

Foreign Seated Arbitration and Indian Insolvency: A Confluence of Challenges

I. INTRODUCTION

The increasing cross-border participation of Indian companies in international commerce has led to a corresponding rise in participation of Indian companies in foreign-seated arbitrations for resolution of disputes between the parties. In many instances, foreign lenders have attempted to enforce foreign arbitral awards in India against the Indian entities. However, when such Indian entities enter insolvency proceedings, the interplay between the *Arbitration and Conciliation Act, 1996* (“**Arbitration Act**”) and the *Insolvency and Bankruptcy Code, 2016* (“**Code**”) becomes contentious.

The principal question, which stems from such interplay is: [a] whether there is a prohibition on continuation of foreign-seated arbitral proceedings upon issuance of a ‘moratorium’ under Section 14 of the Code against the Indian entity undergoing corporate insolvency resolution process (“**CIRP**”); and [b] whether a foreign award under Sections 44 of the Arbitration Act can be treated by the resolution professional (“**RP**”) as a “claim” of the foreign lender in the ongoing CIRP of the Indian entity.

This article examines the treatment of foreign-seated arbitration proceedings and foreign arbitral awards against Indian companies undergoing insolvency. **Part II** of the article analyses the impact of the moratorium under Section 14 of the Code on the continuation of such proceedings. And **Part III** discusses the requirement of judicial recognition for enforceability of foreign awards, the restrictions imposed by the moratorium on enforcement of foreign awards and the treatment of unenforced foreign awards as “claims” under the Code. Further, **Part IV** presents concluding thoughts on the issues set out above.

II. IMPACT OF MORATORIUM ON CONTINUATION OF FOREIGN SEATED ARBITRATION PROCEEDINGS

The territorial scope of the Code is defined under Section 1(2), which provides that the Code extends to the whole of India. This establishes the general principle that the Code, including its moratorium provision under Section 14, operates within India’s territorial boundaries. However, Section 234 of the Code carves out a limited exception to this rule by empowering the Central Government to enter into reciprocal agreements with foreign states to facilitate the application and enforcement of the Code’s provisions across jurisdictions. This Section provides that the Government may notify a list of countries with whom a reciprocal arrangement has been made regarding application of the Code in those countries, and in turn application of such countries’ insolvency laws in India. The process stipulated under the Code is akin to the list of notified countries under the New York Convention, 1958 in terms of the Arbitration Act for the purposes of enforcement of foreign awards in India.¹

¹ IBA Toolkit on Insolvency and Arbitration, Questionnaire – National Report of India, Para 88 and 89, Page 23.

A harmonious reading of Section 1(2) with Section 234 of the Code implies that the moratorium's applicability under Section 14, to foreign-seated arbitration proceedings, is contingent upon the existence of such a reciprocal arrangement between India and the foreign state concerned. In the absence of a reciprocal agreement, Section 14 cannot automatically apply to prohibit the continuation of foreign-seated arbitrations. This limitation restricts the moratorium's operation to domestically seated arbitrations,² and renders the Code ineffective in halting arbitral proceedings or enforcement actions abroad. As a result, arbitral tribunals seated outside India are not bound to recognise or give effect to the Indian moratorium, and may continue proceedings or enforce awards against the corporate debtor's foreign assets.

It is important to note that, as of date, India has not entered into any reciprocal agreements under Section 234. This legislative inaction has created a practical void wherein Section 14 remains inapplicable to foreign-seated arbitrations that lack a connection to Indian law or assets. Consequently, assets of corporate debtors involved in foreign arbitral proceedings outside India are left without effective protection during the CIRP, exposing it to potential enforcement.³ This lacuna undermines the very purpose of Section 14, which is to preserve the corporate debtor's assets and maintain the status quo during the resolution process.⁴ The absence of cross-border applicability of the moratorium under Section 14 of the Code frustrates this objective by allowing foreign arbitral proceedings to proceed unchecked, thereby eroding the corporate debtor's global asset base and disturbing the parity among creditors.

III. TREATMENT OF AN UNENFORCED FOREIGN AWARD AS "CLAIM" UNDER THE CODE

(i) Legal Status of a Foreign-Seated Award

Under Indian law, a foreign award is not ingrained with self-enforcing authority. A clear distinction exists between a foreign award *per se* and an award that has been judicially recognised and deemed enforceable. The Supreme Court of India, in *Government of India v. Vedanta Ltd.*⁵ has clarified that a foreign award "is not a decree by itself" and does not become a "foreign decree" at any stage of the proceedings. Its legal efficacy within India is entirely contingent upon its enforcement in accordance with the Part II of the Arbitration Act,⁶ which is a two-stage process. The first and most crucial stage is that of "recognition", wherein the award holder is required to file an application under Section 47 of the Arbitration Act before a competent High Court. The court does not undertake a review on the merits but performs a limited supervisory role, examining whether any of the exhaustive grounds for refusal of enforcement, as enumerated in Section 48, are met. Once the Court is satisfied that the foreign award is enforceable, the second stage gets triggered under Section 49 of the Arbitration Act, where the award "shall be deemed to be a decree of that Court".

As per the ruling of the Bombay High Court in *Jindal Drugs Ltd. v. Noy Vallesina Engineering Spa*,⁷ a foreign award yet to be found enforceable under the Arbitration Act "cannot be relied on for any purpose in India"

² *Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd.* (2018) 16 SCC 94, Para 4; *K.S. Oils Ltd. v. State Trade Corporation of India Ltd.* 2018 SCC OnLine NCLAT 352, Para 14-15.

³ IBA Toolkit on Insolvency and Arbitration, Questionnaire – Report of India, Para 29, Page 8.

⁴ *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.* 2017 SCC OnLine Del 12189, Para(s) 10, 14-15.

⁵ *Government of India v. Vedanta Ltd.* Civil Appeal No. 3185 Of 2020, Page 38.

⁶ *Kalyani Transco v. Bhushan Power & Steel*, 2025 SCC OnLine SC 2093, Para 176.

⁷ *Noy Vallesina Engg. SpA v. Jindal Drugs Ltd.*, (2021) 1 SCC 382, Paras 8-11.

and is not considered binding on the parties. Therefore, judicial recognition is a non-negotiable condition precedent for an award to have any coercive legal effect in the country.

Despite the above judgments, in *Agrocorp International Private (PTE) Limited v. National Steel and Agro Industries Limited*,⁸ CIRP was initiated against the corporate debtor on the basis that the unrecognised foreign award was pronounced in a country which is reciprocating territory within meaning of Section 44-A of Civil Procedure Code, 1908 (CPC) and thereby capable of execution in India. This judgment of the NCLT Mumbai, while on the face of it is favourable to foreign creditors, its legal reasoning has been criticized, for conflating a foreign ‘award’ with a foreign ‘decree’ by relying on Section 44-A of the CPC. The enforcement of foreign awards is governed independently by Part II of the Arbitration Act and not by the provisions of the CPC. Further, even if it assumed that a foreign award is a “deemed decree” if issued by a reciprocating territory, such award is not automatically enforceable in India unless it fulfils the substantive requirements prescribed under Section 13 of the CPC.⁹ Finally, *Agrocorp* is clearly contrary to the ruling in *Vedanta* and *Jinal Drugs Ltd.*

The correct view, according to us, was taken by the NCLT, Cuttack Bench, in *Jaldhi Overseas Pte. Ltd. v. Steer Overseas Pvt. Ltd.*¹⁰, which relying on *Vedanta*, held that a foreign award is not by itself sufficient to initiate CIRP under Section 9 of the Code, pending recognition and enforcement of the award under the Arbitration Act.

(ii) Effect of Moratorium on Enforcement of Foreign Award

Upon the initiation of CIRP, the moratorium declared under Section 14 of the Code bars “the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order...”. This creates a challenging scenario for an award holder whose award was not recognised by Indian courts prior to the commencement of CIRP. Upon issuance of the moratorium against the Indian corporate debtor, any and all proceedings, including enforcement proceedings of foreign arbitral awards before Indian courts, must be stayed till completion of the moratorium period. Also, once the CIRP is completed, assuming successfully, the ‘clean slate principle’ of the Code would render the award meaningless, therefore, leaving the award holder with no other option but to file its claim with the RP.

(iii) Admission of Claim under the Code Basis Foreign Award

The admissibility of a foreign award as a “claim” under the Code depends on the distinction between a mere claim and an enforceable claim. Section 3(6) of the Code defines a “claim” broadly as a “right to payment, whether or not such right is reduced to judgment, fixed, disputed, or undisputed”. An unrecognised foreign award may, on case-to-case basis, qualify as a claim within this definition. The NCLT Kolkata bench in *Yes Bank Ltd. v. Sarga Hotels (P) Ltd.*¹¹ (relying on the judgement of the Supreme Court in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*¹²) held that a claim can be admitted by the

⁸ *Agrocorp International Private (PTE) Limited v. National Steel and Agro Industries Limited*, CP (IB) No. 798/ MB/ C-IV/ 2019, Para 36.

⁹ *Usha Holdings LLC v. Francorp Advisors*, (2019) 5 Comp Cas-OL 159, Para 26.

¹⁰ *Jaldhi Overseas Pte. Ltd. v. Steer Overseas Pvt. Ltd.*, P No. L8/CTB/2019., Para(s) 10,12.

¹¹ *Yes Bank Ltd. v. Sarga Hotels (P) Ltd.*, 2023 SCC OnLine NCLT 1051, Para 41.

¹² *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531, Para 155.

RP as contingent claim, wherein the claim amount under unenforced foreign award can be held in escrow by the RP, which then can be released on enforcement of the foreign award by the relevant Indian court.

Thus, while an unrecognised foreign award may constitute a “claim” under the Code, it lacks the enforceability and can only be admitted as *contingent claim*, subject to recognition and enforcement under Part II of the Arbitration Act. This approach ensures procedural fairness by preserving the claimant’s right to eventual recovery while preventing premature depletion of the corporate debtor’s estate.

(iv) Alternative Remedy Available to Foreign Creditors or Award Holder of a Foreign Award

In the event a foreign award remains unenforced under Part II of the Arbitration Act, the foreign creditor / award holder may still seek recourse under the provisions of the Code. An unenforced foreign arbitral award can be submitted as a proof of claim in the CIRP of the corporate debtor rather than the award forming the actual basis of the claim. Upon commencement of CIRP and issuance of moratorium by the NCLT, the Interim Resolution Professional (“**IRP**”) issues a public announcement under Section 15 of the Code, inviting creditors to submit their claims within a specified time period. The foreign creditor / award holder can submit, with the IRP (later the RP), the prescribed form along with the necessary documents supporting/evidencing its claims, which documents qualify as proof of claim. As part of the supporting documents the foreign creditor / award holder may also provide the foreign award. Therefore, while the unenforced foreign award supports the claim submit, the same does not form the basis of the claim. Accordingly, a foreign creditor / award holder is not required to rely solely on an arbitral award and can submit supporting / underlying documents as proof of claim,¹³ ensuring the admission of its claim despite the award not being enforced. This route may be equally applicable in cases where insolvency proceedings are sought to be initiated under Section 7 or 9 of the Code. However, this may not be a blanket solution in each case and the viability of the same will depend on the facts of each case.

IV. ANALYSIS AND CONCLUSION

The intersection of foreign-seated arbitration and the moratorium provisions for insolvency under the Code exposes a significant structural gap in India’s cross-border insolvency regime. While Section 14 aims to preserve the corporate debtor’s assets, its territorial limitation under Section 1(2) and the absence of reciprocal arrangements under Section 234 prevent its effective application to foreign proceedings. As a result, tribunals seated in foreign territory may continue arbitration or enforcement against offshore assets, undermining the collective insolvency framework. The moratorium’s inability to extend beyond India’s borders allows differential treatment between domestic and foreign creditors, weakening the principle of creditor equality.

Further, unresolved questions persist on the treatment of foreign awards. Judicial recognition remains a prerequisite for enforceability under Part II of the Arbitration Act, but the moratorium halts even such recognition proceedings during CIRP. This forces resolution professionals to treat unrecognised awards as contingent claims creating uncertainty for creditors and other participants alike. Alternatively, award holders of an unrecognized foreign award might also choose to file their claim in the CIRP of the corporate debtor with supporting documents. Such claims might be accepted basis the procedure provided under the Code as elaborated in the article above. To ensure

¹³ *Anand A Kulkarni v Rajkumar Das & Ors.*, C.P. No. (IB) 965/MB/C-III/2022, Para 11.

coherence, India must operationalise Section 234 through reciprocal treaties and clarify statutory provisions governing the status of foreign awards and proceedings during insolvency.

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