

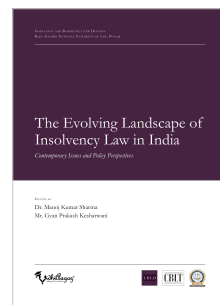
CHAPTER 2

Navigating the Intersection of Insolvency and Arbitration: Understanding Jurisprudential Fissure and Tensions

Abhay Shrotiya and Keshav Kulshreshtha

in *The Evolving Landscape of Insolvency Law in India: Contemporary Issues and Policy Perspectives*, edited by Manoj Kumar Sharma and Gyan Prakash Kesharwani (VidhiAagaz 2026), pp. 21–38

DOI <https://doi.org/10.63108/VAB.IBL.1.2>



CITE THIS CHAPTER

BLUEBOOK (21ST ED.)

Abhay Shrotiya & Keshav Kulshreshtha, *Navigating the Intersection of Insolvency and Arbitration: Understanding Jurisprudential Fissure and Tensions*, in *THE EVOLVING LANDSCAPE OF INSOLVENCY LAW IN INDIA: CONTEMPORARY ISSUES AND POLICY PERSPECTIVES* 21 (Manoj Kumar Sharma & Gyan Prakash Kesharwani eds., VidhiAagaz 2026).

OSCOLA, Chicago and APA citations, RIS and BibTeX: vidhiaagaz.com/books/the-evolving-landscape-of-insolvency-law-in-india/chapter-2/

LICENCE

Open access under the Creative Commons Attribution-NonCommercial 4.0 International Licence (CC BY-NC 4.0): it may be copied, shared and adapted for non-commercial purposes, with credit to the authors and the source. The permanent address of this chapter is its DOI above.

CHAPTER 2

Navigating the Intersection of Insolvency and Arbitration: Understanding Jurisprudential Fissure and Tensions

ABHAY SHROTIYA* AND KESHAV KULSHRESHTHA**

The interplay between insolvency and arbitration mechanisms remains a significant topic for jurisprudential discussion and scholarship. The coexistence of both laws is best described by the US Court as a ‘Conflict of two near-polar extremes’. This variance is premised upon the contrasting and contradictory objectives of both laws. Insolvency resolution is aimed at a centralized and unified mechanism, where all the claims concerning the corporate debtor are consolidated and dealt with to provide a fresh start to a corporate debtor. Contrastingly, arbitration is a dispute resolution mechanism that is based on the principle of party autonomy, where judicial intervention is expected from nil to zero. However, complexities and confusion arise when parallel proceedings are initiated under both frameworks to govern the same entity, i.e., the corporate debtor. The conflict lies in the governing authority and nature of the law, that is, which law will prevail over the other. Through this paper, an attempt has been made by the authors to understand the complexities arising from the intersection of the two legislations. The authors’ main objective is not only to deal with these issues from a legal perspective but also to touch upon the practical challenges faced by the stakeholders. For this purpose, the paper provides an extensive analysis of the legislative schemes, judicial pronouncement, and global approaches. To have an overall understanding, the authors also underpinned the plausible implications of adopting international frameworks and concluded by emphasising the need for legislative reform. By highlighting these issues, the authors aim to bring attention to the legislative gaps that exacerbate these conflicts and make a call for clearer, more coherent solutions.

Keywords: Arbitration, Insolvency, Moratorium, Corporate Debtor, Resolution Professional.

1 INTRODUCTION

With the advent of globalization, India has witnessed significant development and an influx in foreign direct investment. To respond to such economic advancement effectively, there

* Student at Institute of Law, Nirma University, Ahmedabad, Gujarat, India.

** Student at Institute of Law, Nirma University, Ahmedabad, Gujarat, India.

remains an underlying need to provide for a robust legal mechanism. Against this backdrop, two key legislations which have turned out to restructure and improve the ease of doing business in India are the Insolvency and Bankruptcy Code and the Arbitration Act.

Insolvency code is aimed at a centralised and unified mechanism, where all the claims concerning the corporate debtor are consolidated and dealt with to provide a fresh start to a corporate debtor. Contrastingly, arbitration is a dispute resolution mechanism that is based on the principle of party autonomy, where judicial intervention is expected from nil to zero.

Though the said legislations aim to pursue different objectives, they have indeed contributed to and turned the markets for good, as can easily be seen from the improvement in the ease of doing business in the country.¹ Despite the benefits that arose from the enactment of the said legislations, it remains unanswered how the legislations would meet their respective objectives, given a situation in which they were to interact with each other. Unfortunately, neither the Code nor the Act outlines exactly the procedure or approach that has to be followed when the said legislations are enforced simultaneously.

The conflict between Insolvency and Arbitration regimes lies in the underlying objective of the frameworks. Insolvency law aims to cater relief to the majority of stakeholders by utilising the best potential of the assets in such a way that it provides optimum returns to all the stakeholders.² This value maximisation process requires individual stakeholders to dissuade their claims against the corporate debtor³ not only for the sake of sanity in the process but also to preserve the interest of the stakeholders lowest in the hierarchy.⁴

Contrastingly, arbitration is rooted in the principle of party autonomy and minimal judicial intervention. It empowers the contracting party to autonomously decide the forum for resolving their disputes.⁵ So, essentially, the underlying policy is that if the dispute falls under the scope of the arbitration agreement, then it must only be referred to the arbitral tribunal.⁶

However, this party-driven principle is in direct conflict with the principle of consolidation of claims under the insolvency framework. Continuation of proceedings under the insolvency framework would mean that every other proceeding or case would be barred during the insolvency process due to the imposition of a moratorium. The moratorium is

¹ WORLD BANK GROUP, <https://archive.doingbusiness.org/en/rankings> (last visited Dec. 13, 2024).

² Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717–89 (1991).

³ The Insolvency and Bankruptcy Code, 2016, § 14.

⁴ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE (2020), <https://ibbi.gov.in/uploads/whatsnew/2020-10-01-210733-43cms-9224c9b668aac0d6149a5d866bfb4c79.pdf> (last visited Dec. 13, 2024).

⁵ Christian Buhring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 25 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

⁶ ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2004).

described as a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor.⁷ It is imposed so that a specialised and centralised authority could adjudicate upon the dispute.⁸

This raises an important question: What happens to an arbitration agreement when the matter has to be dealt with under the insolvency framework? Whether the party to an arbitration agreement, which specifically decided to refer the dispute to arbitration, would be compelled to submit their claim before the insolvency court, frustrating its very objective?

2 BREAKING THE COMPLEXITY: MAKING SENSE OF CONFLICTING SITUATIONS

2.1 Conflict between Arbitration Agreements and Insolvency Proceedings

To better understand the gravity of the matter, assume that Party A and Party B enter into a contract worth \$50 million. Considering the high stakes involved in the matter, the parties decided to refer any dispute that arises during the course of the contract to the arbitration. However, the conflict arises when B has the same contract with 20 other parties, and one of them files an insolvency petition to initiate a corporate insolvency process. Once the insolvency proceeding begins, A is not allowed to pursue his remedy through the agreed terms but through the insolvency procedure. Now a question arises: whether this overpowering of the insolvency proceeding over arbitration or to put it simply, this transition from *in-personam* (against the individual) to *in-rem* (against the world) proceeding, is legitimate within the context of both legal systems?

2.2 Competence of Insolvency Courts in Complex Disputes

The intention of referring the dispute to arbitration is not only to have a quick but an effective remedy as well. The parties, while referring the dispute to arbitration, have a specific intention in their mind that the person who is presiding to adjudicate the issue is well versed with the subject matter of the dispute, meaning thereby he would have particular expertise of the matter involved in the dispute.⁹ When the insolvency proceeding begins, the insolvency court, specifically the Resolution Professional (RP), would have the power to admit or reject the claim.¹⁰ Now, this discretion of RP to determine the validity of the claim is

⁷ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

⁸ Larsen Oil & Gas Ltd. v. Petroprod Ltd., [2011] SGCA 21.

⁹ Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

¹⁰ The Insolvency and Bankruptcy Code, 2016, § 25.

dependent on his ability to interpret the terms of the contract correctly, which may involve long and complex ledger accounts, timeline of events and various other things. Therefore, the question arises: whether the insolvency court is the right forum to decide these disputes. Further, this also raises questions over the powers of the resolution professional.

2.3 Cross-Border Challenges in Arbitration and Insolvency

This situation becomes more complex when Party B has some assets in a foreign jurisdiction and they form the subject matter of arbitration as well. In this scenario, the jurisdiction of the insolvency court is limited to the territorial boundaries of the nation and does not extend to foreign assets.¹¹ Now the question arises: whether the arbitral tribunal can proceed with those assets, and if so, does that frustrate the objective of insolvency proceedings? These questions require extensive analysis of the existing jurisprudence in reference to the philosophies and objectives of the law vis-à-vis the actual effect of the law.

3 INTRODUCTION TO IBC: A CHANGE IN APPROACH

In India, the Insolvency framework is regulated by the Insolvency and Bankruptcy Code, 2016 (IBC).¹² IBC came after the failure of previous laws that failed to govern the insolvency regime adequately. The IBC represents a more carefully crafted and outward-looking approach, incorporating the universally recognized parameters for efficiently resolving insolvency matters. The success of the code is evident in India's improved ranking in the World Bank - Ease of Doing Business Index.¹³ However, before exploring the achievements of the IBC, it is essential to first understand the background and the evolution of the Code.

3.1 Failure of Pre-Existing Laws

Before the introduction of IBC, India's insolvency framework was affected by inordinate delays resulting in undesirable outcomes. The earlier framework was scattered across multiple laws governing insolvency disputes, which ultimately led to failure to meet the key parameters of insolvency such as time, cost, outcome, and recovery rate.¹⁴

It is for the first time, on the recommendation of the Tiwari Committee, that the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was introduced,¹⁵ which dealt

¹¹ Divyanshu Kumar, *Cross Border Insolvency Regime in India: Draft Part-Z Vis-à-vis the UNCITRAL Model Law*, 1 HPNLU JLBE 104 (2022).

¹² The Insolvency and Bankruptcy Code, 2016.

¹³ WORLD BANK GROUP, <https://archive.doingbusiness.org/en/rankings> (last visited Dec. 13, 2024).

¹⁴ Rajeswari Sengupta et al., *Evolution of the Insolvency Framework for Non-Financial Firms in India* (Indira Gandhi Institute of Development Research), <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> (last visited Dec. 13, 2024).

¹⁵ Sick Industrial Companies (Special Provisions) Act, 1985.

with the insolvency of corporates. Unfortunately, SICA didn't survive long as, firstly, it allowed the debtor to take charge of a company and declare sick; secondly, it tried to revive the sick companies in all situations, including where it was not possible; and lastly, the tribunal that was set up under it was not efficient in dealing with the increased number of cases.¹⁶

To address this void created by the failure of SICA, the government enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI)¹⁷, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)¹⁸ on the recommendation of the Narasimham Committee I¹⁹ and II,²⁰ respectively. However, these laws further added a layer of complexities by creating multiple legislation and forums to deal with interrelated aspects of insolvency,²¹ consequently leading to further delays in resolving insolvency disputes.

Finally, on the recommendation of the Report of the Bankruptcy Law Reform Committee (BLRC Report)²², the current Insolvency and Bankruptcy Code was framed, which is now working as an established code to deal with all aspects of Insolvency.

3.2 IBC in Focus: Achievements So Far

The newly enacted IBC is a comprehensive, self-contained code that aims to align India with the globally recognised insolvency standards by adopting certain internationally accepted parameters, which can be seen below:

3.2.1 Time

It is a crucial factor in insolvency proceedings as delays can lead to the erosion of debtor's assets and reduce the chances of business revival. According to World Bank data from 2016²³, the average time taken for resolving insolvency under the previous mechanism was 4.3 years, while as per the latest IBBI report, this time has been reduced to an average of

¹⁶ *Madras Petrochem Ltd. v. Bd. for Indus. & Fin. Reconstruction*, (2016) 4 SCC 1.

¹⁷ The Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

¹⁸ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

¹⁹ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/resources/Narasimham%20Committee%20I-min.pdf> (last visited Dec. 13, 2024).

²⁰ COMM. ON BANKING SECTOR REFORMS, REPORT OF THE COMMITTEE ON BANKING SECTOR REFORMS (1998), <https://the1991project.com/sites/default/files/2023-07/1998%20Banking%20Sector%20Reforms%20Report%20-%20Narasimham%20II.pdf> (last visited Dec. 13, 2024).

²¹ *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

²² INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Dec. 13, 2024).

²³ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

1.6 years.²⁴ This shows the effectiveness of the reforms and an overall improvement in India's financial resolution framework.

3.2.2 Cost

Minimizing the cost of insolvency is vital for maintaining the debtor's financial health.²⁵ The data by IBBI suggest a notable decline in the average cost of the resolution, which is now standing at 0.73% of the resolution value and 1.23% in cases of liquidation.²⁶ This lower insolvency cost would encourage the business to opt for insolvency proceedings over liquidation.

3.2.3 Outcome

The ultimate outcome of any insolvency framework should be to revive and reorganise the companies facing financial catastrophe. As per the data, since the inception of IBC 2016, 67% of the total CIRP has been successfully closed. A successful resolution not only aids in recovering the distressed business but also protects jobs, preserves assets, and ultimately benefits the overall economy.²⁷

3.2.4 Recovery Rate

It reflects the quantum of successful repayment of debt to creditors and the effective preservation of the debtor's assets value. The data indicates that the on-average recovery rate is around 32 per cent of admitted claims and 168 per cent of the liquidation value is resolved under IBC.²⁸ High recovery rates indicate a well-functioning insolvency system, balancing creditor interests and debtor rehabilitation.

²⁴ Neeti Shikha & Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Feb. 2021), <https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf>; MS Sahoo, *Moving Up in 'Ease of Resolving Insolvency'*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Mar. 2020), <https://ibbi.gov.in/uploads/whatsnew/faf3af70524e6c7ccf0b6762ab70216c.pdf>.

²⁵ Jason Allen & Kiana Basiri, *The Impact of Bankruptcy Reform on Insolvency Choice and Consumer Credit*, BANK OF CANADA (May 2016), <https://www.bankofcanada.ca/wp-content/uploads/2016/05/swp2016-26.pdf>.

²⁶ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf> (last visited Dec. 13, 2024).

²⁷ Medha Shekar & Anuradha Guru, *Theoretical Framework of Insolvency Law*, in INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE 45 (2020), <https://ibbi.gov.in/uploads/resources/158497d3735f154918648288e56dfebc.pdf>.

²⁸ M.P. Ram Mohan & Balagopal Gopalakrishnan, *Report of Study on Effectiveness of the Resolution Process: Firm Outcomes in the Post-IBC Period*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Aug. 2023), <https://ibbi.gov.in/uploads/whatsnew/59f737b213b4700cc16428aefd62869a.pdf>.

4 MORATORIUM AND ITS APPLICABILITY IN DIFFERENT STAGES OF ARBITRATION

The moratorium under the IBC is defined as a period during which no judicial proceedings for recovery, enforcement of security interests, sale or transfer of assets, or termination of essential contracts may be initiated or continued against the Corporate Debtor.²⁹ Its origin can be traced back to Section 446(1) of the Companies Act, 1956³⁰ which provided that no person can initiate any legal proceedings against the company after the winding-up process has been initiated or an official liquidator is appointed.

Further, according to the Hon'ble Supreme Court³¹ and the BLRC report, the fundamental intention behind imposing a moratorium is to provide a “calm period or breathing spell” in order to create a plan for maximizing the value of the corporate debtor.³²

A moratorium protects the corporate debtor from any fresh suits or proceedings that are pending in any other forum. However, the term ‘proceedings’ mentioned under Section 14 does not bar all proceedings against the corporate debtor. This has been reiterated many times by the Supreme Court and, more specifically, by the Hon'ble Delhi High Court in *Power Grid Corporation of India v. Jyoti Structure Ltd.* The court, in the latter, departed from the general view that all proceedings are barred, holding that Section 14(1)(a) does not indicate a blanket prohibition on all proceedings as the word proceeding is not preceded by the term all.³³

4.1 Understanding the General Effect of the Moratorium in Different Stages of Arbitration

4.1.1 Pre-Insolvency

The arbitration proceedings that have no impact on the assets of the corporate debtor may continue as they may lead to the maximization of the assets of the corporate debtor³⁴. In cases where a counterclaim is initiated and filed by the corporate debtor, such disputes can also be arbitrated, even after the moratorium is imposed, subject to the award being in favour of the corporate debtor.³⁵ This demonstrates that arbitration proceedings are permitted

²⁹ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fdce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

³⁰ The Companies Act, 1956, § 446(1).

³¹ *Innoventive Indus. Ltd. v. ICICI Bank*, (2018) 1 SCC 407.

³² INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Dec. 13, 2024).

³³ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

³⁴ *SSMP Indus. Ltd. v. Perkan Food Processors Pvt. Ltd.*, 2019 SCC OnLine Del 9339.

³⁵ *Id.*

when they are beneficial to the corporate debtor. If the outcome of these proceedings is unfavourable to the corporate debtor, such an award will fall within the teeth of the moratorium.

4.1.2 *After the Commencement of Insolvency*

The fate of the arbitration award hinges on whether it is in favour of the corporate debtor or the opposite party. In the *Power Grid case*,³⁶ the court held that if an award is not against the basic principles that a moratorium seeks to uphold, then such proceedings may be continued. Furthermore, an award can also be challenged under Sections 34³⁷ and 37 of the Arbitration & Conciliation Act³⁸, provided such a challenge is in favour of the corporate debtor, and the continuation of the proceeding does not result in harm to the corporate debtor.

4.2 Moratorium Mandate: Judicial Interpretation and Its Conflicting Effects on Arbitration Proceedings

The courts have carved out exceptions to the general moratorium rule, allowing proceedings that either benefit the corporate debtor or are *in-personam* in nature to be initiated or continued.³⁹

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*⁴⁰, the Supreme Court of India questioned the arbitrability of insolvency disputes. The court held that those matters that are essentially *in-rem* are excluded from adjudication by a private forum i.e. Arbitral tribunal. However, in the case of *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund & Ors.*⁴¹ the Court clarified its stance and held that when a case is in transition from an *in-personam* proceeding to an *in-rem* proceeding, a case can be filed against the company that is yet to become insolvent as a mere pendency of the application for the initiation of insolvency cannot be construed as *in-rem proceedings*. This stance was also accepted by the Supreme Court in the *Swiss Ribbons v. Union of India*⁴² where the court held that until claims of the creditors are received and a COC is constituted, the proceedings will remain an *in-personam* proceedings.

³⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

³⁷ The Arbitration and Conciliation Act, 1996, § 34.

³⁸ *Id.* § 37.

³⁹ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

⁴⁰ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 SCC 532.

⁴¹ *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund*, (2021) 6 SCC 436.

⁴² *Swiss Ribbons v. Union of India*, (2019) 4 SCC 17.

Further, the Supreme Court of India in *Vidya Drolia & Ors. v. Durga Trading Corporation*,⁴³ laid down the fourfold test for the arbitrability of a dispute in India. It held that those disputes that arise from *in-rem* proceedings could not be arbitrated. However, it has also been clarified that disputes of *in-personam* nature, arising from *in-rem* disputes can be arbitrated. In other words, to connect this with insolvency proceedings, it can be comprehended that those disputes and concerns that are *in-personam* in nature or those *in-personam* matters that arise from *in-rem* proceedings can be arbitrated.

Furthermore, the court in the case of *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd & Anr.*⁴⁴ introduced another exception to the general moratorium mandate under the IBC. Departing from the ruling in the *Alchemist Asset Reconstruction Company Ltd. case*⁴⁵, which held that arbitration could not continue during a CIRP, the court allowed the continuation of arbitration proceedings that commenced after the initiation of CIRP. To arrive at such a conclusion, the court analysed the scope and purpose of the moratorium and determined that the moratorium doesn't bar the continuation of those arbitration proceedings where claim and counterclaim have been filed, subject to an award being passed in favour of the corporate debtor and requiring payment to the corporate debtor. In contrast, if the award mandates payment to the opposite party, it will not be enforceable. In such a scenario, the opposite party must file the claim before a resolution professional.

Conclusively, it is clear from the above judgments that there is no strict applicability of the mandate as defined under Section 14 of IBC on arbitration proceedings. The judiciary has, time and again, carved out the exceptions where it has allowed arbitration to continue even after the company was undergoing CIRP and held that those proceedings that benefit the corporate debtor, maximise the value of corporate debtor assets, and do not harm the corporate debtor are allowed to continue.⁴⁶

4.3 Dual Nature of Moratorium: Conflicting Effects on Arbitration

The dual nature of the moratorium becomes evident during the enforcement of the arbitration award. Consider a scenario where an arbitration proceeding is ongoing between parties A and B, and during the process, Company B enters into insolvency. Now, if the result of the arbitration proceedings is in favour of Party A, then the award cannot be enforced due to the moratorium. However, if the said award is in favour of B, i.e. the corporate debtor, it can be enforced against A as this would maximize the value of the corporate debtor's assets.

⁴³ *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

⁴⁴ *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd.*, 2018 SCC OnLine NCLAT 891.

⁴⁵ *Alchemist Asset Reconstruction Co. v. M/s Hotel Gaudvan Pvt. Ltd.*, (2018) 16 SCC 94.

⁴⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

This makes the entire arbitration proceeding futile and ineffective for A, as even if an award is passed in its favour, no efforts can be made to enforce it due to the imposition of a moratorium. This problem is further aggravated in cases where A is an international party to the said agreement. While the moratorium is designed to protect the corporate debtor and ensure asset maximisation, it inadvertently undermines the rights of other parties who may invest considerable time and effort in legal proceedings only to find their efforts nullified by the moratorium. This imbalance poses a significant risk to international commercial relations and impacts the credibility of the arbitration agreements involving insolvent Indian parties.

5 ADMISSION OR ADJUDICATION OF THE CLAIM?

In the preceding paragraphs, a substantial discussion has already been undertaken on the impact of the moratorium on arbitration proceedings. Once the CIRP proceeding is initiated, a public announcement shall be made under Section 15 of the Insolvency and Bankruptcy Code,⁴⁷ requiring every potential creditor to submit their claims before RP under Section 18,⁴⁸ who in turn will assess the validity of every claim.⁴⁹ However, this power to determine the validity of the claim has been a major ground of contestation across various forums where it has been repeatedly held that the RP possesses administrative, not adjudicatory, power.

In the combined appeal filed before the Appellate Tribunal in the matter of *SREI Infrastructure Finance Ltd. vs. Kannan Tiruvengandam*⁵⁰ and *M/s. Prasad Gempex vs. Star Agro Marine Exports Pvt. Ltd. & Ors.*⁵¹, the issue was raised regarding whether the 'RP' has the power to adjudicate the creditor's claim.

By referring to the landmark case of *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*⁵² (Swiss Ribbons), the Supreme Court thoroughly examined these issues and held that the RP's duty is only limited to vetting and verifying the claims and does not include adjudicatory authority. To arrive at such a conclusion, the court compared the power of the RP to a liquidator and held that, unlike a liquidator, the RP could not act without the approval of the Committee of Creditors (COC). Thus, the RP serves merely as a facilitator in CIRP,

⁴⁷ The Insolvency and Bankruptcy Code, 2016, § 25.

⁴⁸ *Id.* § 18.

⁴⁹ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

⁵⁰ *SREI Infrastructure Fin. Ltd. v. Kannan Tiruvengandam*, Company Appeal (AT) (Insolvency) No. 591 of 2018 (NCLAT Feb. 1, 2019).

⁵¹ *M/s Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd.*, 2019 SCC OnLine NCLAT 368.

⁵² *Swiss Ribbons v. Union of India*, (2019) 4 SCC 17.

whose administrative function will be overseen by the COC and can be replaced by the COC.

Further, in *Grasim Industries Limited and Edelweiss Asset Reconstruction Company Limited v. Tecpro Systems Limited*,⁵³ the NCLT, Principal Bench, New Delhi, held that ‘a perusal of Regulation 13 of the CIRP Regulation makes it clear that RP is under a statutory duty to verify each and every claim and maintain the list of creditors containing their names and amount claimed.’⁵⁴

However, what has been overlooked by the Court here is that the approval of COC is only required in certain matters specified in section 28 of the IBC.⁵⁵ The RP does not need any authorisation to make a precise estimate of the amount to be claimed. Since, there lies a significant leeway for the RP to exercise its discretion while investigating, inquiring and verifying any claim made by the creditor, therefore making the power adjudicatory in nature and essence.

Even the contention that RP can be replaced by COC does not hold any ground because such a replacement can only be triggered when, in the opinion of COC, such acceptance or rejection of the claim is against the interest of the COC.⁵⁶ Such an exercise of reviewing the actions of the RP is not undertaken by the COC on a continuous and routine basis but rather only when the necessary circumstances arise. Thus, this power of administration by the COC does not really maintain any check on RP whether it accepts or rejects the genuine claim of the creditors.

Further, going back to the example discussed in 2.1, when the moratorium hits the arbitration proceeding, Party A would then be required to submit its claims before the RP. The RP, to ascertain the amount claimed, would first need to determine whether there has been a breach of the underlying contract, and only then would the RP decide on the quantum of the claim. In this process, while deciding on the breach of the contract, the RP, not de jure but de facto, becomes an arbitrator. The issue here is that the RP may or may not have the particular expertise to decide upon the dispute. Deciding on the breach requires extensive analysis and interpretation of the terms of the contract, which essentially falls into the domain of the arbitrator’s expertise rather than RP’s. Therefore, this de facto power of RP to decide on the claim is ultra vires to the IBC and goes against the legislative intent. The IBC does not envisage the RP acting in a quasi-judicial or Arbitral capacity, and allowing such authority to do so will contradict the framework and purpose of the code.

⁵³ *Grasim Indus. Ltd. v. Tecpro Sys. Ltd.*, CA-19 (PB)/2018 in (IB)-197(PB)/2017.

⁵⁴ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 13, No. 004, 2016, <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>.

⁵⁵ The Insolvency and Bankruptcy Code, 2016, § 28.

⁵⁶ *Id.* § 21.

Probably what could be a better option, in the opinion of the authors, is to allow the simultaneous proceeding of arbitration during CIRP to the extent of deciding the breach. It is not the suggestion of the authors to allow the arbitrator to decide the amount of debt, but rather the presence of the debt. Once the existence of the debt is established, determining the quantum of the debt would then rightfully come under the ambit of RP. In this way, the objective of both laws could be upheld, and the desired outcome would be achieved without unnecessarily encroaching on the jurisdiction of the other authority. By this approach, a balance could be struck between both the legislations, thereby giving effect to the legislative intent and upholding the objective of the laws.

6 CHALLENGES OF FOREIGN-SEATED ARBITRATION UNDER INDIAN INSOLVENCY LAW

As discussed under the first heading, there exists an inherent conflict between the insolvency and arbitration proceedings. This conflict is further escalated in cross-border disputes, especially where the pool of creditors involves both Indian and foreign parties or where the corporate debtor has an international presence. In foreign seated arbitration, the moratorium can only be applicable if the respective governments have a reciprocal agreement with each other.⁵⁷ However, as of date, India has not signed such a reciprocal agreement with any foreign country.⁵⁸

With this background, an issue arises regarding the applicability of the moratorium under Section 14 of the IBC on foreign assets,⁵⁹ as Section 1 of the IBC⁶⁰ restricts the applicability of the code within India's territory. While Section 238 of IBC,⁶¹ with its overriding effect on other proceedings, clarifies that the moratorium would be applicable to the arbitration proceedings conducted in India, there remains a significant void when it comes to foreign seated arbitration in a cross-border dispute.

In a foreign seated arbitration, the whole purpose of the moratorium vitiates due to the territorial restrictions and limitations in the scope of the code. However, the courts have carved out an exception to this, particularly when a connection exists between the arbitral award and the Indian laws, such as the enforcement of an award or involvement of Indian

⁵⁷ *Id.* § 234.

⁵⁸ Alipak Banerjee, *IBA Toolkit on Insolvency and Arbitration Questionnaire National Report of India*, INTERNATIONAL BAR ASSOCIATION (2021), <https://www.ibanet.org/MediaHandler?id=7875944E-D52D-48D1-92F5-BD33E84753E2>.

⁵⁹ The Insolvency and Bankruptcy Code, 2016, § 14.

⁶⁰ *Id.* § 1.

⁶¹ *Id.* § 238.

assets. In such case, Section 14 of the IBC can be invoked, irrespective of the absence of the reciprocal agreement.⁶²

This stance was affirmed in the case of *Videocon Industries Limited vs Union of India*,⁶³ where the court held that a moratorium cannot be applied to foreign seated arbitration in cases where there exists no connection between the award and its enforcement with the Indian law or assets.

Despite these judicial exceptions, the void continues to exist as the multinational companies contracting with Indian companies strategically choose to opt for foreign seated arbitration to avoid the applicability of the moratorium. This situation will put the corporate debtor in a situation where its fate will be dependent upon the chosen seat of arbitration vitiating the very purpose of the moratorium and IBC, 2016.

This situation further places the Indian creditors on an unequal footing with the international parties since if the award is passed against the corporate debtor, any recovery made against assets located outside India will deplete the overall value of the assets of the corporate debtor. For instance, consider an agreement between A and B, where B is a foreign entity. As per the terms of the contract, B is duty-bound to supply raw materials to A (a party in India). The said agreement also contained an arbitration clause according to which the seat of arbitration was decided to be the Netherlands. Assume that a contractual dispute arises between A and B, subsequently leading to the formation of an arbitral tribunal and parallelly, A goes into bankruptcy in India, and a moratorium is imposed. Since the scope of IBC is limited to territories of India, the moratorium in this instance will not be applicable to B, and he can very well continue with the Arbitration.⁶⁴ Such a hypothetical situation is similar to the controversy that arose during the Jet Airways insolvency.⁶⁵

Further, for the enforcement of the award, the arbitral tribunal can also create a charge against the assets of the corporate debtor lying in foreign territories, ultimately leading to unequal treatment between B as an International creditor and the other domestic creditors.

To address this void, the authors suggest here that the government take the initiative in entering into reciprocal agreements like those of Double Taxation Avoidance Agreements with the countries having key business relations with India. Such initiatives can further strengthen economic ties between the two nations and facilitate the ease of doing business. This would also mitigate the uncertainties and complexities faced by international companies and would ensure more equitable treatment to all creditors.

⁶² *Vitol SA v. Asian Natural Resources (India) Ltd.*, (2018) 145 SCL 30.

⁶³ *Videocon Indus. Ltd. v. Union of India*, (2011) 6 SCC 161.

⁶⁴ *Ashapura Minechem Ltd. v. Armada (Singapore) Pvt. Ltd.*, 2016 SCC OnLine Bom 5326.

⁶⁵ *Jet Airways (India) Ltd. v. State Bank of India*, 2019 SCC OnLine NCLAT 1216.

7 GLOBAL APPROACHES TO RESOLVING ARBITRATION AND INSOLVENCY CONFLICTS

The conflict between Arbitration and Insolvency legislation is not unique to India, and countries across the globe face a similar issue. However, some jurisdictions, including the USA and the UK, have so far been successful in addressing this issue.⁶⁶ The solution is based on the idea of segregating the disputes between two segments: where one set falls within the exclusive domain of the Insolvency Courts, while the other can still continue to be adjudicated by the relevant forum during the insolvency proceeding.⁶⁷ This method effectively minimises the scope of the collision between two legal frameworks.

Moreover, the exact approach to segregate the issues may vary from country-to-country basis, but each method ultimately upholds the basic idea of providing clarity on the jurisdictional boundaries between both legislations. These approaches can broadly be classified as:

7.1 Creating a Distinction between Core and Non-Core Matters

This approach advocates for creating a distinction between core and non-core matters where core matters are directly related to the insolvency proceedings and corporate debtor debt-paying ability. On the other hand, non-core matters are those that do not have any bearing on the corporate debtor's estate or his ability to discharge his financial liabilities.

Moving on similar lines, the USA has adopted a test called the McMahon test⁶⁸ to determine the arbitrability of insolvency matters. The test stipulates that when an issue does not stem from the initiation of insolvency proceedings but arises from an agreement made prior to insolvency and would have occurred independently of the insolvency, then it is eligible for arbitration. Applying the same test in *Northwestern Corporation v. National Union Fire Insurance Company of Pittsburgh, P.A.*⁶⁹ the U.S. Bankruptcy Court held that bankruptcy courts do not have the discretion to decline to stay noncore proceedings in favour of arbitration.

⁶⁶ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

⁶⁷ Bahram N. Vakil et al., *To Adjudicate or Not Adjudicate: Conflict of Jurisdiction Between NCLT and Civil Courts*, AZB & PARTNERS (June 22, 2022), https://www.azbpartners.com/bank/to-adjudicate-or-not-adjudicate-conflict-of-jurisdiction-between-nclt-and-civil-courts/#_edn3.

⁶⁸ *Shearson Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987).

⁶⁹ Bahram N. Vakil et al., *To Adjudicate or Not Adjudicate: Conflict of Jurisdiction Between NCLT and Civil Courts*, AZB & PARTNERS (June 22, 2022), https://www.azbpartners.com/bank/to-adjudicate-or-not-adjudicate-conflict-of-jurisdiction-between-nclt-and-civil-courts/#_edn3.

7.2 Adjudicating the Dispute Based on In Rem and In Personam Nature

Under this approach, the segregation is required to be done based on the nature of the claims. If the claim is only against the corporate debtor and not in any way can affect the interest of the third party, then such a claim must be allowed to proceed under the respective forums. In the Insolvency context, essentially, till the time, a proceeding determining the liability of the corporate debtor is an *in personam* proceeding.⁷⁰ However, the moment the proceeding for enforcing such liability begins, it becomes an *in rem* proceeding since it stands to impact all the other creditors. This approach also fits well with the principle of *Erga Omnes*, i.e. disputes affecting third parties are not arbitrable.⁷¹

7.3 Adjudicating the Dispute Based on Its Impact on the Corporate Debtor

As per this approach, only those disputes that are prejudicial to the corporate debtor or could affect the dissipation of the assets to the detriment of the creditors must not be allowed to proceed. However, if the dispute includes claims that, if resolved in favour of the corporate debtor, could positively enhance the financial health of the corporate debtor, then such dispute must be allowed to proceed within an originally designated forum. The same rationale applies at the stage of enforcement of the claim, where such enforcement should only be allowed if it is in favour of a corporate debtor.

None of the above approaches has been statutorily incorporated in the recently enacted IBC. However, the judiciary has made efforts to give effect to these principles by giving a purposive interpretation to the statute. The Indian Courts, time and again, held in several cases that proceedings which do not adversely impact the estate of the debtor or harm the interests of the creditors can continue during CIRP.

The Supreme Court, in the case of *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors.*,⁷² to some extent, acknowledges the difference between core and non-core matters. It was held that:

“... to the insolvency of the Corporate Debtor. However, in doing so, 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 relating to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.”

⁷⁰ Shearson Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

⁷¹ Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

⁷² Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209.

Further, the Court clarified that the power given to NCLT under Section 60(5)(c)⁷³ constitutes a ‘residuary jurisdiction’ provision enabling the tribunal to adjudicate all the disputes pertaining to facts arising from or in relation to the insolvency process.

From the above observation, it can be reasonably deduced that the power of the Insolvency Tribunal is only limited to the cases related to the Insolvency process. Therefore, any claim against the corporate debtor, though not affecting the CIRP in any manner, can continue to be adjudicated by the other authorities (including arbitration), which originally had jurisdiction over the subject matter.

Thus, the Apex Court essentially delineates the core matters as those where the preservation of the value of the corporate debtor or maintaining its ‘going concern’ is directly in relation. While non-core matters are those where the subject action is unrelated to the insolvency or the action is unlikely to cause the liquidation of the corporate debtor.

Further, the glimpse of approaches 7.2 and 7.3 can also be visible in the judgments of the Supreme Court in *Vidya Drolia*,⁷⁴ *Booz Allen*⁷⁵ and of the Delhi High Court in *Power Grid*⁷⁶, as discussed in the fourth head. Through the analysis of the above-stated judgments, it can be reasonably deduced that the judiciary here seems to be carving out exceptions from the general rule i.e. no other proceeding must be initiated or continued during the CIRP, by giving purposive readings to statutes. The Indian judiciary is already on the path of harmonising and reconciling the legal framework between both legislations, and it will be no surprise if, in future, there are more direct implementations of these approaches.

These approaches align with the UNCITRAL Model Law on Cross-Border Insolvency.⁷⁷ Article 20 of the model law imposes an automatic stay on all the proceedings during insolvency, which overrides the parties’ agreement to arbitrate for the sake of the insolvency process. However, the Model law allows the State the flexibility to introduce exceptions or additional rules, enabling them to accommodate the complexities of international arbitration more effectively.

⁷³ The Insolvency and Bankruptcy Code, 2016, § 60(5)(c).

⁷⁴ *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

⁷⁵ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 SCC 532.

⁷⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

⁷⁷ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, MODEL LAW ON CROSS BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION (2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

8 PROBABLE DRAWBACKS AND CONSEQUENCES

No analysis is complete without acknowledging the plausible drawbacks of the argument raised. It is essential to briefly discuss the probable implications of applying the above-discussed approaches in the context of the Indian legal framework.

Firstly, there cannot be a second thought in the argument that frequent use of arbitration during insolvency proceedings would significantly affect the timebound nature of CIRP proceedings. For instance, if arbitration is allowed to be initiated at a later stage of the insolvency process, then the insolvency court would not be in a position to conclude the insolvency process in the stipulated time, ultimately frustrating the overall effectiveness of the process.

Secondly, cost-effectiveness is one of the objectives behind the introduction of IBC. Permitting simultaneous arbitration proceedings would unnecessarily prolong the insolvency resolution process, which in turn would also increase the cost associated with the CIRP process, ultimately putting additional financial strain on the already debt-ridden corporate debtor.

Thirdly, a successful resolution is contingent upon the RP's ability to preserve and protect the value of assets of the corporate debtor. However, if the RP is occupied with defending the suits and proceedings, then the overall outcome of the process would be sacrificed.

Lastly, the negative impact on the time, cost and outcome would drastically affect the overall recovery rate of the company, which would further diminish India's global ranking in the Ease of Doing Business index.

9 CONCLUSION AND WAY FORWARD

Throughout the article, the authors analyse the intersection between the legal framework of Arbitration and IBC. From the above discussion, it becomes evident that there lies a significant gap between the legislative intent and ground reality. Implementing the mandate of the moratorium in its absolute sense is neither feasible nor practical, considering the legal and operational challenges that arise during the insolvency process. To address these challenges globally, various principles have been developed. However, in the authors' view, it would be imprudent to directly apply these approaches within the Indian framework as there exists a substantial difference between India and other jurisdictions in terms of legal infrastructure, multiplicity of legal avenues and established hierarchy among courts. Rather, a prudent approach for India would be to incorporate a calculated and careful change which is adaptable to the requirements of the Indian legal system. Most importantly, this reform

should come from the Parliament rather than the court. Only then will it hold the true value in preserving the fundamental constitutional principle of ‘Separation of Powers’.

* * *