INSOLVENCY LAW AND INTELLECTUAL PROPERTY RIGHTS: ENFORCEMENT COMPLEXITIES IN CORPORATE BANKRUPTCY

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ABSTRACT

The union of insolvency law and intellectual property (IP) rights marks one of the significant legal issues arising in the modern economy where IP plays a crucial role. As companies increasingly transition their product offerings from physical goods to intangible assets as shown by the landmark 110-375 Indian patent filings in 2024-25 effectively handling such assets in a bankruptcy situation is essential to the maximization of the estate value. This article attempts to unravel the intricacies involved in exercising IP rights amidst the provisions laid down by the Insolvency and Bankruptcy Code (IBC) 2016. Although IP represents a significant value addition to a financially distressed company, the manner of its disposition in the circle of Corporate Insolvency Resolution Process (CIRP) is still a big challenge. There is a major disagreement between the efforts of the liquidator towards the revival or sale of corporate assets and the invention rights preservation. In contrast to the United States where Section 365 of its Bankruptcy Code offers strong protections to the IP licensees, Indian legislation has no definite legal provisions for the licensees. The study looks into the role of the Resolution Professional in carrying out due diligence, differentiating among registered and unregistered rights, as well as interpreting the "moratorium" that prohibits asset transfers. Besides these points a power to refuse "burdensome property" in liquidation is dissected and the constraints under Section 20(2)(b) in altering pre-petition agreements are explained. The final takeaway from the article is that changes to the law are required if we want Indian insolvency law to be on par with international standards for example those put forward by UNCITRAL, and that these changes would provide legal certainty for stakeholders in cross, border situations.

Keywords: Corporate Insolvency Resolution Process (CIRP), Intellectual Property (IP) Licensees, Executory IP Contracts, Section 365 (US Bankruptcy Code)

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Introduction

Intellectual property is one of the complicated types of assets which need to be professionally appraised. However, it can significantly increase a business's value even if it is bankrupt. The total value of a firm's proprietary assets can greatly influence the outcome of its restructuring process. The rights of innovation are one of the main considerations of a liquidator, irrespective of whether the focus is on rescuing a brand, selling it as a going concern or using IP transfers as a means of increasing the payout to lenders in a winding, up situation. Logos, inventions, designs and works of art are the main forms of intangible assets. Besides, there can be other kinds such as ownership of databases, URLs, social media channels, scientific papers as well as confidential information.

Proprietary assets of any kind, be it a trademark, invention or creative work, have become one of the key factors in the success of any business. Companies put maximum effort into carving out a niche or market and setting their products apart from those of competitors. Such differentiation is primarily through the uniqueness of the products used and the brand image created. However, the treatment of intangible assets has become one of the issues of the Corporate Insolvency Resolution Process. When a company hits a financial downturn, it might go bankrupt and therefore lose its executives. In the event that a company heavily relies on protection of its innovations through legal means, it has to be represented by an expert in the field of intellectual property law.

After the court approves the insolvency petition a 'moratorium' starts in relation to the assets, particularly trademarks of the bankrupt company.[2] It is of paramount importance to understand that the company is prohibited from transferring any of its properties during the period of the moratorium. Creditors and corporate entities wishing to protect the brand of a company should notify the Trade Mark Registry about the freeze so as to prevent misleading transfers.[3] In this way, the TMR will be able to refrain from blocking the assignments during this period.

The Insolvency and Bankruptcy Code set out the rules for managing holdings and lender demands in the case of insolvency including intellectual property permits. The law has provisions assisting the debtor permit, holders to retain the main asset licenses and also includes rules that may offer assistance to the debtor permit, holders in avoiding liability. The lender

[2] Insolvency and Bankruptcy Code 2016, s 14 (India).
[3] Trade Marks Act 1999, ss 37–45 (India).

who claims a charge over intellectual property must provide all the relevant documents concerning the IP. The lender who claims a charge over the collateral must "perfect" it.

Insolvency law intends to help struggling businesses recover and become profitable again, at the same time it ensures that lenders get the best possible returns. It is also a way to find out why a company failed and if the management acted in an illegal or irresponsible way, it will be punished. This regulatory regime lays down the rules for an insolvency happening and stipulates the instruments for the supervision of the different stakeholders of the company. Besides, it provides protection to the authorized users and the holders of proprietary assets. The main aim of bankruptcy law is to see if there is a way the company can be kept in operation instead of being shut down.

This law is meant to simplify and modernize the legislation relating to the reorganization and the settlement of insolvency of the business entities, partnerships and individuals within a certain period for the maximization of the value of the holdings. The idea is to support innovation, increase credit availability and ensure everyone is treated fairly including changing the order of priority for the state liabilities. Besides, it sets up the Insolvency and Bankruptcy Board of India and deals with related issues.[4] As new trends emerge, property rights are getting more and more connected with liquidation cases which makes it very important to comprehend the relationship between IP and the bankruptcy law.

Reconciling Intellectual Property Protection with Insolvency Resolution Mechanisms

The Interim Resolution Professional and the management of corporate entities are required to collect financial, property and functional information as per Section 18 of the IBC.[5] Section 18 of the Law enumerates the constituents that are eligible to be termed as assets. The corporate entity can have different sorts of properties which can be tangible, intangible or financial instruments. The intangible assets include artworks, trademarks, inventions and industrial designs. As per Section 29 of the IBC[6], the Resolution Professional has to provide the resolution applicant with all the information. The resolution applicant must comply with non-disclosure restrictions, abide by the laws and safeguard the Intellectual Property of the corporate entity. The security of proprietary assets must be kept even after the completion of

[4] Insolvency and Bankruptcy Code 2016, s 188 (India).
[5] Insolvency and Bankruptcy Code 2016, s 18 (India).
[6] Insolvency and Bankruptcy Code 2016, s 29 (India).

the corporate insolvency settlement process.

Due Diligence of Intellectual Property Assets by the Resolution Professional: Legal and Practical Dimensions

The insolvency settlement expert is obligated to identify and draw up a list of the proprietary assets that a corporate debtor had at his disposal. The resolution professional is the company's entire Intellectual Property supervisor and he has to take the registered and unregistered proprietary rights apart. A few intangible properties may be allowed for use. The holder of a proprietary permit collects royalty fees when the item, service or idea generates income. The appraisal of permit rights in insolvency is different for holders of 'non-exclusive permits' and for those with 'exclusive rights.'

Proprietary asset holders consider the initiation of insolvency as a relief measure. Bankruptcy encompasses a wide variety of court proceedings which are segregated under the bankruptcy code by chapters. Chapters 7, 11, and 13 are the most frequently, occurring types of bankruptcy actions.[7] The filing of an insolvency petition sets off an automatic freeze. The automatic freeze is a very efficient tool that ensures that creditors of pre, insolvency debts will be least able to carry on with credit collection activities.

Insolvency and Executory Intellectual Property Licences: An Indian Perspective

Unlike the US and some other jurisdictions, the IBC does not have clear safeguards for intellectual property licensees. Part of the problem is that there has been little guidance in international business on how to identify and enforce IP licensing arrangements. UNCITRAL is still working on providing a legal framework for successful IP licensing transactions during insolvency and has not yet reached a conclusion.[8] Unfortunately, the Indian judiciary has not yet dealt with IP licensing in bankruptcy cases.

There is a significant absence of clear indications both from the courts and the legislator on the issue of intellectual property licensing during insolvency. IBC does not include any provisions that are as detailed as Section 365[9] of the US Bankruptcy Code. However, different parts of the

[7] United States Bankruptcy Code 1978, 11 USC §§ 701–784 (Chapter 7), §§ 1101–1174 (Chapter 11), §§ 1301–1330 (Chapter 13) (US).
[8] *Legislative Guide on Insolvency Law* (2004) and Supplement on Insolvency of Enterprise Groups (2010).
[9] 11 USC § 365 (US).

Statute contain equivalent powers to discard and cancel agreements. In this article, those rules are explored and assessed to their extent through statutory analysis and legal counsel.

Disposition of Executory IP Contracts in Liquidation Proceedings in India

In accordance with the IBC 2016, a bankruptcy administrator may refuse any troublesome property that belongs to the insolvent estate.[10] The idea of allowing a debtor to simply give up the onerous property was first brought into English insolvency legislation in 1869.

Through "Section 23 of the UK Bankruptcy Act 1869"[11] the agreement of disclaimer would end the relationship. The individuals affected by the renunciation would be deemed as creditors of the bankrupt company to the extent of the damage suffered and thus could include it as a liability in the insolvency process. The same type of disclaimers can be seen in current English and Indian bankruptcy laws. The Insolvency Trustee is given the power under the IBC to give up undesirable assets. The Trustee's renunciation as illustrated in English Insolvency Law, closely resembles the rejection power granted by the law to insolvent debtors in the United States.[12]

By issuing a disclaimer the relationship between the parties concerned is severed and the Bankruptcy Trustee is no longer personally liable or bound to any obligation that may be connected with the onerous property. It specifies the legal rights, interests and duties of the bankrupt party with respect to the burdensome holding which has been renounced. Besides that, onerous property means unprofitable contracts or assets that cannot be exchanged for value. The rule for renouncing property is designed to spare the bankrupt estate from the financial burden of maintaining unproductive contracts which can lead to the depletion of its resources.

The notion of a disclaimer goes back to English bankruptcy law and the language used in both sets of laws is identical. Thus, decisions of the English court are a good guide in interpreting the scope of the Indian law. The House of Lords in 1997 held that the rights and duties of the counterparty in a refusal should be disturbed as little as possible.[13] Those rights should only be changed to the extent necessary to achieve the main point, discharging the corporation from its

[10] Ibid s 35(1)(k).
[11] Bankruptcy Act 1869, s 23.
[12] 11 USC § 365 (US).
[13] [1997] AC 70 (HL).

liabilities. Bringing this logic to bear on intellectual property licenses, a disclaimer would only free the debtor from the obligations to a certain extent. In an ideal situation, the licensee should be able to continue using the licensed intellectual property as before. Nevertheless, due to the absence of clear statutory or official rulings on the matter, this reading is still a bit fragile.

Treatment of Executory Intellectual Property Licences during the Corporate Insolvency Resolution Process under the IBC 2016

There is a major difference between the "disclaimer of onerous property" that looks very much like the power to "reject executory contracts" under the Bankruptcy Code (US) and the power to "reject executory contracts" under the Bankruptcy Code (US), the essential point is that Disclaimers can only be used in a liquidation and insolvency context. They have no place in a restructuring or CIRP. This part is about the CIRP and it discusses the justification for IIBC intervention.

The IBC has the capacity to prevent four types of transactions that are beside the point: "preferential transfers, undervalued transactions, transactions made with the intention of deceiving lenders and extortionate credit arrangements."[14] The purpose of insolvency legislation is to strike a balance between the interests of the debtors who are in financial difficulties and their creditors by shutting down such harmful deals. The debtor can be given the power to disaffirm contracts as a means of regaining the assets that the corporate entity has secretly distributed. However, these powers of avoidance are only to be used in very limited circumstances and there are a set of procedural rules which strictly regulate their use. If the transaction that is undervalued or preferred is done in the ordinary course of business, it is saved from being annulled. All potentially vulnerable transactions must have been executed within two years from the date of the commencement of insolvency proceedings. Legal provisions limit the rescission of unnecessary transactions by setting up definite boundaries for the enabling clauses.

The IBC 2016 confers the rights of avoidance on transactions in the following four categories of vulnerable deals that is preferential transactions, extortionate credit arrangements, undervalued transactions and transactions to defraud creditors. Avoidance powers are recognized by law as a tool to deal with the possible 'twilight' period between management's

[14] ibid ss 43–51

realization of insolvency and the formal commencement of proceedings. At such time, leadership might have a strategy to favour certain lenders over others.

Bankruptcy law permits the reallocation of incentives between the genuinely insolvent debtors and their lenders so as to safeguard the interests of creditors. These avoidance rights include the making of changes to pre-bankruptcy agreements and authorizing a debtor to recover the assets which the entity's management has fraudulently disposed of. Nowadays, the avoidance provisions have become a ubiquitous feature of modern insolvency law.

Despite the complex legal protocols and strict time limits required, avoidance powers should not be used to investigate or reject economic deals that are considered fair and reasonable. The Indian Bankruptcy Law Reforms Committee places unauthorized executive expenditures, deceptive trading or activities referred to as illegal or fraudulent as those which are vulnerable.[15] The UK Supreme Court notes that the main point of the reversal of vulnerable transactions is to prevent the pool of lenders' assets from being unfairly depleted by the rescue of a single party merely.[16]

The Supreme Court of India has ruled that the IBC provides the necessary tools to discover, neutralize or discard "avoidable transactions" that insolvent firms might have used to delay the recovery of creditors.[17] The exercise of these powers may result in the unravelling of agreements made prior to a filing for insolvency, especially where these involve the fraudulent conveyance and the obtaining of unjustified preference by certain creditors. Hence, considering the statutory framework and the legislative intent the avoidance powers cannot be equated with the ambit of Section 365.

Section 20(2)(b) of the IBC is an alternative proviso that allows the involvement in the deals that occur before the insolvency filing. This is the part of the law that gives Resolution Professionals (RPs) and Interim Resolution Professionals (IRPs) the possibility to change the requirements of the pre-petition agreements. However, it has been held that the power given by Section 20(2)(b) cannot be used by the Resolution Professionals without the sanction of the Court. When deciding the *EIH v. Subodh*[18] case, the NCLT Hyderabad observed that a pre-petition agreement cannot be lawfully modified or changed unilaterally. Moreover, the NCLT

[15] The Report of the Bankruptcy Law Reforms Committee (2015).
[16] [1990] Ch 78 (CA).
[17] (2020) 8 SCC 401.
[18] EIH Ltd v Subodh Kumar Agrawal, CP (IB) No 102/7/HDB/2017

Mumbai has observed that a resolution plan should not change the binding pre-filing obligations which the company had to carry out. Those contractual duties pre-existed and must be dealt with as if the insolvency process had not started.[19]

There are no direct provisions in the Indian law for intellectual property licensees like those under American law. Most importantly, Section 20[20] is different from Section 365 of the US Bankruptcy Code in that it neither permits unilateral modifications nor does it provide safeguards to the licensees. Therefore, a resolution professional must have the power to act in the case of exigent pre-petition contractual agreements during the CIRP.

Firstly, the legislature has the prerogative either to widen the reach of the disclaimer to cover CIRP proceedings or to adopt a list of measures similar to Section 365 of the US Bankruptcy Code. Such a change should also consider how they might affect intellectual property licenses and to what extent they must provide a clear statutory safe harbor.

Harmonising Insolvency and Intellectual Property Law in Cross-Border Contexts

Indian legislation is devoid of clear and definitive earmarked intellectual property licensee protections, which makes it a set up quite different from the US law system that has a strong framework. Whereas US law precedents such as Lubrizol, In Re Exide and Tempnology have dealt with IP licensing bankruptcy issues, IP licensing issues are yet to be decided by Indian courts. As a result, there is no direction either from the courts or the legislators regarding the treatment of IP licenses in the Indian insolvency law. The lack of judicial and legislative guidance can also be attributed to the fact that the Indian insolvency code does not have a power like the rejection power in Section 365 of the US Bankruptcy Code. Moreover, worldwide efforts in managing contractual agreements have not come up with suggestions for the proper handling of IP licenses thus there is a lack of international standards for the recognition and enforcement of standard intellectual property contract templates.

The move towards an IP-centric economy has been more of a swift change than a gradual one. Over a period of several decades, both global and local markets have shifted their emphasis from physical goods to intangible assets that can be commercialized. One of the clearest manifestations of this IP Revolution is the skyrocketing number of filings at the Indian

[19] Kundan Care Products Ltd, MA 21/2018 in CP 182/2017
[20] 11 USC § 365.

Intellectual Property Office.

The Surge in Indian Intellectual Property Registrations (1993–2025)

The pattern of IP growth in India has markedly changed from a gradual increase to a sharp rise, especially after the National IPR Policy of 2016 and the Patents (Amendment) Rules 2024.

Financial Year	**Patent Registrations/Filings**	**Key Milestone**
1993-94	1318 (Registrations)	Pre-TRIPS era
2014-15	5978 (Registrations)	Digitalization push begins
2018-19	15283 (Registrations)	National IPR Policy impact
2023-24	92168 (Filings)	Domestic filings cross 50%
2024-25	**110,375 (Filings)**	**Historic 1-Lakh Milestone**

At the moment, intellectual property (IP) licensing rules are mainly determined by an elaborate mixture of different statutory provisions such as labour, competition, contract, bankruptcy and consumer protection laws. An example of such a complex network of conflicting domestic laws that change the IP licensing setting is Section 365 of the United States Bankruptcy Code. This situation is made even more challenging by the wide differences that exist between various national insolvency systems. The circumstances in the famous case of *Samsung v. Jaff* (In re Qimonda) where the U.S. courts invoked Section 365(n) to safeguard licensees even though the foreign law was against it, are a clear demonstration of how such huge legal differences influence at a very fundamental level the coordination between the international bankruptcy regimes. The absence of a coherent legal framework for IP licensing has been identified as a major source of global commerce friction for a long time by UNCITRAL (United Nations Commission on International Trade Law). The problem is exacerbated when the licensing party becomes insolvent and different national laws can result in the sudden termination of essential technology or brand rights.

A Decade of Reform: The UNCITRAL Trajectory from 2013 to 2026

The initiative that began in 2013 has evolved into a centrepiece of UNCITRAL's modern agenda shifting from a general study to specific legislative tools designed for a digital-first economy.

Era	Focus of Work	Primary Outcome
The Inception (2013-2015)	Assessing 'desirability and feasibility.'	Identification of "substantive lacunae" (legal gaps) in global IP licensing.
The Integration (2016-2021)	Linking IP with Insolvency and MSMEs.	Part V of the Legislative Guide on Insolvency Law (2021), focusing on Micro and Small Enterprises.
The Digital Pivot (2022-2025)	Data provision and digital trade.	Draft default rules for Data Provision Contracts and secured transactions in new asset types.
The Modern Era (2026)	Cross-border enforcement and "Paperless Trade."	Model Law on Electronic Transferable Records (MLETR) expansion and updates to Cross-Border Insolvency guides.

Conclusion

The shift of the global marketplace towards an intangible asset-based economy requires a closer adhesion between insolvency mechanisms and intellectual property rights. One only needs to look at the example of the recent "IP Revolution" in India to understand how proprietary assets such as trademarks, inventions and databases have moved from being merely peripheral to becoming the core components of a firm's valuation and thus its ability to be successfully restructured. Nevertheless, the present Indian legal scenario under the IBC 2016 seems to be heavily marked with issues, especially concerning the rights of intellectual property licensees.

A comparison with US law brings to light a crucial flaw: the non-existence of a "rejection power" or safe harbor provisions similar to Section 365. This absence of a clear roadmap from both the legislature and the judiciary results in a precarious situation for licensees who could be left hanging without the use of essential technology or brand rights if the other party, whose rights they have licensed, goes into insolvency. The IBC does offer devices that can be used to counteract 'avoidable transactions' and to deal with 'onerous property' in liquidation. However, such instruments fall short of adequately addressing the specific features of executory IP contracts in the CIRP. To stimulate innovation and facilitate greater credit access, India should explore modifications in its laws that would either extend the range of CIRP related disclaimers or provide targeted safeguards for IP licensees. Moreover, as UNCITRAL progresses in establishing international standards for digital first economies and 'Paperless Trade' it will be essential for India to follow these global standards for the effective handling of cross-border enforcement and the reduction of trade friction.

To sum up, the objective of generating the maximum value of assets and ensuring the equal treatment of all stakeholders will be achieved only through a well-defined and stable legal environment that understands the special characteristics of intellectual property in the context of bankruptcy.