



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF INDIA**

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\* I would like to thank Mr. Arjun Gupta, my colleague in the International Dispute Resolution practice, at Nishith Desai Associates for helping me with the responses. For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in India produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

### Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

1. Does the law of India contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?

1. In India, insolvency proceedings are governed by the Insolvency and Bankruptcy Code, 2016 (“Code”). There are no provisions in the Code which specifically stipulate the impact of the insolvency proceedings commenced under the Code on an arbitration proceeding. Similarly, the Indian Arbitration and Conciliation Act, 1996 (“Arbitration Act”) does not contain any provision reflecting the effect or impact of commencement of a corporate insolvency resolution process (“CIRP”) or liquidation, which are the two most important types of proceedings contemplated under the Code.<sup>1</sup>
2. However, the Code stipulates the consequences of CIRP or subsequent liquidation on the continuation/commencement of legal proceedings, and bars them. This includes arbitration proceedings, as well. With respect to CIRP, all pending and future claims are barred; with respect to liquidation, pending claims can continue, but future claims are barred. This is further explained below. Furthermore, the CIRP (once commenced) is not arbitrable (at least during the pendency of the insolvency resolution process). The Supreme Court in *A. Ayyasamy vs A. Paramasivam & Ors*<sup>2</sup> has observed that “insolvency and winding-up matters” are not arbitrable.
3. A brief snapshot of the insolvency regime in India has been set out below.

<sup>1</sup> The Code provides for two types of insolvency proceedings. Part II covers Insolvency Resolution and Liquidation for corporate persons. The development of law since the Code came into existence in 2016 has been under Part II. Part III relates to Insolvency Resolution and Bankruptcy for individuals and partnership firms. It is only *vide* gazette notification dated 15 November 2019 bearing Serial No. 4126 certain select provisions under Part III pertaining to personal guarantors to corporate debtors were notified with effect 1 December 2019. Therefore, the remaining provisions of Part III do not have the force of law. In particular, the provisions pertaining to bankruptcy of individuals have not been notified as of yet.

<sup>2</sup> [2016] 10 SCC 386. Also, see *Vidya Drolia and Ors v. Durga Trading Corporation* (Special Leave Petition (civil) Nos. 5605-5606 of 2019 and Special Leave Petition No. 11877 of 2020).

4. Prior to 2016, the insolvency resolution of companies under Indian law was governed by multiple statutes.<sup>3</sup> As per the data available with the World Bank, in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher than in the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years).<sup>4</sup> Thereafter, in 2016, the Code was enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporations, firms, and individuals in a time-bound manner. The Code has unified the law relating to the enforcement of statutory rights of creditors and streamlined the manner in which a debtor company can be revived to sustain its debt without extinguishing the rights of creditors.
5. Under the Code, a financial or operational creditor having outstanding dues of at least INR 1 crore<sup>5</sup> or a corporate debtor who has defaulted on payment of debts to its creditors can seek to initiate CIRP over a corporate debtor by filing an insolvency application before a National Company Law Tribunal (“NCLT”),<sup>6</sup> also known as Adjudicating Authority, under the Code. If the NCLT finds that a default in payment of the said debt exists, the NCLT can direct the initiation of CIRP over the corporate debtor and appoint an Interim Resolution Professional (later replaced by a Resolution Professional) to manage the affairs of the corporate debtor during the CIRP period.
6. As soon as the CIRP is initiated, the initiation or continuation of arbitration proceedings or related court proceedings are barred in light of the moratorium imposed under the Code. This is further discussed in the answer to Question 2.
7. During the CIRP period, the Resolution Professional invites interests from the various prospective Resolution Applicants<sup>7</sup> to submit their resolution plans for addressing the insolvency of the corporate debtor. The Resolution Plan<sup>8</sup> is approved by the Committee of Creditors of the corporate debtor (comprising of only the financial creditors) and thereafter, approval is sought from the NCLT. Once approved by the NCLT, the Resolution Plan is implemented, and the CIRP comes to an end. If for any reason a Resolution Plan is not submitted by a Resolution Applicant,<sup>9</sup> not approved by the Committee of Creditors (with a two-thirds majority),<sup>10</sup> not approved by the NCLT, or if an approved resolution plan is

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<sup>3</sup> Such as Companies Act, 1956; Limited Liability Partnership Act, 2008; Sick Industrial Companies (Special Provisions) Act, 1985.

<sup>4</sup> “Time to resolve insolvency (years)” <<https://data.worldbank.org/indicator/IC.ISV.DURS?locations=IN>>, accessed 27 May 2020.

<sup>5</sup> Notification under Section 4 of the Code, available on <<https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>>, accessed 29 May 2020.

<sup>6</sup> Code, ss 7, 9, 10.

<sup>7</sup> Section 5(25) of the Code states: “resolution applicant means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25”.

<sup>8</sup> Section 5(26) of the Code states: “‘resolution plan’ means a plan proposed by 2[resolution applicant] for insolvency resolution of the corporate debtor as a going concern . . .”.

<sup>9</sup> Code, s 33(1)(a).

<sup>10</sup> *ibid*, s 33(2).

contravened,<sup>11</sup> the NCLT may, in accordance with the provisions of the Code, direct the corporate debtor to be liquidated.

8. As soon as the corporate debtor enters into liquidation, a liquidator is appointed, and there is a bar against the initiation of any suit or other legal proceeding by or against a corporate debtor during the liquidation proceedings. However, a suit or other legal proceedings may be initiated by the liquidator on behalf of the corporate debtor with prior approval of the NCLT.<sup>12</sup>
9. Pending legal proceedings which had been stayed due to the operation of the moratorium order under Sections 14(1)(a) and (4) of the Code can be reinstated once the CIRP is successfully completed, as the moratorium is lifted after the completion of CIRP, as well as on the completion of liquidation proceedings. However, the ability of the creditors to pursue a pending claim will largely depend on the treatment accorded to them in the Resolution Plan and the contractual mechanism incorporated therein—which may stipulate extinguishment of all pending proceedings against the corporate debtor.

2. **Does the insolvency legislation in India provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**
  - a. **Which disputes fall under the rules on *vis attractiva concursus*?**
  - b. **Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

10. Under the Code,<sup>13</sup> once the insolvency proceeding is admitted, the NCLT (a) declares a moratorium under Section 14 of the Code; (b) causes a public announcement of the initiation of the corporate insolvency resolution process and calls for the submission of claims under Section 15 of the Code; and (c) appoints an Interim Resolution Professional under Section 16 of the Code.
11. Importantly, a moratorium is imposed, prohibiting, among other things, the institution or continuation of suits or other proceedings against the corporate debtor and the transferring, encumbering, or disposing of the corporate debtor's assets.<sup>14</sup> The order of moratorium is effective from the date of such order until the completion of the CIRP.<sup>15</sup>
12. Notably, case law has clarified the scope of the moratorium imposed on legal proceedings and has held that the primary objective of the moratorium is to ensure that the assets of the corporate debtor are not adversely impacted.

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<sup>11</sup> *ibid*, s 33(3).

<sup>12</sup> *ibid*, s 33(5).

<sup>13</sup> *ibid*, s 13.

<sup>14</sup> *ibid*, s 14(1)(a). See *K.S. Oils Ltd. v. The State Trade Corporation of India Ltd. & Anr.*, Company Appeal (AT) (Insolvency) No. 284 of 2017.

<sup>15</sup> Code, s 14(4).

13. In fact, arbitrations or related proceedings commenced after initiation of the CIRP are considered unlawful.<sup>16</sup> However, various judgments and tribunals/courts have held that not all litigation or arbitration in relation to a corporate debtor under a CIRP is affected by the moratorium. Courts have created an exception in these cases, such as when (i) the proceedings lead to the maximisation of the value of the assets of the corporate debtors; (ii) the proceedings are beneficial to the corporate debtor and do not adversely impact the assets of the corporate debtor;<sup>17</sup> or (iii) even if proceedings are allowed to continue, no recovery can be pursued against the corporate debtor during the operation of the moratorium period.<sup>18</sup>
14. Courts have also refused to stay claims/counterclaims against a corporate debtor if it was found that the corporate debtor did not face any adversity until the claims/counterclaims are adjudicated upon.<sup>19</sup> The Delhi High Court held in *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd*<sup>20</sup> that “until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1)(a) of the Code . . .”.
15. Under Section 18 (b) of the Code, it is the duty of the Interim Resolution Professional to receive and collate all the claims submitted by the creditor pursuant to the public announcement. The financial and operational creditors are entitled to file claim forms as prescribed under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“Regulation”) before the Interim Resolution Professional.
16. Separately, under Section 60(3) of the Code, an insolvency resolution process, liquidation, or bankruptcy proceeding of a corporate guarantor or personal guarantor (as the case may be) of the corporate debtor pending in any court or tribunal shall be transferred to the NCLT dealing with the insolvency resolution process or liquidation proceeding of such corporate debtor.

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<sup>16</sup> *Alchemist Asset Reconstruction Company Ltd. v Hotel Gaudavan Pvt. Ltd.* AIR 2017 SC 5124.

<sup>17</sup> *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.* 246 (2018) DLT 485.

<sup>18</sup> *Jharkhand Bijli Vitran Nigam Limited v IVRCL Ltd. (Corporate Debtor) & Anr. [Company Appeal] (AT)* (Insolvency) No. 285 of 2018.

<sup>19</sup> *SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd.*, CS (COMM) 470/2016 & CC(COMM) 73/2017. The Delhi High Court in this case observed that: “Under Section 14(1)(a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars the institution of suits or continuation of pending suits or proceedings against the corporate debtor”. A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor ie, the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation ie, that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims, but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed, and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.

<sup>20</sup> 246 (2018) DLT 485.

17. The Code primarily recognizes two categories of claims: financial debts<sup>21</sup> and operational debts.<sup>22</sup> A claim under the arbitration agreement is not specifically covered under the definition of a debt under the Code. However, if the claim independently falls within the purview of the “financial” or “operational debt”, the same can be filed by a creditor and becomes part of the overall resolution process. If the claims are not included by the Interim Resolution Professional, they are categorized as a pending litigation/dispute, and it is up to the Resolution Applicant to determine how to treat these claims. In most cases, nil value is assigned to such claims, or the Resolution Plan will have a clause which stipulates that all pending litigation/dispute resolution claims will stand extinguished as soon as the CIRP is completed and the new management takes over the corporate debtor. This aspect has been further discussed in response to Question 9.
18. If the CIRP fails, and the corporate debtor enters liquidation, the liquidator under Section 38 of the Code has been vested with the right to consolidate the claims. A financial creditor, an operational creditor, or a creditor who is partly a financial creditor and partly an operational creditor can file such claims before the liquidator.<sup>23</sup>

**3. What are the effects (if any) of the opening of insolvency proceedings in India on the possibility to commence or continue arbitration proceedings?**

**In answering this question, please address separately each of the following points:**

- a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?**

19. Any proceedings which adversely impact the insolvent party (corporate debtor) will be subject to the moratorium order. The moratorium order applies where the proceedings have been initiated against the insolvent party (ie, where the insolvent party is a Respondent). The moratorium order may not apply where the insolvent party is the claimant and proceedings are for its benefit, as set out earlier. In such proceedings, the moratorium may be imposed only if there is a counterclaim against the insolvent party. Therefore, although not expressly mentioned, the law draws a distinction between arbitration proceedings where the insolvent

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<sup>21</sup> Section 5(7) of the Code defines a “financial creditor” as “any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”. Financial Debt is defined in Section 5(8) of the Code and means “a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes - (a) money borrowed against the payment of interest; (b) amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent; (c) amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument . . .”.

<sup>22</sup> Section 5(20) of the Code defines an “operational creditor” as “a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred . . .”. Section 5 (21) of the Code defines an “operational debt” as “a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority . . .”.

<sup>23</sup> Code, ss 38(2), (3), (4).

party acts as defendant and as claimant. Separately, in the liquidation proceedings, the liquidator can initiate fresh proceedings on behalf of the corporate debtor (ie, corporate debtor acting as the Claimant) after receiving the prior approval of the NCLT. This has been discussed in the answer to Question 3(e).

**b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?**

20. The law creates a distinction between insolvency proceedings aimed at the liquidation of the company and proceedings that are aimed at the financial restructuring or rehabilitation of the company (CIRP). While initiation or continuation of legal proceedings are barred under the moratorium order upon admission of the CIRP, the liquidation process only bars initiation of new proceedings (ie, existing proceedings may continue against the corporate debtor).

**c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?**

21. Neither the Code nor caselaw specify any concrete subject matters or kinds of relief over which the moratorium will or will not apply. The determination of the issue is primarily based on the assessment of whether a moratorium is required to maximise the assets of the corporate debtor for its benefit.

**d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?**

22. The moratorium prohibiting commencement or continuation of arbitration is applicable if a corporate debtor is undergoing CIRP, notwithstanding whether such CIRP was commenced at the behest of a creditor or the corporate debtor itself. Further, the moratorium is not applicable prior to the commencement of CIRP. Therefore, the impact of moratorium does not extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency.

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?**

23. The law does not differentiate between arbitration proceedings which are pending and the ones commenced for restructurings (CIRP). However, as mentioned above, the liquidation

process only bars initiation of new proceedings (ie, existing proceedings may continue against the corporate debtor).

**f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?**

24. If a corporate debtor is not restructured pursuant to the CIRP, and the NCLT directs that the corporate debtor should be liquidated involuntarily, a prohibition is imposed from the time the order for liquidation is passed on the institution of any suit or other legal proceeding (including arbitration) by or against a corporate debtor.<sup>24</sup> Legal proceedings after commencement of involuntary liquidation can only be instituted by the liquidator and only upon prior approval of the NCLT.
25. In a voluntary liquidation, a moratorium or prohibition on initiation or continuation of legal proceedings (including arbitrations) is not imposed. However it is expected that before the company is dissolved, all legal proceedings against the company are put to an end and a declaration regarding non-pendency of legal proceedings is made.<sup>25</sup>

**g. Do those effects intend to apply extraterritorially, ie, to every arbitration regardless of the location of the seat in India or abroad?**

26. While the Code extends to India, under Section 18(f)(i) of the Code, the Interim Resolution Professional has the right to take control and custody of assets over which the corporate debtor has ownership rights and which may be in a foreign country. Additionally, the Explanation to Section 18 and Section 36(4)(d) of the Code clarifies that “assets” under the code shall not extend to “foreign subsidiary of corporate debtor”. Therefore, while the Code does not extend to foreign subsidiaries of the corporate debtor, it extends to all assets (which may be in a foreign country) over which there exist ownership rights.
27. All India seated arbitrations must comply with the moratorium order issued by the NCLT. In case of a foreign seated arbitration involving an Indian party, and if such party is subject to insolvency proceedings, they would typically apply to the foreign seated arbitral tribunal requesting a stay on the proceedings. One can argue that the language in Section 14 of the Code—“the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority”—is broad, and would be applicable even in a foreign seated arbitration, as well.
28. However, if a foreign seated arbitration award can be enforced against the foreign assets (outside India), then there may be no real prejudice, as the award need not have any nexus

<sup>24</sup> *ibid*, s 33(5).

<sup>25</sup> Regulation 38(b)(iii) of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.



with the law of India. This is on the basis that India has not yet notified the reciprocating territories under the Code, and therefore, unless the courts at the seat of the arbitration recognize the insolvency proceedings, there may not be any bar in continuation of such arbitral proceedings. Should the tribunal not adhere to the moratorium order passed by the NCLT, there may be challenges in the enforcement of such award, at least in India, as enforcement will be resisted on the grounds of public policy, as explained in the answer to Question 26.

29. If a foreign seated tribunal refuses to issue a stay on the arbitration proceedings, it is not clear whether the corporate debtor will be successful in applying to the supervisory jurisdiction to get the moratorium order under Section 14 of the Code recognized. India has not yet notified the reciprocating territories under Section 234 of the Code, and hence where insolvency orders are recognized on the basis of reciprocity, such orders may not be enforceable in India. Where the Indian insolvency proceedings are automatically recognized as the main proceedings under the applicable law, it may be possible to get the moratorium order recognized. For details, please see the answer to Question 29.

**h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

30. The effect of insolvency (ie, the moratorium order under Section 14 of the Code) becomes operative when the CIRP is admitted by the NCLT (ie, when the insolvency proceeding is admitted against the insolvent party).

**4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**

- a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?**
- b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?**

31. Indian law does not provide any specific statutory procedure for overcoming the moratorium imposed by the Code for initiation or continuation of arbitration. However, as discussed in response to Question 2 above, if an arbitration is demonstrated to be for the benefit of the corporate debtor, maximise the corporate debtor's assets, or would not adversely affect the corporate debtor's assets, an arbitrating party may be able to seek continuation of the arbitration proceedings. Ultimately, the NCLT will have to render a finding on this issue.

32. Since the board of the corporate debtor stands suspended during the operation of the moratorium order, and the Resolution Professional will be in charge of continuing with all the legal proceedings, and if they refuse to continue with the proceedings, the arbitrating party may file an application before the NCLT, seeking declaration from it that the arbitration is not prohibited under the moratorium, in light of the jurisprudence aforementioned.

**5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?**

33. The NCLT's order initiating CIRP in a corporate debtor is not specifically an anti-arbitration injunction. However, to the extent that the moratorium imposed by it operates even against arbitration proceedings, it functions as an anti-arbitration injunction. In *K.S. Oils Ltd. v. The State Trade Corporation of India Ltd. & Anr.*,<sup>26</sup> when the National Company Law Appellate Tribunal ("NCLAT") was called upon to pass directions to injunct the arbitral proceedings, they refused to set aside the order of the arbitral tribunal and instead directed the parties not to pursue the arbitration proceedings.<sup>27</sup>
34. The law does not differentiate based on the seat of arbitration. Please also see the response to Question 3.

**6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

35. There are no such powers expressly provided under the Code, but it can be implied from the below.
36. Under Section 17 of the Code, the management of the affairs of the corporate debtor vests in the Interim Resolution Professional, and later the Resolution Professional, during the CIRP; the Board of Directors of the corporate debtor stands suspended by law. Under Section 20 of the Code, the Interim Resolution Professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.<sup>28</sup>

<sup>26</sup> Company Appeal (AT) (Insolvency) No. 284 of 2017.

<sup>27</sup> "14. . . .we are not inclined to interfere with the part of the impugned order 9 Company Appeal (AT) (Insolvency) No. 1122 of 2019 whereby the Adjudicating Authority refused to set aside the order passed by the Indian Council of Arbitration, declare that the Arbitration Tribunal/Indian council of Arbitration cannot proceed with the arbitral proceeding pending between the parties. Both the parties are directed not to pursue arbitral proceeding before the Arbitration Tribunal/Indian Council of Arbitration till final order is passed by the Adjudication Authority on the resolution plan and completion of the moratorium period . . .".

<sup>28</sup> *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others*, 2019 SCC OnLine SC 1478 para 22.

37. Section 20(2)(b) of the Code authorizes the insolvency administrator (Resolution Professional) “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 . . .”.
38. Under Section 14 of the Code, in addition to a bar on the initiation and continuation of arbitration proceedings, there is also a bar on the transferring, encumbering, alienating or disposing of assets, or any legal right or beneficial interest by the corporate debtor. Section 14 of the Code also protects the corporate debtor from any action to foreclose, recover, or enforce any security interest created by the corporate debtor in respect of its property, including the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
39. A combined reading of the provisions of moratorium and the power and duties of the Resolution Professional would suggest that the Resolution Professional has been conferred with wide powers to take all steps necessary for protecting and preserving the value of the property of the corporate debtor and to manage the operations of the corporate debtor as a going concern (which may also include terminating contracts). Since the moratorium ensures that there are no payment obligations or enforcement of securities under the relevant contract, it is unlikely that the Resolution Professional will terminate a contract. However, should the need arise, the Resolution Professional can do so, as explained above.
40. Similar powers are vested on the liquidator under Sections 35 and 37 of the Code.

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

41. If a termination takes place, ordinarily the arbitration clause could be severed from the main agreement by applying the doctrine of severability stipulated under Section 16 of the Arbitration Act. However, a bar on initiation of the arbitration proceedings will be in operation, and therefore, practically, termination of such contracts would bring the arbitration agreement to a standstill.
42. A decision of termination taken by the Resolution Professional can be the subject matter of challenge before the NCLT. If its contract is disclaimed/terminated by NCLT, one can challenge the NCLT’s decision in appeal before the NCLAT.

**8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?**

43. This has been answered in part in the answer to Question 6. Yes, the insolvency administrator or NCLT can terminate or suspend the effectiveness of arbitration, and it will have to be shown that such a step was necessary to protect and preserve the value of the corporate debtor and manage its operations as an ongoing concern.

**9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?**

**a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**

**b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

44. As explained in the previous response, as soon as the insolvency proceeding is admitted, there is a bar on the initiation and continuation of arbitration proceedings. There are limited instances where arbitration proceedings have been allowed to be continued, ie, when the proceedings did not ultimately impact the corporate debtor or when they were for the benefit of the corporate debtor. Therefore, the only step which an alleged creditor may take is to file an application before the NCLT, and if the case arises under the broad category of exemption discussed above, such an application may be allowed. The law is still evolving on this point, and the merits of each matter would be decided on a case-by-case basis.

45. Assuming the NCLT refused to grant any favourable orders, the next step is to file the claims before the Resolution Professional. If the claim is accepted, then the claim becomes a part of the list of credits, and the Resolution Applicant will have to deal with all such claims in the proposed Resolution Plan. If the claim is refused to be inserted in the list of credits, appeal can be filed before the NCLT, and in the meantime, the claim appears as a pending dispute. A list of pending disputes is also collated and included in the information memorandum made available to all the prospective Resolution Applicants.

46. The NCLT can either agree to include the claim as list of credit or reject the plea. If the NCLT still refuses it, the claim is confirmed as a pending dispute in the information memorandum so that the Resolution Applicant may consider all these aspects before submitting a Resolution Plan. However, further appeals can be filed before the NCLAT and the Supreme Court. A Resolution Applicant can propose in the Resolution Plan that all pending disputes will be

distinguished and subject to approval of the Committee of Creditors. When the NCLT approves the Resolution Plan, the Resolution Plan becomes binding on all the parties. These aspects have been further elaborated below.

47. Therefore, if the claim is refused, the existence of the arbitration agreement would not allow the arbitral tribunal to rule on these claims due to the operation of the moratorium.
48. Filing a claim before the jurisdiction of the insolvency court would amount to submission of the jurisdiction. However, even if the claims are not submitted, the Resolution Professional will review the records of the corporate debtor and in the Information Memorandum prepared for inviting prospective investors, will mention all the details of such claims under the category of pending litigation. The Resolution Applicant has the discretion to decide how it will deal with the pending claims, and the same is recorded in the Resolution Plan. In many instances, the resolution plan will include a clause which will suggest that all pending litigation/disputes will stand extinguished as soon as the resolution plan is implemented. Once a resolution plan is submitted, and if it is approved by the Committee of Creditors by two-thirds majority and subsequently by the NCLT, the same becomes binding on all the relevant parties. There is a limited review available to challenge the Resolution Plan before the NCLT on the ground that the interests of all stakeholders have not been taken into consideration, but in practice, such a challenge is usually heard if they are made by the existing financial or operational creditors. Pending litigations/disputes are usually not even included in the claims collated by the Resolution Process, so their ability to challenge a Resolution Plan because their claim has been extinguished is extremely narrow. The law is still developing at this stage, and we have not seen many cases that discuss this point.
49. The Supreme Court's ruling in *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors*<sup>29</sup> has also clarified that the successful Resolution Applicant must take over the corporate debtor on a fresh slate and should not be subject to any liabilities arising out of the pending litigation/undecided claims—which went into a standstill due to the operation of moratorium.

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<sup>29</sup> 2019 SCC OnLine SC 1478 para 67 “the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count . . .”.

**10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?**

50. As a matter of general law, and as explained before, the arbitration clause becomes inoperative as soon as the moratorium is imposed, unless the exceptions created by judicial precedents apply, ie, if such arbitral proceedings are beneficial for the corporate debtor, maximize the value of the corporate debtor, and help the corporate debtor manage its operations as an ongoing concern. Therefore, the arbitration clause will ordinarily not be enforceable.

51. The Resolution Professional<sup>30</sup> or the liquidator<sup>31</sup> is authorized to initiate or defend legal proceedings. Under Section 25(2)(j) of the Code, the Resolution Professional can file an application for avoidance of the transaction. The most common grounds are “preferential transactions”<sup>32</sup> and “undervaluation of transaction”.<sup>33</sup> A Resolution Professional or a

<sup>30</sup> Section 35(k) of the Code states: “to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor . . .”.

<sup>31</sup> Section 35(k) of the Code states: “to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor . . .”.

<sup>32</sup> Code, s 43. Recently, the Supreme Court in *Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. v Axis Bank Limited, etc* has discussed the concept of “preferential transaction” under Section 43 of the Code. The Supreme Court, after analysing Section 43, observed that a transaction entered into by a corporate debtor would be deemed to have given a preference to a creditor if:

- (a) the transaction involved a transfer of property of the corporate debtor for the benefit of a creditor, for or on account of an antecedent financial debt owed by the corporate debtor to the creditor; and
- (b) the transfer had the effect of putting the creditor in a more beneficial position than it would have been, in the event of distribution of assets of the corporate debtor in the usual course as per the liquidation waterfall provided under Section 53 of the Code;
- (c) such transactions were entered into either (1) during the two-year period preceding the insolvency commencement date in case the beneficiary was a related party, or (2) during the one-year period preceding the insolvency commencement date in case the beneficiary was an unrelated party.
- (d) the transactions can be excluded from the purview of preferential transactions on one of the following two grounds: (1) if it was a transfer made in the ordinary course of business/financial affairs of the corporate debtor and the transferee; (2) if the transaction created a security interest, secured a new value in the property acquired by the corporate debtor (ie, in monetary terms, or in terms of goods, services, new credit), or secured the release of a previously transferred property.

<sup>33</sup> Code, s 45. Under Section 45(2) of the Code, a transaction shall be considered undervalued where the corporate debtor (a) makes a gift to a person; or (b) enters into a transaction with a person which involves the

liquidator has the right to apply before the NCLT for avoidance of these categories of transactions. These actions will be in the exclusive domain of the insolvency court (ie, NCLT).

**11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?**

52. There is no bar, so long as the actions taken by the administrator are in the interest of maximizing the value of the corporate debtor. The same considerations as those explained in the answer to Question 6 apply to this case.

**12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?**

53. As explained in response to Question 1, the intention of Section 14(1) is to bar pending proceedings until the conclusion of the CIRP. The absence of a bar in continuing with pending proceedings in the liquidation also explains the same intention. However, in practice, pending arbitrations are usually not taken forward because (a) the treatment provided to such a claim in the Resolution Plan becomes binding on all parties once it is approved by the NCLT; (b) nearly all Resolution Plans provide for extinguishment of all pending litigation clause, which once approved by the NCLT exempts the corporate debtor from any past liability arising out of any pending litigation.
54. More specifically, if there is a successful resolution of the insolvency proceedings, there can be two outcomes. First, the debt of the creditor may be addressed by the Resolution Applicant in the Resolution Plan, and if the Committee of Creditors and the NCLT approve the Resolution Plan, it is binding on all the parties. Resultantly, the treatment provided by the Resolution Applicant regarding the pending litigation/claim of the debtor will bind the parties arbitrating against a corporate debtor.
55. Secondly, if the Resolution Applicant does not adequately consider or make provisions regarding the claims pending in arbitration and if the Committee of Creditors and NCLT approve such a Resolution Plan, the wisdom of the Committee of Creditors prevails. There are narrow grounds on which a Resolution Plan can be challenged, and it must be established in the challenge that the Resolution Plan does not appropriately consider the interest of all stakeholders.<sup>34</sup> Additionally, in almost all the Resolution Plans, there is a clause which stipulates that all the pending litigations/claims or other claims not specifically discussed will stand extinguished. This is now a market practice to ensure that the Resolution Applicant

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transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

<sup>34</sup> *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others*, 2019 SCC OnLine SC 1478.

starts on a clean slate to revive the corporate debtor.<sup>35</sup> Therefore, one could say that the effect of insolvency does operate even after the creditors' arrangement in so far as there is no mechanism for the creditor to pursue their claims after successful resolution of the corporate debtor.

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?**

56. All the rules are mandatory. The Code does not envisage a procedure where certain provisions can be opted out.

**14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?**

57. Yes, the arbitrators in the jurisdiction are bound by the provision of the Code. The arbitral tribunal seated in India will be bound by the law of the seat of arbitration, which will include the provisions of the Code. Nevertheless, Section 238<sup>36</sup> of the Code also stipulates that the provisions of the Code will override the other laws.

**15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?**

58. No. The ability and effectiveness of the insolvency court is supreme. Section 238 of the Code clarifies that notwithstanding any other law in force (for example, those regarding jurisdiction), the provision of the Code will override any conflicting legislation.

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<sup>35</sup> *ibid*, para 67.

<sup>36</sup> "The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."



**Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings**

**16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?**

**a. If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]**

59. The insolvent party will continue to proceed in its own name; however, the effective control and management of such proceedings will be in the hands of the Interim Resolution Professional or the Resolution Professional, as applicable.

60. Section 25(2)(b) of the Code stipulates that the Resolution Professional shall represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial, or arbitration proceedings.

**17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?**

61. The essence is to maintain confidentiality. However, since the orders of the NCLT are available in the public domain, the confidentiality obligation can often be compromised.

62. Under Regulation 36A of the Regulation, the Resolution Professional is required to publish brief particulars of the invitation for expression of interest, as per the scheduled format, to generate a response from interested and eligible prospective Resolution Applicants. The invitation prescribes certain criteria for the prospective Resolution Applicants.<sup>37</sup> A prospective Resolution Applicant who meets the requirements of the invitation for expression of interest may submit their expression of interest.<sup>38</sup> Along with the submission, the prospective Resolution Applicant is required to provide an undertaking that “it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself . . .”.<sup>39</sup>

<sup>37</sup> Regulation, s 36A(4).

<sup>38</sup> *ibid*, s 36A(5).

<sup>39</sup> *ibid*, s 36A(7)(g).

63. Thereafter, the Resolution Professional is required to issue a provisional list of eligible prospective Resolution Applicants within ten days of the last date for submission of expression of interest.<sup>40</sup>
64. The Information Memorandum, which contains all the relevant details about the corporate debtor, is shared by the Resolution Professional after receiving an undertaking from the members of the Committee of Creditors to the effect that such member or the prospective Resolution Applicant shall maintain confidentiality of the information and shall not use such information to cause an undue loss to itself or any other person.<sup>41</sup> The Information Memorandum will list all the pending litigations/arbitrations and set out the name of the parties, the value of the dispute, the stage of the dispute, and may also set out a brief narration about the nature of the dispute. There are no specific requirements as to how a pending claim is to be presented, and it depends on the Resolution Professional and the nature of the pending litigation/arbitrations.
65. However, when the Resolution Plan is placed before the NCLT for approval, the contents of the Resolution Plan often come into the public domain.

**18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?**

66. Under Indian law, the name of a party does not change as a consequence of the opening of insolvency proceedings.

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

67. There are no provisions in the Code which stipulate that an Interim Resolution Professional or a Resolution Professional can reach a settlement of disputes (including arbitration).
68. Notably, the liquidator<sup>42</sup> has been conferred with powers to invite and settle claims of the creditors, subject to the directions of NCLT. There is no clarity as to whether such settlement would include a settlement in arbitration, and this remains a grey area.
69. However, so long as the settlement results in maximization of the value of the corporate debtor and is beneficial for the corporate debtor, it is reasonable to assume that such settlement may be permitted to be carried out by NCLT.

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<sup>40</sup> *ibid*, s 36A(10).

<sup>41</sup> Code, s 29, read with Regulation, s 36.

<sup>42</sup> Section 35(k) of the Code stipulates that the liquidator has the power to “to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code . . .”.

**20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?**

70. No. Once the insolvency proceedings are admitted, due to the moratorium order imposed under Section 14(1) of the Code, there is a bar on the continuance of arbitration proceedings. Hence, the arbitral tribunal cannot proceed and order interim measures, unless it falls within the limited exceptional circumstances discussed earlier—ie, the proceedings are towards the benefit of the corporate debtor, would maximize the value of its assets, and would help in keeping its operation as a going concern.

**21. Does the opening of insolvency proceedings in India affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?**

71. The opening of the insolvency proceedings bars the initiation and puts a stay on the continuation of the arbitration proceedings. Further, as explained earlier in Question 14, under Section 238 of the Code, the provisions of the Code will prevail over any conflicting legislation. Therefore, the interim orders in any arbitration will be on hold during the period of moratorium, unless they are beneficial towards maximizing the value of the corporate debtor's assets.

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?**

72. Yes. The capacity of the insolvent party (ie, the corporate debtor) to settle the dispute in an arbitration is significantly impacted by commencement of the insolvency proceedings. What may have been a good settlement in ordinary circumstances cannot be enforced, unless it can be established that the settlement maximizes the value of the corporate debtor and is in its best interest. Further, approvals from the Committee of Creditor may be required if any amount is to be paid pursuant to the settlement. As such, the corporate debtor does not have the authority to even negotiate the settlement, as the Resolution Professional acts on behalf of the corporate debtor.
73. If the moratorium is lifted, and provided the pending dispute survives the insolvency resolution process, a settlement can certainly be achieved by the new management (ie, the successful Resolution Applicant).

### **Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings**

**23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?**

74. The opening of an insolvency proceeding bars enforcement actions in India. The NCLAT in *K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors*<sup>43</sup> has clarified that proceedings towards recovery against the corporate debtor cannot be continued during the operation of the moratorium. The Delhi High Court in *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*<sup>44</sup> has observed that the moratorium under Section 14(1)(a) of the Code is intended to prohibit debt recovery actions against the assets of the corporate debtor.

**24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?**

75. Where a company is in CIRP, its pending claims are listed as part of the Information Memorandum, and it is up to the Resolution Applicant as to how they will deal with such a claim. In the Resolution Plan, typically a clause is inserted which extinguishes all the pending litigations/ arbitrations. Therefore, in a given circumstance where a claim is being pursued in the arbitration and has not resulted in a final award, the effect of a successful resolution typically leads to a nullity in the claim amount, unless the Resolution Applicant prescribes a value to the pending dispute. Please see the answer to Question 9 for further details on the insolvency process as regards a pending litigation/arbitration and the involvement of the insolvency court (ie, NCLT).

76. As explained in response to Question 11, the Supreme Court in *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others*<sup>45</sup> has also held that pending claims should be treated at nil value, so as to ensure that the Resolution Applicant shows interest in restructuring the corporate debtor and starts on a clean slate.

77. During the operation of the moratorium order, there is a bar on continuation of the arbitration proceedings, and therefore, it is unlikely that a claim will convert into a final award during the intervening period. Even if the arbitration continues, it could be challenged subsequently under Section 34 of the Arbitration Act on the ground that “the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force”.

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<sup>43</sup> [2018] 146 SCL 588.

<sup>44</sup> 246 (2018) DLT 485.

<sup>45</sup> 2019 SCC OnLine SC 1478.

**25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?**

78. If the arbitral award is being used to initiate insolvency proceedings, the credit therein must be undisputed. The Supreme Court in *M/s Vijay Nirman Company Pvt. Ltd and M/s Ksheerabad Constructions Pvt. Ltd*<sup>46</sup> has affirmed that even though arbitral awards are valid records of an operational debt, the same would have to be undisputed in order to enable initiation of the corporate insolvency resolution process by operational creditors. In this case, the Supreme Court concluded that there was a dispute with respect to the sum awarded in the Arbitral Award and refused entertaining the corporate insolvency resolution process on the premise (a) that a counterclaim exceeding the claim awarded was rejected by the Arbitral Tribunal on merits, and such rejection is also a subject to a challenge before the Courts; and (b) a challenge had also been filed against the Arbitral Award.
79. While the above judgment is in relation to initiation of a fresh insolvency proceeding, participating in an existing insolvency proceeding will involve the same threshold, ie, the arbitral award should be undisputed, without any legal challenge pending.
80. In case of a foreign award, it will have to be first recognized under the Indian law as per Section 47 and 49 of the Arbitration Act. Upon recognition of the foreign award, and if the enforcement of such award is not resisted, it may be treated as an operational debt. (If the enforcement of the award is resisted, then it would become disputed.) However, there is no judicial precedent to support this position yet.
81. However, recently, the Mumbai bench of NCLT in *Agrocorp International Private (PTE) Limited v. National Steel and Agro Industries Limited [CP (IB) No. 798/ MB/ C-IV/ 2019]* has taken an opposite view. In this case, it held that enforcement of a foreign award is not required for successfully maintaining an insolvency claim against the corporate debtor. In this case, the foreign award was not challenged,<sup>47</sup> and that was used as a basis to admit the insolvency petition. There are a series of cases by the Indian Supreme Court which have recognized that a foreign award has different stages: in the first stage, the Court would decide about the enforceability of the award having regard to the requirements of Section 47 and 48 of the Arbitration Act. Once the enforceability of the foreign award is decided, the Court would proceed to take further effective steps for execution of the award.<sup>48</sup> One may also argue in support of the decision and contend that a foreign award, so long as it has attained finality at

<sup>46</sup> Civil Appeal No. 21825 of 2017.

<sup>47</sup> Paragraph 37: “This Bench is of the considered view that it is not possible to wait indefinitely for the Corporate Debtor to challenge the Arbitral Award, and that it has to decide the present petition on the basis of the admitted positions, that is to say, there is an Arbitral Award passed by a competent Arbitral Tribunal after the consideration of the positions of both the sides, and there is no challenge to the Arbitral Award dated 16.04.2018 in a manner known to law. Hence the same cannot be considered as a pre-existing dispute, and the objection of the Learned Counsel for the Corporate Debtor on this count is rejected . . .”.

<sup>48</sup> *Fuerst Day Lawson Ltd v. Jindal Exports* [2001] 6 SCC 356; *Government of India v. Vedanta Limited & Ors*, SLP (Civil) No. 7172 of 2020.

the seat of arbitration, is a valid proof of debt, and therefore, can be used by a foreign creditor to initiate insolvency proceedings in India. It remains to be seen whether an appeal against the judgment of the NCLT is filed before the NCLAT and how they decide this issue.

**26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?**

82. As stated earlier, there are no specific rules regulating the effect of insolvency on arbitration, except Section 14 of the Code, which contains the moratorium provision during the CIRP period, and Section 33(5) of the Code, which prohibits initiation of legal proceedings during insolvency liquidation. A violation of the above provisions of the Code could be argued as a contravention of the fundamental policy of Indian law, which is a part of public policy under the Arbitration Act, and an India seated Arbitration Award can be challenged on this basis.<sup>49</sup> There are no judicial precedents where a breach of the provision of the Code has been pleaded to challenge an Award, and hence, the Courts have not opined on this issue.

**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?**

83. The principle of *par conditio creditorum* does not exist in the Code.
84. The Resolution Plan (which indicates the treatment of creditors) submitted by the Resolution Applicant is approved by the Committee of Creditors<sup>50</sup> by a two-thirds vote in favour.<sup>51</sup> Voting by the Committee of Creditors shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debt owed to such creditors.<sup>52</sup>
85. It is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by the Committee of Creditors with the prospective Resolution Applicant. The ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the

<sup>49</sup> *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, [2019] 15 SCC 131; *Associate Builders v. DDA*, [2015] 3 SCC 49.

<sup>50</sup> The Committee of Creditors shall comprise of all financial creditors of the corporate debtor.

<sup>51</sup> Code, s 30(4).

<sup>52</sup> *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others*, 2019 SCC OnLine SC 1478 para 35.

corporate debtor and the fact that it has adequately balanced the interests of all stakeholders, including operational creditors.<sup>53</sup>

**28. Are there any other provisions or case law of India concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?**

86. No.

### **IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION**

**[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in India concerning the insolvent party.]**

**29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in India?**

87. The Indian Insolvency law (ie, the Code) does not automatically recognize foreign insolvency proceedings. Currently, the Code contains two provisions to assist with cross-border insolvency disputes, as have been set out below. However, the reciprocal arrangement contemplated in these sections has not been given effect. At this point, in case of foreign insolvency proceedings, the proceedings are recognized on a case-by-case basis depending on the facts and circumstances and the provisions explained below.

#### **Agreements with foreign countries:**

88. Section 234 of the Code states that the Government of India may enter into an agreement with the Government of another country for enforcing the provisions of the Code. The section further provides that the Government may notify a list of the countries with whom a reciprocal arrangement has been made regarding application of the Code in those countries and in turn, application of such countries' insolvency laws in India.

89. The process stipulated is akin to the list of notified countries under the New York Convention 1958, in terms of the Arbitration Act for the purposes of enforcement of foreign awards in India.

90. As per the information available, no country has been notified as a reciprocating territory.

#### **Letter of request:**

91. When evidence or action relating to assets of a corporate debtor situated outside India is required in relation to an insolvency resolution process, the resolution professional,

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<sup>53</sup> *ibid*, SC 1478.

liquidator, or bankruptcy trustee can make an application to the NCLT pursuant to Section 235 of the Code.

92. Although the inclusion of Sections 234 and 235 in the code was to facilitate resolution of cross-border insolvencies, no steps have been taken to effectively implement the inter-government agreements. As of today, an order of the NCLT in a cross-border insolvency matter would not directly be recognized or enforced in any foreign country.<sup>54</sup> Similarly, there are significant challenges in the recognition of foreign insolvency proceedings in absence of notifying the reciprocating territories and giving effect to Section 234 and 235 of the Code.
93. In *Jet Airways (India) Limited v. State Bank of India*,<sup>55</sup> a Jet Airways aircraft had been grounded in Amsterdam over non-payment of dues to a European Cargo firm. The Jet group was facing insolvency proceedings in the Netherlands and in India at the same time. The Dutch court-appointed administrator in charge of the proceedings in Netherlands moved the NCLT (Mumbai) to have the NCLT recognize the Dutch proceedings.
94. The NCLT rejected its plea and opined that “there is no provision and mechanism in the I&B Code, at this moment, to recognize the judgment of an insolvency court of any Foreign Nation. Thus, even if the judgment of Foreign Court is verified and found to be true, still, sans the relevant provision in the I&B Code, we cannot take this order on record”.
95. Aggrieved by the order of the NCLT, the Dutch administrator approached NCLAT to recognize Jet Airways’ insolvency proceedings in the Netherlands. Pursuant to the NCLAT’s directions, the Dutch Court Administrator and the Resolution Professional in India agreed upon a “Cross Border Insolvency Protocol” wherein India was recognized as the “centre of main interests”, and the Dutch proceedings were recognized as the “non-main insolvency proceedings”. Through this Protocol, the Resolution Professional and the Dutch Court Administrator agreed on terms and conditions on which they would cooperate in the ongoing insolvency process, except the involvement of the Dutch Administrator in meetings of the Committee of Creditors. In response, the NCLAT allowed the Administrator the right to attend Committee of Creditors meetings but to only observe in order to prevent an overlap of powers.
96. Therefore, in absence of a protocol on recognition of cross border insolvency, an ad hoc mechanism had to be agreed during the course of the hearing.

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<sup>54</sup> *In State Bank of India v. SEL Manufacturing Company Limited’s case*, CB (IB) No. 114/Chd/Pb/2017, pending before the NCLT, Chandigarh, the US Bankruptcy Court for the District of Delaware (“US Court”) recognized the pending proceeding in India as the foreign main proceeding under the USA Bankruptcy Code. This is the first instance when an Indian insolvency proceeding under the Code has been recognized under Chapter 15 of the US Bankruptcy Code.

<sup>55</sup> *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices) v. State Bank of India Company Appeal (AT) (Insolvency) No. 707 of 2019*, Order dated 26 September 2019.



**30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?**

97. The Insolvency Law Committee (“Committee”) submitted a report on October 16, 2018 (“Report”), suggesting the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) into the Code, albeit with certain modifications in the Indian context. However, this is still at the recommendation stage, and legislation has not been passed implementing the Model Law.

**31. Does the opening of insolvency proceedings outside of the territory of India produce any effect on arbitrations seated in the jurisdiction? What is the source of the rule or legislation providing for such effects?**

98. The opening of insolvency proceedings outside the territory of India may not directly impact the arbitrations seated in India, as the mechanism to recognize a foreign insolvency proceeding under the Code has not been implemented. However, if a foreign insolvency is brought to the notice of the arbitration tribunal seated in India, the tribunal is likely to closely consider the impact of such proceedings on the arbitration, as the enforcement of the award could be impacted by initiation of such insolvency proceedings.

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

99. Presently, since no countries have been notified under the Code for reciprocal enforcement of insolvency laws in India, there is no occasion for arbitrators to recognise foreign insolvencies. However, as mentioned in the previous response, the arbitrators are likely to consider the overall impact of the insolvency proceeding on the arbitration proceeding.

**33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?**

100. No.

**34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?**

101. Under the Arbitration Act, only arbitral awards rendered in an India-seated arbitration can be set aside. As regards arbitral awards rendered in foreign seated arbitrations, Indian courts can, at best, refuse enforcement on limited grounds.
102. In an India-seated arbitration, if one of the parties is undergoing CIRP or liquidation, then, if an award is rendered contrary to the provisions of the Code (especially those relating to moratorium or non-initiation of fresh legal proceedings), the courts are likely to set aside such an award under Section 34 of the Arbitration Act on the premise that “the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force”.
103. In case of an India-seated arbitration award involving a foreign party, where insolvency proceedings have been admitted against the foreign party, the same may not have any impact in the setting aside proceedings in India, unless the foreign insolvency proceedings are recognized in India.
104. If the Award is issued in a foreign seated arbitration, it can be refused enforcement under Section 48 of the Arbitration Act, on the premise that “the subject-matter of the difference is not capable of settlement by arbitration under the law of India”.

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?**

105. There are no publicly available cases on the effect of foreign insolvency on arbitration seated in India or otherwise.