INDUS BIOTECH V. KOTAK INDIA VENTURE - FAILED ATTEMPT TO RECONCILE INSOLVENCY AND ARBITRATION REGIME

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The presence of an effective arbitration regime forms an indispensable part of modern commercial dispute resolution. However, in case of bona fide dispute between parties with an arbitration clause concerning the quantum and existence of debt where the creditor also has the right to apply for initiation of corporate insolvency resolution process, there arises a conflict between arbitration and insolvency regime. The conflict is regarding the role to be played by arbitration in the determination of alleged debt in situations where rights under the Insolvency regime are available to the creditor. The latest development in this regard is the decision of the three-judge bench of Hon'ble Supreme Court in Indus Biotech v. Kotak India Venture. While analysing this decision with a primary focus on conducting an in-depth analysis of the competing interest between the arbitration and insolvency regime, the authors explain the anomalies underlying the two crucial issues where the court has erred - misinterpretation of the term "default" and failure of the court to reconcile the arbitration and insolvency regimes harmoniously. The authors further delve into the position of law in other jurisdictions on the issue of standard of review to be adopted. Lastly, the article suggests solutions such as the adoption of prima facie standard of review with provisions for

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fast-track arbitration and effective implementation of information utilities to achieve a harmonious balance between these regimes to ensure that intent and purpose associated with these regimes is preserved.

Keywords: Arbitration, Insolvency, CIRP, Financial Creditor

I. Introduction

A Three-Judge Bench of the Hon'ble Supreme Court in Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund (hereinafter 'Indus Biotech'),[1] while dealing with a Section 11 application under Arbitration and Conciliation Act,1996[2] ["Arbitration Act"] has finally decided the long-standing controversy between Insolvency and Bankruptcy Code, 2016 ["Code"] and Arbitration Act.

Though the conclusion reached by the court wherein it allowed the arbitration between the parties is correct, however, the path taken by the court is unnecessarily convoluted and raises more doubts than it solves. The article will seek to unravel some patent flaws in the reasoning of the court such as its misinterpretation of the scheme envisioned under the Code.

In this case, the respondent was a subscriber of Optionally Convertible & Redeemable Preference Shares of the petitioner company. While the discussions were underway between the parties with regard to the quantum of conversion value of the said security, the redemption value became due and payable back in 2018 pursuant to the Share Subscription Agreement. As a result, the respondents moved a Section 7[3] application under the Code for initiation of the Corporate Insolvency

[1] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund, (2021) 6 SCC 436 : 2021 SCC OnLine SC 268 (hereinafter 'Indus Biotech').
[2] Arbitration and Conciliation Act, 1996, § 11, No. 26, Acts of Parliament, 1996 (India).
[3] Insolvency & Bankruptcy Code, 2016, § 7, No. 31, Acts of Parliament, 2016 (India).

Resolution Process ("CIRP") claiming to be a financial creditor of the petitioner company. Meanwhile, the corporate debtor raised an application under the Arbitration Act for reference of the dispute to the arbitration which was accepted by the NCLT Mumbai in a previous order.[4] The matter reached the Hon'ble Supreme Court after the petitioners approached it under Section 11 of the Arbitration Act for the appointment of an arbitrator.

In the judgment, the court firstly held that the Code shall override the provisions of the Arbitration Act and an application for initiation of CIRP under Section 7 of the Code would be given preference over the arbitration agreement of the parties. Settling the position of law on this issue, the court held that in case the corporate debtor raises an application under Section 8 of the Arbitration Act during an ongoing legal proceeding under Section 7 of the Code, the court must first examine the merits of the Section 7 application before entertaining the question of reference of the parties to arbitration. It held that parties can be referred to arbitration only when the court is satisfied that no default occurred within the meaning of the Code.

Alluding to the facts in the present case, it held that a default under Section 7 of the Code cannot be proved, if there exists a dispute between the parties. This reasoning runs contrary to the strict default rule introduced by the legislature in the Code for "*financial defaults*". Moreover, it also leaves loopholes in the system which the unscrupulous parties can take advantage of.

The Code is a trailblazing piece of legislation that has employed rather unique approaches to expedite insolvency resolution. For initiation of CIRP, Code implements an ingenious measure to move away from the concept of the incapacity to honour debts to the concept of "*determination of default*" (hereinafter 'Swiss Ribbons').[5] The reasons for this approach are very pertinent and integral to achieving the objective of this Code (which shall be discussed in the next part of the article). However, according to the authors, an isolated interpretation of

[4] Indus Biotech (P) Ltd. v. Kotak India Venture Fund- I, 2020 SCC OnLine NCLT 1430.
[5] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17 : 2019 SCC OnLine SC 73, ¶ 37 (hereinafter 'Swiss Ribbons').

this rule without reconciling it with the arbitration regime will create a fatal lacuna by providing an escape route to the unscrupulous litigants to subvert arbitration clauses by dressing up Section 7 applications initiating CIRP against the other party.

The authors in this article will seek to explore the competing interests involved in this issue. Secondly, the article will analyse the position taken in judgment and assess whether the court has been able to reconcile the insolvency and arbitration regimes. Consequently, the position of law as laid down in *Indus Biotech* will be compared with the reconciliatory interpretation in arbitration-friendly regimes like Singapore and the UK. Finally, the authors will suggest some pragmatic solutions which can be implemented either by the judiciary or legislature to reconcile the two regimes in the most effective manner possible.

II. Understanding Competing Interests

The apparent conflict between the Arbitration Act and the Code cannot be studied in isolation to the interests which are embodied in them. The objective, nature, express provisions involved, and the implications must all be considered when studying these interests.

A. The Default Rule for Financial Debts

Earlier the corporate resolution and the winding up of the company was based on incapacity to honour its debts which led to a lot of uncertainty in the process of winding up. To determine the capacity to honour debts, the adjudicative authorities had to get into a long-drawn inquiry of the balance sheet of the company and compare its assets and liabilities (hereinafter 'V.V. Krishna').[6] The standard of "*inability to pay*" gave a lot of discretion to the court which proved to be ineffective and long-drawn.[7] Apart from showing the default of the debtor to pay dues, the creditor also needed to prove the commercial insolvency of the

[6] V.V. Krishna Iyer Sons v. New Era Mfg. Co. Ltd., 1964 SCC OnLine Ker 206 (hereinafter 'V.V. Krishna').

[7] Aparna Ravi, *Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings*, Economic and Political Weekly (Dec. 19, 2015), https://www.epw.in/journal/2015/51/special-articles/indian-insolvency-regime-practice.html.

company which often proved to be a cumbersome exercise especially considering the inconsistent judicial interpretation of the standard.[8] Moreover, the courts were generous to grant more time to the corporate debtors who were ex facie commercially insolvent and regularly defaulted for years exercising their wide discretion.[9]

This complicated process and the inordinate delay gave an unfair opportunity to the existing management to destroy the value of the corporate debtor for personal benefits, virtually foreclosing any chances of resolution. Thus, the legislature introduced the unique concept of "*default rule*" for instilling predictability in the process and maximizing the value of the corporate debtor.[10] The default rule entails that the financial creditor has the right to initiate the CIRP on the happening of default as defined in the Code.

B. Timely Identification & Resolution of Assets

The financial creditor's interest in the assets of a firm is secured by the time-bound process laid down in the Code. The prime object of implementing centralized insolvency legislation in the form of the Code can be gathered from its Statement of Objects & Reasons, which aims to promote entrepreneurship, the interest of stakeholders, and the ease of doing business by amending the laws concerning insolvency resolution.[11] Hence the code makes every attempt to avert the commercial death of a company by liquidation and tries to preserve it as a continuing entity assuring recovery to creditors.[12] To ensure a successful recovery of the corporate debtor, the delay in resolution is to be minimized as the passage of long periods pushes the company to the brink of liquidation.[13] This is because the market value of assets is susceptible

[8] M.P. Ram Mohan, *The Role of Insolvency Tests: Implications for Indian Insolvency Law,* IIM Ahmedabad (Apr. 2021), https://web.iima.ac.in/assets/snippets/workingpaperpdf/14365012642021-04-01.pdf.
[9] *Id.*
[10] Akshaya Kamalnath, *Corporate Insolvency Resolution Law in India – A Proposal to Overcome the 'Initiation Problem',* SSRN (Jun. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387001.
[11] Insolvency & Bankruptcy Code, 2016, *Statement of Object & Reasons*, No. 31, Acts of Parliament, 2016 (India).
[12] Swiss Ribbons, *supra* note 5.
[13] M.S. Sahoo, *A Shorter Haircut: Timely Use of IBC can Help Minimise and Even Losses for Creditors,* The Indian Express (Aug. 20, 2021), https://indianexpress.com/article/

to a steep decrease due to speculation and a high rate of depreciation.[14] Moreover, timely initiation of CIRP for stressed assets also lies integral to the scheme of the Code, as unless the resolution process is initiated the company faces the risk of value destruction at the hands of existing management.[15]

Consequently, the timely initiation of CIRP of stressed assets and resolution of the debts lies at the core of the scheme proposed in the Code[16] which is strengthened by the default rule enshrined in the code.[17]

C. Upholding Party Autonomy

On the other hand, Section 8 of the Arbitration Act enjoins the judicial authority to refer the parties subject to an arbitration agreement to the arbitration tribunal.[18] The government recognized that the economic reforms cannot be effectively implemented if the commercial dispute resolution regime remains outdated.[19] To rectify the situation, the Arbitration Act was introduced. The Arbitration Act aims to minimize the supervisory role of courts to encourage dispute resolution through arbitration.[20] The Arbitration Act was further amended to limit judicial intervention and to strengthen the principle of party autonomy in line with the legislative aim.[21] This said autonomy can only be attained by easy enforcement of arbitration agreements ensured by the presence of a robust arbitration regime.[22]

Arbitration is a dispute resolution mechanism that recognizes party autonomy. It allows the parties to a contract to constraint by mutual

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[14] Bankruptcy Law Reform Committee, The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design 94 (2015).

[15] Swiss Ribbons, *supra* note 5.

[16] Insolvency & Bankruptcy Code, 2016, § 7, No. 31, Acts of Parliament, 2016 (India).

[17] Insolvency & Bankruptcy Code, 2016, § 4, No. 31, Acts of Parliament, 2016 (India).

[18] Arbitration and Conciliation Act, 1996, § 8, No. 26, Acts of Parliament, 1996 (India).

[19] Arbitration and Conciliation Act, 1996, *Statement of Objects & Reasons*, No. 26, Acts of Parliament, 1996 (India).

[20] N. Blackaby et al., Redfern and Hunter on International Arbitration 2.126 (6th ed. 2015) (hereinafter 'Blackaby et al.').

[21] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).

[22] Vinay Reddy & V. Nagaraj, *Arbitrability: The Indian Perspective*, 19 J Int'l. Arb. 117, 123 (2002).

agreement their right to approach courts as a first resort to have their disputes adjudicated (hereinafter 'Vidya Droliya').[23] Therefore, the arbitration clause is to be interpreted as accommodating the intention of parties instead of invalidating it on technicalities.[24] In light of legislative aim and provisions enacted, the court has to make the arbitration agreement workable within the permissible limits of the law.[25] Consequently, when a party intends to avoid an arbitration agreement, strict inquiry as to the cause of the same is required.[26] After such inquiry, only when the court is satisfied that the reasons for wriggling out of the arbitration agreement are of severe and complicated nature, an application under Section 8 of the Arbitration Act can be rejected.[27] The court should deem it more fit in presence of such reasons that judicial intervention is made to deal with the subject matter rather than relegating the parties to the arbitration.[28]

III. Analysing the position taken in the Judgment

A. Arbitrability of Insolvency Issues

As we have observed in the previous chapter, the interests reflected by arbitration and insolvency regimes are poles apart. The arbitration regime seeks to provide the parties with the choice of a private forum for resolving their disputes.[29] On the other hand, the insolvency regime seeks to provide a central adjudication for creditors of the corporate debtor.[30] Hence, the issue of arbitrability of insolvency disputes under Section 7 of the Code came for determination before the court.

Arbitration is a private adjudicatory process through which parties decide to forego their right to approach the courts in favour of arbitral tribunals. Hence it is necessary that it should be ousted in cases where

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[23] Vidya Droliya v. Durga Trading Corpn., (2021) 2 SCC 1, ¶ 18 (hereinafter 'Vidya Droliya').
[24] MTNL v. Canara Bank, (2020) 12 SCC 767 : 2019 SCC OnLine SCC 995, ¶ 9.
[25] *Id.*
[26] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386.
[27] *Id.*
[28] *Id.*
[29] Ajar Rab, *Defining the Contours of The Public Policy Exception – A New Test for Arbitrability in India*, 7 Ind. Jour. of Arb. L. 161, 161 (2019).
[30] *Id.*

erga omnes rights i.e., rights for and against everyone concerned are present.[31]

Since insolvency disputes relate to the rights of third parties' creditors who have an interest in liquidation or resolution of the corporate debtors, insolvency disputes were painted with a broad brush to be non-arbitrable in the case of Booze Hamilton[32]. However, this position changed for good in Vidya Drolia[33] wherein a three-judge bench of the court opined that, subjects should not be declared non-arbitrable by laying bold expositions. Additionally, it advised the courts to find out the specific *erga omnes* rights involved in the case.

Keeping in mind these pronouncements, the court in *Indus Biotech* took a rather pragmatic approach while deciding the arbitrability of default under Section 7 of the Code. It observed that *erga omnes* rights of various creditors to the corporate debtor come into place only after a Section 7 application for initiation of CIRP is accepted by the NCLT. Thus, it declared that the dispute is non-arbitrable only after admission of the application under the Code, leaving the parties competent to raise an application for reference to an arbitrator before admission of the corporate debtor in CIRP.[34] This sensible approach provided a good start to the judgment which was in contrast to the inchoate tangle of a mess that followed soon.

B. Insolvency and the Stubborn Overrider

The provisions for initiation of CIRP (Section 7 of the Code) and for referring the parties (Section 8 & 11 of the Arbitration Act) to the arbitration are mandatory in nature. This gives rise to a clash among provisions of both acts. This clash becomes even more intriguing by virtue of overriding provisions present in both statutes.[35]

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[31] N. Blackaby et al., *supra* note 20 at 7.
[32] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[33] Vidya Droliya, *supra* note 23 at 8.
[34] Indus Biotech, *supra* note 1 at 2.
[35] Insolvency & Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India); Arbitration and Conciliation Act, 1996, § 5, No. 26, Acts of Parliament, 1996 (India).

Interpreting this conflict, the court in Indus Biotech[36] gave an overriding effect to the provisions of the Code over the Arbitration Act, owing to the former being a subsequent statute.[37] Hence it came to the conclusion that the Adjudicating Authority has to adjudicate over the application filed by the financial creditor before considering the application filed for referring the parties to the arbitration.

This interpretation was in clear disregard to the settled law of interpretation according to which courts should first try to reconcile two ostensibly contrary enactments.[38] This principle of harmonious construction provides that when two legislations are pitted against each other, courts should try to ensure their complete operation in their respective domains.[39]

Applying this rule in Central Bank of India v. State of Kerala,[40] the apex court decided not to give overriding effect to the non-obstante provisions of RDDBFI[41] and SARFAESI[42] over the Sales Tax statutes after pointing out that these statutes were merely aimed to ensure a speedy recovery for banks and not to give them priority over the first charges created by the state taxation legislations. Similarly, provisions in the Code are also not meant to override the jurisdiction vested in arbitral tribunals through arbitration agreements.

However, the Hon'ble Supreme Court made no such efforts to reconcile the object of enactments and departed from the object oblivious of the potential effect of this judgment on the arbitration regime in India.

This strict and uncompromising reading of the Code in isolation from interests involved in arbitration can have disastrous consequences. As it will throw the doors wide open, for the unscrupulous parties to oust

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[36] Indus Biotech, *supra* note 1 at 2.
[37] Kohinoor Creations v. Syndicate Bank, 2005 SCC OnLine Del 650 : (2005) 2 Arb LR 324.
[38] Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission, (2014) 8 SCC 444.
[39] LIC v. D.J. Bahadur, (1981) 1 SCC 315 : AIR 1980 SC 2181; J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170.
[40] Central Bank of India v. State of Kerala, (2009) 4 SCC 94.
[41] The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993 (India).
[42] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002 (India).

arbitration agreements by dressing up vexatious applications under the Code. Identifying this fear, the Bombay High Court in Rakesh Malhotra v. Rajinder Kumar Malhotra[43] addressed the responsibility of courts to weed out vexatious and mala fide applications dressed up in non-arbitrable subject matters to oust arbitration agreements. However, in *Indus Biotech,* the SC seems to have lost its way, leaving the arbitration regime susceptible to tactics of unscrupulous parties.

C. Misreading "Default"

Apart from striking a blow to the arbitration regime, the court also created a gaping loophole by misinterpreting the term *"default"* as defined in the Code. The Hon'ble Supreme Court while considering the issues held that non-payment of dues in the present case cannot be classified as default till the dispute between the parties concerning terms of payment is resolved.[44]

This view adopted is contrary to the statutory provisions which define default as non-payment of *debt* that has become due and payable under the law.[45] Further, the Code defines *"debt"*as a liability or obligation in respect of a claim which is due.[46] A *"claim"* is defined in Section 3(6) of the Code as a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured.[47]

Hence the combined reading of the above-mentioned provisions points to the conclusion that even disputed claims can form the basis of default in the Code, for which CIRP can be initiated by a financial creditor. This intention was also identified in Innoventive Industries Ltd. v. ICICI Bank,[48] the first judgment which dealt with the Code.

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[43] Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288.
[44] Indus Biotech, *supra* note 1 at 2.
[45] Insolvency & Bankruptcy Code, 2016, § 3(12), No. 31, Acts of Parliament, 2016 (India).
[46] Insolvency & Bankruptcy Code, 2016, § 3(11), No. 31, Acts of Parliament, 2016 (India).
[47] Insolvency & Bankruptcy Code, 2016, § 3(6), No. 31, Acts of Parliament, 2016 (India).
[48] Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, ¶ 30 (hereinafter 'Innoventive Industries').

However, the court ignored this mandatory and swift process enshrined in the Code to introduce an unwarranted discretion on the courts to ascertain the existence of a default. This approach not only falls foul of statutory provisions but also the legal intent to reduce delays in the process and increasing uncertainty in the process. It is to be noted that an unwarranted implication of this judgment would be that even the parties which do not have arbitration agreements will have an option of raising the defense of dispute to derail the initiation of CIRP. Thus, the judgment erred for firstly not trying to reconcile the objectives of insolvency and arbitration regimes and secondly not interpreting the Code in line with the legislative intent.

D. Diluting the Legislative Intent Behind the Special Position of Financial Creditors

In misinterpreting the terms "financial debt" and "claim" as it appears in the code, the court contravenes the very clear legislative intent behind distinguishing the rights of operational creditors and financial creditors. The financial creditors can initiate CIRP based on the existence of a default irrespective of the presence of any dispute.[49] On the other hand, the operational creditors can initiate CIRP only in the absence of any dispute raised by the corporate debtor.[50] The reason for such difference has been observed in Swiss Ribbons.[51] The Hon'ble Supreme Court observed that financial creditors are engaged in assessing the viability of the business from the very beginning, thus they are in a better position to identify the problems in the business and try to take corrective actions for the company.[52] Moreover, unlike operational creditors they have huge sums invested in the business, hence, they are also more impelled to restructure the business of the corporate creditors when they come across a problem in the acts of the promoter group.[53]

However, by imposing the condition on the financial creditor to prove an undisputed debt before initiating the CIRP, it has placed financial

[49] *Id.*
[50] Insolvency & Bankruptcy Code, 2016, § 9(3)(b), No. 31, Acts of Parliament, 2016 (India).
[51] Swiss Ribbons, *supra* note 5 at 28.
[52] *Id.*
[53] *Id.*

creditors on the same footing as that of the operational creditor. Thus, the judgment smudges the difference between the two classes of creditors to a vanishing point and ends this objectivity in the process of initiating CIRP for the financial creditors and replaces it with a rather vague and befuddled standard.

E. Preference Shareholders are not Creditors

As observed earlier in the article, the respondent wanted to initiate the CIRP process against the Optionally Convertible and Redeemable Preference Shares (OCRPS) assuming it to be financial debt. However, the law has been clearly laid down in Aditya Prakash Entertainment (P) Ltd. v. Magikwand Media (P) Ltd.[54] on the point that Preference Shareholders are not creditors of the company, as they can only be paid out of the company's profit[55] unlike creditors who have a right to be paid despite the profitability of the company.[56] Hence the court should have rejected the claims of the respondent in the capacity of "*financial creditors*" on this very ground, nonetheless, it glossed over a catena of contrary judgments to this effect[57] and went into the questions of conflict between arbitration and Insolvency. However, this mistake committed by the court is not our mainstay of arguments, hence, the next parts of the article will compare the position taken in the judgment with the reconciliation attempted by other common law jurisdictions such as UK and Singapore.

IV. The Position of Law in other Jurisdictions

Various jurisdictions across the globe have dealt with the conflict of centralization of dispute resolution in bankruptcy law and the party autonomy provided by arbitration law. In this section, the authors try to analyze the position of law adopted in other relevant common law jurisdictions.

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[54] Aditya Prakash Entertainment (P) Ltd. v. Magikwand Media (P) Ltd., 2018 SCC OnLine Bom 551.
[55] Companies Act, 2013, § 55, No. 18, Acts of Parliament, 2013 (India).
[56] V.V. Krishna, *supra* note 6 at 5.
[57] Anarkali Sarabhai v. Commissioner of Gift-Tax, 2001 SCC OnLine Guj 313.

Faced with the same conflict, in AnAn (Singapore) Pte. Ltd. v. VTB Bank, the Singapore Court of Appeal ruled that the alleged debtor must dispute the debt in good faith on a prima facie basis for reference to arbitration.[58] This is because, when parties agree to settle conflicts by arbitration, one party should not be allowed to override the arrangement by pursuing the other remedy for non-payment of a contested debt.

In this case, the court extensively relied on the approach in *Salford Estates (No 2) Ltd v. Altomart Ltd* adopted by the English Court of Appeal which held that the courts ought to dismiss or stay the winding-up application except in wholly exceptional circumstances.[59] These wholly exceptional circumstances included the cases where the corporate debtor raises patently superficial and futile defences to delay inevitable insolvency.[60]

In the *AnAn* Case, the court was faced with a choice among the two standards of review to assess if the parties should be referred to arbitration. While according to the "*triable issue*" standard the parties had to prove an arguable case substantially on merit to dispute the validity of the debt to refer the parties to arbitration. However, the "*prima facie*" standard merely requires the parties to establish the existence of a bona fide dispute regarding the debt and a valid arbitration agreement.

The Singapore Court of Appeal drew attention to the incoherent standard adopted to review and refer debt proceedings to arbitration.[61] While the prima facie standard was applied in ordinary litigation, the triable issue standard was applicable on insolvency applications. It was of the opinion that there is no justification to apply different standards to the same disputed debt because it encourages the tactical use of winding up application.

The Court also emphasized that the application of the triable issues standard of review violates the principle of party autonomy as it disregards any benefit that the parties sought to obtain by agreeing to

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[58] AnAn (Singapore) Pte. Ltd. v. VTB Bank, 2020 SGCA 33 (hereinafter 'Anan').
[59] Salford Estates (No. 2) Ltd. v. Altomart Ltd. (No. 2), 2015 Ch 589.
[60] *Id.*
[61] AnAn, *supra* note 58 at 63.

refer disputes to arbitration in the first place.[62] Finally, it was deemed critical to bring certainty regarding the resolution of disputes according to the agreed-upon method.[63]

The court in this case was faced with the issue of possible abuse of lower review standards to buy time and delay inevitable insolvency. To render such objectives unobtainable the court held that the bonafide of the disputes raised by a corporate debtor is to be scrutinized.[64] Accordingly, the referral of winding-up applications to arbitration is not to be adopted as a default rule. In a pertinent observation, the court held that any possible misuse of the prima facie standard must be contrasted with the real likelihood of misuse by corporate creditors unilaterally choosing a winding-up application to bypass the obligation to refer the dispute to the arbitration.[65]

The judgment in *AnAn* endorsed the legislative policy to arbitrate the dispute between the parties before initiating insolvency proceedings. Subsequently, it highlighted as the primary principle, the intent of the insolvency regime to enable creditors to prefer an application to wind-up companies incompetent to honor their debts where no bona fide dispute regarding the existence and quantum of debt exists.[66] In doing so it rendered unauthorized a state of affairs where the financial creditor could act without giving justifications for its inconsistent actions to the agreement. This is because in such situations the financial debtor lost their status as a rights-bearing entity and became subject to the whims of the financial creditor pending the dispute.

Thus, in the conflict between arbitration and insolvency, the insolvency regime does not apply until a debt is determined by arbitration. This is because the parties decided to settle disputes regarding the existence of debt itself through arbitration.

AnAn cemented the logic that a system of law instituted by parties on themselves, with the expressed purpose of resolving a debt dispute, could be applied without making an alteration to the relationship

[62] AnAn, *supra* note 58 at 82.
[63] AnAn, *supra* note 58 at 86.
[64] AnAn, *supra* note 58 at 94.
[65] AnAn, *supra* note 58 at 107.
[66] AnAn, *supra* note 58 at 89.

between an arbitration agreement and the insolvency regime. It did so by placing the autonomy at the heart of its interpretation of the applicable review standard and making the determination of debt by the agreed method, the organizing principle to determine the interplay between arbitration and the insolvency process.

V. Solutions for balancing the conflict of interests

A. Introduction of Prima Facie Standard

The earlier discussions in this article pose a very fascinating problem of how to discourage the strategic invocation of CIRP by financial creditors to subvert arbitration while maintaining allegiance to the legislative intent behind "*default rule*" enshrined in the Code. However, a solution to this conflict cannot be arrived upon without considering the interests involved in the Arbitration regime.

Arbitration agreements are binding contracts that are entered into for ousting the primary jurisdiction of the court and placing it in hands of a private adjudicatory body.[67] The effective enforcement of these agreements lies at the very bedrock of modern international commercial transactions as it maintains predictability and reinforces the trust of the investors.[68] These pivotal interests inextricably linked with our current conflict must not be glossed over.

Thus, we lean in favour of the view where this binding arbitration agreement should not be thrown out of the window merely because of the invocation of Section 7 application for initiation of CIRP under the Code. Thus, the English "*prima facie*" standard where parties are referred to arbitration except in wholly exceptional cases should be preferred. This approach strikes the perfect balance between the competing interests as it upholds the sanctity of arbitration agreements without diluting the objective "*default rule*" enshrined in the Code for cases other than arbitration, which the current judgment fails to do.[69]

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[67] Vidya Droliya, *supra* note 23.
[68] Bijoylashmi Das & Harsimran Singh, *India: Commercial Arbitration in India - An Update*, Mondaq (Jul. 12, 2021, time of access), https://www.mondaq.com/india/arbitration-dispute-resolution/284570/commercial-arbitration-in-india--an-update.
[69] Indus Biotech, *supra* note 1 at 2.

B. Fast - Track Arbitrations

Though the "*prima facie*" standard is an effective way of upholding the sanctity of arbitration agreements without diluting the objectivity of default rule in cases other than arbitration, however, it comes with its own set of concerns. Value destruction caused by inordinate delay is the stumbling block of a successful resolution process.[70] If the valuable time elapses in a prolonged arbitration process, the objective of value maximization will be defeated. Such reduction in value can occur due to a variety of reasons such as market speculation or fraudulent trading by the promoter group. Thus, the time elapsed during the arbitration should be minimized and closely monitored.

The stated problem can be addressed by taking a resort to fast-track arbitration. Fast-track arbitration is a stringent time-bound sub-system of regular arbitration which cannot be delayed due to any reason. The fast-track arbitration regime, considering time as essence, allows the consenting parties to waive the conventional procedural and technical requirements to accelerate the dispute resolution process. The process of expedited arbitration as prescribed under Section 29B of the Arbitration Act[71] prescribes mainly three stipulations which are as follows.

1. The Arbitral Tribunal consists of a sole arbitrator;
2. Waiver of formalities such as oral hearing; and
3. Compliance with a six months' timeline.

This fast-track arbitration provision is based on the mutual consent of parties providing no power to the courts to make an order for mandatory arbitration.[72] However, it is suggested that the parties can be encouraged to adopt the procedure by mutual consent under Rule 11 of the NCLT Rules which provide the tribunals with the power to do complete justice.[73] Alternatively, the legislature can also add an enabling clause to the Code empowering the tribunal to pass orders for mandatory arbitration.

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[70] Ivo Welch, Arturo Bris & Ning Zhu, *The Costs of Bankruptcy: Chapter 7 Liquidation versus Chapter 11 Reorganization*, 61 Journ. of Fin. 1253, 1275 (2006).
[71] Arbitration and Conciliation Act, 1996, § 29-B, No. 26, Acts of Parliament, 1996 (India).
[72] *Id.*
[73] National Company Law Tribunal Rules, 2016, GSR 716(E) 57.

C. Effective Implementation of Information Utilities

The problem of strategic dressing up of petition by the financial creditor in situations when the corporate debtor is financially viable can be solved by effective implementation of Information Utilities. The Code envisages Information Utility as a data repository to provide core services such as accepting and safekeeping electronic submission of financial information.[74] This information including the sum borrowed, default made, and other security interests of corporate debtors is kept and validated by Information Utility to deliver it to concerned stakeholders.[75]

The concept of Information Utility is visualized as one of the supporting pillars of institutional infrastructure under the Code as it speeds up the default authentication. The objective of proposing Information Utilities is to reduce information asymmetry and strengthen the system of credit risk assessment to empower the creditors and lenders to make informed choices. The ambitious time limit prescribed in the Code is based on the belief that relevant evidence-based information will be easily available to concerned stakeholders through Information Utility. Additionally, as evident from the observations of SC in Swiss Ribbons[76] and Innoventive Industries[77], the "default rule"which provided different standards for Financial and Operational Creditors was premised on the assumption of effective working of Information Utilities.

However, Information Utilities have been miserably failing in its duty of providing comprehensive quantity and quality of authentic records. It is a settled debate that Information Utility is only one of the designated methods of furnishing proof to the Adjudicating Authority or NCLT, to prove the existence of a financial debt that has accrued to a financial creditor.[78] In such a situation, effective implementation of this overlooked supporting institution will ensure a conducive environment

[74] Insolvency & Bankruptcy Code, 2016, § 3(9), No. 31, Acts of Parliament, 2016 (India).
[75] Insolvency & Bankruptcy Code, 2016, § 213, No. 31, Acts of Parliament, 2016 (India).
[76] Swiss Ribbons, *supra* note 5.
[77] Innoventive Industries, *supra* note 48 at 30.
[78] Univalue Projects (P) Ltd. v. Union of India, 2020 SCC OnLine Cal 1452, ¶ 76; Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, pt. III sec. 4 (Nov. 30, 2016).

for the financial creditor and Adjudicating Authority to make informed decisions quickly.

VI. Conclusion

The solutions suggested in the article conspicuously provide that the competing interests are not irreconcilable. The competing interest can be solved by implementing arbitration clauses with full effect except in exceptional circumstances where it is apparent that the invocation of arbitration is mala fide and dilatory. This provides a twin solution as it *firstly* thwarts the possibility of strategic use of arbitration to avert or delay insolvency and it *secondly* maintains the integrity of default rule in disputes between parties without an arbitration clause. However, the Hon'ble Supreme Court in *Indus Biotech* miserably fails to balance as it disturbs the integrity of the "*default rule*" and throws the door open for unscrupulous litigants to avert insolvency by raising futile defences. Thus, failing on both accounts.

Though referring the parties to arbitration may balance the competing interests between arbitration and insolvency, however, we must not lose sight of the fact that it comes with the problem of delay caused by long periods taken by the arbitration process to culminate between the parties. To resolve this issue, the authors have suggested several ways such as passing orders for fast-track arbitration and reinforcing institutional systems of the Code such as information utilities to ensure speedy adjudication of "defaults" at the stage of initiation of CIRP.