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NON-FUNCTIONING OF INFORMATION UTILITY IN INDIA - A HINDRANCE TO GROWTH AND FULFILLMENT OF INSOLVENCY AND BANKRUPTCY CODE

Name of the Author: Hemang Wadhwa
University/Institute: Christ (Deemed to be) University, Lavasa Campus

Qualification: Undergrad (5th year student)
Course name: BBA LLB (H) (5 year integrated course)

Co - Author/Guide : Dr. Mehak Vohra

ABSTRACT

Creditors are considered as a lifeline of a company and companies are considered as a lifeline of every country's economy. Similar inference can be taken from the recently developed Insolvency and Bankruptcy Code 2016 (IBC). The code was developed with a view to easing the process of Insolvency resolution and giving the companies and individual's another financial lifeline. Hence, promoting ease of doing business.

One of the major features of IBC 2016 was the formation of a custodian body under its provisions, namely, Information Utility (IU). IU is regulated by Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, with the sole purpose of easing the process of collection of reliable and readily accessible financial records of solvent and insolvent entities. However it is noteworthy, owing to the provisions of the Act, it casts an *empty* obligation on the financial creditors and debtors as it does not provide for any penalty incase of non fulfillment of such obligation. Thus defeating the purpose of these provisions. It has been observed that IU's have a huge potential to help play a key role in not just speedy resolution process but also for the smooth functioning of companies and credit houses nationwide. This paper analyzes the immutable potential and limitations of Information Utilities on a micro and macro level — formulated under IBC 2016.

INTRODUCTION

The lifeline of any country's economy is its companies, so to ensure the proper resurrection of dying companies and a smooth dissolution of the companies beyond a light of resurrection many countries have developed Laws relating to the same.

In India, the Insolvency and dissolution of corporate entities and as well as individuals are overseen by the Insolvency and Bankruptcy Code, 2016 (IBC from hereon). There are various bodies formulated under IBC such as the Insolvency and Bankruptcy Board of India (IBBI) and so on, but the highlight of this code was formulating Information Utility (IU from hereon). IU is a custodian body, i.e. a custodian of all the information, the code envisages IUs as repositories of financial information about the debtor for expeditious completion of various processes under the code, to ensure speedy recovery. The bankruptcy law reforms committee (BLRC) conceptualized the code, and hoped for a competitive industry of inter-operable IUs with a rationale:

"*Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems. Hence, the Committee envisions a competitive industry of information utilities who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of*

delay."[1](India to date however only has one functioning IU i.e National E-Governance Service Ltd./ NeSL).

IU's are India's unique way to tackle the problem of asymmetric information (this problem is discussed in detail later in the paper) which is prevalent all over the world in case of insolvency regime, created in accordance with the outline given by several studies done internationally to best tackle the hindrances in speedy insolvency/ bankruptcy/ recovery of corporate as well as individuals in India. This paper focuses on the question *whether IUs are performing upto the full potential in terms of insolvency process in India?* And *if not what changes are required?* The importance of IUs in India can be noticed by taking cognisance of statements made in the official report by the Bankruptcy Law Reforms committeE[2] (BLRC);

"Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. Hence, the Committee envisions a competitive industry of information utilities who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay."

EVIDENTIARY VALUE OF DATA COLLECTION BY IUs

The applicability of IUs in India can be seen in two places, namely, the statutory provisions of the code and the judicial decisions. Considering the statutory provisions; in accordance with section 7 (4) the code states that all the required information by the insolvent entity shall be submitted to the National Company Law Tribunal (NCLT) in electronic form only. To further solidify the trust in the information so recorded by IU - Section 3 (9) (c) and Section 214 (e) of IBC states that once information is submitted to the IU, it must be authenticated with all the parties concerned and only then be recorded in the respiratory[3].

However let us take a example of Section 9 (3) (d) of the code: " *a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;"* The code makes it compulsory for the insolvent entity to prove that there is no prior default in any debt and a record of this can easily be kept with the Information Utilities and a proof of it to be filed in NCLT along with the application for self- insolvency as per Section 10. It is however provisions like Section 9 (3) (d) which

[1] Insolvency and Bankruptcy Board of India, 'Information Utilities: A Key Pillar of Insolvency Proceedings Information Brochure, (Dec. 31, 2020).

[2] Government of India, 'Report of the Bankruptcy Law Reforms Committee' (Ministry of Finance, Nov., 2015) accessed 2th May 2025.

[3] Insolvency and Bankruptcy Board of India, 'Understanding the IBC : Key jurisprudence and practical considerations', 30 October, 2020. <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 2th May 2025.

allow the debtors/insolvent entities to go "scotch free" without actually filing necessary documents with IU. As they do not give any absolute obligation to either of the parties i.e. the creditor or the debtor to file such documents as found relevant by the code. Rather it adds on to its sections wordings like "if available" making it completely optional.

Let's take a look towards Section 215 (2) which states that the financial creditors shall submit information to the IU's (as prescribed under the Code), but it does not state any penalty for non-compliance of the same. Furthermore moving towards Section 215 (3) provides that operational creditors "may" submit the information regarding their financial debt to the financial debtor to the IUs. Again here we can observe a may provision/ liability instead of a "shall" obligation. Further relevance of Information provided by IU's can be seen under section 65-B, information contained in any electronic record shall be deemed to be a document and shall be admissible in a court of law. Furthermore, in Section 31 of the Indian evidence act 1872; with the emergence of the Information Technology Act, 2000 the definition of "Documents" and "admission" was also altered to include "e-documents/ electronic documents" in its ambit and lastly under section 155 which states "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."[4]

Secondly admissal of information provided by IU can also been seen in case of *Innovative Industries Ltd. vs. ICICI Bank and Ors*[5] in which the Supreme Court (SC) clearly held that when any corporate debtor commits a default in payment of any debt, the adjudicating authority just simply has to see the records of information utilities and any other evidence provided by financial creditors to satisfy itself of the default committed. But later in and under *Swiss Ribbons Pvt. Ltd. v. Union of India*[6], when the validity of various provisions of IBC were considered by the SC, one of the arguments raised was that IU's not only collect financial data but also check whether a default has occurred or not. It was argued that certification of debt by IU's is like a preliminary decree without any notice or chance of hearing granted to the debtor. On this ground along with others, the constitutional validity of IBC was challenged. To understand the validity of the information provided by IU's (para 57 of the judgment);

"57. The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General, is only prima facie evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail."

As stated is of utmost importance, in which the Attorney General stated that the records of default/debt is only prima facie evidence of default, i.e. it is still open for rebuttable by the debtor or "alleged insolvent entity". So the records of IU's are no longer conclusive proof but they are to be treated as a prima facie evidence of default which may be open for rebuttable.

INTERNATIONAL AGGREGATE INSOLVENCY INDICATORS

It has been observed that early debt distress– in turn, helps the creditors to get the maximum value back and minimize the cost on the economy. A lack of proper streamlining and preventive measures can act as a huge hindrance to achieving the same.[7] We have already observed that to achieve a better insolvency structure

[4] Indian evidence act § 31 (1872).
[5] *M/s Innoventive Industries Ltd. vs. ICICI Bank and Ors* [2018] 1 S.C.C. 407.
[6] *Swiss Ribbons Pvt. Ltd. v. Union of India* [2019] 4 S.C.C. 17.
[7] Müge Adalet McGowan and Dan Andrews, 'Design of Insolvency Regime across countries'(OECD, 6 september, 2018).

India, unlike the UK (from whom the basic structure of the Act has been taken) has removed the requirement of desire from one of the prerequisites required to consider an antecedent transaction.

Looking at the international scenario, a cross-country study yielded 13 key aggregate insolvency indicators and the same falls under 4 heads namely, Treatment of failed entrepreneurs, preventive and streamlining, restructuring tools and lastly other factors. Now looking at India's contemporary insolvency and Bankruptcy regime, certain features such as time to discharge, creditors' ability to initiate insolvency, availability and length of stay on assets, etc are already dealt with optimally.

Taking reference from Organisation for Economic Co-operation and Development's (OECD) questionnaire on insolvency regimes across the country it is clearly observed that the "early warning system" (under the head of prevention and streamlining), possibility and priority of new financing, possibility of "cram-down" on dissenting creditors and degree of courts involvement are the key factors which slow down the insolvency process in India. It can be observed that IU can easily resolve most of the above-mentioned issues to a certain degree, as proper accumulated information not only helps in streamlining the process but also helps in finding new financing, as helps the interim financier by providing them with the "concrete-information" about the real position of the debtor, thus helping in securing timely finance, which may be all a corporate debtor require to resolve its insolvency.

IMPACT OF DATA COLLECTION AND FULL FUNCTIONING ON SOCIETY (MACRO LEVEL)

To understand this let's consider the contemporary situation with a view of a stochastic game, in which IU's are not functioning. Many unforeseeable external occurrences can place us in unforeseen circumstances in real life. Many games, such as dice tossing, have a random element to reflect this unpredictability. These are known as stochastic games, for our consideration let's assume it to be "trading losses" or sudden rise in liabilities over assets.

A stochastic game is simply a repeated game of probabilistic transitions, played by one or more players, in which players select actions and each player receives a payoff that depends on the current state and chosen action. The game continues in a random state whose distribution depends on the previous state and action chosen by players. The procedure is repeated at the new state and play continues for a finite or infinite number of stages. The total payoff to a player is often taken to be the discounted sum of the stage payoffs or the limit inferior of the averages of the stage payoffs.

Stochastic games generalize Markov decision processes to multiple interacting decision-makers, as well as strategic-form games to dynamic situations in which the environment changes in response to the players' choices.[8] Similarly, let's consider that all the players in this game are entities who have some financial interest in the corporate insolvent, their decision-making or their *action* is dependent on the information provided to them or which is already with them regarding the previous action and condition of the corporate entity in question. But a perfect outcome of this is only possible if there is symmetric information supplied to all the people.

What happens in the case of asymmetric information? For easy understanding, asymmetric information is a situation in which one party in a transaction has more information than the other party involved in the said transaction. So the main question which arises is that does this situation become *a game of Nash equilibrium with asymmetric information"*? where all the players are uncertain regarding the correct information of the Corporate entity's financial condition and thus were unable to start insolvency in time, in turn lowering the

<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)52&docLanguage=En > accessed 2th May 2025.

[8] Eilon Solan and Nicolas Vieille, 'Stochastic Games' (2015) PNAS,1-4.

valuation of assets even more just because the Board of directors wanted to show that the company was still in floatation. An example of this can be when over 94% value erosion found in 165 IBC liquidation case[9].

So here comes the role of IU's clearing this problem of asymmetric information, and finding perfect Nash equilibria. IUs' collected information is required not only by the financial creditors but also by the whole of society since the whole society has an interest in the Corporate entities. In case of bankruptcy and dissolution, it is not just the financial burden to the creditors but also the government, owing to the unemployment generated, affecting the lives of many. So to help keep a vigilant eye on such Corporate entities.

One plus side to this is that even the prospective investors and creditors tend to feel confident in inventing larger sums of money or monies in such entities owing to the reliable information available with the "*repository*". This applies not only to creditors & credit institutions in the Indian market but also to Foreign markets, increasing the FDI in the country if IU's are implemented correctly, they have the potential to be a necessary part of due diligence being entering into any contract with the entity. Thus IU's have the potential to play a key role in the Credit industry as well.[10]

One of the key methods of revival of a company is via a merger and acquisition (M&A). Mergers in the Indian economy are often a long-drawn process owing to which official liquidators (OL) are appointed by the courts to fasten the process.[11]

The audit committee had opined that a separate registry is required for filing schemes under Section 390 of the Companies Act 2013 and further given importance to the unsecured creditors and minority creditors in case of the debt restructuring process in case of a merger (through the 75% share is required only of the financial creditors /CoC) in order to ensure that the objective of adequate representation is attained by the Code.

One major key feature of merger and Acquisition during insolvency, which makes the entire process time bound is not just the supervision by the NCLT or appointment of an Official Liquidator (OL) under the code but the role that IU's get to play in fastening the process. IUs potentially can be of great help in the due diligence required for mergers and acquisitions, which not just helps the tribunal in coming to a proper conclusion regarding the admissal/rejection of the proposed restructuring plan and helps the firm in saving the cost which it may have faced otherwise when it had to outsource the due diligence to a third party.

Ensuring that due diligence is done by IU also removes the scope for any discrepancies which could have arisen otherwise. Coincidentally this function of IU's cannot only be used for M&A of bankrupt companies but also in view of company law in general as information filed to it can help any stakeholder who is interested to gain information. It is however, pertinent to note that for this "pocket-dream" of steam lining and fast-tracking merger process, critical information regarding the unsecured assets of the debtor, assets under hire purchase but under debtor's possession, et cetera need to be covered under IU i.e it needs to be added/take in the purview of mandatory information to be filed by the debtor.

One of the key considerations to be taken into account is that sensitive financial information shall be dealt with utmost caution by the IUs, to ensure that no one can take undue advantage of a company's condition. Thus better provisions for data protection and privacy concerning "big data" in relation to the corporate sector shall be made available, especially for custodian bodies. Some resistance to sharing information stems from

[9] Mayur Shetty, 'Over 94% value erosion found in 165 IBC liquidation case', Times of India (India, 20 February, 2023). <http://timesofindia.indiatimes.com/articleshow/98072144.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 5th May 2023.

[10] 'Insolvency and Bankruptcy Board of India, 'Understanding the IBC : Key jurisprudence and practical considerations', 30 October,2020. <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 2th May 2025.

[11] Government of India, Data & reports on mergers & Acquisition. <https://www.mca.gov.in/mca/html/mcav2_en/home/dataandreports/reports/otherreports/report+of+the+expert+committee+on+company+law/mergers+and+acquisitions/mergers+and+acquisitions.html> accessed 2nd May 2025.

IUs having a digital database and thus being susceptible to the risk of data piracy and data theft. It is a simple observation that India does not have a proper data and privacy bill in place regarding these matters, thus this has become one of the major factors as to why the company, as well as the relevant stakeholders, have been feeling reluctant to file their financial statements/ data with the IU's.

Individual insolvent is the condition in which a person is unable to pay his/her debts i.e. they have defaulted on repayment of the debt, to protect the creditors in such a case in the recovery of the debt. IBC took individual insolvency and bankruptcy within its ambit. But what most people may often overlook is the fact that personal insolvency is often relevant in cases of small-scale businesses and entrepreneurs as well. The distinction between corporate insolvency and individual insolvency is mostly blurred in the case of small-scale firms, either due to the need of creditors for personal guarantees and securities, for instance, a mortgage on the personal assets of the owner of the firm or maybe because the firms many-a-times may prior to incorporating & obtaining limited liability protection, may use the entrepreneur's personal finances. When during the corporate insolvency/bankruptcy the personal assets of the proprietor get disposed of as it was a credit source for the firm, it leads to a personal/private loss to the proprietor as well. Looking at the following facts we can conclude that in the case of small-scale firms, corporate insolvency proceedings may even be a contributing factor to the personal insolvency of the owner(s)/ entrepreneurs/ proprietor of the firm. To understand this better take an example of a sole proprietorship firm or a Partnership firm dealing with a large amount of capital – which was raised by multiple mortgages on the personal assets of the owner(s)/proprietor(s).

So to lessen the burden on these firms in raising capital and to keep their growth and credit capacity in check, furthermore to make a clear distinction between personal and corporate insolvency in case of such entities – streamlining of information is of utmost importance as it may even alter the decision making of the creditors vide *ex-ante and ex-post valuation* of assets so mortgaged.

Even in the case of IU's declaring sure entities insolvent– and later proven otherwise (*Swiss Ribbons Pvt. Ltd. v. Union of India*[12]) , it will act as warning not only to the debtor but also help the creditors, especially operational creditors who prefer "rush to the exit" during the *ex-ante valuation* of the assets to ensure maximum recovery.

To understand the possible impact of IU's on a micro level let's focus on the situation of the creditors. A creditor is basically an investor and like every investor he needs to consider several factors before investing in any firm. The investment decision or credit decision is based on a multitude of factors, the most important of which is "Risk" (Business risk, Financial risk, insolvency risk and so on). This risk management is highly associated with the opportunity cost and comparative advantage of the credit decision.

An opportunity cost for a creditor is simply the foreseen cost i.e. the loss of the other alternative credit invested in the other businesses when one alternative is chosen. Whereas, a comparative advantage is simply a comparison of the opportunity cost prevailing in an alternative. In this case, it can be referred to as the relative cost of investing/ giving credit to a certain business. This opportunity cost on credit given can easily be determined by all the creditors individually in accordance with the information filled with the IUs by the "possible debtors". Every business requires a strong and constant flow of credit to expand and prosper. This would in turn help in removing the investments from near-dead/ "zombie" firms who are taking away the credits and not yielding the required outcomes and help in redirecting the credit investments to more viable

options, thus boosting the economic growth as well (causing a macro level impact). This especially makes sense considering that Senior investors are generally paid in full prior to any payment being made to junior creditors (the standpoint of a global perspective), in the Indian scenario we may refer to financial and operational creditors. Securitised creditors have the highest priority, all creditors have seniority to equity shareholders but there can be other stakeholders as well such as employees, suppliers (especially those who

[12] *Swiss Ribbons Pvt. Ltd. v. Union of India* (2019) 4 S.C.C. 17.

may have to give supplies even during the insolvency proceedings if their supplies come within the ambit of "necessary goods" according to the provisions of the IBC. eg; electricity) and tax authorities.

Though IU's were formulated under the code to help the insolvent entity by giving a speedy recovery/revival and for creditors to "get back"/recover the maximum amount of credit given by them in case of insolvency, the actual use of IU's start way before insolvency even begins i.e from the investment decision itself for it has the potential to be a part of the due diligence process of the investment/credit decision. IU's may also help in reducing the confusion caused by the problem of lack of information and facts shared about multiple mortgages on a single asset in case of Individual insolvency/ bankruptcy.

ANALYSIS FOR FUTURE POTENTIAL

To bring to a conclusion, early resolution of financial distress can maximize the value recovered for creditors while minimizing the cost to the economy but a lack of appropriate preventative and streamlining measures can be a barrier to early and rapid resolution[13]. A clear solution at least for the Indian scenario is fully functioning IUs – not just in a capacity as an entity established just for the bankruptcy process, but rather an entity/entities established under the whole company law itself, as this has the potential to help in streamlining mergers, acquisitions and any speedy settlement of the like nature. But importance should be given to the following components of IU, namely;

1. The IUs so instituted/established under that Code shall have robust data protection legislation attached to it. As to protect the interest of stakeholders involved at all levels.
2. Extra consideration shall be given to the BLRC's vision of a competitive structure of IU's (industry). If multiple bodies of IUs are not established under the Act, it may in turn not be able to "live up to its full potential" as competitiveness in the market is the key to growth and faster development. A competitive market/ industry of IUs would in turn help in providing accurate information faster and in a more precise manner. Competitiveness between IUs will in turn help in its growth.
3. Most importantly, the Code needs to be amended in order to add a penalty as deemed fit by the law makers, to motivate the "defaulters" to file information with IUs.

Further suggestions involves :

- Inclusion of every "stakeholder" to gain access to basic financial data available with the IU's about any corporate debtor/company. : "Stakeholders" here needs to be interpreted in a broader context, as to include the other custodian bodies under the Companies Act 2013 as well. It needs to be put to light that all of society gets affected in case a huge corporate body dissolves or liquidates. So even though only a financial creditor can start insolvency proceedings under the code (Except certain exceptional conditions in which operational creditors and government after fulfilling the requirements under the code can initiate insolvency resolution against an entity aswell) Bodies such as NSDL, et cetera need to cross verify information from IUs – the society at large can keep a vigilant eye on the company, this, in turn, will help in further reducing the chance of antecedent transactions and will increase the faith of people in the companies as well, thus increase the chance of getting more finance from the public, as this would make them more inclined towards investing in the company, thus boosting the economy (This may even help during interim financing). It is pertinent to note that any and all access to such information shall be limited and under a guided light of data protection legislation to safeguard the interest of the corporate debtor as well.

[13] Garrido and Jose M, *Out-of-Court Debt Restructuring* (2012).