Innovations

A Review on the Historical Development Towards the Insolvency & Bankruptcy Code

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Abstract

The word Bankruptcy and Insolvency is notnew concept. It exists even in the early stages ofan ancientcivilization. The key objective of the study was to identify the historical existence and the development of the concept. The review was made to the studies conducted by various authors around the globe to identify the suggestible strategies to overcome Bankruptcy and Insolvency. The outcome of the study revealed that therehas been various development in Bankruptcy & Insolvency Laws around the world. Britain pioneered these laws and later adopted them in various parts of the world. The countries reviewed in this study were found to be in continuous modification. India framed the Insolvency & Bankruptcy Code 2016 which is still in the early stage of its development. The study identifies the research gap and suggests the need to pursue approval of the resolution plan from the National Company Law Tribunal (NCLT) during the specified time frame.

Keywords*: 1.Bankruptcy & Insolvency Code 2. Indian Bankruptcy Code 2016 3.Insolvency Professionals 4. National Company Law Tribunal 5. Non-Performing Assets*

Introduction

Various studies have been done on various aspects of The Insolvency and Bankruptcy Code to the global counterpart including the USA, Europe, Asia, Africa and many other countries including developing nations of the world. The law related to Insolvency and Bankruptcy mechanisms, especially in the USA and Western Europe is developed and well-structured and organized. However, in terms of India,The Insolvency and Bankruptcy Code 2016 are relatively new as compared to other developed nations. An attempt has been made to review the studies relevant to the present topic of research.

Objectives of the Study:

- To understand the concept of Insolvency and Bankruptcy Code as a remedial tool for the insolvent or bankrupt companies
- To explore the research works carried out in different parts of the world.

Research Methodology

The present study is exploratory as it tries to explore the cause-and-effect relationship that arises due to bankruptcy and insolvency law proceedings.

Data Period: The study considers the historical review and focused more on the studies done in the nineteenth and twentieth centuries. The parameters were considered based on the study made by Martino (2006), Samuel (2006), Johri and Narkhede (2020)and Hishikar et al. (2020).
Data Source: The data was collected through various secondary sources including articles of the research scholars, a news feed, articles and official publications through the websitesand other published materials.

Literature Review
The review is based on the studies made on International Laws and broadly classified into four categories namely:

- 1 An Overview of the Studies Made in Europe
- 2 An Overview of the Studies Made in America
- 3 An Overview of the Studies Made in Australia
- 4 An Overview of the Studies Made in Asia

1 An Overview of the Studies Made in Europe
In the early studies made by Levinthal (1918, republished) from 1570 to 1861, the law applies to all debtors in England. During this period only tradesmen could be considered bankrupt "In Germany, Austria, England, and America, the independence of the honest insolvent from previous responsibility was deemed to be an important innovation". In additionally William Cooke, "A Compendious Treatise of the Bankrupt Law" (1778); 'Lehrbuch des Konkursrechts' written by Josef Kohler (1891) still are the most valuable contribution to the study of comparative and historical bankruptcy law to the European nations.

Dunscomb, "Bankruptcy-A Study in Comparative Law" (1893); Edward Jenks, "A Short History of English Law" (I912)are the pioneers who studied bankruptcy law and its outcomes for their native countries in Europe. The outcomes of the study indicate that countries like England, Italy, France, Roman, Jewish, Germany and Spain limit the application of bankruptcy law applicable to the debtors exclusively.Varga (2012)and republished by Herman Post (2014) state the Roman, Jewish, French, Belgian, Spanish and Italian laws, among the few, do not discharge bankruptcy.

Sgard (2006)in his book titled 'The Early History of the law of Bankruptcy in Europe' identified the 51 laws that were framed during the period from 1808 to 1914. The law was identified in the study of 15 European nations and summarises the rights and incentives of the concerned parties and the procedures followed towards it.

According to Britannica (2021), the bankrupt estate also includes all non-exempt property owned by the debtor at the time of the adjudication and all property acquired during the proceedings until the case is closed or the debtor is rehabilitated in the majority of civil-law countries that follow the traditional French model. Laws exist in Argentina, Austria, Brazil, Italy, Portugal, Spain, and Switzerland, with minor differences in specifics. Some of Chile's and Italy's laws offer exceptional exclusionsrequired for the debtor's preservation. According to the 1985 French law on economic rehabilitation and liquidation, all property acquireduntil the end of the procedures is included in the bankrupt estate. The countries listed above, except for Austria, Italy, and Switzerland, retract the effective date of adjudication to the date of payment cessation.

As per Adalet et al., (2018), several studies have outlined international best practices which were mentioned in the working paper series by IMF (1999); UNCITRAL (2004); World Bank (2015). The outcome of the studies states that Bankruptcy and insolvency do not create a negative impact. Sometimes positive vibes can be generated. According to cross-country evidence, lower personal costs for failed entrepreneurs can create an opportunity and be discovered to increase self-employment rates. Further studies outcomes on the

Insolvency proceedings for small business owners' (Armour and Cumming, 2008), firm admission rates (Lee et al., 2007); Fan and White, 2003) and the way to attract "better" entrepreneurs (Eberhart, 2014).

The outcomes are First, all legal traditions strongly protected creditors' rights; only British law is apparent as lesser protective. Secondly, the evolution of these laws was influenced less by their past than by continent-wide trends. Due to this reason, an early nineteenth-century model witnessed heavy domination of failed debtors and lengthy highly regulated judicial procedures due to system failure. After a transition period from the late 1860s to the late 1880s, custodial debt was abandoned, so it makes rehabilitation somewhat easier, and the parties were enriched to re-contract on property rights.

2 An Overview of the Studies Made in America

The history of bankruptcy law in America is divided into three historical stages: a. the pre-nineteenth century, b. the era of the 1898 Bankruptcy Act and the Great Depression, and c. the modern era adopted after the 1978 Bankruptcy Code.

The Bankruptcy Acts of 1800, 1841, and 1867 were enacted by the federal government before the beginning of the nineteenth century, the federal government enacted three bankruptcy laws. The 1800 Act was only in effect for three years, the 1841 Act was only in effect for two years, and the 1867 Act was only in effect for eleven years later. In the superseding periods, debtor-creditor relations remained wholly the sphere of state law and were enacted only in times of crisis.

A new code was developed replacing the 1898 code with the '1978 Bankruptcy Code' (Bruce, et al., 1999). This Code overwhelmingly changed the bankruptcy system and its importance to society and the economy. By applying this new code, the number of filed personal bankruptcies cases rose from 300,000 in 1980 to over 1.5 million in 2002 (ABI World. 2003)

The study made by Mathews & Skeel (2006) identified the 1978 Code attracted a huge flow of consumer bankruptcy filings resulting in an additional cost to the federal government and it also delayed decision-making. The consumer-bankruptcy filing rate sky rocked to nearly 8 lacs cases annually and has almost doubled again since the law of inception. Failing this law the senet approved the new Bankruptcy Reform Act of 2002 ("BRA"). But this code also fails the expectations hence it was further replaced by the new code as approved by the National Bankruptcy Review Commission ("NBRC"). Warren, the NBRC reporter, has criticized the attempts of creditors to influence the NBRC's hearings, longing instead for the days when creditors and other interested parties left bankruptcy law up to the experts.

Zywicki (2003) identified in his research as American bankruptcy law had classified into three sets of interests a. protector ideological interests b. creditor interests and c. bankruptcy professionals; interests (including bankruptcy judges).

According to statistics provided by the US Administrative Office of Courts, There were 413,616 bankruptcy filings in the calendar year 2021 a rolldown of24% to the year 2020. The following chart 1 indicates the bankruptcy case filings in the US from 1990 to 2020.

Chart 1: source: https://www.debt.org/bankruptcy/. Retrieved on December 19'2022

As per the American Bankruptcy Institute,95 percent of the cases filed under chapter 7 (for those with a low income and few assets) in 2020 were successfully discharged. Whereas, individual cases under chapter 13 popularly known as "wage earner's bankruptcy," only 106,476 cases were settled against246,369 cases filed. The success ratio was about 43 percent and 139,893 cases were dismissed by the law (adopted from www.debt.org). The most important Chapter 11 known as "reorganization bankruptcy," is meant for corporate houses towards the restructuring of a debtor's business, debts, and assets.

Ishai (2009) discussed in depth the success and failure of bankruptcy laws in Canada. The author celebrates the success story of the various bankruptcy acts and states about very few instances of bankruptcy cases from 1867 to till date. The first bank bankruptcy to be was the Bank of Prince Edward Island in 1932. The next bankruptcy occurred after four decades in the banking sector in Canada.There exist two laws first for banks governed under WURA and second for corporates under Companies Creditors Arrangement Act ("CCAA"), 1985.Table 1 indicates the corporate insolvencies and Bnakrupticessduring the period 2017 to 2021 in Canada.

Table 1: corporate insolvencies and Bnakruptices in Canada

	2017	2018	2019	2020	2021
Corporate Insolvencies	5,256	5,120	5,244	4,284	3,884
Corporate Bankruptcies	3,894	3,904	4,024	3,388	3,240
Total	9,150	9,024	9,268	7,672	7,124

Source: https://open.canada.ca/. Retrieved on December 20' 2022

3 An Overview of the Studies Made in Australia

Australian bankruptcy governance operates in the environment of the English common law system. The Sources of Australian insolvency law[1] predominantly contained in the federal Corporations Act 2001 and its related rules and regulations which include: (a) the Insolvency Practice Schedule (Corporations) ("IPSC") (b)

[1] Centre for Corporate Law, University of Melbourne Law School, "Key Documents in the History of Australian Corporate Law"

bankruptcy Corporations Regulations 2001 and (c) the Insolvency Practice Rules (Corporations) 2016 ("Insolvency Rules").

Australia's Personal Insolvency law, which concerns the insolvency of individuals, is governed by the federal Bankruptcy Act 1966 and its related rules including the Bankruptcy Regulations 1996(Kenan, 2021). The objective behind this was to harmonize the terms and concepts of the two regimes into one.The new Insolvency Law Reform Bill, 2015 amends the old Bankruptcy Act an Insolvency Practice Schedule 2 that replaced both of these earlier Acts (www.aph.gov.au). The objectives of the bill were to increase efficiency in insolvency administrations.

Australia has lawfully adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency Act 2008 (Law Council of Australia). Countries like Cayman Island and Estonia also have adopted the UNCITRAL law.

4 An Overview of the Studies Made in Asia

Isaacs (1917)in his book, "The Law and the Law of Change, discuss the Jewish Sabbatical Year (a Jewish calendar) talked about similar laws prevailing in ***Israel*** related to a bankruptcy act popularly known as Mosaic. The Mosaic discharge was designed to apply to all creditors, whether solvent or insolvent, honest or dishonest. Furthermore, in the past, the Sabbatical Year was rarely used to discharge creditors, with ingenious ways to get around the legislation being used at all times.

In ***Japan,*** several different statutes provide for bankruptcy filings, and they were each borrowed from different foreign jurisdictions: some were adopted from Germany in 1921, some from the United Kingdom in 1938, and some from the United States in 1952 (Shea & Miyake, 1996). Along with the old laws Japan continued will the new law. Herewith Japan followed two types of liquidation proceedings and three types of reorganization proceedings i.e.Company Reorganization, Corporate Arrangement, and Civil Rehabilitation**.** (Shoichi, 1994).

HONG KONG is one of the world's leading financial centres with the second-largest stock market in terms of turnover in Asia. Among Asian countries, Hong Kong has one of the most recent bankruptcy laws. The initial laws were substantially amended in 1984. Ironically,' Hong Kong's model was based upon United Kingdom law from 1948 and discontinued at the time Hong Kong emulated China. Historically, the United Kingdom's laws were found to be pro-creditor. As one of the experts views, "The purpose of the law is to kill the company so that the creditor gets the best deal". In 1995 the Law Reform Commission of Hong Kong established a subcommittee on Insolvency to study new principles on Insolvency. Even taken over by China,Hong Kong's bankruptcy law applied and still maintain an independent judiciary system (Booth, 1994), Hong Kong become a Special Administrative Region of China but ensures a high degree of autonomyis available for up to 50 years 1997.

China the global leader follows the socialist pattern of economic development and passed a common law in 1986 which constitutes the state-owned enterprises to liquidate, reorganize, merge, and provision to take over (Grove, 2021).The most important law in the bankruptcy code applicable to ***China*** is the Enterprise Bankruptcy Law, which was of the People's Republic of China came into existence on 27 August 2006 (the 2006 Law), and came into effect on June 01, 2007, replacing its predecessor law, the 'Enterprise Bankruptcy Law of the PRC (Trial) 1986. Although the scope of application of the 2006 Law expanded, it still only applies to corporate legal authorities (Yumin&Uan, 2021).The new revised version passed in the 78th National People's Congress, 2021 was an amendment to the existing Insolvency Act 2006. Under this new law, the personal bankruptcy procedures are divided into three broad categories that are, liquidation, reorganization

and reconciliation, which were lacking behind the earlier applicable laws. Despite all these numbers bankruptcy rates are increasing at an alarming rate in China.

Malaysia's bankruptcy laws were based upon old UK laws enacted in 1965 and were revised in 1973. On September 01, 2021, the new Insolvency (Amendment) Act 2020 was introduced replacing the old Insolvency Act 1967 (Principal Act) which provides a platform for creditors to file a bankruptcy petition against a debtor (Allen & Gledhill, 2021). Islamic law is treated with another story in some Arabic countries, notably in the Undang-Undang (a ruling chief or territorial chief who plays an important role in the state of Negeri, Malaysia). In this state, all debts are extinguished through these acts.

Thailand pioneered in applying bankruptcy law to the whole of Asia. They implemented the newest bankruptcy law in Asia, with a new reorganization law which was effective on April 10, 1998. This law amends the previous Bankruptcy Act of 1940. The law of 1940 was a derived version of the United Kingdom's bankruptcy law of 1914. The limitation of the 1914 law provided only for liquidating bankruptcies followed a very touched procedure and failed to perform during the current financial crisis (Walker, 2001). The newly formulated law The Bankruptcy Act (No. 10) B.E. 2561 (2018) was published in the Royal Gazette of Thailand and effective from 3rd March 2018. This law has been a hybrid of the latter two. It is judicial management of the financial restructuring of the debtor company. It contains very specific procedures, allows the creditors to vote on an acceptable plan, and establishes short time frames to keep the reorganization on track.

Singapore enacted a new bankruptcy law 'the Companies Act in 1965. It was based on the laws of Australia and in contrast, the Australian law was based on the laws of the United Kingdom. The global financial crisis in 1985 the countries' economies was collapsed followed too Malaysian and Thailand's economies which were seriously affected due to the global crisis. Learning through the history lately, Singapore government amendment laws in 2009 and on October 01' 2018, the Singapore Parliament passed the Insolvency, Restructuring and Dissolution Act 2018 (**IRDA**) which was implemented on July 30' 2020. This law provides for asset restructuring, moratorium and rescue financing was also introduced. Being Singapore a regional hub and headquarters for many MNCs in Asia. Singapore's debt restructuring orders with the Model Law to have recognition the foreign jurisdictions (like UK and Bermuda).[2]

India

India is predominantly a rural economy around 70 per cent workforce residing in rural areas. To have higher productivity, more amount of capital needs to flow into the rural economy. Thereafter credit is not only required for business or agriculture but also other family expenses like marriage, death, spiritual ceremonies, etc. This leads to a debt trap for the farmers from moneylenders and Sahukars.

In this context before the Britishers, there was no indigenous law towards insolvency in the country. Back in the 16th century, there were only elementary provisions related to bankruptcy. In 1828, the first insolvency law developed by Britishers in India was made under Statute 9. Separate status was given to the Insolvency Courts which can dispose of the insolvency matter as and when necessary. The Indian Insolvency Act, of 1848 differentiated insolvency proceedings between traders and non-traders to a certain extent. The Act of 1828 was continued till the Act of 1861 except that a judge of the High Court was to chair such court (Mulla, 2013)[3]. The important statutes on the subject are the Bankruptcy Act passed by British Parliament in 1849, 1869, and 1883. To overcome the existing shortcomings The new law was adopted as the Presidency-towns Insolvency Act, of 1909 and the Provincial Insolvency Act, of 1920. Post-independence insolvency laws were rooted in

[2]Singapore's new insolvency law: a status report on the progress of the new regime https://www.jdsupra.com/legalnews/singapore-s-new-insolvency-law-a-status-2126064/. Retrieved June 24, 2021.

[3]irDinshawFardunji Mulla (2013), The Law of Insolvency in India, p. 9

English Laws. Despite several modifications, the RBI took several steps to encourage banks to recover borrowings that lend to non-banking financial companies and retail borrowers.
There exist many laws to crab bankruptcy and Insolvency.The inefficiency of all these laws a need arises to have uniform laws which can dill with all the matters altogether. The recommendations of T. K. Viswanathan In 2014, the Bankruptcy Legislative Reforms Committee proposed the Insolvency and Bankruptcy Code (IBC). This code come into existence in 2017 and constituted the Insolvency and Bankruptcy Code (Act) 2016. The key objective is to provide a platform to reorganise and resolve insolvency on time to maximise the value of their assets, and stakeholders (source IBC Act, 2016). Since its formation, it has gone through a long way with many successfulresolutionsto disputes amongst corporate debtors and creditors.

Limitations & Scope for further research

The existing work is limited to the number of research articles accessed and books referred to. The study was conducted under a specific time frame. Broader time duration and in-depth analysis can be done on the topic.More countries can be covered regarding their historical and existing laws related to bankruptcy and insolvency.Cross-country analysis is required to understand the international effect on the MNC under this law.

Conclusion:

The concept of bankruptcy and insolvency is not new but had been found even before Christ. The above-found studies elaborated on the concept and its brief implications to the various continents of the globe. The continuous development of the laws had been witnessed in the study. Each country has its laws and was influenced by other countries. Historically, aesthetic and personal beliefs have prevented the use or updating the bankruptcy laws. Presently, due to rapid globalization, lots of alterations are recommended in these laws. There is a need for a uniform code of conduct to meet cross-border bankruptcy issues. The study emphasizes the need for speedy action for the settlement of disputes in the direction of non-performing assets as it can create an adverse effect on the goodwill of insolvency firms, which may restrict them to enter the market in the future.

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