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Clean Slate: The Interface Between Arbitration and Insolvency Processes in India

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Arbitration and insolvency embody, to some extent, countervailing legal policies. Courts in many jurisdictions have grappled with the extent to which claims involving an insolvent company should be permitted to be resolved through arbitration. In the October 2023 decision of *Indian Oil Corporation Ltd v Arcelor Mittal Nippon Steel India Ltd* ("***Indian Oil***"), the Delhi High Court refused to refer claims to arbitration as they had been extinguished under a duly approved insolvency resolution plan and were therefore "non-arbitrable."

In this post, we consider the interface between arbitration and insolvency in India, in light of the *Indian Oil* judgment and other recent decisions.

Background

In 2017, Indian Oil issued a notice of arbitration against Essar under a gas supply agreement ("**GSA**"). Around the same time, some of Essar's creditors initiated insolvency proceedings in the National Company Law Tribunal ("**NCLT**") under India's Insolvency and Bankruptcy Code ("**IBC**"). Essar notified Indian Oil of the insolvency and of the NCLT's declaration of a moratorium suspending all proceedings against Essar.

The NCLT-appointed resolution professional invited claims against Essar by all interested parties. Indian Oil filed a claim of approximately USD 450 million. The resolution professional admitted the claim at a notional value of INR 1 (approximately USD 0.012) to ensure Indian Oil's participation in the insolvency process. The remaining amount was not admitted because of the pending dispute regarding the claim.

A resolution plan was approved by the Committee of Creditors ("**COC**") and the NCLT, which provided for Essar's acquisition by Arcelor Mittal and declared that claims against Essar were extinguished in the manner set out in the plan.

Indian Oil and other creditors appealed the plan to the National Company Law Appellate Tribunal ("**NCLAT**"), which modified the plan to "safeguard" the rights of the appellant creditors.

The COC appealed to the Supreme Court, which set aside the NCLAT judgment, highlighting the importance of the "clean slate" doctrine under the IBC. As discussed below, under this doctrine the

approval of a resolution plan extinguishes claims against the corporate debtor, thus enabling the successful resolution applicant to start afresh without being subject to unresolved claims.

The Delhi High Court Judgment

Following the Supreme Court's decision, the resolution plan was implemented and Arcelor Mittal acquired Essar in 2019.

In 2021, Indian Oil pursued claims against Arcelor Mittal for amounts allegedly owed under the GSA, now amounting to approximately USD 1.4 billion. Arcelor Mittal denied liability and refused to participate in arbitration. Indian Oil approached the Delhi High Court to constitute an arbitration tribunal.

The Delhi High Court identified two fundamental questions:

1. Whether approval of the resolution plan had extinguished all claims that Indian Oil could pursue against Arcelor Mittal; and
2. Whether approval of the resolution plan rendered the disputes sought to be referred to arbitration non-arbitrable.

- **The Clean Slate Doctrine**

Under the IBC, one of the principal legislative objectives is to rescue the corporate debtor as a going concern. To this end, the Supreme Court held in its decision setting aside the NCLAT findings that a resolution plan accepted under the IBC must operate as a "clean slate," such that the successful resolution applicant starts afresh and is not thrown into uncertainty by undecided claims which would render the resolution plan unworkable.

Applying this jurisprudence, the Delhi High Court emphasised the importance of the successful resolution applicant taking over the corporate debtor without the uncertainty posed by unresolved claims. In light of the Supreme Court's decision, the Delhi High Court held that a "seal of finality" was attached to the approval of the resolution plan.

- **Through the Eye of the Needle: Non-Arbitrability**

On non-arbitrability, the Delhi High Court applied the "eye of the needle" test, according to which a court's pre-referral jurisdiction involves strictly limited scrutiny. When considering a petition under section 11 of India's Arbitration and Conciliation Act 1996 for the constitution of an arbitral tribunal (or the appointment of an arbitrator, as the case may be), a court should confine itself to examining the existence of an arbitration agreement, and matters which are contested or even arguable should be left to the arbitral tribunal to determine. A court should only refuse reference to arbitration where an arbitration agreement is non-existent or a claim is manifestly unenforceable in law (*NTPC Ltd v SPML Infra Ltd*, 2023 SCC Online SC 389).

Applying these principles, the Delhi High Court held that Indian Oil's claim *was* manifestly non-arbitrable. Reference to arbitration would "amount to rewriting the clean slate" upon which Arcelor Mittal took over Essar and would effectively reopen the resolution plan, which was impermissible in light of the finality accorded to it by the Supreme Court.

Key Takeaways

The Delhi High Court's decision clarifies that claims against an insolvent debtor are non-arbitrable once a resolution plan is approved. This reflects the primacy of the insolvency resolution process, which caters to the wider interest of all creditors, over an arbitral dispute between one creditor and the insolvent debtor.

Looking beyond India, Singapore follows a similar approach: its Court of Appeal has held that courts should treat disputes which arise upon the onset of insolvency, due to the statutory insolvency regime, as non-arbitrable. Even for disputes that stem from pre-insolvency rights and obligations, arbitration agreements should not be enforced against the liquidator where they affect the substantive rights of other creditors, to protect the policy aims of the insolvency regime (*Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21, [45]–[50]).

UK courts have displayed greater readiness to find certain insolvency disputes arbitrable, particularly in the context of foreign insolvency proceedings. In several decisions, the English High Court has looked beyond a claim's general characterisation as an insolvency claim and deemed the dispute arbitrable. For example, in *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* [2020] EWHC 2483 (Comm), the English High Court held that where 'insolvency claims' seek relief which an arbitration tribunal could grant, and do not engage the interests of third parties (save insofar as any creditor of an insolvent company will benefit from its success in arbitration), those claims are arbitrable. According to the English High Court, there was no sufficient countervailing public policy arising from the mere fact that the claims were avoidance claims in a foreign bankruptcy to override the "clear policy of English law of upholding arbitration agreements."

Creditors involved in disputes with counterparties in India facing financial difficulties should carefully consider their strategy. The aim should be to promptly crystallise their claim and actively participate in the insolvency process through negotiations with the resolution professional and coordination with other creditors, to ensure that their claim is recorded in the resolution plan itself. Any claims not recorded in the resolution plan are likely to be treated as extinguished, in keeping with the "clean slate" doctrine.

In terms of arbitration strategy, subject to the *lex arbitri*, creditors may consider emergency arbitration mechanisms or applying for partial or interim awards which they might be able to utilise as evidence of a crystallised debt with the resolution professional or the NCLT at an early stage.

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