
INSOLVENCY OF PARTIES IN THE ARBITRATION PROCESS: AN ANALYSIS

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ABSTRACT

In India, there are certain matters that do not fall under the ambit of resolution via arbitration. Since insolvency proceedings are in rem and include third party rights, they are not subject to arbitration. The Supreme Court of India in *A. Ayyasamy v. A. Paramasivam & Ors.*¹, had observed that the insolvency matters are not arbitrable. But there are exceptions to cases where either of the processes can override the other. In order to avoid arbitration processes, to stop the parties from resolving the issue, and to serve as a pressure tactic, the insolvency proceedings are started. In India, the arbitrability of insolvency petitions is still a murky topic devoid of definitive answers because of conflicting and dearth of Supreme Court decisions. The commencement of insolvency proceedings has caused many arbitral proceedings to stop, and the impact of insolvency on ongoing arbitration proceedings causes a stir. What happens when one application is made to institute insolvency proceedings and another to refer the same matter to arbitration? That is the fundamental question that must be answered. This paper analyses this prime question which is the main crux for understanding the intersection of insolvency and arbitration in India. The insolvency and arbitration intersection in India has been dealt with only on case-by-case basis, with the main test being that if the arbitration proceeding is done with the intention of debt recovery, only then can it override the insolvency proceedings. The paper delves into various cases to understand how this overriding effect is decided, what are the basis, and different aspects in the collision.

Keywords: Arbitration, Insolvency, NCLT on Arbitration and Insolvency, Overlap in Arbitration and Insolvency; Simultaneous Arbitration and Insolvency Proceedings.

¹ (2016) 10 SCC 386

INTRODUCTION

Insolvency and arbitration are two distinct legal processes that serve different purposes. But today we can see that, due to complex legal scenarios, both processes collide. Insolvency proceedings are those that deal with the financial distress of an entity and arbitration is the process of settling the disputes arising from a defined legal Relationship, privately through one or more arbitrators chosen by the parties who make a binding decision on the dispute. Insolvency proceedings focus on the collective interests of creditors and the orderly distribution of assets, often under the supervision of a court or insolvency practitioner. On the other hand, arbitration is a consensual method of resolving disputes wherein parties agree to submit their conflicts to a neutral third party. There are instances where parties may wish to pursue arbitration while insolvency proceedings are ongoing or where insolvency issues arise in the context of an arbitration. Despite their differences, there are situations that arise presenting challenges to the overriding or prevalence of one over the other.

A case becomes complex when it combines questions of insolvency, which is handled by the NCLT, with questions of contract validity, which is handled by an arbitral tribunal. If an application under Sec. 7 of the IBC² is pending before the NCLT, the party seeking a referral under Sec. 8 of the Arbitration Act has few options. The NCLT may handle issues pertaining to insolvency and winding up, whereas disagreements arising about the interpretation of the terms of the contract may be directed to arbitration under Sec. 8 of the Arbitration Act.³ If the arbitration proceedings are in the corporate debtor's (CD) favor, they may be held concurrently with the IBC proceedings in conformity with Sec. 7.

This Paper explores the compatibility and conflicts arising from the simultaneous pursuit of insolvency and arbitration proceedings & attempts to decipher the current Indian courts' jurisprudence and legal framework in order to identify problems and offer remedies. This Paper also looks at instances when proceedings against the CD have been permitted to proceed, even though Section 14(1) of the IBC seemed to have sealed the destiny of arbitration proceedings. Aspects of this dispute have been made clearer by the judicial gap filling, but the situation is constantly changing case by case.

² The Insolvency & Bankruptcy Code, 2016, § 7, No. 31, Acts of Parliament, 2016 (India).

³ *Id*

INSOLVENCY AND ARBITRATION LAWS IN INDIA

To understand the main concern in intersection of arbitration and insolvency proceedings, it is important to understand what both the processes mean and why there is a conflict. While both arbitration and insolvency procedures may be requested, they cannot take place simultaneously. Under Indian law, the Arbitration and Conciliation Act, 1996 deals with the arbitration and the Insolvency and Bankruptcy Code, 2016 deals with insolvency. The Arbitration and Conciliation Act, 1996 does not contain any provisions addressing how arbitration proceedings are affected by the Corporate Insolvency Resolution Process (CIRP).⁴ Similarly, there are no provisions in the Insolvency and Bankruptcy Code (IBC) which addresses how the bankruptcy process affects arbitrations.

In circumstances of insolvency, the Act places a great deal of responsibility on the receiver to decide whether to resort to arbitration or not. Thus, any business contract that includes an arbitration clause may be enforced against the insolvent party in the event of a dispute if it is adopted by the receiver in its entirety. Receivers are not allowed to accept only a portion of the agreement and reject another section. To ensure that the outstanding debt is paid, the court appoints a receiver to seize and sell the assets covered by the security agreement. Provisions in an arbitration agreement concerning the insolvency of parties are expounded upon in Sec. 41 of the Act. An arbitration agreement does not automatically become void if any of the parties to it become insolvent. It will rely on the circumstances and the receiver's acceptance of the contract. This section is read in conjunction with the provisions of the IBC. According to the Code, an Arbitral Tribunal may continue with ongoing arbitration proceedings even after applying to initiate CIRP against the Corporate Debtor (CD) while it is awaiting admission. The Indian judiciary has made it clear that until CIRP proceedings are admitted, party would have access to their rights and remedies.

Insolvency law is a self-contained benefit legislation that was developed with the purpose of reducing distressed assets in a time-bound way and providing for the maximization of the value of the CD's assets, whereas arbitration law prioritizes party liberty. The Indian courts have addressed in cases like *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund*⁵ and *Jasani Realty (P) Ltd. v. Vijay Corpn.*,⁶ the distinction between submitting a petition to initiate

⁴ WEBNYAY, <https://www.webnyay.in/blog/41>, (Aug 15 2024)

⁵ *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund*, (2021) 6 SCC436, para 26.

⁶ *Jasani Realty(P) Ltd. v. VijayCorp.*, 2022 SCC OnLineBom 879, paras 17 and 21.

CIRP and having it admitted. Once it has started, the CIRP cannot be arbitrated, at least not while the insolvency resolution procedure is ongoing. The moratorium order is in effect until the CIRP is finished.⁷

According to the ruling in *P. Anand Gajapathi Raju v. P.V.G. Raju (Dead)*⁸, Section 8 of the Act is preemptive, which means that the court must refer the parties to arbitration in line with the terms of the arbitration agreement if there is an arbitration agreement in place and the subject matter of the dispute before the court is the same as the subject matter of the arbitration agreement. According to Sec. 40 of the Act, an arbitration agreement remains enforceable by or against the deceased's legal representative in the event that any party dies without fulfilling their obligations under it, either with regard to the deceased or with respect to any other party.

In *Canara Bank v. Deccan Chronicle Holdings Ltd.*,⁹ it was held that the prohibition under Section 14 of the Insolvency and Bankruptcy Code (IBC) does not extend to Articles 32, 136, and 226 of the Indian Constitution. The court clarified that the moratorium does not limit the High Court's powers under Article 226. Furthermore, any ongoing proceedings before the Supreme Court under Article 32, or orders issued under Article 136, will not be impacted by the moratorium.

SIMULTANEOUS INSTITUTION OF INSOLVENCY AND ARBITRATION

Both the Act and the Code are special laws for different specific purposes. One of the main reasons of clash in opting for arbitration over insolvency is because of the intention behind the imposition of moratorium and the CIRP process under the Code. The goal of the moratorium, according to the 2015 Report of the Bankruptcy Law Reforms Committee is to establish a "calm period" during which the business debtor's worth is maximized while its viability is being evaluated as part of the insolvency resolution process.

The Supreme Court of India ruled in *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407¹⁰, that the moratorium was meant to provide debtors a "breathing spell" so they may reorganize their companies. The question that arises, though, is whether the corporate debtor

⁷ Alipak Bannerjee and Payel Chatterjee, *The arbitration and insolvency collision: the Indian Perspective*, IBANET (Aug 15, 2024), <https://www.ibanet.org/arb-insol-india>.

⁸ *P. Anand Gajapathi Raju v. P.V.G. Raju (Dead)*, (2000) 4 SCC 539

⁹ *Canara Bank v. Deccan Chronicle Holdings Ltd*, 2017 SCC OnLine NCLAT 255.

¹⁰ *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, para 14

or debtors should enjoy complete immunity during this "calm period." In resolving a dispute between the overriding effect under Section 238 of the IBC and the non-obstante clause (a statutory provision intended to give an overriding effect over other provisions or enactments) under Section 5 of the Arbitration Act, the Supreme Court ruled that, because both are special statutes, the later-enacted statute will take precedence. Sec. 5 states that, "*notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part*". Again, Section 238 states that, "*the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*" The supreme court makes it clear that a disagreement cannot be arbitrated after insolvency procedures are accepted.

- **Arbitration in Insolvency cases**

When the receiver has elected to adopt the contract, he may enforce any arbitration clause made before to an insolvent order and following the start of the insolvency proceedings. Furthermore, the NCLT would not need to be consulted for approval by the receiver or insolvent parties. The receiver managing the insolvency would take over the insolvent party or corporation if the receiver approves the contract and moves forward with the arbitration. The opposite party may seek to the NCLT to have a referral to arbitration if the recipient decides not to accept the contract. If the receiver has opted to adopt the contract, the arbitration clause, which refers to future disputes and differences, may be enforced by or against the receiver if it is entered after the start of the insolvency proceedings but before the insolvency order is passed. In this scenario, the parties to the arbitration agreement would proceed with the arbitration matter without the need for NCLT consent. Every time a disagreement emerges, the arbitration clause may be enforced against the insolvent party if the receiver accepts the contract including it. Only if the contract benefits the insolvent company, the receiver can accept it.

An ongoing arbitral proceeding has the authority to terminate an insolvency proceeding initiated by operational creditors. When a corporate debtor is informed of a default by an operational creditor, the debtor has ten days to show that there is a disagreement. Legal actions or arbitration pertaining to the presence of debt, the caliber of products or services, or the violation of a warranty or representation are all considered disputes under Section 5(6) of the Insolvency and Bankruptcy Code (IBC).

However, once liquidation is initiated, the legal framework shifts. The appointment of a liquidator prohibits the corporate debtor from filing or continuing lawsuits or legal actions against itself during the liquidation process. In spite of this, the liquidator may bring legal action on behalf of the corporate debtor with prior consent from the National Company Law Tribunal (NCLT). Therefore, continuing legal activities, including arbitration processes, are not inherently forbidden during a corporate debtor's liquidation.¹¹

The Supreme Court ruled in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*,¹² that the adjudication and enforcement procedures offered by other laws cannot be circumvented through bankruptcy proceedings pertaining to operational creditors. In a similar vein, the Court determined in *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*,¹³ that the filing of a claim under Section 9 of the Insolvency and Bankruptcy Code (IBC) is prohibited if an arbitration process is ongoing because it meets the criteria for a pre-existing dispute under Section 8 of the IBC. Additionally, in *Pramod Yadav v. Divine Infracon Pvt. Ltd.*,¹⁴ it was determined that a petition under Section 9 of the IBC becomes inadmissible once arbitral proceedings have commenced under Section 21 of the Arbitration and Conciliation Act.

In *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors.*,¹⁵ the issue was that since the Power Purchase Agreement (PPA) was the only thing keeping the Corporate Debtor afloat, terminating the PPA in light of the insolvency proceedings against the CD would have amounted to the Corporate Debtor's commercial death. In this case, the NCLT and the Supreme Court clarifies that IBC would prevail over other laws to the extent of the inconsistency.

- **NCLT's Role and Overriding Effect in Permitted Arbitration**

The NCLT will have the exclusive authority to determine whether arbitration should be used to resolve the parties current disagreement. If an arbitration agreement is made before the insolvency procedures start, the receiver will have to decide whether to accept it. If the receiver declines to accept the contract, the party may file an appeal with the NCLT. Therefore, under the IBC, the presence of a dispute before or after insolvency procedures begun is taken into

¹¹ Alipak Bannerjee, Payel Chatterjee, *The arbitration and insolvency collision: the Indian Perspective*, IBANET (Aug 17 2024), <https://www.ibanet.org/arb-insol-india>

¹² *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*, AIR 2017 SC 4532

¹³ *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*, Civil Appeal No. 21825 of 2017.

¹⁴ *Pramod Yadav v. Divine Infracon Pvt. Ltd.*, 2017 SCC OnLine NCLT 11263.

¹⁵ *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors.*, [C.A. No. 9241/2019]

consideration and evaluated for an application for the CIRP. As a result, after the petition is granted, the next important step is to declare a moratorium in order to protect the corporate debtor's value. To use its overriding authority under Sec. 238 of the Code, it is crucial to adhere to this moratorium procedure and to make a public declaration of it in accordance with Sec. 13(1)(a) of the Code. This will stop any erroneous challenges that could result from a moratorium imposed by an arbitral tribunal and damage the debtor's worth.

If the NCLT allows arbitration, an arbitral tribunal will be formed, and it will employ the *Kompetenze Kompetenz*¹⁶ principle to rule on whether an insolvency petition is admissible. The remaining proceedings would proceed under the auspices of the arbitral tribunal after the tribunal determines that the petition is admissible, at which point the NCLT would proclaim a moratorium. Lastly, the NCLT's involvement would be essential once more in the post-award phase when the duly passed award, which included the approved resolution plan, would be granted appropriate enforcement in accordance with Sec. 31 of the Code.¹⁷

- **Prohibitions on Arbitration in Insolvency Proceedings**

If the arbitration agreement is entered after the date of insolvency order, then it shall be void. Any arbitration agreement entered by an insolvent party cannot bind the opposing party after the company is declared insolvent. The party seeking arbitration may petition to the NCLT to persuade the other party to initiate an arbitration procedure if the recipient decides not to accept the contract that contains the arbitration clause. If the disagreement should be resolved through arbitration, the NCLT alone will make the decision, taking the circumstances into consideration. Considering this, the NCLT will issue an order. The receiver will not be impacted if the arbitration agreement mentions submitting ongoing issues to arbitration.¹⁸

The parties may bring a civil lawsuit against the receiver if the NCLT or NCLAT orders that an arbitration agreement not be considered due to the circumstances of the insolvent company. As a result, the resolution of insolvency proceedings is impacted by an existing arbitration agreement. If the insolvency resolution proceedings culminate in an order of winding up or

¹⁶ a legal body such as courts or arbitral tribunal may have competence or jurisdiction to rule as to the extent of its competence on an issue before it.

¹⁷ Yashaschandra Devarakonda, Sushmit Manda, *Insolvency Arbitration : Dawn of a New Era in India*, IRCCL (Aug 27, 2024), <https://www.irccl.in/post/insolvency-arbitration-dawn-of-a-new-era-in-india>

¹⁸ Mr. Kartikeya Awasthi, *Insolvency of Parties and Impact on Arbitration Part 1*, VIAMEDIATIONCENTER, <https://viamediationcentre.org/readnews/MTAwOA==/Insolvency-of-Parties-and-Impact-on-Arbitration-Part-1>

liquidation being passed against the company, then it will not be entitled to continue the arbitral proceedings through its former management.¹⁹

In the case of *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund*,²⁰ where the issue was referred to the NCLT, it consented to send the case to arbitration when the proper course of action would have been to investigate whether Indus had defaulted then move on with the CIRP or dismiss the case. It was a default in this case for the NCLT to dismiss the Sec. 7 application under the IBC because the Sec. 8 application under the Act was still pending. The judgment in the Indus case clarified that disputes become non-arbitrable only after the admission of the Corporate Insolvency Resolution Process (CIRP) application. The *Emaar MGF*²¹ case further emphasized that the National Company Law Tribunal (NCLT), as a judicial authority, cannot refer insolvency and winding-up cases to arbitration. This is because the Insolvency and Bankruptcy Code (IBC) is a special legislation specifically designed for such matters and takes precedence over any conflicting laws, as outlined in Section 238 of the Code. In *K Kishan v. M/S Nirman Company Pvt Ltd.*,²² an award was passed concerning an insolvent party and was challenged under Sec. 34 of the Act. The Supreme Court decided that pending Sec. 34 application is the existence of disputes and hence barred from initiating CIRP.

STAGES OF ARBITRATION AND IMPACT ON INSOLVENCY

Arbitral tribunals in India are not permitted to decide cases involving rights in rem, such as winding up or insolvency. However, since the recent ruling in Indus Biotech, this position has been modified. The court determined that CIRP can be divided into “pre” and “post” Committee of Creditors (CoC) formation phases, with the post-CoC formation phase posing the only non-arbitrability issue due to the existence of in rem rights.²³ An application under Sec. 8 of the Act was denied in oppression and management cases under the Companies Act, 2013 in the case of *Haryana Telecom v. Sterile Industries*²⁴ because the issue involved a right in rem. Consequently, it is sufficiently evident that the application may be denied due to the

¹⁹ Pradeep Nayak, Sulabh Rewari, Vikas Mahendra and Vaishali Movva, *Arbitration Procedures and Practice in India: Overview*, UKPRACTICALLAW (AUG 24, 2024), [https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true).

²⁰ *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund*, (2021) 6 SCC 436

²¹ *Aftab Singh v. Emaar Mgf Land Ltd.*, 2017 SCC OnLine NCDRC 1614.

²² *K Kishan v. M/S Nirman Company Pvt Ltd*, Civil Appeal No. 21825 of 2017

²³ Yashaschandra Devarakonda, Sushmit Manda, *Insolvency Arbitration : Dawn of a New Era in India*, IRCCL (Aug 27, 2024), <https://www.irccl.in/post/insolvency-arbitration-dawn-of-a-new-era-in-india>

²⁴ *Haryana Telecom v. Sterile Industries*, (1999) 5 SCC 688)

non arbitrability of the class of conflicts. Thus, the stages in an arbitration proceeding and its effect in case a moratorium is imposed on either party are stated below.

- **Ongoing Arbitration Proceedings:**

Section 14 of the Insolvency and Bankruptcy Code (IBC) imposes a moratorium that prohibits the initiation or continuation of legal suits, the execution of judgments, the transfer or disposal of assets, recovery efforts, the enforcement of security interests, and any actions under the SARFAESI Act, 2002, against the corporate debtor. This moratorium also includes a suspension of arbitration proceedings. In the case of *Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan (P) Ltd.*,²⁵ the Supreme Court of India examined the impact of the moratorium on arbitration. The Court clarified under Section 14(1)(a) that initiating or continuing legal proceedings, including arbitration, against the corporate debtor during the moratorium is prohibited. Additionally, the Court ruled that any arbitration proceedings started after the issuance of a moratorium order are invalid.

- **Pending Arbitration Proceedings:** The NCLAT in *K.S. Oils Ltd. v. State Trade Corpn. Of India Ltd.*,²⁶ stated that during the moratorium, the arbitral processes that were ongoing on the day that CIRP began cannot be continued.
- **Arbitration proceedings started following the imposition of a moratorium:** Arbitration proceedings are *non-est* in law when they are started after a moratorium has been imposed. The continuation of arbitration proceedings that were started after the declaration of moratorium may be contingent upon the nature of the claims, whether they are intended to maximize the value of the CD's assets or to pursue debt collection against the CD.
- **Arbitration invoked for value maximization of assets:**

After analyzing the purpose of Section 14, the Delhi High Court concluded that it does not apply to proceedings that benefit the corporate debtor (CD), particularly if those proceedings are debt recovery actions that do not endanger, reduce, deplete, or

²⁵ Asset Reconstruction Co. Alchemist. Ltd. v. Hotel Gaudavan (P) Ltd., 16 SCC 94, para. 5 (2018).

²⁶ S. Oils Ltd. v. StateTrade Corpn. of India Ltd, 2018 SCC OnLine NCLAT 352, para 14

otherwise affect the CD's assets. In one case, the Court chose not to stay the enforcement of an award in favor of the CD, as doing so would have delayed the recovery of funds.²⁷ This indicates that not all proceedings are restricted by the moratorium under Section 14(1)(a). However, in *Power Grid Corp. of India Ltd. v. Jyoti Structures Ltd.*²⁸, the Delhi High Court clarified that the term "proceedings" in Section 14(1)(a) is not preceded by "all," meaning the moratorium does not apply to every proceeding against the CD. Proceedings that benefit the CD are exempt from the restrictions of Section 14 of the Act.

- **Pre-award stage:** It is the phase in which the arbitration is still in progress but the verdict has not yet been made. There can be claims and counterclaims made by and against the CD in this situation. In *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd.*,²⁹ determining whether a counterclaim in an arbitration might move forward during the moratorium period fell to the NCLAT. The NCLAT ruled that the creditor's counterclaim would be considered as a procedure against the CD and, as such, come under the purview of Sec. 14 embargo. Even during the moratorium period, the CD's counterclaim could still be heard by the Arbitral Tribunal. NCLAT went on to say that despite the moratorium, the claim and counterclaim should be heard and decided. However, as no recovery is possible while the moratorium is in effect and that Sec. 14 of the Code would apply if the CDs were ordered to pay damages or any other sum. Therefore, Sec. 14(1) may not apply to arbitrations involving claims and counterclaims made by and against a CD during the pre-award phase. Depending on the decision made during the proceedings, the moratorium can be implemented. The moratorium will apply to prevent any financial or other recoveries in the event that the CD is not awarded a favorable outcome.
- **Post-award stage:** It is the stage where the arbitration proceedings have ended and the award is passed. The award may be challenged under Sec. 34(2) or Sec. 36 of the Act. Therefore, challenges to an arbitral ruling might only be allowed to proceed if the CD wins the case or if carrying out the processes won't negatively impact the CD in any way. In *Jharkhand Bijli Vitran Nigam Ltd.* case, according to the NCLAT, an arbitral

²⁷ Power Grid Corp. of India Ltd. v. Jyoti Structures Ltd., 2017 SCC OnLine Del 12189.

²⁸ *Ibid*

²⁹ *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd.*

award made against a CD is regarded as a default under IBC. In *K. Kishan v. Vijay Nirman Co. (P) Ltd.*,³⁰ the Supreme Court of India held that while arbitral awards are valid proof of debt, operational creditors cannot initiate a CIRP unless they are uncontested. According to the research above, Indian courts tend to limit the CD's capacity to take on new obligations and liabilities.

- **Proceedings contesting an arbitral decision:** It is crucial to understand how proceedings contesting an arbitral award can impact insolvency proceedings under the Insolvency and Bankruptcy Code (IBC). Operational debts can only trigger insolvency proceedings if they are uncontested. In *K. Kishan v. Vijay Nirman Company Ltd.*, The Supreme Court ruled that arbitral awards cannot be regarded as final because they are susceptible to dispute or set-aside. As long as the proceedings contesting the award remain unresolved, the associated debts are considered disputed. Therefore, such contested debts cannot be used to initiate insolvency proceedings under the IBC until the relevant court has made a final determination on the arbitral award.³¹
- **Initiation of insolvency proceedings and enforcement proceedings in respect of an award:**

An award-holder generally has the discretion to either file for insolvency against the award-debtor or seek enforcement of the arbitral award under the Arbitration Act when the debt remains unpaid, and the arbitral award has not been set aside and has become final. This choice rests solely with the award-holder. Therefore, if the award-holder opts for insolvency proceedings instead of enforcing the award, this decision cannot be challenged, as it falls within their legal rights to choose the most suitable course of action.³²

The award-holder may justify the decision to initiate insolvency proceedings based on the debtor's inability to settle its debts. The Insolvency and Bankruptcy Code (IBC) does not prohibit an award-holder from choosing insolvency over enforcement in such

³⁰ *K. Kishan v. Vijay Nirman Co. (P) Ltd.*, (2018) 17 SCC 662

³¹ Civil Appeal No. 21824/2017

³² *M/s Ugro Capital Limited v. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd.*, Company Appeal (AT) (Insolvency) No. 984/2019

circumstances. By initiating insolvency, the award-holder aims to compel the award-debtor to settle and pay the amounts awarded.³³

However, the National Company Law Appellate Tribunal (NCLAT) has observed that initiating insolvency proceedings solely based on an arbitral award, when it serves as a method of coercion to recover the debt rather than seeking the appropriate enforcement through a court, may be prohibited under Section 65 of the IBC. This section restricts actions that are deemed as fraudulent or malicious initiation of proceedings under the Code.

- **Claims in arbitration proceedings by the insolvent company:** An insolvent business may initiate or pursue claims against other parties, but it is not permitted to initiate or pursue arbitration procedures against such a business. In cases when an arbitration involving an insolvent company involves both the company's claims and counterclaims against the company, the Resolution Professional may pursue the claims before the arbitral tribunal, while the Code will bar the counterclaims or vice versa. In *P. Mohanraj and Ors. v. Shah Brothers Ispat Pvt. Ltd.*, Civil Appeal No. 10355/2018, the Supreme Court of India explained that it would be a misreading of the Insolvency and Bankruptcy Code (IBC) to permit claims and counterclaims to proceed in arbitration involving an insolvent corporation. The Court reasoned that such proceedings could result in an arbitral award against the debtor, leading to the depletion of the debtor's assets, which is contrary to the objectives of the IBC. This interpretation ensures that the moratorium under the IBC effectively protects the corporate debtor's assets during insolvency proceedings.

ARBITRABILITY OF INSOLVENCY DISPUTES

To grasp the concept of arbitration, it's crucial to understand which types of disputes can be arbitrated. Arbitration typically deals with rights in personam (against specific individuals) rather than rights in rem (against everyone). The Indus-Kotak case exemplifies this distinction.

In India, insolvency matters are generally not considered arbitrable because they affect multiple

³³ *Sushil Ansal v. Ashok Tripathi and Ors.*, Company Appeal (AT) (Insolvency) No. 452 of 2020; *Sh G Eswara Rao v. Stressed Assets Stabilisation Fund and Anr.*, Company Appeal (AT) (Insolvency) No. 1097 of 2019; *HDFC Bank Ltd. v. Bhagwan Das Auto Finance Ltd.*, Company Appeal (AT) (Insolvency) No. 1329 of 2019.

parties' rights. This principle has been established through several landmark cases, including *Swiss Ribbons Private Limited v. Union of India*;³⁴ *P. Anand Gajapati Raju v. PVG Raju*;³⁵, and *Booz Allen and Hamilton v. SBI Home Finance Limited*.³⁶

The Booz Allen case is particularly significant. In this ruling, the Supreme Court clarified that even when parties have agreed to arbitration, the court handling the case won't refer them to arbitration under Section 8 of the Arbitration Act if the dispute isn't arbitrable by nature. The court specifically declared that insolvency and winding-up proceedings are not suitable for arbitration.

The courts have allowed arbitration proceedings to continue as long as they enhance the value of the corporate debtor's assets, benefit the debtor, and do not harm its assets. Even if the arbitration is allowed to proceed, no recovery can be made against the debtor while the moratorium remains in effect. In certain cases, courts have declined to postpone filings of claims or counterclaims against a corporate debtor until after it has been shown that the debtor did not experience any hardship. After the CIRP is successfully finished, the moratorium is lifted, and any pending legal actions that had been put on hold because of the moratorium order can be resumed. This is also the case when liquidation procedures start.

- **Parties to an Arbitration Filing Claims in CIRP**

The Insolvency and Bankruptcy Code (IBC) does not explicitly address claims arising from arbitration agreements. However, if a creditor's claim falls within the Code's definitions of financial or operational debt, it can still be presented to the Interim Resolution Professional (IRP). Although an arbitral award may be recognized as a debt, it generally does not qualify as "financial debt" under the Code, since the sums awarded are not amounts that were originally lent by the award-holder to the award-debtor. Rather, these amounts are determined by an arbitral tribunal and are classified as "operational debt" under the IBC.³⁷

If the IRP or Committee of Creditors does not consider such claims, the creditor can approach the National Company Law Tribunal (NCLT) to contest the non-inclusion of their claims. The NCLT may either accept or reject the plea, and if rejected, the claim will remain listed as a

³⁴ *Swiss Ribbons Private Limited v. Union of India*, WRIT PETITION (CIVIL) NO. 99 OF 2018.

³⁵ *P. Anand Gajapati Raju v. PVG Raju*, (2000) 4 SCC 539.

³⁶ *Booz Allen and Hamilton v. SBI Home Finance Limited*, AIR 2011 SUPREME COURT 2507

³⁷ *Sushil Ansal v. Ashok Tripathi and Ors.*, Company Appeal (AT) (Insolvency) No. 452 of 2020

pending dispute in the information memorandum. These unresolved claims are often included in the resolution process, but they are typically given little to no value. Alternatively, the resolution plan might contain provisions for terminating all pending litigation or dispute resolution claims upon completion of the Corporate Insolvency Resolution Process (CIRP).

The Supreme Court's ruling in the *Essar Steel*³⁸ case further solidified this approach, affirming that the successful Resolution Applicant assumes ownership of the corporate debtor without inheriting any prior liabilities. This ruling reinforces the notion that, post-CIRP, the corporate debtor emerges free from past obligations, including any claims arising from arbitration or pending disputes.

- **Determining Precedence in Insolvency and Arbitration Conflict**

The interplay between the Insolvency and Bankruptcy Code (IBC), 2016, and the Arbitration Act, 1996, raises important questions about which statute prevails in cases of conflict, both being special laws. In the *Kotak-Indus* case, the National Company Law Tribunal (NCLT) considered whether insolvency proceedings or arbitration should take precedence. The NCLT ruled that in the case of contractual disputes where an arbitration clause exists, arbitration would take precedence over insolvency proceedings. This decision was based on the principle that special law supersedes general law, with arbitration protecting solvent companies from unnecessary Corporate Insolvency Resolution Processes (CIRP).

However, in *ICICI bank Ltd v. ABG shipyard Ltd*,³⁹ where a conflict arose between Section 56 of the Electricity Act, 2003, and Section 14 of the IBC, the Supreme Court held that the IBC would prevail, as it was later in time and more specific to insolvency matters. This underscores that in cases of conflicting statutes, the IBC tends to take precedence when the matter involves insolvency, given its status as a more recent and specialized law.

Thus, in this case also, IBC will take precedence over the Arbitration Act. Determining Precedence becomes a central concern in the complex interplay between arbitration and insolvency. The conflict between the 1996 Arbitration and Conciliation Act and the 2016 Insolvency and Bankruptcy Code (IBC) is what creates this impasse. It takes a careful

³⁸ *Essar Steel India Limited v. Satish Kumar Gupta & Ors*(2019) SCC OnLine SC 1478.

³⁹ *ICICI bank Ltd v. ABG shipyard Ltd*, SCC OnLine NCLAT 30892 (2018).

examination of the substantive rights guaranteed by each statute, jurisdictional variations, and procedural complexities to navigate this legal conflict.

FINDINGS AND RECOMMENDATIONS

The intersection of arbitration and insolvency proceedings presents a complex legal landscape in India. The Arbitration and Conciliation Act of 1996 and the Insolvency and Bankruptcy Code of 2016 govern these processes, yet the lack of explicit provisions addressing their interaction leads to conflicts. The arbitrability of insolvency disputes is scrutinized, with an evolving stance allowing certain arbitration proceedings to align with insolvency objectives. The intricate interplay between these legal frameworks demands careful consideration of their nuanced provisions and procedural intricacies.

Empowering the NCLT with clearer guidelines on the interaction between arbitration and insolvency can enhance its effectiveness in managing such complex cases. Periodic reviews of the arbitrability of specific types of insolvency disputes should be done to ensure that the legal system adapts to evolving circumstances and complexities and awareness programs and educational initiatives for legal practitioners, arbitrators, and insolvency professionals should be conducted to understand the nuanced complexities of these legal domains. Also, the legislature can establish specialized courts or tribunals to handle disputes at the intersection of arbitration and insolvency to enhance efficiency and expertise in handling complex cases. Additionally, efforts should be made to harmonize laws related to arbitration and insolvency to ensure consistency and prevent conflicting interpretations. The legislature should consider amending the Arbitration and Conciliation Act, 1996, and the Insolvency and Bankruptcy Code, 2016, to explicitly address the interaction between arbitration and insolvency proceedings.

CONCLUSION

In the case of insolvency in India, the dispute is non-arbitrary as the rights in rem are in rem of a third party. The procedure of arbitration and insolvency are distinct and cannot be carried out at the same time. The dates of the arbitration agreement's formation, the phases of the award and the proceedings, the court appointed receiver's decision, and the National Company Law Tribunal's orders all have a major impact on the laws and procedures that apply to a dispute involving an insolvent party. The simultaneous pursuit of insolvency and arbitration

proceedings introduces a layer of complexity into the legal landscape. Parties must navigate the intricacies of arbitrability, potential stays, and the enforcement of arbitral awards in the context of insolvency.

According to the legal precedent outlined in the analysis above, arbitration proceedings against any CD cannot proceed after a moratorium has been placed on them, except for actions that are for the advantage of the CD. From the standpoint of a claimant in an arbitration procedure, who can be left without any recourse when an insolvency proceeding is initiated against a respondent in an arbitration proceeding, this leaves a lot to be desired. This contradictory result is not surprising considering the significant distinctions between insolvency and arbitration legislation. Therefore, it is imperative that the legislature address the practical and legal issues surrounding how insolvency affects arbitration proceedings. These issues include the enforceability of arbitration agreements, the treatment of pending versus post-insolvency arbitration proceedings, and the conduct of arbitration proceedings, among other things.