WP-2015-029

Corporate Insolvency Resolution in India: Lessons from a cross-country comparison

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December 2015
http://www.igidr.ac.in/pdf/publication/WP-2015-029.pdf

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Abstract

In this paper we analyse the corporate insolvency resolution procedures of India, UK and Singapore within a common framework of well-specified principles. India at present lacks a single, comprehensive law that addresses all aspects of insolvency of an enterprise. The presence of multiple laws and adjudication fora has created opportunities for debtor firms to exploit the arbitrage between the systems to frustrate recovery efforts of creditors. This also adversely impacts timeliness of the resolution process. While the importance of a well-functioning insolvency resolution framework can hardly be overstated, there is no single framework with well-defined rules laid out for organizing an efficient insolvency resolution process. Hence we undertake a cross-country comparison, the underlying motivation being to highlight the similarities as well as differences across the laws and procedures of the three countries. The objective is to learn important lessons for India, in context of the formation of the Bankruptcy Law Reforms Committee (BLRC) in 2014. The Committee has recently recommended an Insolvency and Bankruptcy Code that would be applicable to all non-financial corporations in India.

Keywords: Resolving insolvency, Liquidation, Reorganisation, Adjudicator, Loss given default, Recovery rate, Timeliness, Information system

JEL Code: G1, G2, G33, G34

Acknowledgements:

We thank Susan Thomas and participants at the DEA-IGIDR Roundtable on Elements of a sound bankruptcy process, for their helpful comments and suggestions.

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December 16, 2015

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1 Introduction

At the current time when India, a major emerging economy, is endeavoring to revive and sustain its high growth rate, it is imperative that financing constraints in any form be removed and a favorable environment be created for fostering business and competition. In this context, a well functioning and orderly corporate insolvency framework consisting of well-defined rules, procedures and timelines as well as efficient institutions, is critical for encouraging the development of robust domestic credit markets.[1]

However India at present lacks a single, comprehensive law that addresses all aspects of insolvency of an enterprise. In principle the Companies Act of 1956 contains the main legal provisions for dealing with corporate insolvency. In reality though there are three major laws, two ancillary laws and one special provision that address various elements of it. In addition there are different institutions and agencies defined under each of the laws/provisions with inevitable conflicts of jurisdiction between them. The current system does not address the interests of unsecured creditors (such as bond holders), foreign creditors or institutions other than banks (such as Non-Banking Finance Companies or NBFCs).

Institutions that support the insolvency process, such as dedicated bankruptcy benches in tribunals, official liquidators, the credit registry and credit bureaus, have not yet achieved the capacity and capability to support a diverse set of creditors. The fragmentation of the legal framework and inordinate delays in enforcement, create incentives for rent seeking by various participants in the insolvency process. The consequent outcomes of the current system with regard to time taken to resolve corporate insolvencies, costs associated with the proceedings as well as creditors' recoveries, have been extremely poor and lagging far behind those of other economies, resulting in sustained criticisms of the overall framework over the last couple of decades.

Policy makers from time to time, have acknowledged the need to create a robust corporate insolvency framework in India. This was done in the form of expert committees studying the shortcomings of the existing framework, its adverse impact on the credit markets and making recommendations for reform. In implementation however, the reform process has so far taken the approach of "interim fixes designed to solve the problem at hand" (Aghion *et al.* (1992)).

The poor outcomes of India's corporate insolvency process are reflected in the country's rankings in the World Bank (2016). With regard to Insolvency Resolution, India's rank is as low as 136 compared to Australia's 14, Singapore's 27,

[1]There is significant evidence in the literature that indicates legal protection of creditors' rights supports development of credit markets. Studies have also shown when lenders can easily enforce repayment, they are more willing to extend credit and at lower prices. See for example, La Porta *et al.* (1996); La Porta *et al.* (1997); Djankov *et al.* (2007); Levine (1999); Aghion and Bolton (1992); Aghion *et al.* (1992); Davydenko and Franks (2008); Bolton and Scharfstein (1996); Qian and Strahan (2007) among others.

UK's 13, and USA's 5. According to Wadia (2000), a typical winding-up process under the Companies Act takes anything between 3-15 years. Such delays have twin effects - the cost of liquidation goes up and the realizable value of assets drops.

The absence of a well functioning and effective corporate insolvency framework also reflects in the state of credit markets in the country. India has a domestic credit to GDP ratio of only 77% as opposed to 112% in Singapore and 195% in the UK (Table 1). Domestic markets for corporate debt have stagnated over the last 10-15 years and banks and financial institutions (FIs) continue to be the dominant sources of debt financing for companies. As Table 1 shows, bank credit constitutes as much as 93% of total credit in India compared to only 56.5% in Singapore. Also in India banks and FIs mostly focus on providing credit secured by collateral, and credit based on the size and reputation of the debtor. In such a market, on one hand debtors are limited in their access to credit, and on the other hand creditors are limited in their ability to diversify their debt portfolio.

Moreover banks have become increasingly vulnerable to poor recovery on loans made to corporates. The problem of non-performing assets (NPAs) in their books has become a cause of serious concern. Gross NPAs of the banking system have risen from 2.4% (on a base of Rs. 23.3 trillion of advances) in 2008 to 3.2% (on a base of Rs. 59.8 trillion of advances) in 2013. In addition to these, restructured advances, which are loans whose terms have been revised and which have a higher probability of becoming non-performing in the future, have increased from 1.2% in 2008 to 5.6% in 2013. This acts as a serious constraint on the lending capacity of Indian banks thereby further choking the already inadequate and shallow credit market and making it harder for business enterprises to fund themselves.

India has become an important emerging economy experiencing high growth rates in recent times and is fast evolving into a favorite destination for foreign investors. However, the evidence about credit outcomes highlight the weaknesses in the legal framework for credit in India (Table 1). If Indian debt financing has to move from the constraints of a homogenous set of formal FIs and a large informal market to the depth and diversity of heterogenous private and public debt markets, the corporate insolvency resolution framework of the country needs to be reformed to achieve that goal. With this objective in mind the Ministry of Finance in India set up a committee in 2014 (Bankruptcy Legislative Reforms Committee (BLRC)), to recommend an Indian Bankruptcy Code that would be applicable to all non-financial corporations and would replace the existing procedures and acts.

While the importance of a well-functioning insolvency resolution framework can hardly be overstated, there is no single, internationally accepted framework with well-defined rules and standards laid out for organizing an efficient insolvency resolution process. Corporate insolvency regimes vary substantially across countries and in different respects. These differences reflect variations in

their underlying economic context, legal traditions, institutional structures and political economy considerations. As a result, whilst the basic principles and standards of what comprises an effective framework are well defined , there is no generally applicable best design solution. Moreover, insolvency laws are not static and in fact evolve over time, making it even more difficult to arrive at a ready recipe for designing a proper resolution system.

Given the absence of a universal framework for resolving corporate insolvencies, in this paper we attempt to compare and contrast the insolvency resolution procedures of non-financial enterprises of two countries namely, UK and Singapore alongside that of India. The underlying motivation of this comparison is to be able to systematically identify the principal elements in the construct and the implementation of the chosen countries' corporate insolvency regimes. The objective is that this comparison will yield important lessons for India at a stage when it is poised for a significant reform of its corporate insolvency laws. A comparison with systems of other countries will enable its learning process in designing its own.

The choice of UK, and Singapore for the cross country comparison has been motivated by several factors:

Common legal tradition: Each of the three countries including India follow the common law tradition. UK is the country of origin for corporate insolvency law, which emerged as an outcome of the limited liability company structure. Both Singapore and India follow the common law tradition and their insolvency codes find their origins in the English system.

Different outcomes: While following a common legal tradition, each of these countries has experienced different outcomes with respect to corporate insolvency resolution. This is reflected in their rankings and parameters in the "Insolvency Resolution" area of the World Bank's Doing Business Report, 2016 (Table 7). As already mentioned above, Singapore ranks 27, UK ranks 13 while India has a rank of 136.

The structure of credit markets in these countries also varies. Table 1 shows that while banks are the dominant source of credit to the non-financial sector in India and Singapore, in the UK non-bank sectors' share in credit is also significant.

Insolvency reform: Each of these countries is at a different stage in the process of reform of its corporate insolvency framework. UK has already undertaken two rounds of significant reform, in 1986 and in 2002. Singapore is in the advanced stages of reforming its code. The Singapore insolvency law review committee (ILRC) submitted its report with recommendations in October 2013, and those are currently being deliberated upon. India, as mentioned earlier, is at the starting point of its reform process. Provisions regarding insolvency in the Companies Act, 2013 are yet to be notified and as mentioned earlier, the government constituted an expert committee on bankruptcy law reform in 2014.

Table 1 Insolvency resolution parameters and Credit data

Indicator	UK	Singapore	India
Rank	13	27	136
Time (years)	1.0	0.8	4.3
Cost (% of estate)	6.0	3.0	9.0
Outcome (0-sale; 1-going concern)	1	1	0
Recovery rate (cents on dollar)	88.6	89.7	25.7
Domestic credit to GDP[1] (%)	171.5	126.3	74.8
Bank credit to GDP[2] (%)	85.3	56.5	93.1

Source: World Bank Doing Business Report, 2016
BIS Debt Statistics, 2014
World Development Indicators, 2015
[1] Domestic credit by financial sector as a % of GDP.
[2] Domestic credit to private sector by banks (% of GDP).

2 Corporate insolvency system: function, form and objectives

Before launching into a cross country comparison, it is useful to layout a context. Some key elements that need to be considered when evaluating a corporate insolvency system are:

Role: The corporate insolvency system performs an important function in an economy. That of dealing with firm distress. Distress in firms can be of two types: (1) financial distress, where the firm has a viable business but an unviable financial structure; and (2) economic distress, where the firm's business itself is unviable. The basic role of an insolvency resolution system is to preserve fundamentally "viable" firms and liquidate "unviable" firms.

System: The framework for corporate insolvency includes not just the law but other elements that contribute to the achievement of the objectives to which this law is directed. The corporate insolvency system, hence, includes:

- the legal system – the law of insolvency, its rules of procedure and the interaction of this law with other laws of the country.
- the adjudication system – the formal process for insolvency resolution is essentially a judicial process and the courts and judiciary form an integral part of it.

- the professional system – the professionals that provide services towards the insolvency resolution process.
- the information system – information regarding firm's finances, database for defaults, credit registries, collateral/security information etc.

For the system to be effective, each of these elements individually and together needs to be effective.

Form: The law of insolvency takes different forms across countries. In some countries, it is contained in a separate insolvency code, while in others it may be scattered across various laws and debt collection systems. Similarly, there are variations in the institutional mechanisms.

Outcomes: The outcome of the process is a resolution of the firm's distress in one of three ways: (1) The firm is restructured and returns to profitable trading, through a change in its financial structure, the terms of its liability contracts or a reorganisation of the firm itself; (2) Its business or assets get sold off to to interested parties, prior to a liquidation; or (3) It enters immediate liquidation.

Principles: Regardless of the differences in form, an effective framework needs to have the following principles built into it:

- **Efficiency:** The framework should minimise probability of default (PD) ex ante and maximise loss given default (LGD) during insolvency and ex post. This is critical in financial contracts, where the time value of money is paramount.
- **Accountability:** The framework should create accountability for parties in a debt contract and from participants in the insolvency resolution process (courts, IPs). It should create disincentives for strategic behaviour ex ante, ad interim and ex post.
- **Expertise:** In insolvency, there is no unique and optimal equilibrium. An effective system acknowledges this and enables negotiation based outcomes aided by experts. It also means that the law is supported by clarity of procedures as well as capacity and capability of institutional systems.
- **Fairness:** The concept of fairness in insolvency has multiple dimensions. For creditors, it means that similar creditor groups should be treated similarly and as far as possible pre-insolvency priorities should be maintained. For debtors, it means that the framework should seek to preserve viable firms and only liquidate the unviable ones.

3 Comparison of the laws

3.1 The legal and institutional setting

3.1.1 The insolvency law

The law dealing with corporate insolvency varies both in form and in substance across the UK, Singapore and India. In the UK, till 1985, the provisions for dealing with insolvency were contained in the UK Companies Act. In 1986, based on the recommendations of the Insolvency Law Review Committee, chaired by Sir Kenneth Cork, the Insolvency Act, 1986 was enacted. This Act carved out and consolidated all the insolvency linked provisions. The first part of this Act had provisions for corporate insolvency and the second part had provision for individual insolvency. The Companies Act provisions were more liquidation focused and this Act sought to create a balance by introducing provisions to enable the reorganisation of companies, where feasible.[2] The Act was significantly amended in 1994[3], 2000[4] and in 2002[5]. The Insolvency Rules, 1986 form the subordinate legislation for insolvency and contain both key provisions and procedural guidelines.

Both in Singapore and in India, the respective Companies Acts continue to be the primary laws for dealing with insolvency. Despite the similarity in form, some key differences exist in the two countries laws. The Singapore Companies Act, 2006 has provisions for both reorganisation and liquidation of companies.[6]

In contrast, the Indian Companies Act, 1956 deals mainly with liquidation and winding up of companies, with insolvency as one of the conditions for winding up.[7] Reorganisation under the Act can only be through a Scheme of Arrangement, which is not a procedure specific to insolvency[8]. The only formal provisions for reorganisation of insolvent companies are laid out in the Sick Industrial Companies Act (SICA), 1985. This law, however, deals only with a sub-set of

[2] A new procedure, Administration, was introduced by this Act.

[3] The 1994 amendment addressed issues regarding the personal liabilities of Administrators and Administrative Receivers.

[4] The 2000 amendment introduced new provisions for company voluntary arrangements and moratorium.

[5] In 2002, the Enterprise Act further significantly amended the provisions of the Insolvency Act, 1986. It abolished Administrative Receivership, except in certain specified cases. It also provided that a prescribed part of the floating charge realisations (subject to a maximum of GBP 600,000) be made available for recovery of unsecured creditors dues. Another big change was the abolition of Crown preference in the statutory priority.

[6] Part VIII (Receivers and Managers), VIIIA (Judicial Management) and X (Winding up) of the Companies Act, 2006.

[7] Part VII of the Act (Section 425 – Section 560) addresses the subject of winding up of registered companies and Part X (Section 582-590) addresses the winding up of unregistered companies, including foreign companies, partnerships, societies and associations with more than seven members.

[8] Sections 391 – 395 of the Companies Act, 1956.

companies that are eligible[9] and are deemed to be sick[10] This structure, where the laws are not consolidated, creates several challenges in India. The first, is with regard to coverage of the law. Companies that are not eligible under SICA, have no formal reorganisation procedures available to them. A large number of micro and small enterprises do not register as companies. Such firms have no access to any insolvency provisions.

Another important aspect of the legal framework is the interaction of insolvency laws with other laws of the country. These could be laws pertaining to: the general functioning of companies[11], contract enforcement[12], employees/labour and their benefits[13] the functioning of financial markets[14], human rights laws etc. In the UK, specific carve outs have been made in several laws for dealing with cases of insolvency. In India, in contrast, the subject of interaction between laws has been fraught with complexity and has been the cause of significant litigation contributing to delays in the resolution process.

3.1.2 The courts

Courts play an important role in insolvency proceedings. Across countries, their role varies from dispute resolution, to ensuring that the law is applied duly and without prejudice, to, in some countries, even adjudging the resolution proposal for the distressed firm. Courts exercise significant discretion in all matters, including economic and commercial issues. Further, the timeliness of insolvency proceedings depends on the capacity (ability to deal with case volume) and capability (ability to deal with specialised economic and commercial matters) of the court system.

Both the UK and Singapore have a single adjudicating authority for dealing with insolvency related matters. In the UK, corporate insolvency matters are heard by the Chancery Division of the High Court. This court deals primarily with matters related to business and trade disputes, intellectual property and trusts and inheritance. Between 2008 to 2014, approximately 18,000 – 25,000 new corporate insolvency cases were filed in the UK every year. In Singapore the High Court deals with all corporate insolvency matters.

In India, the fragmentation of the laws for liquidation and reorganisation is further complicated by the presence of separate adjudicating authorities under

[9] Industrial companies defined as a company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Amendment Act, 1993, and registered for not less than five years.

[10] Sick companies defined industrial companies as having at the end of any financial year accumulated losses equal to 50% of its peak networth during the immediately preceding four financial years.

[11] Companies Act

[12] Contract laws, individual enforcement rights of creditors.

[13] Employee laws, Union related laws, special laws for workers/labour, pensions laws.

[14] Specially with respect trading on exchange platforms

each. High Courts in India primarily deal with writ petitions[15] and are the courts of appeal for civil and criminal matters. However, for certain companies related matters like liquidation and winding up, they also exercise original jurisdiction. Between 2000 and 2013, 300 − 350 new liquidation cases were filed with the Court every year and 6,000 cases remained pending.[16].

Given the problem of delays in company liquidation proceedings in the High Courts, when SICA was enacted, a specialist tribunal was created to administer it to ensure the speediness of the rescue process. It seemed safer to entrust the procedure to a body that could operate largely outside the court system. The Board of Industrial and Financial Reconstruction (BIFR) and the Appellate Authority of Industrial and Financial Reconstruction (AAIFR) were set up, which are deemed to be civil courts[17], have jurisdiction over reorganisation cases under SICA. The presence of multiple laws and adjudication fora has created opportunities for the debtor firms to exploit the arbitrage between the two systems to frustrate the recovery efforts of creditors and to adversely impact the timeliness of the resolution process.[18]. SICA provides that the orders and proposals made under the Act cannot be appealed in any other civil court except the AAIFR, However the BIFR and the AAIFR are deemed quasi-judicial bodies and hence subordinate to the High Court. This means decisions taken by them can be appealed at the High Court. The High Court has the authority to hear cases, on which BIFR has given a ruling, afresh on merits.

3.1.3 Insolvency professionals

Insolvency professionals such as liquidators and administrators play a central role in insolvency proceedings. Their role may range from evaluation of the distressed company, its management during the proceedings, preparation and implementation of the resolution proposal and distribution of the realisation proceeds. In doing all these, they need to ensure that due process in compliance of the law is followed and hence, it is important that they have adequate knowledge of the law, sufficient experience in commercial and financial matters and integrity in their functioning.[19]

In the UK, the ministerial responsibility for insolvency matters rests with the Ministry of Business, Innovation and Skills (BIS). The Insolvency Service, an executive body of the BIS is the regulator for this area and specifically for the insolvency practitioners (IPs). IPs are regulated under the Insolvency Act. A practitioner needs to be licensed before being appointed in relation to an insolvency matter. The licensing and oversight of IPs has been devolved to

[15] Under Article 226 of the Constitution

[16] Source: Ministry of Corporate Affairs Annual Report.

[17] For the purpose of Section 195 and 196 of Chapter XXVI of the Code of Criminal procedure, 1973.

[18] Also referred to as forum shopping.

[19] International Monetary Fund Orderly and Effective Insolvency procedures, 1999 – Chapter on Institutions and Participants.

seven professional bodies[20]. Applicants need to pass a qualifying exam[21] in addition to meeting the authorising body's insolvency experience requirements. A licensed IP can be appointed as an Administrator, Liquidator, Receiver or Supervisor in an insolvency procedure.

In Singapore, the Ministry of Law acting through the Insolvency and Public Trustees Office, has jurisdiction over insolvency matters. In most cases the government Official Assignee or the Official Receiver is appointed to administer insolvency. The required qualifications for such appointments are defined in the Companies Act and typically vary based on the type of appointment[22]

In India, the Ministry of Corporate Affairs (MCA) has jurisdiction over all Companies Act related matters whereas the Ministry of Finance (MoF)[23] The provisions for appointment of an official liquidator (OL) are laid out in the Companies Act[24]. OLs are appointed by the central government and typically, each High Court has one OL attached.[25] Under SICA, an operating agency (OA) aids the eligible company in proposing a draft rehabilitation proposal. Under the Act, any public financial institution, scheduled bank, state level institution or person can be appointed by the BIFR as an OA.[26]

3.1.4 Procedures

There are two possible outcomes for a firm in distress. It can get reorganised and continue as a going concern or it can get liquidated. Reorganisation of a firm can be through: (1) an informal work-out, where the debtor firm and its creditors agree to a plan of reorganisation through private negotiations; (2) a voluntary reorganisation process under the law, where the negotiations are voluntary but are conducted under the supervision of the court; and (3) a formal process for assessing viability and deciding between reorganisation and liquidation, typically supervised by the court. Liquidation in turn can have two procedures: (1) voluntary liquidation, where the firm itself proposes liquidation when it becomes insolvent; and (2) compulsory liquidation, where the creditor/s apply to court for liquidating the firm.

[20] The following professional bodies have been authorised by the Insolvency Service to conduct exams and provide oversight to IPs from within their domain: (1) Association of Chartered Certified Accountants; (2) Insolvency Practitioners Association; (3) Institute of Chartered Accountants in England & Wales; (4) Institute of Chartered Accountants in Ireland; (5) Institute of Chartered Accountants of Scotland; (6) Law Society of Scotland; and (7) The Solicitors Regulation Authority.

[21] JIEB exams

[22] For example: A Judicial Manager has to be a public accountant. A liquidator must be a public accountant who is certified as an approved liquidator by the government.

[23] The Department of Financial Service under the Ministry of Finance has jurisdiction over the BIFR and the AAIFR.

[24] Section 448 of Companies Act, 1956.

[25] There are a total of 22 OLs across 24 High Courts in India.

[26] There are 24 OAs.

In addition to these, several countries also have individual enforcement procedures available to certain eligible creditors. These provide creditors powers in addition to their ability to exercise their own security interest.

The wide variety of procedures available reflects the complexity in dealing with a failing firm. There are two models that countries follow in the design of their procedures. Some countries follow the linear model, where a common linear process evaluates the viability of the firm before deciding on whether it should be reorganised or liquidated. For example, the new German law where all insolvencies are conducted initially under the same rules and, for an initial period of up to three months, there is no presumption as to whether the enterprise will be rehabilitated or liquidated. The proceedings only separate into liquidation and rehabilitation proceedings once a determination has been made as to whether rehabilitation is, in fact, possible. However, given the complexity and subjectivity in assessment of value, most countries follow a non-linear model where both reorganisation and liquidation procedures are made available to parties and the choice of procedure is left to the party initiating the process. Since all procedures have costs associated with them, it is expected that parties will choose those procedures that will optimise their costs while yielding the highest value. Each of these models has advantages and disadvantages. A linear model is well suited for countries that have constraints in capacity of the institutional infrastructure. However, they impose an additional cost of a common procedure on all parties. The non-linear model provides choice to the concerned parties but adds to complexity.

Figure 1 shows the procedures in UK, Singapore and India under each category.

Figure 1 Corporate insolvency resolution procedures

UK	Singapore	India	
Scheme of Arrangement Company Voluntary Arrangement	Scheme of Arrangement	Scheme of Arrangement	Voluntary Reorganisation
Administration	Judicial Management	SICA Rehabilitation	Formal viability assessment
Voluntary/ Compulsory Liquidation	Voluntary/ Compulsory Liquidation	Voluntary/ Compulsory Liquidation	Liquidation
London Approach	Work-out	Corporate Debt Restructuring	Informal
Administrative Receivership	Receivership	SARFAESI	Individual enforcement

4 Comparison of procedures: methodology

Comparison across three countries is made challenging by the differences in the variety and the design of the procedures. To deal with this, we propose to use a framework for comparison. At the outset, procedures will be categorised into the following sets:

1. Under reorganisation:
    - (a) Formal procedure for assessing viability, to decide between reorganisation and liquidation;
    - (b) Formal procedures for voluntary reorganisation;
2. Under liquidation:
    - (a) Voluntary liquidation;
    - (b) Compulsory liquidation.

Each of these sets of procedures is compared below, across countries and using a set of common parameters. These parameters will highlight the design of the procedures and the critical differences that exist across them in the three countries. This framework will then be used to discuss the effectiveness of each of these countries insolvency systems. Table 2 lays out the common factors for the comparison.

In addition to the collective insolvency resolution procedures, each of these countries also has an individual or partly collective enforcement mechanism available to some categories of creditors. The scope of these procedures enables these creditors to take actions towards resolving insolvency of the debtor firm. Further, there also exist mechanisms for informal work-outs between debtors and creditors. Both these will also be discussed in some detail.

Table 2 Common factors for comparison

Factor	Description
<u>**Initiating the process**</u>	
Who can initiate the process	Generally, debtors may choose to initiate reorganisation while creditors may initiate liquidation. However, in some cases the reverse may also occur. Further, creditors and debtors are not homogeneous entities. Creditors may be financial, secured, unsecured, trade or operations linked, tort and state dues linked. The debtor firm has management, Board of Directors (BOD) and members, each of which may have different interests.
How is the process initiated	What is the trigger? Is it based on determination of insolvency or default or can onset of financial distress be sufficient to initiate the process? In general, early entry into a formal process may yield better resolution outcomes.
<u>**Control**</u>	
Who retains control of the firm?	The existing BoD/management have greater information and ability but their objectives may not be aligned with the creditors. The control of the firm without adequate checks on the controlling entity may lead to erosion in value of the firm.
Who can propose a plan?	While debtors are likely to propose plans for reorganisation, which inherently require longer implementation time, creditors are likely to favour plans that enable quick recoveries, such as a sale of business or liquidation.
How is the plan adopted	The process of adoption of the resolution plan reflects the influence of the various classes of creditors and the debtor firm in the resolution process.
Is there a cram down?	A cram down enables a majority decision to be enforced on residual dissenting parties. However, safeguards need to be built to protect the interest of the dissenting parties.
<u>**Other elements**</u>	
Is there a moratorium?	A moratorium provides a period of standstill during which creditors' individual enforcement rights are suspended. This period can be used by the debtor to negotiate with the creditors and to propose a plan.
New money	A distressed firm needs interim finance to survive during the proceedings and to be able to trade out its difficulties.
What is the priority in distribution?	This has an impact on the design of credit markets, ex ante. This priority should, as far as possible, reflect the pre-insolvency priority of debts.
Exit	A clearly defined exit from the insolvency process enables the freeing up of capital and resources from distressed firms.
<u>**Implementation mechanisms**</u>	
Role of IP	Outside professional who provide specialised services may be required to aid the resolution process to reduce the friction between debtor and creditors.
Role of Court	Courts are scarce and expensive resources with specialised skills and the extent and nature of their involvement in the insolvency resolution process has an impact on the cost of and time taken for the process.

5 Reorganisation procedures

The objective of a reorganisation procedure is to either enable the distressed firm to return to profitable trading or to preserve its business as a going concern, even if the firm gets liquidated. While in liquidation, the firm can create value only for the recipients of the liquidation proceeds, in reorganisation, the productive entity, whether it is the firm or its business, creates value for all its stakeholders and the economy in general.

For a reorganisation procedure to be used and for it to achieve its objective, its design needs to create appropriate incentives for both the debtor firm and its creditors. For example, the design of the procedure should incentivise debtors to trigger formal proceedings at the onset of distress. This is unlikely to happen if initiation of proceedings automatically take away control of the firm. This may be countered by creating punitive measures for Directors who delay insolvency proceedings despite being aware of distress in the firm. Similarly, creditors must be incentivised to participate in reorganisation proceedings by giving them the confidence that these will not be used to delay liquidation and to undermine the value of their claims. For example, reorganisation proceedings need to be time bound and give control to creditors to approve or reject the plan of reorganisation or to convert it to liquidation proceedings. Further, creditors that have security over the firm's assets also need confidence that they would get at least as much as they would in liquidation.

Most countries have a formal process for evaluating whether a firm should be reorganised or liquidated. Further, countries also have procedures that enable debtors to negotiate with their creditors on a voluntary basis but under the supervision of the court.

5.1 Formal procedure for assessing value

UK, Singapore and India each has a formal procedure to evaluate whether a firm should be reorganised or liquidated.

In the UK, Administration, a procedure introduced by the Insolvency Act, 1986, is a collective remedy whose main objective is to hold the company together till a decision can be made regarding the resolution of its insolvency. This is done by placing the affairs of the company in the hands of an Administrator entrusted with the task of promoting the interests of the general body of creditors. The Administrator can do so by rescuing the company as a going concern, and if this is not practicable, achieving a better result for creditors than would be achieved on an immediate liquidation. The Enterprise Act, 2002 greatly enhanced the Administration procedure by: (1) enabling companies to enter the procedure without a court order; (2) by abolishing Administrative Receivership, an individual enforcement procedure, using which a qualified floating charge (QFC)

creditor could block an Administration; and (3) by defining the priority of objectives for the Administrator. The outcome of an Administration can be a rescue of the company or its liquidation and subsequent winding-up. A special form of the procedure is a pre-packaged Administration. In this procedure, a company in financial distress, with the approval of its dominant creditors and with the involvement of an insolvency practitioner as a prospective Administrator, reaches an agreement of sale of its business or assets before entering Administration. This agreement is placed in an escrow and as soon as the company enters formal Administration and the Administrator appointed, the sale is effected.

In Singapore, Judicial Management (JM) is a court-supervised corporate rescue proceeding modeled on the Administration regime in the UK. The objective of this procedure is to give viable companies in financial trouble, a more even chance to rehabilitate themselves and be restored to profitability. The benefit of JM in Singapore is that it allows a company that is not hopelessly insolvent some breathing space to reorganize its affairs. The procedure is essentially carried out by a court-appointed judicial manager whose primary goal is to preserve part or all of business as going concern. The JM order remains in force for 180 days. The court may extend duration of the JM order at the judicial manager's request. Upon JM order being made the Board of Directors (BoD) becomes *functus officio* and its functions and powers are transferred to the judicial manager who replaces the management. This also mirrors the effect of administration in the UK.

In India, the Sick Industrial Companies Act, 1985 provides for rehabilitation of firms. However, its applicability is limited only to eligible firms i.e. industrial companies that have become sick. Once a company has been referred to the BIFR, the adjudicating body under SICA, an inquiry is made to assess whether it can be rehabilitated and a scheme of rehabilitation proposed. If rehabilitation is not feasible, liquidation is recommended and carried out under the provisions of the Companies Act.

Table 3 compares the features of these procedures.

Table 3 Formal reorganisation procedures

Country	UK Administration	Singapore JM	India SICA
Initiating the process			
Who can initiate the process	Holder of a QFC or the company or its Board.	The company, its Board or its creditors. Appointment of a Receiver can be used to block a JM.	The Board required to initiate.
How is the process initiated	Actual or impending insolvency requires to be established except when Administration triggered by a QFC holder.	Evidence that company is unable to pay its debts but there is a reasonable prospect of rehabilitating the company.	Eligible sick companies required to file with BIFR.
Control			
Who retains control of the firm?	Administrator manages the company and Board loses control.	Judicial Manager manages the company and the management is displaced.	The existing management and Board retain control.
Who can propose a plan?	Administrator prepares and proposes the plan.	Judicial Manager prepares and proposes a plan.	The company or the Operating Agency.
How is the plan adopted	Through a vote by the creditor's committee.	Through a vote by the creditor's committee.	Approved by the BIFR.
Is there a cram down?	Yes, on unsecured and floating charge creditors. Fixed charge holders consent is required.		Effectively yes, as the BIFR decision becomes binding.
Other elements			
Is there a moratorium?	Yes, for the duration of the procedure, which may last up to 18 months.	Automatic and immediate moratorium.	Yes. An automatic moratorium starts on reference to the BIFR.
New money	Yes, interim financing treated as part of Administration expenses and get priority.		Yes, but no priority given to interim financing.
What is the priority in distribution?	Statutory priority defined.	Statutory priority defined.	As agreed in the rehabilitation plan.
Exit	Through implementation of a plan of reorganisation or liquidation.	Through implementation of a plan of reorganisation or liquidation.	Through implementation of a rehabilitation plan or liquidation.
Implementation			
Role of IP	Administrator manages the firm, proposes the reorganisation plan and can take any actions that are in the interest of creditors. Administrator usually appointed by the Board.	Judicial manager manages the firm, proposes the reorganisation plan and can take any actions that are in the interest of the creditors.	The Operating agency conducts an inquiry into the distressed company's affairs and proposes a rehabilitation plan.
Role of Court	Court oversees the process through the Administrator, who is regarded as an officer of the court and can be consulted for guidance on actions or for dispute resolution.	Court adjudges insolvency and appoints Judicial Manager. It can make amendments to the rescue plan and make interim orders.	BIFR adjudges the rehabilitation plan.

The main differences in procedure across the three countries are:

- In the UK and Singapore, the procedure can be initiated by both the debtor and the creditors. In India, the primary onus of initiating the procedure lies with the Board of the sick company.
- In UK, if the company or its unsecured creditors trigger the procedure, actual or impending insolvency needs to be established for the procedure to commence. Only if the procedure is initiated by a creditor with a qualified floating charge (QFC), insolvency does not need to be established. In Singapore, evidence of inability to pay debts is required. In India, there is a balance sheet trigger for the procedure.
- Both in the UK and Singapore, the existing management and Board of the company lose control, while in India the existing management and Board remain in control.
- In UK and Singapore, the reorganisation plan is adopted through a vote by the creditor's committee where as in India, the BIFR adjudges and approves the plan.
- While UK enables interim financing by providing priority to it, the same is not done in the SICA provisions in India.
- In the UK, Administrator is generally appointed by the Board of the company while in Singapore Judicial Manager is appointed by the court. The Administrator/Judicial Manager manage the overall procedure under the supervision of the court and are monitored by a committee of the creditors. In India, the Operating Agency under SICA acts under the directions of he court. The key decisions regarding rehabilitation are made by the court and the company continues to be managed by the existing Board/management.
- The court's role in the lowest in the UK where it is not uncommon for an Administration to complete without any judgment by the court. The Court does not adjudge the reorganisation plan itself and mainly acts as a body for dispute resolution and providing guidance to the Administrator. In Singapore, the court plays a more active role in the JM. It has power to adjourn creditors' meeting, and allow amendments to rescue plan. In India, the BIFR plays the critical role in deciding on the plan of rehabilitation.

5.2 Voluntary reorganisation

In addition to the formal procedure for evaluating reorganisation, each of these countries also has formal procedures that enable voluntary negotiations between the debtor and creditors. In the UK, there are two such procedures, the Company Voluntary Arrangement (CVA), a procedure under the Insolvency Act,

1986, and a Scheme of Arrangement, under the provisions of Companies Act, 2006 which is used for a wide range of purposes going beyond insolvency. A CVA enables a company to restructure its debt or reorganise its business, with the consent of its creditors while a scheme could be an arrangement with creditors for debt restructuring, mergers and takeovers or other forms of reconstruction such as capital structure changes. A CVA can only be proposed by the Board of Directors of a company, not by members or creditors and an application for a CVA does not require any evidence of current or impending insolvency. The Board of the company retains control and can, with the help of an IP, propose a plan of reorganisation, which needs to be approved by both the creditors and the shareholders of the company. A CVA is approved by 75% in value of creditors and 50% in value of members present and voting. A validly approved CVA can be crammed down on unsecured creditors and members but not on secured and preferential creditors[27]. The role of the court in a CVA is to allow the Board of the company to propose a CVA and to approve any mechanism in the CVA plan that requires approval of court as per the Companies Act. The court cannot vary the terms of a validly approved CVA. The challenge with the CVA process is that there is no moratorium on proceedings once a CVA is initiated.[28] This creates challenges in proposing and negotiating a CVA plan to creditors. As a result, most often, a CVA succeeds an Administration procedure, where a moratorium is available.

A Scheme of Arrangement in the UK is a procedure that is used by companies with complex capital structures to negotiate an arrangement o compromise with creditors. It can be proposed by the Board of the Company, its creditors or members and does not require actual or impending insolvency as trigger. The Board of the company retains control during a Scheme and proposes a plan for consideration by creditors. There is no IP involved in the process. A Scheme is approved by a three stage approval process that is closely managed and monitored by the court to ensure that due process is followed without prejudicing the interest of any party affected by the Scheme. In the first stage, the court allows a Scheme to be proposed to the creditors and orders the formation of creditor/s committees. In the second stage the Scheme is put to vote and approved by 75% in value and a majority in number of each class of creditors committees. In the third stage, the court approves the Scheme. A validly approved Scheme is binding on all creditors, including secured and preferential creditors. Even in case of a Scheme, there is no moratorium on enforcement proceedings while a Scheme is under consideration unless specifically applied for and approved by the court.

In the UK, companies may prefer the voluntary reorganisation proceedings as they allow for reorganisation to be proposed even when there is no actual or impending insolvency. The other difference is that the Board retains control during these procedures whereas in Administration, the Board loses control.

[27] Mainly employees.

[28] A moratorium is available for eligible small companies only under s. 382(3) of the Companies Act, 2006

The problem however is that both these procedures do not have a moratorium period that allows companies to negotiate with their creditors. Further, a CVA plan, though light on court involvement, cannot be crammed down on secured creditors. While a Scheme can be crammed down on all creditors, the extent of court involvement makes it an expensive procedure. As a result of these shortcomings, both these procedures are not used frequently and Administration continues to be the procedure of choice for reorganisation (Table 8

In Singapore, voluntary reorganisation can only be through a Scheme of Arrangement under the Companies Act, even though Schemes are not insolvency specific procedures. The design of the Scheme is very similar to that in the UK. The Board of the company proposes a Scheme and retains control during its approval process and its implementation. The court is closely involved in the approval process and in determining that the Scheme is fair and reasonable. While there is no automatic moratorium during the process, it can be applied for and approved by the court. A validly approved Scheme is binding on all creditors. As in the UK, Schemes are wide ranging and include any form of compromise or 'give-and-take' agreements between debtors and creditors including debt for equity conversions, debt moratoriums, extended repayment schedules, fresh equity contributions, or in the case of a group, its reorganization or merger.

In India, compromises or arrangements are allowed under the provisions of the Companies Act, 1956.[29] and the procedure is similar to the UK and Singapore. In India, a company or its members or its creditors can make an application to court to call for a meeting of the creditors/classes of creditors to approve a Scheme. Till SICA was enacted in 1985, a Scheme of Arrangement was the only procedure available to companies for reorganisation. This holds true even today for companies that are not eligible under SICA.

5.3 Informal work-outs

Each of these countries also has a mechanism for an informal work-out between the debtor and creditors. In the UK, there is an informal, non-binding process for work-outs using the London Approach, supported by guidelines from the Bank of England. The London Approach has also inspired the INSOL principles laid out in the Statement of Principles for a Global Approach to Multi Creditor Work-outs, 2000. The four main principles on which this approach relies are: (1) Standstill – lenders agree to not exercise individual enforcement rights while the work-out is being considered; (2) Information – all decisions are made based on reliable information that must be shared between all lending banks and that remains confidential; (3) Negotiation and decision on viability – lending banks should take a collective view on whether to support the debtor and in what form; and (4) Business plan and new money – all lending banks should share

[29]Section 391 of the Companies Act, 1956

the burden of supporting the debtor. The London Approach and the INSOL principles rely on a financial supervisor acting as mediator to create a context for the negotiations. The main advantage of this approach is that the negotiations remain private and do not pose any threat to the reputation of the debtor. The challenge, however, arises from the need for consensus on the work-out, which is often difficult to achieve, specially in case of companies with complex capital structures.

In India, in 2001, the Reserve Bank of India (RBI) set up the Corporate Debt Restructuring (CDR) process as a voluntary mechanism to enable restructuring of viable companies outside the legal framework for recovery and insolvency resolution. The Indian CDR mechanism, while based on the 'London Approach', which encourages creditors to opt for an out-of-court agreement, differs from it in many respects. Unlike the London Approach, which is an informal procedure, CDR is a formal process where the decision to grant a CDR to a company is taken by a body of institutional creditors namely banks, financial institutions and asset reconstruction companies and is governed by detailed guidelines issued by RBI.[30] These guidelines include norms on eligibility of companies for CDR, the nature of the restructuring, the timelines, the roles and responsibilities of the parties and the procedure for exit from CDR. The CDR process is also unique in that the RBI provides relief on prudential norms for loan accounts that have been restructured using the CDR mechanism. The CDR process is only available to CDR lenders and bondholders and foreign lenders are excluded from the process. Over time, in India, CDR has become a mechanism for addressing the asset quality problem of banks rather than a mechanism for reorganising distressed companies.

In addition to CDR, in June 2015, RBI introduced a Strategic Debt Restructuring (SDR) mechanism to help banks recover their loans by taking control of the distressed listed companies. Under this scheme a consortium of lending institutions or Joint Lenders' Forum (JLF) may at their discretion, convert loan dues into equity shares. At the time of initial restructuring, the JLF must incorporate an option in the loan agreement to convert the entire or part of the loan including the unpaid interest into equity shares if the company fails to achieve the milestones and critical conditions stipulated in the restructuring package. This option must be corroborated with a special resolution since the debt-equity swap will result in dilution of existing shareholders. This scheme will results in lenders acquiring 51% ownership of the distressed companies. From the time SDR is invoked, JLF must approve the debt-equity conversion within 90 days. JLF will get 90 more days to actually do the conversion. Thereafter, JLF will hold the existing asset status of the loan for 18 more months once the debt-equity conversion is completed. At the end of 18 months JLF must divest their holdings in the equity of the company. The biggest challenge under this scheme will be for the lenders to continue to run the distressed companies till they are able to find a suitable buyer. It can be a chicken and egg situation wherein until

[30]Issued first in 2008 and further augments in 2012 and 2013.

the companies are turned around and become viable, finding a suitable buyer might be difficult and may take much longer than 18 months.

6 Liquidation procedures

Liquidation of a distressed or insolvent firm should, in theory, occur only if it is not economically viable and there is no possibility of reorganising it. In practice, liquidation is the most likely outcome in insolvency. Preserving value in liquidation and ensuring that it is conducted in an orderly manner as compared to a piece-meal liquidation by creditors racing to collect their dues is an important function of the insolvency resolution process. An effective and timely liquidation process performs three functions: (1) it provides certainty to creditors regarding a minimum level of recovery and of the priority in distribution; (2) it provides a time-bound exit to the debtor firm and allows capital to be released for more productive deployment; and (3) it creates a "threat" in the context of which parties consider and implement reorganisation.

Most countries allow for direct entry into the liquidation proceedings and for their conversion into reorganisation of parties agree to it. Liquidation can either be initiated by the debtor firm seeking to get liquidated, under insolvency, or creditors petitioning for liquidation.

In the UK, Singapore and in India, liquidation precedes a winding up of the company. In the UK, winding up is a remedy available under the Insolvency Act, 1986, while in Singapore and India, it is available under their respective Companies Acts. The general procedure followed in the three countries is very similar to each other. There are two modes of winding up in an insolvency situation. The first is a voluntary winding up by creditors. In this procedure, the company, through a resolution of its shareholders and in consultation with its creditors, petitions the court to be wound up without making an accompanying declaration of solvency. The second is a compulsory winding up by the court and is initiated by a creditors. A creditor can initiate compulsory winding up proceedings through an application to court on grounds that company has either defaulted in a debt of a defined threshold or is unable to pay its debts as they come due.

The liquidation procedure has several key components: (i) the commencement of liquidation and appointment of a third-party administrator known as the liquidator; (ii) administration of the company's affairs and assets by liquidator; (iii) ascertainment of company's liabilities and recovery and realisation of company's assets; (iv) distribution of the proceeds of realisation to company's creditors and members; and (v) the eventual dissolution of the company. In Singapore and UK, creditors nominate the liquidator, and the court usually accedes to this nomination. In a compulsory liquidation the court initially appoints the liquidator who may be confirmed or changed by creditors subsequently. The

Court may appoint a liquidator in cases where no private liquidator takes up the proceedings. In India, each bench of the High Court has an Official Liquidator attached to it. This OL is appointed by the court for liquidation proceedings.

Once a liquidation proceeding is commenced, the company normally ceases business. The liquidator is empowered to manage the affairs of the company in liquidation. In both compulsory and voluntary winding up, there is no statutory time limit on liquidation proceedings.

Table 4 and Table 5 compare the liquidation proceedings across the three countries.

Table 6 defines the order of priority in distribution of liquidation proceeds in each of the countries. The UK and Singapore priority is similar except that in the UK, the Crown has given up its preference in the order or priority and in lieu of that a portion of the floating charge realisations (up to a maximum of GBP 600,000) are reserved for unsecured creditors. In India, secured creditors and workmen get priority over all other dues. However, the extent of secured creditor's realisation is pari passu with workmen's dues.[31]

[31] For example: If secured creditors' dues are Rs. 300,000 and workmen's dues are Rs. 100,000, if the value of the secured asset is Rs. 100,000, workmen will receive 25% (workmen's dues divided by sum of workmen's dues and secured creditors' dues) of the realisation i.e. Rs. 25,000 and secured creditors' will receive 75% of the realisation i.e. Rs. 75,000.

Table 4 Liquidation and winding up

Country	UK	Singapore	India
<u>**Initiating the process**</u>			
Who can initiate the process	CVL (compulsory voluntary liquidation)– Company Board. CL (compulsory liquidation) – Any creditor, Director, member, Administrator separately or together petition the court for a CL.	CVL – Company Board. CL – Creditors, the company, Directors and Judicial Manager can file a petition with the court.	Company, creditors and members/contributories and Official Liquidator.
How is the process initiated	CVL – through a shareholder resolution with no declaration of solvency. CL – default on an undisputed debt of GBP 750 OR inability to pay debts as they fall due OR application that a CVL is not being properly conducted.	CVL – through a shareholder resolution. CL – default on dues in excess of SGD 10,000 within three weeks of the demand OR inability to pay debts as they fall due.	CVL – shareholder special resolution for winding up, with no declaration of solvency. This has to be in consultation with creditors. CL – default on a debt of Rs. 500[32] OR inability to pay dues as adjudged by the Court OR if a decree in favour of a creditor is unsatisfied in whole or in part.
<u>**Control**</u>			
Who retains control of the firm?	CVL – liquidator monitored by creditors. CL – liquidator monitored by court and creditors' committee.	CVL – liquidator monitored by creditors. CL – liquidator monitored by court and creditors' committee.	Liquidator monitored by court and creditors' committee.
<u>**Implementation**</u>			
Is there a moratorium?	CVL – No automatic stay on proceedings against the company. Liquidator can apply to court for a stay. CL – Automatic stay on proceedings against the company.	Post winding up order, automatic stay of proceedings against company unless court gives leave for proceedings to continue.	Once a winding up order is made, there is a stay on suits and proceedings against the company, except with the approval of the court.
Role of IP	Reviews assets and creditors' claims. Collects assets, realises them and distributes the net realisations according to statutory priority. May carry on the business of a company in winding up. Also required to investigate causes of failure and bring to book delinquent Directors.	Reviews assets and creditors' claims. May also carry on business of the company in winding up. Post assessment, participates in adjudication of claims lodged against company, disposes of company's assets and applies proceeds in order of priority established by law.	Reviews assets and creditors' claims. May carry on business of the company in winding up. Post assessment, participates in adjudication of claims lodged against company, disposes of company's assets and applies proceeds in order of priority established by law.

Table 5 Liquidation and winding up

Country	UK	Singapore	India
Implementation			
Appointment of IP	CVL – Liquidator, an IP, appointed by the company and approved by the creditors. CL – interim liquidator appointed by the court. However, creditors can later convene a meeting to appoint a private liquidator.		CVL – Company appoints the liquidator in consultation with creditors. CL – Official Liquidator attached with the High Court in which the petition is filed is appointed.
Role of Court	CVL – Court has a supervisory role. CL – Court orders and oversees the CL procedure.	Court involvement in initial stage of petition and order. Subsequently oversees and makes orders as required by the law.	Court hears the petition and makes the winding up order. Subsequently, oversees the procedures and makes orders as required by the law.

6.1 Priority in distribution

Table 6 Statutory priority in distribution

UK	Singapore	India
Administrative receiver's expenses	Receiver's expense	
Proceeds from fixed charge assets net of costs of realisation to fixed charge holders.	Claims secured by fixed charges	Workmen's dues and dues to secured creditors to the extent defined in the statute.
Liquidation/administration expense, including contracts entered into by them as agents, to the counterparty.	Costs and expenses of the winding up	All dues from the company to the Central or a State Government or to a local authority that have become due and payable in the last twelve months.
Preferential debts, primarily employee dues, subject to statutory maximums.	Employees' remuneration and other payments due to employees	Employee wages and salaries not exceeding four months of dues.
Prescribed part, up to a maximum of GBP 600,000 set aside from proceeds of floating charge assets, for unsecured creditors.	All taxes assessed before date of commencement of winding up or assessed at any time before expiration of time fixed for proving of debts	Employee accrued holiday remuneration, Employee State Insurance dues, death and disablement dues, provident fund, pension fund, gratuity and welfare dues.
Proceeds of floating charge assets net of costs of realisations to floating charge holders.	Claims secured by a floating charge	Expenses of any investigation conducted into the affairs of the company.
Unsecured creditors	Unsecured creditors	
Any surplus to company/shareholders in accordance with Articles.	Any surplus to company/shareholders in accordance with Articles.	

7 Individual enforcement procedures

In addition to the formal procedures for reorganisation and liquidation, each of these countries also has an individual enforcement procedure available to certain categories of creditors. Administrative Receivership in the UK, Receivership in Singapore and SARFAESI (The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act) in India fall in this category. The powers available to eligible creditors under these procedures go beyond contract enforcement.

Prior to the enactment of the Enterprise Act in 2002, Administrative Receivership was a widely used procedure in the UK. Administrative Receivership is

not a collective remedy. It is an individual enforcement action available to the lender of a specific type of secured credit, where the holder has a "floating charge" over assets such as stock and work in progress. The Administrative Receiver is appointed by the QFC holder based on the terms agreed on in the debt/security contract and represents only the interests of that creditor. The Receiver has wide powers. He can take control of the company and does not require the permission of the court or other creditors for taking any actions for realising the dues of his appointer. While the Receiver cannot vary the interests of the fixed charge holders, he can terminate the companies' contracts with supplier contractors. Subject to the enforcement rights of the fixed charge holders, he can sell the assets or business of the company to realise his appointer's dues. The application for an Administration could be stopped by appointing an Administrative Receiver.The Enterprise Act, 2002 largely abolished Administrative Receivership, though the procedure is still available to qualified floating charges (QFC) created before September, 2003. This was done to strengthen the Administration procedure and to increase the possibility of reorganisation.

In Singapore, Receivership is a common remedy used by secured creditors. The Receivership related provisions have been adopted from the Australian Companies Act 1961. This procedure is given precedence over liquidation and Judicial Management, on account of its being founded on enforcement of security rights. A receiver is normally appointed by a security holder for the predominant purpose of realising the security and applying the proceeds of sale towards the discharge of the debts owed to the security holder. Where the security is a floating charge that covers the undertaking of the company, the receiver is also given powers of management over the company. A right to appoint a receiver and manager is typically included in security documents. A receiver usually is not displaced even if the company is placed under liquidation. In fact the liquidator has to wait until the receiver has completed his task before entering into possession of company's assets (if any left). Also a company cannot be placed under Judicial Management if a Receiver has been appointed or if a secured creditor entitled to appoint a receiver objects to a Judicial Management. The appointment of a receiver is contractual and no court application is required. Hence, receivership in Singapore is an expedient and effective procedure for a debenture holder to realise his security and displace the management of the company in favour of an insolvency practitioner of his choice.

In India, the SARFAESI Act, 2002 provides wide powers to secured creditors with regard to recovery of the loans made by them that have become non-performing. The primary intent of this Act is to address the problem of ballooning NPAs of banks and large public financial institutions. It allows these institutions to take possession of the collateral security of such a loan without court intervention. This Act also paved the way for setting up of Securitisation Companies/Asset Reconstruction Companies (SC/ARC), regulated by the RBI. These companies are specialized institutions that buy NPAs from banks, for the purpose of resolving them. The Act envisaged that these measures would enable banks to realise long-term assets, manage the problem of liquidity, asset liability

mismatches and improve recovery.

SARFAESI vested extraordinary enforcement powers, but only with banks. In addition to enforcing their security, these creditors also had the power to takeover the management of the company if they comprised a certain threshold in value. Enforcement actions under this Act, if agreed on by 60% of the lenders in value, took precedence over BIFR proceedings for rehabilitation and winding up proceedings in the High Courts. This meant that rehabilitation or winding up could be delayed or even abated in the light of SARFAESI, 2002 enforcement. Appeals against SARFAESI actions can only be made in the Debt Recovery Tribunals, but any appeal could only be made after depositing 60% of dues beforehand with the tribunal.

8 Comparing the outcomes

8.1 World Bank report on corporate insolvencies

In order to compare the outcomes of various insolvency procedures across jurisdictions of the three countries studied in this paper, we use the World Bank Doing Business Survey rankings. The Doing Business is an annual project that provides quantitative indicators of business regulations for local firms in 189 countries thereby offering objective measures for comparing across countries. According to their indicators of resolving insolvency, UK, Singapore and India are ranked 13, 27 and 136 respectively for the assessment year 2015-16. This measure is further split into sub-categories such as time taken in years for a resolution, cost in percentage of estate, outcome in terms of sale or preservation as a going concern, recovery rate in terms of cents on the dollar and so on. Details of the comparative statistics from these indicators are given in Table 4 below. In terms of time taken, cost as well as recovery rate Singapore exhibits the best statistics whereas India seems worst off.

If we dig deeper into some of the criteria used in the World Bank project to arrive at the broader ranking, we get a more clear and precise picture. For instance, in commencement of proceedings, whereas in India the only procedure available to debtor seems to be liquidation, in both UK and Singapore debtors have access to liquidation as well as reorganization. In India there is no common framework for all debtors, even within corporate insolvency. Not all firms are eligible for BIFR, which as described above, is the only procedure with a reorganization option. Firms that are ineligible for BIFR only have recourse to the provisions on winding up through the Companies Act. Likewise even for creditors the only process they can access while filing for the debtor's insolvency is liquidation.

As far as management of debtor's assets is concerned, in India there are no specific provisions in the law that would encourage financing for debtors that have filed for bankruptcy whereas in the UK debtors can obtain credit post

commencement of insolvency proceedings. In the case of reorganization proceedings while in both UK and Singapore creditors have voting rights on the proposed rescue plan in India that is not the case and only BIFR has a say in this matter. This further adversely affects the creditors' rights when it comes to insolvency resolution in India. Consequently India scores lower than both UK and Singapore with regard to creditor participation score.

Table 7 World Bank Doing Business: Insolvency Resolution (2016)

Indicator	UK	Singapore	India
Rank	13	27	136
Time (years)	1.0	0.8	4.3
Cost (% of estate)	6.0	3.0	9.0
Outcome (0-sale; 1-going concern)	1.0	1.0	0
Recovery rate (cents on dollar)	88.6	89.7	25.7
Strength of insolvency framework (0-16)	11.0	8.5	6.0
Commencement of proceedings (0-3)	3.0	3.0	2.0
• Procedures available to debtor	Liquidation & reorganization (1.0)	Liquidation & reorganization (1.0)	Liquidation only (0.5)
• Creditor filing for debtor's insolvency	Yes, liquidation & reorganization (1.0)	Yes, liquidation & reorganization (1.0)	Yes, liquidation only (0.5)
• Basis for insolvency commencement	Inability to pay debts or financial distress (1.0)	Inability to pay debts (1.0)	Inability to pay debts (1.0)
Management of debtor's assets (0-6)	5.0	4.0	3.0
• Continuation of contracts supplying essential goods & services	No (0.0)	Yes (1.0)	No (0.0)
• Debtor's rejection of burdensome contracts	Yes (1.0)	Yes (1.0)	Yes (1.0)
• Avoidance of preferential transactions	Yes (1.0)	Yes (1.0)	Yes (1.0)
• Avoidance of undervalued transactions	Yes (1.0)	Yes (1.0)	Yes (1.0)
• Debtor obtaining credit post commencement	Yes (1.0)	No (0.0)	No (0.0)
• Priority to post commencement credit	Yes, over unsecured creditors (1.0)	No (0.0)	No (0.0)
Reorganization proceedings (0-3)	1.0	0.5	0.0
• Creditors voting on plan	Only creditors whose rights are affected by proposed plan (1.0)	All creditors (0.5)	N/A (0.0)
• Dissenting creditors receive at least as much as in liquidation	No (0.0)	No (0.0)	No (0.0)
• Creditor class-based voting and equal treatment	No (0.0)	No (0.0)	No (0.0)
Creditor Participation (0-4)	2.0	1.0	1.0
• Creditor approval for selection/appointment of IP	Yes (1.0)	No (0.0)	No (0.0)
• Creditor approval for sale of debtor's assets	No (0.0)	No (0.0)	No (0.0)
• Creditor right to request information from IP	No (0.0)	Yes (0.0)	Yes (1.0)
• Creditor right to object to decisions accepting/rejecting claims	Yes (1.0)	Yes (1.0)	No (0.0)

9 Conclusion

The objective of this paper is to analyze the corporate insolvency resolution procedures of India, UK and Singapore within a common framework of well-specified principles. The underlying motivation of this exercise is to highlight the similarities as well as differences across the laws and procedures of these three countries and to learn important lessons for India, in context of the formation of a new committee in 2014 to reform the country's corporate bankruptcy law. The fragmentation of the existing legal framework and the delays in enforcement in India have created incentives for rent seeking by various participants in the insolvency process. If a robust market for credit is to develop in India, the corporate insolvency process must give clarity to all debtors as well as all classes of creditors about the procedures and rules to deal with in an event of insolvency. Only then will a credit market without concentration of any one class of debtors or creditors can develop.

A comprehensive analysis of the laws and procedures of these three countries yields some crucial lessons for the way forward for India. The presence of multiple laws and adjudication fora has created opportunities for the debtor firms to exploit the arbitrage between the systems to frustrate the recovery efforts of creditors and to adversely impact the timeliness of the resolution process. Thus, it is imperative to consolidate the multiple laws and fora in India, a strategy that seems to work well for both UK and Singapore. Furthermore, in the UK procedures like Receivership could be used to stall the Administration mechanism as is the case in Singapore too. As a result, UK has placed greater focus on reorganization and has abolished the Receivership procedure altogether. In India too SARFAESI can be effectively used to stall the reorganisation proceedings under BIFR proceedings as well as liquidation. This needs to be addressed to create a consolidated framework. Also the mechanism for informal work outs in UK and Singapore function without any regulatory interference or required sanction. In contrast in India, the RBI has allowed prudential and provisioning norms to be changed under the CDR mechanism thereby bringing it within the regulatory ambit implying that the process no longer remains informal. There is a thus an urgent need to consolidate the laws in India including the individual enforcement as well as informal procedures.

The formal process for insolvency resolution is essentially a judicial process and the courts and judiciary form an integral part of it. Countries have chosen to deal with this in their own ways. For instance the UK law has devolved large portion of the responsibilities to the insolvency practitioners thereby minimizing the role of the judiciary, which is now involved primarily in dispute resolution and for setting guidelines for the parties involved. In Singapore on the other hand, the court plays a more active role in the judicial management process and the IP is in a way subservient to the court system. However, Singapore has also taken considerable effort in significantly improving the capacity and capability of its court system. Thus for India the choice is open-either to opt for large

scale, thorough judicial reforms to improve the efficiency of the court system or to build an effective, well functioning IP institution so as to support a relatively weaker judiciary. Having said that, given that the role of the courts in resolving insolvency will always remain crucial, India still needs to work on improving and reforming the judicial machinery.

Another key element of an effective insolvency resolution framework is to create a strong and well defined liquidation law, which can act as a viable threat forcing parties into reorganization. While the reorganization procedures themselves need to be effective and well designed, a timely and well enforced liquidation mechanism will create substantial incentive for the parties involved to push for reorganization. Finally, the insolvency resolution law should be such that at various points in the entire process there should be clear predictability of outcomes, well written rules under the laws clarifying procedures, as well as specific and clearly defined timelines, so as to design a resolution framework that will minimize the probability of default and maximize the loss given default. Furthermore mechanisms need to be built at every stage of the law to create sufficient disincentives for strategic behaviour by the parties involved. Likewise the insolvency practitioners system must also be a strong one such that the their objectives are aligned with those of the insolvency resolution system.

While the corporate insolvency resolution law can lay out clear and well defined provisions governing the procedures at each stage, effective and timely resolution of an insolvency case will depend to a large extent on the efficiency with which those provisions and rules are enforced. Hence the success of the new law proposed by a committee in any country including India will depend critically on the extent to which existing institutions can also be reformed and made more effective, new enabling infrastructure can be set up and adequate State capacity can be created.

A Countrywise data on corporate insolvencies

A.1 UK

Table 8 UK Corporate insolvency: new cases filed

Procedure	2009	2010	2011	2012	2013	2014
CL (%)	22.2	22.9	22.9	20.5	19.3	21.9
CVL (%)	52.8	53.7	54.4	57.3	60.3	60.2
Administration (%)	16.4	13.5	12.8	12.2	12.5	10.5
CVL following Administration (%)	5.8	7.1	5.2	4.8	5.0	5.2
CVA (%)	2.9	3.7	3.5	4.0	1.1	3.3
Receiverships (%)	5.8	6.2	6.4	5.9	4.9	4.2
Total new cases (No.)	25,432	20,954	21,858	20,749	18,849	17,120
Total incorporated companies (No.)			26,05,889	27,89,415	29,63,933	31,64,418
New insolvencies as % of total companies incorporated			0.84	0.74	0.64	0.54

Source: Insolvency Service, Companies House.

A.2 India

Table 9 Liquidation in India under Companies Act, 1956

	Number of cases		
	2008	2010	2013
Opening cases	6,653	6,155	5,727
Added during the year	376	225	331
Completed during the year	896	261	575
Pending cases	6,133	6,119	5,483
Voluntary winding up	1,366	1,331	616
Winding up by court	4,767	4,788	4,367

Source: Ministry of Corporate Affairs Annual Report

Table 10 Status of cases in BIFR in India

	No. of cases		
	2003-08	2009-13	Total
Total filings	1,262	381	1,643
Exited BIFR	929	201	1,130
Status			
Dismissed/Abated	876	182	1,058
Winding up confirmed	52	4	56
Others	1	16	16
Pending in BIFR	320	167	487
Status			
Rehabilitation scheme	273	65	338
Winding up notice	7	0	0
Remanded/stayed	28	5	33
Pending	12	97	109
Average pendancy (years)	4.8	1.1	4.0

Source: Information on case status from www.bifr.nic.in

B Insolvency reforms in Singapore and India

B.1 The Singapore insolvency reform

In December 2010, the Minister of Law in Singapore appointed the Insolvency Law Review Committee (ILRC) to review the existing corporate insolvency (and individual bankruptcy) regimes in Singapore and in October 2013, the ILRC submitted its report which recommended that the New Insolvency Act should address insolvency of individuals and companies together. Specifically with regard to corporate insolvency, the ILRC report lays down the following recommendations:

Judicial management: JM ought to be made more accessible by granting the holder of a floating charge the right to appoint judicial manager. Courts to be given the power to appoint a judicial manager despite objections of the holder of a floating charge, in order to rebalance with receivership. Furthermore, a company is to be enabled to enter JM without having to make a formal application to courts. Likelihood of inability to pay debt ought to be a trigger for the court to place the company in JM as opposed to actual insolvency. There should also be super-priority for rescue financing and judicial manager should have the power to repay the debts incurred before the company went into JM. Once JM application is filed, directors of the company should give personal undertakings to the court that the company will not dispose of its assets or make payment to any creditor in respect of any debt or liability incurred prior to the date of the filing, while the application is pending.

Schemes of arrangement: Greater protection should be provided to the creditors under SA by strengthening and clarifying the scope of the stay against certain actions against company, providing greater clarity on procedure for proofs of debt and creditors right to information, and providing additional safeguards to creditors during the period between the making of an application and holding of the scheme meeting. Super-priority for rescue financing should also be introduced. Furthermore, the court should be given the discretionary power to extend the moratorium. Creditors should be allowed to apply to court to restrict any disposition of property by the company after the filing of the scheme application.

Liquidation: Amongst the key recommendations one is related to the introduction of a system similar to UK wherein the Official Receiver may apply to court to seek an early dissolution of the company if it appears that assets of the company are insufficient to cover the winding-up costs and no further investigation is required. A director should be given the right to commence winding up proceedings against company if he is able to show that there is a prima facie case that company ought to be wound up, and where leave of court is obtained and prior to the appointment

of the liquidator, directors should not be allowed to exercise their powers without sanction of the court.

Receivership: ILRC recommends retention of this procedure subject to a few suggested changes for instance, the personal liability of a receiver should be extended to any contract entered into by him and any contract of employment adopted by him in the performance of his function as a receiver.

ILRC has also made recommendations with regard to the investigative and examination powers of liquidators, provisional liquidators, administrators and administrative receivers. Furthermore the ILRC recommends that qualification requirements for IPs across insolvency regimes should be homogenised to ensure common standards, except for scheme managers and liquidators in a members' voluntary winding up. The disciplinary processes of existing professional bodies should be followed and for those IPs who are not a member of any existing professional body, the ILRC recommends introduction of a simple regulatory system or to confine all insolvency work only to professional bodies.

B.2 Companies Act 2013 in India

The process of reforming the insolvency provisions in the Companies Act was initiated with the Companies Act (Second Amendment), 2002. This amendment proposed proposed the setting up of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT), which would be the adjudicating authority for all matters pertaining to the Companies Act. However, this amendment was challenged in Madras High Court on grounds of constitutionality and with respect to the extent of jurisdiction permitted to the NCLT and NCLAT. In 2010, the Supreme Court finally ruled the amendment constitutional, but required for certain changes to be made to the Act for the NCLT and NCLAT to be established. As a result this amendment of the Companies Act remained un-notified. In 2013, the new Companies Act (CA 2013) was enacted. This Act consolidated the winding up and liquidation provisions of the Companies Act, 1956 and the rehabilitation provisions on SICA, 1985, in one place. The CA 2013, introduces several new measures to reform the insolvency resolution framework for companies in India. However, several challenges remain both with regard to the provisions of the law as well as with regard to its implementation. The legal challenge to the formation of the NCLT and the NCLAT has still not been resolved and till this happens, the insolvency provisions under this Act cannot be notified. In the meanwhile, the BLRC has carried out a detailed review of all the insolvency provisions of the law and made recommendations for interim reforms. These will address the challenges of insolvency resolution for companies.

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