INTERNATIONAL COMMERCIAL ARBITRATION AND CROSS- BORDER INSOLVENCY

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The Collision between International Commercial Arbitration and Cross-Border Insolvency assumes a major foreground in contemporary times, when the multi-national corporations are not restricted in their business by the national borders of the countries. As the area expands with the progress of the economic parameters, disputes related to Insolvency and Corporate Restructuring tend to increase. Dispute Redressal Mechanisms of a majority of nations appear to be different while dealing with international corporate matters. Amidst all this variance, Alternative Dispute Redressal mechanism has enjoyed the leverage over the traditional court system due to the common establishments, similar rules, and procedures, etc.

Arbitration and Cross Border Insolvency, if dealt with separately, have found a cakewalk path in their own domains but, the intersection if faced, is characterized by unique difficulties because of the competing policy objectives and purposes of the Insolvency and Arbitration Laws.

Arbitration Law, is based upon the contractual obligations between the parties to the arbitral agreement and limited to all or some of the disputes arising out of the agreement. The purpose is to execute and enforce the agreement. The arbitral agreement specifically determines the law applicable, both substantial and procedural, the number of the arbitrators, the place in which any dispute is to be determined. Arbitration provides a vehicle for the resolution of all the disputes arising out of the arbitral agreement according to the terms and conditions specified under the agreement. The extent to which there is an agreement to arbitrate a dispute is to be determined on construction of the contract taking account of what a reasonable person in the position of the parties would have understood it to mean having regard to the surrounding circumstances, purpose,

and object of the underlying transaction.[1]

Insolvency Laws, on the other hand, include the satisfaction of the creditors' claims, transparent and clear accounts, a coordinated distribution of assets, etc. The fundamental purpose of insolvency laws is to maximize the value of an insolvent debtor or for a debtor's restructuring and to provide an effective system for the collective satisfaction of claims made against an insolvent entity.[2]

The United Nations Commission on International Trade Law (UNCITRAL) emerged as the first body to approach the issue at hand and formulated the unparalleled Insolvency Model Law on Cross Border Insolvency and UNCITRAL Model Law on International Commercial Arbitration. Both the model laws have been adopted and incorporated by the majority of the countries and aid in dealing with the common issues emerging from the interfacing area.

The famous case of *Syska v. Vivendi*[3] is counted as one of the earliest cases dealt by the European Union in these contexts. The Court was faced with the problem as to the procedure in cases where the arbitration seat has been determined and proceedings are pending between the parties to the arbitration agreement, and one of the party is also undergoing insolvency proceedings in one of the member states. The problem majorly revolves around the domain of Choice of Law. The facts of the case should be considered in-depth to understand the dichotomy between the present laws.

The case mentions of a company named as Elektrim SA, incorporated in Poland, which entered into an investment agreement with the defendant companies, incorporated in France. The mentioned investment agreement was governed by the Polish Law. The abovementioned agreement contained an arbitration clause, which provided for arbitration in London and LCIA rules to be applicable. The unique attribute attached to the agreement was that, only the arbitration clause was governed by the English Laws and the rest of the agreement was under the Polish Laws. In August 2003, Vivendi commenced an arbitration proceeding before the LCIA, pursuant to the arbitration clause, claiming an amount of $1.9 billion.

In around the year 2007, the debtor company was declared insolvent by the Polish Court and Mr. Syska was appointed as the administrator by the Warsaw Court. There wasn't any dispute as to the Centre of Main Interests and both the parties agreed to the fact that Poland should be considered the COMI.

Under the Poland Insolvency Laws, once the corporate debtor is declared insolvent, all the pending arbitration agreements are realized as void. The pending arbitration proceedings were challenged by the administrator and were requested to be ceased. The administrator contended, as the agreement was governed by the Polish law, hence, the arbitration proceedings should be nullified. Vivendi on the other hand, contended and cited Article 15 of EIR which provides that "*the effects of insolvency proceedings on a lawsuit pending... shall be governed solely by the law of the Member State in which that lawsuit is pending.*" England was the seat of arbitration and English Laws were meant to be lex arbitri, therefore, giving the discretion to the English Courts to stay or not to stay the arbitration proceedings.

Such a layered conflict between the Choice of Law is faced while dealing with the matters overlapping the domain of International Commercial Arbitration and Cross- Border Insolvency. The Indian stand on the same issue is dealt with by the provision mentioned under Section 14[4] of the Insolvency and Bankruptcy Code, 2016 where the issue of Moratorium is dealt by the law. Section 14 clause 1 specifically mentions about the prohibition of all types of new or pending proceedings in any court of law, arbitrational panel, tribunal, or before any other authority. The provisions in relation to Cross-Border Insolvency under the 2016 Code has still not been brought up in force by the enforcement wing. The stand as of now in the Indian context remains the same as of Polish law, resulting in abdication of the proceeding, but the law may be altered, as the need may be, by the Judiciary or the Legislative branch.

ENDNOTES-

[1] Pacific Carriers Ltd. v BNP Paribas, (2004) 218 CLR 451.

[2] Samantha Jayne Lord, *When Two Polar Extremes Collide: An Exploration into the Effects of Insolvency on International Arbitration*, 15 ITBLR 316, 319 (2012).

[3] Syska v. Vivendi Universal SA & Ors., (2009) EWCA Civ 677.

[4] The Insolvency and Bankruptcy Code, 2016, §14, No. 31, Acts of Parliament, 2016 (India).