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Arbitration: A Viable Option for Insolvency Matters

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Abstract: Insolvency and Bankruptcy laws are an integral part these days of any nation. Every country wants its Insolvency and Bankruptcy laws to find the best way via which the distressed company can be put back to its normal position. A good insolvency and bankruptcy law is a need to maintain the economy of the country. India had enacted Insolvency and Bankruptcy Code, 2016 with an objective i.e. effective revival and reorganisation of the company. Judiciary through its various amendments, and judicial precedents had brought changes in the code keeping into consideration the growing economies. IBC Code though is a success, but it has left one important thing within its ambit i.e. arbitration as a mechanism for resolving insolvency disputes. Though Arbitration is still evolving in India, but the judgments delivered by court has still left insolvency matters out of arbitration proceeding. Moreover, as the present Code focus on creditor in possession approach it must give viable option to creditor whether he wants to resolve the insolvency disputes judicially or through any other mode. Author vide way of this article highlights International scenario of usage of Alternative Dispute Resolution in Insolvency matters and then author by way of this article presents the roadmap where India is lying in this aspect of adopting ADR in IBC.

Keywords: Insolvency and Bankruptcy, Alternative Dispute Resolution, ADR, viable mechanism

I. INTRODUCTION

Insolvency is the situation in which a company is unable to pay its debts. Thus, in India Insolvency and Bankruptcy code, 2016 is enacted for reorganisation of the corporate debtor. The code has shifted its focus from debtor in possession to creditor in possession. Resolution of Insolvency matters so far is in the hands of NCLT, NCLAT, High Court and the supreme authority being Hon'ble Supreme Court of India. Meaning thereby that so far, insolvency disputes are solved by court procedure in India.

Disputes are best handled with peaceful resolution, and that is where comes the role of Alternative Dispute Resolution. Though there is no denying the fact that courts are the best guardians of the citizens, but ultimately in the court proceedings there will be one party in the last who would not agree with the court decisions. Whenever a company is unable to pay its debts, lot of disputes arises among several people, and this situation is described as state of being insolvent. Every country must have the best law for Insolvency Matters, as it ensures stability in the country. Normal court way of resolving disputes is not best suited sometimes. Therefore, many countries in view to overcome the shortcomings have adopted Alternative dispute resolution process for issues related to insolvency. Benefits of having ADR are innumerable. There are some countries which had emerged as a role modelfor India in terms of their development in field of ADR for insolvency matters. Though ADR has not emerged as a mechanism for resolving disputes related to Insolvency in India. But in various other developed countries, ADR is the only mode for resolving disputes.

1.1 International Commercial Arbitration:[1]

International Commercial Arbitration is a term that denotes arbitration which is done in commercial matters across different nations. As globally many countries were entering into trade with each other, a need was felt to develop a body so that interest of both parties are protected. And thus UNCITRAL was established.

II. ADR: A GOOD MECHANISM FOR INSOLVENCY DISPUTES

The burden which the courts are experiencing on a daily basis can't be imagined. And therefore, with a view to provide assistance to courts, ADR can really support. ADR is not adjudication and this is where ADR differs from Adjudication. Adjudication imply that the party has to strictly follow the norms of the court but whereas in ADR the party has a liberty for resolving the dispute. Though in court procedure, court is also a third party who resolve disputes. But in ADR, the third

[1]Suryansh Singh Kushwah, Shreyash Goyal and Neeral Jain, "Foreign Awards in International Commercial Arbitration: Recognition, Enforcement and Challenges to an Award, 2017 Special Issue IJLIA 60,

party has a great role in effective resolving of the disputes. In ADR, Parties can put forward their view point. Proceedings in courts are public whereas proceedings in ADR are held in private. Therefore, ADR is considered as the most flexible way of resolving Insolvency disputes. Thus, if Insolvency matter disputes are solved with the help of ADR, It will be for the benefit of Creditor as well as for Debtor. By using ADR tool, Insolvency proceedings can be benefitted a lot.[2] The aim of IBC code is timely revival of the company, thus if this aim of timely resolution is combined keeping the concern of privacy of the parties, then ADR seems to be a better option than Court proceedings. Thus, parties need to think that at which stage they want to address their disputes in ADR. ADR can be helpful in the sense when Resolution plan is not acceptable by one party then parties can sit and negotiate the restructuring plan with each other. Preamble of IBC focus on aspect of reorganization of the Corporate Debtor and this aim can be better fulfilled with ADR.

ADR can be considered a good tool for resolving insolvency disputes in the sense that through personal attention, disputes between the parties can be solved at an early stage. Aim of IBC is revival of the company, thus, this aim can be better fulfilled by using mechanism of ADR. If the creditor and the debtor sit and think of all possible outcomes, and how to deal with it, is a better option than instead of fulfilling the claims of the financial creditors just by liquidating the company. Thus so far India don't have any frameworkwherein the court can refer the matter to ADR in insolvency disputes, though some other nations had adopted this model. Its high time for India to use ADR as one of their process. Arbitration can be prove to be the best friend for resolving Insolvency related matters and International Arbitration if developed can help in resolving of Cross Border Insolvency, which can further maintain good relations among nations.[3] Moreover, it has been recommended by International Financial Institutions that where courts are burdened then use of Alternative Dispute Resolutions mechanism (Mediation, Arbitration, Conciliation and Negotiation) can really help.

2.1 Using ADR in Insolvency results in midway:

By using ADR concerns of both parties can be considered and a midway can be adopted, which is generally not done in courts. Because in courts one party wins, and other loses. In courts, the judgment usually favors one and other party loses. Thus, a settlement can be done using ADR which is not possible in Courts. An arbitration mechanism adopted in an insolvency dispute matter can help to resolve individual claim which eventually and ultimately solve the collective issues between parties.[4]

2.2 ADR: a Cost Effective mechanism:

ADR is cost effective mechanism in the sense that usually in courts proceedings losing party has to pay for winning party as well. But that is not in case of ADR. Parties can equally divide the costs among themselves.[5] Distressed companies are anyways not having enough funds, thus use of Arbitration can definitely help them, as lot of extra expenses can be reduced. Insolvency matters involves lot of substantial persons. Adopting Arbitration in place of Court proceedings will protect concerns of parties involved as in arbitration there will be no third party involved. Moreover privacy concerns of the parties can be well protected.[6]

2.3 Collective outcome of Company as Going concern, arbitration and insolvency:

Going concern imply that a company is viewed as "*an entity as continuing in business for foreseeable future*".[7]

[2] https://legaldesire.com/possibility-of-using-adr-for-insolvency-resolution-processes/

[3] VelislavaHristova, Andres Eduardo Alvarado Garzon, "International Arbitration and Cross Border Insolvency-Friends or Foes? Revisiting the role of Arbitration in resolving Cross Border Insolvency related disputes", Journal of International Dispute settlement, Volume 12, Issue 4, December 2021, Pages 693-711, International Arbitration and Cross-Border Insolvency—Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-border Insolvency-Related Disputes | Journal of International Dispute Settlement | Oxford Academic (oup.com)

[4] Sarah Biser, Craig Tractenberg, Oksana Wright, Insolvency and Arbitration Proceedings- Are they so happy together?,https://www.jdsupra.com/legalnews/insolvency-and-arbitration-proceedings-3166943/

[5] Mark Addison, "Australia: 10 reasons why insolvency practitioners should consider ADR", https://www.mondaq.com/australia/insolvencybankruptcy/439512/10-reasons-why-insolvency-practitioners-should-consider-adr

[6] Sam Luttrell, Opportunities for Australian Arbitration Practitioners in the "Global Financial Crisis", Kluwer Law International - Document (openathens.net)

[7] Aceris Law LLC, The Notion of Going Concern in International Arbitration, https://www.acerislaw.com/going-concern-arbitration/

III. PROVISION RELATED TO ARBITRATION, MEDIATION, CONCILIATION AND NEGOTIATIONIN INSOLVENCY LAW

Till now, there is no framework of Mediation, Arbitration, Conciliation and Negotiation under Insolvency and Bankruptcy Law. But Section 14 of Insolvency and Bankruptcy Code, 2016 via Section 14 titled Moratorium expressly states that "*on insolvency commencement date, Adjudicating Authority shall by order declare moratorium for prohibiting all of the following and in this category, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or authority comes."*[8]

India has a distinctive approach if we evaluate it from terms of usage of arbitration in insolvency proceeding. We recognises remedies of two sort, i.e. right in rem and right in personam. India's current framework in regard to right in rem remedies states that power of winding up/ insolvency matters shall be vested with only a specialised tribunal and matters shall be non-arbitrable whereas in reference to remedies arising out of right in personam, matters will be arbitrable.[9]

I. Pre-packaged Insolvency Resolution: Similar mode of ADR

Recently India had also adopted a Pre-Packaged Insolvency process. At some extent it can be said to be one of the initial step. Recently Indian Government had adopted Pre-packaged model for MSME. Pre-pack model is better than the CIRP in terms of its cost, flexibility and other such factors. This is an informal alternative way, as compared from CIRP.[10] This method is now being well recognized because of the advantages it offers. It is a type of hybrid mechanism, which allow out of court settlement and this is an informal way.[11]

4.1 ADR: An Internationally recognised mode of resolving insolvency disputes:

The perception of resolving disputes have been changed globally. Apart from the Many countries had adopted the mechanism of ADR for resolving insolvency disputes.[12] Though Internationally use of ADR in Insolvency proceedings is proving to be a big success. But India so far has not adopted this model of mechanism.

IV. COMPARATIVE ANALYSIS

There are some countries which do not favor arbitration in insolvency proceedings. The primarily reason adopted by these countries are that an arbitrator is not competent enough to deal with issues arising out of insolvency matters, because he is not well versed with commencement of insolvency proceedings and other such issues. Other reason is, insolvency matters are core issues and hence are considered non arbitrable.

5.1 ADR Model for Insolvency Disputes in the United States:

United states adopted ADR in 1960 but for insolvency matters, it took a great way. The initiative of ADR for Insolvency disputes goes to Pound Conference, when Harvard Professor, Frank Sander introduced ADR method.

Case: Lehman Brothers Holding Case[13]. Landmark case in United States is that of Lehman Brothers. Via Mediation, Lehman Brothers were able to repay the creditors.[14] UNCITRAL Model law had adopted the base from the U.S. Bankruptcy law. *"Section 304 was based on the proposition that there was a principal insolvency proceeding in the foreign jurisdiction and that the U.S. proceedings would be ancillary*

[8] §14, The Insolvency and Bankruptcy Code, 2016

[9] Mr Ben Hornan, George Harnett, Chris Dobby, James Kwan, Jonathan Kwan, Kent Phillips, Mayuri Tiwari and Rishab Gupta, Does an Arbitration agreement protect a debtor from the threat of liquidation, https://www.hlarbitrationlaw.com/2020/07/does-an-arbitration-agreement-protect-a-debtor-from-the-threat-of-liquidation/

[10] Tariq Khan, Pre-Packs for MSME: A Positive step with Implementation Hurdles, 2021 SCC OnLine Blog Exp 59

[11] Sandeep Parekh and SudarshanaBasu, IBC 2.0 in the making: A Relook into the Insolvency Regime in India

[12] https://ibbi.gov.in/uploads/resources/1acc8439aab101c013221a481fe108a6.pdf

[13] https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf

[14] "Alternative Dispute Resolution and its uses in Insolvency", https://brodies.com/insights/restructuring-and-insolvency/alternative-dispute-resolution-and-its-uses-in-insolvency/

and provide assistance".[15] Thus, this created the base ultimately in US. In US as well the criteria to determine whether insolvency matter disputes would be arbitrable or non-arbitrable would depend upon whether the matter related to insolvency is core or non-core. In US core matters will not be arbitrable. What is core and non-core has been exclusively mentioned in the code. At 28 U.S.C Sect. 157 (b) (2) a non-exhaustive list has been mentioned which depicts which are core proceedings.[16]

5.2 ADR Model for Insolvency Disputes in Switzerland:

Switzerland is also among those countries who had adopted arbitration in insolvency proceedings. Article 177 of PILA in Switzerland expressly states that "*any dispute involving property is arbitrable."* Meaning thereby, that Article 177(1) of the Swiss Private International Law Act (PILA) enumerate that any dispute involving economic interest is arbitrable.[17] There are many principles embodied in the Swiss Law and keeping these principles into consideration, Swiss law has ruled that matters related to insolvency and bankruptcy shall be arbitrable under Swiss Law. Many commentators including Poudret and Besson had recognized that insolvency and bankruptcy matters disputes shall be arbitrable in Switzerland. But there is one exceptioni.e. in Switzerland "core issues" related to insolvency and bankruptcy shall not be arbitrable. *"Core issues are initiation of insolvency proceedings, appointment of trustees etc."* thus, these core issues cannot be subject to arbitration. Therefore, in Switzerland most of bankruptcy matters dispute shall be subject to arbitration except for core insolvency proceedings.[18]

5.3 ADR Model for Insolvency Disputes in England:

English legislation framework does not expressly mention that insolvency matters are arbitrable but the legislation in no way deny also. Thus the scenario is "*insolvency matters disputes does not affect the ability of a party to proceed with arbitration*". One Landmark case in England is of Fulham Football Club (1987) Ltd v. Richards[19], in this case Lord Justice Patten stated that *"it does not follow from the inability of an arbitrator to make a winding up order affecting third parties that it should be impossible for the members of a company, for example to agree to submit disputes inter se as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in disputes in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process".*[20]

Thus the conclusion is arbitrability of insolvency matter in England depends upon whether the dispute engages third party rights or is there public interest involved. This will include payment made to third party creditors.[21]

5.4 ADR Model for Insolvency Disputes in Chile:

Chile Insolvency law was also enacted with a view to effective reorganization of the distressed companies. Amendment has been done in insolvency law of Chile which now includes the provision for out of court settlement in bankruptcy matters. Though Specialized Insolvency courts are being set up in Chile but for better fulfilment of the goal with a view to shorten the long process of reorganization of the distressed companies, vide Chapter 4 of the Insolvency law, Concept of Insolvency Arbitration has now been included within the framework of Chilean insolvency law. Thus now parties (Debtor and creditor) have the liberty to choose arbitration while their reorganization proceedings. But during Liquidation of the companies, debtor consent is not required to adopt arbitration. Primary reason why Insolvency Arbitration wasadopted by Chilean Government is to reduce the burden of the Bankruptcy court.[22]

5.5 ADR Model for Insolvency Disputes in Japan:

[15] Hon. Allan, L. Gropper, International ADR 2.0: Big Solutions for Big Problems.

[16] Robert B. Kovacs, A transnational approach to the arbitrability of Insolvency Proceedings in International Arbitration, https://www.iiiglobal.org/sites/default/files/transnationalapproachtothearbitrabilityofinsolvencyproceedingsininternationalarbitration.pdf

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[19] Fulham Football Club (1987) Ltd v. Richards [2011] EWCA Civ 855

[20] Fulham Football Club (1987) Ltd v. Richard [2011] EWCA Civ 855 at 40

[21] Robert B. Kovacs, A Transnational Approach to the arbitrability of Insolvency Proceedings in International Arbitration, https://www.iiiglobal.org/sites/default/files/transnationalapproachtothearbitrabilityofinsolvencyproceedingsininternationalarbitration.pdf

[22] Adam Brenneman, Pamela Arce, Pablo Mori Bregante and David Schwartz, You have Options: The Use of Alternative Dispute Resolution in Insolvency Proceedings

Japan has an effective bankruptcy law and Japan too uses arbitration method in insolvency proceedings. Though initially rate of precedents were quite low. But gradually it rose, after successful implementation. Japan has revised its bankruptcy law and subsequently adopted the UNCITRAL Insolvency law. Japan believe in cooperation as the best method for effective reorganization of the distressed company.[23] In Japan apart from arbitration, mediation is sometimes used for the purpose of revitalisation of debtors.[24]

5.6 ADR Model for Insolvency Disputes in Germany:

German Arbitration law encompasses wide variety of matters than can be arbitrable. Under German law, any matter of economic interest can be arbitrable.[25]

Fulham Football Club v Richards[26] is one such notable case in this regard.

5.7 ADR Model in Insolvency proceeding in Australia:

Legislation of Australia vide case of ACD Tridon Inc v. Tridon Australia Pty Ltd.[27] stated that "*while most matters under the Corporations Act (Cth) could be referred to arbitration (if the clause was worded appropriately and that matters concern the parties' rights stemming from contract rather than statute), the parties could not refer to arbitration matters relating to the winding up of a corporation, as this is a matter stemming from statute and involves interest of third parties."*[28]

II. Instances where India took a stand for using ADR for solving Insolvency matters

Hon'ble Mr. Ratakonda Murali has emphasised and suggested the lawyers to use ADR for solving Commercial disputes.[29] Moreover, Chief Justice of India while delivering his speech at International Arbitration and Mediation Centre, Hyderabad has also emphasized on the importance of ADR Mechanism.[30] He further added that option of approaching courts should be last resort. His exact views are reproduced herein as *"My advice after participating in the legal profession for over 40 years in different capacities, is that you must keep the option of going to Courts as a last resort. Use this last resort only after exploring the option of ADR- (Arbitration, Mediation and Conciliation). Arbitration and Mediation are efforts at restoring a relationship. I think that the most important factor behind the resolution of any dispute is having the right attitude. By right attitude, I mean we should leave aside our ego, emotions, impatience and embrace practicality. But once these conflicts enter a Court, much gets lost in the practice and procedure".*[31]There are many advantages of ADR Mechanism than the traditional form of litigation. ADR mechanism takes less time, they are less expensive etc.

III. Judicial Precedents

This section of the article discusses about the view of the Indian judiciary with respect to arbitration in Insolvency matters.

7.1 Ayyasamy v. A. Paramasivam&Ors.[32]

In this case, viewpoint of the judiciary was not favoring ADR in IBC Disputes. The relevant facts are that in the case it was stated that certain matters are non-arbitrable. And Insolvency and Winding up matters falls in the category of such disputes that are non-arbitrable. The case was before Hon'ble Dr A.K. Sikri and Dr D.Y. Chandrachud JJ. Though the case was concerned with the issue that whether allegation of fraud is arbitrable or not. But before reaching to this question, it was mentioned that insolvency matters are non-arbitrable.

7.2 Indus Biotech Private Limited v. Kotak India Venture

[23] Shin-Ichiro Abe, International Arbitration in Japanese Bankruptcy Cases, Japan Commercial Arbitration Journal Vol. 2 [2021]

[24] Anderson Mori and Tomotsune, First step analysis: restructuring & insolvency in Japan, https://www.lexology.com/library/detail.aspx?g=fca61c5e-ddef-4957-89ba-44005f657680

[25] Kluwer Law International - Document (openathens.net)

[26] https://ibclaw.in/addressing-the-issue-of-arbitrability-of-insolvency-disputes-in-india-by-adv-nanita-bajpai-nandini-shenai/

[27] ACD Tridon Inc v. Tridon Australia Pty Ltd [2002] NSWSC 896

[28] ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896 at 193

[29] http://www.bimacc.org/colloquia-on-adr-in-the-areas-of-corporate-insolvency-and-bankruptcy-disputes/

[30] Aaratrika Bhaumik, "Keep the option of going to Courts as last resort: CJI NV Ramana emphasizes importance of ADR Mechanism", 'Keep The Option Of Going To Courts As Last Resort': CJI NV Ramana Emphasizes Importance Of ADR Mechanisms (livelaw.in)

[31] 'Keep The Option Of Going To Courts As Last Resort': CJI NV Ramana Emphasizes Importance Of ADR Mechanisms (livelaw.in)

[32] A. Ayyasamy v. A Paramasivam (2016) 10 SCC 386

Fund[33]:

This recent pronouncement by the Hon'ble Supreme Court discusses in detail about the arbitrability of insolvency disputes. Issue before the Supreme Court was whether the dispute had been rendered non arbitrable, foreclosing thecourt from appointing an arbitrator. Though Later on, Supreme Court had allowed Arbitration petition. This judgment clears the long lasting dispute and it was held by the Hon'ble Court that Insolvency proceedings stops being arbitrable from the point when petition u/s 7 of the code is admitted.[34] Indus Biotech has raised a question that "*whether the reliefs claimed in the insolvency petition is capable of being referred to arbitration*? For this they stated that as insolvency matters are of right in rem, they relied on Booz Allen to substantiate the point that insolvency petitions are non-arbitrable.[35] Thus, vide this judgment it came forward that once moratorium commences, arbitration or related proceedings commenced after initiation of CIRP will be considered to be non-est in law.[36]

7.3 Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd[37].

In this case Supreme Court expressed his views that *"Generally and traditionally all disputes relating to rights in personam were amenable to arbitration, while all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration."* Vide this case Supreme Court ruled that winding up and insolvency matters are non-arbitrable.[38]

IV. Challenges

Assets of a Corporate Debtor in India is managed by the Adjudicating Authority as mentioned in the code. IBC is a comprehensive code and so is the process involved. Thus, the biggest challenge which Authors feel is that Since Insolvency matters involve lot of persons. And till now, the scenario is that only an insolvency courts will take care of the assets as the insolvency professionals and other designated officials appointed there are well versed with the procedure there and they will be in a better position to bring back the distressed company and can help in its revival better than arbitrators.

Another issue in arbitration in insolvency can be adopted if the parties themselves want to adopt this mode. And here lies the issues, as numerous persons are involved in the process, there can be some conflicting interests regarding adoption of arbitration.

V. Author's Comments

Arbitration encompasses within itself the principal of "Party Autonomy". Thus Party Autonomy provide liberty to the parties to choose mode of doing, through which way they want to get their disputes resolved and everything. But there are some concerns in this regard. The view of Indian Judiciary whether a matter is arbitrable or not is well established via way of the judgments declared in this context. The Judiciary had well established via way of judgments delivered that what matters are arbitrable and what matters are not arbitrable. Though Author is of the view that Supreme Court should consider the arbitrability issue keeping into consideration the objective of IBC code and the benefit which IBC Proceedings can get via ADR Mechanism. Arbitrability in simple words is the capability vide which an institution can get to know what matters are arbitrable and what matters are not arbitrable. May be the laws of other nations are way forward than India in terms of determining that a commercial matter can be subject to arbitration. But India has yet not adopted this approach. So far Indian Judiciary is of the view that Insolvency proceedings are not arbitrable.[39]

For a good and fair revival of the Corporate Debtor and the company it is must that both the parties get fair chance and the best way to bring the distressed firm back to normal position is by adopting the mechanism of ADR. Thus to increase the investments in India and to make India a hub for business the

[33] Indus Biotech Private Limited v. Kotak India Venture Fund (2021) 6 Supreme Court Cases 436

[34] Adv. Nandita Bajpai & Nandini Shenai, "Addressing the issue of Arbitrability of Insolvency Disputes in India", https://ibclaw.in/addressing-the-issue-of-arbitrability-of-insolvency-disputes-in-india-by-adv-nanita-bajpai-nandini-shenai/

[35]Purbasha Panda, Balancing Competing Interests in Intersection of Arbitration and winding up proceedings, https://www.thearbitrationworkshop.com/post/balancing-competing-interests-in-intersection-of-arbitration-and-winding-up-proceedings-part-ii

[36]Sanskar Modi and Vijpreet Pal, "A Tale of two proceedings: Revisiting the Intersection of Insolvency and Arbitration", Law School Policy Review &Kautilya Society, 14 July, 2021, https://lawschoolpolicyreview.com/2021/07/14/a-tale-of-two-proceedings-revisiting-the-intersection-of-insolvency-and-arbitration/

[37] Booz Allen & Hamilton Inc v. SBI Home Finance Ltd. (2011) 5 SCC 532

[38]Amiy Kumar, Supreme Court practical view on reference to arbitration in insolvency proceedings, https://ksandk.com/arbitration/arbitration-in-insolvency-proceedings/

[39] Douglas S. Jones, "Insolvency and Arbitration: An Arbitral Tribunal Perspective, Kluwer Law International - Document (openathens.net)

foremost Thing which Indian Government must consider is to adopt ADR during Insolvency disputes. Arbitrators/ Mediations/ Negotiators can be proved to be the best persons in commercial matters like IBC.

Existing framework of IBC Code is not upto mark in terms of implementation of Alternative Dispute Resolution during Insolvency. Overall enactment of all provisions will not be fulfilled if we leave Alternative Dispute Resolution from scope of IBC. India can be prove to be a hub for numerous opportunity for Arbitrators once India use ADR method arrangement to resolve disputes. As many countries are favoring Arbitration mode of resolving insolvency disputes over Litigation proceedings, its high time for India too to adopt.

Currently in India Legislature is of the view that insolvency matters are non-arbitrable. The primary reasons assigned by them for citing commercial disputes matters as non-arbitrable is because of the public policy concerns.[40]

VI. Concluding Remarks

Success rate of ADR in settlement of commercial matters depends on various factors and it varies from nation to nation approach as well.[41] Therefore a corporate debtor must have the liberty to choose options for himself. There are numerous viable restructuring structures available these days. Debtor can now opt for out of cross proceedings as Arbitration in insolvency proceedings is going to be the new buzz now. Since there are many countries which are of the view that Alternative Dispute Resolution mechanism is not appropriate in resolving insolvency matters as the matters involves creditors, debtors and employees and other category of persons. Thus, Author concludes the article by stating that if India wants to improve its restructuring mechanism and its economy, then Arbitration is the future in this. Arbitration will only complement the process of insolvency ultimately helping in building an effective reorganization law. Use of Arbitration can not only help domestic insolvency law, but it can brighten scope of cross border insolvency law as well. Via Arbitration the parties can opt for speedier mode, choosing the place of dispute resolution by themselves and what more. Preamble of Insolvency and Bankruptcy Code states and aims at effective resolution of the corporate debtor whereas preamble of Arbitration and Conciliation act aims at dispute resolution between the parties according to their own way. Therefore there is no conflict between the two legislations. And the combined result of both legislations can prove to be the best in restructuring of the corporate debtor as well for the creditor. All India needs is a collective measure and support from Indian Government. Even if whole of the insolvency matter cannot be solved by arbitration, but Indian Government can allow in part that such matters in insolvency shall be arbitrable and some can be exception to this rule.[42]

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