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Creditor-Driven Insolvency Resolution Law – A Review of Intent v/s Practice

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Abstract

Purpose- *This paper aims to examine the effectiveness of the Insolvency Law in India in addressing cases of corporate distress and enabling them to revive the business through restructuring by passing appropriate resolutions as envisaged by the Law. It aims to seek evidence as to whether the 'creditor driven insolvency resolution' model has a propensity towards 'resolution' or is it driven more towards 'liquidation' leading to 'value erosion.'*

Design/Methodology/Approach- *The paper is descriptive in nature. The paper studies the practice and impact of the Insolvency and Bankruptcy Code in India. The data reported by the Insolvency and Bankruptcy Board of India have been used to examine insolvency law practice.*

Findings- *The author argues that Indian Insolvency Law tends to lean towards the 'Liquidation' of a distressed entity rather than the 'Reorganisation' of the entity against legal wisdom behind insolvency laws to promote revival of the distressed entity. The authors also imprint that increasing withdrawal of admitted cases from IBC indicates distressed entities resorting to informal methods of resolving cases outside IBC.*

Originality/Value- *The paper puts across the dichotomy between 'intention' and 'impact' of Insolvency law in India. The study highlights the deviation of the insolvency resolution framework in India from the 'Evolutionary Theory', which states that increased dispersion of corporate ownership would lead to increased affinity towards a 'manager-driven insolvency regime.'*

Practical Implications- *This study would be useful to insolvency resolution regulators, insolvency professionals, and the Government in examining the insolvency law framework to improve the effectiveness of the Insolvency and Bankruptcy Code in practice.*

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1. Introduction

The primary objective of Insolvency law has been to provide a recourse to protect the interests of creditors of a distressed entity. It seeks to provide an instrument to help the creditors realise their contractual claims in a time-bound manner. It is done through a collective procedure, which replaces individual creditor action. A court supervises the use and disposition of assets and holds them together to preserve and maximise their value (Adler, 2018). Insolvency laws are important for settling disputes on account of corporate distress and affecting various aspects of the economy, such as banking, pension funds, contracts, entrepreneurship, employment, and governance. It also influences the risk-taking behaviour of investors, bankers, and creditors (Sahoo and Guru, 2020). Hence, insolvency laws are becoming increasingly significant. Therefore, the insolvency legislation must move forward with a clear purpose, direction, and motivation. If a sense of direction is lacking, this area of law is liable to be marked by inconsistencies in reasoning and failures in policy (Finch, 1997). Business failure is an unavoidable phenomenon in any economy. It is essential to have a speedy resolution and arrangement between the debtors and creditors to restructure the distressed entity and help maintain its going concern status. In the event of non-viability of business, to liquidate the same in the best interests of all stakeholders (Bankruptcy Law Reform Commission Report). Entrepreneurs should be free to fail, and government intervention should enable easy exit from genuine business failures (Sahoo and Guru, 2020).

A robust insolvency resolution regime provides confidence to investors and lenders, leading to a positive investment climate and economic growth. The insolvency regime directly affects resource allocation in an economy (Shikha & Shahi, 2021). Insolvency mechanism is expected to provide solutions to a distressed entity to revive itself as a cashflow generating entity (Deb and Dube, 2020). Insolvency laws are an efficient measure to manage and reduce high rates of non-performing assets and protect the interests of creditors and investors, attracting attention. Despite wide-ranging insolvency reforms in many countries, the complexity of regulation, high compliance costs, and ineffective insolvency regimes remain major obstacles to entrepreneurial activity (Finch,1997). In addition, there is a huge array of comparative information, as the design of each insolvency regime varies significantly across countries (McGowan & Andrews, 2018). However, studies show that insolvency laws are framed by Government keeping in view large and medium-sized companies to accommodate the complexities of large and medium businesses (Mokal et al., 2018)

Insolvency Law Framework in India

Rising non-performing assets (NPAs) have overrun Indian banks. According to reports from the Reserve Bank of India, Indian banks are burdened with non-performing assets. In 2022, the public sector bank’s Gross NPA at Rs. 5.42 trillion. The introduction of the Insolvency and Bankruptcy Code (IBC), 2016 is seen as a crucial legal reform in India. The goal is to create a climate that encourages wise investment and makes business easier. Investors desire a prompt resolution of insolvency proceedings, a flexible exit strategy, and the greatest possible asset realisation, all of which the IBC Code is supposed to offer. The Indian Insolvency law, hailed as key economic reform, has established itself, in a noticeably short span of time, as a credible instrument which has brought about perceptible transformation in the prevailing credit culture in the country (Shukla, 2022). The Insolvency and Bankruptcy Code, 2016 was enacted in India as a time-bound mechanism for the insolvency resolution of stressed debtors, for maximising the value of their assets (Shukla, 2022) and has proved to be a comprehensive ‘one-stop shop solution’ for resolving insolvency of corporate businesses (Mital, 2022). Before IBC, India’s insolvency resolution regime was fraught with multiple laws and various legislations that provided overriding powers to owners and lenders, leading to chaos and a lack of coordination. Voluntary and involuntary liquidation was seen as a predominant mechanism for addressing corporate distress. Sick Industrial Companies Act (SICA),1985 was enacted to bring more discipline and protect the interest of employees of distressed corporates. However, SICA failed to deliver on account of willful corporate defaulters, institutional inefficiency, and poor revival plans, (Deb and Dube,2020). SICA was a debtor-driven process wherein management (debtor) continues to control the distressed firm whereas IBC,2016 is a creditor-driven process giving creditors control over the management of the distressed firm. The key objective of the Code is to promote entrepreneurship and protect the interests of all stakeholders by providing a legal environment to resolve corporate financial distress and insolvency. The Code addresses three important parameters: 1) Closure of resolution within a time-bound manner to preserve value; 2) Facilitating the stakeholders and authorities to take decisions judiciously, 3) Shifting the control of distressed entity from debtors to creditors.

The four pillars of the insolvency ecosystem in India, namely the Insolvency and Bankruptcy Board of India (IBBI), Insolvency Professionals (IP), Insolvency professional agencies, and Information utilities, have been set up for ensure smooth functioning of the Law. IBC has matured and graduated over last over five years, (Shukla, 2022). Since the inception of the Code, the Legislature has intervened six times to amend the Code, to incorporate key learnings, to reinforce the processes and advance its core objectives. (Shukla, 2022). A plethora of landmark judgments have been delivered in the past few years, clarifying several conceptual issues, and settling the position of the Code over other existing laws, in case of any inconsistency between them (Shukla, 2022). The Code has included new provisions to increase the scope of the framework viz. including homebuyers as financial creditors, pre-packaged insolvency process for small and medium firms, insolvency process for financial service providers, framework for cross border insolvency, placing statutory bar on certain class of persons from submitting resolutions. The constant endeavor of the Government and the Insolvency and Bankruptcy Board of India (IBBI) to urgently address the upcoming challenges, has transformed IBC into a future ready and relevant in time, legislation (Mital, 2022). The reallocation of idle resources by putting it to more viable uses, has been made possible with the implementation of the Code, as it enables the firms to

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restart in the hands of new management, if feasible, or to liquidate its assets and put it to new uses (Mital, 2022)

The Code has repeatedly withstood judicial scrutiny and in over six years of its enactment, has strengthened the rights of creditors and reinforced the confidence of investors. The Code has continuously evolved with emerging challenges and changing dynamics of the economy.

Through Insolvency and Bankruptcy Code,2016, India has transitioned from a 'manager driven insolvency regime' to a 'manager displaced insolvency regime', (Deb & Dube, 2020). IBC, 2016 empower creditors to initiate insolvency proceedings. This contradicts the premise of insolvency laws practiced in nations like USA, Finland and Japan hailed as top-ranking countries per World Bank's 'Ease of Resolving Insolvency' index. Table 1 highlights the Insolvency Resolution Indicators of India in comparison those of USA, Finland, and Japan.

Table 1 Insolvency Resolution Indicators.

Statistical indicator	**India**	**Finland**	**Japan**	**United States**
Ease of resolving index rank	52	1	2	3
Average duration of Insolvency resolution in years	1.6	0.9	0.6	1
Recovery rate of insolvency (cents on the dollar)	71.6	88	92.1	81
Strength of insolvency framework index (0-16)	7.5	14.5	13	15
Resolving Insolvency score	62	92.7	90.2	90.5

Source: Ease of Resolving Insolvency Index,2019, World Bank.

Table 2 compares the key features of corporate insolvency resolution laws in these countries with those of India.

Table 2. Features of Insolvency Law across countries

Parameters	**India**	**Finland**	**Japan**	**United States**
Rationale and conceptual base	Resolving insolvency and providing exit option	Part of financial reforms to combat economic depression. 'Pro-debtor'	Corporate rehabilitation	Reorganisation of business and payment to creditors over time

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

Initiator of the Insolvency and Bankruptcy process	Financial and Operational creditors	Bankruptcy begins when the court makes an order of bankruptcy relating to the debtor.	A petition for commencement of bankruptcy proceedings may be filed by a debtor, a director of a debtor company or a creditor	Debtor Company
Management control during proceeding	Creditor-in-possession (CIP) approach. Management gets suspended. Authorities appoint Insolvency Professionals to oversee the proceedings.	A court-appointed administrator manages bankruptcy proceedings.	Debtor-in-possession (DIP) process approach	Management continues. Debtor in Possession approach (DIP) is adopted.
Resolution plan	A revolution plan to be submitted by the Insolvency Professionals (IP). Once the plan is approved by 66% voting share of 'Committee of Creditors' (CoC). The CoC approved resolution plan will be then placed before Adjudicating Authority (AA) for approval	The estate administrator shall provide for peaceful resolution of disputes through estate administration. However, the aggrieved parties may settle disputes during the proceedings.	Turnaround Alternative Dispute Resolution process. Debtors may, with the consensus of participating creditors, restructure debts owed. A rule based on the out of court settlement process is followed. Supervision of the court or approval by court is not mandated by the Act.	Debtor gets a definite period to propose a resolution plan for the approval of creditors and shareholders. Each class of creditors who have unsettled claims can vote. The resolution gets approved if two-thirds of the aggrieved parties vote in favor.
Sale of Assets during insolvency proceedings	Insolvency professionals are allowed to sell the assets e approval of Committee of Creditors (CoC)	The estate administrators take charge of the process of sale of assets. The assets are liquidated of the distressed entity are liquidated in a manner which is most beneficial to the aggrieved parties.	The trustee gets the power to declare sale of certain assets done during the period of distress void. The debtors can sell the assets during the insolvency process. This ensures that the creditors' interests are protected in the	Debtors are allowed to sell all its assets free of encumbrance. This is done for quick sale of assets and maximum realisation of value.

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

			event of a fraudulent or preference transaction. This is to ensure avoidance of obligations that arose out of sale transactions done while the debtor was in distress.	

As seen in Table 2, countries ranking high on insolvency resolution scores have adopted a 'debtor driven' approach to resolving corporate bankruptcy and distress, as opposed to India adopting a 'creditor-driven' approach. Courts play a minimum role in intervening between aggrieved parties. The agenda of IBC, 2016 has been to resolve distressed corporate within a time bound manner wherein the power to decide the continuity or liquidation of the distressed corporate lies with the 'Committee of Creditors'. Once the creditors file a claim against a debtor company, IBC Code assigns the management and control of distressed corporate assets to Insolvency Professional (IP) thereby displacing the management from the control of the company's assets (Sivakumar, 2019). The Insolvency Professional would prepare a resolution plan, which has to be approved by members with 66.66% voting power in CoC. If the CoC does not approve the resolution plan, then liquidation is considered a measure to settle the insolvency claim.

Corporate ownership in India is characterised by family/promoter/government ownership (Krishnan, 2015). Owners influence managers holding access to relevant information for revival of a distressed entity. Under IBC, managers or promoter/owner control are relieved of the management and control of assets and "Committee of the Creditors" (CoC) comprising of financial and operational creditors of the distressed entity assumes power. The CoC appoints insolvency professionals (IPs) to manage the insolvency process, who may get little cooperation from managers/ owners (who have access to critical information). With the absence of pertinent information, complexities of debtors' business model and probable lack of expertise in 'CoC', the resolution may steer more towards the liquidation of distressed entity rather than a resolution to revive the distressed entity. Differences in perception about resolution amongst creditors also leads to preference towards 'liquidation' than 'resolution.'

The motivation of this study is to review the effectiveness and practice of the Insolvency Code, 2016 in resolution of insolvency cases in India. IBC 2016 provides for 'Creditors managed resolution' instead of 'Managers managed resolution' paving the way to information asymmetry. The proportion of cases ending with liquidation event is higher than resolution for business continuity. It indicates the propensity of the Law towards

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

liquidation than resolution. There is an incentive for creditors (banks) to advocate liquidation of companies rather than revival on account of high provisioning of Non-performing Assets. 'Managers displacing' insolvency laws will further support their demand. IBC could drive companies to liquidation than resolution and reorganisation thereby defeating the philosophy embedded in the IBC (Sivakumar, 2019)

This study would be of immense importance to regulators, government, and insolvency professionals to increase the Code's effectiveness. As the Insolvency and Bankruptcy Code evolves, its achievements must be compared with expected outcomes. A careful analysis and evaluation of the Code in practice will guide further refinement of the Code. Academic knowledge, empirical evidence based on rigorous analysis and domain expertise can collectively lead to further refinement in the formation and implementation of the policies of the Government (Bajaj, 2022).

2. Literature Review

V Kavya (2022) says it is imperative to have a legal framework in India that is like Chapter 11 of the US Bankruptcy Code which permits business continuity during bankruptcy proceedings, with the managers retaining control over the assets of the company and keeping subsidiaries/certain assets outside the scope of the bankruptcy process. Md.R. Shamim (2019) examined a comparative relationship of United States and Indian Insolvency and Bankruptcy laws from individual and corporate perspectives and analysed the legislative framework and stated that significant amendments and replacement are made in previous related Acts for implementing the all-new bankruptcy code with insolvency resolution and liquidation process with brief history of bankruptcy. Kattadiyil. B and Mehboob P (2020) compared the corporate insolvency in India with the other countries like the US, UK, Germany, Singapore, and Australia and analysed that all the laws look for resolution plan to restructure distressed firms over liquidation. Sengupta & Sharma (2016) analysed the corporate insolvency resolution procedures of India, UK, and Singapore within a common framework of well-specified principles and stated that India at present lacks a single, comprehensive law that addresses all aspects of insolvency of an enterprise. A weak insolvency framework may create opportunities for debtors to stall and hinder the efforts of creditors in getting their contractual dues. Sengupta and Sharma, (2016) argue that a weak insolvency regime will hinder the timeliness of resolution. Comparison of various insolvency laws across countries has highlighted the absence of a single insolvency resolution framework with well-defined rules for an effective insolvency resolution process. The Indian experience with IBC has not been exceptionally smooth. Creditors must face a challenging resolution process on account of numerous petitions filed by debtors, (Das et al, 2020).

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

Drafted laws were different from its practice leading to complexities and ambiguities in interpretation of Law. (Das et al, 2020). Eide Mueller, (2019) discussed the rise and fall of regulatory competition in corporate insolvency law in the European Union and compared it with those of Australia and Singapore. The study highlights the different approaches taken to balance the interests of owners and creditors. Non-inclusion of owners in asset stripping and lack of expertise by Insolvency Professionals may also lead to erosion in value of assets, (Bhagwati.J. 2022). India's bankruptcy and insolvency framework will have to face the test of implementation success, (Valecha and Xalxo, 2017). Armour et al, 2002, posits that as the nation evolves, an ex-post-bankruptcy regime will exist where managers will retain control even if a company becomes bankrupt. Pillar (2013) in his study comparing insolvency framework of European Union opines that standardised insolvency procedures follow a two-tier process which begins with a decision to restructure the distressed corporate and liquidation as a process only if restructuring fails. It points out a manager-driven resolution process. However, In India, the Law indicates an ex-ante regime where the managers get displaced if company becomes bankrupt. Insolvency laws, in general, are embedded with the objective of providing resolution to distressed assets/company. But, the manager displaced approach, evident in Indian Insolvency law, points to a liquidation-oriented resolution.

3. Analysis of Corporate Insolvency Resolutions under IBC, 2016

Table 3 highlights the initiation of insolvency process by stakeholders viz: financial creditors (FCs), Operational Creditors (OCs) and Corporate Debtors (CDs). 94% of the CIRPs have been initiated by Creditors.

Table 3. Stakeholder wise initiation of CIRPs

Year	No. of CIRPs Initiated by			
	FCs	OCs	CDs	Total
2016 - 17	8	7	22	37
2017 - 18	286	310	111	707
2018 - 19	517	569	71	1157
2019 - 20	883	1054	51	1988
2020 - 21	197	318	22	537
2021 - 22	372	473	43	888
2022 - 23	654	537	70	1261
2023-24 (till Sep 23)	224	223	32	479
Total	**3141**	**3491**	**422**	**7054***

Source: IBBI Report, Sep,2023 *Excludes 4 cases of application filed by RBI

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

Of the 7058 cases admitted, 44.47% of cases were closed through liquidation, 27% were either withdrawn/settled under Section 12A of the Code. IBBI has cited the reasons for withdrawal to be full settlement with creditors or an agreement for future settlement, (IBBI newsletter, Sept 2023) outside IBC. Only 16% of the cases were closed through resolution plan for business continuation. Table 4 provides data for mode of closure of CIRPs till September 2023.

Table 4. Mode of closure of CIRP admitted.

Year	**Admitted**	**Closure by**			
		Approval of Resolution Plan	***Commencement of Liquidation***	***Withdrawal under Section 12A***	***Appeal/ Review/ Settled***
2016 - 17	37	0	0	0	1
2017 - 18	707	19	91	0	95
2018 - 19	1157	77	304	97	155
2019 - 20	1989	133	540	216	343
2020 - 21	537	121	350	162	89
2021 - 22	891	147	342	184	116
2022 - 23	1261	184	409	200	172
2023-24 (till Sep 23)	479	127	213	88	82
	7058	**808**	**2249**	**947**	**1053**

Source: IBBI Report, Sep,2023

Table 5 gives details on reasons for liquidation for the 2249 cases where orders for liquidation have been passed under IBC,2016. In 66.67% of cases, CoCs have taken the decision to liquidate the distressed entity.

Table 5. Reasons for liquidation

Reasons for liquidation	Number of cases
CoC decision to liquidate during CIRP u/s 33(2)	1499
No resolution plan received u/s 33(1)(a)	665
Resolution Plan rejected dure to non-compliance of conditions u/s 33(1)(b)	61
CD contravened provisions of resolution plan u/s 33(3)	24
Total cases	**2249**

source: IBBI Report, Sep,2023

Another interesting observation is the increasing number of cases withdrawn over the years. 947 cases have been withdrawn till Sept 2023. Reasons for such withdrawal are given in Table 6. This points out the motivation to settle cases outside IBC.

Table 6. Reasons for Withdrawal of Cases under CIRP

Reasons	Number of cases
Full settlement with the applicant creditors	350
Full settlement with other creditors	55
Agreement to settle in future	48
Other settlements	267
Others	224
Total	944*

Source: IBBI Report, Sep,2023 *Data for 3 CIRPs NA

ISSN (Print Version) 0975-3931
ISSN (On Line Version) 2278-1277

4. Conclusion and Recommendations

Resolving and reforming insolvency laws is gaining global interest due to increased susceptibility to corporate financial crises (F.C. Too, 2015). Reduced revenues and profitability lead to compromised solvency for business enterprises. The firms are thus forced to liquidate and go bankrupt during financial crises. Liquidation and bankruptcy gravely impact investment and debt ecosystem in a country. The increased instances of insolvency prompted many countries to a relook at their insolvency and bankruptcy laws (Sivakumar, 2019). Effective insolvency norms lead to the reorganisation of 'economically feasible' business' and exit of others with minimum costs. Such a regime will be beneficial to all stakeholders. There was no single law in India addressing corporate bankruptcy and distress. Scattered provisions for winding up included in general legislations, debt restructuring schemes of financial institutions under Central Bank of India and legal recourse through civil suits formed the landscape of insolvency regime. These were fraught with lengthy delays and lack of legal clarity. The Sick Industries Companies Act, (SICA) 1985 also failed to deliver due to institutional inefficiencies. Insolvency and Bankruptcy Code (IBC) 2016, brought in by repealing SICA, has been a very reform that has brought radical changes to the insolvency regime in India. It is interesting to note the views of Traditionalists and Proceduralists about insolvency law (Shekar and Guru, 2020). Traditionalists advocate reorganisation of financially distressed company to maintain the going concern value of the business as opposed to proceduralists who believe that a company's continuity or liquidation should be a market determined process. Insolvency laws should only prevent premature liquidation. The primary objective of IBC, 2016 is to revive a distressed corporate entity. IBC has adopted a 'manager displacement model' to achieve the objective. The creditors assume charge of the assets of the distressed corporation and its management. The existing literature suggests that insolvency laws should complement corporate ownership structure for the best results. The ownership in Indian corporates is more controlled than diffused. The controlling stakeholders often influence the appointment of management with more information than other stakeholders. Creditors (financial or operational) do not have adequate information, which leads to information asymmetry. The appointment of Insolvency Professionals to manage the insolvency process leads to further problems as they do not get the cooperation of management. Thus, the reorganisation of business becomes complex leading to a preference for liquidation rather than revival of the distressed entity. Thus, it calls for a more informal and 'manager driven' insolvency regime moving forward. The evidence from the proceedings of IBC also points out that under the 'creditor driven' insolvency resolution process, there is a clear tendency towards liquidation of the distressed entity as compared to revival and reorganisation of the distressed entity. Around 67% of the cases admitted under IBC, 2016 were resolved by liquidation of the entity. Another argument in favor of a more informal and manager-driven insolvency is the evidence of an increased number of admitted cases being withdrawn under IBC, 2016. The common

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ISSN (On Line Version) 2278-1277

reason cited include full settlement with creditors. This highlights creditors' reluctance to use legal recourse under IBC. Increase in availability of credit risk in India may also decrease the interest of the creditors to revive the business leading to unnecessary liquidations (Wu,2005). With trends of diffused ownership in Indian corporate with Institutional investors and lenders acquiring higher stake in business being observed, the insolvency regime will have to shift to a 'manager driven process' as is seen in countries with diffused ownership. This is also in alignment with the 'Evolutionary theory' propounded by Armour et al, 2003. A creditor driven insolvency resolution model is often seen as a punishment to managers for failure of business (Mann, 2002). Mere insolvency should not provide reasons for creditors to petition for or force a liquidation (Mann and Mann, 2019) Insolvency and Bankruptcy Board of India should take all the factors to account along with available evidence to analyse the IBC in practice to weed out inconsistencies and incorporate changes to establish a more productive legal framework for resolving insolvency and bankruptcy cases in India.

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