DISPUTE RESOLUTIONS

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Message to the Readers

The legality of modifying arbitral awards

Can an arbitral award be modified by civil courts?

Without directly answeringthat question, arbitral awards have been modified by civil courts right from the level of the district courts before which Section 34 applications to set aside awards are filed and up to the Supreme Court. In ***McDermott International Inc. vs. Burn Standard Co. Ltd., (2006) 11 SCC 181***, the Supreme Court had held that civil courts had no power to modify arbitral awards. However, this judgment as well as the specific provisions of Section 34 of the Arbitration and Conciliation Act, 1996 have only been observed in their breach. Thankfully, in the recent judgment of the Supreme Court in ***The Project Director National Highways vs M. Hakeem and another [2021 (4) CTC 582***], in addition to emphasizing that civil courts have no such power to modify, the Court has also come out with a clear declaration of law on the issue. In this case, the Supreme Court held:

> *"40. It can therefore, be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is co- terminus with the 'limited right', namely, either to set aside an awardor remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."*

> *"41. A look at the Arbitration Acts of England, the United States, Canada, Australia and Singapore also lead to the same conclusion. In each of those legislative measures, there are express provisions which permit the varying of an award, unlike Section 34 of the present Act."*

> *"46. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to bedone. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."*

A little earlier in the judgment, the Court has observed in Para 23 as follows: "*23. As a matter of fact, the point raised in the appeals stands concluded in McDermott International Inc. vs. Burn Standard Co. Ltd., (2006) 11 SCC 181, where this Court held: -*

> *"51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter ofchallenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal there against was provided for under Section 37 of the Act.*
>
> *52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

Importantly, the Court has noted that in all earlier cases where the Supreme Court has modifiedawards the Supreme Court has held that such modification has been on account of exercise of powers under Article 142 of the Constitution, which power obviously other civil courts including the High Court cannot exercise. Such power has been exercised in ***Tata Hydro-Electric Power Supply Co. Ltd. vs. Union of India, (2003) 4 SCC 172,Krihna Bhagya Jala Nigam Ltd., vs Friends Coal Carbonisation (2007) 2 SCC 720, etc.***

Interestingly, such a position in law has been recognised by the Madras High Court even in 2007 in ***Central Warehousing Corpn. vs. A.S.A. Transport, 2007 SCC OnLine Mad 972*** where it had specifically considered the judgment of the Supreme Court in McDermott (supra) and held: -

> *"18. Though we are not in a position to concur with the reasoning of the learned single Judge, we are in complete agreement with the ultimate order of the learned single Judge in setting aside the award. However, the further direction given by the learned single Judge directing the appellant to appoint an arbitrator at Chennai and for conducting the arbitration are to be set aside as it cannot be given as an order of the Court. Useful reference can be had to the judgment of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard co. Ltd., (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. Hence, in an application taken out under section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired. 19. Therefore, the order of the learned single judge setting aside the award is confirmed for the reasons given by us. However, the other observations of the learned single Judge are set aside. The issue is left open to the parties to proceed further. The appeal is disposed of in the above terms. However, there is no order as to costs. The connected miscellaneous petition is closed."*

The judgment of the Supreme Court in ***Project Director National Highways vs. M.Hakeem 2021 (4) CTC 582*** will hopefully infuse clarity to this vexed issue in arbitration law.

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ALL THAT IS NOT RIGHT WITH INDUS BIOTECH VS. KOTAK | INDUS BIOTECH (P) LTD. V. KOTAK INDIA VENTURE (OFFSHORE) FUND: A CASE COMMENT[1]

*by Renu Gupta**

Introduction

1. This article analyses the following issues arising from the Supreme Court ("**SC**") decision in ***Indus Biotech Pvt. Ltd.* vs. *Kotak India Venture (Offshore) Fund***[1]:
   (i) Should the adjudicating authority first decide the application under Section 8 of the Arbitration and Conciliation Act, 1996[2] ("**the A&C Act**"), before deciding the application under Section 7 of the Insolvency and Bankruptcy Code, 2016[3] ("**IBC**")?
   (ii) What should be the inquiry of National Company Law Tribunal ("**NCLT**") under Section 7 IBC?
   (iii) Was the procedure for appointment of Arbitral Tribunal followed?

Relevant facts

2. 4 entities of Kotak Fund ("**Kotak**") entered into 4 separate share subscription agreements ("**SSSA**") with Indus Biotech Private Limited ("**Indus**").

3. Kotak subscribed to certain equity shares and optionally convertible redeemable preference shares ("**OCRPS**") of Indus. According to Kotak, (i) Schedule J of SSSA specified that OCRPS were issued for a term of 20 years unless previously redeemed and cancelled or converted; (ii) Kotak also had an option to convert or seek redemption of OCRPS; and (iii) SSSA specified that at the end of the period specified, investment of Kotak is redeemable at internal rate of return ("**IRR**") of 30% and if not redeemed, it will be treated as debt. Indus of course advanced a different interpretation of these terms.

4. According to Kotak, Indus failed to provide Kotak an exit by an agreed date by qualified initial public offering ("**QIPO**"). Therefore, Kotak exercised its right of redemption and asked Indus to make payment of Rs 367 crores as the redemption value of OCRPS.

5. Indus did not make the payment. According to Kotak, as per the calculation and conversion formula to be followed while converting OCRPS into equity shares, Kotak should get 30% of the total paid-up share capital of Indus; while as per Indus, it should only be 10%.

6. On 16-8-2019, one of the four entities of Kotak filed a petition before NCLT Mumbai, under Section 7[4] IBC, as a financial creditor claiming a default in payment of debt by Indus, a financial debtor, to initiate corporate insolvency resolution process ("**CIRP**") against Indus.

7. On 20-9-2019, Indus sent an arbitration notice to Kotak seeking to invoke arbitration under all the 4 SSSA. Kotak set up a defence that the notice was defective because (*i*) under the arbitration clause, Indus had no right to appoint an arbitrator; and (*ii*) there were 4 separate agreements providing for constitution of separate Arbitral Tribunal.

8. On 6-11-2019, Indus filed an application, in the pending Section 7 IBC proceedings, under Section 8 of the A&C Act, to refer the dispute to arbitration. Indus had also filed an application seeking dismissal of Section 7 IBC proceedings as not maintainable.

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[1]This Article was first published in the SCC Online Blog and can be accessed at: https://www.scconline.com/blog/post/2021/06/12/indus-biotech-v-kotak/

Proceedings before NCLT

9. The impugned order[5] of NCLT allowed Indus' application under Section 8 of the A&C Act and dismissed Kotak's Section 7 IBC application as a corollary.

10. From the orders of NCLT, it is apparent that NCLT heard and decided the Section 8 application first and did not meaningfully engage or decide the Section 7 IBC application on merits. This article discusses why this approach is problematic.

11. Kotak's case before NCLT was:
    (i) Existence of arbitration clause is not relevant, not a factor and cannot affect proceedings under Section 7 IBC;
    (ii) Section 7 IBC deals with subject-matter of insolvency which is non-arbitrable and in rem; and
    (iii) Non-payment of redemption value of OCRPS is a default in payment of debt by Indus and, therefore, NCLT should admit the application under Section 7 IBC.

12. Indus' response was:
    (i) Dispute pertains to valuation of Kotak's OCRPS, which is arbitrable;
    (ii) Indus is a debt-free, profitable company and is not in need of resolution; and
    (iii) Investment of Kotak was in the share capital of Indus, by preference shares and Kotak is not a financial creditor.

13. Without addressing the issue of maintainability i.e., whether Kotak is a financial creditor or whether there is a debt, NCLT Mumbai allowed[6] the application under Section 8 of the A&C Act. While allowing the application, NCLT made observations that:
    (i) Indus is a solvent, debt-free and profitable company and pushing a solvent company into insolvency is neither meaningful nor desirable at that stage;
    (ii) Dispute between the parties is regarding the valuation of OCRPS and parties must make an attempt to Reconcile the differences and invocation of arbitration is justified; and
    (iii) Petition for appointment of arbitrator filed by Indus is pending before the SC.

Proceedings before the Supreme Court

14. There were 2 proceedings before the SC: (*i*) petition by Indus, common for the 4 SSSA, under Section 11[7] of the A&C Act for appointment of an Arbitral Tribunal; and (*ii*) special leave petition (and not appeal) by Kotak against the NCLT order. The SC appointed an Arbitral Tribunal and held:
    (i) Mere filing of an application under Section 7 IBC does not make the proceeding in rem. It becomes in rem only on the date of admission; and
    (ii) IBC overrides all other laws.

15. Therefore, if there is an application under Section 8 of the A&C Act pending in a Section 7 IBC application which has not been admitted, the adjudicating authority will first decide Section 7 IBC application and ascertain if there is any default by the financial debtor. This will ensure that mere filing of an application under Section 8 of the A&C Act will now allow corporate debtor to delay the process. There will be no independent consideration of Section 8, A&C Act application dehors the Section 7 IBC application.

16. The SC justified the NCLT's approach where it allowed Section 8, A&C Act application and as a corollary rejected Section 7 IBC application, in the facts and circumstances of the case and "construed in the reverse"[8].

Should adjudicating authority first decide the application under Section 8 of the A&C Act, before deciding Section 7 IBC application?

17. The SC held that if there is an application under Section 8 of the A&C Act pending in a Section 7 IBC application which has not been admitted, the adjudicating authority will first decide the Section 7 IBC application and ascertain if there is any default by the financial debtor. However, in the facts of ***Indus Biotech[9]***, the SC does not meaningfully engage with this issue.

18. There was an application filed by Indus challenging the maintainability of Section 7 IBC proceeding. However, NCLT considered the Section 8, A&C Act application. This is evident from the order of NCLT.

19. NCLT ought to have first decided whether it would admit Section 7 IBC proceeding. If it chose to admit it, the proceeding would become in rem and there would be no occasion for a pending Section 8, A&C Act application to survive or a future application to be maintainable. However, if it found that there is no default and hence no trigger for Section 7 IBC, there would have been no occasion to decide Section 8, A&C Act application as the main proceeding had terminated. Therefore, it is not easy to reconcile the conclusion of SC to uphold NCLT order of allowing Section 8, A&C Act application even after dismissing Section 7 IBC proceedings.

20. The scope and inquiry of a Section 7 IBC application is different from the scope and inquiry of a Section 8, A&C Act application. The presence of an arbitration clause and existence of a dispute is relevant for the purpose of Section 9[10] IBC where an operational creditor approaches the court. It will be a bar to initiation of corporate insolvency resolution process. However, not in the case of Section 7 IBC. This is the main difference between Section 7 and Section 9 IBC.

21. By deciding Section 8, A&C Act application first, NCLT did not actually conduct a proper inquiry under Section 7 IBC. Its inquiry was primarily directed to Section 8 application with a perfunctory mention of the default. This is evident from:
    (i) NCLT recorded submissions of Indus in the Section 8 application first, followed by submissions of Kotak's counsel.
    (ii) In para 3.1 of NCLT order[11], Kotak submitted that if Section 8 application is dismissed, Section 7 IBC matter should be heard on merits.
    (iii) In para 3.8[12], the order states "the principal argument in the present IA...."
    (iv) In para 5.2[13] where NCLT records its findings, "[a]t the outset, we must say that the subject-matter of this IA seeking a reference to arbitration in a petition filed under Section 7 of the IBC is something that is res integra".
    (v) In para 5.5.[14], the question framed was "[W]ill the provisions of the Arbitration and Conciliation Act, 1996 prevail over the provisions of Insolvency and Bankruptcy Code, 2016?".

22. The NCLT order extracts Section 238[15]IBC and wrongly concludes in paras 5.10 and 5.11 that the A&C Act will prevail over IBC. Apparently, the NCLT decided the Section 8, A&C Act application on this premise. This is contrary to law.

23. Even Kotak in its written submissions before the SC argued that it was not heard on merits of Section 7 IBC by NCLT. This should have weighed with the SC. If NCLT did not hear the parties on merits of Section 7 IBC proceedings, the SC could have considered remanding the matter back to NCLT.

What should be the inquiry of NCLT under Section 7 IBC?

24. The inquiry of NCLT ought to have been:
    (i) Is Kotak a financial creditor?
    (ii) Whether OCRPS constitute financial debt?
        (a) Whether OCPRS issued with IRR of 30% constitute disbursal against consideration for time value of money as per Section 5(8)[16]IBC?
        (b) Whether OCPRS constitute "any amount…having commercial effect of a borrowing" under Section 5(8)(*f*) IBC?
        (c) Whether a shareholder can be a debtor and what is the nature of OCRPS?
    (iii) Whether there is a default?
    (iv) If Section 7 IBC application is allowed or rejected, what should be the fate of Section 8, A&C Act application? not the reverse.

25. Both NCLT and the SC proceeded on the understanding/assumption that Kotak is a financial creditor, to whom financial debt is due, but go on to find that there is no default yet. Both NCLT and SC did not engage in a meaningful analysis of default. There is also no analysis or finding of debt.

26. This issue was raised in written submissions before the SC, but the SC in para 36[17] observed that:
    ***36*…"[t]he contention as to whether payment of investment in preferential shares can be construed as financial debt was raised in the written submissions. However, we have not adverted to that aspect since the same was not the basis of the impugned order passed by the adjudicating authority."**

27. This issue should have formed the basis of the proceedings before NCLT. However, in para 5.5, the question framed by NCLT was "[W]ill the provisions of the Arbitration and Conciliation Act, 1996 prevail over the provisions of Insolvency and Bankruptcy Code, 2016?".

28. If there is no financial debt, Kotak could not have maintained Section 7 IBC proceedings. The application should have been rejected and there should have been no occasion to even examine Section 8 application. According to Kotak, non-payment is a default which should trigger Section 7 IBC, while according to Indus payment cannot be made till the conversion formula calculation is finalised, hence, no default. Kotak relied on Clauses 5.1 and 5.2 of Schedule J to SSSA to argue that parties had agreed that redemption value shall constitute a debt outstanding by Indus to Kotak.

29. NCLT in allowing the Section 8, A&C Act application was influenced by the following factors:
    (i) Indus is a solvent, debt-free and profitable company and pushing a solvent company into insolvency is neither meaningful nor desirable at that stage;
    (ii) Dispute between the parties is regarding the valuation of OCRPS and parties must make an attempt to reconcile the differences and invocation of arbitration is justified; and
    (iii) Petition for appointment of arbitrator is pending before the SC.

30. In paras 20 and 21[18], the SC agreed that NCLT's exercise of finding no default is correct. It observed that:
(i) Yes, there is a debt including a clause in the agreement providing that redemption value shall constitute a debt;
(ii) There is a redemption date;
(iii) There were inconclusive discussions between the parties on the redemption value;
(iv) It was premature to arrive at a conclusion of default in payment of debt until the amount payable is determined; and
(v) It is not appropriate to find a default merely because Kotak made a claim as per the agreed date of redemption and filed a petition under Section 7 IBC.

Why is it not appropriate? Would a dispute between parties on the redemption value, postpone the trigger of default? The SC should have given reasons for its findings or the relevance of these questions.

31. Let us test these factors in the author's opinion, none of these are relevant for an inquiry default under Section 7 IBC proceeding:

(i) In para 27[19] of ***Monotrone Leasing (P) Ltd.*** **vs.** ***PM Cold Storage (P) Ltd.***[20], the National Company Law Appellate Tribunal ("**NCLAT**") held that inability to pay debts and committing default are two different aspects which are required to be adjudged on equally different parameters. Inability to pay debt has no relevance for admitting or rejecting an application for initiation of CIRP under the IBC.

(ii) Similarly, the SC in para 64 of ***Swiss Ribbons (P) Ltd.*** **vs.** ***Union of India***[21], observed that the legislative policy is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation.

(iii) There is no connection between the value of redemption and a finding of default. If the debt is unpaid on the due date, it is default. If the Court's reasoning is correct, a debtor has to simply create a dispute about the sum/amount to be paid and will escape Section 7 IBC.

(iv) The finding of default under Section 7 IBC is independent from the inquiry whether the subject-matter of the underlying dispute of valuation is capable of being resolved by arbitration.32. This decision is a missed opportunity for the SC to develop jurisprudence for issues like can an agreement change the nature of a security ? in this case the agreement specified that OCRPS will constitute debt upon redemption; and whether preference shares/OCRPS constitute financial debt under Section 7 IBC.

Was the procedure for appointment of Arbitral Tribunal followed?

33. There are 2 issues here. First, Section 11 petition was filed by Indus but as per SSSA, Indus did not have a right to nominate an arbitrator. The agreed procedure had not failed, and Section 11 petition was premature. On this issue, the SC treated the affidavit by promoters (only promoters and Kotak had a right to nominate arbitrator), who had the right to nominate arbitrator, as sufficient to constitute an Arbitral Tribunal. The problem with this is that Indus had no locus standi to file Section 11 petition. Kotak argued that the arbitration notice is defective, and the petition is not in accordance with the arbitration agreement. This was an opportunity for the Court to decide whether Section 11 can be invoked by a party which does not have a right to nominate an arbitrator under the agreement. The author has not come across any decision on this issue. Additionally, such appointment of Arbitral Tribunal is contrary to settled position of law that procedure for appointment has to be followed strictly and appointment which is not in accordance with the procedure is void.

34. Second, the SC thought it was fit to consider the nature of Arbitral Tribunal, because one agreement will give rise to ICA and other three to domestic arbitration. However, after flagging this issue, the SC does not meaningfully address it. In para 39[22], the SC appointed a single Arbitral Tribunal with same members but separately constituted for each agreement and left it open to the Tribunal to work out the modalities of conducting ICA separately and clubbing the remaining domestic arbitrations.

35. In the author's view, the SC could have considered clarifying whether this will be a composite arbitration which will result in 1 award or 4 arbitrations under 4 agreements with 4 separate awards. In absence of this, Kotak is likely to seek 4 separate awards from the Tribunal and Indus will seek a composite common award.

Conclusion

In the author's view, the order of NCLT is not an order on merits of the Section 7 IBC application. If existence of dispute ~~is not an inquiry for a Sectio~~n 7 IBC proceeding and Section 7 IBC application has to be considered first, the SC should have considered setting aside the impugned order and remanded the matter to NCLT for deciding the Section 7 IBC proceedings on merits. The Court should, if an opportunity arises, consider clarifying that NCLT cannot decide Section 8, A&C Act application first and dismiss Section 7 IBC proceeding as a corollary or consequence.

[1] 2021 SCC OnLine SC 268.
[2] The Arbitration and Conciliation Act, 1996.
[3] The Insolvency and Bankruptcy Code, 2016.
[4] **7.** ***Initiation of corporate insolvency resolution process by financial creditor.*** (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority *when a default has occurred*:
Explanation. For the purposes of this sub-section, *a default includes a default in respect of a financial debt owed not only to the applicant financial creditor* but to any other financial creditor of the corporate debtor.*(emphasis supplied)*
[5] Indus BioTech (P) Ltd. v. Kotak Venture Fund, 2020 SCC OnLine NCLT 1430 [NCLT Mumbai].
[6] Ibid.
[7]<http://www.scconline.com/DocumentLink/02bfnuC4>.
[8]*Indus case*, *supra* Note 1.
"36. In that circumstance though in the operative portion of the order dated 9-6-2020 the application filed under Section 8 of the Act,1996 is allowed and as a corollary the petition under Section 7 of the IB Code is dismissed; in the facts and circumstances of the present case it can be *construed in the reverse*. Hence, since the conclusion by the adjudicating authority is that there is no default, the dismissal of the petition under Section 7 of IB Code at this stage is justified. Though the application under Section 8 of the Act, 1996 is allowed, the same in any event will be subject to the consideration of the petition filed under Section 11 of the Act, 1996 before this Court. The contention as to whether payment of investment in preferential shares can be construed as financial debt was raised in the written submissions. However, we have not adverted to that aspect since the same was not the basis of the impugned order passed by the adjudicating authority.*(emphasis supplied)*
[9] Supra Note 1.
[10]<http://www.scconline.com/DocumentLink/09ftZIDF>.
[11] "*3.1*. Mr Fredun E DeVitre, learned Senior Counsel for the respondent-financial creditor, submitted that the only issue to be decided in the present is this:
"Are the reliefs claimed in the petition capable of being referred to arbitration or being granted by an Arbitral Tribunal?"
If the answer is no, then the present IA should be dismissed, and the underlying company petition should be heard on merits."

[12] "*3.8*. The third aspect of Mr Fredun E DeVitre's argument centred on the QIPO date. He submitted that in terms of the SSPA, the date was to be December 2011 or a date which is approved by three investors. The principal argument in the present *IA* is that the respondent-financial creditor has not redeemed the OCRPS by 2011. In this regard, there was an amendment made to the SSPA in 2017, in terms of which the life of the agreement was extended by another ten years. The amendment retains the QIPO definition from the original document, since all other terms and conditions were retained. Therefore, Mr Fredun DeVitre argues, a fresh right of redemption by agreement was conferred on the respondent."*(emphasis supplied)*

[13] "*5.2. At the outset, we must say that the subject-matter of this IA seeking a reference to arbitration in a petition filed under Section 7 IBC is something that is res integra.* The facts of the case are, however, undisputed, and therefore, we seek to address the points of law that need to be addressed. In our endeavour to arrive at a decision, we have tried to be guided by the decisions of the constitutional courts under other laws, and the underlying reasons in arriving at those decisions. The case law cited by both senior counsel is a good starting point in this quest."*(emphasis supplied)*

[14] Be that as it may, the question that really needs to be answered is this: *Will the provisions of the Arbitration and Conciliation Act, 1996 prevail over the provisions of the Insolvency and Bankruptcy Code, 2016?* If so, in what circumstances?

[15]Section 238 IBC.

[16] Section 5(8) IBC.

[17]*Indus case*, *supra* Note 1. "*36*. In that circumstance though in the operative portion of the order dated 9-6-2020 the application filed under Section 8 of the Act, 1996 is allowed and as a corollary the petition under Section 7 of the IB Code is dismissed; in the facts and circumstances of the present case it can be construed in the reverse. Hence, since the conclusion by the adjudicating authority is that there is no default, the dismissal of the petition under Section 7 of IB Code at this stage is justified. Though the application under Section 8 of the Act, 1996 is allowed, the same in any event will be subject to the consideration of the petition filed under Section 11 of the Act, 1996 before this Court. *The contention as to whether payment of investment in preferential shares can be construed as financial debt was raised in the written submissions. However, we have not adverted to that aspect since the same was not the basis of the impugned order passed by the adjudicating authority*."*(emphasis supplied)*

[18]*Indus case*, *supra* note 1, paras 20 and 21.

"*20*. Therefore, in a fact situation of the present nature when the process of conversion had commenced and certain steps were taken in that direction, even if the redemption date is kept in view and the clause in Schedule J indicating that redemption value shall constitute a debt outstanding is taken note ; when certain transactions were discussed between the parties and had not concluded since the point as to whether it was 30 per cent of the equity shares in the company or 10 per cent by applying proper formula had not reached a conclusion and thereafter agreed or disagreed, *it would not have been appropriate to hold that there is default and admit the petition merely because a claim was made by Kotak Venture as per the originally agreed date and a petition was filed. In the process of consideration to be made by the adjudicating authority the facts in the particular case are to be taken into consideration before arriving at a conclusion as to whether a default has occurred even if there is a debt in strict sense of the term, which exercise in the present case has been done by the adjudicating authority.*

21. In such circumstance if the adjudicating authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit-making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the corporate insolvency resolution process and get entangled in a proceeding with no point of return. Therefore, the adjudicating authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. Dr Singhvi, however contended, that when it is shown the debt is due and the same has not been paid the adjudicating authority should record default and admit the petition.

He contends that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the adjudicating authority is appealable to the NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. *We note, it cannot be in dispute that so would be the case even if the adjudicating authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to the NCLAT and the Supreme Court where the correctness in that regard also will be examined."(emphasis supplied)*

[19] 2020 SCC OnLine NCLAT 581. "*27.* We are bound to emphasise that a presumption cannot be drawn merely on the basis that a company, being solvent, cannot commit any default. As observed in financial and economic parlance, the inability to payoff debts and committing default are two different aspects which are required to be adjudged on equally different parameters. *Inability to pay debt has no relevance for admitting or rejecting an application for initiation of CIRP under the IBC."(emphasis supplied)*

[20]2020 SCC OnLine NCLAT 581. Civil appeal and a review both were dismissed by the Supreme Court.

[21] (2019) 4 SCC 17

"*64*. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(*e*) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. *Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation.* Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy."*(emphasis supplied)*

[22]*Indus case*, *supra* Note 1. "*39*. A perusal of the arbitration agreement indicates that the arbitration shall be held at Mumbai and be conducted by three arbitrators. For the purpose of appointment KIVF I, KEIT and KIVL are to jointly appoint one arbitrator and the promoters of Indus Biotech Private Limited, to appoint their arbitrator. In the second agreement dated 20-7-2007, "KMIL" as the investor is on the other side. In the third agreement dated 20-7-2007, "KIVFI" as the investor is on the other side and in the fourth agreement dated 9-1-2008 it has the same clause as in the first agreement. The two arbitrators who are thus appointed shall appoint the third arbitrator who shall be the Chairperson. Recital (*c*) in the different agreements though refers to each of the entity in Kotak Investment Venture and amount invested in shares is referred to, it is provided therein that the equity shares and preference shares subscribed by KMIL, KIVF I, KEIT and KIVL are hereafter collectively referred to as the "financial investors shares". *If the said aspect is taken into consideration keeping in view the nature of the issues involved* being mainly with regard to the conversion of preference shares into equity shares and the formula to be worked thereunder, such consideration *in the present facts can be resolved by the Arbitral Tribunal consisting of same members but separately constituted in respect of each agreement. It will be open for the Arbitral Tribunal to work out the modalities to conduct the proceedings by holding separate proceedings in the agreement providing for international arbitration and by clubbing the domestic disputes.* All other issues which have been raised on merits are to be considered by the Arbitral Tribunal and therefore they have not been referred to in this proceedings."*(emphasis supplied)*

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TRACING THE ASSETS | KEY FOR ENFORCEMENT OF AWARDS

by Binsy Susan, Neha Sharma** and Prabhakar Yadav****

I. Introduction

After what is usually a long and arduous battle, an award holder may feel a sense of respite in arbitration disputes. Naturally. But the real challenge often only begins once the award has been issued and the holder seeks execution of the arbitral award. It is unlikely that the losing party will readily pay the dues, pursuant to the arbitral award. The losing party will ordinarily challenge the arbitral award before a Court and also seek a stay on the execution of the arbitral award. It is also not unusual for the losing party to attempt stripping or diluting its assets so as to make its assets beyond the reach of the award holder thus, preventing the award holder from effective relief, despite ostensibly being successful in the arbitration proceedings. Therefore, as a matter of strategy, it is key for parties to make attempts to secure against dissipation of assets by the opposite party.

Asset tracing is an effective tool and a possible solution to this problem a process of identifying the location and nature of assets held by the losing party that may be utilised for satisfaction of the award. However, given that a number of companies operate through complex corporate structures and engage in cross-border transactions, it may be difficult for anaward holder to identify assets of the losing party without reliable information. This article discusses the possible methods of identifying and tracing assets of a losing party as well as the possible remedies available to anaward holder in the enforcement proceedings.

II. Identifying Assets

In case of companies, publicly available corporate and regulatory filings, are a potent tool to identify target assets of the losing party/target company. Information filed by the company itself is often the best information and a good starting point for asset tracing, especially in complex international commercial arbitration cases.

Significantly, in the case of conglomerates and group holdings, it is not uncommon for the assets to be held in the name of shell companies or private trusts, such that it becomes difficult to identify the assets of a company. Similarly, in case of multinational companies, the assets of a company may be spread across geographic borders or offshore locations. To overcome such limitations, an award holder may employ professional services of asset tracing agencies to help with piercing the corporate veil. Asset tracing agencies use sophisticated techniques for following complex money trails and un ravelling corporate structures, with the aid of forensic audits and investigations to track down potential assets for satisfaction of the arbitral award.

III. Getting behind the Assetin Enforcement Proceedings

In India, enforcement of domestic arbitral awards is governed by Part I of the A&C Act. In terms of Section 36 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**"), once the prescribed time limit (i.e. 90 days) for making an application to set aside the **arbitral** award has expired, or such application (having been made) has been rejected, the arbitral award may be enforced as if it were a decree of the Court. A domestic arbitral award can be enforced in accordance with the conditions laid down in Section 36 of the A&C Act, read with Order XXI of the Code of Civil Procedure, 1908 ("**CPC**") in the execution proceedings. Enforcement of foreign arbitral awards (rendered under the New York Convention and Geneva Convention), is governed by Part II of the A&C Act. Sections 44 to 52 of the A&C Act deal with the enforcement of foreign awards under the New York Convention.

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To commence enforcement proceedings, an award holder must satisfy two conditions: *First*, the foreign country must be a signatory to the New York Convention; *Second*, it must also be notified as a reciprocating territory by the Central Government. Upon satisfaction of these two pre-conditions, an award holder may move an application before the appropriateCourt/ High Court under Section 47 of the A&C Act for enforcement of the arbitral award. The applicant is also required to mandatorily produce before the Court: (a) duly authenticated original arbitral award or a copy thereof; (b) original agreement for arbitration or a duly certified copy thereof; and (c) evidence(s) regarding the arbitral award being a foreign award.A counterparty is entitled to challenge a foreign award under Section 48 of the A&C Act, in line with Article V requirements of the New York Convention. In the event the opposing party is unsuccessful in its objections, the foreign award will become enforceable and will be deemed to be a decree of the domestic Court per Section 49 of the A&C Act.

Likewise, foreign awards rendered under the Geneva Convention may be enforced in India, in terms of Sections 53 to 60 of the A&C Act. By and large the conditions / groundsfor enforcement and challenge are similar to the ones applicable to awards rendered under the New York Convention. But the Court under the Geneva Convention may also refuse to enforce the arbitral award if there is an additional ground available to the counterparty under the law of seat of the arbitration to contest the arbitral award. If none of the objections fructify, the foreign award will be enforceable and deemed to be a decree of the domestic Court as per Section 59 of the A&C Act.

In execution proceedings, an award holdermay seek assistance of the Court in tracing the potential assets for satisfaction of the decree. An application may be filed under Order XXI Rule 41(2)of the CPC to compel the losing party to file an affidavit accurately disclosing its assets for the purpose of execution proceedings (Form 16A of Appendix E along with Annexures A1, B1, C1 depending on whether the debtor is an individual or a company/trust/partnership firm). Failure to comply with any such directions may invite severe penalties, such as detention in civil prison for up to 3 months. Further, furnishing false information could invite criminal prosecution under Section 209 of the Indian Penal Code ("**IPC**") for committing perjury.

The Hon'ble Delhi High Court in ***M/s Bhandari Engineers & Builders Pvt Ltd vs. M/s. Maharia Raj Joint Venture***, byits recent order dated 24.06.2021,[4] directed the judgement debtors to furnish a comprehensive description of their assets and statements of income in an affidavit filed under Order XXI Rule 41(2) within 30 days. If a ground for lifting the corporate veil is made out, the Court may direct the Directors / Promoters of a judgement debtor to disclose their personal assets and income.[5] To that end, wherever necessary, the Court may order interrogatories, discovery, production of document or any evidence to corroborate the claims made in an affidavit as per Section 30 of the CPC.[6] It may further order examination of judgement debtor in the Court to evaluate statements made in the affidavit, in terms ofSection 165 of the Indian Evidence Act, 1872 (**"Evidence Act"**).[7]

Based on these affidavits and evidences gathered, the Court maypass an injunction order under Order 39 Rule (1) and (2), popularly known as Mareva injunction,[8] *if there is a possibility that the losing party may dissipate assets before judgment.* If the losing party fails to comply with such an injunction order granted under Order 39 Rule (1) and (2), the Court may issue an order attaching property and order detention of the losing party in civil prison for a period up to three months, in terms of Order XXXIX Rule 2A (1) of the CPC. The above guidelines apply to all kinds of execution proceedings commenced under the CPC, within the territorial jurisdiction of the Delhi High Court, including the Section 36 execution proceedings instituted under the A&C Act.[9]

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[4] Ex.P. 275/2012 & E.A. 193/2020.
[5] Id at ¶ 69.
[6] Id at ¶ 72-73.
[7] Id at ¶ 74.
[8] *Mareva Compania Naviera SA v International Bulkcarriers SA*, [1980] 1 All ER 213.
[9] Supra (n 1) at ¶ 82.

In sum, the purpose of Court-ordered disclosure of assetsensures that the fruits of the arbitral award are not frustrated due to evasive behaviour of the judgement debtor, in shielding its assets.

IV. Worldwide Freezing Order

Once assets of the losing party have been identified, steps may be taken towards preservation of those assets to prevent any dissipation by the losing party. Given that the substantive law and procedural rules vary from jurisdiction to jurisdiction, advice should be sought from local counsel on the available conservatory measures in each jurisdiction where the target assets are located.

Enforcement proceedings should be commenced in a jurisdiction where the target assets are located. However, depending on the circumstances anaward holdermay have to seek enforcement proceedings in multiple jurisdictions. To fulfil that objective, the party may consider obtaining a worldwide freezing order ("**WFO**") to prevent dissipation of assets. WFO will prohibit the losing party from dissipating any of its assets located worldwide. The losing party may also be directed to disclose the location, nature and value of all its assets by way of an affidavit. If the losing party still makes any attempt to sell or dissipate its assets, it could be held liable for contempt of Court.

While WFOs are not common in most jurisdictions, including India, in some arbitration-friendly jurisdictions (for example, Singapore, U.K. and Hong Kong), Courts do grant a WFO on worldwide assets of the losing party, provided it meets three conditions:[10] *First*, that the award-holder has a good arguable case; *second*, there lies a real risk that the assets will be dissipated or disposed off, which may frustrate the outcome of the award; and *third*, granting WFO is just and convenient in the facts and circumstances of the case.

If the WFO is granted, it can be enforced in other reciprocal territories, which recognise the decree passed by these foreign Courts through a process called *exequatur*. In India, that would be akin to enforcing a decree of a domestic Court: as India has notified these three leading arbitration friendly jurisdictions Singapore, U.K. and Hong Kong as a reciprocating territory under Section 44A of the CPC. In case, a WFOis granted by a non-reciprocating territory, that cannot be automatically enforced in India. In sucha case, a fresh suit will need to be filed in an appropriate domestic Court where the foreign decree may be presented as evidence regarding legally owed debt due to the creditors by the judgement debtor. The Court will examine the foreign decree on its merits, and also verify whether it is conclusive as per the mandate of Section 13 of the CPC. If the Court is convinced on those parameters, it will pass its own decree based on that foreign judgement / decree and the resulting domestic decree can be enforced as per Order XXI of the CPC.

Notably, Indian Courts or tribunals may also exercise their long-arm jurisdiction by passing a WFO against the assets of the wrongdoer, which are located in the territory of another sovereign. Indian Courts are by nature conservative in granting a worldwide injunction. But this is not without precedent. Take an example. The enforcement authorities in Vijay Mallya case got a WFO from the Karnataka Debt Recovery Tribunal to freeze the Kingfisher assets worldwide.[11] In turn, English Courts recognised and enforced this in the U.K. on account of reciprocity treaties between India and UK on recognition and enforcement of foreign judgments. Thus, anaward holder may consider these litigation strategies in enforcement actions pursuing action against the worldwide assets to satisfy the award. However, the jurisprudence on WFO is still evolving and is at a nascent stage.

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[10] *ArcelorMittal USA LLC v Essar Steel Limited and others* [2019] EWHC 724 (Comm); *ADM Rice Inc v CORCOSA*, [2015] EWHC B1 (Admlty).

[11] O.A.No.766/2013.

V. Conclusion

Given technological advancements that have improved the ease in mobility of funds and gaps in regulatory norms, it has become common for debtors to siphon off their funds/assets across nations with a view to frustrate the realisation of the award. Therefore, identifying and tracing the debtor's assets timely is critical for seeking enforcement of an arbitral award. To achieve this objective, an award holder may engage services of asset tracing firms for an early identification the assets of the losing party. As a matter of strategy, aparty to a dispute may even consider on-boarding an asset tracing firm at a pre-award stage.

Once the target assets have been identified, an award holder should take adequate steps towards preserving these assets such as, seeking an injunction or freezing orders in jurisdiction(s) where the target assets are located.In case the opposite party is seeking to dispose off its assets even before the issuance of the arbitral award, a party may secure the target assets by seeking interim relief(s) before an appropriate Court or arbitral tribunal, depending on the stage of arbitration proceedings. If the assets of the opposite party are located in multiple jurisdictions, an award holder may explore the possibility of seeking a WFO. However, in order to secure a WFO, an award holder will be required to discharge a higher burden of proof through evidence that the losing party was attempting to dissipate its assets. A mere suspicion will not allow the award holder to secure a WFO in its favour. Therefore, an award holder should closely monitor the status of the target assets so that immediate steps may be taken upon any dissipation of assets. To conclude, if the above measures are duly followed, an award-holder can successfully navigate the complex asset tracing issues that arise in enforcement/ execution proceedings, ultimately leading to realisation of the arbitral award.

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