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INSOLVENCY AND INTELLECTUAL PROPERTY RIGHTS PROTECTION AND ENFORCEMENT ISSUES IN BANKRUPTCY PROCEEDINGS

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ABSTRACT

This research paper explores the intricate relationship between intellectual property ("IP") rights and insolvency proceedings, particularly within the framework of the Insolvency and Bankruptcy Code ("IBC") in India. Intellectual property assets, including trademarks, patents, copyrights, and other intangible assets, hold significant value for companies, often becoming pivotal factors in insolvency resolution outcomes. Despite the critical role of IP, the IBC lacks explicit provisions addressing the treatment of IP licenses during insolvency, leading to uncertainties and gaps in legal guidance.

Through a comprehensive examination of relevant sections of the IBC, such as Section 18 and Section 29, alongside comparative analysis with international insolvency laws, this paper elucidates the complexities surrounding the treatment of IP licenses in insolvency scenarios. It delves into concepts like the disclaimer of onerous property, avoidance powers, and the role of resolution professionals in managing IP assets during insolvency resolution processes.

Furthermore, this paper identifies the absence of clear guidelines for cross-border insolvency cases involving intellectual property licenses, highlighting the need for harmonization and regulatory clarity to address potential conflicts between different insolvency regimes. The research underscores the importance of administrative inquiry and legislative action to provide robust protection for IP rights within insolvency frameworks, ensuring equitable treatment for all stakeholders involved.

KEYWORDS: Intellectual Property, Insolvency, Insolvency and Bankruptcy Code, IP Licenses, Cross-border Insolvency

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INTRODUCTION

IP is a complex asset class that requires expert appraisal. However, it may significantly enhance a company's worth during bankruptcy. The overall worth of a company's intellectual property assets may significantly influence the final result of its bankruptcy proceedings. Intellectual property rights are a crucial concern for insolvency practitioners, whether they are dealing with rescuing a firm, selling it as a continuing concern, or using the sale of IP to enhance creditor returns during liquidation. Trademarks, patents, design rights, and copyright are the primary types of intellectual property. Additional forms may include rights to databases, domain names, online content, research and development, and private information.[1]

Whether it's a brand, patent, or copyright, intellectual property has become a crucial element in the company's achievements. Corporations invest significant efforts to establish a market position and differentiate themselves from competitors. Differentiated goods enable the client or the consumer to differentiate among the items. However, intellectual property has been a concern in the CIRP. The company's financial difficulty may result in bankruptcy and might impact the management. Companies relying on intellectual property rights need an expert in the field of intellectual property rights.[2]

When an insolvency application is accepted, a 'moratorium' is issued regarding the assets, including trademarks, of the company in debt. It is important to note that the corporate debtor is prohibited from transferring any of its assets during the moratorium period. Creditors and anyone concerned with protecting a corporate debtor's trademark should notify the Trade Mark Registry about the moratorium to prevent fraudulent transfers. This will assist TMR in preventing assignment blocking during this time.[3]

The Insolvency and Bankruptcy Code dictates the procedures for managing assets and creditor claims during bankruptcy, including intellectual property licences. The code includes measures to assist debtor licensees in retaining valuable property licences and regulations that may provide relief to debtor licensees from debt. The creditor asserting a security interest in intellectual property should provide all relevant papers related to the IP. The creditor asserting a security interest must "perfect" it.

[1] Mohan, M. P. "Treatment of Intellectual Property Licenses in Bankruptcy." Am. Bankr. Inst. L. Rev. 31 (2023): 245.
[2] Wicaksono, Aldy. "Legal Protection of Intellectual Property of Insolvent Debtors in Bankruptcy Perspective." International Journal of Social Service and Research 3, no. 8 (2023): 1860-1868.
[3] Mohan, M.P., "Intellectual Property licenses in cross-border insolvency: Lessons from In Re Qimonda." Hastings Bus. LJ, 18, p.181. (2021).

ISSN: 2583-6129
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Insolvency law aims to help struggling businesses recover and become profitable again, while also ensuring that creditors receive the maximum possible returns. It seeks to understand why a company failed and holds accountable any management that acted unlawfully or negligently. This law outlines the steps for resolving bankruptcy and sets rules for overseeing various parties involved in the company. It also provides protections for licensed individuals and intellectual property owners. The main goal of insolvency legislation is to find solutions that allow the company to continue operating rather than shutting it down.

This act intends to simplify and modernise the legislation related to the restructuring and bankruptcy resolution of corporate organisations, partnerships, and individuals within a predetermined period to maximise the value of assets. The goal is to promote entrepreneurship, improve access to finance, and guarantee equitable treatment of all parties, including modifying the payment order for government obligations. It also creates the Insolvency and Bankruptcy Board of India and deals with associated issues.

With new developments emerging, IPRs are being intertwined with bankruptcy proceedings, highlighting the need to comprehend the connection between IPR and the insolvency code.

RELATION BETWEEN THE IPR AND THE INSOLVENCY CODE

Section 18, Insolvency and Bankruptcy Code

The interim resolution professional and the management of corporate debtors shall collect financial, asset, and operational information as per Section 18 of the IBC. Section 18 of the Code specifies the items that may be considered as assets. The corporate debtor may or may not have assets, which might be physical, intangible, or securities. The intangible assets consist of copyrights, trademarks, patents, and designs.

Section 29 of the Insolvency and Bankruptcy Code

According to Section 29 of the IBC, the “Resolution Professional” must provide all information to the “resolution applicant”. The resolution applicant must adhere to confidentiality requirements, comply with the law, and safeguard the Intellectual Property of the corporate debtor. Intellectual property protection must be extended while the business bankruptcy resolution process is ongoing.

Review by the resolution professional

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The insolvency resolution expert must identify and compile a list of the intellectual property used by the corporate debtor. The resolution professional is responsible for overseeing the company's complete Intellectual Property and must separate the registered and unregistered intellectual property.

Some intellectual properties can be licenced. Royalty payments are received by the holder of an intellectual property licence when the product, service, or concept generates profit. When going through bankruptcy, the evaluation of licence rights differs for those with a 'non-exclusive licence' compared to those with 'exclusive rights.' For intellectual property owners, filing for bankruptcy is seen as a 'relief remedy.' Bankruptcy encompasses many forms of legal processes, each categorised by chapters under the bankruptcy law. Chapters 7, 11, and 13 are the most prevalent kinds of bankruptcy procedures. Once the bankruptcy petition is submitted, an automatic stay is initiated. The automatic stay refers to the instant cessation of all debt collection activities for debts that were due before filing a bankruptcy case.[4]

TREATMENT OF EXECUTORY IP LICENSES IN INDIA

Unlike the US and some other countries,[5] the IBC does not specifically safeguard intellectual property licensees. Part of the responsibility for this scenario may be attributed to the lack of advice in multinational projects regarding the identification and enforcement of IP licencing arrangements.[6] UNCITRAL's attempts to provide a legal framework for successful IP licencing transactions during bankruptcy are still ongoing and have not been completed. Regrettably, the Indian court has not yet addressed matters of IP licencing in bankruptcy. There is a notable absence of clear guidance from the court and legislative regarding the treatment of intellectual property licencing in bankruptcy proceedings. Although the IBC does not include a provision as specific as section 365 of the American Bankruptcy Code, other sections in the Code possess comparable authority to reject and annul contracts. This part analyses the provisions and evaluates their extent via legislative interpretation and legal advice.[7]

During liquidation

[4] Harjono, Dhaniswara K. "The Legal Position Of Intellectual Property As Bankruptcy Property And Its Management And Settlement By The Curator." Baltic Journal of Law & Politics 16, no. 3 (2023): 889-899.
[5] Canada: Bill C-86 Budget Implementation Act, 2018.
[6] Tosato A., "Intellectual Property License Contracts: Reflections on a Prospective UNCITRAL Project", University of Cincinnati Law Review, Vol.86, p.1251, pp.1255-1256. (2019)
[7] Hopkins, M., "Insolvency and Trademarks: How the Bankruptcy Code's Treatment of Trademarks Promotes Naked Licensing," 18 J. (2019).

ISSN: 2583-6129
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Under the IBC of 2016, a bankruptcy trustee may renounce any troublesome property owned by the insolvent estate. The notion of disclaiming onerous property was first included into English bankruptcy law in 1869. According to "Section 23 of the UK Bankruptcy Act, 1869," a disclaimer would end the association. Individuals affected by the disclaimer would be seen as creditors of the bankrupt entity for the amount of damage caused and might therefore claim it as a debt during bankruptcy proceedings. Comparable disclaimers are included in the latest editions of English and Indian bankruptcy legislations.[8]

The Insolvency Trustee is permitted under the IBC to renounce burdensome property.[9] The Trustee's disclaimer, as found in English Bankruptcy Law, bears a striking resemblance to the power of refusal granted to insolvent debtors in the United States.[10] Through the use of a disclaimer, the relationship between the persons concerned is effectively severed, and the Bankruptcy Trustee is released from any personal responsibility or duty that may be associated with the onerous property.[11] It establishes the legal rights, interests, and obligations of the bankrupt individual over the burdensome property that has been disclaimed.[12] Additionally, onerous property refers to unproductive contracts or property that cannot be sold for value. The provision for disclaiming property aims to prevent the financial burden of maintaining unproductive contracts that might deplete the assets of a bankrupt estate.[13]

The legislation of disclaimer comes from English Bankruptcy jurisprudence, and the wording used in the two laws is also the same. Thus, court rulings from English law should help define the extent of the Indian regulation. In 1997, the House of Lords said that the rights and responsibilities of the counterparty in a refusal should be impacted as little as practicable. They should only be modified to the amount required to accomplish the main goal: releasing the corporation from any liabilities.[14] Applying this logic to intellectual property licences implies that a disclaimer would only release the debtor from obligation to a certain degree. The licensee's interests should not be impacted by continuing to use the licenced intellectual property. Due to the absence of any legal or official direction on the matter, this conclusion may be somewhat precarious.

[8] Zachariah, Nimmy Saira. "Patent as security in insolvency process: Problems and solutions." The Journal of World Intellectual Property 25, no. 2 (2022): 271-278.
[9] "Section 160, IBC; Regulation 10, The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016"; Makhija A., "Insolvency and bankruptcy code of India: a commentary on insolvency resolution, liquidation, bankruptcy of corporate persons, individuals, sole proprietorship & partnership firms," First Edition, pp.1512–1514. (2019)
[10] McCartney P., "Disclaimer of leases and its impact: the pecking order", Corporate Rescue and Insolvency Journal, Vol.28, p.79. (2002)
[11] Section 160(3)(b), IBC.
[12] Section 160(3)(a), IBC.
[13] "Narayan Gajanan Vidvans v. Special Prints Ltd" 2020 (SCC Online NCLT 636).
[14] "Hindcastle Ltd v. Barbara Attenborough Associates Ltd," [1997] AC 70.

ISSN: 2583-6129
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During the "Corporate Insolvency Resolution Process" (CIRP)

Although the 'disclaimer of onerous property' closely resembles the American Bankruptcy Code's authority to 'reject executory contracts', they have a significant distinction. Disclaimers are only effective in situations involving liquidation and insolvency. It does not apply to situations of restructuring or CIRP. This section focuses on the CIRP and assesses the justification for intervention inside IBC.[15]

The IBC grants rights to prevent four types of transactions deemed vulnerable: "preferential transactions, undervalued transactions, transactions deceiving creditors, and extortionate credit transactions."[16] Bankruptcy law helps to balance the interests of debtors in financial trouble and their creditors by preventing risky transactions. Bankrupt debtors may use the authority to refuse contracts to retrieve assets that a corporate debtor has dispersed secretly. Nevertheless, the avoidance powers are only applicable in very specific circumstances and their use is restricted by a carefully selected set of procedural rules

If a deal that is undervalued or preferred is made in the normal course of business, it cannot be nullified. All susceptible transactions must have occurred within two years before the start of bankruptcy proceedings. The legislative rules restrict the application of unnecessary transactions by limiting the enabling clauses.

IBC, 2016 enacts avoidance rights for four types of susceptible transactions: preferential transactions, extortionate credit transactions, discounted transactions, and transactions deceiving creditors. Avoidance powers are legally recognised as a way to address the potential delay between a company's management discovering the company is becoming insolvent and the start of insolvency proceedings. During this period, the management may choose to strategically prioritise some debtors over others. The bankruptcy law permits the adjustment of incentives between debtors who are truly insolvent and their creditors to safeguard the creditors' interests. These avoidance rights include modifying transactions made before filing for bankruptcy and allowing a bankrupt debtor to reclaim assets that the corporate debtor's management has fraudulently distributed. Contemporary insolvency legislation have avoidance provisions.

[15] "The power of disclaimer is made available by the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which applies exclusively in reference to liquidation proceedings."
[16] Sections 43, 45, 49 & 50, IBC.

ISSN: 2583-6129
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Avoidance powers should not be used to scrutinise or refuse economic transactions that are deemed fair and reasonable, notwithstanding the intricate statutory procedures and strict deadlines involved. Unauthorised management spending, fraudulent trading, or illegal or fraudulently categorised activities are all considered susceptible according to the Indian Bankruptcy Law Reforms Committee. According to the UK Supreme Court, safeguarding creditors' assets from being unduly enriched by one party is the main goal of avoiding susceptible transactions.[17]

The Supreme Court of India said that the IBC has procedures for detecting, annulling, or dismissing "avoidable transactions" that distressed corporations may have engaged in to obstruct creditors' recovery.[18] Avoidance powers may permit interference with contracts made before a bankruptcy filing, focusing on fraudulent transfers and giving preferential treatment to certain creditors. Therefore, due to the statutory design and legislative aim, avoidance capabilities cannot be equated with the extent of section 365.

Additional language in the IBC that permits participation in transactions that occur prior to the bankruptcy filing is Section 20(2)(b). The ability to modify or alter the terms of pre-petition contracts is granted to Resolution Professionals and Interim Resolution Professionals under this clause. Legal and administrative standards, however, state that the authority outlined in subsection (20(2)(b)) cannot be exercised independently. In the decision known as "EIH v. Subodh," the NCLT in Hyderabad made it very clear that pre-petition contracts cannot be legally revised or modified unilaterally.[19] For additional clarification on this matter, the NCLT in Mumbai has said that a settlement plan cannot change legally binding commitments that were made previous to the filing of the complaint. It is necessary to handle and settle any existing contractual commitments as if the bankruptcy procedures had never taken place. In contrast to the law in the USA, Indian statute does not provide licensees of intellectual property with any forms of express protection. It is important to note that Section 20 is distinct from Section 365 of the American Bankruptcy Code in that it does not permit change made unilaterally.

Hence, a resolution professional should have the authority to intervene in burdensome pre-petition contractual agreements during the CIRP. The legislature may choose to either expand the scope of the disclaimer to CIRP proceedings or introduce a set of measures similar to section 365 of the American

[17] "Rubin v. Eurofinance SA," [2012] UKSC 46, 95 (2012).
[18] "Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.," (2021) 3 SCC 475, 482.
[19] "EIH Ltd. v. Subodh Kumar Agarwal," 2018, I.A. No. 73 of 2018 in CP (IB) No. 248/7/HDB/2017.

ISSN: 2583-6129
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Bankruptcy Code. These revisions should consider how they could interact with intellectual property licences and provide explicit protection via legislation as necessary.

INTELLECTUAL PROPERTY LICENSES IN CROSSBORDER INSOLVENCY

Indian law lacks clear safeguards for intellectual property licensees, unlike American law. The Indian court has not made a ruling on an intellectual property licencing problem in bankruptcy, unlike American legal rulings like "Lubrizol, In Re Exide, and Tempnology." Consequently, there is a shortage of legal direction from the judiciary and legislature on the management of intellectual property licences inside the Indian bankruptcy system. The absence of clear direction may be attributed in part to the Indian Insolvency regime's lack of a comparable authority to the rejection power outlined in section 365 of the American Bankruptcy Code.[20] Moreover, international programmes regulating contractual agreements have not offered any direction on the proper handling of IP licences. This results in a lack of international guidelines for the acknowledgement and implementation of standard intellectual property contract models.

The increasing prevalence of IP transactions in modern global and local industries has constantly replaced businesses that rely mostly on selling things. The increase in the quantity of IP registrations is a key sign of this expanding prevalence. *"The Indian IP office registered 1,318 patents in 1993-94, 5,978 registrations in 2014-15, and 15,283 registrations in 2018-19."*[21] Designs, trademarks, and copyright registrations have shown a parallel development pattern. For the business environment to thrive with IP transactions, a stable and reliable regulatory framework for IP licencing transactions is essential. To accomplish this goal, many parties involved in the process have suggested improvements and modifications to the global licencing architecture.

Currently, the regulations of IP licencing are primarily influenced by a combination of many legal standards such as labour law, competition law, contract law, bankruptcy law, and consumer protection laws. Section 365 of the American Bankruptcy Code is an illustration of the complex network of interrelated national legislation that changes the landscape of intellectual property licencing. This is exacerbated by the significant differences across various national bankruptcy systems. The topics addressed in *Samsung v. Jaffe* demonstrate how significant differences impact the relationship between national bankruptcy systems.

[20] Indrajit Dube, "National Report for India, in EXECUTORY CONTRACTS IN INSOLVENCY LAW: A GLOBAL GUIDE" (Jason Chuah & Eugenio Vaccari eds., 2019).
[21] Mohan, M. P. "Intellectual Property licenses in cross-border insolvency: Lessons from In Re Qimonda." Hastings Bus. LJ 18 (2021).

ISSN: 2583-6129
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UNCITRAL is interested in addressing the legal structure that governs the initiation, maintenance, and conclusion of successful IP licencing agreements. In July 2013, the UNCITRAL General Assembly asked its secretariat to conduct a study to determine if it is desirable and possible for the Commission to create a legal document to address obstacles to international trade related to intellectual property licencing practices.

CONCLUSION

Failure of company operations might be seen as an essential part of the market economy. Having a fast process in place would be beneficial for financiers to quickly negotiate and establish a new agreement. The IBC has contributed to enhancing India's worldwide ranking in the ease of doing business. Intellectual property rights are universally acknowledged. Intellectual property's significance in the modern economy is unquestionable, making it crucial to address all connected elements. Corporations may encounter liquidation proceedings under insolvency laws. A corporation must consider its intellectual property assets during liquidation. Although there is a framework for addressing bankruptcy matters under the IBC, of 2016, there is less information available on IPR. IPR seem to be a neglected asset according to the code. Any bankruptcy law must include provisions for safeguarding intellectual property assets.

An analysis of how intellectual property licences are handled in bankruptcy proceedings shows a notable inadequacy under the IBC. It does not address the importance of IP licences in bankruptcy. The legislative and administrative committees have failed to consider a crucial interpretational rule that might lead to challenging bankruptcy outcomes, both domestically and internationally. Analysis of the authority conferred by IBC shows that an insolvent debtor has less capacity to disrupt pre-petition transactions. Applying these rights would not lead to a scenario as severe as the bankruptcy cases of Lubrizol or Qimonda in American law. Yet, this conclusion is precarious since there is a deficiency of administrative, legislative, or judicial direction on the matter. What are the consequences if an Insolvency Trustee rejects a sole intellectual property licence? If this happens, the exclusivity restriction would significantly hinder the licensor's ability to profit from and use the intellectual property right in question. Would the exclusivity requirement be undermined by a disclaimer from the Trustee? The authors propose conducting an administrative inquiry to provide clear answers and establish the policy-based arguments for applying for IP licences inside IBC.

There is a notable deficit when examining how bankruptcy law and intellectual property exploitation connect. There is little global direction for the handling of intellectual property licences in bankruptcy. America has addressed this problem significantly, but India lacks clear legislation or regulatory rules.

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The significant differences in bankruptcy laws across various nations might lead to challenging outcomes. One area where the absence of harmonisation is a significant issue is cross-border bankruptcy. Based on the findings of the inquiry, it was discovered that the ways in which Indian and American bankruptcy laws handle licensees of intellectual property are, for the most part, comparable. Under Indian bankruptcy law, this conclusion is still in the process of being determined. This is due to the absence of judicial, administrative, or legislative guidance, as well as policy-based considerations.

Various circumstances can disturb this compliance. The authors point out a potential conflict between Indian and American bankruptcy laws regarding exclusive intellectual property licences. India's bankruptcy system is close to implementing cross-border insolvency rules. The Committee recommended that insolvency practitioners, under the supervision of NCLT, might establish procedures to address any legislative anomalies across various regimes. Without clarification on how Indian bankruptcy law handles IP licences, the strategy for creating, regulating, and enforcing protocols in this regard would be mostly theoretical. Indian insolvency law must regulate the treatment of intellectual property licencing in insolvency proceedings due to the Indian legislative authorities' acknowledgment of the global aspect of bankruptcy procedures. The authors suggest initiating an administrative inquiry to address potential uncertainty in cross-border bankruptcy cases where managing intellectual property licencing is a major challenge.

SUGGESTIONS

1. **Legislative Clarification**: There is a clear need for legislative clarification within the IBC regarding the treatment of IP assets and licenses during insolvency proceedings. Specific provisions outlining the rights and obligations of IP holders, licensees, and insolvency professionals would provide much-needed guidance and mitigate uncertainties.
2. **Protection of IP Licenses**: Given the significant value of IP licenses to both debtors and creditors, measures should be implemented to ensure the protection and preservation of these licenses during insolvency. This could involve introducing provisions to prevent the unilateral modification or termination of IP licenses without due process, thereby safeguarding the interests of both parties involved.
3. **Cross-border Insolvency Considerations**: With the increasing globalization of business operations, the treatment of IP licenses in cross-border insolvency cases becomes crucial. Harmonization of insolvency laws across jurisdictions, along with clear guidelines for

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addressing conflicts between different legal regimes, would facilitate smoother resolution of insolvency cases involving IP assets.

4. **Administrative Protocols and Guidance**: In the absence of specific legislative provisions, administrative protocols and guidelines can be developed to govern the treatment of IP assets and licenses during insolvency proceedings. These protocols can provide practical frameworks for insolvency professionals to navigate complex IP-related issues and ensure consistency in decision-making.

5. **Stakeholder Collaboration and Education**: Collaboration between stakeholders, including IP holders, licensees, insolvency professionals, and regulatory authorities, is essential for effectively addressing the intersection of insolvency and IPR. Additionally, educational initiatives aimed at increasing awareness and understanding of IP-related issues in insolvency among relevant parties can help promote transparency and fairness in the process.

6. **Continuous Review and Adaptation**: Given the dynamic nature of both IP law and insolvency practices, it is essential to conduct regular reviews of existing frameworks and adapt them to evolving circumstances. This may involve periodic amendments to insolvency laws, as well as ongoing monitoring and evaluation of the effectiveness of IP-related provisions in insolvency proceedings.