Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

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Reconciling Arbitration with Insolvency Proceedings

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Received 27 January 2023; *Accepted* 15 February 2023; *Published* 20 February 2023

In this day and age, bankruptcy and insolvency laws may be found in every country. Every State wants the bankruptcy and insolvency regulations that it has in place to be able to restore a damaged company's reputation. The regulations governing insolvency and bankruptcy need to be strengthened for the economy. The Insolvency and Bankruptcy Code ("the Code") that went into effect in India in 2016 makes an effort to restructure and revitalize firms. The Act has been revised in response to several different court judgments to accommodate expanding economies. The use of bankruptcy arbitration will not be prohibited even if the Insolvency and Bankruptcy Code is put into force. Due to court decisions, arbitration of bankruptcy disputes is not permitted in India, even though the arbitration industry there is continually expanding. Before moving on to explore India's Alternative Dispute Resolution (ADR) system implementation under the International Business Code, the authors move on to discuss the worldwide context for making use of alternative dispute resolution in situations involving bankruptcy. Corporate Debtors need to have the opportunity to make their own choice. There are now a variety of accessible and successful reorganizational options. Given the prevalence of arbitration in bankruptcy proceedings, debtors are free to avoid cross-procedures if they so want. Alternative dispute resolution is seen as improper in many nations because bankruptcy concerns include several parties, including creditors, borrowers, workers, and other individuals.

Keywords: *arbitration, insolvency proceedings, bankruptcy, corporate debtor, creditor.*

INTRODUCTION

With the development of new insolvency law in India, the relationship between arbitration and insolvency has recently taken on significant relevance.[1] Numerous arbitral cases have been halted as a result of the initiation of bankruptcy proceedings since there is no regulatory guidance on the matter. India is comparatively a newcomer to the list, even though certain nations have established a legal stance in this respect. With the passage of the Code, India's approach to insolvency experienced a radical transformation. Other than the implementation of a moratorium, there are no provisions in the Code that specify how the insolvency procedures may affect an arbitration. The Corporate Resolution Insolvency Process (CIRP) or liquidation under the Code is not specifically mentioned in the Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act").[2] These challenges will become increasingly more important as the globe struggles to deal with the rise of new business conflicts in the post-Covid age.[3]

The ability to participate in the insolvency resolution process, the impact of insolvency proceedings on a foreign seated arbitration, and the enforcement of an arbitral award in light of such proceedings are just a few of the many issues that parties are facing due to the lack of clarity regarding laws and judicial precedents. Both rules appear to be at odds with one another, and the point of junction is unclear. The conflict between these two approaches to dispute resolution has been succinctly described in a US court decision as "a conflict of near-polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach to dispute resolution."[4] Insolvency's implications on ongoing arbitration processes fully halt them in India, although they may also cause modifications in other countries.

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[1] Alipak Bannerjee & Payel Chatterjee, 'The arbitration and insolvency collision: the Indian Perspective' (*International Bar Association Blog*, 03 June 2021) <https://www.ibanet.org/arb-insol-india#_ednref6> accessed 25 January 2023

[2] Yasaschandra Devarakonda, Sushmit Mandal, Insolvency Arbitration: Dawn of a New Era in India, (The Indian Review of Corporate and Commercial Law, 27 March 2022) <https://www.irccl.in/post/insolvency-arbitration-dawn-of-a-new-era-in-india> accessed 25 January 2023

[3] Alipak Bannerjee (n 1)

[4] In *Re United Stated Lines Inc* 197 F.3d 631 (2nd Cir. 1999)

Code on Arbitration: The Code was developed to consolidate and modernize the laws relevant to company reorganization and bankruptcy resolution in a time-bound way to maximize the value of people's assets, foster entrepreneurship, and balance the interests of all stakeholders.[5] A corporate debtor that hasn't paid its creditors or a financial or operational creditor with unpaid debts of at least INR 1 crore[6], or USD 137,300, can start a CIRP.[7] CIRP is initiated by filing an insolvency application before a National Company Law Tribunal ('NCLT')[8], also known as the Adjudicating Authority (AA) under the Code.

If the NCLT finds a default in repayment of the debt, an Interim Resolution Professional (later replaced by Resolution Professional) will oversee the corporate debtor's operations throughout the CIRP period. After the declaration of a default, a public announcement[9] is made under the Code. Once a petition under the IBC is admitted against the Corporate Debtor, a moratorium follows in favour of the Corporate Debtor.[10] The moratorium under IBC kicks in on the Insolvency Commencement date and is in force till the Corporate Insolvency Resolution Process ('CIRP') period and during such period no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the Corporate Debtor. In *A. Ayyasamy v A. Paramasivam & Ors*.[11], India's Supreme Court ruled that "insolvency and winding-up issues" cannot be arbitrated. The moratorium will persist till CIRP is complete.[12]

Moratorium and arbitration: The execution of any judgment, decision, or order in any court of law, tribunal, arbitration panel, or other Authority is expressly prohibited by the moratorium, as is the creation of new lawsuits or the continuing of existing lawsuits or processes against the corporate debtor.[13] In India, the beginning of an insolvency case also precludes taking

[5] Insolvency and Bankruptcy Code 2016
[6] Insolvency and Bankruptcy Code 2016, s 4
[7] *Ibid*
[8] Insolvency and Bankruptcy Code 2016, s 7, 9, 10
[9] Insolvency and Bankruptcy Code 2016, s 13(1)(b)
[10] Insolvency and Bankruptcy Code 2016, s 14
[11] *A. Ayyasamy v A. Paramasivam & Ors* (2016) 10 SCC 386.
[12] Insolvency and Bankruptcy Code 2016, s 14(4)
[13] *K.S. Oils Ltd v The State Trade Corporation of India Ltd & Anr* Company Appeal (AT) (Insolvency) No. 284/2017

enforcement action. The legal rulings have made it clearer what is covered by the moratorium, including maximizing assets and protecting the corporate debtor's assets from damage.

Indeed, the Supreme Court ruled in *Alchemist Asset Reconstruction Company*[14] held that any arbitrations or comparable actions that are started after the CIRP has been initiated are deemed non-est in law. Even though there are no statutory exclusions, numerous exceptions to the general rule have been established by court decisions. The arbitration procedures may continue under the following conditions:

- they maximize the value of the corporate borrowers' assets, and
- they are advantageous to the corporate debtor and have no negative effects on its assets[15], or
- even if the case is allowed to go forward, no recovery can be made against the corporate debtor while the moratorium is in effect.[16]

Additionally, where it was shown that a corporate debtor did not experience any difficulties before the claims or counterclaims were decided, courts have declined to order a stay of the claims or counterclaims.[17] Once the CIRP is successfully finished, the moratorium is lifted, as well as the start of liquidation procedures, allowing pending legal processes that had been stopped due to the operation of the moratorium order to resume. If liquidation is started, the legal situation changes somewhat. A corporate debtor is prohibited from starting a lawsuit or other legal action while the liquidation process is ongoing once a liquidator has been appointed. However, with previous NCLT clearance, the liquidator may start a lawsuit or other legal action on behalf of the corporate debtor.[18] Therefore, in the case of the corporate debtor's liquidation, ongoing legal actions (which would include arbitration proceedings) are technically not blocked.

[14] *Alchemist Asset Reconstruction Company Ltd v Hotel Gaudayan Pvt Ltd.* AIR (2017) SC 5124
[15] *Power Grid Corporation of India Ltd. v Jyoti Structures Ltd.* 246 (2018) DLT 485
[16] *Jharkhand Bijli Vitran Nigam Limited v IVRCL Ltd. (Corporate Debtor) & Anr* Company Appeal (AT) (Insolvency) No 285/2018
[17] *SSMP Industries Ltd. v Perkan Food Processors Pvt. Ltd* CS (COMM) 470/2016 & CC (COMM) 73/2017
[18] Insolvency and Bankruptcy Code 2016, s 33(5)

The legislation does not distinguish between ongoing arbitration procedures and those that were started after the start of insolvency proceedings. It does not outline a precise legal process for getting beyond the moratorium the Code imposes on starting or continuing arbitration. However, an arbitrating party may be allowed to request continuation of the arbitration procedures if they can show that the arbitration was started to benefit the corporate debtor, to maximize the business debtor's assets, or in a way that would not adversely affect the corporate debtor's assets. The clarity in this regard would be provided by an NCLT decision. All India-seated arbitrations must follow the NCLT's moratorium judgment. An Indian party in bankruptcy may petition a foreign-seated arbitral panel to suspend an arbitration. A wide reading of Section 14 of the Code, which states "the establishment of actions or continuation of current suits or processes against the corporate debtor, including enforcement of any verdict, judgment, or order," would apply even in an arbitration with a foreign seat.

Since the award need not be tied to Indian law, it may not be harmful if it is applied to foreign assets (outside India) in a foreign arbitration. Therefore, such arbitral procedures may continue until the courts in the arbitration's seat accept insolvency proceedings. Section 234 of the Code requires India to inform territories that must reciprocate. If the tribunal disregards the NCLT's moratorium order, executing the judgment may be difficult, at least in India, because of public policy.

CIRP and arbitration: A debt as defined by the Code does not immediately apply to a claim that has been arbitrated by the arbitration agreement. However, the creditor may submit the claim to the interim resolution professional if it independently fulfills the criteria of "financial debt" or "operational debt" under the Code. The creditor retains the right to pursue legal action before the NCLT and challenge the claims' exclusion if such claims are not included in the settlement. The NCLT may decide to either accept the claim as a credit or refuse to accept the plea. If the NCLT maintains its stance that the claim is invalid, the information memorandum will reflect this as an ongoing disagreement. Claims of this nature are also referred to as pending litigation or disputes, and the investor has complete autonomy in determining how to deal with them (Resolution Applicant). The Resolution Plan may contain language stating that, following

completion of the CIRP, any ongoing litigation or conflict resolution claims will be cancelled, or in most cases, a value of zero will be given to such claims. This type of wording is not uncommon. According to the ruling that was handed down by the Supreme Court in the matter of Essar Steel, the successful Resolution Applicant is required to acquire control of the corporate debtor without having made any prior promises.[19]

Debt and arbitration award: Insolvency procedures may be started using an arbitral award, but the credit included within must be uncontested. In *K. Kishan v M/s Vijay Nirman Company*[20], the Supreme Court reaffirmed that although arbitral decisions are legitimate records of an operational debt, they must be uncontested for operational creditors to be allowed to initiate the CIRP. The Supreme Court declined to hear the case involving a corporate insolvency resolution process because (a) a counterclaim that exceeded the amount awarded had been rejected on the merits by the arbitral tribunal and that this rejection was subject to judicial review; and (b) a challenge had also been made to the arbitral award.

A foreign award must pass both the recognition and enforcement requirements under Part II of the Arbitration Act. The Indian Supreme Court has acknowledged in several judgments that there are many phases to a foreign award. In the first stage, the Court will assess whether the judgment is enforceable in light of Sections 47 and 48 of the Arbitration Act. After the foreign award is acknowledged, it may be handled as an operational debt if it is not contested throughout the enforcement process (if the award is contested during the enforcement process, it would become disputed). It would then move forward with taking additional effective procedures for the award's implementation after the enforceability of the foreign award had been determined.[21] However, the Mumbai bench of the NCLT took a different stance and held that enforcement of a foreign award is not necessary for successfully maintaining an insolvency claim against the corporate debtor in *Agrocorp International Private (PTE) Limited v National Steel*

[19] *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & Ors* (2019) SCC OnLine SC 1478

[20] *K. Kishan v M/s Vijay Nirman Company Pvt. Ltd and M/s Ksheerabad Constructions Pvt. Ltd.* Civil Appeal No 21825/2017

[21] *Fuerst Day Lawson Ltd v Jindal Exports (2001) 6 SCC 356; Government of India v Vedanta Limited & Ors* SLP (Civil) No 7172/2020

and Agro Industries Limited[22]. In this instance, the bankruptcy petition was admitted because the foreign award was not contested. According to the NCLT's reasoning, a foreign judgment is legitimate evidence of debt as long as it has reached finality in the place of arbitration. As a result, a foreign creditor may utilize a foreign award to start insolvency proceedings in India. A foreign award is genuine proof of debt that can be utilized by a foreign creditor to start insolvency proceedings in India as long as it has reached finality at the place of arbitration, according to one argument in favour of the ruling. It would be interesting to watch whether and how the National Company Law Appellate Tribunal ('NCLAT') handles any appeals against the NCLT's ruling.

Code and Arbitration Act: In a recent judgment, *Indus Biotech Private Limited v Kotak India Venture Fund-I*[23], the NCLT directed parties to arbitration while insolvency proceedings were pending and addressed the crucial question of which legislation would take precedence in a disagreement. The NCLT held that in the event of a contractual dispute between parties with an arbitration clause, arbitration would prevail over insolvency proceedings and prevent solvent companies from being subject to CIRP. The NCLT based this decision on the age-old principle of special law superseding general law. It has been common practice to file feigned insolvency petitions to delay arbitration procedures, hinder parties from deciding the issue, or as a pressure technique, however, doing so consistently may not always be effective. Due to conflicting decisions and the absence of a Supreme Court decision on the subject, the arbitrability of insolvency petitions continues to be a murky subject in India.

Although in this case the NCLT, the adjudicating authority, ordered the parties to arbitrate their problems, it is significant that the adjudicating authority did not rule that the Arbitration Act would take precedence over the IBC and noted that the law on this topic is res integra. The Arbitration Act could not take precedence over the IBC in the event of a conflict between the two Acts' provisions.

[22] *Agrocorp International Private (PTE) Limited v National Steel and Agro Industries Limited* CP (IB) No 798/MB/C-IV/2019

[23] *Indus Biotech Private Limited v Kotak India Venture Fund* (2021) SCC OnLine SC 268.

In the event of a controversy, the provisions of the IBC would take precedence over those of the Arbitration Act. The NCLT's decision in *ABG Shipyard Ltd v ICICI Bank Ltd*[24], which was rendered in Ahmedabad, supports this viewpoint. The adjudicating authority in that instance had to decide whether section 56 of the Electricity Act, 2003 would take precedence over section 14 of the IBC. Because both statutes are special laws and the IBC was passed later in time than the Electricity Act, the adjudicating authority determined that the IBC will take precedence over the 2003 Electricity Act. The Adjudicating authority had relied on the Supreme Court's ruling in *KSL And Industries Ltd v Arihant Threads Ltd*[25] to reach its conclusion. The Supreme Court had ruled in that case that "it is settled law that where there are two enactments approved by the Parliament, and if there is any provision in such Acts which is opposed to another, the provisions included in the Act which is later in point of time should prevail".

In the case of *Shalby v Dr. Pranav Shah*[26], a similar request for the NCLT Ahmedabad Bench to submit an ongoing bankruptcy petition to arbitration was denied, incurring significant fees for the petitioner. The arbitrator lacks jurisdiction over the subject matter of an insolvency petition, regardless of whether there is an arbitration clause in the parties' contract. The NCLT Ahmedabad rejected the argument that the insolvency resolution procedure is not a right in rem. The Adjudicating Authority would not be prevented from starting CIRP against the corporate debtor if there was an arbitration agreement between the parties if it was determined that there was a "default" as defined by section 7 of the IBC. Section 7 of the IBC would therefore take precedence over Section 8 of the Arbitration Act.

ARBITRATION AND UK INSOLVENCY

The connection between bankruptcy and commercial arbitration is important since the two fields seek two distinct, occasionally incompatible policy goals. Private contractual ties, party autonomy, and to a considerable extent, privacy, and secrecy are all issues that come up in commercial arbitration. Contrarily, insolvency is characterized by openness, binding law, and

[24] *ABG Shipyard Ltd v ICICI Bank Ltd* (2017) SCC OnLine NCLT 12031
[25] *KSL And Industries Ltd v Arihant Threads Ltd* (2008) 9 SCC 763
[26] *Shalby v Dr. Pranav Shah* (2018) SCC OnLine NCLT 137

the concentration of conflicting claims. Therefore, prospective or ongoing arbitration procedures may be affected by insolvency proceedings in a variety of ways. This covers matters such as the insolvent party's ability to arbitrate disputes, the legality of the arbitration agreement, and the acceptance of arbitral rulings by national courts. Depending on the law of the contract, the location of the arbitration, and the regulations that apply to the insolvency of the distressed or insolvent party, an insolvency will have a specific impact on arbitration proceedings.

The insolvency of a business partner remains a concern even in normal times, despite the coronavirus pandemic having a large negative impact on businesses in a variety of industries, both in the UK and abroad. Many nations have enacted fresh regulations designed to support companies in surviving the epidemic. The *Corporate Insolvency and Governance Act 2020 (CIGA 2020)*[27] and government financial aid to businesses are two examples of this in the UK. Due to the temporary nature of some of these measures, such as the current limitations on filing winding-up petitions and statutory demands that are set to expire on December 31, 2020, there are currently several businesses that are still operating but are in danger of going out of business once these restrictions end. As arbitration has become more and more popular as a method of resolving disputes, creditors have begun to wonder how they can assert claims against financially troubled and insolvent business partners in contracts that contain arbitration clauses. This is especially true in cross-border situations where the jurisdiction of the arbitral tribunal and the jurisdiction of the local courts overseeing the insolvency process may not be the same.

Insolvency before and during Arbitration: According to the regulations of the country where the bankruptcy procedures have been initiated, the precise repercussions of a party joining an insolvency process would differ. The Insolvency Act of 1986 (IA 1986), which is governed by English law, controls insolvency and its connection to arbitration and other forms of dispute resolution. An insolvent corporation may be the subject of the initiation or continuation of arbitration proceedings, subject to certain legislative limitations. For instance, when a party enters administration, a moratorium is automatically imposed that forbids the start or continuation of "legal proceedings" (which includes arbitration) against the firm without the

[27] Corporate Insolvency and Governance Act 2020

administrator's or the court's approval (IA1986, Sch B1, para 43(6)). In forced liquidation, a similar stay is applicable (IA 1986, s. 130(2)). A corporation may request an independent moratorium under IA 1986, Part A1 (added by CIGA 2020), which has a similar impact to the administrative moratorium if certain requirements are satisfied. Once more, the court's approval is necessary for the start or continuation of any "legal proceeding" against the firm. Contrary to administration, however, if a creditor is attempting to collect on a debt for which the firm has a payment holiday during the moratorium, the court cannot approve the start or continuation of a procedure. However, in the event of a member's voluntary liquidation or creditors' voluntary liquidation, there is no automatic suspension of arbitration procedures. On a party's request, the court has the option to issue a stay concerning certain proceedings (IA 1986, s 112). However, decisions made by national courts located outside of the arbitration venue are often not binding on arbitrators. They have the option to carry on with arbitration procedures elsewhere even if the national court in charge of the party's insolvency has ruled for a stay or one has already been imposed automatically. This was indeed a problem in *Syska (Elektrim SA) v Vivendi Universal SA and others*[28].

The specific set of factual and legal circumstances will have a significant impact on the outcome of the question of whether or not another party can take the place of an insolvent party in an arbitration case that has already begun. This is because these aspects will play a role in determining whether or not this is feasible. After one party in a dispute merged with another company and ceased to exist as a result of a reorganization plan, for example, the Indian High Court upheld the decision of an arbitral tribunal to replace one claimant with another. This decision was made in the case of *A v B*[29]. The decision was supported by the Indian High Court. The decision reached by the arbitral tribunal to substitute one claimant for another was made in this particular instance. The court concluded that the other company may participate in the arbitration instead of the original party since it had lawfully acquired the responsibilities that were outlined in the contract that contained the clause requiring the parties to submit to arbitration. substitute one claimant for another when the original party amalgamated with

[28] *Syska (Elektrim SA) v Vivendi Universal SA & Ors* (2009) EWCA Civ 677
[29] *A v B* [2016] EWHC 3003 (Comm)

another firm and ceased to exist as a result of a reorganization plan in India. The court determined that because the other firm had legitimately acquired the original party's duties under the contract that contained the arbitration provision, it may participate in the arbitration in place of that party.

ARBITRATION AND US INSOLVENCY

US federal courts must reconcile bankruptcy and arbitration legislation. Section 362 of the US Bankruptcy Code immediately stops pre-bankruptcy claims, including litigation.[30] The bankruptcy court has wide estate Authority. The FAA protects valid arbitration agreements.[31] The US Supreme Court has repeatedly affirmed the FAA's underlying principle, but it hasn't addressed the possible conflict between the two pieces of legislation if a party forms a legal and enforceable arbitration agreement and subsequently wants to reorganize under Chapter 11 of the US Bankruptcy Code.

Due to the automatic stay's applicability to all claims in a Chapter 11 bankruptcy process, a party wishing to begin arbitration procedures against a debtor must get judicial relief. A US bankruptcy court must decide whether a dispute is "fundamental" under US bankruptcy law before allowing arbitration under a valid and enforceable arbitration agreement.[32] A case is sometimes considered "core" if it involves rights under the US Bankruptcy Code. The Act's "core" items include orders to sell a property or recover fraudulent conveyances. If the issue is "non-core," focusing on the parties' business before bankruptcy, bankruptcy courts may lack the jurisdiction to prohibit arbitration under legitimate and enforceable arbitration agreements. A 2017 bankruptcy court judge in the case of insolvent brokerage company MF Global Holdings highlights this disparity.

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[30] Insolvency and Bankruptcy Code 2016, s 362

[31] Jon O. Shimabukuro & Jennifer A. Staman, 'Mandatory Arbitration and the Federal Arbitration Act' (*Congressional Research Service*, 20 September 2017) <https://sgp.fas.org/crs/misc/R44960.pdf> accessed 25 January 2023

[32] Leslie A. Berkoff & Theresa A. Driscol, 'To Enforce or Not to Enforce: What Test Should Courts Apply When Faced With Arbitration Agreements In Bankruptcy?' (2019) 28(4) Norton Journal of Bankruptcy Law and Practice

The bankruptcy plan administrator sued Bermuda-based insurer Allied World Assurance Company for excess errors and omissions coverage. Allied World asked Bermuda to arbitrate the issue under the insurance conditions. First, the bankruptcy court noted that the imprecise policy reflected the parties' desire to arbitrate policy-related conflicts. After determining that the clause was valid and enforceable, the bankruptcy court considered whether Congress intended for disputed claims to be arbitrable. To harmonize the FAA and US Bankruptcy Code, the court decided whether the issue included a "fundamental" problem. Despite involving the administration of estate assets and perhaps prior bankruptcy court judgments, the bankruptcy court ruled that the matter was "non-core," noting that the monies at issue were tiny and the dispute related almost completely to the parties' pre-petition relationship. It will be difficult for a party to arbitrate claims against a debtor in a US bankruptcy court, despite Allied World's victory. The bankruptcy court ordered MF Global Holdings to visit Bermuda to handle an insurance problem.

Allied World requested arbitration against MF Global Holdings after the main bankruptcy concerns were addressed, and the claims were quite modest. Arbitration isn't necessary because the US Bankruptcy Code gives the debtor a grace period. More stakes make it less likely to enforce an arbitration agreement. In this situation, parties must consider filing an adversary process in bankruptcy court to enforce claims.

ARBITRATION AND CROSS-BORDER INSOLVENCY

Insolvency law tends to intrude on other areas of law, both nationally and globally, based on the "asset value maximization" policy. About the resolution of claims through arbitration with an insolvent business, this contribution examines the effectiveness of creditor protection. In contrast to international arbitration, which is founded on the principles of "party autonomy" and "privity of contract," bankruptcy has a local pull and a single jurisdiction (except in situations of cross-border insolvency). According to this proposal, the arbitration agreement at such intersections should only be deemed unlawful when it is unavoidably endangered by bankruptcy proceedings.

International perspective:

Whether insolvency came before arbitration or the other way around determines the jurisdiction and maintainability of claims before an arbitral panel.

Situation 1: When the insolvency process started while the arbitration case was still pending:

In such a scenario, an examination of the economic laws of several states reveals that the arbitration processes are halted, and the arbitration agreement is rendered unlawful and invalid. However, the legislation at the national level in several different national legal systems has been updated in this area (Poland and Latvia). The section of the Polish Bankruptcy Code that had previously prohibited the continuation of arbitration procedures has been made useless by the new restructuring law that has been passed in the nation (Act of May 5, 2015). If a party to an arbitration agreement filed for bankruptcy before the modification, the arbitration agreement was dissolved on the day the bankruptcy was proclaimed by the provisions of Articles 142 and 147 of the Bankruptcy and Reorganization Law. This was the case even if the other party to the arbitration agreement did not file for bankruptcy. The arbitration processes in their entirety were likewise finished.

Arbitration procedures are required to be ex officio postponed once the bankruptcy petition has been filed or up to the appointment of the trustee of the bankrupt estate, whichever comes later. After that, the court continues the proceedings from the point where it left off and formally resumes them. The requirement that a creditor must first exhaust all available avenues before having their claim included on the list of claims prepared by the bankruptcy trustee has the potential to have an impact on the arbitration procedures that are initiated in such a scenario. The creditor is allowed to move on with the arbitration process if the claim is not listed on the list of claims that are maintained by the trustee of the bankruptcy.

Situation 2: When the arbitration procedures began while the insolvency processes were ongoing.

The arbitration agreement specifies the arbitral tribunal's subject-matter Authority. When international arbitration procedures are commenced for a party who is experiencing insolvency,

public policy considerations come into play. Because all procedures often halt at the start of insolvency in most national systems, such circumstances seldom arise in domestic arbitrations. In systems where arbitration comes before bankruptcy, the tribunal's Authority to decide the case brought before it is greater. In such cases, the tribunal's function and the trustee's/interdependence administrators are essential. In this situation, the Elektrim/Vivendi story is relevant. In the aforementioned instance, an LCIA Tribunal continued the arbitration against Elektrim even though a Swiss Tribunal declined to do so. Elektrim was at the time the subject of insolvency proceedings in Poland. Also upheld were both prizes.

Indian perspective:

The Code of 2016 makes no distinction between arbitration cases that have already commenced and those that begin after the insolvency processes have begun. Rather, it treats both types of cases in the same manner. The courts have stated that to avoid confusion, an arbitrating party may be able to successfully argue for the continuation of arbitration proceedings if it can be demonstrated that arbitration is initiated for the benefit of the corporate debtor, to maximize the debtor's assets, or that the arbitration proceedings will not adversely affect the corporate debtor's assets. In other words, the arbitrating party must be able to show that the continuation of the arbitration proceedings will not have an impact on the corporate debtor's assets. In other words, the courts have ruled that an arbitrating party may have a chance to successfully argue for the continuation of arbitration proceedings if it can be shown that arbitration was initiated to resolve a dispute. This can be demonstrated by showing that arbitration was initiated to resolve a dispute.

Scenario 1: Insolvency is undergoing in India by one of the arbitrating parties, who is Indian and has foreign-seated arbitration:

In such a case, the insolvent Indian party may petition the arbitral tribunal with a foreign seat and ask for a suspension of the arbitration. However, while a foreign award may not be related to Indian law and may be enforced against foreign assets, there is no prejudice against a foreign

award that is. This is predicated on the fact that India has not declared any reciprocating territories by section 234 of the IBC.[33]

Scenario 2: Claims filed in CIRP while concurrent arbitrations are ongoing:

No express prohibition against this exists. The concept of debt (financial or operational) under the Code does not apply to a claim made under an arbitration agreement. However, the claim might be presented to the resolution professional if it comes within the category of financial or operational debt on its own (or IRP as the case may be). If the IRP declines to include the claim, the creditor may appeal to the NCLT; if the NCLT likewise declines to include the claim, the claim will be listed in the information memorandum as a pending dispute. In such cases, the Resolution Applicant shall have sole discretion over the determination and handling of such claims. Such claims are often given no value, or the resolution plan will include a provision stating that following the conclusion of insolvency, all pending claims must be extinguished.

In this regard, the Hon'ble Court recently granted permission to an operational creditor of the corporate debtor to continue arbitration proceedings despite approval of the corporate insolvency resolution plan by the Committee of Creditors and the Apex Court in the case of *Fourth Dimension Solution Solutions Ltd. v Ricoh India Ltd*.[34], which was decided on January 21, 2022, by the Apex Court. The operational creditor's acknowledged claims were listed by the court as "Nil" with the following comment attached: "The FDSL claims have been contested and are currently being heard by the arbitrators or appellate Authority. The obligation is related to the outcome of these procedures".

In the matter of *K. Kishan v M/s. Vijay Nirman Company*[35], the Hon'ble Apex Court ruled that arbitral judgments constitute legitimate records of operational debt. The credit therein must be uncontested, nevertheless. The counterclaim that exceeded the claim awarded was rejected by the arbitral tribunal and was a subject of a challenge before the Courts in this instance, and a challenge was also made against the arbitral verdict, therefore the court declined to initiate

[33] Insolvency and Bankruptcy Code 2016, s 234

[34] *Fourth Dimension Solution Solutions Ltd v Ricoh India Ltd* Civil Appeal No 5908/2021

[35] K. Kishan (n 20)

CIRP. As a result, the CIRP was not started since the award was subject to challenge. Foreign awards may be considered operational debt once their enforceability has been determined (by sections 47 and 48 of the 1996 Act) and there has been no resistance to their execution. It is a legal axiom that in the absence of effective enforcement, debt does not serve as a liquid asset. Domestic creditors should treat the entity as they found it, with a range of rights and responsibilities, including the duty to arbitrate and manage debt effectively. However, it is a subject for domestic deliberation to object to the continuance or execution of arbitral rulings based on public policy.

The unwillingness to commence or continue arbitration procedures in this situation might be viewed as a breach of the *pacta sunt servanda* norm of international law. This is not only unfriendly to arbitration, but it can also be problematic because it has an impact on the arbitration agreement's validity, which blocks not only future arbitration proceedings but also ongoing arbitrations and post-arbitration actions for the recognition and enforcement of arbitral awards made by invalid arbitration clauses. The determination of the parties' rights, which occurs in arbitration processes, cannot possibly be replaced by the proceedings before the IRP because they are essentially summary in nature. It is nonsensical to hold up arbitration proceedings against a bankrupt corporation unless the arbitration agreement's legality on its face is in doubt.

SUGGESTIONS AND ROAD AHEAD

Arbitration is a complex and extremely subtle method of conflict resolution. Insolvency arbitration will eventually develop into its niche, enjoying the rewards of the arbitral system, much like other types of arbitration such as commercial, investment, marine, and sports arbitrations. It would also become a popular method of recovery for financially troubled corporations as a result, a specific effect that is made worse in the wake of COVID-19.

Unquestionably, the current CIRP under the Code lacks the convenience of control over the nomination of the arbitral tribunal through party-appointed arbitrators who would then designate a chair arbitrator. Furthermore, arbitration is practical for scheduling hearings at any

location and on any day agreed upon by the parties. Unlike CIRP, which has a deadline, arbitration offers a flexible approach. According to this framework, the date the award is rendered must be taken into account for the 330-day deadline outlined in the Code for the completion of the CIRP, which is comparable to the time-bound requirement that an arbitral award is rendered within a year under Section 29A of the Arbitration Act. Thus, the framework doesn't openly interfere with India's insolvency deadlines.

Confidentiality of the arbitral procedure is one key issue that requires in-depth study. While it is undeniable that maintaining confidentiality helps debt-ridden companies prevent further declines in market value, the requirement for mandatory public disclosure for the invitation to submit claims and the subsequent invitation to submit an expression of interest (EOI) appears to outweigh company preference. First, arbitral proceedings can be placed behind closed doors with a shroud of secrecy safeguarding the insolvent firm and its image from public focus and examination, which might lead to a two-pronged resolution of these ostensibly conflicting interests. Second, a well-known idea of redacted arbitral awards and arbitral papers would come to the rescue about the documents and, most importantly, the award itself. Importantly, rigorous secrecy terms about the corporate debtor's financials must be included in the arbitration agreement for respondents to EOIs.

Even though it might seem like the confidentiality of the arbitration alone would be a deal-breaker to persuade businesses to choose an arbitration-led CIRP over the one that is currently governed by the Code, it is important to keep in mind that the fundamental tenet of the entire framework is a very liberal interpretation of who gets to decide which in rem rights are covered by the CIRP. Indus Biotech shook up the conventional wisdom about the scope of arbitrability in insolvency in several ways. Therefore, while ambitious and liberal, the understanding that in rem rights are solely decided by the CoC, with little to no intervention by the NCLT except in the most extreme cases of irregularities, is quite necessary for arbitration to deal with insolvency in light of the rise in corporate insolvencies.

The Code was put on hold for a year starting on March 25, 2020, due to the introduction of Covid-19. With the suspension set to be removed, it will be fascinating to see how the

bankruptcy process after COVID-19 develops and how it affects arbitration cases. Despite the corporate debtor being saved, the arbitral proceedings' parties were effectively awarded nothing, leaving them with little recourse. If the law is not properly addressed, the number of cases where arbitral proceedings are compromised by the initiation of insolvency proceedings against the corporate debtor will rise as businesses fail as a result of the pandemic's effects. This will hurt investor confidence in the ability to enforce contracts and the convenience of conducting business in India.