Crossroads of Insolvency and Arbitration

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Editors' Note

Each year, a Special Issue of the *Comparative Law Yearbook of International Business* is published under the auspices of the Center for International Legal Studies. The 2022 Special Issue addresses the intersection of arbitration and insolvency. This junction has been made all the more topical and intense by the adverse effects of COVID-19 on a broad range of businesses' finances and supply chains, and by the still growing recourse to arbitration (and other forms of ADR) to resolve business disputes. A diverse pool of contributors gives a broad range of perspectives from Europe (Italy, Lithuania, The United Kingdom), the Middle East (Palestine, UAE), Asia (India), Africa (Malawi), North America (Canada) and public international law on several common issues posed when one or more parties to an arbitration (agreement) are faced with a financial crisis – or vice versa when an over-indebted party is expected to resolve claims that it has or faces, not in State courts but before 'private' adjudicators.

This Special Issue is aimed at bringing to fore the multitude of issues that exist at the convergences of the domains – a step towards better understanding the intricacies and the complexities that arise in different jurisdictions, and how stakeholders react. To highlight just a few of the aspects addressed:

- the law to be applied by arbitral tribunals in regard to insolvency issues;
- insolvency arbitrations and tax claims;
- how the representatives of bankrupt entities may participate in international investment claims;
- avoidance of transactions and anti-suit injunctions; and
- the uneasy but unavoidable cohabitation of insolvency and arbitration in the MENA Region.

Editors: Ishaan Madaan and Christian Campbell

Foreword

It would be a first statement to make that since the start of this century we have experienced a much greater financial volatility in a relatively short period of time: from the Asian financial crises, to Latin America to the financial crises in Europe.[1] To top these financial turbulences the COVID-19 pandemic added to the business uncertainty and with the consequence of several insolvencies with local, regional or international impact. At the same time the use of arbitration and ADR for the resolution of business disputes has been constantly increasing. Hence it comes as no surprise that arbitration tribunals encounter issues of insolvency more frequently than in the past. While the divergence of approaches is highlighted in the *Elektrim/Vivendi* cases in England[2] and Switzerland[3], the theoretical debate[4] and its practical impact is less than settled. This has prompted the International Bar Association to produce a toolkit on the issue of arbitration and insolvency.[5]

The main issue of tension is that insolvency is a fundamentally public process involving all creditors while arbitration is primarily bilateral and confidential. In addition, a public policy argument is also being made – insolvency should remain in the purview of national courts (although this argument does not fully address global or multi-jurisdictional bankruptcies). Of course, there is hardly an argument that arbitration should replace bankruptcy courts; a bankruptcy court has to distribute assets to creditors. This is not what an arbitration tribunal should aspire to do. The main issue from an arbitration prism is the fate of the arbitration agreement and the arbitration proceedings if one party becomes insolvent. Given that insolvency involves a range of situations where an insolvent party may not lose its legal personality and capacity, it may well be argued that the impact on

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1 In this respect see the QMUL and PwC survey which considers, in part, the impact of the financial crisis on arbitration: 2013 Corporate Choices in International Arbitration: Industry Perspectives - School of International Arbitration (qmul.ac.uk).

2 *Syska and another v. Vivendi Universal SA and others*, [2009] EWCA Civ 677, [2009] Bus. L.R. 1494.

3 *Elektrim v. Vivendi*, Decision 4A_428/2008 dated 31 Mach 2009, published in ASA Bull. 1/2010, 104ff. See, however, the different approach in Decision 4A_50/2008 dated 16 October 2012 (138 III 714), published in ASA Bull. 2/2013, 35.

4 A number of authors including Stefan Kröll, Vesna Lazic, Fernando Mantilla Serano, Manuel Penadez Fons, Stefan Riegler, and Philipp Wagner, to name but few, have produced substantial work on the topic.

5 IBA Toolkit, https://www.ibanet.org/MediaHandler?id=087B4D4A-B82E-4FAC-817F-64EE50091D66.

arbitration should be limited or negligible. Even where the insolvent party is represented by an administrator under certain circumstances the arbitration may proceed. Hence, in the last 20 years we have seen that a significant number of tribunals in various arbitral seats felt confident enough to proceed with arbitrations involving a party under bankruptcy protection or represented by an administrator. It seems that issue of arbitrability of disputes with insolvent parties is being gradually albeit reluctantly addressed in favour of arbitration. Still, several procedural and jurisdictional issues remain.

Against this background this volume is a joint venture of the Center for International Legal Studies and Arbinsol and is edited by Ishaan Madaan and Christian Campbell. It is a forward-looking collection of essays on the intersection or arbitration and insolvency. It offers a number of thoughtful and insightful contributions ranging from applicable law to regional and national perspectives (including Europe, Middle East, Africa, and the Americas), insolvency administrators in investment disputes as well as the role of tax authorities in such arbitration proceedings and the impact of the COVID pandemic.

I am impressed by the diversity or contributors and topics and most importantly by the quality of the chapters. I do commend the publication and the excellent work of editors and contributors. This volume makes a substantial and original contribution to the topic and hence I extend my warmest congratulations.

April 2022
Prof Loukas Mistelis

Preface

In a world of increasingly complex commercial transactions and investments, and volatile economic growth, arbitration and insolvency act as tools for the resolution of claims. The efficacy of these resolution mechanisms depends on a plethora of factors, and at times can result in conflicting – and often frustrating – scenarios, especially when insolvency and arbitration intersect. Insolvency law is a centralized, formalistic body of law. By contrast, arbitration is decentralized, contractual and party-autonomy based.

Since primary objects of insolvency include preservation of assets and maximization of their value, a pivotal method to achieve these ends is the abatement of claim proceedings against the entity undergoing insolvency. This naturally includes arbitration proceedings as well, including those commenced by creditors that are not subject to the domestic laws of the insolvent. The implications of an insolvency on an affected arbitration are so intricate that there is an impending need to decipher the various points of intersections and examine possible outcomes – both in a theoretical and in a practical sense. The insight into issues at the crossroads of insolvency and international arbitration is still underdeveloped.

In recent years, the dialogue around these issues has gained an audience. The onset of the pandemic disrupted economic order around the world. There were strict measures taken across the world to tackle its spread, and these inevitably resulted in lockdowns and slowdowns in trade and commerce. No wonder, the abilities to perform obligations were thwarted, and force majeure suddenly became the buzz term when the pandemic made landfall. The drought in cash flow and lack of liquidity inevitably pushed countless corporate entities to seek refuge under bankruptcy laws, and some were pushed towards the corporate death-knell by creditors. Many of those entities have been parties to arbitration proceedings or arbitration agreements.

On the one hand, there is the parties' promise to commit themselves to arbitration, and on the other hand, one of the parties finds itself entangled in the web of insolvency. In most jurisdictions, insolvency means a big pause to everything 'dispute resolution'. Triggers of insolvency, one might argue, would run contrary to the same entity's promise to arbitrate. One may have to look at the local laws of the struggling entity to figure out

whether or not it can be compelled to arbitrate. That may also conflict with the law of the arbitration agreement. Another question would be to see what happens to ongoing arbitration proceedings where a party is suddenly declared insolvent. The administrator of the estate finds itself confronted with a variety of issues to be addressed in terms of the law governing the insolvency process. The creditors are required to comply with the set of laws while asserting their claims, and the judicial body(ies) overseeing the insolvency process are to assist the process envisaged under the law. In a domestic scenario, it is easier to determine these issues; but in an international scenario – a conflict emerges between domestic laws and (in a majority of cases) the New York Convention. It does not just stop there. As we have seen in recent years, like in the *Herzig v. Turkmenistan* case (ICSID), insolvency of the investor opens doors to an array of issues in investment arbitration as well. The pandemic has necessitated a revision of the basic issues that arise in different jurisdictions, the implications thereof, and the consequences of these actions at various stages, including concerning those of temporal primacy.

The authors in the Special Issue were invited to address areas of commercial and business law at the crossroads of insolvency and international arbitration from an international comparative perspective. The chapters in this edition touch upon not just the basics of the 'crossroads' but dive deep into regional and international issues that arise at the junctures; and for various stakeholders. All this, while also sharing at length how these issues are handled domestically in national systems in Europe, the Middle East, Asia, Africa, and the Americas. Though conceptually, the issues still remain and are similar across these jurisdictions, there has been more than a single sighting of jurisprudential evolution with a flavour – at times – of a pro-arbitration response.

The worldwide readership may not only find answers to certain domestic issues at the 'crossroads' in some jurisdictions but also a jurisprudential understanding of a multitude of issues along the way. This includes, broadly, questions on applicable law, treatment of claims by revenue authorities, binding and non-binding nature of arbitration agreements, scope of avoidance powers of the insolvency administrator, as well as the handling of investment treaty arbitration instituted by an impecunious claimant.

The purpose of this book is not to provide a solution to the conflicts that exist at the convergences of the domains, but it is a step towards better understanding the intricacies and the complexities that arise in different jurisdictions and steps that stakeholders take or may take. This book is both a substantive as well as a comparative study of the variety of issues that

come to the fore and the juxtapositions that stakeholders find themselves in. We expect to periodically publish a revision of this understanding, with growing contributions from current and new authors.

Ishaan Madaan
March 2022, New York

Acknowledgements

We express our gratitude to each of the authors for their invaluable contributions, their support with the editorial process, and in converting this discussion into a publishable edition.

It is important to recap the journey leading to the conception of this edition. During my days as Professor Jan Paulsson's student, I wrote a paper on 'The Conflict Between International Arbitration and Domestic Insolvency' under his cherished guidance. The arbitration and insolvency conundrum, and the COVID-19 pandemic, lead to the founding of Arbinsol – a platform advancing research, dialogue and thought leadership on the interplay of International Arbitration and Insolvency. Arbinsol could not have been conceptualized without the meticulous academic support of my dear friend Professor P. Chauhan – Associate Professor at Jindal Global Law School and a contributor to the present edition.

It was the Center for International Legal Studies, Austria (CILS) – more specifically my co-editor Christian Campbell, and my mentor Professor John Rooney, who were the wind beneath Arbinsol's wings. Our collective efforts to expand dialogue on Arbitration and Insolvency was thoroughly supported by celebrated academics and arbitrators including Professor Loukas Mistelis, Prof. Dr Patricia Shaughnessy, Dr Francisco Reyes Villamizar, Kiran N. Gore, and Dr Kabir A.N. Duggal.

The onset of the pandemic – through early 2021 – saw several panel discussions and debates co-organized by CILS and Arbinsol on several aspects falling on the 'crossroads' of insolvency and arbitration. The growing importance of the contiguous issues weighed in on the importance of the present edition, to commence publication of research on the 'crossroads'. The editorial process was graciously assisted by the authors across a long-drawn and pandemic stricken process. The discussions regarding the contributions were had at many places and mustered critical analysis with the most generous support from my significant other.

It is with deep gratitude to family, friends in our ever-expanding yet well-knit community, and last but most, Christian Campbell, that I share our editorial work in what we believe will be an important step in commencing a structured and thorough dialogue on the 'crossroads'.

Ishaan Madaan

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Arbitration and Insolvency: A Conflict of Near Polar Extremes: Contrary Perspective

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Arbitration and Insolvency: A Conflict of Near Polar Extremes: Contrary Perspective

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Introduction

Arbitration and insolvency mechanisms are contrasting in nature and at conflict with each other. Reasons for the conflict are premised on the nature of the proceedings, which are in variance at core. Arbitration as a mechanism advocates for higher party autonomy with minimal to nil involvement of judicial institutions, and there is an aspect of privity, confidentiality, and privacy. Insolvency is a centralised mechanism and requires consolidation of all disputes concerning a debtor before an insolvency court, and it is open and transparent in character.

Practically, however, the conflict is less problematic; and there are possibilities of harmonising the two processes. Recently, scholars have challenged this theoretical conflict and have instead emphasised the increased use of arbitration during insolvency as it may further the objectives of insolvency.[1] It is reasoned that arbitration, as an alternate dispute mechanism, may contribute to insolvency as efficiently as it does to other civil disputes. It would not only reduce the burden on the insolvency courts and allow them to focus on the crucial issues emanating from or in relation to the insolvency process, but also promote party autonomy and re-enforce

1 *See* Paul F. Kirgis, *Arbitration, Bankruptcy and Public Policy: A Contractarian Analysis*, 17 Am. Bankr. Inst. L. Rev. 503 (2009); Stephan Madaus, *The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings*, Maxi Scherer (ed), Journal of International Arbitration (Kluwer Law International 2020, Volume 37 Issue 4) pp. 449—478.

sanctity of commercial contracts by allowing parties to resolve their disputes by and through their preferred mechanism for dispute resolution. We break down the issues and discuss them forthwith.

Understanding 'What' and 'Why' of the Conflict?

The conflict between arbitration and insolvency lies in the tension between the underlying policy objectives of these processes. Insolvency is meant to provide solutions to resolve defaults in ways that command the respect of majority of the debtor's stakeholders[2]. A process that maximises returns for the stakeholders – by maximising the value of the debtor and its assets – and showcases rationality in distribution, by way of ensuring optimum return to all the stakeholders, will best serve insolvency objectives. Such a process would incentivise either voluntary or compulsory collectivisation among the stakeholders. It would encourage stakeholders to recognise the need for a stay on individual enforcement action for the common good, such that not only the returns are maximised but also the interest of those stakeholders who stand lower in the hierarchy vis-à-vis formal creditors is also preserved.[3]

To achieve these objectives, insolvency legislations usually provides for an automatic stay on individual actions,[4] and require all the stakeholders to lodge their respective claims against the debtor in a consolidated process. On submission of claims, the process would be carried out with efforts being made to retrieve maximum value for the debtor and have the same distributed in a rational manner balancing the interest of all stakeholders.[5] In case of dispute during the process, the insolvency law requires it to be addressed exclusively by a specialised court dedicated to oversee such insolvency process. This would lead to consolidation of all disputes, against the debtor, before one forum, and help (a) maintain sanity of the insolvency process, (b) reduce the stress on the debtor, and (c) ensure

2 D.R. Korobkin, *Rehabilitating values: A jurisprudence of bankruptcy*, Columbia Law Review (1991), 91, p. 717, Value based theory.

3 Insolvency and Bankruptcy Regime in India —A Narrative, Insolvency and Bankruptcy Board of India, 2020, available at https://vidhilegalpolicy.in/wp-content/uploads/2020/10/2020-10-01-210733-43cms-9224c9b668aac0d6149a5d866bfb4c79-1.pdf.

4 Stay on both institution of new actions and continuations of pending actions so as to provide a 'calming period' to the debtor. *See* Indian Insolvency and Bankruptcy Code, 2016, s. 14; US Bankruptcy Code, 11 U.S.C. § 362(a).

5 *Binani Industries Limited v. Bank of Baroda & Anr*., NCLAT, Company Appeal (AT) (Insolvency) No. 82 of 2018; *In re Atlantic Computer Systems Plc*, Re (1992) 1 All ER 476, 501-2.

timely completion of the insolvency process. In essence, insolvency law considers it best that the jurisdiction of all other courts and forums remain barred during insolvency, and all matters pending insolvency are heard exclusively by one specialised and centralised forum.

Against this, arbitration law is based on the idea of party autonomy and providing parties a tool of alternate private dispute resolution, which is not only simpler and quicker, but also cost effective in resolving disputes in comparison to statutorily established courts.[6] It aims to give parties the control on their dealings and disputes arising out of it, by limiting the involvement of courts only at the stage of enforcement.[7] The arbitration policy requires that disputes that fall within the scope of the arbitration agreement be referred to arbitration only, and the jurisdiction of courts remains ousted.[8]

This party driven nature of arbitration is also attractive to global corporations as it enables them to move away from the unpredictable and lengthy court processes, and have their dispute resolved by mechanisms/ procedures which meet their needs. Economies too, in their bid to come across as business friendly, promote arbitration by providing for robust mechanism of recognition and enforcement of such arbitrations agreements and awards, and minimising judicial intervention. Judiciaries, as part of the larger scheme, also endeavour to enforce the arbitration clauses by referring parties to arbitration, thereby upholding party autonomy, than assuming jurisdiction themselves. This is one of the fundamental aspects of arbitration, and it is even recognised under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration which many jurisdictions, including India, has taken into consideration while framing their respective municipal laws. Consequently, the underlying principles of arbitration and the treatment, scope and import of several arbitration related aspects such as arbitration agreements, arbitral awards, among others, are in line with the Model Law.

It is this very principle of party autonomy in choosing the dispute resolution mechanism that conflicts with the insolvency policy objective of

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6 *See* Christian Buhring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in Towards a Science of Arbitration: Collected Empirical Research, Christopher Drahozal and Richard Naimark eds (Kluwer Law International, 2005), at 38.

7 Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Commercial Arbitration (4th Edition, Sweet and Maxwell, 2004), at 1.

8 The Right Hon. Sir Michael Kerr in Ronald Bernstein ed., *Handbook of Arbitration Practice* (Sweet and Maxwell, 1987), at 3.

consolidating all disputes before one court. In essence, it is the conflict of 'choice of forum',[9] wherein although parties have chosen to submit themselves to the jurisdiction of the arbitrator but the compelling interest of insolvency law is forcing them to submit to the jurisdiction of the insolvency court. Thus, in a situation wherein an insolvency proceeding is initiated against a party to the arbitration agreement, a conflict arises that whether the principle of party autonomy to have the dispute resolved through arbitration would subsist, or does it stand frustrated in terms of the bar under the insolvency law – thereby compelling the parties to submit their dispute to the insolvency court[10] – the 'WHAT' of the conflict.

This conflict, at times, is resolved by allowing the policy objectives of insolvency law to overpower the policy objectives of arbitration law, through the moratorium/stay provisions under the insolvency law. In other words, insolvency law is prioritised considering the possible implications that a continued arbitration would have on the recovery to be made by other creditors in the insolvency process. Thus, in case of an intersection between arbitration and insolvency, insolvency process would prevail over arbitration and over-ride the rights of a party claimant/defendant to contest/defend its claims in accordance with the dispute resolution mechanism chosen by, and between, the parties, and compel it to contest/defend the claim before an insolvency court created under the insolvency statute, having no relation to the dispute at hand.[11] In effect, what could otherwise been a private dispute between two parties, merely on acceptance of insolvency application, is transformed into an in rem proceeding – the 'WHY' of the conflict.

Solutions to the Conflict

Since both arbitration and insolvency flow from statute and have equal force of law, letting one overpower the other may not be the best solution to

9 Paul F. Kirgis, *Arbitration, Bankruptcy and Public Policy: A Contractarian Analysi,* 17 Am. Bankr. Inst. L. Rev. 503 (2009), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/125.

10 In the US, this 'conflict' between the two processes was extensively discussed in *Zimmerman v. Continental Airlines, Inc*., US Court of Appeals 3rd Circuit, 712 F.2d 55. (3rd Cir. 1983), cert. denied, 464 US 1038, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984). Here, Court concluded that policies of Bankruptcy Code 'impliedly modify' the policies of Arbitration Act and that the enforcement of arbitration agreements in a bankruptcy procedure was to be 'left to the sound discretion of the bankruptcy judge'.

11 *Larsen Oil and Gas Pte Ltd. v. Petropod Ltd.,* Singapore Court of Appeal (2011) 3 SLR 414 at 46.

the conflict.[12] Thus, it merits that efforts be made to find alternatives and to best harmonise the policy objectives of both arbitration and insolvency, so they can subsist together.

Although it is universally uniform that insolvency laws focus on centralisation of disputes upon commencement of insolvency proceedings, there are still some explored deviances, which may provide for a viable alternative to the conflict.

Distinction of 'Core' and 'Non-Core' Matters

Distinction between 'Core' and 'Non-Core' insolvency/bankruptcy[13] matters is prominent in jurisdiction such as the United States of America (US or USA). This distinction proposes to bifurcate between 'core' and 'non-core' insolvency/bankruptcy issues, and permit parties to 'non-core' issues to continue resolution of their disputes before other relevant fora, irrespective of the pendency of insolvency proceedings against the debtor. It considers that 'non-core' matters need not be exclusively adjudicated by bankruptcy courts, as adjudication by an external forum may not necessarily frustrate or jeopardise the bankruptcy process.

The US Court of Appeals in *Hays & Company* affirmed this understanding vis-à-vis arbitration proceedings. It observed that bankruptcy courts are 'to enforce such clause [Arbitration] unless that effect would seriously jeopardize the objectives of the Code [Bankruptcy].'[14]

However, what remained pivotal for this distinction is the US Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*.[15] In this case, arbitration policy was balanced against the competing interests of other statutes (like bankruptcy) by acknowledging that an exception to arbitration can be made where there exists a 'contrary congressional command' or 'intent'.[16] This test required the party opposing the enforcement of arbitration agreement to satisfy that there exists a contrary congressional command or intent which required creation of an exception to the enforcement of arbitration ('McMahon Test'). The court held that such a command or intent can be evidenced from:

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12 *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., U.S. Court of Appeals, 885 F.2d 1149, 1161 (3d Cir.1989).

13 The term 'Insolvency' and 'Bankruptcy' is used interchangeably in this part to refer to the collective process.

14 *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., US Court of Appeals, 885 F.2d 1149, 1161 (3d Cir.1989).

15 United States Supreme Court, 482 U.S. 220 (1987).

16 *Ibid*., at 226.

(a) the relevant statute's text;
(b) the relevant statute's legislative history; or
(c) the existence of an inherent conflict between arbitration and the relevant statute's underlying purposes.[17]

Since, in the US Bankruptcy Code or its legislative history, there is no express or implied exception to arbitration, the McMahon Test narrowed down to the examination of existence of 'inherent conflict' between arbitration and bankruptcy. The conflict, as highlighted above, does exist between the two laws as to whether compelling reference to arbitration of a dispute would jeopardise the underlying purpose of centralising all disputes before a bankruptcy court in the bankruptcy process.[18] Thus, in case the institution or continuation of arbitration would jeopardise the bankruptcy process, there exists an exception, and the dispute cannot be referred to arbitration, while, where it does not jeopardise, then there is no exception, and the parties must be compelled to arbitrate. This notion led to the conception of a distinction between 'core' and 'non-core' bankruptcy matters, with arbitration of 'core' matters being considered to be jeopardising the bankruptcy process,[19] while arbitration of 'non-core' matters not.[20]

However, what constitutes 'core' and 'non-core' remained contentious, since, drawing up an exhaustive list[21] of either of these matters was found

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17 *Ibid*., at 227.

18 *MBNA Am. Bank, N.A. v. Hill*, US Court of Appeals 2nd Circuit, 436 F.3d 104, 109 (2d Cir. 2006).

19 *In re White Mountain Mining Co*., US Court of Appeals 4th Circuit, 403 F.3d 164, 169 (4th Cir. 2005). Here, Court noted that permitting an arbitrator to decide a core issue would jeopardise the bankruptcy process as it would make debtor-creditor rights contingent upon an arbitrator's ruling.

20 *See* Marianne B. Culhane and Michaela M. White, *Enforcing (or not) Arbitration Clauses in Bankruptcy*, 1362 PRAC. L. INSTI. CORP. L. & PRAC. HANDBOOK SERIES 39, 48 (2003).

21 US Bankruptcy Code provides for a non-exhaustive list of 'core' matters under s. 157(b)(2), to include —

(A) matters concerning the administration of the estate;
(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;

difficult. 'Core' matters is broadly understood to be related to those issues that involve substantive rights,[22] arising from and under the Bankruptcy Code, or those that are central to a collective bankruptcy process such as matters related to adjudication of the insolvency itself, verification and priority of creditors' claims,[23] among others. While, 'non-core' matters usually arises outside the bankruptcy law and exist independently in as much as they could be agitated even if there is no bankruptcy processes.[24] They do, however, have an effect on the bankruptcy, for instance, debtor's contractual disputes or tax liability, but they are not central to the process or continuing arbitration in relation to them would not frustrate the bankruptcy process.[25]

Creating this distinction presents a persuasive method to minimise conflict between arbitration and insolvency, as all cases with 'non-core' issues continues to remain arbitrable, and only cases involving 'core' issues, critical to the process, remained under the exclusive jurisdiction of the insolvency court.

(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

22 *See Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp*. (In re Nat'l Gypsum Co.), United States Court of Appeals, Fifth Circuit, 118 F.3d 1056, 1062 (5th Cir. 1997).

23 *In re Lehman Bros. Holdings Inc*., U.S. Court of Appeals (2d Cir., 6 Oct. 2016).

24 *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., US Court of Appeals, 885 F.2d 1149, 1161 (3d Cir.1989), at 1156 n.9.

25 France applies similar approach in determining arbitrability of insolvency matters. It provides that issues that '*(a) do not arise from the opening of the insolvency proceedings; (b) which derive from agreements concluded prior to the insolvency; and (c) which would have occurred regardless of the insolvency'*, are arbitrable. *See* Veronika Timofeeva and Ketevan Betaneli*, Surviving COVID-19: Arbitrations involving insolvent companies,* FRESHFIELDS Bruckhaus Deringer, 1 April 2021, available at https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/surviving-covid-19-arbitrations-involving-insolvent-companies.

Distinction of In Rem and In Personam Matters: The *Erga Omnes* Test

Arbitration, being an alternate dispute resolution mechanism, requires voluntary submission. It emanates from the contract between the parties, and is thus, private. It is not to affect the interest of those who are not party to the arbitration agreement as it is mandated to regulate the affairs of only those who submit to its jurisdiction, i.e., *inter partes*.

These characteristics of arbitration indicate that arbitration would not be suitable, or be allowed, for those actions where rights and obligations in contention are owed to the world at large, i.e., in rem.[26] Otherwise, arbitration of such actions would result in unintended implications for the parties not before the arbitration. Due to this, globally, certain types of disputes remain excluded from the list of subject matter capable of arbitration. Insolvency and bankruptcy being an action in rem, requiring consolidation of all claims against the debtor and central adjudication of disputes in the interest of all stakeholders, to remain excluded from scope of arbitration, and lie within the exclusive jurisdiction of bankruptcy courts, whose jurisdiction at its core is in rem.[27]

Arbitration, thus, is primarily meant to adjudicate disputes that are in personam in nature, i.e., where a right is available/enforceable against a specific person or persons.[28] However, whether these in personam disputes would also include subordinate in personam disputes arising out of broader in rem actions remain a point of discussion.

Some jurisdictions, including US,[29] have explored these subordinates in personam disputes in relation to the larger in rem insolvency actions, and observed that subordinate disputes are also arbitrable.[30] In simple words, disputes emanating during the insolvency proceedings but having in personam character continue to remain arbitrable, even though the larger insolvency proceedings itself is non-arbitrable for being in rem. It essentially signifies that actions that would not create effect towards the world, *erga omnes*, will remain arbitrable, irrespective of the fact that it arises out of or during the pendency of insolvency proceedings. Thus, those in

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26 *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors*., Supreme Court of India, (2011) 5 SCC 532, at para. 23.

27 *Cent. Va. Cmty. Coll. v. Katz*, US Supreme Court, 546 U.S. 356, 362 (2006).

28 *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors*., Supreme Court of India, (2011) 5 SCC 532, at paras 22-23.

29 Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH.J. L. REFORM 175 (1978).

30 Sir Michael J. Mustill and Stewart Crauford Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001).

personam disputes that would have no effect on rights of other stakeholders in the insolvency, or prejudice their legitimate interest under the insolvency process, would continue to be arbitrable during insolvency. Such in personam dispute may include issues related to unsecured claims as they would not operate or create rights against the estate of the debtor.

Distinction Between Beneficial and Prejudicial Disputes

This distinction is in vogue in jurisdictions such as UK,[31] Singapore,[32] and India.[33] Under this distinction, proceedings that are in the interest of the corporate debtor or that may conclude improving the prospects of the corporate debtor are considered to be arbitrable, while those which are prejudicial to the value of the debtor or that may have impact on its estate are considered non-arbitrable.

This distinction upholds the core principle of insolvency law, i.e., to protect and preserve the value of the debtor such that the interest of its stakeholders, who have chosen to participate in a collective process by way of insolvency resolution rather than enforcing their individual actions, can be maximised. Continued adjudication of those disputes that may derive benefits to the debtor is in the interest of the stakeholders. It would help in maximising the value of the debtor that would in turn help in maximising the return to the stakeholders.

On the other hand, disputes that can be perceived to be prejudicial to the debtor's interest or its estate, in particular, for instance, disputes initiated against the debtor at the instance of the more aggressive creditors, would be contrary to this principle as it may cause dismemberment and disappearance of the estate. Continued adjudication of these disputes may expose the debtor to orders which may require payments to be made or assets to be disposed of or transferred to a third party, resulting in dissipating the overall value of the debtor or the asset available under the insolvency process.

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31 UK Insolvency Act 1986, Schedule 1 ¶ 6, '*Power to refer to arbitration any question affecting the company*.'

32 Insolvency, Restructuring and Dissolution Act 2018, ss 144(1)(e) and 378(b), and para. (e) of the First Schedule to the Insolvency, Restructuring and Dissolution Act 2018.

33 *See Power Grid Corporation of India v. Jyoti Structures Ltd*., Delhi High Court, (2018) 246 DLT 485; *SSMP Industries Ltd v. Perkan Foods Processors Pvt. Ltd*, Delhi High Court, 2019 SCC Online Del 9339; *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Limited & Anr*., NCLAT, Company Appeal (AT) (Insolvency) No. 285/2018, decided on 3 Aug. 2018.

Thus, in case of any challenge to reference to arbitration of a dispute, the critical determination would be whether the dispute at hand prima facie appears to be beneficial or prejudicial to the interest of the debtor. If it is found beneficial, then the challenge to arbitration would not sustain and the parties would be compelled to arbitrate.

The aforesaid approaches, individually, thus, present a viable alternative to address the conflict between the arbitration and insolvency. However, since, they may overlap at some points, a cumulative application of all on a case-to-case basis may also strengthen the efforts to minimise the conflict and streamline the policy objectives of arbitration and insolvency. However, in order to see how these approaches weigh in vis-à-vis the Indian insolvency regime, it merits that a reference be made to the legislative history of the Indian insolvency law.

Indian Insolvency and Bankruptcy Law: Past and Present

At present, insolvency and bankruptcy in India is regulated through and under the Insolvency and Bankruptcy Code, 2016 (IBC). IBC was promulgated finally in 2016[34] after a long and much-awaited decision that paved the way for a new insolvency paradigm in India. This IBC regime is much more carefully crafted as it is globally more outward looking and in tandem with the key parameters recognised universally to measure efficiency for resolving insolvency, i.e., time, cost, outcome, and recovery rate.[35]

The current Indian insolvency regime (IBC) makes a significant leap forward from the earlier law as it shows substantial improvement on all the aforesaid parameters. As a result, with the introduction of the IBC, India has moved considerably upward in the World Bank Ease of Doing Business Index, which measures a nation's efficiency in 'resolving insolvency' as one of the 12 areas of business regulation that 'encourages efficiency and supports freedom to do business'.[36] As per Doing Business 2020, the recent reforms in India, including the introduction of the IBC,

34 IBC was passed by Lok Sabha on 5 May 2016 and by Rajya Sabha on 11 May 2016. It received the assent of the President of India on 28 May 2016 and was published in the official gazette on 28 May 2016.

35 World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO, page 19.

36 *Ibid*., p. 3.

have resulted in a significant move upwards for India as being ranked from 130th in 2016 to 63rd in 2020.[37]

Failure of Pre-existing Legislations

The erstwhile insolvency and bankruptcy regime in India was severely plagued with inordinate delays and unintended outcomes. It failed to stand tall at any of the aforesaid parameters of time, cost, outcome, and recovery rate. It was characterised as a complex system with fragmented laws accompanied by an inadequate institutional set-up.[38]

Earlier insolvency regime was scattered under many laws. Personal insolvency was, and is to some extent even now, governed by and under the archaic Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The 26th Law Commission had suggested amendments in the year 1964, however, till date, even after a period of hundred years, nothing has changed in this space.[39]

For corporates, there was no law specifically dealing with insolvency and bankruptcy till 1985. Tiwari Committee (1981) acknowledged the vacuum in this area and recommended a legislative tool, namely, Sick Industrial Companies Act, 1985 (SICA). SICA was meant to identify the stress and then employ measures, including providing for stay on all proceedings against the industry, to revive them. However, SICA failed as (a) it allowed the debtor to be in control of the corporate even after it being adjudicated sick, (b) endeavoured to rehabilitate the sick corporate in all situations, even when there were negligible possibilities of revival, and (c) the tribunal set up to support SICA could not match with the increasing number of cases.[40]

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37 *Ibid*.

38 Rajeswari Sengupta, Anjali Sharma, and Susan Thomas, *Evolution of the insolvency framework for non-financial firms in India*, Indira Gandhi Institute of Development Research, Mumbai June 2016, available at http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf.

39 Government of India, Notification dated 15 Nov. 2019, notifying provisions of Part III of the IBC so far as they relate to 'personal guarantors to corporate debtors'.

40 *See Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors*., Supreme Court of India, (2016) 4 SCC 1. In this case, Supreme Court of India referred to Eradi Committee report wherein it was observed that out of 3068 cases referred to BIFR between 1987 and 2000, 2006 cases have been disposed of, out of which 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985.

Thereafter, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB')[41] and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI')[42] were enacted on recommendations of Narasimham Committee I[43] and II[44] respectively. However, severe difficulties existed even in these legislations[45] as instead of having one single statute consolidating all aspects of insolvency and bankruptcy of corporates, it provided for four different laws, namely, SICA, RDDB, SARFAESI, and Companies Act, 2013 governing different, though inter-related, aspects of the insolvency and bankruptcy of corporates. Each of these statutes further provided for creation of multiple fora such as Board of Industrial and Financial Reconstruction ('BIFR'), Debts Recovery Tribunal ('DRT'), and National Company Law Tribunal ('NCLT') and their respective Appellate Tribunals, including National Company Law Appellate Tribunal ('NCLAT'). This multiplicity of statute and fora led to a framework which was inadequate and ineffective, and resulted in undue delay.[46]

The Report of Bankruptcy Law Reform Committee (BLRC Report),[47] which paved the way for present IBC, also noted these shortcomings and observed that the existing law is a highly fragmented framework with powers of creditors and debtors under insolvency being provided for under different statutes. Existence of multiple forums to decide inter-related issues causes grave prejudice to the resolution framework and results primarily in two types of problems, namely:

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41 RDDB provided for setting up of the Debt Recovery Tribunals (DRT) and the Debt Recovery Appellate Tribunals (DRAT). These tribunals were intended to be specialised tribunals facilitating expeditious recovery of debt from the defaulters by banks and a defined set of financial institutions.

42 SARFAESI provided sweeping powers to the banks and financial institutions to recover against non-performing secured loans. Since the DRTs had not proved to be as effective in enabling recovery as expected, the SARFAESI provided an alternative route for recovery. SARFAESI allowed banks and FIs to take possession of the collateral security without court intervention.

43 Reserve Bank of India's Committee on the Financial System, under the chairmanship of M Narasimham, 1991.

44 *Ibid*., 1998.

45 The Supreme Court of India, in *ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors*., Supreme Court of India, Civil Appeal Nos. 9402-9405/2018 (decided on 4 Oct. 2018) ('***ArcelorMittal'***), observed that SICA and RDDB Act have completely failed, and that even though SARFAESI Act has recorded improvement in the amounts recovered as compared to other two enactments, yet it is inadequate.

46 Statement of Objects and Reasons leading up to the enactment to the IBC.

47 The Report of Bankruptcy Law Reform Committee Vol I: Rational and Design, Ministry of Finance, (Nov. 2015)**.**

(a) Where one forum decides on the issue relating to creditor in an insolvency, while the other forum decides on the issue relating to the debtor; such decisions are usually challenged and often stayed or set aside by the appellate court causing a significant delay in arriving at the outcome. If this concern is to be remedied, it is best suited that the rights and liabilities of debtor and creditor are both adjudicated before one single forum, who may after considering both sides of the argument render a reasoned judgment expeditiously.

(b) Multiple fora under different statutes often expose the issues to be adjudicated by a forum which may not have adequate commercial or business expertise, knowledge, or experience to decide issues relating to insolvency and bankruptcy. This leads to delay and inconsistency in the decisions and increases the vulnerability of challenge to such decisions.

The BLRC further records that due to this uncertainty in judicial and legislative environment on insolvency and bankruptcy, the outcome of insolvency in India is very poor. It notes that, in 2014, India took 4 years to resolve insolvency, while Singapore took 0.8 year and UK took 1 year.[48] Supreme Court of India also emphasised on this in *Innoventive Industries Ltd. v. ICICI Bank and Anr.*[49] It noted that in the World Bank's Ease of Doing Business Index, 2015, India was ranked 135th out of 190 countries on the ease of resolving insolvency. Post IBC, however, the rankings have significantly improved as India in 2020 was ranked 52nd.[50]

Transition to IBC

Introduction of the IBC, as stated above, was not a sudden measure but a gradual outcome of detailed deliberations by various committees constituted. It was noticed by each of these committees that the existence of numerous laws governing different aspects of the same process and each law providing jurisdiction to different fora in case of disputes, has frustrated the overall objective of the mechanism instituted for resolving insolvency.

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48 Ref. World Bank, Doing Business Project, Time to resolve insolvency (years) – India, 2014, available at https://data.worldbank.org/indicator/IC.ISV.DURS?most_recent_year_desc=true&locations=IN.

49 Supreme Court of India (2018) 1 SCC 407 ('*Innoventive*').

50 World Bank, 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO, p. 3.

As a consequence, in 1999, Justice Eradi Committee[51] recommended significant amendments to the Companies Act and proposed repeal of SICA. Report noted that

> … there is a need for establishing a National Tribunal as a specialized agency to deal with matters relating to rehabilitation, revival and winding up of companies. With a view to avoiding multiplicity of fora, the National Tribunal should be conferred with jurisdiction and powers to deal with matters under Companies Act, 1956 presently exercised by the Company Law Board; jurisdiction, power and authority relating to winding up of companies vested with High Courts and power to consider rehabilitation and revival of companies presently vested in the BIFR.

This was the first time that a tribunal with power and jurisdiction to decide all issues of insolvency, bankruptcy, and liquidation/winding up was conceptualised for Indian corporates, as it exists now under the IBC. Although the committee's recommendation did translate into amendment to Companies Act in 2002,[52] it remained dormant until 2016, i.e., till the time the IBC got promulgated.

Subsequently, in 2001, N.L. Mitra Committee recommended a new comprehensive Bankruptcy Code. However, this Committee report was not acted upon directly. In 2005, the JJ Irani Committee relied heavily on N.L. Mitra Committee Report and suggested transition from 'inability to pay' to 'failure to pay' threshold under Indian law. The current Indian Companies Act, 2013 is based on the recommendations of the JJ Irani Committee Report. The Companies Act 2013 provided for setting up of NCLT and NCLAT as the dedicated tribunals for dealing with matters involving corporates, particularly winding up and liquidation of companies. Although, Companies Act, 2013 in itself was a major break-away from the earlier laws, it still lacked a mechanism for effective reorganisation of insolvency and bankruptcy of corporates, as SICA, RDDB, and SARFAESI continue to govern these limited aspects.

Consequently, in 2014, the Ministry of Finance set up the BLRC to formulate a consolidated and comprehensive insolvency and bankruptcy regime for India. BLRC was mandated to draw up a system that would

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51 The High Level Committee on Law relating to Insolvency and Winding Up of Companies, chaired by Justice V. Balakrishna Eradi (31 July 2000).

52 Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts.

replace the erstwhile mechanism and consolidate all the different processes and subjects under one law. In 2015, BLRC submitted its report recommending enactment of the IBC, as it stands today. IBC stands at a great departure from the erstwhile regime under SICA, RDDB, and SARFAESI as it addresses all the shortcoming of the erstwhile laws by:

(a) Providing a common insolvency and bankruptcy framework for all type of corporates and individuals.
(b) Uniformising the trigger for initiating insolvency and bankruptcy proceedings against a debtor.
(c) Separating the debtor from its promoters and shifting from debtor-in-possession to creditor-in-possession framework.
(d) Providing rights to all types of creditors, financial or operational, to initiate insolvency against a debtor.
(e) Providing for an automatic moratorium on all actions pending or to be instituted against the debtor during the insolvency resolution period.
(f) Providing for a specified and condensed timeline for completion of the insolvency resolution process.
(g) Providing for exclusive jurisdiction to NCLT and NCLAT for adjudicating disputes 'arising out of' or 'in relation to' the insolvency and bankruptcy of the debtor.
(h) Setting up of multiple benches of the adjudicatory forum (NCLT) to enable effective dealing of the rising cases of insolvency.
(i) Conceptualising and providing for mechanisms/protection to the interim-financing of the debtor during insolvency resolution.
(j) Providing for clear classes of creditors and the specified hierarchy of their claims against the debtor's estate.
(k) Providing primacy to IBC over other laws inconsistent with IBC thereby leading to minimisation of conflicts between different statutes.

IBC Affirms and Upholds Each of the Parameters of Effectively Resolving Insolvency

As stated above, IBC is a well-thought out and comprehensive economic legislation. In wake of the growing menace of loan defaults with which

most of the banks were, and are, swamped with, it had long been felt to have a disciplined legislation like IBC to address this issue.

The preamble to the IBC sets out the objects as follows:

> An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

The Preamble gives a clear indication of the objectives that IBC seeks to achieve. The stated objects of the IBC are two-fold: first**,** consisting of the scope of the laws – (i) reorganisation of corporate persons, which will include reorganising the capital of the corporate person in terms of IBC; (ii) insolvency resolution of corporate persons; (iii) undertaking the first two in a time-bound manner; and second**,** setting of the overall objectives of the law; (iv) maximisation of value of the assets of the corporate debtor; (v) promotion of entrepreneurship; (vi) promotion of availability of credit; and (vii) balancing the interests of the stakeholders.

Each of these objects, taken individually and cumulatively, puts India's IBC along-side the most developed insolvency regimes in the world. Further, it suggests that India, being an active member of international community, is striving towards laws which are more outward looking and that fits well with the idea of promoting entrepreneurship and ease of doing business. Furthermore, these objects, directly or indirectly, also further India's position on the parameters of time, cost, outcome, and recovery rate, which are relevant to measure efficiency of a law in resolving insolvency, as detailed hereinafter. Individually taken, these parameters suggest the fundamentals of any robust insolvency law.

Speed Is of the Essence: 'Time'

'Time' as a parameter identifies and measures the period taken between the default by the debtor and the payments of the debt owed to the lender. It also considers the time consumed in contesting proceedings, legitimate or frivolous, extensions in time sought to complete proceedings, the inter-se dispute between the lender and the debtor, among others.

BLRC Report notes that 'speed is of essence for the working of the bankruptcy code'.[53] Consequently, IBC, through its overall scheme and in its objects, emphasises on the vital role of a time-bound insolvency resolution process. The Preamble states that time-bound reorganisation and insolvency resolution is essential for value maximisation. It acknowledges that better realisation is obtained when a corporate is sold off as a 'going concern', rather by way of a piecemeal sale in liquidation, which results in retrieval of lesser value to the creditors. Hence, when delays bring liquidation, there is value destruction. Further, even during liquidation, the value tends to reduce in cases of delay as assets usually suffer depreciation. Thus, for maximising the value, it is pertinent that the causes of delays are eliminated, and the process is strengthened.

The provisions of the IBC individually, and its scheme in general, address this problem. IBC provides for a self-contained mechanism whereby the legislative policy is reflected to place an ailing cooperate debtor to the process of insolvency resolution at the earliest and not wait till the fiscal stability of the corporate debtor becomes so vulnerable that either insolvency resolution process becomes difficult or liquidation becomes inevitable.[54] IBC, on the one hand, provides for moratorium that ensures a 'calming period' for the corporate debtor as during this time it remains stress-free and afloat, while simultaneously appoints a qualified insolvency professional at the helm of the debtor's management, who take ownership and control of the ailing debtor and make important decisions to maintain the corporate debtor a 'going concern'. This insolvency professional is tasked to conduct the insolvency resolution process of the corporate debtor in a time-bound manner, i.e., within 180 days (extendable to the maximum of 330 days),[55] while protecting and preserving the value of the debtor.

The results that ensued from these provisions in the decrease in time consumed in resolving insolvency is astounding. IBBI data as of March 2021 provides that the 348 cases (out of 2,653 closed till March 2021), which have been resolved by way of reorganisation, took on average of 406

53 BLRC, p. 14.

54 The emphasis on early recognition and admission of a company into the protective framework of the CIR Process is also demonstrated by explanation to s. 7(1) of the IBC which enables a financial creditor to seek admission of the corporate debtor even in case of a default with respect to debts owed to a different financial creditor as any default of financial debt is an indication of insolvency, and its resolution rather than rights of any party is the intended objective of the IBC.

55 Insolvency and Bankruptcy Code 2016, s. 12.

days (excluding the time consumed on account of litigation and COVID-19) to conclude. While, the 1,277 cases that ended in liquidation, took on average of 351 days to conclude.

This is a significant jump from the time taken in earlier insolvency regime. As per the World Bank Data of 2016, India took 4.3 years to resolve insolvency under the earlier mechanisms,[56] while as per the World Bank Data of 2020 (benchmarked as on data received by May 2019), India now takes 1.6 years to resolve insolvency on an average.[57]

Promoting Entrepreneurship and Availability of Credit: 'Cost'

'Cost' measures the amount of money spent for carrying on the proceedings for resolving insolvency qua the total value of insolvent debtor's estate. This includes cost incurred towards court fees, taxes, fees of personnel engaged to manage the insolvency estate during the process, lawyers, and other professionals and advisors.

Cost of reorganisation and bankruptcy procedures is inversely associated with growth of entrepreneurship and availability of credit in the economy. Economies compete and endeavour to become business friendly. India is a young republic and has a dynamic pool of young entrepreneurs who are risk-taking and competition-loving. They are the growth drivers for the times to come. However, they stand dissuaded from contributing to their full potential due to red-tapism and the general legal and regulatory environment that leads to excessive delays and increased cost in resolving issues concerning repayment and availability of credit. For a country like the size of India, the availability of credit to new and existing viable businesses is so staggered, as a large portion of money remains held up in non-performing accounts due to defaults in repayments and delay in recovery, that many businesses close before they even start.

The World Bank in its Report on Principles and Guidelines for Effective Insolvency and Creditor Rights, April 2001 also highlights the relationship between the cost and flow of credit. At Para 8, it observed role of enforcement systems as follows:

> [A] modern, credit-based economy requires predictable, transparent and affordable enforcement of both unsecured and secured credit

56 Doing Business 2016 (13th edn.), World Bank Group Flagship Report, Measuring Regulatory Quality and Efficiency, Economy Profile 2016, India, p. 126.

57 World Bank Group (2020). Economy profile India: Doing Business 2020. World Bank. https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf.

> claims by efficient mechanisms outside of insolvency, as well as a sound insolvency system. These systems must be designed to work in harmony. Commerce is a system of commercial relationships predicated on express or implied contractual agreements between an enterprise and a wide range of creditors and constituencies. Although commercial transactions have become increasingly complex as more sophisticated techniques are developed for pricing and managing risks, the basic rights governing these relationships and the procedures for enforcing these rights have not changed much. These rights enable parties to rely on contractual agreements, fostering confidence that fuels investment, lending and commerce. Conversely, uncertainty about the enforceability of contractual rights increases the cost of credit to compensate for the increased risk of non-performance or, in severe cases, leads to credit tightening.

An insolvency regime with lower insolvency cost and a transparent process is likely to encourage more, and timely, insolvency filings[58] leading to improved chances of revival of viable businesses and a quicker liquidation of unviable businesses, preventing burning of further cash.[59] Thus, practically, variation in the insolvency cost will influence an individual's or enterprise's reaction towards entrepreneurial entry, success or failure. In other words, promotion of entrepreneurship will take place when there is assurance of easy exit in case of failure, and lower costs being a crucial factor in the regard, would promote creation of new firms and promote healthy competition in the economy.[60]

The cost of insolvency proceedings is also directly proportionate to the length of the process. The lengthier the process to resolve insolvency or effectuate liquidation, the higher the cost to recover the credit. The reasons for the same are two-fold: (a) the corporate debtor would remain in stress during this process, and would be required to be managed by insolvency professionals and its advisors, whose fees would form part of insolvency costs and would be adjusted against the value available to the creditors on

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58 Jason Allen and Kiana Basiri (2016). *The impact of bankruptcy reform on insolvency choice and consumer credit*, Bank of Canada Staff Working Paper, Number 2016-26, Bank of Canada, Ottawa.

59 Potential economic gains from reforming insolvency law in Europe, AFME Finance for Europe, Feb. 2016.

60 *See* Elena Cirmizi and Leora F. Klapper, and Mahesh Uttamchandani, *The Challenges of Bankruptcy Reform* (1 Oct. 2010), World Bank Policy Research Working Paper No. 5448.

completion of the process, and (b) during the process, the debtor would not operate at its full potential due to its inability to raise adequate finances, which it may otherwise raise if operating outside the rigour of insolvency process. A quicker recovery would also lead to availability of better credit in the market, which can be channelled back to the same debtor, from whom it is recovered, on fresh terms. This importance of quicker recovery of credit was also recognised by Gujarat High Court in *Alka Ceramics v. Gujarat State Financial Corporation and Ors*[61] – 'If quick recovery is not ensured, the credit would be slow in giving and would thus hinder the industrial growth.'

IBC addresses these concerns by (a) providing for clear trigger thresholds of default and setting up of information utilities for recording defaults, thereby minimalising the requirement of adjudication; (b) streamlining the process with no ambiguity on the rights and powers of the stakeholders leading to lesser chances of conflicts and disputes, saving time and cost; (c) providing for a time-bound process to conduct reorganisation; (d) envisaging the need of interim finances to keep viable businesses alive during reorganisation process; (e) stipulating limits on the fees of the professionals appointed to conduct the process; and (f) providing for separate and priority treatment of cost incurred during the process.

As per the data released by IBBI as of March 2021, under the IBC, the average cost for resolution is approximately 0.49% of the resolution value, while it is 0.92% in cases of liquidation. The increased cost in liquidation is understandable as (a) under IBC, liquidation of the corporate debtor is treated as the last resort and is only preferred in case the resolution fails, and therefore, the cost calculation accounts for costs incurred for both resolution and liquidation, and (b) liquidation value is usually lesser than the resolution value for a stressed debtor, and thus, a percentage increase in cost during liquidation. Despite this, there is a significant reduction in costs under the IBC as compared to the erstwhile insolvency regime.

Revival of the Debtor: 'Outcome'

'Outcome' is a crucial parameter as it measures the success of the insolvency resolution process. Proceedings that lead to revival or reorganisation of the debtor and ensure preservation of the value of the debtor is regarded as a better outcome[62] as compared to those that leads to liquidation. It is

61 Gujarat High Court, AIR 1990 Guj 105.

62 *Orderly & Effective Insolvency Procedures: Key Issues*, Legal Department, International Monetary Fund 1999, available at https://www.imf.org/external/pubs/ft/orderly/.

primarily for the reason that liquidation leads to a lower recovery as compared to reorganisation, as in cases of piecemeal sale of the debtor, the debtor is bound to recover a lesser value as compared to what it can generate as a 'going concern'. Moreover, reorganisation ensures that the debtor does not die and continue to support its stakeholders by generating revenue.

IBC's primary focus, by the above stated aims of 're-organization and insolvency resolution', is to ensure the revival and continuation of the corporate debtor, which it seeks to achieve by protecting the corporate debtor, at the first instance from its various interested parties, such as the creditors, and its own management and shareholders; and in the second instance, from a corporate death by liquidation.[63] IBC intends and places the interests of the corporate debtor on a higher pedestal than the interests of any other party. This is based on the rationale that the continuation of a viable economic enterprise will have the potential to return more value than any other form of distribution, or management.

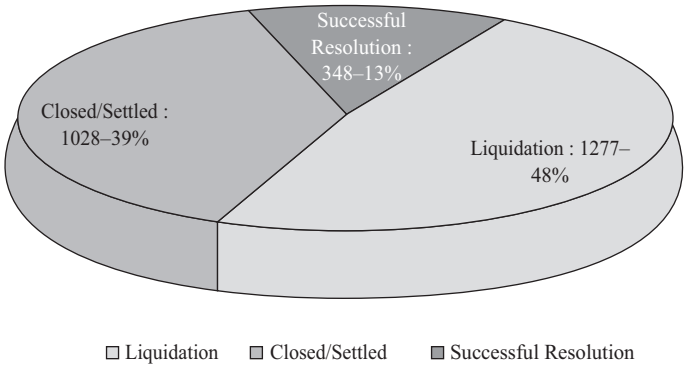
In this regard, IBC framework is a departure from the erstwhile insolvency regime as it does not attach any stigma to corporate insolvency resolution process and in fact encourages companies which need insolvency resolution to be admitted immediately into such a protective process. Therefore, by design and in light of its objects, the IBC is a beneficial legislation for corporate debtors and not a recovery legislation for the creditors.

The data available as of March 2021 also amply indicates that IBC has been a relative success as compared to its predecessors in this regard. Figure 7.1 shows the data in relation to 2,653 closed cases since 2016.[64]

63 *Swiss Ribbons Pvt. Ltd. v. Union of India*, Supreme Court of India, Writ Petition (Civil) No. 99 of 2018, decided on 25 Jan. 2019.

64 *Insolvency Reform Developing Metrics, Tracking Outcomes*, Insolvency and Bankruptcy News, January-March 2021, Vol. 18, available at https://ibbi.gov.in/uploads/publication/2021-05-29-204331-atxcy-3363461de858b06bfa1afdbf13151b90.pdf.

Figure 7.1 Status of 2,653 cases closed under IBC since 2016



Thus, as evident, out of total 2,653 closed cases, 348 cases have resulted in approval of resolution plan, while 1,277 have ended in liquidation, and another 1,028 have either been closed as withdrawn or settled or on appeal or review. Further, a major chunk of the 1,277 that ended in liquidation, i.e., 946 cases to be precise, belonged to and transferred from the BIFR or were already defunct before IBC was enacted.[65] These 946 cases had assets with average value of 5% of the outstanding debt owed by them.

Further, another crucial figure in this regard is that the 348 corporate debtors who were rescued by way of approval of resolution plan had a total asset valuation of INR 1.11 lakh crore (USD 14.88 billion approx.), while the 1,277 cases that ended in liquidation had a total asset value of INR 0.46 lakh crore (USD 6.16 billion approx.) as on the date of admission into insolvency process. This data suggest that in monetary terms almost 70% of the distressed assets are rescued under the IBC.

Cumulative Impact of Improvement in Time, Cost, and Outcome on 'Recovery Rate'

'Recovery Rate' is at the centre of the whole resolving insolvency matrix, as it ranks a system the highest which maximises the value of the debtor and ensures maximum return on the lender's debt. It is measured based on

65 *Insolvency Reform Developing Metrics, Tracking Outcomes*, Insolvency and Bankruptcy News, January-March 2021, Vol. 18, available at https://ibbi.gov.in/uploads/publication/2021-05-29-204331-atxcy-3363461de858b06bfa1afdbf13151b90.pdf.

the cumulative effect of the other three parameters, i.e., time, cost, and outcome. For its calculation, 'outcome' provides the data as to whether the debtor is reorganised and is continuing as a 'going concern' or that the debtor's estate is sold off and liquidated. 'Cost' provides the data as to how much money is spent in recovery of a penny of the debt owed. 'Time' provides the data as to the loss of value, including on account of depreciation, during the time the process to resolve insolvency was on-going and the loss of interest as the money owed by the debtor remained tied up with the proceedings.

The improvement in performance in each of these three parameters has a cumulative effect on the overall recovery rate under the IBC. As stated above, the 348 debtors rescued had a total asset value of INR 1.11 lakh crore, while they had a total creditor claim of INR 5.67 lakh crore against them. Under IBC, reorganisation of the 348 debtors led to recovery of INR 2.09 lakh crore for the creditors; which is approximately 189% of the total asset value of these debtors. In other words, resolution has fetched an excess of 89% to the creditors, in comparison to the recovery that would have been possible under liquidation or any other process, including the erstwhile insolvency regime. Further, this recovery is exclusive to the process initiated for the corporate debtor and the recovery to be made from guarantors, corporate or personal, and from the avoidance/preferential transactions would be over and above this.

This exponential increase in recovery rate from the distressed assets under the IBC is also evident from the data released by Reserve Bank of India in its Report on Trend and Progress of Banking in India 2019-2020.[66] Report indicates that the recovery from IBC was 61% of the total amount recovered by banks through 'all' means in 2019-2020. It is a further increase of 5% from the recovery made in 2018-2019 through IBC. Further, in 2019-2020, the recovery made under IBC was 45.5% of the total amount involved in cases before IBC, while only 26.1% and 4.1% of the total amount involved was recovered under SARFAESI and RDDB respectively during the same period. Thus, the improvement in comparison to previous insolvency regime is evident.

The aforesaid improvements have also resulted in global acknowledgment of Indian efforts in changing landscape of doing business in India, and specifically in the index of 'resolving insolvency'. As per the World

66 Reserve Bank of India, *Report on Trend and Progress of Banking in India 2019-2020*, 29 Dec. 2020, available at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0RTP2020_F3D078985540A4179B62B7734C7B445C9.PDF.

Bank Resolving Insolvency Index, India is now ranked 52nd among 190 countries, which is the best ever ranking in this Index for India and a huge move upward from being ranked 136th in 2016.[67] Similarly, the Global Innovation Index, 2020 edition,[68] has ranked India as 47th in 'Ease of Resolving Insolvency'. The World Bank, in a press release, also applauded India's effort and noted that under the IBC regime, 'the overall recovery rate for creditors has jumped from 26.5 to 71.6 cents on the dollar. India now is by far the best performer in South Asia on this component and does better than the average for OECD high-income economies.'[69]

Scheme of IBC

The improvement in rankings evidences that IBC has transformed India's insolvency regime. How it does so is evident from its scheme. IBC, as a consolidating statue, provides for a detailed and streamlined process focussed primarily on insolvency resolution, and in case, the resolution is not possible or feasible, then liquidation. It also envisages creation of multiple bodies to support the process, including and not limited to, the 'Insolvency and Bankruptcy Board of India',[70] which is tasked to frame detailed guidelines in the form of Rules to supplement the IBC provisions and have overall regulatory oversight over the process, and the 'Information Utilities'[71] which is to collect, collate, authenticate, and disseminate financial information on debt and default such that delays and disputes can be eliminated, when a default takes place. Further, IBC provides for insolvency professionals, who act as dedicated officials of the court and oversee the smooth conduct of the insolvency resolution process of a debtor.

67 Doing Business 2016, Measuring Regulatory Quality and Efficiency, 13th Edition, World Bank Group, —World Bank. 2016. Doing Business 2016: Measuring Regulatory Quality and Efficiency. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0667-4. License: Creative Commons Attribution CC BY 3.0 IGO.

68 Cornell University, INSEAD, and WIPO (2020). The Global Innovation Index 2020: Who Will Finance Innovation? Ithaca, Fontainebleau, and Geneva, available at https://www.insead.edu/sites/default/files/assets/dept/globalindices/docs/GII-2020-report.pdf.

69 Doing Business 2020: Reforms Boost India's Business Climate Rankings; Among Top Ten Improvers for Third Straight Year, 24 Oct. 2019, https://www.worldbank.org/en/news/press-release/2019/10/24/doing-business-india-top-10-improver-business-climate-ranking.

70 Insolvency and Bankruptcy Code 2016, s. 188.

71 Insolvency and Bankruptcy Code 2016, s. 196.

Under IBC, once the corporate debtor is admitted into insolvency process, an insolvency professional is appointed as the resolution professional and is required to take control and custody of the debtor. On appointment, the resolution professional is to make a public announcement declaring the initiation of insolvency process against the debtor and inviting claims, due and outstanding as on insolvency commencement date ('ICD'). The creditors to the debtor are required to submit their claims to the resolution professional, along with sufficient proofs, as specified in regulations framed under the IBC.

Once the claims are submitted, the resolution professional prepares a list of creditors which forms part of Information Memorandum (IM) and is disclosed to public at large. Simultaneously, the resolution professional invite expression of interests from prospective resolution applicants who may express interest in submitting a revival proposal for the corporate debtor, known as 'resolution plan' under IBC.

The claims submitted by the creditors are subject to their treatment under the resolution plan, as may be approved by committee of creditors (consisting of financial creditors) of corporate debtor in their commercial wisdom, and subsequently by NCLT. Under IBC, these claims are to be only resolved as per the resolution plan and the timelines stated therein. They cannot be enforced in preference to other creditors as enforcement of all claims against the corporate debtor is stayed in light of the protection of moratorium under section 14(1) of IBC.[72] Further, all claims, filed or unfiled, stand frozen on the date of NCLT order approving the resolution plan, such that the successful resolution applicant starts with a 'clean slate' and is not flung with any surprise claims.

If, in case, however, there is no resolution plan approved by the committee of creditors within the timelines prescribed under the IBC, the insolvency process would stand terminated and the liquidation process would begin.

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72 During insolvency process, Resolution Professional is however allowed to make the payment of insolvency resolution process costs from cash flows of corporate debtor, and in case not paid from cash flows, then in priority to other dues under the approved resolution plan. These costs include the costs incurred by Resolution Professional in running the business of the corporate debtor as a going concern during insolvency process.

Scheme of IBC Vis-à-Vis Arbitration

IBC strives to provide a stressed and an ailing debtor a 'calming period' by staying actions already initiated and pending or yet to be initiated against the debtor, including legal and regulatory proceedings, execution and enforcement actions, etc. Termed in India as 'moratorium' period ensures that a corporate debtor does not create further stress on its estate and is relieved from contesting or participating in these actions, and focus on its revival.

The provision for moratorium is widely worded and provides for stay on all type of proceedings against corporate debtor, including (a) institution of fresh proceedings, (b) continuation of pending proceedings, and (c) execution of any judgment, decree, or order of a court, tribunal, arbitral panel, or any authority. Since, the provision mentions both suits and proceedings and covers order from arbitration panels, it does not remain ambiguous that arbitration proceedings are included within the scope of the moratorium. Thus, institution, continuation, enforcement/execution (as the case maybe) of arbitration proceedings and awards shall also remain prohibited during the moratorium period. Reading other clauses of the section 14 in conjunction with the aforesaid provision would fully illustrate the scope and basis of the moratorium, i.e., (a) ensuring maximisation of value of assets of the corporate debtor by staying all actions against them, and (b) protecting and preserving the assets of the corporate debtor by staying all recoveries that may prejudicially affect the estate of the debtor, or may allow a particular creditor to prioritise its claims and derive repayment in preference to other creditors participating in the process.

Judicial pronouncements have, time and again, affirmed these principles and used them as the thresholds for determining whether a particular action is hit by a moratorium or not. Since, section 14 does not provide a list of proceedings covering all type of eventualities that may attract moratorium, these judicial pronouncements occupy a crucial position in determining the true stance of Indian IBC vis-à-vis the scope of moratorium. For instance, Supreme Court of India in *Alchemist Asset Reconstruction Company v. Hotel Gaudayan Pvt Ltd*., has held that the commencement of arbitrations or related proceedings post initiation of insolvency process is *non-est* in law.[73] This position, however, subsequently has undergone change by way of creation of certain exceptions to this general rule through

73 *Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudayan Pvt Ltd*., Supreme Court of India, AIR 2017 SC 5124.

judgments of the Indian Courts, including the Supreme Court of India and the high courts of various Indian states.

Impact of Moratorium on Arbitrations During, Pre- and Post-Initiation of Insolvency Process: The Indian Status Quo

Arbitrations are dealt under IBC only in the context of the moratorium provision, namely, section 14. Since, section 14 refers to stay on arbitration and other proceedings in a general sense, the peculiarities of different scenarios of arbitration and the applicability of moratorium over them are not detailed therein. Consequently, courts in India took upon themselves the duty to interpret the provision on a case-to-case basis. While the moratorium provision in itself is straightforward, the courts could not prevent themselves into exploring, or to say narrowing the scope of moratorium on arbitrations in certain eventualities as detailed below.

For ease in understanding all the scenarios possible, the arbitration proceedings are analysed herein within four timelines:

(a) Pre-Insolvency Process Stage – Arbitration(s) involving a corporate debtor commenced prior to commencement of insolvency proceedings against the debtor.
(b) Pre and During Insolvency Process Stage – Arbitration agreement(s) entered into prior to commencement of insolvency, but arbitration commenced post-insolvency.
(c) During Insolvency Process Stage – Arbitration agreement(s) entered into during insolvency.
(d) Post Insolvency Process Stage – Continuation/validity of arbitration clause and pending disputes post conclusion of insolvency proceedings.

Although, the underlying rationale in treatment of all these scenarios remain the same as highlighted in portions above, the contextual application of them varies on certain parameters as indicated in the following texts.

Scenario (A): Pre-insolvency Process Stage

Claims being contested in arbitrations unrelated to an insolvency process are categorised as claims with a 'pre-existing dispute'[74] under IBC. Such a claimant creditor is not permitted under IBC to initiate insolvency proceedings against a debtor basis claims. Any attempts to initiate insolvency process by a creditor on the ground of existing disputes are often looked at by tribunals and courts as malicious; as – unless there are admitted debts – they amount to misuse the process under IBC to arm-twist a faster recovery of the claim.

However, there is a possibility that the pre-insolvency process arbitration is initiated at the instance of the debtor, i.e., debtor being the claimant in such proceedings. Although, a moratorium may impede continuation of all pending suits or proceedings, section 14 categorically outlines that in context of proceedings against the corporate debtor. The provision at no place creates a bar on proceedings instated by the corporate debtor, as ultimately, they may lead to maximisation of asset value. Moreover, the resolution professional is required by section 25 to continue with such proceedings (in this context arbitration) which are for the benefit of the corporate debtor. Courts in India were quick to affirm this understanding. Proceedings, conclusion of which would not endanger, diminish, dissipate, or affect the assets of the corporate debtor in any manner whatsoever, would be in sync with the purpose of moratorium and would not attract the bar under moratorium.[75] Therefore, continuation of certain arbitrations which are not prejudicial to the insolvency process of the corporate debtor can validly continue. Any recovery through a money claim or affirmation of right to an asset from such arbitrations would strengthen the financial position of the corporate debtor and improve the prospects for reorganisation.

However, there are further aspects to such arbitrations as well. There is a possibility that in an arbitration where the claimant is the corporate debtor, the opposite party has a counter-claim, or a vice versa, i.e., claim by the opposite party and a counter-claim by the corporate debtor. This

74 *K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd*., Supreme Court of India, 2018 SCC OnLine SC 1013.

75 *See Power Grid Corporation of India v. Jyoti Structures Ltd*., Delhi High Court (2018) 246 DLT 485; *SSMP Industries Ltd v. Perkan Foods Processors Pvt. Ltd*, Delhi High Court, 2019 SCC Online Del 9339; *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Limited & Anr*., NCLAT, Company Appeal (AT) (Insolvency) No. 285/2018, decided on 3 Aug. 2018.

scenario has been a little contentious, as initially, the NCLAT[76] had stayed such arbitrations for being barred under section 14. The reasons for the same can be attributed to an existence of a counter-claim, which may result in an award in favour of the opposite party requiring the corporate debtor to pay under an award, and thus causing an impact on the assets of the debtor's estate, which are now under the control and custody of the resolution professional for the benefit of all the creditors.

However, lately, the position in this regard has also evolved with NCLAT decision in the case of *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Limited & Anr*. In this case, it was held that both claim and counter-claim can continue to be arbitrated even during moratorium period,[77] but only in scenarios that an award requires payment to be made to the corporate debtor (on set off), that it would be enforced and recovery be made. However, if on final award, the claim (counter-claim, as the case maybe) of the opposite party exceeds the claim of the corporate debtor and corporate debtor is required to pay any amount, such award would not be enforceable and the award holder would not be able to recover, but be only able to file its claim with the resolution professional.

Post-arbitral Proceedings

Commencement or continuation of post-arbitral proceedings involving challenges to or execution of an award, that aid the corporate debtor, will also likely be permissible under the scheme of IBC. The impact of a moratorium would narrow down to simple assessment of whether the arbitral award is in favour of the corporate debtor, in favour of the opposite party, or is partly in favour of corporate debtor and partly in favour of the opposite party. If an arbitral award is in favour of the corporate debtor, a resolution professional may continue seeking enforcement of an award. However, a scenario arises when an award-debtor (the opposite party) challenges an award. In such a situation, the question arises as to whether such challenge would be hit by moratorium provision or not.

In *Power Grid Corporation of India v. Jyoti Structures Ltd*., Delhi High Court considered this question and observed that as long as any proceeding does not violate the prime objects that moratorium seeks to uphold, i.e., preventing any action that may prejudicially impact the assets and overall

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76 *K.S. Oils Ltd*. vs *State Trade Corporation of India*, NCLAT, Company Appeal (AT) (Insolvency) No. 284 of 2017.

77 *See also SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd*., Delhi High Court, 2019 SCC Online Del 9339.

estate of the debtor, such proceedings may continue. High court emphasised that it is the 'debt recovery action' that is critical to insolvency process, and not any other proceedings that precedes such action.[78] Court observed:

> … In the light of above purpose or object behind the moratorium, Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor, like the one before this court in as much these proceedings are not a 'debt recovery action' and its conclusion would not endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner whatsoever and hence shall be in sync with the purpose of moratorium which includes keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the process envisaged during the insolvency resolution process and ensuring the company may continue as a going concern.

Courts in India have found it appropriate to allow proceedings challenging awards issued in favour of a corporate debtor even during moratorium period. However, in the event, an award-debtor succeeds in such challenge, the award is set aside and an order is passed against the corporate debtor, enforcement of such order shall be hit by the moratorium.[79]On the other hand, if an award is in favour of the opposite party and a challenge is pending on behalf of the corporate debtor, such award is not actionable as the pending section 34 challenge would qualify as an existence of a 'pre-existing dispute' under the IBC.[80] Until the challenge is decided, the claim of the opposite party would remain 'contingent' against the corporate debtor. In this regard, the another high court in *Sirpur Paper Mills Limited v. I.K. Merchants Pvt. Ltd*.,[81] recently held that the opposite party in such cases shall submit its claim to the resolution professional, based on

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78 *See P. Mohanraj & Ors. v. M/s Shah Brothers Ispat Pvt. Ltd*., Supreme Court of India, Civil Appeal No. 10355 of 2018. Here, Supreme Court, while dealing with an appeal in another matter, considered *Power Grid* (*supra*) in brief and observed that it does not state the law correctly as proceedings seeking setting aside of an arbitral award may result in an arbitral award against the corporate debtor being upheld, as a result of which, monies would then be payable by the corporate debtor, and that therefore, such proceedings would be covered under moratorium. The Supreme Court, however, does not reason nor considers the detailed reasoning of the *Power Grid* (*supra*).

79 *Power Grid Corporation of India v. Jyoti Structures Ltd*., Delhi High Court, (2018) 246 DLT 485.

80 *K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd*., Supreme Court of India, 2018 SCC OnLine SC 1013.

81 Calcutta High Court, A.P. 550 of 2008, decided on 7 May 2021.

the award in its favour, and the resolution professional shall consider the same. Although, the treatment of such claim would depend on the terms of the resolution plan, which may provide that such contingent claims, once crystallised, may be paid in a certain fashion. If the opposite party feels aggrieved by such treatment, it may approach the NCLT seeking relief.

An alternative may exist even in this situation which allows section 34 challenge by a corporate debtor to be continued during moratorium. Since, it is preferred by the corporate debtor, it is not prejudicial to its interest. However, at present, barring the passing observation of the Supreme Court in *P. Mohanraj* (*supra*), there is no precedent in our knowledge that analyses this situation further. Nonetheless, if seen in light of the underlying rationale proposed in the *Power Grid* (*supra*), it could be argued that there appears to be no bar on such proceedings from being continued. To illustrate, in the event, the section 34 challenge is decided in favour of the corporate debtor and the award is set aside, the order passed under section 34 shall not be hit by moratorium and would be enforceable by the corporate debtor against the opposite party. While, in the event, the section 34 challenge is rejected and the award in favour of the opposite party is upheld, then the action for enforcement and execution of such award under section 36 shall be hit by moratorium, and the award holder would only be entitled to file its claim before the resolution professional, but as a crystallised claim at this point of time.

In cases of arbitral award which are a mix of both, i.e., award partly in favour of corporate debtor and partly in favour of the opposite party, the part of the award that is in favour of corporate debtor ideally be made enforceable while the part of award in favour of the opposite party shall be hit by moratorium. However, it remains to be seen if such a segregation of award is even feasible while enforcing, and that whether such question of segregation is to be decided by the executing court under arbitration law or the insolvency tribunal.

Another variation that exists in relation to application of IBC moratorium on arbitration is vis-à-vis the foreign seated arbitrations.[82] A foreign seated arbitration can include arbitrations of two types: (a) foreign seated

82 International arbitrations seated in India would attract similar treatment as any domestic arbitration seated in India for the reason that the IBC provides for territorial and not subject matter jurisdiction.

arbitration between an Indian and a foreign party,[83] and (b) foreign seated arbitration between two Indian parties.[84]

Foreign Seated International Arbitration

Continuation of Pending Foreign Seated International Arbitration

IBC section 1 stipulates that the provisions of IBC, including the moratorium, extend to the whole of India. Hence, there is no extra-territorial enforceability of such moratorium on proceedings outside India. The provisions of IBC that deals with extra-territorial enforceability and recognises cross-border insolvency are IBC sections 234 and 235, but the same has not yet been notified as law.[85] Hence, the provisions of IBC, including moratorium, are not applicable and enforceable to proceedings against corporate debtor outside India, including the continuation of foreign seated international arbitrations.[86]

Enforcement of Foreign Seated International Arbitration Awards

As IBC does not have extra-territorial applicability, there is no restriction on foreign arbitral award holder to have the same enforced against the corporate debtor's assets located abroad, unless there is a reciprocal arrangement between India and the government of the country where the assets are located.

However, enforcement and execution of such awards in India and against the assets located in India, is directly barred by the moratorium

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83 Arbitration Act, 1996, s. 2(1)(f).

84 *PASL Wind Solutions Private Ltd. v. GE Power Conversion India Pvt. Ltd*., Supreme Court of India, Civil Appeal No. 1647 of 2021 arising out of SLP (Civil) No. 3936 of 2021. Supreme Court of India, in this case, has held that two companies incorporated in India can validly designate a foreign seat for arbitration of their disputes.

85 Insolvency and Bankruptcy Code 2016, s. 234. This provision empowers the Central Government to enter into reciprocal agreements with other countries to enforce the provisions of the Code and s. 235 envisages a 'Letter of Request' by the liquidator to the authority of a country with which a reciprocal agreement has been made under s. 234 of IBC for action on the assets of the company situated in such country.

86 *Ashapura Minechem Ltd. v. Armada (Singapore) Pte. Ltd. & Ors*., Bombay High Court, Arb. Petition No. 1359 of 2010. This was a case under s. 22 of the SICA (which is similar to s. 14 (Moratorium) of IBC). Here, Court held that since the provisions of SICA, including s. 22 thereof, extended to only the territory of India, it does not have any application to proceedings outside India. Applying the same rationale, it can be safely implied that even moratorium under IBC s. 14 would not apply to any proceedings outside India.

provision.[87] The only remedy available to such an award holder is to submit a claim to the resolution professional based on such foreign arbitral award. However, since a foreign arbitral award is not directly recognisable and enforceable under Indian Arbitration Act, unless it passes through the test of sections 47 and 48, namely, the two-fold test of recognition and enforcement under Part II of the Arbitration Act, such an award is not treated as a valid proof of claim under the IBC.[88] This is unlike the position of a domestic award, which is equivalent to a decree of a court,[89] and directly admissible as a proof of claim, provided the period to file a challenge against it under section 34 has expired.

Foreign Seated Arbitration Between Two Indian Parties

Until April 2021, the position on the legality of two Indian parties choosing a foreign seat of arbitration was not sufficiently clear. Although neither the Arbitration Act nor the Indian Contract Act, 1872 ever prohibited two Indian parties from resolving their disputes in a country other than India, the Supreme Court of India decision in *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited*,[90] has made it clear that two Indian parties can very well choose a foreign seat of arbitration. Supreme Court has also clarified that award of such an arbitration would be a 'foreign award' and shall be enforceable in accordance with Part II of the Act.

With such an arbitration being judicially recognised, it is essential that we analyse this vis-à-vis the moratorium provision under IBC as well to provide an exhaustive outlook for all type of arbitrations under this chapter. However, this being a nascent development, there is no existing judicial data that may set out the position of law in this regard conclusively.

Continuation of Foreign Seated Arbitration Between Two Indian Parties

Regarding the impact on continuation of such arbitration during insolvency process, it remains an open question as to whether the claimant

87 *Vitol S.A. v. Asian Natural Resources 9India) Ltd. & Ors*, NCLT, Ahmedabad Bench in (2018) 145 SCL 30.

88 *Adityaa Energy Resource Pte Ltd. v. Simhapuri Energy Ltd*., NCLT Hyderabad Bench, CP(IB) No. 389/9/HDB/2018.

89 Arbitration Act, 1996, s. 36.

90 Supreme Court of India, Civil Appeal No. 1647 of 2021 arising out of SLP (Civil) Number 3936 of 2021.

Indian party to the arbitration can be made subject to the moratorium under IBC, without the moratorium provision having any force of law at the foreign seat of arbitration. In this regard, guidance may be drawn from the position under Singapore law[91] which permits courts to restrict continuation of arbitration seated outside Singapore, as long as the claimant to such arbitration proceedings is subject to the Singapore's jurisdiction.

Enforcement of Award Passed in Foreign Seated Arbitration Between Two Indian Parties

As stated above, Supreme Court in *PASL Wind* (*supra*) has unequivocally observed that if an arbitration is seated outside India, irrespective of the nationality of parties, such award will be a 'foreign award'.[92] Thus, such arbitrations would attract a similar treatment as accorded to an award of an otherwise foreign seated arbitration, i.e., it would not be directly recognisable and enforceable in India, unless it passes through the two-fold test of Part II.

Scenario (B): Pre and During Insolvency Process Stage

In the event a fresh arbitration is allowed to be initiated against the corporate debtor during the insolvency process, all the eventualities considered in scenario (A) above shall be equally applicable.[93] However, what remains a crucial issue in this scenario is whether an agreement entered into prior to commencement of insolvency would retain its validity during the insolvency process. The question of commencing a fresh arbitration during insolvency process, thus, becomes a secondary issue, as the validity of the agreement containing arbitration assumes the primacy in this regard.

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91 Companies Act, 1967, s. 211B; Insolvency, Restructuring and Dissolution Act 2018, s. 64.

92 Supreme Court of India, Civil Appeal Number 1647 of 2021 arising out of SLP (Civil) No. 3936 of 2021, at para. 57. *See* also *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, Supreme Court of India (2012) 9 SCC 552. In this case, it was held that 'Foreign award' is an award in any arbitration whose juridical seat is outside India, which would be enforceable in India, if at all, under Part II and only to the extent provided therein.

93 Although Alchemist case held that all arbitrations commenced post initiation of insolvency process is non-est in law, the exceptions drawn by the courts subsequently (as highlighted in scenario (a)) continue to remain applicable even in scenario (b) as once arbitration is commenced, there remains no distinction between scenario (a) and scenario (b).

As identified above, the resolution professional under the IBC is tasked to protect and preserve the assets of the corporate debtor and continue business operations of the corporate debtor on a 'going concern' basis.[94] To do so, IBC provides the resolution professional with the authority to take all actions as are necessary to keep the corporate debtor a going concern. One such authority is 'to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process'.[95]

The resolution professional thus can not only enter into fresh contracts, but also continue to act under the existing contracts entered by the corporate debtor prior to the initiation of insolvency process and amend and modify the same. This also clarifies that initiation of insolvency proceedings against a corporate debtor would not lead to any 'legal incapacity', which is a ground for setting aside of arbitral award under Indian Arbitration Act[96] as well as under the Model Law[97] and United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[98] The corporate debtor, thus, remains competent during insolvency process to enter into contracts, including arbitration, and act by and through the resolution professional.

Further, this authority to modify or amend the contracts would not have been envisaged, if in case the IBC considered termination of all existing contracts *ipso facto* on account of the initiation of the insolvency process.

Similarly, the IBC does not bar termination of contracts by the counter party[99] or termination of the burdensome contract by the resolution professional during the insolvency process, in accordance with the terms of the agreement. In the event, however, the termination by the counter party is impacting the 'going concern' status of the corporate debtor or violating the objects of the moratorium, such termination can be challenged by the

94 Insolvency and Bankruptcy Code 2016, s. 25.
95 Insolvency and Bankruptcy Code 2016, s. 20(2) (b).
96 Indian Arbitration Act, 1996. s. 34(2)(a)(i) & 48(1)(a).
97 UNCITRAL Model Law on International Commercial Arbitration in 1985, Arts 34 and 36.
98 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Art. V.
99 *Gujrat NRE Coke Limited*., CP (IB) No 326/KB/2017 (NCLT Kolkata, 22 Aug. 2017). NCLT allowed the termination of a contract for maintenance of certain windmills during the moratorium, due to failure of the corporate debtor to pay outstanding dues under the contract.

resolution professional before the adjudicating authority under the IBC.[100] In a nutshell, the pre-insolvency process agreements remain in force even post initiation of insolvency process and the parties continue to remain bound by the terms of such agreements, except where the adjudicating authority may suspend rights of an opposite party to terminate a contract.

This position is further strengthened from the fact that the IBC casts a duty on the resolution professional, under section 25(2)(b), to 'represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings'. This implies that the legal capacity of the corporate debtor under the contracts entered by it does not undergo any change on initiation of insolvency process, and it is only the resolution professional, who supersedes the board of the corporate debtor, who will now act as the official representative of the corporate debtor relating to all such contracts. Thus, if an agreement of the corporate debtor provides for dispute resolution by way of arbitration, and if a dispute arises under it, irrespective prior or during the insolvency process, the parties to agreement are free to commence and continue arbitration[101] within the permissible contours highlighted in scenario (A).

Scenario (C): During Insolvency Process Stage

As stated in scenario (B), the resolution professional has an authority under the IBC to enter into contracts on behalf of the corporate debtor,[102] in line with the larger object of continuing the business of the corporate debtor as a going concern; with the objective to preserve, protect, and maximise the value of its assets. To effectively discharge such duties and smoothly conduct the insolvency process of the corporate debtor, it is essential that the resolution professional is given a free hand in this regard. For instance, resolution professional would need to negotiate and arrange for interim-financing of the corporate debtor, and to do so, he or she would be required to enter into contractual obligations with the financer. Similarly, in order to continue receiving supplies to carry on the production activities or providing services, as the case maybe, and to continue to generate revenue as a

100 *Pepsico India Holdings Pvt Ltd. v. Mr V Nagarajan*, CP/564 (IB)/CB/2017 (NCLT Chennai, 28 May 2019); *SREI Infrastructure Finance Ltd. v. Sundresh Bhatt*, Company Appeal (AT) (Insolvency) Number 781 of 2018 (NCLAT, 31 July 2019).

101 France and Netherlands provide for similar position that arbitration agreement remain binding even post initiation of insolvency process.

102 Insolvency and Bankruptcy Code, 2016, s. 20(2)(b).

going concern, the resolution professional would have to arrive at fresh commercial understandings with the supplier and with its customers during the insolvency process as well. These commercial understandings may be contained in a completely fresh agreement or may be incorporated in the existing agreements by way of modification/amendment. Further, these agreements may provide for any type of dispute resolution mechanism, including by way of arbitration, as there is no embargo under the IBC expressly providing exclusive jurisdiction to the NCLTs over disputes under agreements entered during the insolvency process.

Although the agreements entered during the insolvency process, and supplies made thereunder, would be covered as the insolvency resolution costs under the IBC, and any payment required to be made to a supplier by the corporate debtor would be required to be paid in priority in both resolution and liquidation, there may be situations where the parties see a roadblock and a dispute arises. In any such situations, the dispute resolution clauses may be referred and if it provides for arbitration, then appropriate arbitration proceedings may be commenced and continued during the insolvency process again within the permissible cont.

Scenario (D): Post-Insolvency Process Stage

Post insolvency process stage encompasses within itself two possibilities, i.e., (a) successful resolution of the corporate debtor by way of approval of a resolution plan of a resolution applicant who would now take over the ailing corporate debtor and turn it around into a viable running business, and (b) initiation of liquidation proceedings due to failure to resolve the insolvency by way of a revival plan. In both these possibilities, the impact on arbitration is different.

Successful Revival by Way of Approval of Resolution Plan

If the insolvency process results in a successful resolution/reorganisation of the corporate debtor, the corporate debtor will likely be taken over by a new management subject to the arrangement approved as regards the successful resolution applicant. This applicant is obligated to revive the corporate debtor in terms of the approved resolution plan. However, in order to do so, it is recognised that certain protections to the assets of the

corporate debtor and its actions (independent of its earlier management), post resolution, are necessary.[103]

One such protection is the certainty and predictability of the pending claims against the corporate debtor. The IBC provides for a time frame within which claimants can file their claims. Based on the filed claims, a resolution professional is obligated to prepare an Information Memorandum, and disclose it to the prospective resolution applicants, who may take cognisance of all such claims, and accordingly prepare a resolution plan providing for treatment of each of such claims. However, in case a claim, not submitted during insolvency process, is raised post resolution, it would frustrate the resolution plan and the commercial planning of the successful resolution applicant who had, in terms of the information shared by the resolution professional, submitted a plan considering such list of claims against the corporate debtor to be exhaustive.

This eventuality has been considered in a number of cases, and it has been held that no such claims survives post resolution under IBC.[104] For instance, in *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited*,[105] the Supreme Court of India held as follows:

> 86. … The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.
>
> … 95. In the result, we answer the questions framed by us as under:
>
> (i) That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no

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103 Insolvency and Bankruptcy Code, 2016, s. 32A.

104 *Committee of Creditors of Essar Steel v. Satish Kumar Gupta & Ors.*, Supreme Court of India, (Civil Appeal No. 8766-67 of 2019), para. 67.

105 Supreme Court of India, Civil Appeal No. 8129 of 2019.

> person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

Thus, no claim for the pre and during insolvency process period can be continued post approval of a resolution plan. This also answers the issue of validity of the arbitration clauses under the agreements entered pre and during insolvency process period. If the agreement pertains to a claim which is provided treatment for under the resolution plan, then such resolution plan will bind the parties to the agreement, and depending on the terms of the resolution plan, such agreement would either remain in force or terminate. For example, if the claim is fully settled under the plan, then the agreement would subside, while if the claim is considered to be 'contingent' and the plan requires such claims to be continued, then the agreement will remain in force and continue to govern the acts of the parties in that regard, including dispute resolution by way of arbitration.

However, lately, majority of the resolution applicants submit resolution plans containing a standard clause providing for extinguishment of all pending and contingent claims. These clauses are widely worded so as to cover all eventualities and prevent the successful resolution applicant from any unforeseen liability. These clauses sit well with the principle of providing a 'fresh plate' to the resolution application and preventing the 'hydra head' from popping up post resolution. A sample clause, in this regard, may look like as below:

> All liabilities in relation to any period prior to the resolution plan approval date, whether due or contingent, asserted or unasserted, crystallized or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the Information Memorandum, the balance sheets or the profit and loss account statement or the list of creditors, will be settled at NIL value and shall be deemed to be permanently extinguished by virtue of the resolution plan approval order.

'Settled at NIL' implies that claims, whether in knowledge or not, will deemed to be settled against the new management, thus, providing a fresh start to the new corporate.

(ii) Liquidation on failure to approve resolution plan

Thrust of moratorium is lesser in liquidation as compared to insolvency resolution. As stated above, insolvency resolution process prohibits institution and continuation of all suits or proceedings, as well as all actions of

enforcement and execution of any judgment, decree, or order against the corporate debtor. On the other hand, liquidation process merely stipulates that 'no suit or other legal proceeding shall be instituted by or against the corporate debtor.'[106] In comparison to insolvency resolution, liquidation does not stay (a) continuation of pending suits or proceedings, and (b) enforcement and execution of the judgment, decree, or order. But, unlike insolvency process, liquidation does stay suits or proceedings by the corporate debtor. However, the proviso to section 33(5) provides an exception and allows a liquidator to initiate suits or proceedings on behalf of the corporate debtor with the prior permission of the NCLT. This proviso makes IBC consistent and in line with the section 41[107] of the Arbitration Act.

The aforesaid understanding also reflects under IBC section 35(1)(k), which considers it a duty/power of the liquidator 'to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor'. This suggests that the liquidator in the name of corporate debtor can (a) institute suit, prosecution or other legal proceedings, civil or criminal, and (b) defend suit, prosecution, or other legal proceedings, civil or criminal, as may be pending against the corporate debtor.

The aspect of instituting and continuing proceedings by the liquidator that are in the interest of the corporate debtor is in line with the understanding and scope of moratorium applicable under insolvency process. But the aspect of continuation of proceedings pending against the corporate debtor and actions for execution/enforcement proceedings against the corporate debtor during liquidation is a significant departure from the moratorium during insolvency process.[108] One reason for such a departure can may be the nature of liquidation process itself, i.e., the process requiring the assets

106 Insolvency and Bankruptcy Code 2016, s. 33(5).

107 Arbitration Act, 1996, s. 41. '*Provisions in case of insolvency.— ... (2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly*.'

108 Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, February 2020. Report records that this departure is possibly an 'error' and

to be sold off and payment being made to the creditor, in the order of priority of their rights.[109] Thus, if these legal rights in contention are determined by way of continuing the pending proceedings, then the proceeds from assets can be allocated to the creditors in accordance to their rights, without further dispute.

This divergence would also affect those proceedings (including arbitration), which got stayed on initiation of insolvency process, as highlighted under scenario (a) above, as they can be re-commenced during liquidation on account of the narrower moratorium provision.[110]

Indian Status Vis-a-Vis Global Approach Towards Reference to Arbitration During Insolvency: An Attempt to Reconcile

As dealt in above, the collision between arbitration and insolvency has been globally recognised. This explains why some jurisdictions such as US and UK, are much more settled in this regard as they have adopted interpretations/mechanisms that minimises the impact of this collision, or to say, have found solutions to prevent the collision by harmonising the policy objectives of insolvency and arbitration. Since, prior to IBC, there was no full-fledged statutory insolvency process in India that could compare with the insolvency regime of the developed jurisdictions, this conflict of arbitration and insolvency remain insignificant in India. However, since 2016, India too has witnessed these concerns requiring balance the conflicting interests of arbitration and insolvency. Therefore, it merits that a comparison be made of these globally recognised approaches in the Indian context.

As highlighted in the portions above, the most common methods adopted globally for minimising the effect of this collision is based on the idea of segregating disputes which lie exclusively in the domain of an insolvency court, from the disputes which may continue to be adjudicated

suggests that the Indian legislature amend section 33(5) for it to include continuation of pending proceedings within its cover. However, till date, no such amendment has been made.

109 Insolvency and Bankruptcy Code 2016, s. 35(1)(j). Section 35(1)(j) —'*to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code*.'

110 Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018, at para. 5.4.

by the relevant forum during the insolvency process. The approaches can broadly be classified as follows:

(a) Creating a distinction between 'core' and 'non-core' insolvency dispute, and reserving only a core matter for insolvency court;[111]
(b) Analysing a dispute based on its in rem and in personam character, and reserving only such disputes for insolvency courts which have *erga omnes* effect;[112] and
(c) Analysing a dispute based on its impact on the debtor, i.e., disputes being either beneficial or prejudicial to the debtor, and reserving only such disputes for insolvency courts that are prejudicial to the interest of the insolvent debtor, or that have the effect of dissipating the estate of the debtor to the detriment of the creditors.[113]

Although statutorily none of the above approaches has been referred in the IBC expressly or impliedly, the method (c) was first to find its way in by way of the purposive interpretation undertaken by the Indian judiciary in numerous decisions as indicated above. Indian courts have, time and again, affirmed that the proceedings which are not prejudicial to the corporate debtor or has the potential of diminishing the value of the estate of the corporate debtor, but are beneficial and in the interest of the corporate debtor, are not barred under the IBC during moratorium. These proceedings can continue to be adjudicated or enforced or executed, as the case maybe, before the relevant forum having jurisdiction. Courts have acknowledged that proceedings, outcome of which might improve the prospects of the corporate debtor being resolved, are not critical to the interest of creditors of the corporate debtor in the insolvency process per se and their continuing adjudication would not act to their detriment or reduce the estate of the corporate debtor, available to be resolved for their collective benefit in the insolvency process.

The method (a) and (b), on the other hand, have not been talked about or analysed in the context of IBC by the courts directly yet. However, their glimpse, although couched in different terms, in the judicial pronouncements is evident, as detailed below.

111 For instance, US and France.
112 For instance, US.
113 For instance, UK, Singapore, and India.

Method (A): Core and Non-core Distinction

As stated earlier, 'core' and 'non-core' distinction is pretty elaborate and of wide judicial discourse in jurisdiction such as US. In US, although there exist judgments which list down the issues that qualify as 'core', yet there is a lot of inconsistency in the decisions of different courts. In India, the closest courts came to acknowledging this distinction is in a recent judgment of the Supreme Court of India in *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors*.[114] wherein it was held that[115]

> ... NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

Here, the point in contention was termination of a power purchase agreement (PPA) by Gujarat Urja Vikas Nigam Ltd. (GUVNL) entered into and with Astonfield Solar (Gujarat) Private Limited, the corporate debtor. GUVNL was corporate debtor's sole client and the PPA was the only agreement that was keeping the corporate debtor afloat.[116] The ground for termination of the PPA was the initiation of insolvency proceedings against Astonfield (*ipso facto* clause). The resolution professional of Astonfield challenged the termination before the NCLT, who upheld the challenge and rejected the termination. GUVNL assailed the NCLT decision before the NCLAT, but NCLAT too rejected the termination of the PPA. Finally, an appeal was preferred to the Supreme Court of India, the apex authority. Before the Supreme Court, GUVNL, *inter alia*, contended that PPA being a contractual arrangement between the parties is not subject to the jurisdiction of the NCLT under the IBC, but to the authority[117] set up under Indian Electricity Act, 2003.

The Supreme Court analysed the issue in the context of IBC section 60(5) which provides for the wide jurisdiction to NCLT. Section 60(5)(c)

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114 *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors*., Supreme Court of India, Civil Appeal Number 9241 of 2019. ('*Gujarat Urja*').

115 Gujarat Urja, at para. 67.

116 Gujarat Urja, at para. 165.

117 Gujarat Electricity Regulatory Commission.

particularly reads that NCLT shall have jurisdiction to entertain or dispose of 'any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.' The Supreme Court held that section 60(5)(c) is a 'residuary jurisdiction' provision as it provides wide jurisdiction to NCLT to adjudicate all questions of law or facts *arising from* or *in relation to* the insolvency resolution process.[118] Court further held that this provision is not confined to the contours of section 14 moratorium, as otherwise it would be rendered otiose in relation to cases, which may not fall foul of section 14,[119] but still involve the issue of preserving the value of corporate debtor or its status as 'going concern',[120] such as the instant fact scenario.

In the instant case, if the PPA was allowed to be terminated, no resolution applicant would have shown interest in submitting a resolution plan, and the corporate debtor would have headed towards liquidation, i.e., corporate death. Since IBC strives for resolution and liquidation[121] is the last resort,[122] the Supreme Court of India deemed it fit, in the peculiar facts of this case, i.e., centrality of the PPA to the insolvency process and termination being made on the sole ground of initiation of insolvency proceedings, that the NCLT rightly assumed jurisdiction and decided upon the validity of the termination of PPA by GUVNL.[123]

However, while doing so, the Supreme Court emphasised that they are not laying down a general principle of law on the contours of NCLT

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118 Gujarat Urja, at para. 87.

119 For instance, termination of PPA where corporate debtor is to supply power to third party to generate revenue and not the other way round, i.e., corporate debtor receiving the supply, termination of which is expressly restricted under s. 14. Also *see GRIDCO Limited v. Surya Kanta Satapathy and Ors*., NCLAT, CA (AT) (INS) Number 1271 of 2019 (decision dated 14 July 2020).

120 *See*, for e.g., *Pepsico India Holdings Pvt Ltd v. V Nagarajan, Resolution Professional of Oceanic Tropical Fruits Pvt. Ltd*., NCLAT, CA (AT) Insolvency No. 686 of 2019 (decision dated 13 Nov. 2019); *Tata Consultancy Services v. Vishal Ghisulal Jain*, NCLAT, CA (AT) Insolvency No. 237 of 2020 (decision dated 24 June 2020).

121 Even in case of liquidation, NCLAT has set aside the termination of PPA. *See Gujarat Urja Vikas Nigam Ltd. v. Yes Bank Limited*, NCLAT, CA (AT) (Insolvency) Number 601 of 2020 (decision dated 20 Oct. 2020). However, an appeal (bearing Civil Appeal No. 3965 of 2020) is pending adjudication before Supreme Court against the NCLAT decision.

122 *Swiss Ribbons Pvt. Ltd. v. Union of India*, Supreme Court of India, Writ Petition (Civil) Number 99 of 2018, decided on 25 Jan. 2019.

123 Gujarat Urja, at para. 165.

jurisdiction, and that the NCLT do not have jurisdiction over matters that are dehors the IBC.[124] The Supreme Court observed that

> [T]he jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a **termination may take place on grounds unrelated to the insolvency of the corporate debtor**. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, **if such termination will not have the effect of making certain the death of the corporate debtor**. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would **merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract** (as was the case in this matter's unique factual matrix).[125]

By way of these observations, the Supreme Court essentially identified and distinguished the matters that are 'core' and 'non-core' to the insolvency and held that the insolvency court (NCLT) would not assume or usurp the legitimate jurisdiction of other courts when the matter pertains to a 'non-core' issue. As per the above quoted portion of the judgment, 'Core' matters may be where the preservation of the value of corporate debtor or maintaining its 'going concern' status is so threatened by an action that if not prevented the corporate debtor would be pushed into liquidation. While, 'non-core' may be those where either the subject action is unrelated to the insolvency or the action is not likely to cause liquidation of the corporate debtor, or at most, merely dilute the value of the corporate debtor.[126] Inclusion of the latter in the 'non-core' list is significant as it indicates that NCLT's jurisdiction can be excluded even in matters that may affect the value of the corporate debtor. This essentially broadens the scope of this distinction and renders much more disputes amenable to adjudication by forums (including arbitration) having original jurisdiction over the matter. For instance, in a subsequent Supreme Court judgment in *Tata Consultancy Services Limited v. Vishal Ghisulal Jain*,[127] the challenge to termination of a contract was held to be not maintainable before the insolvency court 'for want of jurisdiction' as there was no analysis as to

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124 Gujarat Urja, at para. 87.
125 Gujarat Urja, at para. 165.
126 *See MF Global Holdings Ltd. et al. v. Allied World Assurance Co. Ltd. et al.*, No. 1:16-ap-01251 (Bankr. S.D.N.Y. 24 Aug. 2017).
127 Supreme Court of India, Civil Appeal Number 3045 of 2020.

how the termination 'would put the survival of the Corporate Debtor in jeopardy'.

However, considering that the judgment in *Gujarat Urja* is recent, it is yet to be conclusively seen that how far this distinction between 'core' and 'non-core' matters is observed and followed by the courts in India. In any case, it is significant step ahead in putting the Indian insolvency regime (IBC) in tandem with the global practises.

Method (B): Disputes of In Personam Nature and Not Having *Ergo Omnes* Effect

It is not disputed that certain types of disputes are non-arbitrable in light of the underlying nature of arbitration proceedings. Supreme Court of India[128] has identified these non-arbitrable disputes to, *inter alia*, include matters pertaining to insolvency. This is considering the fact that the insolvency proceedings are of *in rem* nature, i.e., proceedings against the world at large. An insolvency proceeding requires a collective action in resolving the stress faced by the debtor. It is a proceeding conducted in the interest of all the creditors who have submitted their claims against the debtor in a consolidated insolvency resolution process, rather than initiating individual actions against the debtor. Therefore, these proceedings are not to be arbitrated but dealt exclusively by a centralised forum, i.e., the NCLT herein, which is a specialised tribunal constituted for this purpose, and is expected to be more efficient and have full jurisdiction to dispose of the entire matter efficaciously.[129]

Thus, the question with respect of non-arbitrability of the dispute requiring determination of insolvency has been settled conclusively. However, the question that whether all disputes pertaining to such insolvency proceedings are non-arbitrable, for being *in rem* in nature, remains inconclusive. This being a question of law and fact requires analysis that whether those disputes which although arises from an *in rem* insolvency proceeding but themselves are of in personam nature can be arbitrated or not.

In this regard, it has been time and again held that the disputes whose subject matter and cause of action relates to rights *in rem* are not arbitrable,[130] with the exception of those subordinate disputes that arise from

128 *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*., Supreme Court of India, (2011) 5 SCC 532.

129 *Vidya Drolia v. Durga Trading Corpn*., Supreme Court of India, (2021) 2 SCC 1, at para. 77.

130 *Vidya Drolia v. Durga Trading Corpn*., Supreme Court of India, (2021) 2 SCC 1.

the rights/actions *in rem* but pertains to rights in personam.[131] For instance,[132] Bombay High Court in *Eros International v. Telemax Links India Pvt. Ltd.*,[133] held that although a copyright is a right *in rem* and exercisable against the world at large, a copyright infringement action under a contract is a dispute vis-à-vis the other party to the contract, i.e., an in personam action against an individual and the determination of this action would not have any effect on any third party unrelated to the contract. Accordingly, this dispute was held to be in personam and arbitrable.[134]

The above-mentioned line of distinction of arbitrability between an in rem action and the subordinate in personam matters arising from such in rem action, can be suitably applied to matters relating to in rem insolvency proceedings. For an in rem insolvency proceeding, a subordinate in personam matter may include, for instance, a dispute between the debtor and the supplier under a contract on account of the supply of defective goods by the supplier and the consequent non-payment by the debtor. Here, the supplier as a claimant may institute arbitration and seek payments for the supply of goods made. If seen in the context of the *Telemax* case, the dispute is arbitrable as it arises out of a contract between two parties and any determination made, by way of an arbitral award, would only relate to the rights of the debtor and supplier to pay for or receive payments for the goods supplied. It is only if the determination is in favour of the supplier, i.e., requiring the debtor to make payments, and that the supplier files for the enforcement/execution of such an award, that it would possibly affect the other creditors involved in the insolvency proceedings, as it may then amount to prioritising the payments to the supplier at the cost of other creditors.

In the insolvency context, essentially, till the time, a proceeding merely assess or determine liability, it is in personam in nature, but the time it becomes a proceeding to recover the assessed or determined liability, the nature of proceeding transforms into an in rem action as it stands to impact the interest of all the other creditors in an insolvency proceeding. Since, arbitration, as a proceeding, is required merely to assess and determine the liability, while the underlying action to enforce such determination lies

131 *See also Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, Supreme Court of India, (2011) 5 SCC 532.

132 *See HDFC v. Satpal Singh*, Delhi High Court (2012) 193 DLT 203, at paras 10 and 12.

133 Supreme Court of India, 2016 SCC Online Bom 2179.

134 *See also Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, Supreme Court of India, (2003) 6 SCC 503; *Olympus Superstructures (P) Ltd. v.* Meena Vijay Khetan, Supreme Court of India, (1999) 5 SCC 651.

before an executing court, it can be argued that the subordinate in personam disputes is arbitrable and can continue to be referred to arbitration even post-initiation of the insolvency proceeding.

This argument also sits well with the *erga omnes* principle. Similar to the exception of in rem actions, disputes having e*rga omnes effect*, i.e., affecting third-party rights and liabilities even though they are not bound by the arbitration agreement, are also considered non-arbitrable.[135] If, however, we consider the above distinction between the proceedings that merely determine the dispute and the proceedings that enforces/execute such determination, i.e., the step succeeding the determination, then the former stage of proceedings will appear to have no *erga omnes* effect, and therefore, remain arbitrable.[136] While, the latter stage of proceedings will have *erga omnes* effect, and therefore, becomes non-arbitrable. In other words, proceedings at any stage preceding the enforcement/execution action are arbitrable under law for having no *erga omnes* effect.

In the context of IBC, the Delhi High Court judgment in *Power Grid* (*supra*) may act as a pivotal point for this approach.[137] In *Power Grid* (*supra*), Delhi High Court affirmed this understanding and observed that it is the 'debt recovery action' that is critical to insolvency process, and not any other proceedings that precedes such action. In other words, it is when the execution proceeding to recover the debt is initiated that the moratorium kicks in, as it is only such debt recovery action that has the effect of diminishing or dissipating the assets of the corporate debtor and affecting the third-party rights of the other creditors. Apart from such debt recovery proceedings, the moratorium provision does not bar or restricts institution or continuation of any other proceedings (including arbitration).

From the judgments discussed earlier, it can be deduced that the Indian judiciary is already on the path to explore and reconcile these globally tried and accepted methods of harmonising and preventing collision between arbitration and insolvency in the context of the IBC. There is no doubt that in the times to come we may see more direct application of these global approaches by the Indian courts, and India contributing to the global jurisprudence in this regard.

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135 *Vidya Drolia v. Durga Trading Corpn*., Supreme Court of India, (2021) 2 SCC 1.

136 *See* France Supreme Court's decision in *Jean X. v. International Company for Commercial Exchanges (Income)*, 6 May 2009, Case Number 08-10281. This case applies similar principle and held that an arbitral tribunal may only render a decision deciding the amounts owed by the insolvent party, but not order the insolvent to pay any amount.

137 *See supra* n. 81.

Plausible Drawbacks of Applying These Approaches under IBC

The current Indian insolvency regime under IBC is a big leap upward from the erstwhile severely plagued and scattered insolvency regime. IBC has been identified as an overhauling legislation which has cemented India's outlook towards promoting business and commerce globally. Global publications hail IBC as a momentous step by the Indian legislature to put India on the map of an attractive business destination.[138] It has improved India's position on various fronts, including the ease of doing business[139] and resolving insolvency.

IBC has contributed significantly to the Indian economy in its original form and is considered a success in terms of (a) substantially increasing the recovery rate for lenders, (b) reducing the time consumed to resolve insolvency, (c) reducing the cost for resolving insolvency, and (d) ensuring better outcomes in terms of increased chances of revival than liquidation. Further, the overall scheme of the IBC to promote, protect, and preserve the value of the debtor, and take steps that leads to value maximisation is progressive and in line with global aspirations.

In this backdrop, it becomes essential to analyse, in the Indian context, that whether adopting the approaches that promote increased use of arbitration during the pendency of the insolvency proceedings would have any downsides or drawbacks? Whether it may faulter with the IBC's overall efficiency and acuity in producing results as it does presently? If yes, does it merit adopting these changes or is India better served with the present status quo? The best way to answer these would be to analyse the effect of these approaches on the very four parameters of time, cost, outcome, and recovery rate, that any insolvency regime is measured upon globally.

Impact on 'Time' Taken to Resolve Insolvency

There are no two thoughts that moving away from or narrowing the exclusive jurisdiction of the insolvency court over insolvency matters would have significant impact on the efficiency and time-bound nature of

138 Sui-Jim Ho and Surya Kiran Banerjee, *Indian Bankruptcy Code—How Does It Compare?*, Emerging Markets Restructuring Journal, Issue Number 8 — Winter 2018–2019.

139 MS Sahoo, Moving up in 'ease of resolving insolvency', The Hindu Business Line, updated on 5 March 2020, available at https://www.thehindubusinessline.com/opinion/moving-up-in-ease-of-resolving-insolvency/article30992998.ece.

the process. The impact would be visible for, *inter alia*, the following reasons:

(a) No control of insolvency court over other court or tribunal: In India, insolvency tribunal is statutorily not given precedence over any other court or tribunal (including arbitration). If a dispute is allowed to be continued or instituted during the insolvency process before any other forum, then the insolvency courts would not be able to dictate or seek disposal of the dispute within the timeline specified under the IBC. To illustrate, if an arbitration is allowed to be instituted at the later stages of the insolvency process or if the section 34 challenge is pending before the court, then the insolvency court would not be in a position to direct such proceedings to be concluded within the time prescribed under IBC to conclude the insolvency process. In such a case, either the timeline under IBC would stand frustrated or the claims pending adjudication as on the insolvency completion date would stand extinguished on successful resolution under IBC, thereby frustrating the institution or continuation of such proceeding at the first place.

(b) IBC process and process of other courts and tribunals are at variance: IBC provides for a faster redressal of disputes through dedicated and specialised tribunals. Further, IBC appeal provisions are limited and can be availed only in observance of strict timelines. Other courts and tribunals may not provide for similar provisions. This exposes a possibility where the disputes allowed to be adjudicated during insolvency process may lie before forums (including arbitration) which have relaxed timelines or provide for broader and increased appeal avenues.

Thus, possibly, adopting these approaches that advocates for increased use of arbitration during insolvency may delay the timely completion of the insolvency process.

Impact on 'Cost' Incurred to Resolve Insolvency

Cost is directly connected with the time to resolve insolvency. Thus, increase in time will automatically increase the process cost. However, cost for the extended time is only a part of the concern, as an increased reference to these approaches would also mean that the corporate debtor will see more proceedings during the insolvency process, as compared to the present status quo. This would imply that the corporate debtor would be

required to participate and represent its interest at various forums (not required earlier) thereby requiring the assistance of more human and other resources. The employment of additional resources would involve significant cost towards litigation and management that will add to the stress faced by the debtor, which will ultimately reflect by way of deduction in value retrieved by the creditors on completion of the process. In other words, the recovery made would be lesser on a cent.

Impact on 'Outcome' of the Insolvency Proceedings

IBC aims and strives for resolution/revival of the ailing debtor. Successful resolution is contingent on the fact that the business is seen viable to a resolution applicant. A business is viable if its value is preserved during the insolvency process. Value is preserved when the assets are managed properly, and business is continued on a 'going concern' basis. However, if the resolution professional, who is designated as the official to oversee these aspects, is occupied primarily in defending the suits or proceedings, then the duty to maintain the corporate debtor as a going concern and protect and preserve its value would become secondary and may even be neglected.

Further, the increase in time in completing the insolvency process may also dissuade potential resolution applicants from continuing to express their interest in submitting the resolution plan for a stressed debtor. Since preparation of resolution plan and conducting due diligence in itself a costly affair, any delay in the prescribed timeline under the IBC may discourage the resolution applicant, leading to withdrawal from the process. This would affect the prospects of successful resolution of the debtor and may push the debtor into liquidation.

Impact on 'Recovery Rate' Under the Process

Negative impact on time, cost, and outcome is bound to have negative effect on the recovery rate. With the increase in time, the recovery rate would be less as during the time the insolvency process is on-going, the corporate debtor would not operate to its full potential, and accordingly, would not retrieve a value that justifies its full potential. Further, with increase in time, the value lost on account of depreciation would also increase. This will lead to a further reduction in the recovery made on completion of the process.

With increase in costs, the recovery rate is bound to go low as well. Every extra penny spent as insolvency process cost would factor in the value received by the creditors on completion of the process. Similarly, the diminishing probabilities of successful resolution and increasing chances of liquidation, would further affect the recovery rate. As stated earlier, liquidation is expected to retrieve a lesser value for the creditors as compared to a value that a successful resolution may attract. Thus, overall, the recovery rate under the insolvency process may fall if these approaches are to be considered and applied under the IBC.

The question, therefore, arises that whether does it merit for India to adopt these globally applied approaches of reconciling the conflict between arbitration and insolvency or is India better served with the status quo.

Conclusion

As stated earlier, US,[140] UK,[141] and other European nations[142] apply several approaches under their respective insolvency and arbitration laws to prevent collision between the policy objectives of arbitration and insolvency and perform much better than India on the index of 'resolving insolvency'. However, there is an inherent distinction between India and these jurisdictions which makes such comparison unviable, which is, these jurisdictions are comparatively advanced and a quicker legal system in place overall, than the legal regime of India.

Further, the parameters to measure the score for resolving insolvency is based on a composite metric of time, cost, outcome, and recovery rate, which although is broad and cover a lot of aspects, but still has its own limitations. For instance, these parameters are made to be applicable to around 200 jurisdictions, and thus, are required to be focussing on broader issues that are common and prevalent than those that are particular or

140 Ranked 2, World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO.

141 Ranked 14, World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO.

142 Germany – Ranked 4; France – Ranked 26, World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO.

unique to some jurisdictions. Since each jurisdiction would have their own unique experiences in dealing with insolvencies and their outcome, one parameter of measuring the efficiency of insolvency law may not fit all. For instance, there are several social and economic aspects that are unique to India and bear significant effect on how the stress is seen and credit is made available. Similarly, India has its own legal peculiarities, such as having no settled hierarchy among courts, tribunals, and forum other than the Supreme Court of India or availability of multiple avenues to challenge one order, which may not get measured under these parameters but remain critical to determine the true state of IBC and its impact.

Hence, considering India's unique circumstances and acknowledging existence of a vibrant legal space that is outward looking and observant of the global developments, it may be prudent that India adopts a more careful and calculated approach in this regard. For instance, courts may allow all beneficial actions to a corporate debtor and subordinate in personam disputes to continue while applying other global recognised methods contextually on a case-to-case basis.[143] It would enable courts to further the prospects of the IBC and the objects it seeks to achieve, rather than being bogged down under global peer pressure by following them indiscriminately, upsetting the progress made so far under the IBC.

143 For instance, as done in the jurisdictions like UK and Singapore wherein courts have devised broad principles to assess whether a case is to be allowed to be arbitrated or to be adjudicated by the bankruptcy court.