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ARBITER OF RESILIENCE: The Crossroads of Global Insolvency

Megha Bhartiya & Sneha Bharti

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ARBITER OF RESILIENCE:
The Crossroads of Global Insolvency

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[Abstract: *This essay critically examines the evolving landscape of global corporate resilience amidst the challenges presented by the COVID-19 pandemic. With a surge in insolvencies worldwide, the paper delves into the intricate disruptions witnessed in the corporate sector, highlighting the alarming trends in insolvency rates. The authors propose a paradigm shift through the integration of the proven institution of arbitration into the existing insolvency regime, by way of focusing on the urgent need for a structured legal framework which can address the cross-border insolvency (CBI) issues. The essay aims to bridge the apparent dichotomy between insolvency and arbitration, emphasizing the underutilization of arbitration provisions in the current legal landscape. This can be done through a symbiotic approach, leveraging arbitration to expedite and decentralize insolvency proceedings, providing swift resolution for creditors and fostering the survival of distressed companies. The authors also aim to challenge traditional presumptions surrounding the arbitrability of insolvency-related disputes, particularly those related to in personam rights, which pertain to specific individuals or entities rather than the public at large. They emphasize that arbitration could help alleviate some of the burden on national insolvency tribunals, particularly in countries like India, where insolvency proceedings are often slow and inefficient. Key areas where arbitration could be applied in the context of CBI have been identified and expounded upon. These include disputes between affiliated companies and debt restructuring negotiations. In conclusion, the authors contend that the integration of arbitration into the cross-border insolvency framework could be a game-changing reform, a forward-looking model that harmonizes these legal realms.*]
Keywords: *Cross-Border Insolvency, Arbitration, Arbitrability, In Personam Rights, Enforceability*

I

Introduction

The COVID-19 outbreak ensued in an unforeseen test of resilience for several companies. In many scholars' learned opinion, the pandemic led to disorder and

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frictions in the corporate world, in addition to creating turmoil across the financial and business sectors worldwide.[1] As a result of the unprecedented circumstances, various companies were forced, *inter alia*, to file for bankruptcy and wind up. The recent global trends also depict a worrying picture. There was an increase in insolvencies globally in 2023 with a tempered growth expected in 2024.[2] The global insolvency index was quoted by reports[3] to jump by a staggering twenty one percent (21%) in 2023.[4] The United States witnessed an eighteen percent (18%) increase in bankruptcies in 2023, which was expected to rise in 2024. England and Wales also witnessed the highest rate of corporate insolvencies in thirty years.[5] Further, Asia and Japan watch[6] noted that small and midsize companies were going bankrupt now because the loans taken during the pandemic were starting to become due. Further, Allianz reports that they expect the prevailing conditions would increase corporate insolvencies by two percent (2%) in 2025 and then the same would stabilize at high levels in 2026.[7] Deloitte also forecasts an increase in insolvencies to above 1,000 in 2025.[8]

These trends are indicative of a potentially concerning future for the global economy, a state in which numerous major economies face an insolvency crisis. They also present statistical proof as to the gravity of the insolvency crisis and the need for a uniform, structured and apposite legal framework to ensure that when companies with presence across different jurisdictions file for insolvency, the questions pertaining to application

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1 Rajendra P. Gunputh, *The COVID-19 (Miscellaneous Provisions) Act 2020: To curb Repercussions on the Financial Sector (Bankruptcy and Insolvency)*, EXPLORING NEW PERSPECTIVES ON INSOLVENCY 245 (2022) IBBI 226.

2 *Insolvencies adjust back to pre-pandemic levels,* (Sep., 25, 2023*)* ATRADIUS *available at: https://group.atradius.com/knowledge-and-research/reports/insolvencies-adjust-back-to-pre-pandemic-levels* (last visited Jan 15., 2025) .

3 Allianz Trade, *Insolvency Report: No rest for the leveraged*, (2023) *available at:* https://www.allianz.com/en/economic_research/insights/publications/specials_fmo/global-insolvency-report-2023.html (last visited Jan 15., 2025).

4 Allianz Trade, *The number of bankruptcies will increase by 21% worldwide in 2023*, *available at-* https://www.allianz-trade.com/en_BE/news/latest-news/insolvency-forecasts-2023.html (last visited Jan 15., 2025).

5 Valentina Romei, *Corporate insolvencies hit 30-year high in England and Wales in 2023*, FINANCIAL TIMES (2024) *available at:* https://www.ft.com/content/d1b95539-4afe-4a33-9e08-b05c1099efb8 (last visited Jan 15., 2025).

6 Doni Tani, *More small and midsize firms going bankrupt post pandemic*, THE ASAHI SHIMBUN (2023) *available at:* https://www.asahi.com/ajw/articles/14985765 (last visited Jan 22, 2025).

7 *Global Insolvency Outlook: The Ebb and Flow of the Insolvency Wave*, ALLIANZ (Oct. 15., 2024) *available at:* https://www.allianz.com/en/economic_research/insights/publications/specials_fmo/241015-global-insolvency-outlook.html (last visited Jan. 30, 2025).

8 *Insolvency figures likely to surpass 1,000 in 2025, Deloitte forecasts*, DELOITTE (Jan. 10, 2025) *available at:* https://www.deloitte.com/ie/en/about/press-room/deloitte-forecasts-insolvency-figures-likely-to-rise.html (last visited Jan. 30, 2025).

of different laws in different jurisdictions do not lead to a pandora's box. While the global economy faced, and is still anticipating a continuation of this crisis, another question emerges. Have the legal systems across the globe also developed at a pace which is rapid enough to protect the interests of multinational companies that are approaching insolvency? Moreover, a pertinent predecessor to this question is spotlighted - what is insolvency and, in this discourse, how does insolvency happen for entities with presence across different jurisdictions? These questions pertain to global regulatory voids that have been a source of discourse and debate by both academicians and practitioners in the field of insolvency. To test whether the current legal framework catering to cross-border insolvencies ("**CBI**") is sufficient or not, one must analyze the legal voids it poses and come up with modifications to the existing framework that allow for a swift and efficient way to conclude insolvency proceedings which span across continents. There is a need for a system that ensures the following: *Firstly*, that the foreign creditors of a company filing for insolvency are not prejudiced against on account of application of a territorial law of the jurisdiction where the company has filed for bankruptcy. *Secondly*, to build a framework which not only protects the interests of the creditors, but also allows the companies a fair chance to negotiate with their creditors and survive in the market. *Thirdly*, to help incorporate other institutions of legal negotiations into the current insolvency regime in order to relieve the burden on the insolvency tribunals which in India have an abysmal track record.[9] These modifications when effectively combined would help expedite as well as decentralize the insolvency proceedings and increase the efficiency and satisfaction of the parties from the overall result on account of their increased role.

In light of these aims, especially the third and the most important objective, the authors wish to suggest utilizing the time-and-tested institution of arbitration to supplement the current insolvency regime. This would allow for several benefits, including a faster and more efficient mechanism to resolve the concerns of creditors while also allowing the indebted corporation a greater chance to recover and survive. Further, it will relieve the burden on the insolvency tribunals in different countries, including India. However, there are concerns regarding this confluence of arbitration and insolvency which pose a hindrance for establishing their synchronized framework. The most important concern being that both these legal institutions present a dichotomy; a form of dipole to the effect that insolvency and arbitration are founded upon largely contradicting principles.[10] While the former is concerned as a matter of public policy, the latter is a party driven process with one of its core values being confidentiality.[11] Prima facie, they appear to be

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[9] Aparna Ravi., *Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings* 50 EPW 46. (2015).

[10] Philipp Wagner, *Insolvency and Arbitration: A Pleading for International Insolvency Law* 5 DRI l 189 (2011).

[11] *Id*.

fundamentally different, despite this there are ways to allow both the fields to interact so as to be mutually beneficial.

In this context, the authors propose instrumentalizing arbitration to help resolve some conflicts pertaining to CBIs, which by nature are complex and difficult to resolve. To achieve the same, the authors will first endeavor to bridge the gap between the two near-polar opposite fields of law - insolvency and arbitration. In doing so, the aim will be to highlight how the judiciary in India has failed to utilize the provisions in the existing Insolvency law that incorporates arbitration into the insolvency regime. The aim is to highlight how the full potential of arbitration remains dormant, and alongside realizing this potential, the use of arbitration can also be widened to cater to the growing issues prevalent in the complexities of the CBI cases. Further, the aspect of better enforceability for global disputes resolved via arbitration also posits its advantages and has thus also been briefly explored. Hence, **Part I** of the paper will introduce the need and urgency of the issue and **Part II** will elaborate the dichotomy between the founding principles of insolvency and arbitration and detail the birth of CBI in the global context. **Part III** will then delve into the insufficiencies of the present legal framework in India with respect to insolvency and arbitration. In **Part IV**, the authors challenge the traditional understanding of the arbitrability of the insolvency disputes and lay down the need and benefits of utilizing arbitration to resolve the issues concerning cross-border insolvencies. This is followed by **Part V** which will conclude the essay.

II

The Near-Polar Opposites: Insolvency and Arbitration

Insolvency generally refers to a situation in which the debtor cannot meet his or her financial obligations, i.e. the debtor is unable to pay the debts that they owe.[12] There are two tests to determine whether a company is insolvent or not - the cash flow test and the balance sheet test.[13] Further, the laws pertaining to insolvency and bankruptcy across the world have two common objectives - *first*, ensure equitable distribution of the insolvent debtor's properties and *second*, to ensure that the debtor's conduct does not harm the creditors.[14] Insolvency law emerged in the fourteenth century,[15] however,

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[12] *Insolvency,* Legal Information Institute Cornell Law School (June, 2020) *available at:* https://www.law.cornell.edu/wex/insolvency#:~:text=Generally%20speaking%2C%20insolvency%20refers%20to,leading%20to%20a%20bankruptcy%20filing (last visited Jan. 30, 2025).

[13] *Insolvency Definition.* LEXIS NEXIS *available at:* https://www.lexisnexis.co.uk/legal/glossary/insolvency (last visited Jan. 30, 2025).

[14] L.E. Levinthal, *The Early History of Bankruptcy Law* 66 U. PA. L. REV. 223 (1918).

[15] J.L. Howell, *International Insolvency Law* 42 TIL 113 (2008).

CBIs were not a matter of concern until the commencement of the epoch of corporate globalization in recent years. It is only after this corporate globalization (which in effect refers to the expansion of the presence of corporate entities across different continents) that the possibility and the reality of CBIs became concrete, and despite the same there were little to no efforts to have a uniform and universal legal framework for it until the 1970s.[16] Interestingly, this is the same time-period in the seventies when the push for arbitration as an alternative dispute resolution mechanism gained increasing momentum. The birth of arbitration is attributable to the failures and problems associated with litigation across the globe. The original proponent of arbitration may, arguably, be Justice Rehnquist who in his seminal work observed three major problems with the litigation system and advocated for a model of arbitration to resolve disputes.[17]As an answer to the three major problems of litigation noted by Justice Rehnquist, Arbitration saves time, money and judicial resources.[18]

III

Grossly Insufficient Existing Legal Framework

Before the authors expound upon their proposed framework that utilizes arbitration to supplement the CBI regime, it is pertinent to examine the existing interplay between insolvency and arbitration in the existing domestic framework and how the present framework is deeply insufficient when it comes to catering the problems that arise from globalized business transactions. In India, insolvency and bankruptcy proceedings are governed by the Insolvency and Bankruptcy Code, 2016 (IBC).[19] This framework was instituted with the objective of establishing a consolidated framework for all insolvency proceedings and it does so through a two-pronged mechanism. *Firstly*, it endeavors to educate debtors, fostering informed decision-making processes, and mitigating instances of failure. *Secondly*, it extends avenues for the rehabilitation of distressed corporate entities, facilitating their restoration to operational viability. There is little to no confluence between arbitration and insolvency in the Indian domestic regime, and the little conflux present, is shrouded with doubt and legal uncertainty.

The first imbrication arises when the corporate debtor is a party to an ongoing arbitration proceeding. Under IBC, when an application is admitted under Sections 7,[20]

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16 *Id*.

17 W. Rehnquist, *Jurist's View of Arbitration*, ARBITRATION J. 1 (1977).

18 JN. Weiner, *Is Arbitration An Answer?* XV NRL 2 (1982).

19 Insolvency and Bankruptcy Code 2016.

20 Insolvency and Bankruptcy Code 2016, S. 7.

9[21] or 10,[22] a moratorium under Section 14[23] is declared by the Adjudicating Authority. Imposition of a moratorium effectively bars the initiation of any new and the continuance of any pending proceedings, leaving such proceedings non-est.[24] Having said that, Section 14 has been construed not to encompass proceedings that serve the debtor's interests, particularly those oriented towards asset maximization.[25] This leaves much to be desired from the claimant's point of view in an arbitration proceeding as they may be left without a recourse once an insolvency proceeding has been started against the respondent. This also points towards an either-or approach when it comes to the two regimes.

Another instance of overlap emerges when parties seek arbitration after an application has already been made under the IBC. Although the IBC is clear on the fate of these proceedings by way of a moratorium, several decisions by the courts have helped establish the point of no return. The most recent development being the Indus Biotech[26] case wherein a Section 8 application under the Arbitration and Conciliation Act, 1996[27] (1996 Act) along with a Section 7 application under the IBC was made to refer to parties to arbitration. The Supreme Court (SC) upon observing this overlap clarified that insolvency proceedings would not be rendered *in rem* and consequently non-arbitrable by mere filing of an application under the IBC. The Courts expounded that the true implications of the moratorium only materialize following the establishment of the Committee of Creditors (COC), as parties retain the liberty to approach the tribunal for settlement and withdrawal matters. Thus, it is only post COC that the *in personam* proceedings actually become *in rem*. It is worth noting that the court instead of building upon the National Company Law Tribunal's (NCLT) powers in an application under Section 8 of the 1996 Act, which contemplates referral to arbitration by any judicial authority, merely stated that the disposal of the application would be dependent on the insolvency petition's outcome under Section 7 of the IBC.

The authors here wish to posit the idea that the courts in Indus Biotech overlooked an opportunity to engage with what could have been a synergic interplay of the IBC and the 1996 Act. This could have been done by building upon the powers of the court in matters of referrals to arbitration. This case, in addition to laying down the foundational understanding of the domestic framework, also highlights the proclivity of the domestic courts to underutilize the latent efficacy of arbitration within the realm of insolvency.

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[21] Insolvency and Bankruptcy Code 2016, S. 9.

[22] Insolvency and Bankruptcy Code 2016, S. 10.

[23] Insolvency and Bankruptcy Code 2016, S. 14.

[24] *Alchemist Asset Reconstruction Co. Ltd.* v. *Hotel Gaudavan (P) Ltd.* [2018] 16 SCC 94 [5].

[25] *Power Grid Corpn. of India Ltd.* v. *Jyoti Structures Ltd.* [2017] SCC OnLine Del 12189, [10], [14] (India).

[26] *Indus Biotech (P) Ltd.* v. *Kotak India Venture (Offshore) Fund* [2021] 6 SCC 436 (India).

[27] Arbitration and Conciliation Act, 1996, S. 8.

In addition to Section 8 of the 1996 Act, Section 153 of IBC is another gateway for cooperativeness between the two regimes. Section 153 allows the bankruptcy trustee, subject to the COC's approval, to refer to arbitration any debts subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt.[28] Granted, the scope of this section is severely limited, particularly in light of the Indus Biotech precedent according to which, the constitution of COC already renders this proceeding to be at the in-rem stage. Moreover, similar to Section 14, this section can only be availed if it favors the debtor, thereby potentially leaving creditors without adequate recourse to their rights and remedies. Even so, this section, in its limited scope, has yet to be invoked in any court proceedings, only reinforcing the authors' observance.

This deposition of underutilisation is again manifested in the 2020[29] and 2021[30] reports released by the Insolvency Law Committee (ILC). Established in 2017 by the Ministry of Corporate Affairs, the ILC was tasked with formulating a comprehensive framework for CBI, drawing upon the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (UMLCBI). Upon finalization of this draft, designated as part Z, it is slated to be incorporated into the IBC.

As of present day, IBC only has two provisions addressing cross-border disputes i.e. Section 234[31] and 235.[32] Whilst Section 234 empowers the Government to enter into bilateral agreements to resolve cross-border disputes, Section 235 empowers the Adjudicating Authority to issue letter and notice to the Court of the countries with which the agreements have been entered into under 234 to secure the assets of the corporate debtor situated outside India.

Nevertheless, these two provisions by themselves in no way provide a comprehensive framework for CBI. The failure of these provisions can be imputed to the fact that these agreements are generally time-consuming, expensive, and inconclusive due to the multiple layers of negotiations involved. Additionally, it becomes cumbersome to balance multiple treaties with separate jurisdictions due to the presence of the corporate debtor's assets in multiple countries. This aforesaid ad hoc process provided for in these two provisions results in significant delays.

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[28] Insolvency and Bankruptcy Code 2016, S. 153.

[29] Ministry of Corporate Affairs, *Cross Border Insolvency Rules/Regulations Committee's Report on the Rules and Regulations for cross-border insolvency solution* (June 2020) *available at*: https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf (last visited 10 Jan., 2025).

[30] Ministry of Corporate Affairs, *Cross Border Insolvency Rules/Regulations Committee II's Report on the Rules and Regulations for cross-border insolvency solution* (December 2021) *available at:* https://ibbi.gov.in/uploads/resources/9ff4f639c0d2a29ea188fd0cba332273.pdf (last visited 10 Jan., 2025).

[31] Insolvency and Bankruptcy Code 2016, S. 234.

[32] Insolvency and Bankruptcy Code 2016, S. 235.

A perusal of the two parts of the report, released in June 2020 and December 2021 respectively, makes it clear that there haven't been any deliberations about the use of arbitration in the draft part Z. At least none that have been reflected in them.

IV

Instrumentalizing Arbitration to Supplement the Current Cross-Border Insolvency Regime

The integration of international arbitration with the mandatory domestic laws of insolvency can become a powerful tool to resolve CBI matters in a swift and efficient manner. As mentioned above, there already exists gateways to arbitration under the IBC, albeit underutilized. The authors advance that the ambit of referring disputes to arbitration be extended to stages beyond the formation of COC under the draft part Z. This referral would not be with respect to the entire dispute, rather it would be for certain specified functions that we believe would be better resolved via arbitration. These functions and their arbitrability will be elaborated upon later.

This modus operandi would allow the insolvency tribunal to reap the benefits that the arbitration regime has to offer all the while affording the insolvency tribunal i.e. the NCLT, the comfort of the final supervision. For the following specified functions as mentioned below, the tribunal can offer the parties an option to switch to arbitration. Upon the consensus of the parties, they would then appoint a tribunal and convene under the institutional arbitration of choice. The said proceedings would only be restricted to the purpose delegated by the NCLT, thus allowing the tribunal autonomy with respect to the said task whilst also allowing NCLT to retain control over the overall insolvency proceedings. The award passed would then be incorporated into the insolvency proceedings subject to NCLT's approval. Post incorporation, the insolvency proceedings would resume as per the domestic CBI laws.

Need for a Symbiotic Approach

Assuming this outlook is embodied in the new draft, the question that arises is why would the insolvency tribunal choose to exercise this power?

The most conspicuous advantage of this model lies in the parties' autonomy, enabling them not only to choose the governing rules and institution, but also the competent arbitrators with expertise in the designated field. Besides this, arbitral tribunals are less burdened, more equipped and the proceedings remain short. Adaptability and accessibility are hallmarks of arbitration.[33] Nevertheless, the aforementioned

[33] *Mitsubishi Motors Corp* v. *Soler Chrysler Plymouth Inc.*, [1985] 473 U.S. 614 S Ct 3346, U.S. Supreme Court. p. 633.

advantages are in the general knowledge of the public. The primary and arguably the most pivotal rationale in the context of CBI is the facilitation of smoother coordination and enforcement mechanism.

The leading reason that often renders CBI arduous is the conflicting judgments in different jurisdictions resulting from parallel proceedings. Additionally, UMLCBI, an instrument devised to harmonize CBI and prevent asset deprivation, has only been ratified by fifty one (51) countries. Conversely, the New York Arbitration Convention 1958 ("**Convention**")[34] has 172 signatories, making it one of the most successful instruments as of now. It obligates all its signatory states and their respective courts to recognize and execute all foreign awards presented to them, giving it an edge over other regimes.[35]

The Foreign Awards Act, 1961 of India incorporated the Convention. It recognizes and enforces 'foreign award' in India 'as if it were an award made on a matter referred to arbitration in India'.[36] Such an award will be ordered to be filed by a competent court which will then announce the judgment as per the award[37] via Sections 46[38] and 47[39] of the 1996 Act.

Similar provisions exist in the domestic arbitration legislations of all 172 signatories. This creates a platform wherein creditors across jurisdictions can come together to resolve their disputes and claims. This transition into an efficient dispute resolution system will avoid delays and suspension of proceedings that are prone to occur in the national courts of the states involved.

Testing the Traditional Presumption: Everything Insolvency is not In Rem

It is imperative to understand that simply allowing the insolvency tribunals to refer a matter to arbitration will not suffice the purpose of providing for this provision. Further, it is also important that the insolvency tribunal's referral to arbitration depends on the arbitrability of the subject matter. In this regard, the SC of India in the case of *Vidya Drolia* v. *Durga Trading Corporation*[40] propounded a four-fold test to determine the non-arbitrability of the subject matter of a dispute, the first among these being – when the cause of action and subject matter of the dispute are concerned with rights *in rem*, and are not pertaining to subordinate rights *in personam* which accrue from rights *in rem.*

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[34] New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

[35] Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 75-77 (2021) 3.

[36] Foreign Awards (Recognition and Enforcement) Act, 1961, S. 4.

[37] Foreign Awards (Recognition and Enforcement) Act, 1961, S. 6.

[38] Arbitration and Conciliation Act, 1996, S. 46.

[39] Arbitration and Conciliation Act, 1996, S. 47.

[40] *Vidya Drolia and Ors.* v. *Durga Trading Corporation* [2021] 2 SCC 1.

The issue of arbitrability of the cause of action and subject matter of the dispute is also where a contradiction in terms of Insolvency arises. Traditionally, insolvency proceedings are considered as matters of public concern and thus are not amenable to private resolution of conflict. This is founded upon the notion that insolvency and bankruptcy matters give rise to rights *in rem*, which are rights against the world and thus cannot be arbitrable.[41]

The SC, in *Booz Allen & Hamilton Inc*. v. *SBI Home Finance,* observed that insolvency and winding up matters were well-recognized examples of issues that were not arbitrable and, *'...traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.'*[42] In *Haryana Telecom Limited* v. *Sterlite Industries India Ltd*.,[43] the SC stated that *'an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company.'* This aspect of subordinate rights *in personam* arising from rights *in rem* in the first step of the test propounded in Vidya Drolia is founded upon an observation made in the Booz Allen case, that subordinate rights *in personam* which arise from rights *in rem* are always considered as arbitrable. Thus, the notion that disputes concerning rights *in rem* can never be arbitrated is not absolute since the rule itself has an exception, and is hence not inflexible. Secondly, the Court in the case of Booz Allen relied on Mustill and Boyd[44] to observe that subordinate *in personam* rights are arbitrable. This was explained through the following example - in a dispute concerning a patent, the rights pertaining to the patent license are arbitrable, however, the validity of the patent itself is not arbitrable. When reading this example with the decision of the Haryana Telecom case, it is evident that the arbitrator would not have the power to order a company to wind up. At the same time, this would not imply that the arbitrator would not have power to arbitrate over any issue pertaining to insolvency proceedings. It in no way suggests that the arbitrator cannot decide on *in personam* rights arising from an insolvency proceeding. As has been proven above through the observations in various Apex Court decisions, the authors wish to bring emphasis to the element of subordinate rights *in personam* arising from rights *in rem.* It is thus incorrect to assume that all rights arising from insolvency proceedings are rights *in rem*.

The authors contend that it is time to modify the traditional approach adopted with respect to rights *in rem* and *in personam* and their bifurcation vis-a-vis adjudication and arbitration. This is because with time the instrument of arbitration has developed to prove itself to be incredibly flexible with a lot of benefits; benefits that carry immense potential to help in the cases of corporate insolvency resolution process. Further, even if the insolvency of a company is considered to be a matter *in rem*, the rights of the

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41 *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* [2011] 5 SCC 532.

42 *Id*.

43 *Haryana Telecom Limited* v. *Sterlite Industries India Ltd.* [1999] 1999/INSC/272.

44 Mustill and Boyd, COMPANION OF THE COMMERCIAL ARBITRATION (2001).

creditors accruing from it may include rights *in personam*, largely up until the COC is formed.

Velislava and Andrés in their notable work[45] talk about four scenarios pertaining to insolvency wherein the dispute may be resolved through arbitration. While they do not expand upon the ratio for choosing the four scenarios, the authors herein wish to expound upon a selected few of them and further underpin the same by establishing that the ratio behind choosing these particular instances lies actually in the *in personam* rights accrued. Velislava and Andrés mention the following instances - (i) disputes between affiliates, (ii) debt restructuring, (iii) claims allowance, and (iv) allocation of enterprise value. Amongst these, the authors herein will expound upon the first and third scenarios together i.e., disputes between affiliates, and the second scenario of debt restructuring in the context of *in personam* rights.

Disputes between Affiliates

When one or a group of stockholders owns a controlling interest in a corporation, that organization of a corporation is called "affiliates" or "affiliated corporation."[46] When one or more affiliates in a group of affiliated companies goes insolvent, a number of problems may arise in lieu of their interrelationship and the overlapping interests involved.[47] In such circumstances, the property of the insolvent affiliate is in question. Further, the creditors may seek to reach for assets of a separate affiliate company by disregarding the insolvent one, and when more than one affiliate company is insolvent, there is a sense of competition between the creditors of each to attain the most valuable assets to satisfy their debts.[48]

The examples of insolvencies of Lehman Brother Inc. and Spansion Inc. exhibit how complex CBIs involving affiliates in different jurisdictions can be. They are difficult, cumbersome and time-consuming, and often lead to undesirable outcomes due to clashes between the insolvency laws of different nations. A part of the disputes concerning asset distribution or the likes between the affiliated companies can be solved by empowering a third-party arbitrator and submitting to its jurisdiction. The same would involve cooperation between cross-border affiliates and arbitration as an institution can help resolve conflicts between affiliates in a faster and less cumbersome manner. Such a recourse is aimed at protecting the interests of the various creditors in different jurisdiction who get entangled in the complexities of cross-border conflict of laws, and thus by keeping the creditor's interests as a priority while allowing the

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[45] Velislava Hristova and Andrés E. D. Garzón, *International Arbitration and Cross-Border Insolvency: Friends or Foe? Revisiting the Role of Arbitration in Resolving Cross-border Insolvency-Related Disputes*, JIDS (2021).

[46] J.M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Question in Bankruptcy* 42 UCLR 4 (1975).

[47] *Id*.

[48] *Id*.

corporate debtor i.e., the insolvent affiliated companies an alternate route to resolve their qualms, albeit partially, the entire suggested framework only serves to further the main objectives of insolvency law. Moreover, arbitration may prove to mitigate the complexities of such disputes by allowing for a neutral, party-driven platform to resolve the conflict.

The same is proposed, and is possible, on account of the arbitral award in case of a dispute between affiliates affecting only the concerned parties i.e., the award would not be *in rem* because the interest and rights concerned in the above scenario are not *in rem.* A right *in personam* is an interest protected solely against specific individuals, which in this case pertains to the rights of creditors or the affiliate companies against each other. The disputes between affiliates in different jurisdictions may be on a variety of issues unconnected to insolvency as well, and amongst all of these the rights that accrue, and the consequential obligations are both only affecting a specific group of individuals. Such rights do not project on the world since the conflict remains privy to the affiliates, be it concerning matters of bankruptcy or otherwise.

Debt Restructuring

Another scenario pertains to avoiding insolvency altogether through debt restructuring. The process of debt restructuring involves negotiations between the creditors and the corporate debtors to restructure the debts. It includes, *inter alia*, equity swaps, debt rescheduling, interest rate reduction and even debt forgiveness. To ensure the long-term viability of such a restructured debt arrangement, it is generally accompanied by managerial changes. Such changes in effect make the entire process *in rem*, because the change in management of the company affects the public at large including the consumer base of the company's product or service. Despite this, in terms of CBIs, the primary issue of concern is with respect to assets of the company situated in different jurisdictions, i..e., the concern does not lie with the change in management if and when it may happen alongside a debt restructuring arrangement. In such scenario the most widely used solution to this is a workout arrangement. This refers to a mutual agreement entered into by the debtor and its creditors wherein the terms of the loan is rescheduled and negotiated. This can be done by reducing interest rates, loan forgiveness and swapping equities. The primary objective is to mitigate, or rectify a default by the borrower, or to safeguard and avert any depreciation in the value of the collateral security of the loan i.e. the assets across jurisdictions.

This claim to foreclosure of the debtor's assets stems from the underlying contract of the loan given by the creditor and is not strictly an insolvency related claim. Here the creditor had already delivered the funds or services and is now demanding repayment. This, in its essence, it is a pre-insolvency claim and was arbitrable before the insolvency proceedings. It did not lose this arbitrability upon initiation of insolvency.

The underlying claim thus remains *in personam*, making workout arrangements an option open to international arbitration. Since the workout arrangement itself is a

private arrangement between the parties, the conflict from which it stems may easily be resolved through a private resolution of conflict such as through arbitration. Arbitration, in the present case, also provides the benefit of party autonomy which can help induce a smoother process of debt restructuring for the company and the creditors involved.

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Way Forward

The growth of insolvency regime reached a milestone during corporate globalization, post which, CBIs also started gaining attention. Today, the world has an opportunity to make the post-pandemic era another milestone of growth whereby the global insolvency framework is overhauled to allow for easier resolution of particular conflicts through the use of arbitration. In light of this golden opportunity, the authors aimed to spotlight the growing trend in insolvencies and to expound upon how a systematic and careful incorporation of arbitration to resolve specific *in personam* issues in CBIs could prove to be groundbreaking. There is a tendency of the judiciary to underutilise the existing gateways to arbitration present in the domestic insolvency realm. This observance is only strengthened and extended from the judiciary to the legislature upon a perusal of the ILC reports released in 2020 and 2021. This underscores the primary argument of the article, that there is a need to better utilize all that arbitration has to offer in cases of CBI disputes. This must be done by integrating international arbitration within the domestic framework for CBI with respect to certain functions by adopting a more flexible construction of the *in rem* and *in personam* concept when it comes to the arbitrability of certain insolvency disputes. The same has been exemplified in reference to disputes between affiliates and debt restructuring.

Thus, an approach that allows arbitration and insolvency to do more than co-exist could prove to be beneficial in resolving the qualms associated with CBI disputes. The need for such a synergic approach has never been greater or more urgent, especially in light of the possibility of an insolvency crisis post pandemic.