INSOLVENCY VS. ARBITRATION IN INDIA: JURISDICTIONAL CONFLICT AND THE PRIMACY OF COLLECTIVE PROCEEDINGS

Abstract

Few areas of Indian commercial law generate as much doctrinal friction as the overlap between insolvency and arbitration. When a creditor holds both a contractual arbitration clause and a claim that qualifies under the Insolvency and Bankruptcy Code, 2016 (IBC),[1] the question of which regime takes precedence becomes unavoidable. The IBC's overriding effect under Section 238 sits in direct tension with the party autonomy that animates the Arbitration and Conciliation Act, 1996 (A&C Act).[2] This paper traces that tension through the legislative texts, the competing theoretical frameworks, andmost criticallythrough the divergent rulings in *Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund*[3] and *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*[4] The central argument is that insolvency proceedings are justified in overriding arbitration where collective creditor interests are genuinely at stake, but that neither the legislature nor the courts have yet articulated a principled boundary distinguishing the two regimes. Legislative intervention is long overdue.

Keywords: Insolvency and Bankruptcy Code; Arbitration; Section 14 Moratorium; Party Autonomy; Collective Creditor Proceedings; NCLT; Kompetenz-Kompetenz; Non-Arbitrability.

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[1]Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) [hereinafter IBC].

[2]Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [hereinafter A&C Act].

[3]Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I, (2021) 8 SCC 401 (India).

[4]Vidarbha Indus. Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 (India).

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I. Introduction

There is an inherent tension in the co-existence of two legal regimes that pursue fundamentally different ends. Arbitration is built on contractual consent: the parties have agreed in advance that their disputes will be resolved privately, outside the ordinary court system. Insolvency, by contrast, is a statutory mechanism designed to address financial failure in a manner that is equitable to all creditors, rather than to whichever individual claimant moves fastest. When a creditor holds both an arbitration agreement and a claim that falls within the scope of the IBC,[5] these two systems collide, and the outcome is neither legally obvious nor practically settled.

India has been grappling with this collision since the IBC came into force in 2016. The volume of insolvency applications grew sharply in the years following enactment, and the disruption caused by COVID-19 accelerated that trend further. Against that background, the question of whether a creditor must honour an arbitration agreement or can instead proceed directly under

[5]IBC § 238.

the IBCand vice versa, whether a debtor can use pending arbitration to delay CIRP admissionhas moved from academic interest to practical urgency.

Arbitration, as a creature of contract, draws its authority from the voluntary agreement of the parties to take disputes outside the state court system. The Arbitration and Conciliation Act, inspired by the UNCITRAL Model Law, reflects a policy choice preferring minimum judicial intervention. It also ensures the enforceability of arbitration agreements and the tribunal's own authority to rule on its jurisdiction. Insolvency law operates on an entirely different logic. It is statutory rather than consensual, collective rather than bilateral, and is explicitly designed to halt individual creditor action when a debtor's financial position has crossed an irretrievable threshold.

Three questions sit at the centre of this paper. First, can insolvency proceedings lawfully displace an arbitration agreement, and if so, under what conditions? Second, at what stage of the process does arbitration become procedurally unavailable? Third, how should courts calibrate the balance between the contractual rights of parties and the statutory imperatives of the insolvency framework? Each of these questions is addressed in turn, with particular attention to the Supreme Court's rulings in

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II. Legislative Framework

2.1 The Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 provides the primary statutory framework for arbitration in India, drawing heavily on the UNCITRAL Model Law on International Commercial Arbitration. Its key principles are: courts must not intervene beyond what the Act permits (Section 5); they must refer parties to arbitration where a valid agreement exists (Section

8); and arbitral awards are enforceable as if they were court decrees (Section 36).[6] The 2015 and 2019 amendments introduced stricter timelines on arbitral proceedings (Section 29A)[7] and transferred appointment functions to designated arbitral institutions.

Notably, the Act contains no express carve-out for disputes that arise in an insolvency context. The doctrine of kompetenz-kompetenz, codified in Section 16,[8] gives the arbitral tribunal the authority to rule on its own jurisdiction, and the Supreme Court in *Vidya Drolia v. Durga Trading Corporation* (2021)[9] affirmed a strong presumption in favour of arbitrability. Taken together, these provisions indicate that courts have historically defaulted to referring parties to arbitration unless there are strong grounds for non-arbitrability.

2.2 The Insolvency and Bankruptcy Code, 2016

The IBC was enacted to consolidate India's fragmented insolvency framework and to introduce a time-bound resolution mechanism for financially distressed corporate entities. The legislation establishes a Corporate Insolvency Resolution Process (CIRP) of 180 days, extendable to 330 days in prescribed circumstances, directed by the National Company Law Tribunal (NCLT) and supervised by the Insolvency and Bankruptcy Board of India (IBBI).[10]

For the purposes of this paper, Section 14 is the most consequential provision. Once a CIRP application is admitted, the NCLT imposes a moratorium that stays: the institution or continuation of any suit or proceeding against the corporate debtor; the execution of outstanding judgments, decrees, or orders; the transfer or disposal of assets; and the recovery of any property by an owner or lessor.[11] Section 238 gives the IBC its overriding characterwhere the Code is inconsistent with any other law, the Code prevails.[12]

III. Theoretical Underpinnings: Party Autonomy vs. Collective Resolution

3.1 The Case for Party Autonomy

[6]A&C Act §§ 5, 8, 36.
[7]A&C Act § 29A (as amended by the Arbitration and Conciliation (Amendment) Act, 2019).
[8]A&C Act § 16.
[9]Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[10]IBC §§ 7, 9, 14, 53, 238.
[11]IBC § 14.
[12]IBC § 238.

The philosophical foundation of arbitration is the idea that parties who have freely chosen a private dispute resolution mechanism should be held to that choice. Courts, on this view, are facilitators rather than gatekeeperstheir role is to give effect to the parties' bargain, not to second-guess it. The Supreme Court articulated this principle clearly in *Vidya Drolia*,[13] affirming that the presumption runs in favour of arbitrability, and that departure from it requires express statutory authority or clear public policy grounds.

Several arguments support honouring arbitration agreements even when insolvency is in the picture. The doctrine of separability means that the arbitration clause survives the main contract and remains enforceable even where the underlying agreement is challenged. The NCLT, as a specialist insolvency tribunal, may not be ideally placed to adjudicate complex contractual disputes involving, for instance, the terms of a convertible debenture or a project finance agreement. And where a debt is genuinely disputed, bilateral resolution through arbitration does not inherently harm the collective interests of other creditorsparticularly if the outcome of the arbitration will simply determine whether a particular claim exists at all.[14]

3.2 The Case for Collective Resolution

Insolvency law operates on a fundamentally different premise: once a debtor crosses the threshold of financial distress, individual creditor action must give way to a collective process. The logic is both protective and functional. Without a moratorium, aggressive creditors can strip assets before others have a chance to recover anythinga dynamic that benefits the fastest-moving party rather than producing a fair or economically rational outcome. A collective process, by contrast, preserves the entity as a going concern where possible, maximises the value available for distribution, and allocates losses according to a designated priority cascade under Section 53 of the IBC.[15]

Allowing arbitration to proceed during CIRP would undermine these objectives in practice. Individual arbitral awards, if executed while the moratorium is in place, deplete the estate available to all creditors. More structurally, if debts are resolved bilaterally, the Committee of Creditors (CoC) cannot form an accurate picture of the corporate debtor's total liabilitieswhich is

[13]Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[14]A&C Act § 16 (kompetenz-kompetenz principle).
[15]IBC § 53.

essential for evaluating any resolution plan. The logic of collective resolution does not merely tolerate the displacement of arbitration when CIRP has been properly triggered; it demands it.

IV. Interaction Between IBC and Arbitration: Section 14 Moratorium

4.1 Scope of the Moratorium

The word 'proceedings' in Section 14(1)(a)[16] is deliberately broad. Whether it covers arbitration proceedings was authoritatively resolved by the Supreme Court in *Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd.* (2018),[17] where the Court confirmed that the moratorium bars the continuation of arbitration against the corporate debtor once CIRP is admitted. This position is now settled and not seriously contested.

There is, however, an important limitation on the moratorium's reach: it applies only to proceedings brought against the corporate debtor, not to proceedings initiated by it. Where the corporate debtor is a claimant in arbitration, the Resolution Professional (RP) who takes over from the management on admission may continue or even initiate arbitration on the company's behalf, where doing so serves the interests of the creditor body.

4.2 Pre-Existing Dispute Doctrine

One of the most consequential battlegrounds in this area is whether a creditor holding an arbitration agreement can bypass it and proceed directly under the IBC. The answer turns on whether the underlying debt is 'disputed'. For operational creditors under Sections 8 and 9, the existence of a pre-existing dispute is a complete defence to IBC proceedings. In *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* (2018),[18] the Supreme Court specified that a qualifying dispute must be both: (a) pre-existingraised before the demand notice was served; and (b) bona fide. A dispute manufactured as a tactical response to a demand notice will not suffice.[19]

No similar dispute defence applies to financial creditors under Section 7. The NCLT need only satisfy itself that a financial debt exists and that there has been a default. This asymmetry has

[16]IBC § 14(1)(a).
[17]Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd., (2018) 16 SCC 94 (India).
[18]Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353 (India).
[19]Consolidated Constr. Consortium Ltd. v. Hitro Energy Sols. Pvt. Ltd., (2023) SCC OnLine SC 1 (India).

survived constitutional challenge: in *Innoventive Industries v. ICICI Bank* (2018)[20] and *Swiss Ribbons v. Union of India* (2019),[21] the Supreme Court upheld the FC-OC distinction, reasoning that financial creditors occupy a qualitatively different position because of their involvement in loan covenants, credit monitoring, and restructuring decisions.

V. Key Case Analysis

5.1 Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I & Ors. (2021) 8 SCC 401

Facts

Kotak India Venture Fund, acting as a financial creditor, filed a Section 7 application against Indus Biotech to initiate CIRP. Indus Biotech resisted, arguing that the underlying debt was subject to a valid arbitration clause and that the question of the precise amount owed was already before an arbitral tribunal. The NCLT admitted the application and the matter ultimately reached the Supreme Court.[22]

Issues

(i) Whether a Section 7 application can be maintained when the underlying dispute about the debt is already pending in arbitration.[23] (ii) Whether the NCLT should have referred the parties to arbitration under Section 8 of the A&C Act before proceeding with CIRP.[24]

Decision

The Supreme Court held that where the existence of a debt is genuinely contested in pending arbitral proceedings, the NCLT should refer the matter to arbitration under Section 8 of the A&C Act rather than admit CIRP. The underlying logic is straightforward: there can be no 'default' for the purposes of Section 7 where the debt itself has not yet been established. The NCLT must first be satisfied that the debt is undisputed; if it is not, arbitration must be allowed to run its course.

Significance

[20]Innoventive Indus. Ltd. v. ICICI Bank Ltd., (2018) 1 SCC 407 (India).
[21]Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (India).
[22]Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I, (2021) 8 SCC 401 (India).
[23]IBC § 7.
[24]A&C Act § 8.