Effect of Moratorium on the fate of Arbitral Proceedings

-By Ms. Parinishtha Ganz,
Law student, Symbiosis Law School, Pune

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   A. Abstract
The research papers attempt to analyse the various situations in which an arbitration clause may be made enforceable post the declaration of insolvency of either party to the arbitration agreement. The two laws i.e. the arbitration laws and insolvency laws have always been seen in a conflict on the national as well as international level. The arbitration laws seek to provide justice to the parties of an agreement in case of breach, who have laid their trust on an alternate dispute mechanism. On the other hand, the Insolvency laws enforce stays on any such proceedings against the debtor in order to provide a calm period to an entity already going through a mentally and financially exhausting liquidation and insolvency process.

Through this research paper, the researcher has analysed the interpretation of Section 14, IBC adopted by various courts in order to decide whether or not section 14 will stand as a bar against any such proceedings. There are various criteria that are judged before deciding the enforceability of such a clause, i.e. it is an unsettled position of law which depends on case to case basis.

Another aspect that the research paper throws light is at the award stage, where though the arbitration proceedings were initiated before the insolvency declaration, but the award was pending post insolvency. The award stages are further divided into pre and post award which depend on various other factors. A lot of landmark judgments have clarified various aspects of this conflict, however it is still a disputed position of law and is evolving with every case.

Furthermore, the research paper talks about the foreign award and strikes a comparative analysis with international arbitration agreements and decisions of courts in other countries on similar cases.

Finally, the research paper ends with suitable suggestions and recommendations that the courts may adopt to simplify and regulate such cases better, in the opinion of the researcher.”

**B. Research objectives**

The Research Paper aims to achieve the following objectives-

- The Research paper aims to analyse Section 14, Insolvency and Bankruptcy Code, 2016
- The Research papers aims to analyse situations in which an arbitration can be initiated post insolvency declaration.
- The Research paper aims to analyse the nature of award post insolvency depending on the claims made.
- The Research paper aims to compare the legal standing of other countries on similar issues.
- The Research paper strikes a comparative analysis between the international and Indian Arbitration Laws.
- The Research paper sorts to recommend procedures that the courts can adopt to simplify decisions in such cases.

**C. Introduction**

This research paper focuses on two major laws governing the corporations in India and around the globe, namely the Insolvency and Bankruptcy Code, 2016 and the Arbitration and Conciliation Act of 1996. Therefore, it’s of vital importance to understand the relevance of these laws in the corporate scenario.

Legal environment of a country plays a vital role in its overall economic development, the strength of
such legal structure strengthens the position of the Country on the global financial level. The Code of 2016 has been one of the greatest economic and legal reforms introduced in India as it definitely plays a very important role in curbing the risks of credit and financial debt. The objective of the code is to rescue distressed entities, facilitates winding up of insolvent entities and safeguard creditors. One of the other effects of insolvency are also that it offers a calm- period to the corporate debtors from litigations related to debt recovery proceedings.

On the flip side, The Arbitration & Conciliation Act, 1996 which came into force in 1996, 25th January provides an alternate dispute resolution mechanism to the parties via Arbitration and conciliation. Arbitration falls on the line of nexus between a formal court proceeding and an informal, comfortable settlement between parties. In the corporate world, most companies prefer to adopt Arbitration because of the many benefits it offers such as cost effectively, chances of a win-win solution, settlements avoiding collateral damage and lesser media attention as compared to court cases etc. The research paper seeks to draw a nexus between the simultaneous applications of the two laws in respect to the objectives they aim to achieve and their limitations in respect to one another.

D. Analysis

The Code, 2016 is undoubtedly a completely self-sufficient code in itself, which secures the commercial interests of the investors by providing for a corporate insolvency resolution process (CIRP) to the distressed creditors, against the corporate debtor. The Code aims at providing a calm period to the debtors and thus contains a provision for a moratorium period as provided under Section 14, IBC 2016. Therefore, on the literal interpretation of the law, it is believed that an arbitration clause cannot be enforced after the declaration of insolvency.

However, through this analysis the researcher tries to explore various other stances taken by the Indian and International courts.

D.1. Interpretation of Section 14

D.1.1. Meaning Of Moratorium

“One of the goals of having an insolvency law is to ensure the suspension of debt collection actions by the creditors, and provide time for the debtors and creditors to re-negotiate their contract. This requires a moratorium period in which there is no collection or other action by creditors against debtors”.

A moratorium is a suspension or stay on any legal activity against a particular person. It provides a temporary break from any legal proceedings or trial against the person. It rests any order or decree of a court for the initiation, continuation or execution of a suit against the corporate debtor. Section 14 of the Code imposes an implied Moratorium in favour of any corporate debtor against whom Insolvency proceedings are initiated. The commencement fate of the Moratorium is the date on which the Insolvency commences and the bar is lifted only once the Courts are through with the CIRP period. No proceeding in relation to the recovery of debt, asset sale and purchase, contractual obligations etc. are entertained by any court of the country during the continuance of the Moratorium period.
Section 14 is recognised as a settled principle of law with a clear and absolute interpretation. The courts have usually interpreted the section on a literal approach granting implied moratoriums to the Debtors. However, when seen in light with other laws governing these corporations the Courts have most often than not, ignored the primary intent behind the provision- to grant a calm period to these corporate debtors undergoing insolvency of their corporations, and to give them enough time to assess and negotiate the winding up of their current assets and liabilities, without any further legal recovery enforcement mechanisms imposed by the creditors trying to pressurise the Corporate debtors.

D.1.2. Meaning of the term ‘Proceedings’-

The word ‘proceedings’ as mentioned in section 14 has proved to be of utmost importance in deciding the nature of cases barred by the section. On a bare reading of the section, it puts a bar on ‘proceedings’, however, it cannot be implied to denote that ‘all proceedings’ are barred under section 14. On multiple occasions the court has included all sorts of proceedings within the ambit of “Proceedings” thereby granting a suspension on non- corporate affairs of the company as well. This interpretation completely defeats the purpose of sections that seeks to protect against financial re-payments and debt, not all sorts of liabilities. The courts finally settled this controversy in the Power Grid Corporation case wherein the court held that the Purposive rule of interpretation shall be applied, stating that the ambit of Section 14 is limited to merely recovering debts against the corporate debtor, and shall not be deemed to be inclusive of “all sorts of Proceedings”.

Author’s Note: The purposive interpretation adopted by the Court suggests that “Calm period” shall not be perceived as an absolute immunity to the Corporate debtors. If that were the case, the provision would not merely be relaxing the financial liabilities off the debtors, but would also provide incentive to the Corporate debtors to escape non-financial liabilities, while simultaneously harming the other proceedings filed against the debtor for non- financial defaults.

D.1.3. Exception to Moratorium

The code is silent on the meaning and ambit of Section 14. It does not list the proceedings that would fall outside the scope of the provision, thereby, leaving the issue to judicial interpretation. Nonetheless, the language of Section 14 of IBC is wide and the intention of the legislature is well interpreted. The courts have attempted to create exceptions to these provisions by way of judicial assessment in the case of Deccan Chronicle, where the tribunal held that a moratorium does not imply absolutely and is restricted to Tribunals, however, any proceedings covered under Article 32, 136, 226 and 227 presented before the High Court or Supreme Court will form an exception to the application of moratorium. Furthermore, this power of the Supreme and High Court cannot be curtailed by any provisions of the Act. Therefore Moratorium shall not operate against any suit filed in the Higher Courts under these specific exceptional articles. However, this exception has an exception of its own, if the suit filed before the Court concerns itself with debt recovery matters, the jurisdiction of the supreme Court is also suspended under Section 14 of the Code.

D.2. Enforceability of Arbitration clause during Moratorium

Insolvency laws often indirectly with arbitration matters due to the binding effect of the agreement creating a recovery mechanism in itself. Non- Payment of debt is not just an insolvency matter then, it becomes a contractual breach as well, as the main objective of an arbitration agreement in a
commercial contract is to ensure certainty in monetary transactions. The enforceability of an arbitration clause depends merely on the nature of the agreement and arbitration proceeding-recovery of debt or not.

**D.2.1. Arbitration Invoked To Recover Debt**

The Critical question of nexus between the laws is whether insolvency provisions, particularly moratorium, are binding on arbitration proceedings and whether an arbitration clause can be invoked after the declaration of insolvency viz-a-viz declaration of a moratorium. The answer to this issue was finally resolved in [*Alchemist Case*](#) wherein the Supreme Court held that any Arbitration initiated after the imposition of Moratorium shall immediately become non est in law. In the present case, Moratorium was declared in favour of the insolvent party, and the case was directed towards arbitration owing to the contractual obligation. The tribunal held that in lieu of Section 14, the adjudicators are mandated to declare moratorium on any and every proceedings, including arbitration proceedings against the Corporate debtor. Therefore, in the above case, the Arbitration proceedings were suspended immediately after insolvency commencement.

However, this case specifically aimed at debt recovery which is covered by the moratorium, it is of vital importance to understand that the same ratio might not be applicable to all such judgement considering various stages of the arbitration and most importantly, the reason behind invocation of such arbitration clause. Therefore, the next section of this paper emphasises that the enforceability of the Arbitration clause is mostly dependent on the award, outcome of the proceedings.

**D.2.2. Arbitration Not Invoked For Debt Recovery**

The landmark judgment of 2018, [*K.S. Oils Ltd. Vs. State Trade Corporation of India Ltd. & Anr.*](#) further clarified that Arbitration proceedings can be initiated against the corporate debtor, however, if the result of the proceedings leads to recovery of debt, then the Corporate debtor will be exempted from the same.

Furthermore, there are cases where the arbitration was already initiated before the declaration of moratorium, however the award has still not been decided. The next section shall focus on the effect of section 14 on the arbitral award.

**D.3. Effect of Insolvency on Arbitral Award**

The above section analysed various scenarios in which an arbitration proceeding may or may not be initiated post insolvency declaration. This section analyses a situation where an arbitration proceed was already initiated before the declaration of insolvency, however the award is still pending. This section has been divided into two parts- Pre-Award stage and Post-Award stage.

**D.3.1. Scenarios In The Pre-award Stage**
Prior to the Arbitral award stage is the stage where the Arbitral proceedings have already been initiated, but the award is still pending, it constitutes merely of claims and counter claim. In this scenario, the award has to be decided post the insolvency declaration and during the moratorium period. This stage is based merely on claims, the claims and counterclaims are allowed to be put forward, however the award depends on various factors. Therefore, depending on the various possibilities of the award, the pre award stage can be divided into three types;

First, when the claims are against the corporate debtor- This entire scenario is based on the objectives of Section 14, i.e. to ensure that the Corporate debtors are given sufficient calm time to wind up the company. Therefore, in such a scenario, Section 14 ex facie shall constitute a complete bar to either the institution or continuance of any arbitration proceedings. Since, all the claims are against the corporate debtor and as discussed above are specifically debt recovery claims, giving an award against the CD will defeat the purpose of the code in its entirety. Therefore, when all the claims are against the corporate debtor, Section 14 stands as a legal wall in front of such award declaration. The second situation is when claims are made by a CD, then section 14(1)(a) does not prohibit such proceedings. The code seeks to protect the insolvent party, and does not curb any legal right to recover debt pending from another party. This case might lead in the favour of the CD and might possibly help in gains to speed up the liquidation process, keeping this as the basis, these types of proceedings are not barred by section 14, IBC. The third scenario is when claims are made by and against the corporate debtor, the NCLAT dealt with this situation in the case of Jharkhand Bhashi Vitrans Nigam Limited v. IVRCL Ltd., wherein the tribunal held that a claim against the Corporate debtor cannot be independently observed, it shall be determined depending on the counter claim of the complainant. In such a scenario, claims are allowed however if the award is limited to the part where it favours the corporate debtor, and any counter claim that leads to diminishing of the value of the assets of the CD are put a bar on. Furthermore, the arbitrator is empowered to adjudicate the claims and counter claims of the parties however, the outcome of the proceedings will be the major criteria in determining liability, i.e. if the claims are proved against the corporate debtor making him liable to repay debt by liquidating his assets, moratorium will be placed and the order will not be executed during the continuance of insolvency.

D.3.2. Scenarios in Post Arbitral Award

Post arbitral proceedings are when an award given by the tribunal is challenged and is pending under Section 34 or Section 36 of the Act, 1996. This is the case where an award was given before declaration of insolvency, but the other party is challenging the award after declaration of insolvency. Section 34 offers a recourse to the parties by allowing applications to set aside the arbitral awards. The important question here is where a moratorium has been declared, whether or not a Section 34 proceeding will lie against an award favouring the corporate Debtor. This question was answered in the Power Grid case, it was held that, “In the light of above purpose or object behind the moratorium, Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor, like the one before this court in as much these proceedings are not a ‘debt recovery action’ and its conclusion would not endanger, diminish, dissipate or impact the assets of the corporate debtor”.

Furthermore, there can be differential points drawn between Section 34 and Section 36. The sections are placed in a step-wise process, wherein objections to the award (Section 34) is placed prior to the enforceability or execution of the award (Section 36). Post the determination of objectives, the court may or may not execute the award, based on whether the claims have been
settled against the Corporate debtor or in his favour, in the first case- moratorium will be imposed. Additionally, in case the proceedings cause no financial loss to the assets of the Corporate debtor, then even if the decree is against him, it shall be executed as an exception to Section 14 of the Code. Section 34 is only considered before the execution on an award, that means the objections may be framed in the said provision, however the enforceability of such an award is contingent on the event where the objections and the award is settled in favour of the corporate debtor.

The courts of India have firmly established that the main objective of the moratorium is to limit further liabilities of the corporate debtor. Therefore, the aim of IBC is well satisfied when the courts create exceptions by lifting the moratorium in certain cases favouring the corporate debtor. These cases are justified in the furtherance of the goal sort to be achieved by the Code.

**E. Insolvency’s effect on Foreign**

This section deals with the agreements on international level and the legal position of various other countries on similar situations. This section has been divided into two parts- Foreign award and comparative analysis with other countries.

The Amendment of 2015 makes its reference to ‘foreign Awards’ as stated under Sections 44 to 52, these provisions draw their relevance from the New York convention which dealt with the meaning and scope of the term “foreign award”. It is an award, the product of an arbitration proceeding, binding on any two or more parties that are signatories of the New York Convention and are involved in a contractual or on-contractual relationship with the other party. Furthermore, these relationships should fall under the ‘commercial relationship category’ under the Laws of India. Considering a scenario where enforcement proceedings against the Corporate Debtor in relation to a foreign award are pending before any commercial court of India, the question that may arise is whether a proceeding under Section 48 of the Arbitration Act will lie to enforce such an award against the Corporate Debtor. The procedure behind the enforcement of foreign awards placed in a step wise process and are very different from domestic arbitral awards. This procedure has been discussed under section 47- 49 of the Arbitration Act, wherein the manner and mode of the enforcement of the Award have been envisaged. There is no immediate enforcement of a foreign award and shall go through entire procedure laid for its execution.

Furthermore, the award is accepted and enforced as a decree, only after the Court records its satisfaction. These ambiguities were finally settled in the case of Fuerst Day Lawson Ltd. vs. Jindal Export, it was stated that it is not necessary to take up separate proceedings for deciding the enforceability of the award and the execution thereafter. Both the reliefs could be sought for in the same proceedings. It could be argued that proceedings till the stage of deciding upon the question of enforceability of the award may not be hit by a moratorium and that only if the Corporate Debtor fails on this account would the moratorium apply to the subsequent proceedings executing the award against him. Thus, the NCLT Ahmedabad Bench in Vitol S.A. v Asian Natural Resources 9India) Ltd. & Ors applied the moratorium under s. 14 of the IBC to the execution proceedings against the CD which were pending after the objections under section 48 of the Arbitration Act to the enforceability of the foreign award had been rejected and stayed the said execution proceedings. The question whether such proceedings would have been maintainable at the stage of deciding of objections under s. 48 of the Arbitration Act relating to enforceability of the foreign award was however not in issue before the learned Tribunal.
However, it is clear from a bear reading of the *Alchemist* judgment that the courts are reluctant to entertain the very institution or continuation of the enforcement proceedings of a foreign award against the Corporate Debtor at any stage. Guidance can be deriving in this regard from the judgment of the Hon’ble High Court of Bombay in *Ashapura Minechem Ltd. v Armada (Singapore) Pte. Ltd. & Ors.* which was decided in the context of Section 22 of SICA, which is a similar provision to Section 14 of the IBC. The court held that since the provisions of SICA including Section 22 thereof extend to only the territory of India, the same do not have any application to proceedings outside India. Therefore, there was no requirement for the of the Board of Industrial and Financial Reconstruction (“BIFR”) to give prior consent for taking steps in execution of foreign awards including filing garnishee proceedings in respect of properties of the judgment debtor situated outside India. On the same logic, in view of Section 1 of the IBC which extends the said Act to India, it could be inferred that the moratorium under Section 14 of the IBC would not apply to execution of a foreign award against a Corporate debtor which has assets outside India. Of course, the situation would change should reciprocal arrangements be in place with other countries, to enforce the IBC (as envisaged in ss. 234 and 235 of the IBC).

**F. Position In Other Jurisdictions**

This section analyses the legal position based on various case laws of various countries on the enforceability of arbitration proceedings post declaration of insolvency or moratorium. The countries that the researcher has focused on are as follows- United States, United Kingdoms, Netherlands and France.

**E.2.1. United States**

The Arbitration Act of United States, also known as the Federal Arbitration Act (“FAA”). The Act, like any other Arbitration law, enables non-litigation dispute resolution through ADR methodology. In *Keating Case*, the United States clarified the superiority relation between the FAA and the Bankruptcy Code conceding that they “can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over the Act.” Therefore, the Court of Appeals for the case of *Hays & Company* analysed that the Court’s “message” for bankruptcy courts is to “enforce such an arbitration clause unless that effect would seriously jeopardize the objectives of the Code.” The Supreme Court clarified that the FAA “mandates enforcement of agreements to arbitrate statutory claims,” the SC in the case of *McMahan* held the FAA’s mandate “may be overridden by a contrary congressional command.” The test articulated by the Supreme Court in *McMahan* was that any person challenging the enforcement of an arbitral law shall show a conflicting congressional command, or establish Congress’s intention to make an exception to the FAA’s mandate. Such an intention may be established in any of three ways: (1) the statute’s text; (2) the statute’s legislative history; or (3) the existence of an “inherent conflict between arbitration and the statute’s underlying purposes.

**E.2.2. United Kingdoms**

The regulation of international Arbitration laws in United Kingdoms is controlled by the provision of the Arbitration Act 1996 (“AA”) and on judicial interpretations and precedential value of case laws. The Act of 1996 consists of 4 Schedules and 110 section. Furthermore, The laws of United Kingdom are based on the UNICTRAL only on an influential discretionary value, and are not binding upon the AA. With respect to Moratorium, post-liquidation any action against the party are automatically
suspended and shall not be initiated or continued without the express directions of the Court. In most cases such consent will not be forthcoming, in order to allow an orderly distribution of the company’s assets. The same principle applies even though the insolvency has taken place in another jurisdiction. In *Cosco Bulk Carrier Co Ltd v Armada Shipping* the court took an unprecedented approach and applied its discretionary powers to stay the moratorium, as it was of the view that “the underlying disputes were best resolved in arbitration rather than in a foreign insolvency court”. Therefore, the court has the discretion to accept exceptional cases however the objective of the bankruptcy law cannot be disturbed which is why the stay is automatically imposed.

The Court of Appeal, in *Syska v Vivendi Universal*, has upheld the decision of Mr Justice Christopher Clarke, on the question of the effect of insolvency on arbitration proceedings. If the insolvent party is undergoing an insolvency procedure in England, the general principle is that the liquidator, administrator or trustee in bankruptcy (as the case may be) has the right to disclaim the contract to which the arbitration clause relates. The arbitration may, accordingly, continue unless and until this occurs. However, not all jurisdictions adopt this approach, and instead the effect of the insolvency of a foreign party may, under the insolvency rules applicable to that party, operate to terminate the insolvency proceedings forthwith. That solution is adopted by the law of Poland. In *Syska* the question was whether English or Polish insolvency law should be applied to a Polish company which was party to an arbitration with its seat in England.

Therefore, if in the course of an arbitration, one of the parties becomes insolvent, English law does not provide for the automatic termination of any subsisting arbitration proceedings, although it is open to the person regulating the insolvency proceeding to disclaim the contract to which the arbitration clause relates.

**G. Conclusion and Recommendations**

It is an undisputable fact that both the laws are imparting justice in their own spheres and fulfilling their own objectives by ensuring fairness to the party suffering losses. This however, leads to a great conflict when these laws are applied together as they protect the interest of opposing parties. It cannot be said that one law overrules the other, they are applied on a similar level and none can prevail over the other. Exploiting a company going through the tedious process of liquidation by slapping them with an arbitral or any other proceedings for that matter, is unjust in terms of the insolvency code. However, on the other hand, not enforcing a contract based on trust of the parties because of the mere reason that one party has been declared insolvent, is again a breach of trust of the other party and deprives them of their right to protection by law.

The court has however struck a middle ground by stating that debt recovery proceedings shall be barred, but the arbitral proceedings that are not aiming at debt recovery can be proceeded with. This position, though is the best possible situation, but is still not fair to the other party of the arbitration agreement. Therefore in the opinion of the researcher, the following suggestions may be incorporated by the courts in order to bring about a little more fairness in such sort of cases-

1. The legislature shall attempt at Simplifying and further clarifying the language of Section 14 of IBC to clearly state the type of proceedings that are barred by the section and the nature of cases that the section may apply to.

2. The Arbitration agreement shall have a clause stating the effect of insolvency on the enforceability of the party, and what are the other options of recourse allowed to the other
3. A separate section shall be introduced focusing particularly on such situations and a definite course of action shall be stated so there is consistency between the judgments of various courts.

4. The cases where the other party to the arbitration agreement has suffered significant loss based on the agreement, cases of these sort shall be treated differently and priority shall be given to partial debt recovery in certain cases.

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