

**INDEPENDENCE AND ACCOUNTABILITY OF JUDGES
IN FORMAL INSOLVENCY PROCEEDINGS**

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Outline

Is the role of judges in insolvency proceedings different to other civil proceedings

In most common law countries, especially those who do not have specialized courts dealing with insolvency matters, judges hear and make decisions on all aspects of the law, be it family law, contract, property, torts, or even international trade law, and other more complicated areas of the law. A judge under the common law system is by his very training and experience expected to hear matters in every area, no matter how complicated it may seem. Of course, lawyers acting for the parties, as officers of the court, assist the judge, by providing the necessary legislation and the case law on the subject. This the lawyers do by stating the position of the law, as interpreted in earlier cases, or by providing other relevant authorities. The judge, based on these submissions of the lawyers, and by conducting his own research, where relevant, will then make a decision on the issue. Most often, this does not pose a great problem to the judge. In this regard, therefore, a judge hearing an insolvency matter is no different to that hearing a matter relating to any other branch of the law.

If one were to accept this explanation, it can be said that all judges, irrespective of whether they are hearing insolvency matters or not need to be independent and accountable. There is no greater degree of independence or accountability which is demanded of judges hearing insolvency matters. All judges are expected to be independent and accountable at all times. It must be emphasized that the degree of independence and accountability does not vary according to the subject matter of the suit.

There may be some other reasons why recently the lack of independence and accountability has been in the forefront in some of the Asian countries. Firstly, it can be said that in some of these countries judges do

not have a long tradition of an independent judiciary, as it is in some other countries. This so called lack of independence has gained more attention in recent years, especially by foreign investors, in insolvency proceedings during the Asian financial crisis. What are the reasons for this?

Second, judges in some countries had to deal with insolvency legislation which is entirely novel to them. Either there was no such legislation before, or the new legislation that has been introduced is based on concepts which these judges are not familiar with. In fact, the entire concept of bankruptcy and insolvency was so alien both in concept and in content to these judges as this branch of the law was rarely invoked or applied. It is this lack of understanding of the law which has resulted in judges making wrong decisions in some insolvency cases. It is not being suggested that this is true in every case. Of course there are certain decisions which were made by taking into consideration improper factors .

Why is independence of judges important for an effective insolvency system

Independence of judges is important in every area of the law. For an effective and meaning resolution of disputes, judges must be independent. Without independence, there is no effective legal system. Can it then be argued that since in insolvency matters the subject matter of the dispute concerns vast sums of money, sometimes in the millions, or that large corporations, both local and foreign are involved, a greater degree of independence and accountability is expected of judges hearing insolvency matters. If one accepts the hypotheses that all judges must be independent and accountable at all times, irrespective of what the subject matter of the dispute, then one cannot accept this argument that a greater degree of independence and accountability is required of judges hearing insolvency matters. The degree of independence cannot vary: judges are either independent or they are not.

From whom should judges be independent

Independence of judges means that judges must be independent of the executive and also from other external forces. It is a generally accepted principle that there must be freedom from external interference in the decision making process: judges must be free to decide disputes impartially. Lord Ackner, a leading judge in the English House of Lords, in a lecture entitled, “The Erosion of Judicial Independence”, observed:

It is a feature of most advance democracies that enormous power is wielded by the executive and indeed, by very large companies with international connections and by other groups and institutions, including those who control the media. (1996 *New Law Journal*, 6771)

In insolvency proceedings, the external forces at play are the borrowers, usually a local corporation or even a multinational. Judges must be free from influence from these parties and they must act in accordance with the law.

In insolvency proceedings, as in other civil matters, independence is a crucial matter as the decisions made by judges hearing an insolvency matter not only affects the parties concerned, but most often than not it may have wider ramifications. It may have direct consequence on the banking sector, labor market, and more importantly, on the economy of the country. As such matters also affect foreign bodies, greater scrutiny is placed on the judicial system. An improper decision made by a judge will be heavily criticized by these bodies.

How can independence be established

There are no clear indicators for measuring independence of the judiciary. Though attempts have been made to formulate certain benchmarks or to quantify judicial independence (see *Template for the Judicial Independence Index: A New methodology for Measuring Judicial Independence*, by ABA/CEELI,2000), no accepted criteria has been universally accepted. At the end of the day, the only means of measuring whether

an judiciary is independent or not is to gauge the public perception of the judiciary. Does the public have confidence in the judiciary? If the answer to this question is in the affirmative, then it can safely be said that the judiciary is independent, whereas if the answer is in the negative, it is not.

Having said that, it must be pointed out that there are certain features in a judiciary which must be present to indicate its independence. Judicial independence now embodies a wide gamut of principles, namely, the appointment of judges, removal of judges, judicial remuneration, tenure of judges, accountability of judges, and the budgetary requirements of the courts.

The International Commission of Jurists, based in Geneva, has over the years, in corroboration with other international organizations, attempted to define standards with respect to the term “independent and impartial tribunal”. In fact, the *United Nations Basic Principles on the Independence of the Judiciary*, and other international agreements, like the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region*, set out the basic principles of an independent judiciary which every member country had agreed to.

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