the code, the party may be a solvent person or an entity, but if the party has made any default, then the creditor may initiate insolvency resolution process.

The research is about the detail comparison of variety of Act which dealt with insolvency and bankruptcy laws in India. Advantages and disadvantages of the previous and present Act. How the Acts played their respective role to develop economic system in our country.

II. HISTORICAL BACKGROUND

1. Pre-Colonial Era:

- Insolvency laws in pre-colonial India were primarily based on customary practices and local regulations.
- Traditional systems like "Kutumbakam" in ancient India and "KudumbaVyavastha" in medieval times addressed debt resolution within communities.

2. Colonial Influence:

- British colonial rule introduced formal bankruptcy laws to India.
- The Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, were among the first formal legislations governing insolvency.

3. Post-Independence Reforms:

- After independence, India witnessed various reforms in insolvency laws to adapt to the changing economic landscape.
- The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) aimed to rehabilitate sick companies, while the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), addressed non-performing assets.

4. Recent Developments:

- The Insolvency and Bankruptcy Code, 2016 (IBC) marked a significant overhaul of India's insolvency framework, aiming for a time-bound resolution of insolvency cases and the maximization of asset value.

III. MEANING OF INSOLVENCY

Insolvency

A person's state in which their property and assets are insufficient to pay out their debts on the date that they become due in the normal course of business.¹¹

Insolvency is a financial instability which can be occur to individual as well as business entity. It is a process where the individual or business entity cannot afford to manage their financial obligation which may lead to bankruptcy. It is repairable and temporary condition, the management of the company or the individual can restructure the financial liabilities by increasing the income.

Insolvency is commonly divided into two types; they are as follow:

⁷ The Companies Act, 1956, § 433(e), No. 1, Acts of Parliament, 1956, (India)

⁸ The Insolvency and Bankruptcy Code, 2016, § 255, No. 31, Acts of Parliament, 2016, (India).

⁹ The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, (India).

¹⁰ The Insolvency and Bankruptcy Code, 2016, § 3(12), No. 31, Acts of Parliament, 2016, (India).

¹¹ Insolvency, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/insolvency> (last visited Feb 7, 2023).

Balance Sheet Insolvency: When an individual or a company does not have sufficient assets to meet their liabilities and the liabilities over passes the total assets, the individual or a business entity becomes insolvent.

Cash- flow Insolvency: When an individual or a company have the assets but not liquid assets to meet their liabilities which leads to negative cash flow, the individual or a business entity becomes insolvent.

Bankruptcy

Bankruptcy is not similar to insolvency, both terms are interrelated but have different nature. Bankruptcy is a legal process wherein an individual or a company has already been insolvent and court intend to resolve the insolvency. It is a process where either debtor seeks relief or the creditors seeks repayment from the judicial authority. Insolvency is the financial situation which may or may not lead to Bankruptcy.

Factors leading to Insolvency

Following are the reasons which leads to insolvency:

- **Failure of projects:** Entities introduce various projects to compete in the market. Such project may be unsuccessful in long run, which may lead to massive loss and debts. Most of the insolvency cases arises due to bad investments.
- **Mismanagement:** Financial Management plays an essential role to develop the company. Every company needs a competent management, without such management company may face heavy losses.
- **Excessive debts:** When the company has more debts than the total earning due to mismanagement and failure to repay loans, such companies are tend to get insolvent.
- **Incompetent Business Strategy:** Companies may make wrong business strategies which can later lead to Insolvency.
- **Ignorance of Business:** Each and every business must be nurtured and concentrated to become successful, such ignorance is the main reason of insolvency.
- **Excessive expenditure:** Capital should be used wisely and steadily to develop the company. Excessive expenditure may cause insolvency.
- **Competition:** Nowadays competition is rising in the market, companies ignore their competitors, does not take them seriously which may cause business failure.

Such reasons may lead to insolvency but does not mean that the company has to go through liquidation. There are various way to make the company solvent, such as:

Restructure of debts.

Initializing Corporate Insolvency Resolution Process as per IBC.

By acquisition and merger. After going through all the given procedures, still the company could not able to rehabilitate than the last option should be liquidation.

IV. COMPARATIVE STUDY

S. No.	Basis of Comparison	Insolvency and Bankruptcy Code, 2016 (India)	UK Insolvency Act, 1986 (UK)	Chapter 11 of US Bankruptcy Code (US)
1.	Initiation of Corporate Insolvency Resolution Process (CIRP) by Creditors/ Corporate Applicant	Financial Creditors; Operational Creditors; or Corporate Debtor.	Creditors; Debtor Company; or Holders of qualifying floating charges (QFC).	Debtor Company

2.	Period of Insolvency Proceedings	330 days	12 months with creditors consent/can be further extended up to 6 months with court's approval.	120 days extendable up to 18 months on genuine grounds.
3.	Management Control during Insolvency Proceedings	Adjudicating Authority appoints the Insolvency Professional as IRP/RP. BOD gets suspended with the appointment of IRP.	The daily operations of the entity remain in the hands of the directors, whereas management control is taken over by the Insolvency Professional/Administrator.	Debtor in Possession (DIP) approach is adopted and thus, the entity continues its operations.
4.	Resolution Plan	Based on the information memo prepared by the RP as per section 29, the resolution applicant submits the resolution plan under section 30 to the RP. As per section 30(4), the Committee of Creditors (CoC), can approve the resolution plan by 66% voting share and the Adjudicating Authority (AA) under section 31, may by order approve the said plan as approved by the CoC.	The approval of resolution plan requires a majority in value of the creditors present and voting.	Resolution plan known as living will, describes company's strategy to mitigate its situation of financial distress. The plan requires at least 2/3 rd members voting to a majority.
5.	Moratorium	NCLT on acceptance of the application for insolvency proceedings, may declare the moratorium period and continue till the approval of the resolution plan.	Moratorium starts once the courts appoint the administrator.	After filing of the petition in the Bankruptcy Court, the moratorium period starts under the US Bankruptcy Code.
6.	Cost of Insolvency Proceedings	If Corporate Insolvency Resolution Process (CIRP) is initiated under section 7 (proceedings initiated by financial creditor against corporate debtor) or under section 9 (proceedings initiated by operational creditor against corporate	Cost of proceedings is borne by debtors.	Cost of proceedings is borne by debtors. However, lenders may provide finance to debtors against lien over the assets which have not been

		debtor), cost is borne by creditors. In case, CIRP is initiated under section 10 (proceedings initiated by corporate applicant), cost is borne by debtors.		pledged to other lenders.
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V. LASTEST INSOLVENCY LAW OF INDIA

The Insolvency and Bankruptcy Code (IBC) of India, enacted in 2016, is one of the most significant economic reforms in the country's recent history. It aims to provide a comprehensive framework for the resolution of insolvency and bankruptcy cases in a time-bound manner. Here are some key highlights of the Insolvency and Bankruptcy Code:

1. **Single Comprehensive Law:** The IBC consolidates and amends the laws relating to insolvency resolution for individuals and corporate entities, providing a single, unified legal framework.
2. **Time-Bound Resolution:** The IBC emphasizes time-bound resolution of insolvency cases, with strict deadlines for various stages of the insolvency process. The objective is to expedite the resolution process and maximize the value of assets.
3. **Insolvency Resolution Process (IRP):** The IBC provides for the appointment of insolvency professionals (IPs) who manage the affairs of the debtor during the insolvency resolution process. The IP plays a crucial role in facilitating negotiations between creditors and debtors and overseeing the resolution process.
4. **Corporate Insolvency Resolution Process (CIRP):** For corporate debtors, the IBC prescribes a structured Corporate Insolvency Resolution Process (CIRP). Under this process, creditors initiate insolvency proceedings against a debtor, and a resolution professional is appointed to manage the affairs of the debtor and prepare a resolution plan.
5. **Adjudicating Authority:** The National Company Law Tribunal (NCLT) serves as the adjudicating authority for corporate insolvency resolution cases, while the Debt Recovery Tribunal (DRT) handles individual insolvency cases.
6. **Priority to Secured Creditors:** The IBC provides for the hierarchy of creditors' claims, giving priority to secured creditors over unsecured creditors and operational creditors. This aims to protect the interests of secured creditors and promote efficient allocation of resources.
7. **Cross-Border Insolvency:** The IBC incorporates provisions for dealing with cross-border insolvency cases, enabling cooperation and coordination with foreign jurisdictions in insolvency proceedings involving Indian entities with assets or creditors abroad.
8. **Liquidation as a Last Resort:** If a resolution plan is not approved within the specified timeline or if the resolution process fails, the debtor's assets may be liquidated to repay creditors. The IBC aims to promote the revival and continuation of viable businesses over liquidation.
9. **Promotion of Entrepreneurship:** The IBC encourages entrepreneurship and risk-taking by providing a robust mechanism for the resolution of distressed businesses. It facilitates the restructuring of debts and provides a fresh start to debtors who are unable to repay their debts.
10. **Amendments and Evolving Framework:** Since its enactment, the IBC has undergone several amendments to address practical challenges and enhance its effectiveness. The framework continues to evolve based on feedback from stakeholders and emerging trends in insolvency resolution.

VI. OBSERVATIONS OF RESEARCH

Awareness-raising activities are required to inform people and businesses about the value of insolvency laws and how they operate. Workshops, seminars, and online campaigns can all be used for this.

To manage the insolvency process successfully, insolvency specialists need to be trained and equipped with the essential abilities. To improve the skills of professionals, the government can offer certification programmes and training sessions.

The insolvency procedure requires a lot of documents; digitization can help to streamline the procedure and shorten the time required. The use of technology and online platforms for insolvency processes should be promoted by the government.

To find gaps and areas for development, the insolvency process needs to be continuously monitored and evaluated. This can aid in improving the process' effectiveness and efficiency.

VII. CONCLUSION

Insolvency laws in India underwent a drastic change in the last 100 years. From enacting the Indian Insolvency Act, 1848¹² to introducing IBC in 2016. The Government made considerably huge efforts for a solid Insolvency law but failed to implement. The CA, 1956 lacked provisions related Insolvency and focused only on winding up. The SICA was the first legislation which ultimately aimed for Insolvency after Independence, but due to the abundance of lacunae the Act was termed as "Defaulters' Paradise." RDDBFI and SARFAESI played an effective role compare to previous Insolvency laws. The process of these Acts are time consuming but the Bank and Financial institutions are assimilating some relief. By passing IBC in 2016, India established a new system for both corporate and individual insolvency. The winding up procedures under the CA, 2013 have been significantly updated and consolidated under IBC. Prior to making the companies enter liquidation, the IBC mandates the insolvency resolution process.

The timelines have been decreased in an effort to speed up the process and lessen the suffering experienced by stakeholders and promoters. With the hope of a quicker turnaround, the decision-making process has been delegated to an expert tribunal. That appears fantastic in theory. Yet, the implementation of the new system has not gone as planned. They significantly fall short in reality.

The Code, which includes the Committee of Creditors, the Interim Resolution Professional/Resolution Professional, and the Adjudicating Authority, is a time-bound mechanism for restructuring and revival of a corporate debtor. The Code is a welcome piece of legislation that has introduced a constructive viewpoint on enhancing India's credit culture by establishing a "creditor driven regime," and the judiciary's contribution to this goal is notable.¹³

A corporate debtor's revival or liquidation, as determined by the CoC, is subject to judicial approval, and there have been many instances in which the CoC's power was contested with regard to the rejection of a resolution plan. Tribunals and courts have been gracious enough to interpret the Code's text as intended by legislators whenever the judiciary has been requested to interfere in the decision-making process by the involved parties.¹⁴

Many incidents, such the PNB bank fraud and Vijay Mallya's default and subsequent fleeing, serve as a reminder of how essential an effective framework of insolvency, bankruptcy, and recovery legislation is for a developing economic powerhouse like India.¹⁵

REFERENCES

- [1]. Agarwal Abha & Agarwal S.K., Concise Concept on Corporate Restructuring And Insolvency, 5th Edition, Reliance Publications Ltd.(2012).
- [2]. Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module
- [3]. VII, (2010).
- [4]. Jackson .H. Thomas, _The Logic and Limits of Bankruptcy Law' (Beardbooks, 2001)
- [5]. Kapoor N.D., Elements of Company Laws, 27th Edition, Sultan Chand & Sons, Delhi,(2003).
- [6]. Prasad Upendra, Systematic Approach to Business & Corporate Laws, 3rd Edition, Bharat Law house Pvt. Ltd. (2006).

¹²The Indian Insolvency Act, 1848, (India).

¹³ Swiss Ribbons (P.) Ltd. v. Union of India, [2019] 152 SCL 365 (SC).

¹⁴IDBI Bank Limited vs. Jaypee Infratech Limited, 2018 SCC OnLine NCLT 9556.

¹⁵Amitanshu Saxena, Insolvency and Bankruptcy Code, 2016: Emerging Jurisprudence, Ambiguities and Predicaments, 5 RGNUL FIN. & MERCANTILE L. REV. 171 (2018).