

Navigating the Interplay of Arbitration and Insolvency Disputes

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Abstract

The interplay of arbitration and insolvency sparks complex legal issues which are marked by different legal objectives. This paper explores how Indian courts and tribunals navigate the tensions between the Arbitration and Conciliation Act, 1996, and the Insolvency and Bankruptcy Code, 2016 (IBC). It examines key issues such as the arbitrability of disputes involving insolvent parties, the effect of moratoriums under Section 14 of the IBC on ongoing and prospective arbitration proceedings, and the evolving jurisprudence on when arbitration agreements can be enforced during insolvency proceedings. By analyzing landmark judgments from the Supreme Court and National Company Law Tribunal (NCLT), the paper highlights the Indian judiciary's efforts to strike a balance between promoting arbitration as a preferred mode of dispute resolution and safeguarding the objectives of the insolvency regime. The study concludes with recommendations for legislative and judicial harmonization to ensure clarity, predictability, and efficiency in the treatment of such overlapping disputes.

Key Words: Arbitration, Insolvency and Bankruptcy, Moratorium, Cross-border disputes and UNCITRAL

Introduction

When the new Insolvency and Bankruptcy Code, 2016¹, was enacted it brought with it the legal complexities in the cases. As the cases were already going on and very limited information was available and as a result a lot of arbitration procedures were stayed due to the enactment of the new law. The enactment of the new law proved to be turmoil for the ongoing arbitration procedures as there was no explicit mention in those laws except for the moratorium to be imposed. Post Co-vid, the businesses were impacted severely and a lot of cases arose. It impacted the disputes as there was no clarity in rules and became tough to operate. A fresh arbitration procedure and the continuing proceedings was not an easy task. It made the things more complex and it was also ruled by the USA

¹The Insolvency and Bankruptcy Code, 2016.

that it would give two conflicting opinions. One was that the insolvency laws would create centralization whereas the arbitration promotes decentralization.² According to the code which was introduced it is said that if a financial creditor³ or the operational creditor⁴ has a loan of one Crore⁵, then the corporate debtor himself could go the National Company Law Tribunal (NCLT) to initiate the proceedings of insolvency against himself.⁶

The law becomes a key point in the dispute resolution especially for the people fighting the financial distress. But the Arbitration is the medium through which the disputes can be resolved without the legal frameworks and procedural delay of the courts and it is governed by the Arbitration Act⁷ of India and it is a complete legislation for the arbitration proceedings in the sense that it governs the arbitration proceeding to passing of awards to its enforcement. So the Arbitration and the Insolvency together plays a key role in the proper functioning of the economy.

Working of Arbitration Agreements and Insolvency Proceedings

The intersection of arbitration and insolvency process possess several questions. One of the major questions raises is that of institution of the arbitration proceedings when the party turns insolvent. The code has a provision for the moratorium in the initial process or continuation of the process, once the insolvency process begins.⁸ The moratorium is kind of a cooling period that is provided to the corporate debtor to re-launch its debt and stop him from doing further business. Sometimes, this concept is proved contrary to the party given autonomy which is the sole of the arbitration. It may happen that party may directly choose arbitration as their dispute resolution but the moratorium can directly impact and give override effect to the contract. Indian courts have tried to strike a balance between these two but they have directly upheld the supremacy of the code in disputes involving insolvency.⁹ In some of the cases, the Indian Courts have proved their stance and stated that once a moratorium has been imposed on the corporate debtor under the Code , he cannot move for the arbitral proceedings without the prior permission of the National Company Law Tribunal.¹⁰ It clearly states that the code is primary while giving importance to the arbitration agreements as far as possible. In some

²*In Re United States Lines Inc.*, 197 F.3d 631 (2nd Cir. 1999).

³The Insolvency and Bankruptcy Code, 2016, S. 5 (7).

⁴The Insolvency and Bankruptcy Code, 2016, S. 5 (20).

⁵Ministry of Corporate Affairs, S.O. 1205(E)(Notified on March 24, 2020).

⁶The Insolvency and Bankruptcy Code, 2016, S 7,9,10.

⁷The Arbitration and the Conciliation Act, 1996.

⁸The Insolvency and Bankruptcy Code, 2016, S. 14.

⁹K. Sashidhar v. Indian Overseas Bank &Anr., Civil Appeal Nos. 10673, 10719, 10793(2018).

¹⁰Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd. &Ors., Civil Appeal No. 16929(2017).

cases, we have witnessed that courts can allow the arbitration if it does not interfere with the insolvency resolution process. As an example, if the arbitral proceedings are going on that pertains to an issue that does not bother the assets of debtors and the outstanding dues of the creditors, it can be allowed to continue.¹¹ Also, judiciary has made a clear stand that the arbitral awards can be enforced if it was given before the insolvency resolution process, but on a condition that it does not affect the Corporate Insolvency Resolution Process.¹² While there are issues which still persist the judiciary has tried to harmonize these two systems, ensuring that the benefits of the arbitration are not completely lost in the insolvency process and to maintain the sanctity of insolvency.

Judiciary's Stance on Arbitration and Insolvency

The interpretation of the code in relation of the arbitration has influenced the framework of insolvency in India. In the landmark judgment, the arbitrability of the subject matter was interpreted and it gave three aspects-

- Whether the subject matter can be sent for arbitration?
- Whether the subject matter of the dispute is covered in the sense that it would be governed by arbitration in case of dispute?
- Whether parties want to resolve their matter by arbitration?¹³

It was also held in one of the judgments that the matters under right in rem¹⁴ cannot be sent for arbitration whereas matters under right in personam is only arbitrable.

A. Dispute in existence

The first main issue which comes into existence is that the meaning of the term “dispute” and “existing dispute” under section 5(6)¹⁵ and there were conflict in opinions in this regard. The term “dispute” was given liberal interpretation by the court in the Mobilox Innovations v Kirusa Software¹⁶. The court also laid that the application to initiate insolvency proceedings against the Corporate debtor by the operational creditor would not be accepted if there is a existing debt between them. It also held that the definition under Section 5(6)¹⁷ is inclusive and not exhaustive. The adjudicating authority has been given a duty to check the authenticity of the application as against fraudulent or illusory practices and also laid guidelines to

¹¹Swiss Ribbons Pvt. Ltd. &Anr. v. Union of India &Ors., Writ Petition (Civil) No. 99,(2018).

¹² K. Kishan v. Vijay Nirman Company Pvt. Ltd., Civil Appeal No. 21824 (2017).

¹³Booz-Allen & Hamilton Inc v SBI Home Finance Ltd and Ors (2011) 5 SCC 532.

¹⁴*Supra note 11*

¹⁵The Insolvency and Bankruptcy Code, 2016, S.5(6).

¹⁶AIR 2017 SC 4532.

¹⁷*Supra note 15*

admit or reject the CIRP after checking its veracity and a notice to the creditor is issued according to Section 8(2)(a)¹⁸ and Section 5(6)¹⁹.

Similarly, the challenge to an award passed under Section 34²⁰ also comes under the purview of pre-existing dispute. This becomes a ground for the operational creditor to not file an application for CIRP, if it is already in dispute.

B. Proof of debts- Arbitral Awards

In the case of Annapurna Infrastructure²¹, it was held that a valid award against the corporate debtor would be covered under the term “operational debt” under sections 3(11)²² and 5(21)²³. Until and unless there is a stay in the arbitral award under Section 34²⁴, CIRP can be filed against the corporate debtor irrespective of the pending of the award. The judgment given by the tribunal is relevant in the current scenario as it upkeeps with the main objective of the code of time bound resolution of the CIRP and is not delayed by the corporate debtor.

C. Effect of Moratorium

• Fresh and ongoing Arbitral Proceedings

When we look on the impact of Section 14²⁵ on the arbitration proceedings, in the case of Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd. &Ors²⁶, the apex court held that the moment the insolvency petition is accepted, the moratorium is imposed, any new proceedings or continuation of any suit is prohibited against the corporate debtor. It also stated that any arbitration proceeding which is instituted after the moratorium is ‘nonest’. The same was applied on the case of K.S. Oils Ltd. v The State Trade Corporation of India Ltd. &Ors²⁷, the NCLT also stood with the view that any proceeding of arbitration would stand still after the moratorium is imposed from the date of commencement of the insolvency.

Thus, it is concluded that the proceeding initiated after moratorium is ‘nonest’ in law. If the arbitration proceedings are initiated after the moratorium then the continuity would depend upon two reasons maximization of the value of the assets and the debt recovery action

¹⁸The Insolvency and the Bankruptcy code, 2016, S 8(2)(a).

¹⁹*Supra note 15*

²⁰K. Kishan v Vijay Nirman Company Pvt. Ltd. (2018) 17 SCC 662

²¹Annapurna Infrastructure Pvt. Ltd. vs SORIL Infra Resources Ltd (2017) 380 SCC

²²The Insolvency and the Bankruptcy code, 2016, S. 3(11).

²³The Insolvency and the Bankruptcy code, 2016, S. 5(21).

²⁴The Arbitration and Conciliation Act, 1996, S. 34.

²⁵The Insolvency and the Bankruptcy code, 2016, S.14.

²⁶*Supra note 10*.

²⁷K.S. Oils Ltd. v The State Trade Corporation of India Ltd. &Ors (2018) 146 SCL 588.

Another issue which arose was solved in the case *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*²⁸ and the Delhi High Court took a purposive approach to Section 14²⁹ and held that it would not apply to proceedings which would benefit the corporate debtor, as they are not to recover the debts and will not impact the assets of the debtor. Thus, if the action continues then it will not be derogatory to the objectives of the code.

- **Pre award stage**

There can be an issue that the arbitration proceedings are ongoing but the award would be pending when the moratorium period is ongoing, and during this period there can be claims and counter claims by the corporate debtor itself. It was opined that during the moratorium period if any counterclaim is filed by the creditor it then it would be a prohibition under section 14³⁰ but it can be continued before the arbitral tribunal in the moratorium period also. The claims and counter claims both can be heard but section 14³¹ would be applied in cases if the corporate debtors would be asked to pay the damages as no recovery of debts can take place during this period.³² The same stance was taken by the Delhi High Court in the case of *SSMP Industries Ltd.v. Perkan Food Processors Pvt. Ltd.*³³

It was clarified that the counterclaim is a proceeding against the Corporate Debtor and its continuance is not a threat but the Section 14³⁴ would only apply if it is the recovery amount is determined to be paid. The arbitral proceedings involving claims and counterclaims would not be hit by the Section 14³⁵ in the pre-award stage. It can only be invoked if there is award passed against the favour of the corporate debtor then moratorium will apply to prohibit any recoveries.

- **Post- Award Stage**

If the award has been passed by the arbitral tribunal it can be challenged under Sections 34³⁶ and 36³⁷. The moratorium will be applied to the corporate debtor if the award is against the corporate debtor. Challenges will only be accepted if the award favors Corporate debtor or if continuation to such proceedings.

²⁸*Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.* (2017) SCC Online12189

²⁹*Supra note 25.*

³⁰*Supra note 25.*

³¹*Supra note 25.*

³²*Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd*, 2018. SCC OnLine NCLT 18197....

³³2019 SCC OnLine Del 9339.

³⁴*Supra note 25.*

³⁵*Supra note 25.*

³⁶*Supra note 24*

³⁷The Arbitration and Conciliation Act, 1996, S.36.

Also an arbitral award against the corporate debtor forms default under the code.³⁸ Even though the awards are valid debt, they need to be undisputed if the operational creditors want to initiate CIRP.³⁹ It can be inferred that the courts tend to limit the further burden on the debtors.

Insolvency's Impact on Enforceability of the Arbitration Agreement

The section 41⁴⁰ incorporates within itself the procedures for the insolvency such as insolvency, impact on the arbitration agreements and the process which is followed under it. It gives several prerequisites that pay attention to insolvency arbitration intersection. If the arbitration agreement is accepted before the insolvency proceedings, it can be enforced against it. Before adopting the arbitration clause the receiver should strongly know that whether it would benefit the company. If it is agreed in toto that the award would be enforceable against the insolvent party.⁴¹ But once the proceedings begin but the order has not yet been pronounced and the receiver accepts that the contract to arbitrate for future, it will be enforceable against him but on the contrary if the receiver does not choose it then the party can apply to NCLT for intervention. But if the company is insolvent the agreement becomes void and will not have any binding effect. Thus, in case of the arbitration, if the party turns insolvent, the agreement is not automatically invalid but depends on facts which surround it and also whether it was accepted by the receiver.

Parallel Arbitration Proceedings and the Theory of "Clean Slate"

It is now an established notion that arbitral proceedings do not interfere with the Corporate Insolvency Resolution Process. The parties can file for insolvency under the Code even if the arbitral proceedings are going on. It led to the origin of the "Clean Slate" in India under section 32A⁴² to determine the liability of the debtors for the offences committed before Corporate Insolvency Resolution Process read with section 31⁴³. The doctrine aims to protect the debtors from the liabilities and unresolved claims and debts before and during the Corporate Insolvency Resolution Process. The doctrine was also taken into consideration in several cases like *EssarSteel India Ltd. Committee of Creditors v Satish Kumar Gupta*⁴⁴ and *Ghanashyam Mishra and Sons Private Limited v Edelweiss*

³⁸*Supra* note 21

³⁹ *Supra* note 20

⁴⁰ The Arbitration and Conciliation Act, 1996, S.41.

⁴¹ *Supra* note 40.

⁴² The Insolvency and Bankruptcy Code (Amendment) Act, Act No. 1 of 2020, S.10 (December 28th, 2019)

⁴³ The Insolvency and Bankruptcy Code, 2016, S.31.

⁴⁴ 2020) 8 SCC 531

Asset Reconstruction Company Limited and Ors⁴⁵. In a recent case it was against the doctrine of the “clean slate” where the courts opined that the arbitration proceedings would continue even after the resolution plan is approved by the Committee of Creditors(COC). The decision can be looked from the two aspects. First, that it is detrimental to the objective of the code as every other legal proceeding would demotivate the acquirer. He may ask for “clean slate” meaning thereby that it would work as a company which do not have inherited liabilities and have focus on the objective to revive the company and its assets. Second, the arbitral proceedings are independent of the resolution plan. It also enhances the possibility of the parallel proceedings along with the need for expeditious insolvency process and right to go for arbitration which related to non-included liabilities.⁴⁶

Which Law would be Prevalent?

The next question that needs to be answered is that in case of conflict which law would be prevalent over the other. In *K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors.*⁴⁷, it was held that if there arises any conflict between the code and other legislation, the non-obstante clause of section 238⁴⁸ will have overriding effect and the code will prevail. However, it is suggested that it should be used cautiously without overriding adjudicatory and enforcement status. As per the previous ruling, in *Swiss Ribbons Pvt. Ltd. & Anr.v Union of India & Ors.*⁴⁹, it was held that when the insolvency proceedings begin, then all the proceedings including that of arbitration will be stayed till the disposal.

Of late, it has been discussed by the court in the case of *Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund*⁵⁰, that if the application for the Corporate Insolvency Resolution Process is admitted, then at that moment only the dispute is rendered non-arbitrable. On the contrary, if the application is rejected then it would go for arbitration. In this case, court also held that if the two statutes are in conflict, then the one which is enacted late would prevail and hence the code would have the overriding effect.

Notion of Conflict between Arbitration and Insolvency in other Jurisdictions

The conflict between the insolvency and arbitration was considered to be the “a conflict of almost polar extremes”. One was that the insolvency laws would create centralization

⁴⁵(2021)ibclaw.in 54 SC.

⁴⁶*Fourth Dimension Solutions Ltd. v. Ricoh India Ltd.*, (2021) SCC Online SC 830.

⁴⁷(2018) 146 SCL 588.

⁴⁸The Insolvency and the Bankruptcy code, 2016, S.238.

⁴⁹[2019] 3 S.C.R. 535

⁵⁰(2021) 6 SCC 436.

whereas the arbitration promotes decentralization.⁵¹ It is worth noticing that there are regional differences meaning that the importance of insolvency for the debt recovery over the likelihood to go for arbitration. An important component of the international commercial arbitration is that it has the ability to solve cross border commercial disputes in which arbitration is used as a personal remedy to solve their claims and settlements. Cross border insolvency initially provides a stay so that all the creditors are treated equally in rem proceedings and then the relevant courts can exercise their exclusive jurisdiction for uniform compliance.

In the case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*⁵², the scope of insolvency disputes which can be arbitrated was enhanced. Arbitration is required over non-core concerns as the code lacks jurisdiction. Even the court has jurisdiction over these issues, the less essential issues would not conflict with the fundamentals of the code and can be resolved by the arbitration and well know case of *Europe case Syska vs. Vivendi*⁵³ which cite an example that parties may be at risk if the arbitration and bankruptcy proceedings collide. The English Court held that the procedures should be governed by the laws of the nation and to preserve reasonable expectations of the debtors so that the agreements are settled.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, says that the member states courts have the right to refuse enforcement of arbitral awards if it is contrary to their sovereignty. Because it is domestic proceeding where the courts are hesitant to enforce the arbitral awards against the insolvent party, also sometimes non-fundamentals issues are also not passed by courts because it is against public policy. The country's economic and legal framework involves insolvency legislation, which contributes to the development of the economy. Thus, it is considered as a part of the public policy of any country. Also Indian Courts have also made a stance that the arbitral awards can be refused to be enforced if it is against natural justice, morality and law of the public.⁵⁴

USA also made clear that there is a great distinction between government policy and public policy in the case of *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie Du Papier*⁵⁵, even though the arbitral award was upheld but the court stated that it should not be contrary to laws which override the morality and justice of a country. Thus, the arbitral award that violates the Bankruptcy laws is void and

⁵¹*Supra note 2.*

⁵² 473 U.S. 614(1985)

⁵³ (2009) 2 ALL ER (Comm) 891

⁵⁴*Cruz City 1 Mauritius Holdings v. Unitech* EX.P.132/2014 & EA(OS) Nos.316/2015, 1058/2015 & 151/2016 & 670/2016.

⁵⁵ (RAKTA).508 f.2d 969

enforceable, but the award would be valid if it concerns to the other disputes between various debtors would be valid.

Generally, the insolvency laws put stay on the arbitral proceedings when the insolvency proceedings begin to preserve the interest of the creditors. Some core matters cannot be sent for arbitration as the arbitrators are not competent enough for it such as verification of creditors claims, wind up of companies, etc.

Current Scenario of Insolvency and Arbitration Disputes

Indian legal scenario is facing complex legal problems between the collision of arbitration and insolvency because the insolvency laws prioritizes maximization of value of assets whereas arbitration seeks binding of the resolution through the party autonomy. Though the judiciary has tries to solve the tussle between the two but the ambiguous legislations and the complexity of the cross border disputes has kept it in friction.

The concept of moratorium under section 14⁵⁶ means a stay at all operations of the corporate debtor and institution of the arbitral proceedings after the moratorium is void.⁵⁷

Arbitral award itself proves as debt.⁵⁸ In case of *Agrocorp International Pte Ltd. v. National Steel and Agro Industries Ltd.*⁵⁹. Even though the unenforced arbitral award was accepted as a debt, whether it would be enforced or not remained a mystery indicating the adoption of commercial reality over the rigourous approach.

The moratorium cannot stop the writ petitions pending under Article 32⁶⁰ and 226⁶¹. Writ petitions are permissible if it affect the interest of public at large which happened in the case of *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*⁶²

Conflict in the Indian Scenario

There is significant clash between the insolvency and arbitration proceeding in the sense that when the moratorium is imposed, all the proceedings against the corporate debtors are halted including recoveries. There are still lot of disparities which needs to be answered as there are disputes regarding extinguishing of the IBC clean slate doctrine and clashes with the autonomy which the arbitration provides.⁶³ The enforcement of the

⁵⁶*Supra* note 25

⁵⁷ *Ibid*

⁵⁸ *Kotak Mahindra Bank Ltd. v. A. Balakrishnan*, (2022) SCC OnLine SC 706

⁵⁹ [2022] 1 Comp. Law Rep. 567 (NCLT Mumbai)

⁶⁰ The Constitution of India, 1950, Ar 32.

⁶¹ The Constitution of India, 1950, Ar 226.

⁶² (2024) SCC OnLine SC 522

⁶³ *Agrocorp International Pte Ltd. v. National Steel and Agro Industries Ltd.*, [2022] 1 Comp. Law Rep. 567 (NCLT Mumbai)

awards becomes difficult as it requires “undisputed debt” to initiate insolvency.⁶⁴ We can also see that there are conflicting situation between the insolvency and arbitration disputes. Even though the judiciary has tried to made the stance clear but still there exists a lot of confusion in regards to scope and application of the arbitration while the Corporate Insolvency Resolution Process is still going on and is pending before it.

Conclusion and Suggestions

The legal system prevalent in India is a turning point where the insolvency and the arbitration proceedings need to cooperate rather than conflict. The trend of the parties to inculcate the arbitration clauses in the contract has necessitated the need to bring amendments in the existing laws and explicitly mention provisions which would render party to go for arbitration in the cases of disputes. To bring the harmony between the laws, India can adopt the reforms in the legislative enactments like codify the exceptions to moratorium and also integrating UNCITRAL Model Law on Cross-Border Insolvency to solve the conflicts related to jurisdictions.⁶⁵ The Synergy could be brought into the timelines provided of 330 days to finish the Corporate Insolvency Resolution Process aligning with the arbitration timelines and incorporating insolvency experts in tribunals to enhance efficiency. India can also draw inspiration from Global Practices such as UK’s practice of allowing non- core arbitration during proceedings of insolvency. Certain amendments can also be brought to the code clarifying the situations and circumstances in which overriding effect of the code can be made flexible on the basis of the facts and circumstances of the case, incorporating strict provisions for the prevention of inordinate delay by the debtors, simplifying the type of awards conferred by the tribunal and explaining the stages of the CIRP in which whether parties can sought for arbitration proceedings or not. This way the insolvency and the arbitration can coexist in harmony as pillars of robust business environment.

⁶⁴*Supra note10*

⁶⁵Ministry of Corporate Affairs , Government of India, “Report of the Insolvency Law Committee” (2022)

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