*Ramanujan International Journal of Business and Research*, 2023, 8(1), 70-79

**doi:** https://doi.org/10.51245/rijbr.v8i1.2023.1171
**P-ISSN:** 2455-5959
**E-ISSN:** 2583-0171

ARTICLE

# Indian Perspective on Arbitrability of Insolvency Disputes: Intersection, Intervention and Interpretation for Synergy Among Both Regimes

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## Abstract

India is fast emerging as a vibrant economy committed to establishing itself as a business-friendly destination country. The current ranking in the World Economic Forum and various reforms to modify the Indian regulatory framework exhibit this trend. From ranking 142 in 2014 to 63 in 2019 in "ease of doing business", the constant effort towards improving Indian business regulation by adopting best practices is observable. In this regard, the Indian laws on Insolvency, Bankruptcy and Arbitration provide swift insolvency resolution and better settlement of disputes outside the traditional and cumbersome court procedures. However, both laws have several confrontational zones of overlapping that require emphasis. The focus and purpose of the paper are to analyze the interplay between arbitration and insolvency proceedings.

Further, the case analysis will highlight the legal position of courts and adjudicatory authorities about the conditions when both regimes can continue concurrently to protect the creditor dealing with an insolvent individual or body. The main idea is to strive and find ways to avoid a collision between the Insolvency and Bankruptcy Code 2016 (hereinafter IBC 2016) and Arbitration and Conciliation Act 1996 (hereinafter A&C Act, 1996) with an appreciation of the applicability, interface, and issues regarding the arbitrability of insolvency proceedings. The paper qualitatively examined several judicial pronouncements relevant to different aspects of the A&C Act 1996 and IBC 2016. The results deduced from the case analysis suggest that the insolvency and arbitration overlap is inevitable due to grey areas and recommend that until the Indian jurisprudence matures, the arbitrability of insolvency disputes will continue. The paper will aid in devising precise and novel ways to balance diverse conflicts and devising novel ways to balance these conflicts to secure the best from both these regimes.

**Keywords**: Insolvency, Arbitration, NCLT, Corporate Insolvency Resolution Processes (CIRP), Corporate Debtor, Dispute and Moratorium.

## 1 Introduction

India is a fast-developing economy that has initiated various reforms in its regulatory framework to establish itself as an attractive business destination. Moreover, the government wanted to tackle the Non-Performing Assets (NPA), streamline the bankruptcy process and alleviate the sufferings of creditors (Agarwal, Das, Jacob & Mohapatra, 2020, p. 66). With these agendas and to provide a single insolvency regime for infusing faith in investors (M/S. Innoventive Industries Limited

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v ICICI Bank & Anr., 2017), it was in the year 2014 that the Indian government constituted the Bankruptcy Law Reform Committee that submitted its report in 2015 (Sharma, 2016, p. 67-68). As suggested by this report and evident from the Preamble to IBC 2016, it is a modern framework for resolving insolvency and bankruptcy issues, deals with insolvent company disputes and provides a mechanism for tackling bad loans. Based on the 2015 committee recommendations, the Central government introduced IBC 2016 applicable to companies, other companies governed by any special Acts, Limited Liability Partnership firms, other bodies incorporated, partnership firms and individuals (IBC 2016, s. 2). 'Insolvency' implies a financial condition wherein owing to several reasons; a debtor person or company fails to pay its debts due towards creditors prompting it to file for 'Bankruptcy' which is a legal position and a legal declaration of insolvency or inability to pay off debts. Before IBC 2016, eleven such laws and scattered, overlapping regulations and statutory instruments provided insolvency and bankruptcy processes (Ministry of Finance, Government of India, 2015). However, they were insufficient in timely resolution with consequent confusion and piling up of NPA (World Bank, 2023). The creditors waited for years to recover their money as the big defaulters escaped penalties either by strategic debt restructuring (by converting the unpaid loan into equity or taking the majority of the ownership of the troubled firm allowed by creditor banks) or by resorting to legal alternatives that were cumbersome and long-drawn (Gupta & Singh, 2020, p. 604-611). Every stakeholder (the defaulting company, the debtor and the creditor) pursued different legal routes and initiated competing proceedings in courts or tribunals with overlap, complexity, delays, proceedings spanning years and asset devaluation. The need was to constitute a single forum under which banks, company promoters and other creditors could get a resolution (Sengupta, Sharma & Thomas, 2016). The IBC 2016 seeks to transform this situation by providing a uniform code with implementation mechanisms for insolvency and liquidation, debt restructuring, asset takeover and their realization (Chatterjee, Shaikh & Zaveri, 2018, p. 89-102). The success of IBC 2016 in terms of preventing defaulting loans is evident from the sheer volume of cases resolved in the last few years. There was a recovery of INR 70,000 crores during 2019, double of INR. 35,500 crores recovered through other resolution mechanisms such as the Debt Recovery Tribunal, Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, and Lokadalat in fiscal 2018 (PSU Watch Bureau, 2019). IBC 2016 is a remedy for the continuation of the company undergoing stress that directly or indirectly impacts several legal fields. In the A&C Act 1996 framework, the scope of inquiry of this paper paper is about-

- Stoppage of arbitration proceedings and dismissal claims by creditors to contingent claims under IBC 2016,
- Effect of insolvency proceedings on arbitration,
- Scope and legality of corresponding arbitration proceedings besides the Corporate Insolvency Resolution Process (hereinafter CIRP),
- Ways the courts are avoiding the situation of limbo and difficulties for creditors and
- Possible solutions to balance the contradictory concerns with IBC 2016.

With this backdrop and the appreciation of contentious issues among insolvency and arbitration, this paper studies their interplay. The main idea is to strive and find ways to avoid a collision between the IBC 2016 and A&C Act 1996 and understand if the existing framework is sufficient to deal with different situations like parallel arbitration proceedings during CIRP and moratorium or if there are gaps in the interpretation of both laws. The assessment will help to devise ways to secure the best from both these regimes.

## 2 Material and Methods

The paper analyses the areas of intersection and overlap among the insolvency and arbitration regimes in India. To understand the possible ways for synergizing both laws and for a better understanding of the future interpretation of legal conflicts, the material and method for the current research heavily rely on the case study method, case analysis and laws relating to insolvency and bankruptcy. The paper will utilize the doctrinal research method. With assistance from the secondary data and legal material available in the form of legislations, rules, regulations, circulars, case laws, notifications and reports on IBC 2016 and A&C Act 1996, the research will help in a detailed understanding of the existing relationship and gaps between the two laws. The paper discusses specific case studies that settle some of the creases among insolvency, bankruptcy and arbitration laws and Indian legal frameworks on insolvency and arbitration for comprehending the research objectives.

## 3 Results

Arbitration and insolvency are two significant Indian regimes whose coexistence is at loggerheads. With judicial interpretations and pronouncements, there is better clarity today about the conflicting zones between the IBC 2016 and the A&C Act 1996. The adjudicatory authorities are rendering decisions to harmonise both regimes. Still, their interplay leaves areas not adequately covered by the statutory laws or judicial precedents as discrepancies exist, leading to competing judgments. The paper proposes that for further peaceful coexistence of both regimes and to avoid collision between them, a few amendments in IBC 2016 and A&C Act 1996 are essential.

Regarding referring parties to arbitration under Section 8 (1) of the A&C Act 1996 by "judicial authority", the term judicial authority is not defined. With the amendment, National Company Law Tribunal (hereinafter NCLT) can be brought under its ambit to avoid future clashes. The parties must be permitted to approach NCLT to initiate CIRP and insolvency

applications as per Section 7 or 8 of IBC 2016 and prefer an application under Section 8 of the A&C Act 1996 substantiated by an agreement to arbitrate. Furthermore, applying the kompetenze principle enshrined in Section 16 of the A&C Act 1996, the arbitral tribunal must decide the jurisdiction-related admissibility of the insolvency petition. If the tribunal declares this petition admissible, the proceedings should continue. Later on, as per Section 31 of IBC 2016, the arbitral award can be enforced by the NCLT.

The Indian A&C Act 1996 should list insolvency proceedings as arbitrable and non-arbitrable disputes. The appointment terms regarding the arbitral tribunal and rendering arbitral award within a prescribed framework will support the insolvency process. The CIRP requires further betterment with every form of the creditor (disadvantageous and prospective) protected and included within the Committee of creditors. The arbitration agreement must be operative to keep protracted litigation low and to avoid conflict and inconsistencies. The paper proposes that the NCLT, National Company Law Tribunal (hereinafter NCLT) and Supreme Court must further settle these uncertainties and ambiguities. It recommends that the legislature must consider these contradictions and intervene to adopt a well-balanced approach for an effective insolvency and arbitration regime.

## 4 Discussion

### 4.1 The Insolvency and Bankruptcy Code, 2016

As per the decision in Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors. (2019) and S. C. Sekaran v Amit Gupta & Ors (2018), the IBC 2016 makes provisions to revive, liquidate and resolve insolvency, curb willful defaults, and empower and protect the interest of the financial creditors through its time-bound insolvency resolution of companies and individuals. The IBC 2016 mentions two kinds of creditors under Section 3(10) of IBC 2016. They are Financial Creditors (hereinafter FC) under section 5(7) and Operation Creditors under section 5(20). The FC is the person to whom a financial debt is due or has extended a loan or financial credit to the debtor. As per section 3(10) of IBC 2016, FC could be a secured or unsecured creditor. It is worth mentioning that IBC 2016 gives preferential treatment to FC over operational creditors (Maharashtra Seamless Limited v Padmanabhan Venkatesh & Ors., 2019). FC can file a direct application to the NCLT by merely proving a default. As per Section 21(2) of IBC 2016, only FC can constitute the 'Committee of Creditors' (hereinafter COC) for bankrupt firms. Operation Creditors cannot be a part of this committee and have no voting rights on the committee decisions around the assets. The operational creditor challenged this differential treatment in Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors. (2019). The court held it to be non-discriminatory, non-arbitrary or violative of Article 14 of the Indian Constitution.

The IBC 2016 has reduced the scope for judicial intervention and established certain new institutions with specialized roles. The Insolvency and Bankruptcy Board of India (IBBI) promotes transparent administration, supervises and educates about IBC 2016 and regulates IP, IPA and IU and their functioning (IBC 2016 s.196). Licensed Insolvency Professionals (IP) act as liquidators or bankruptcy trustees and conduct the resolution process (IBC 2016 s. 34). The creditors appoint the IP to manage assets for them and assist in deciding other crucial matters. He is a member of Insolvency Professional Agencies (IPA) that not only certifies IP but imposes observance of a code of conduct during each task they perform (IBC 2016 s. 204). Besides, as a centralized repository, Information Utilities (IU) collects financial and credit information of borrowers and organizes and distributes finance-related data to facilitate insolvency resolution (IBC 2016 s. 214).

The IBC 2016 has a detailed resolution process that begins with the occurrence of default by the corporate debtor (hereinafter CD). The creditor can approach the NCLT and file CIRP against the CD as per Sections 7, 9 and 10 of IBC 2016. The CD is issued a notice regarding the dispute and for filling their responses in the next ten days. If the NCLT concludes debt and defaults from CD towards the creditor, it shall admit the CIRP and pass a 'moratorium' under Section 14 that stalls the fresh filling and adjudication of pending disputes. The goal is to conserve the assets of CD as company management loses control. The consolidation process allows the creditors to submit their respective claims for preparing a consolidated liability statement.

Afterwards, the interim resolution professional will form the COC consisting of financial creditors to determine liabilities (IBC 2016 s. 21). The resolution professionals take over to collect the required detail to work on the resolution plan that needs the approval of 75% of the FC (IBC 2016 s. 30). The debtor assets are liable for liquidation if there is no consensus within the next 180 days. The IP will oversee the process of liquidation and will distribute the money realized from the sale of the debtor assets according to the preference list (IBC 2016 s. 53). As per section 60 and section 63 of IBC 2016, the NCLT is a quasi-judicial body with no interference from any other court and tribunal. Subsequently,the NCLAT and, on a relevant question, the Supreme Court hear an appeal as per Sections 61 and 62 of IBC 2016.

### 4.2 The Arbitration and Conciliation Act, 1996

Rapid globalization and increased competition give rise to disputes relating to commercial transactions. In such a scenario, establishing oneself as a business-friendly country with an effective dispute resolution regime is paramount. It is a known fact that the traditional court processes are dilatory (Kwatra, 2014). The Alternative Dispute Resolution (hereinafter ADR) movement heralded effective dealing with the global problem of delays and the dispensation of justice. Legal recognition of different modes of ADR for resolving disputes outside the court and without following the rigid court process is trending (Grenig, 2014). Unlike conventional court processes, the ADR is confidential, informal, less stressful and delivers speedy and creative settlement of disputes. Being an amicable resolution, the decisions or outcomes of ADR have higher confirmation

rates with enhanced business relationships among parties (Basu, 2011).

One of the popular ADR varieties is Arbitration or submitting a dispute by agreement of the parties, to one or more arbitrators who deliver an out-of-court binding decision. (WIPO, 2020). The Indian A&C Act 1996, based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law, 1985 and UNCITRAL Arbitration Rules 1976, effectively manages the ever-growing complexities of contemporary commercial transactions (SBP & Co. v Patel Engineering Ltd & Another, 2005). It is a comprehensive and consolidating law that encourages the settlement of domestic and international commercial disputes. The International awards are enforceable by the domestic courts through the New York Convention and Geneva Convention.

The scheme of the A&C Act 1996 allows the disputants to agree and confidentially decide their disagreements with assistance from a third-neutral party. The arbitration process rests on a pre-existing 'arbitration agreement' or an 'arbitration clause' whereby disputants agree to mandatorily settle their future disputes through the arbitration process instead of court (A&C Act 1996 s.7). Even later and in the absence of an arbitration agreement, disputants can voluntarily and mutually consent reference to arbitration process as clarified by the Hon'ble Supreme Court in case of Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. (P) Ltd. (2010). Unlike the Court process, ADR is economical, less time-consuming, and effectively sustains a business relationship. It is a consensual mechanism wherein the parties appoint a neutral individual/sole arbitrator or resolution through an arbitral tribunal. The parties mutually fix the powers and duties of the tribunal and the rules and laws followed during the proceedings. The A&C Act 1996 under section 18 also directs the sole arbitrator/ arbitral tribunal to follow due process and ensure equal opportunity for parties to present and defend their case. The Arbitration process results in a binding and enforceable decision known as an 'arbitral award', (in contrast to mediation, negotiation and conciliation) that is enforceable like a decree by the court (A&C Act 1996 s.35). The idea as per Section 5 of the A&C Act 1996 is to minimize the intervention from the court at different stages of the arbitration process (Konkan Railway Corporation v Mehul Construction Co., 2000).

## 4.3 Interface Between IBC, 2016 and A&C Act, 1996: Some Case Studies

The IBC 2016 and A&C Ac, 1996 continually face legal challenges, the most prominent being; the difference between financial creditors and operational creditors, the legislative scheme under Section 7 of IBC 2016 and the constitutionality of Section 12A inserted by the Second Amendment Act of 2018 to IBC 2016 that allows the withdrawal of a CIRP application. Furthermore, section 29A of the 2019 amendment to the A&C Act 1996 states that every award, except international commercial arbitration, shall be rendered within 12 months beginning from the date when pleadings are complete. In Booz Allen Hamilton v SBI Home Finance (2011), the apex court gave the criteria for the arbitrability and non-arbitrability of a dispute. It laid the test that a dispute will be arbitrable if they are 'right in personam' or against specific individuals -but not arbitrable if it concerns a 'right in rem' or against the world at large, including insolvency matters (however, the courts later on diverted from this test). Then, in Hindustan Construction Company Ltd. v Union of India. (2019) concerning the constitutional plea challenging section 87 of the A&C Act 1996 inserted by the 2019 Amendment Act the court stated a challenge under IBC 2016 and an immediate stay on the arbitral award 'turns the clock backwards' by pushing the companies into insolvency as the same denies them an opportunity to settle the claim of their creditors out of the arbitral awards. The Supreme Court striking this amendment declared Section 87 as 'manifestly arbitrary' and against the spirit of Article 14 of the Indian Constitution. In para 51, the court specified that the arbitral award-holder must enjoy the fruits of its award obtained after several years of litigation. An automatic stay exposes him to the rigours of IBC 2016. Thus, the adjudicating authorities are clarifying diverse issues on the interface among them. Some prominent judicial pronouncements, interpretations of legal provisions and exceptions to IBC 2016 and its arbitrability are detailed below.

### *4.3.1 Interpretation of the Term 'Dispute in Existence'*

The first legal issue or question concerning the interface between IBC 2016 and the A&C Act 1996 is the interpretation of the terms 'dispute' and 'existing dispute' under section 5(6) of the IBC 2016. Conflicting decisions were delivered by adjudicating authorities about the ambit of 'dispute'. Section 9(5) of the IBC 2016 states the process for CIRP by an operational creditor as a dispute between him and the CD will bar the initiation of a CIRP against the CD. The phrase 'dispute in existence' is relevant to this context as CD can raise this defence to halt insolvency or liquidation proceedings filed by the operational creditor.

In Mobilox Innovations v Kirusa Software (2018), the term 'dispute' was given liberal interpretation by the Apex Court. The court observed that the application of an operational creditor for CIRP would not be admitted against a CD if it concerns the existing debt among them. It further clarified that the definition of dispute in Section 5(6) is 'inclusive' but not 'exhaustive' and will include disputes relating to orders, suits or arbitration proceedings. The adjudicatory authority must investigate the application and decide if a bonafide and genuine dispute on real grounds as against frivolous or illusory exists. The court laid guidelines for adjudicating authorities to decide on the admission or rejection of a CIRP application after determining if the dispute raised is valid and a notice to the creditor is issued as per sections 8(2)(a) and 5(6) of IBC 2016.

In K. Kishan v Vijay Nirman Company Pvt. Ltd. (2018), the court resolved the issue of invoking IBC 2016 and the pendency of the decision on a challenge to an arbitral award. The Hon'ble Supreme Court held that the term dispute under Section 9 of the IBC 2016 includes a challenge to an arbitral award per Section 34 of the A&C Act 1996 and qualifies as a pre-existing dispute. Rejecting the CIRP application made by the operational creditor, the court stated that initiating

premature and superfluous legal proceedings by operational creditors must not be made. The court held that any small operational debt (in this case, of INR Two lakhs) will not be the basis for jeopardizing the otherwise solvent company with worth of crores of rupees. The court observed that the company cannot be forced into litigation about the debts if arbitration proceedings are pending.

#### *4.3.2 Arbitral Awards as a "Proof of Debt" in Insolvency Proceedings*

Russell defines an arbitral award as the final determination of the dispute or claims through the arbitration process. In Annapurna Infrastructure Pvt Ltd & Anor v Soril Infra Resources Ltd (2017), the NCLAT held that an arbitral award against CD forms a legal record of the default under IBC 2016. However, pending proceedings for executing the arbitral award, a judgment and decree will not be a reason to stop the operational creditor from preferring an application under IBC 2016. Scrutinizing the provision of section 8(2) (a) in IBC 2016, the court further elucidated the difference between the "existence of a dispute" and the "pendency of an application under section 34 or section 37 of the A&C Act 1996". The court clarified that the final arbitral award and the pending execution or appeal under section 37 of the A&C Act 1996 does not affect the commencement of CIRP, being separate from a suit for recovery, execution of decree or award. The court commenting on the sphere of 'dispute' observed that it should not be limited to suits and arbitrations only but will have an expanded scope to cover consumer and labour court proceedings by CD, mediation and conciliation process, reply notice under section 80 of the Code of Civil Procedure of 1908 and a complaint under section 59 of the Sale of Goods Act of 1930. Furthermore, the dispute filed or pending before the court of law or authority must be without mala fide intention or initiated to halt the insolvency resolution.

#### *4.3.3 Impact of 'Moratorium'*

The 'Moratorium' implies suspending further proceedings or imposing a stay on the legal trial. The concept of moratorium existed before under the Companies Act 1956 (in section 446) and the Sick Industrial Companies Act 1984 (in section 22(1) and now under Section 14(1) (a) of IBC 2016. The Apex Court in M/S. Innoventive Industries Limited v ICICI Bank & Anr. (2017) considered a report of the Bankruptcy Law Reforms Committee regarding the objectives and scheme of IBC 2016 and stated that a moratorium applies to an action for recovery and claims against the CD. The court highlighted the rationale for the moratorium and remarked that it is a way to ensure there is no additional stress on the assets of CD. In Alchemist Asset Reconstruction v Hotel Gaudavan Pvt. Ltd.(2017), the court settled this position and held that the moratorium bars a new suit or arbitration proceedings against the entity under the moratorium. The court also prohibited the continuation of suits or legal proceedings after the moratorium and declared the arbitration proceedings 'non est' in law. The principle was applied to the pending arbitral proceeding in K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors (2018). Again, relating to the stay on arbitration payments under IBC 2016, the NCLT in Canara Bank v Deccan Chronicle Holdings Limited. (2017) interpreting the term moratorium maintained that any suit (instituted or continuing) or execution proceedings within its ambit will bar arbitration proceedings. It held that the moratorium does not affect/apply to Article 32 or 226 of the Constitution of India.

In Power Grid Corporation of India Limited v Jyoti Structures Limited (2018), the Hon'ble Delhi High Court dealt with the question of staying the arbitral award petition under Section 34 of the A&C Act 1996 passed in favour of the CD after the imposition of the moratorium. Factually, during the pendency of arbitration proceedings, the financial creditor filed an IA before the NCLT seeking CIRP against the CD and a moratorium was declared. The court restrictively interpreting the term 'proceedings' under Section 14 (1)(a) of the IBC 2016 held that the word proceedings is not preceded by the term 'all', so it should apply to every proceeding against the CD. It held that the moratorium does not forbid the debt recovery proceedings against CD and his assets. The action under section 34 of the A&C Act 1996 can continue provided it will not "endanger, diminish, dissipate or impact the assets of the CD" and is not derogatory to the objectives of IBC 2016. Once the court determines and approves the objections under section 34, the proceedings for the execution of the award will be permitted. Thus, the continuance of action under section 34 of the A&C Act, 1996 will not be derogatory to the objectives of the IBC 2016 and will not affect the assets of CD and the claim of disputants who can get a decision on their rights.

#### *4.3.4 Insolvency of the Parties and its Impact on the Enforceability of the Arbitration Agreement*

Section 41 of the A&C Act 1996 is an important section that concurs with the provisions of IBC 2016. It deals with the insolvency of the parties, its impact on the enforceability of arbitration agreements and the process/course followed under it. The section envisions several situations that need attention to insolvency arbitration clause intersection. If the receiver or an Official Assignee accepts the arbitration agreement before the commencement of insolvency proceedings, the parties can enforce the agreement against him. Before the receiver decides to adopt the contract containing an arbitration clause or dispute resolution clause, he should responsibly determine if this will benefit the insolvent company. The contract if agreed in totality, the arbitral award will become enforceable against the insolvent person. However, once the insolvency proceedings commence, but the insolvency order is pending, and the receiver selects to adopt the contract with an arbitration clause for future disputes, it will be enforceable against him. But if the receiver chooses not to adopt this contract, parties can apply to the NCLT for intervention. Finally, once the company is declared insolvent, the arbitration clause or arbitration agreement shall be void and will not have a binding effect on the receiver. So, in the case of an arbitration agreement, if parties become insolvent, the arbitration agreement will not automatically become invalid but will be dependent on the surrounding facts and if the receiver adopts the contract.

#### *4.3.5 Parallel or Simultaneous Arbitration and Insolvency Proceedings and Doctrine of Clean Slate*

Various NCLT decisions have now established that the pending arbitration proceedings will not interfere with CIRP. Irrespective of the arbitration agreement and ongoing arbitration proceedings, parties can file insolvency proceedings under the IBC 2016. In this context, the "Clean Slate" doctrine originated in India with Section 32A inserted by the IBC 2016 (Amendment) Act, 2020 for the liability of CD for offences committed before the commencement of CIRP read with Section 31 of IBC 2016 and recognized in various court cases as relevant. The IBC 2016 aims to revive and revitalize stressed companies and keep them a going concern. The doctrine protects CD from liabilities and the burden of unresolved claims and debts before and during the CIRP application. The approval of the resolution plan thwarts an action against CD, permitting the resolution applicant to run the company with a "clean" slate. The doctrine was referred to in several decisions like Essar Steel India Ltd. Committee of Creditors v Satish Kumar Gupta (2020) and Ghanashyam Mishra and Sons Private Limited v Edelweiss Asset Reconstruction Company Limited and Ors. (2021). The recent judgement in Fourth Dimension Solutions Ltd. v Ricoh India Ltd. & Ors. (2021) is against this doctrine. The court allowed arbitration proceedings between CD and the operational creditor even when COC approved CIRP. The decision is believed to be detrimental to the IBC 2016 proceedings as allowing every legal proceeding after CIRP will demotivate the acquirer. He may wish for a "clean slate" i.e. to work as an entity having no inherited liabilities and to focus on the objective of revival and revitalization of a stressed company. The above contradictory pronouncements highlight the confused relationship between the IBC 2016 and the A&C Act 1996.

#### *4.3.6 Prevalence of IBC 2016*

The final point for clarity on the interface between IBC 2016 and the A&C Act 1996 is about the prevalence of one over the other. In K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors. (2018), the court observed that when there is an inconsistency between the IBC 2016 and any other legislation, the non-obstante clause of section 238 of IBC 2016 will come into effect and IBC 2016 will prevail. However, the court suggested using this section cautiously without overriding adjudicatory and enforcement proceedings of other statutes. As per previous judgements in Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors. (2019), the initiation of insolvency proceedings will stall all legal proceedings till the disposal of CIRP, including pending arbitration proceedings. Recently addressing the arbitrability of insolvency proceedings, the Apex court in Indus Biotech Pvt. Ltd. v Kotak India Venture (Offshore) Fund (2021) settled that the application before NCLT for CIRP needs to be decided based on the material on record. If the tribunal finds default and debt due to the company, it will admit the application, making the dispute non-arbitrable. Otherwise, on dismissal of the application, parties can go for arbitration. The court prioritized IBC 2016 and gave it an overriding effect over other legislations in a conflict between section 5 of the A&C Act 1996 on the non-obstante clause and section 238 of IBC 2016. The court stated that if two special statutes are incompatible, the latter enacted shall have precedence; the IBC 2016 will have primacy over other laws. Furthermore, the court observed that IBC 2016 is a mechanism to allow an insolvent company to revive itself and cannot be a replacement for recovery suits.

### 4.4 Analysis of the Interface Between the Arbitration and Insolvency Framework

The paper evaluated every possible scenario concerning the interface between Arbitration and Insolvency proceedings to decode the effectiveness of the current legal framework and jurisprudence as developed by Indian courts. The idea was to identify the challenges and suggest solutions to resolve the conflicting areas among them. The following findings emerged from the research analysis.

### 4.5 IBC 2016 as a Catalyst Law

IBC 2016 is a comprehensive law with crisp guidelines and predictableness. It has introduced considerable positive changes like streamlined insolvency and bankruptcy process, installed faith among creditors, proven better recovery rates and condensed time for resolution It has improved India's ranking in the Ease of Doing Business Index and has enhanced the perception of India as an alluring country to conduct business. Furthermore, it has done away with the previous scenario of diverse legal remedies for debt recovery and insolvency. The IBC 2016 through section 12 (1) provides for a fast-tracked time frame of 180 days for insolvency resolution that can be extended to 90 days, making the process less time-consuming. IBC 2016 deals with several issues and provides relief under this law with minimal court interference. (Sahoo, 2019).

Regarding bankruptcy proceedings, time, cost and the percentage recovery rate are important parameters. With a high recovery rate that has increased from 26.5% to 71.6% and reduced time from 4.3 years to 1.6 years between 2017 and 2020 for resolving insolvency (PRS Legislative Research, 2021), as per the World Bank report on ease of doing business, India further improved its ranking in 2022 and stands at 63rd among 190 countries of the world (Ministry of Corporate Affairs, 2019). As per reports on Trends and Progress of Banking in India 2021-22, out of the total claims, the realisation rate is 33% in 2022 in case of initiation of CIRP by FC (IBC: Resolution value may be compared with liquidation value of stressed assets, says RBI, 2022).

The CIRP provisions came into force on December 1, 2016. Beginning from March 2017, with just 37 CIRP cases admitted with one resolution to 6815 CIRP cases admitted and 4742 resolutions as of June 2023, IBC 2016 has witnessed a phenomenal hike in just six years that is proof of the faith reposed in the IBC 2016.

Thus, IBC 2016 aims to revive the company under distress through its proceedings that are effective, time-bound and follow precise procedures.

**Figure 1: India's Doing Business Rank from 2014 to 2019**
Source: Ministry of Commerce, Government of India, 2020, p. 4.

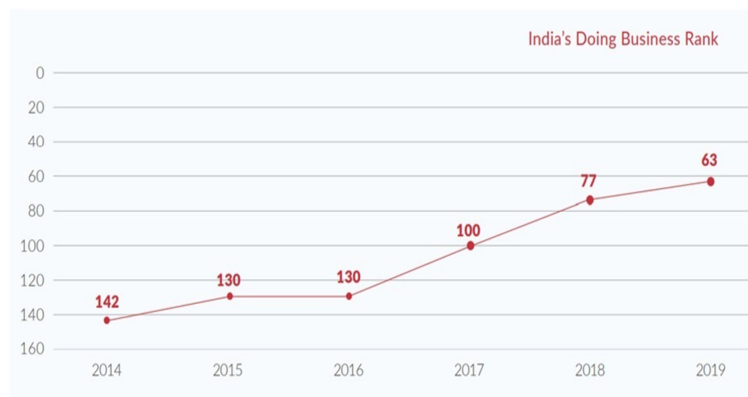
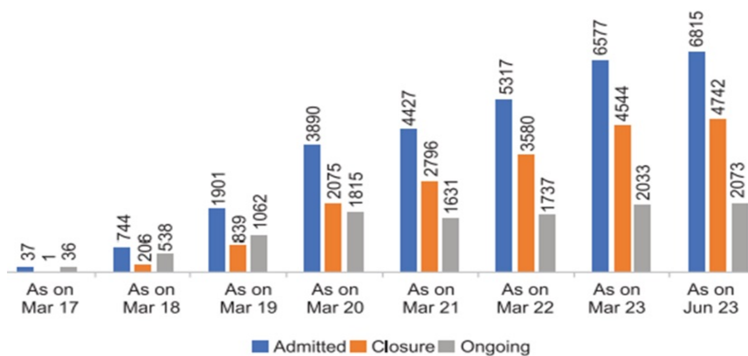



**Figure 2: Corporate Insolvency Resolution Process cases Admitted and closed from March 2017 to June 2023**
Source: The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, 2023, p. 9.




### 4.6 IBC 2016 and Arbitration Cauldron

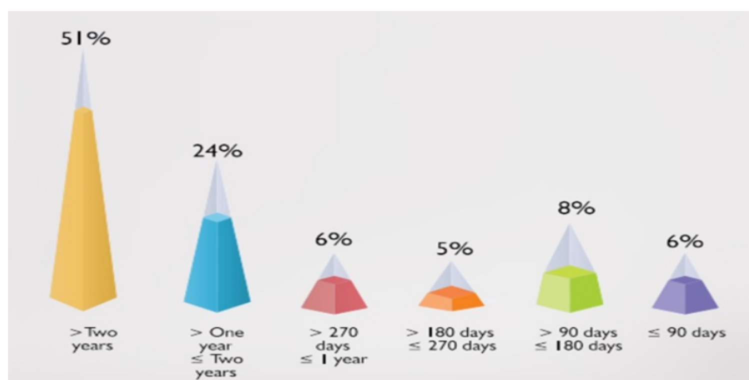
The case analysis establishes several judicial gaps that still exist despite the best efforts by courts to fill them and clarifications on dealing with conflicts. The jurisprudence on this interaction is still evolving and the non-uniformity will continue till the legislature clears the legal position. The exploration discovered that ambiguity in the interface between the two laws gives leeway to financial creditors to use the provisions of the IBC 2016 to avoid arbitration proceedings rather than genuinely resolving the disputing debt amount when the company is otherwise solvent. The proceedings under IBC 2016 are regarded as 'right in rem' as they impact the public at large. If NCLT establishes default and admits CIRP under section 7, it cannot refer parties to the A&C Act 1996 (Pioneer Infrastructure v Union of India, 2019). This point needs confirmation from both the lawmakers and the lawkeepers. IBC 2016 prevails over the A&C Act 1996 and section 7 of IBC 2016 over section 8 of the A&C Act 1996. However, there is no clarity about the effect on IBC 2016 of the pre-existent arbitration agreement, the fate of contractual obligations and the rights of the parties involved. Criteria are yet to evolve to classify the insolvency disputes that will be amenable to arbitration and those that are not. The IBC 2016 need to change the moratorium provision that halts the civil suit and arbitration proceedings or bar the jurisdiction of an arbitral tribunal till the conclusion of CIRP. Thus, permitting concurrent arbitration proceedings under defined criteria will settle IBC disputes while protecting the investors and creditors.

It is time that IBC 2016 stabilises persistent shortcomings in its operation. It must settle the surrounding entanglement from differential interpretation and numerous amendments hampering its adequate implementation. Timely resolution of proceedings is a challenge under IBC 2016 as delays stress assets and diminish the values of a sick company. A study by the Indian Institute of Insolvency Professionals of ICAI (Indian Institute of Insolvency Professionals 2020) has proved that CIRP takes 113 days in litigation and costs around INR 18 lakh. There is a need for additional benches with fully trained staff and expert judges who will strictly observe the prescribed timelines. Thus, cumbersome processes and delays under IBC 2016 require promoting arbitration and mediation to sidestep protracted litigation. Even the Mediation Bill of 2021 states that the dispute should be tried through mediation before one approaches the court.

**Table 1: Summary of Key Findings on the Interface between IBC 2016 and A&C Act 1996**

| Key point | Name of the Case | Dictum |
|---|---|---|
| Interpretation of 'Dispute in Existence' | Mobilox Innovations v Kirusa Software (2018) 1 SCC 353 | The definition of dispute in Section 5(6) is 'inclusive' but not 'exhaustive' and will include disputes relating to orders, suits or arbitration proceedings. |
| | K. Kishan v Vijay Nirman Company Pvt. Ltd. (2018) 17 SCC 662 | "Dispute" under Section 9 of IBC 2016 includes a challenge to an arbitral award under Section 34 of the A&C Act 1996 & qualifies as a pre-existing dispute. |
| Arbitral Awards as a "Proof of Debt" in Insolvency Proceedings | Annapurna Infrastructure Pvt Ltd & Anor v Soril Infra Resources Ltd (2017) Company Appeal (AT) (Insolvency) No. 32 of 2017 | An arbitral award against CD forms a legal record of the default under IBC 2016. However, pending proceedings for executing the arbitral award will not be a bar to stop the Operational Creditors from preferring an application under IBC 2016. |
| Impact of 'Moratorium' | Alchemist Asset Reconstruction v Hotel Gaudavan Pvt. Ltd. (2017) IBC 38 | A moratorium bars a new suit or arbitration proceedings against the entity under the moratorium. |
| | K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors. (2018) 146 SCL 588 | Moratorium bars pending arbitral proceedings. |
| | Canara Bank v Deccan Chronicle Holdings Limited (2017) 141 CLA 93 (NCLT) | Under Section 14(1)(a), the word "all" does not appear before 'proceedings' so moratorium will be inapplicable to all the proceedings against CD. |
| | Power Grid Corporation of India Limited v Jyoti Structures Limited (2018) 142 CLA 285 (Del.) | Action under section 34 of the A&C Act 1996 can continue if it is not derogatory to the objectives of IBC 2016. |
| Parallel Arbitration & Insolvency Proceedings | Fourth Dimension Solutions Ltd. v Ricoh India Ltd. & Ors (2021) Civil Appeal 5908/2021 | The court allowed arbitration proceedings between CD and the operational creditor even when COC approved CIRP. |
| Prevalence of IBC 2016 | K.S. Oils Ltd. v The State Trade Corporation of India Ltd. & Ors, (2018) 146 SCL 588 | Inconsistency between the IBC 2016 and any other legislation, the non-obstante clause of section 238 gives prevalence to IBC 2016. |
| | Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors. (2019) 4 SCC 17 | Initiation of insolvency proceedings will stall all legal proceedings till disposal of CIRP, including pending arbitration proceedings. |
| | Indus Biotech Pvt. Ltd. v Kotak India Venture (Offshore) Fund (2021) SCC Online SC 268 | If the tribunal admits the CIRP, it will make the dispute non-arbitrable, otherwise, on dismissal of the application, parties can go for arbitration. |

**Figure 3: Status of ongoing CIRP as of June 2023 in terms of the time taken.**
Source: The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, 2022, p.15



## 5 Conclusion

The IBC 2016 is gradually ending the culture of "defaulters' paradise" as held in Swiss Ribbons Pvt. Ltd. & Anr. v Union of India & Ors. (2019). It is refining the insolvency process in India while placing safeguards to avoid the misuse of its provisions, like initiating the CIRP for frivolous reasons. The IBC 2016 and A&C Act 1996 are two significant, influential and evolving Indian legal regimes that resolve commercial disputes for a company undergoing financial distress. Among both, arbitration has established itself as a viable dispute resolution option, while the new entrant of insolvency in this global change is obscure. The current jurisprudence to guide this tussle on various dimensions of the insolvency process, its arbitrability, the dichotomy between the IBC 2016 and A&C Act 1996, and the contentious matters surrounding them are limited. The paper qualitatively examined several cases relevant to the topic of inquiry and found convergence and divergence between the A&C Act 1996 and IBC 2016 that makes the insolvency and arbitration overlap inevitable. Till the Indian jurisprudence matures, the arbitrability of insolvency disputes and web of intersections need resolution by adopting a balanced approach with harmonious construction of both the laws except when the arbitration and insolvency intersections jeopardize the insolvency proceeding.

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