Solventia
I(1), 2024, pp. 1-21

Tribunal-Boundedness of Corporate Insolvency Resolution Process: An Inquiry into the Nature of Insolvency Disputes and their Arbitrability in India

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I. INTRODUCTION

Businesses continue to suffer with catastrophic consequences owing to financial reasons, sometimes pandemics and macro-economic downturns too play a villainy role. Owing to the COVID-19 pandemic, the businesses have suffered catastrophic consequences leading to various enterprises succumbing. In India alone, more than 280 firms were

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admitted into the Corporate Insolvency Resolution Process (**CIRP**) within the nine (9) months since the imposition of first lockdown,[1] upon which the World Bank (among other field players) predicted a rise in insolvency filings,[2] which turned out to be the case too.[3] The said rise in insolvency filings impose upon us the need to look out for alternatives and solutions to deal with issues that may range from typical to complex. In context of insolvency disputes, the authors through this paper are arguing in favour of arbitration, with its globally-recognised enforcement mechanisms, as an appropriate solution.

Across jurisdictions, especially those following the UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model Law**), the authority of courts to review arbitral proceedings and awards is limited.[4] National laws impose limitations on the subjects eligible for arbitration, referred to as "arbitrability". Arbitrability issues may arise in two contexts: *first*, when individuals are considered unable to submit disputes due to their status or function, known as "subjective

[1] Ministry of Corporate Affairs, *Bankrupt Companies after lockdown was imposed due to COVID-19 pandemic* (22 March 2021) <https://pib.gov.in/PressReleasePage.aspx?PRID=1706640>.

[2] COVID-19 Notes: Finance Series, World Bank Group, *The Calm Before the Storm: Early Evidence on Business Insolvency Filings After the Onset of COVID-19*, <https://documents1.worldbank.org/curated/en/962221615273849133/pdf/The-Calm-Before-the-Storm-Early-Evidence-on-Business-Insolvency-Filings-After-the-Onset-of-COVID-19.pdf>.

[3] Valentina Romei, 'Bankruptcies Soar as High Rates and End of Covid Aid Hit Businesses Hard' *Financial Times* (London, 18 December 2023) <https://www.ft.com/content/a02cb631-8ae4-4ac2-be45-edfa776ed75f> accessed 5 January 2024.

[4] See Art 34(1), UNCITRAL Model Law on International Commercial Arbitration, 1985, which categorically states that "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

arbitrability"; and *second*, when restrictions on arbitrability are based on the subject matter or dispute at hand, termed '*objective arbitrability*'.[5]

A general study of arbitration laws reveal that insolvency matters not having effect on public at large are considered as arbitrable.[6] Excluding certain dispute types is justified on the grounds that it is inappropriate for private proceedings to rule on matters intrinsic to public policy or determine issues that have an effect in rem (rights exercisable against the world at large).[7] Non-arbitrable disputes are segregated from the otherwise based on the capability of the dispute to be settled by arbitration. For this, it must be noted that the '*capacity to be settled*' has not been defined per se by the UNCITRAL Model Law, the New York Convention, or even the Arbitration and Conciliation Act, 1996 (the Indian domestic arbitration legislation).

Various business disputes like anti-trust,[8] securities,[9] intra-company disputes,[10] including insolvency disputes, have, since a long time, been subject to scrutiny at various jurisdictions for their capability to be

[5] See art V(2)(a), New York Convention, 1958; art 34(2)(b), UNCITRAL Model Law on International Commercial Arbitration.
[6] Aman Lekhi and Pranay Lekhi, 'Chapter I: The Arbitration Agreement and Arbitrability: The Objective Non-arbitrability of Insolvency Related Disputes, An argument in International Public Policy' in Christian Klausegger and Peter Klein et al (eds), *Austrian Yearbook on International Arbitration 2022, Austrian Yearbook on International Arbitration*, vol 2022 (Manz'scheVerlags-und Universitätsbuchhandlung 2022).
[7] See *Booz Allen v SBI Home Finance*, (2011) 5 SCC 532.
[8] See *Mitsubishi Motors v Soler*, 473 US 614 (1985); Case C-126/97, *Eco Swiss China Time Ltd v Benetton Int'l NV*, 1999 ECR. I-3055; *Union of India v Commission of India*, AIR 2012 Del 66 (India).
[9] See *Wilko v Swan*, 346 US 427 (1953); *Rodriguez de Quias v Shearson/American Express* 490 US 477 (1989); The French Civil Code, art 2060.
[10] See *ACD Tridon Inc v Tridon Australia Pty Ltd and others* [2002] NSWSC 896; *Silica Investors Limited v Tomolugen Holdings Limited* [2014] SGHC 101; G Shell, 'Arbitration and Corporate Governance' [1989] 67 North Carolina Law Review 520, 517–575.

settled by way of arbitration. As the scope of the paper incentivises us to restrict our scrutiny to insolvency disputes, it is pertinent to highlight that insolvency proceedings have generally been accepted as non-arbitrable, meaning thereby that an arbitral tribunal shall not be allowed to resolve the insolvency of a particular enterprise[11] (discussed at a later point in this paper). It is unequivocal that so-called "core" insolvency disputes, involving winding up or liquidation orders and administrator appointments, are non-arbitrable.[12] Yet, disputes with an insolvent party often revolve around standard monetary claims arising from contractual agreements, deemed "non-core". Despite extensive literature, the nature of these undoubtedly arbitrable disputes remains unsettled when insolvency is a factor.[13]

Recent jurisprudence signals a trend favouring arbitration in insolvency disputes, acknowledging the merits of a case-by-case approach[14] whereas it still does not permit resolution of insolvency through arbitration. The authors in the paper have argued in favour of resolution of insolvency disputes through arbitration and the jurisdiction of study is India, where the authors are inclined to take inspiration from other jurisdictions, the

[11] Christoph Liebscher, 'Part II Substantive Rules on Arbitrability, Chapter 9 - Insolvency and Arbitrability' in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, vol 19 (Kluwer Law International 2009), 165 – 178, 165.
See also F Mantilla-Serrano, *International Arbitration and Insolvency Proceedings*, Arb. Int'l (1995) 69.
[12] Ibid.
[13] Reza Shahroki and Akshay Gandotra, 'Arbitration for Insolvency: Streamlining the Scope of Arbitrability' (*Kluwer Arbitration Blog,* 13 July2023) <https://arbitrationblog.kluwerarbitration.com/2023/07/13/arbitration-for-insolvency-streamlining-the-scope-of-arbitrability/>
[14] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373; *US Lines Inc v ASOMPIA*, 197 F 3d 631 (1999).

same has been restricted to explanation of certain insolvency law related concepts in the requisite context.

The paper is divided into three segments, firstly the nature of insolvency proceedings is inquired into to determine the basic principles that would be relevant in describing arbitrability related concerns, then the discussion covers the take of Indian judiciary on arbitrability and the general position of insolvency disputes, and lastly provides for an approach towards ensuring arbitrability of insolvency disputes by bifurcating them into 'core' and 'non-core' disputes – the section will also be used to highlight the fallacies and opportunities this approach would provide if applied in India.

II. UNDERSTANDING THE NATURE OF INSOLVENCY DISPUTES

In a society that encourages companies to use credit, there is a risk that creditors may face difficulties when a firm becomes unable to meet its debt obligations. If multiple creditors seek to enforce their rights and remedies simultaneously, such as contractual rights, security interests, debt set-offs, and legal proceedings for delivery, foreclosure, or sale, it could lead to a chaotic race to protect interests.[15] The competitive pursuit of individual claims within insolvency proceedings may engender inefficiencies and yield inequitable outcomes. The attendant costs associated with the assertive pursuit of claims have the potential to confer preferential treatment upon certain creditors, particularly in cases

[15] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2012).

where the available assets prove insufficient to satisfy the entirety of the claims in question.

One primary objective of insolvency law is to replace this disorderly scenario with a legal framework where creditors' rights and remedies are temporarily suspended.[16] Instead, a structured process is established for the organized collection and realization of the debtor's assets, ensuring a fair distribution among creditors based on their claims. Insolvency law, in essence, addresses the challenge of reshaping seemingly concrete and clear legal rights.[17] Thus, insolvency resolution is a collective process for the rescue of a business from the grip of bankruptcy. The Indian legislature, through the Insolvency and Bankruptcy Code, 2016 (**IBC** or **the Code**), has brought in the mechanism for resolution of insolvencies. The process is backed with several principles and has been drafted keeping certain objectives in mind. The specifics that impact arbitrability of insolvency disputes can be categorised into the following categories:

(a) Collective proceedings

Under the IBC, once the insolvency is declared by the Adjudicating Authority (**AA**), a Committee of Creditors (**CoC**) is formed to make collective decisions for the fate of the enterprise.[18] The Bankruptcy Law Reforms Committee (**BLRC**),

[16] ibid.
[17] Vanessa Finch 'The Measures of Insolvency Law' (1997) Oxford Journal Legal Studies 17(2), 227; Saleh Al-Barashdi and Horace Yeung, 'An Assessment of Various Theoretical Approaches to Bankruptcy Law' (2018) Sultan Qaboos University Journal of Arts & Social Sciences, 23.
[18] The Insolvency and Bankruptcy Code 2016, s 13.

in its report has stated that "*law must ensure that all key stakeholders will participate to collectively assess viability*",[19] thereby emphasising on the fact that all creditors shall form a singular decision-making forum which shall be responsible for governing the enterprise for the currency of the resolution process.[20] Furthermore, under s. 12-A of the IBC it can clearly be seen that once the CoC is formed, they also enjoy the power to vote for the withdrawal of the application collectively.[21]

(b) Preventing creditors from initiating individual action

Once the insolvency application is accepted by the AA, moratorium under s. 14 shall be declared.[22] The moratorium, as defined by the IBC, is a designated timeframe during which no legal proceedings for recovery, enforcement of security interests, sale or transfer of assets, or termination of essential contracts can be initiated or continued against the Corporate Debtor (**CD**). The fundamental aim of implementing the moratorium period is to safeguard the assets of the CD throughout the CIRP, preventing their attachment by any competent court of law during the ongoing proceedings against the CD.

(c) Limited disposal of estate by debtor

[19] The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (4 November 2015), 29 <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf>.
[20] The Insolvency and Bankruptcy Code 2016, s 28.
[21] The Insolvency and Bankruptcy Code 2016, s 12-A.
[22] The Insolvency and Bankruptcy Code 2016, s 14.

Further the debtor is also stopped from disposing their estate and certain transactions that they have done in the recent past also come under the scrutiny of the Resolution Professional (**RP**). Transactions that may have been made to unjustly alienate the debtor's estate are declared void and hence are restored in order to protect the debtor's estate. Such transactions are called avoidable transactions. The UNCITRAL Legislative Guide on Insolvency Law defined avoidance provisions as "*provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.*"[23]

(d) The *Pari Passu* principle

It refers to the equal treatment of similarly situated creditors in terms of their legal rights and entitlements during the distribution of assets. This principle is enunciated under the IBC under various provisions including equal treatment for creditors,[24] ranking of creditors and formation of the CoC,[25] decision-making process of the CoC,[26] waterfall mechanism[27] and

[23] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005), 4 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>.
[24] The Insolvency and Bankruptcy Code 2016, s 33.
[25] The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Regulation 17.
[26] The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2017, Regulation 25.
[27] The Insolvency and Bankruptcy Code 2016, s 53.

> the like. The pari passu principle is fundamental to maintaining fairness among creditors in insolvency. It promotes transparency, discourages discriminatory treatment, and establishes a structured approach to the distribution of assets, contributing to the overall effectiveness of the insolvency resolution processes under the Code.[28]

This brings us to a position in India that insolvency disputes are imbibed in the insolvency process itself and should not be looked upon at separately. There does not seem to be much literature to substantiate the proposition that disputes arising in insolvency can be singled out from the whole insolvency proceeding and be made subject to a private forum.

III. AN ARGUMENT IN FAVOUR OF INSOLVENCY DISPUTES ARBITRATION

Insolvency disputes are on the rise and other methods of resolving them to lighten the burden of our quasi-judicial system need to be visited. Earlier, the Insolvency Law Committee has proposed the settlement of insolvency claims[29] leading to the insertion of s. 12-A of the IBC in June 2018[30] and Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

[28] *International Coach Builders Limited v Karnataka State Financial Corporation*, 2003 AIR SCW 1524.

[29] Report of the Insolvency Law Committee (March 2018) 73 <https://ibbi.gov.in/ILRReport2603_03042018.pdf>.

[30] The Insolvency and Bankruptcy Code 2018, s 12-A reads as "Withdrawal of application admitted under section 7, 9 or 10. – The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

Regulations, 2016 (**IBBI Regulations**). The step of introducing ADR in insolvency, which could have made insolvencies faster in India, did not make much difference, a ground for the same has been its very restricted applicability. The number of cases withdrawn under s. 12-A of the IBC stands at a mere 13.4% (7058 cases were admitted till September 2023 out of which 947 have been withdrawn under s. 12-A), wherein 54% of CIRPs so withdrawn had less than one (1) crore rupees of admitted claims, hinting towards the adoption of settlement in CIRPs by minor businesses only.[31]

In light of the same, the authors propose a two-pronged argument favouring insolvency disputes arbitration in India; *firstly*, it will help in utilising the already established mechanism for arbitration, and *secondly*, the burden on the AA will lessen and they still get to play the role of the authority in the said insolvency.

Deliberating upon the first argument, it is to be highlighted that traditional insolvency procedures lack the adaptability and efficiency inherent in arbitration. As a dispute mechanism, arbitration procedures are equipped to provide parties with the flexibility to tailor proceedings to the specifics of their dispute. Arbitration proves particularly effective in addressing critical aspects of the insolvency process, including settling creditor claims, resolving affiliate disputes, valuing and distributing assets, approving restructuring plans, and providing a streamlined mechanism for handling insolvency-related disputes.

[31] IBBI, *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India* (July-September 2023) vol 28.

The infrastructure for international arbitration can also be leveraged for cross-border insolvency. Challenges common to international transactions such as time constraints, language barriers, inconsistent national laws, and the lack of a universally accepted framework can be adequately addressed by the well-known edifices of arbitration laws. Divergent insolvency laws may allocate assets differently to various creditor groups, and failure to reach an agreement could lead to the liquidation of a potentially viable business.[32]

Furthermore, arbitration can be viewed as a ready solution for choice of law related issues in insolvency as the somewhat supernational system of arbitration makes it more convenient for parties to settle disputes under a commonly agreed upon set of rules.[33] However, when introspected from a 'creditors wisdom' approach, the same may lead to disputes relating to the choice of law as different laws may mean varied reliefs to different classes of creditors and the creditors would seek the best solution for themselves. But this can be a position where the system of the CoC would come to play in deciding the rules of procedure and substance applicable to the insolvency dispute. It empowers parties to select a restructuring-friendly law to govern the substance of the dispute, fostering certainty and a sense of fairness that may persuade reluctant creditors to participate in the restructuring process. The Arbitration and Conciliation Act, 1996 provides that the maximum time period for the passing of the arbitral award is eighteen months[34] from the date of constitution of the tribunal, and the window gets shortened to six

[32] Lekhi and Lekhi, (n 6).
[33] The UNCITRAL Model Law for International Commercial Arbitration 1985, art 19.
[34] The Arbitration and Conciliation Act 1996, s 29A.

months[35] in case of a fast-track procedure. Introducing "fast-track proceedings" eases the burden on national court systems struggling with inflexible statutory procedures, making it challenging to promptly and economically resolve even straightforward insolvency-related disputes. It will also foster the harmony in cross-border insolvencies sought under the UNCITRAL Model Law on Cross-Border Insolvencies.[36]

IV. PREVAILING TESTS OF ARBITRABILITY IN INDIA

Assessment of arbitrability of a dispute, up till 2021, has been an area of uncertainty in India. Before the *Vidya Drolia* judgement, the test of arbitrability in India was influenced by the judgement in *Booz Allen and Hamilton Inc. v SBI Home Finance Limited*,[37] wherein the Hon'ble Supreme Court held that the arbitrability of disputes depends on the nature of the rights involved. Matters concerning rights *in rem* were deemed non-arbitrable, while disputes involving rights *in personam* were considered arbitrable. The court listed specific disputes, such as criminal offenses, matrimonial matters, guardianship, insolvency (emphasis provided), testamentary matters, and eviction or tenancy matters, as non-arbitrable. The judgment was criticized for lacking reasoning and misapplication of principles. The position on in arbitrability of insolvency disputes was further upheld by the Hon'ble Supreme Court in *Ayyaswamy v Paramasivam*[38] in 2016.

[35] The Arbitration and Conciliation Act 1996, s 29B.
[36] Shahroki and Gandotra (n 13).
[37] *Booz Allen and Hamilton Inc v SBI Home Finance Limited*, (2011) 5 SCC 532.
[38] *A Ayyaswamy v A Paramasivam*, (2016) 10 SCC 386.

Until 2021, the interpretation of arbitrability in India remained uncertain, with courts presenting varying rules for determination. The Hon'ble Supreme Court attempted to bring clarity through the *Vidya Drolia v Durga Trading*[39] case, resolving certain ambiguities, and providing a clearer pathway to assess the capability of subject matters for arbitration.

The court's test for non-arbitrable subject matters included four prongs:[40]
a) When the subject matter relates to an action *in rem*, not stemming from a right *in personam* subordinate to the right *in rem*.
b) When the subject matter affects third-party rights, having *erga omnes* effect, requiring centralized adjudication where mutual settlements may not be effective.
c) When the subject matter relates to sovereign inalienable state function or public interest function, where private resolution is not executable.
d) Where statutes expressly and mandatorily render the subject matter non-arbitrable.

Though it is criticised on numerous counts (not all of which is relevant to the scope of this paper), the judgement forms the applicable test for determining arbitrability in India. According to the test given by the judgement, insolvency issues are non-arbitrable as a centralized resolution of insolvency disputes is necessary, whether through a court or a specialized forum, to ensure efficiency and possess comprehensive jurisdiction for the effective and complete disposal of the entire matter.

[39] *Vidya Drolia v Durga Trading*, (2021) 2 SCC 1.
[40] ibid [60].

These disputes are actions *in rem* and hence it cannot be made subject to arbitration.

In a recent case, *Indus Biotech Private Limited v Kotak India Venture*[41] (26 March 2021), the Hon'ble Supreme Court extensively delved into the arbitrability of insolvency disputes in India. The Hon'ble Supreme Court unequivocally stated that, post the admission of a petition under Section 7 of the Code, the dispute becomes non-arbitrable. The Hon'ble Supreme Court observed that when an arbitration reference application is filed during the pendency of a Section 7 petition, the AA must first determine the maintainability of the CIRP application. Once the Section 7 petition is admitted, any subsequent application under Section 8 of the Arbitration Act becomes untenable.[42]

The Hon'ble Supreme Court emphasized that insolvency proceedings become proceedings *in rem*, having an effect on the world at large, after the admission of a CIRP application. Referring to *Vidya Drolia v Durga Trading Corporation*, the court noted that upon admission, third-party rights are created in all creditors, and the proceedings have an *erga omnes* effect.

V. THE 'CORE' / 'NON-CORE' OF INSOLVENCY DISPUTES

[41] *Indus Biotech Private Limited v Kotak India Venture*, 2021 SCC OnLine SC 268.
[42] Hitesh Nagpal, 'Indus Biotech Private Limited v. Kotak India Venture Fund-I: Arbitration Of Insolvency Proceedings?' <https://cbcl.nliu.ac.in/arbitration-law/indus-biotech-private-limited-v-kotak-india-venture-fund-i-arbitration-of-insolvency-proceedings/>.

The rules concerning arbitration are consistent across jurisdictions, whereas the arbitrability of insolvency disputes is a question not much discussed about. In 2011, with the *Booz Allen* verdict, the Hon'ble Court declared insolvency disputes to be non-arbitrable and did not take the question of subordinating *in personam* rights arising out of insolvency. The position of insolvency disputes since has largely remained unchanged. Though to appropriately answer the broader question at hand, we must bifurcate it into its constituent parts to identify whether insolvency disputes can be made arbitrable in India.

Firstly, the ambit of the term 'insolvency dispute' must be addressed. During an insolvency proceeding, various claims may arise, including disputes relating to verification and admission of claims, secured claims, unsecured claims, claims relating to costs of insolvency proceedings, administrative costs and fee, claims resulting from violation of contracts (for example, termination of employment, service contracts etc.),[43] and claims in relation to violation of duty by trustee or directors. The arbitrability of these disputes should be looked into in isolation.[44] Though the deliberation also throws some light on whether we can consider 'insolvency' as such a subject matter open for arbitration, the looming conundrum of resolving insolvency by arbitration is that the prevailing international standards necessitate that there must exist a

[43] S Riegler in Riegler et al, *Arbitration Law of Austria: Practice and Procedure* (2007) 706.
[44] Ibid [714].

'dispute'[45] for there to be an arbitration, and insolvency resolution in itself is not a dispute.

The conventional approach to classifying insolvency-related matters for the purpose of arbitrability typically involves dividing them into 'core' and 'non-core' issues. In essence, insolvency courts maintain jurisdiction over core proceedings, while non-core proceedings are subject to resolution through arbitration or alternative non-bankruptcy forums. The pivotal distinction between core and non-core proceedings lies in the extent of relevance a claim holds in relation to the bankruptcy filing. A non-core proceeding typically involves a broad nexus with the debtor's bankruptcy and may be appropriately addressed by a non-bankruptcy forum or an arbitral tribunal.[46] However, the efficacy of this method has been a subject of debate. Recent U.S. court cases, such as *US Lines Inc. v ASOMPIA,*[47] have challenged the notion that labelling an issue as 'core' automatically deems it non-arbitrable. Conversely, with the consent of the parties, even a 'non-core' issue may be heard by the bankruptcy court. This indicates that the categorization was initially intended to ascertain the cause of action rather than its arbitrability.[48]

Notably, this classification overlooks other pertinent factors influencing arbitrability, such as the pecuniary or non-pecuniary nature of the

[45] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art II mentions the word 'differences', whereas art 7(1) uses the term 'dispute', which seem to be quintessential for arbitration to happen.
[46] Mayannk Sharma, 'Arbitrability of Insolvency Disputes – Harmonising the Conflicting Theories of Harm' <https://cbcl.nliu.ac.in/insolvency-law/arbitrability-of-insolvency-disputes-harmonising-the-conflicting-theories-of-harm/>.
[47] *US Lines Inc v ASOMPIA*, 197 F 3d 631 (1999).
[48] Shahroki and Gandotra (n 13).

dispute, exclusive functions of designated authorities, the timing of arbitration initiation in relation to the debtor's insolvency, and the impact on third-party rights.[49]

The position of insolvency disputes in the Indian arbitrability milieu is limited owing to two factors; firstly, s. 14(1) of the Insolvency and Bankruptcy Code, 2016 provides for moratorium which reads as follows:

> *"s. 14 – Moratorium - Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -*
> *(a) 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…."*

The provision puts an immediate bar on institution and continuation of suits and arbitration proceedings before the arbitral tribunal, which also includes the execution of an award. On this, the Hon'ble Delhi High Court, in *Power Grid Corporation of India Ltd. v Jyoti Structures Ltd.*,[50] has declared that the provision does not stop the proceedings instituted '*by the corporate debtor*', meaning thereby that all proceedings by or in favour of the CD are not affected by the provision of moratorium.

[49] Ibid.
[50] *Power Grid Corporation of India v Jyoti Structures Ltd*, (2018) 246 DLT 485.

Also, under s. 34(2)(a) of the Arbitration and Conciliation Act, 1996 any award passed in contravention to public policy of India shall be set aside by the Court where the term public policy is explained as-

> *"For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if—*
>
> *(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
>
> *(ii) it is in contravention with the fundamental policy of Indian law; or*
>
> *(iii) it is in conflict with the most basic notions of morality or justice."*[51]

In the context of insolvency, where courts are likely to reject arbitral award enforcement against an insolvent party in domestic proceedings, the public policy argument can be invoked even for non-core matters. The judgement of *Cruz City 1 Mauritius Holdings v Unitech Limited*[52] emphasized that the refusal to enforce an arbitral award in India should only occur if it contradicts the fundamental public policy, national interests, justice, and morality. The court highlighted that national policy constitutes the foundational principles upon which laws are built.

Insolvency legislation explicitly imposes a moratorium, prohibiting the continuation of all proceedings against the insolvent entity and its estate.

[51] The Arbitration and Conciliation Act 1996, explanation to s 34(2).
[52] *Cruz City 1 Mauritius Holdings v Unitech Limited* [2017] Delhi High Court, EX P 132/2014 & EA(OS) Nos 316/2015, 1058/2015 & 151/2016 & 670/2016.

Violating the automatic stay carries severe penalties and may be considered against the public policy of the state. Consequently, an arbitral award violating an insolvency statute may be deemed void, while an award adjudicating a contractual claim stemming from a corporate debtor may be enforceable.

In the United States, the Second Circuit Court of Appeal, in *In Re United States Lines Inc.,* emphasizes the critical importance of identifying the nature of the dispute in question when considering arbitrability. The court highlights that not all core bankruptcy proceedings inherently conflict with the Federal Arbitration Act, and in core proceedings, the bankruptcy court must judiciously assess whether enforcing an arbitration clause would adversely affect any underlying purpose of the Bankruptcy Code[53].

Similarly, the Singapore Court of Appeal in *Tomulgen Holdings Ltd. v Silica Investors Ltd.* advocates for a nuanced evaluation of the underlying dispute to strike a balance between upholding parties' agreement on dispute resolution and recognizing jurisdictional limitations on arbitral tribunal powers.[54] English law, as exemplified in the *Fulham Football Club (1987) v Richards* case,[55] underscores a fact-sensitive approach, asserting that jurisdictional limitations do not decisively determine the arbitrability of a dispute.

[53] *In Re United States Lines Inc*, 197 F 3d 631 (2d Cir 1999).
[54] *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] 1 SLR 373, [103].
[55] *Fulham Football Club (1987) Ltd v Richards*, [2011] EWCA Civ 855, [2012] Ch 333.

As discussed earlier in the paper, the Supreme Court, in *Indus Biotech Private Limited,*[56] acknowledges that creditors cannot initiate insolvency resolution until the underlying claim concludes through an arbitral process, as the rights do not become *in rem* until a default is conclusively determined.

Though we have some postulates across jurisdictions on the core and non-core bifurcation, what we lack in this regard is a detailed guidance on what would constitute core and non-core disputes which will make it determinable on a case-to-case basis, thereby introducing inconsistent application of principles.

VI. CONCLUSION

In conclusion, this research delves into the complex realm of insolvency disputes and their arbitrability in the Indian context, exploring the nuances of the Insolvency and Bankruptcy Code, prevailing tests of arbitrability, and the potential bifurcation of insolvency disputes into 'core' and 'non-core' categories. The paper highlights the inherent challenges in categorizing insolvency disputes for arbitration, given the particulars involved in determining what constitutes 'core' and 'non-core' matters. The collective nature of insolvency proceedings, the imposition of a moratorium, and the impact on third-party rights present obstacles to arbitrability.

[56] *Indus v Kotak* (n 41).

The argument in favour of insolvency arbitration emerges as potential solution to alleviate the burden on the quasi-judicial system and expedite the resolution of these complex matters. The adaptability inherent in arbitration, coupled with globally recognized enforcement mechanisms, make it a convincing alternative. The paper emphasizes the need for a nuanced approach that considers the nature of individual disputes arising within insolvency proceedings.

The proposal to bifurcate insolvency disputes into 'core' and 'non-core' matters is scrutinized, drawing parallels with international practices. However, the paper highlights the lack of detailed guidance on what constitutes core and non-core disputes, potentially leading to inconsistent application of principles.

In contemplating the way forward, the research emphasizes the standing of considering the specific nature of each insolvency dispute, recognizing the challenges posed by the collective nature of proceedings, moratorium provisions, and the impact on third-party rights. While advocating for the potential profits of arbitration, the paper recognizes the need for a careful balance between upholding parties' agreements, and recognizing jurisdictional limitations.

Ultimately, the research contributes to the ongoing discourse on insolvency disputes' arbitrability in India, shedding light on the complexities inherent in this multifaceted legal landscape. The budding nature of insolvency laws coupled with dynamic economic challenges, underscores the importance of continually reassessing and refining the dispute resolution mechanisms within the insolvency framework.