SIAN PARTICIPATION CORP (IN LIQUIDATION) v. HALIMEDA INTERNATIONAL LTD (VIRGIN ISLANDS): COMMON LAW HARMONY IN INSOLVENCY?

by Pranav Budihal*

Differing insolvency regimes across jurisdictions have a very real effect on the conduct of international arbitration proceedings. Apart from sprouting parallel litigation, all-encompassing moratoriums and the threat of guerilla tactics, the arbitration itself may see increased costs, time and enforceability issues. The relevance of international arbitration in the event an insolvency of a party becomes crucially important in a world where arbitration remains as the most widely used mode for resolving cross border disputes. The interaction between insolvency and arbitration in England and Wales, and the BVI were recently harmonized by the UK Privy Council its decision in Sian Participation Corp (In Liquidation) v. Halimeda International Ltd (Virgin Islands). This article shows that the Sian standard aligns to some extent with the Indian treatment of insolvency and arbitration. First, the article provides an overview of the current insolvency regime under the Indian Insolvency and Bankruptcy Code, 2016. Second, it examines the case law interpretations of the IBC in context of an arbitration. Third, it concludes by tracing the similarities in the treatment of arbitration in context of an insolvency in these major common law jurisdictions, and the benefits that may accrue from such harmony.

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A. Introduction

Insolvency and arbitration are popularly, and legitimately, considered as being at opposite ends of the dispute resolution framework. Insolvency resolution is a statute driven process while arbitration is born from party consent. Arbitration has become an increasingly common feature in commercial contracts. Following the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ('New York Convention')[1] across jurisdictions and the adaptation of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ('UNCITRAL Model Law')[2] in statutes, courts in major jurisdictions such as India,[3] Singapore,[4] the United Kingdom (UK)[5] and the United States of America[6] refer a dispute to arbitration if, prima facie, there is an arbitration agreement in the underlying contract.

The difficulty arises when a request for arbitration is made in context of proceedings stemming from insolvency. English law was settled by the English Court of Appeal in *Salford Estates (No. 2) Ltd v. Altomart Ltd (No. 2)*[7] ('*Salford*') in favour of arbitration. While acknowledging that the Companies Court has the discretion to wind up a company, the Court of Appeal held that:

> *[e]xercise of the discretion otherwise than consistently with the policy underlying the 1996 [Arbitration] Act would inevitably encourage parties to an arbitration agreement – as a standard tactic – to by-pass the arbitration agreement and the 1996*

1 United Nations Treaty Collection, *New York Convention*, https://treaties.un.org/ (accessed 20 Aug. 2024) [New York Convention, Article II(3). As of 20 Aug. 2024, the New York Convention has been adopted in 172 Contracting states.]

2 United Nations, *United Nations Commission on International Trade Law*, https://uncitral.un.org/ (accessed 20 Aug. 2024) [UNTIRAL Model Law, Art. 8. Legislation across jurisdictions based on or influenced by the UNCITRAL Model Law has been adopted in ninety-three states in a total of 126 jurisdictions.]

3 *See In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act 1996, The Indian Stamp Act 1899* 2023 INSC 1066.

4 *See AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Company)* [2020] SGCA 33.

5 *See Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited* [2007] UKHL 40.

6 *See AT & T Technologies Inc v. Communications Workers of America* 475 US 643 (1986).

7 [2014] EWCA Civ 1575.

> *[Arbitration] Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 [Arbitration] Act.*[8]

The *Salford* test resulted in English courts either dismissing or staying insolvency proceedings in favour of the arbitration proceedings. The position has been changed by the Judicial Committee of the Privy Council ('UKPC')'s recent judgment dated 19 June 2024 in *Sian Participation Corp (In Liquidation) (Appellant) v. Halimeda International Ltd (Respondent) (Virgin Islands)*[9] ('*Sian*'), which has amended the *Salford* test and clarified the fraught boundary between arbitration law and insolvency law. While *Sian* is based on the British Virgin Islands ('BVI') law, the UKPC exercised its jurisdiction to render the *Sian* test as the law of England and Wales.[10]

This case note compares the Indian position on insolvency and arbitration to the UKPC's ruling in *Sian.* Indian law is unique in that it has an overriding legislation for insolvency issues, complete with a separate vertical of specialized tribunals with subject matter experts as the judges. The Indian arbitration law has oscillated between the *Salford* and *Sian* tests while also juggling the jurisdiction of an arbitral tribunal with the specialized tribunals set up for insolvency disputes. As set out in greater detail below, *Sian* aligns the English position to the Indian approach for certain types of insolvency disputes.

B. *SIAN*'S BRIEF FACTS AND DECISION

Sian concerns an appeal where the UKPC was called on to decide if the BVI courts were prohibited from furthering a liquidation proceeding when the contract underlying the unpaid debt contained an arbitration agreement. In a nutshell, the Respondent advanced a loan of USD 140 million to the Appellant on the basis of a Facility Agreement. The Facility Agreement provided for all disputes to be resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration.

The Respondent alleged that the loan, together with accrued interest, had not been repaid, while the Appellant disputed the loan amount on the basis of counterclaims and set-off. On 29 September 2020, the Respondent sought

8 *Ibid.*, para. 40.
9 [2024] UKPC 16.
10 *Ibid.*, para. 125.

for liquidators to be appointed on the ground that the Appellant was, both cash flow and balance sheet, insolvent. If deemed insolvent, section 162(1) of the BVI Insolvency Act, 2003 ('BVI Insolvency Act') permits the Companies Court to appoint liquidators to the company.

Justice Wallbank rejected the Appellant's objections on the ground that the Appellant failed to show a genuine dispute on the unpaid debt. The Appellant appealed Justice Wallbank's finding that there was no prima facie case of a cross-claim by the Appellant. The Court of Appeal dismissed the appeal and a further application for leave to appeal to the UKPC was not granted.

The UKPC permitted the Appellant to file an appeal, on the condition that the Appellant would also address the issue of the Appellant's right to appeal. Before the UKPC, the Appellant relied on the *Salford* test to argue that the BVI courts should have deferred liquidation proceedings in favour of arbitration, given that the Appellant has disputed the debt. There were four agreed issues before the UKPC:

(1) *As a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?*
(2) *Was the relevant test met or should the matter be remitted to determine whether this was the case?:*
(3) *Did Wallbank J conclude that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and, if he did so find, was he wrong to do so?*
(4) *Does the appeal fall within section 3(1)(a) of the 1967 Order? In particular, does 'the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of GBP 300 sterling or upwards'?*

On the first issue, the UKPC noted that section 18 of the BVI's Arbitration Act, 2013 ('BVI Arbitration Act') mandates a stay on legal proceedings in an 'action' to arbitration. The UKPC clarified that a winding up application under the BVI Insolvency Act is not an 'action' that could be referred to, and justify the grant of a stay in favour of, arbitration under the BVI Arbitration Act. This is because such applications do not involve, and the insolvency courts do not determine, the existence or amount of the debt. The stay would apply only to disputes that are capable of being decided by an arbitral tribunal. The law is clear that a creditor must first establish their debt before approaching the insolvency courts for winding up of the debtor. Therefore, the mandatory stay provisions of the BVI Arbitration Act would not apply to the liquidation proceedings.

If a creditor's debt is not genuinely disputed on substantial grounds, the UKPC held that an order for winding up against the debtor would not interfere with the mandate to refer a dispute to arbitration. This is because the order for winding up is beyond the scope of the arbitration agreement. The decision in *Salford* assumed that the discretion of the insolvency court has to be exercised in favour of the policy of the UK Arbitration Act, without further analysis on the boundaries of arbitration and insolvency. The practical consequence of *Salford* was that courts did not differentiate between genuine and spurious claims of dispute. This presented a fairly low threshold for arbitration, and a very high one for insolvency disputes involving arbitration agreements.

As such, the test to be applied by BVI courts (and courts in England and Wales) when a debt is disputed in a winding up application is that the court must determine whether the dispute is subject to an arbitration agreement or exclusive jurisdiction clause is genuine and is disputed on genuine and substantial grounds.[11] The process of determination of the genuineness of a dispute does not involve, as a summary judgment procedure may require, a determination of the merits of the dispute. The courts only determine if there is an issue that merits a detailed decision.[12] If such a 'genuine' issue exists, then the courts will refer the matter to arbitration.

The UKPC further ruled that *Salford* was wrongly decided and directed the Companies Courts in the UK to follow the test laid out in *Sian.*[13]

On the second issue, the UKPC held that Justice Wallbank applied the correct test and was right in not applying the test in *Salford.*

On the third issue, the UKPC notes that Justice Wallbank did not consider the impact of the arbitration for various reasons, one among which was the delay in raising the argument. The UKPC rejected this ground of appeal.

On the fourth issue, the UKPC noted that Justice Wallbank rightly relied on the existence of the debt and the lack of any genuine dispute as sufficient ground to order liquidation. He did not adjudicate the claim, which is for the respondent to prove to the liquidator. In such a case, the appeal does not cross the value threshold as Justice Wallbank's decision does not affect the appellant's financial interest.

C. Summary of the Indian insolvency regime

The insolvency regime in India was substantially revised in 2016 with the introduction of the Insolvency and Bankruptcy Code, 2016 ('IBC'). The IBC

11 *Sian, supra* n. 9, para. 99.
12 *Ibid.*, para. 96.
13 *Ibid.*, para. 125.

consolidated and harmonized the various statutory provisions that apply in the context of insolvency of a company. Similar to the UK Insolvency Act, 1986 ('UK Insolvency Act') and the BVI Insolvency Act, the IBC is designed to initiate appropriate insolvency proceedings – including the imposition of an overriding moratorium on other proceedings – in case of default by the corporate debtor. With rare exception of proceedings that benefit the corporate debtor,[14] the moratorium applies to arbitration proceedings. With the objective of providing a comprehensive and quick mechanism for insolvency disputes,[15] the IBC is set up to override all other legislation once an insolvency application is admitted.[16]

Under the IBC, a financial creditor, an operational creditor or the corporate debtor may initiate the Corporate Insolvency Resolution Process ('CIRP').[17] The CIRP process can be initiated only in the event of default by the corporate debtor. With the objective of providing a timely resolution of insolvency disputes, National Company Law Tribunals ('NCLT') as well as an appellate body called the National Company Law Appellate Tribunal ('NCLAT') have been established under the Indian Companies Act, 2013.

A financial creditor is one who holds a financial debt which is '*a debt along with interest, if any, which is disbursed against the consideration for the time value of money*'.[18] This is an inclusive definition with some transactions being specifically listed as a financial debt.[19] The key test for a financial debt is the existence of a debt along with interest disbursed for the time value of money.[20] An operational creditor is one who holds an operational debt, which is defined as '*a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any state Government or any local authority*'.[21] If there is a written agreement between the parties, then the real intention of the agreement has to be ascertained before categorizing the debt as financial or operational.[22]

14 *See Power Grid Corporation of India v. Jyoti Structures Ltd* (2018) 246 DLT 485.

15 The Report of the Bankruptcy Law Reforms Committee (4 Nov. 2015).

16 IBC, s. 238. *See Tata Consultancy Services Ltd v. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited* 2021 SCC Online SC 111.

17 *Ibid.*, s. 6.

18 *Ibid.*, s. 5(8).

19 *Ibid.* [e.g., (1) money borrowed against the payment of interest; (2) any amount raised by acceptance under any acceptance credit facility or its dematerialized equivaled; and (3) any amount raised that has the commercial effect of a borrowing.].

20 *Global Credit Capital Limited and Anr v. Sach Marketing Pvt. Ltd. and Anr* 2024 INSC 340, para. 20(b).

21 IBC, s. 5(21).

22 *Global Credit Capital Limited and Anr v. Sach Marketing Pvt. Ltd. and Anr* 2024 INSC 340, para. 20(d).

A 'default' under the IBC is defined as the '*non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be*'.[23] A corporate debtor is defined as a '*corporate person who owes a debt to any person*'.[24]

The IBC has separated the CIRP initiation process for financial creditors and operational creditors. For an application by a financial creditor to be admitted, the adjudicating authority – the relevant NCLT – has to be satisfied that there is a default of a financial debt by the corporate debtor. An application by an operational creditor may be admitted by the adjudicating authority if the notice procedure under section 8 has been followed and there is proof that there is no payment and the debt is not disputed.[25] The adjudicating authority has fourteen days to decide (1) a default in case of an application by a financial creditor; and (2) an unpaid and undisputed debt in an application by an operational creditor. Importantly, the adjudicating authority has to be satisfied that a *default* has occurred in case of a financial debt while it has to be satisfied that debt is not *disputed* in case of an operational debt.

Since the enactment of the IBC, the Indian judiciary has delivered a bevy of judgments elaborating the test to be applied before admitting an application to the CIRP based on a default of financial debts and operational debts. The common thread of reasoning across its decisions on the IBC was best summed up by the Supreme Court of India ('Supreme Court') in *Swiss Ribbons Pvt. Ltd & Anr v. the Union of India & Ors.*[26] While upholding the constitutional validity to the IBC and in context of determining a financial creditor's application for the CIRP, the Supreme Court observed that the '*Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default"*'.[27]

D. Indian case law on insolvency and arbitration

1. *Insolvency Applications by Financial Creditors*

Soon after the IBC was brought into force, the Supreme Court had the opportunity to clarify the test when determining an application by a financial creditor. In *Innoventive Industries Limited v. ICICI Bank and Anr,*[28] ('*Innoventive Industries*') a two-judge bench of the Supreme Court held that

23 IBC, *supra* n. 16, s. 3(12).
24 *Ibid.*, s. 3(8).
25 *Ibid.*, s. 9(5).
26 (2019) 4 SCC 17.
27 *Ibid.*, para. 37.
28 (2018) 1 SCC 407.

the adjudicating authority would have to decide if a default has occurred. The corporate debtor will then be entitled to point out if the debt involves a disputed claim. A default would mean that a debt is due and payable. However, a debt may not be due if it is not payable in law or in fact. If there is a default, the adjudicating authority has no option but to accept the application, subject to the application complying to form requirements in section 7 of the IBC.[29] Unlike in *Sian* where the insolvency courts were not required to make a summary decision on the merits of the case, the adjudicating authority is required to make a summary decision as a result of the express wording of section 7 of the IBC.

In the *Indus Biotech Private Limited v. Kotak India Venture Fund-I,*[30] ('*Indus Biotech*') a three-judge bench of the Supreme Court revisited its position in *Innoventive Industries.* The Supreme Court reiterated that the adjudicating authority will have to determine if there is a default of a financial debt on the materials before it prior to admitting the financial creditor's application. Once the application is admitted, the underlying dispute becomes a dispute in rem and, consequently, non-arbitrable. It furthered its position by noting that the IBC is an independent code, the adjudicating authority is duty bound to conduct an independent enquiry into the alleged default after considering the corporate debtor's arguments despite the mandate of the Arbitration act to refer the dispute to arbitration. Given the requirement for the adjudicating authority to decide expeditiously, the IBC process cannot be allowed to be defeated by a '*moonshine*' defence seeking reference to arbitration.[31] If the adjudicating authority decides that there is a default, then '*the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause*'.[32] Notwithstanding the Supreme Court's observations on the process that an adjudicating authority must follow when dealing with the CIRP initiated because of a financial debt, it upheld the adjudicating authority's decision to allow the dispute to arbitration as the authority had found no default based on the information provided by the parties.

Albeit in a non-arbitration context, the contours of the adjudicating authority discretion were further clarified by a two-judge bench of the Supreme Court in *Vidarbha Industries Power Limited v. Axis Bank Limited* ('*Vidharbha Industries*').[33] The Supreme Court held that merely because a default is established doesn't mean that the CIRP should be initiated. The

29 *Ibid.,* para. 28. *See* IBC, s. 7 [The form requirements include providing details of the default and a proposal on the prospective insolvency resolution professional].

30 (2021) 6 SCC 436.

31 *Ibid.,* para. 24.

32 *Ibid.,* para. 25.

33 2022 SCC Online SC 841.

adjudicating authority retains discretion to reject the application if it deems that the corporate debtor stands to benefit by continuing its operations without the CIRP. Interestingly, *Vidharbha Industries* was diluted by the Supreme Court while dismissing a review petition. It held that its judgment in *Vidharbha Industries* was peculiar to the facts of the case.

In *E.S. Krishnamurthy and Ors v. Bharath Hi Tech Builders Private Limited*,[34] the Supreme Court reiterated its position in *Innoventive Industries*. The case involved an appeal from a decision of the adjudicating authority to dismiss the financial creditor's application on the grounds that the corporate debtor was in the process of setting its debts with various other lenders. The adjudicating authority held that initiating the CIRP based on a summary procedure would endanger the settlement interests of other non-financial creditors to the corporate debtor. While disposing the application, the adjudicating authority also ordered the corporate debtor to settle its debts in three months. The Supreme Court rejected this approach and held that the adjudicating authority is required to only either admit an application if it finds that there is a default based on the information available to it or reject an application.[35]

In a more recent judgment of *M. Suresh Kumar Reddy v. Canara Bank & Ors*,[36] a two-judge bench of the Supreme Court reiterated the position in *Innoventive Industries*. Once the adjudicating authority finds that there is a default of the financial debt, the adjudicating authority has no option but to admit the application and initiate the CIRP.

The position as it stands today for financial debts is that the adjudicating authority (the relevant NCLT) must ascertain in a summary procedure if there is a *default* of the financial debt. Unlike UK insolvency courts, the focus of the adjudicating authority in India is to determine a default instead of determining if a genuine dispute exists. In other words, even if the adjudicating authority finds that a genuine dispute exists, the adjudicating authority is required to decide if – based on the information made available to it – there is a default from a debt due and payable in law or in fact.[37] While theoretically more feasible, this distinction is arguably lost in the practical setting of a fact intensive case involving a financial debt. If an adjudicating authority finds that there has been no default in context of a disputed debt, then the adjudicating authority would have impliedly recognized that a genuine dispute exists between the parties. The tests as set out in *Sian* may not be immediately applicable when addressing insolvency applications based on financial debts in India.

34 (2022) 3 SCC 161.
35 *Ibid.*, para. 27.
36 Supreme Court, Civil Appeal No. 7121 of 2022.
37 *Innoventive Industries*, para. 30.

If there is a default, the adjudicating authority *has* to exercise discretion in favour of admitting the financial creditor's application. The presence of an arbitration agreement in the underlying contract would not deter the adjudicating authority from initiating the CIRP.

2. *Insolvency Application by Operational Creditors*

The Supreme Court, in *Innoventive Industries*, also provided clarity on the test to be used in cases of an application made by an operational creditor. Noting that the IBC allows the corporate debtor to respond to a demand notice, the Supreme Court observed that merely indicating a pre-existing arbitration proceeding would get the proceeding '*out of the clutches of the code*'.[38]

In *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*,[39] ('*Mobilox Innovations*') a two-judge bench of the Supreme Court held that a 'dispute' on the debt must be examined as being 'plausible'. Plausibility is to be determined based on whether there is '*a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application*'.[40]

Soon after the judgment in *Mobilox Innovations*, the Supreme Court reinforced its dicta in *K Kishan v. M/S Nirman Company Pvt Ltd*.[41] The principal issue before the Supreme Court was whether an ongoing challenge to an arbitral award would not be a pre-existing dispute for purposes of initiating the CIRP for an operational debt. The Supreme Court decided that situation would be a pre-existing dispute and noted that operational creditors could not use the IBC '*either prematurely or for extraneous considerations or as a substitute to debt enforcement procedures*'.[42]

The *Mobilox Innovations* decision stands as good law and has been followed by the NCLTs and the NCLAT.[43] The broader definition adopted for a 'dispute' to operational debts allows the Indian judiciary

38 *Ibid.,* para. 29.
39 (2018) 1 SCC 353.
40 *Ibid.,* para. 40.
41 (2018) 17 SCC 662.
42 *Ibid.,* para. 13.
43 *See K K Ropeways Ltd v. M/S Billion Smiles Hospitality Pvt Ltd* Comp. App (AT) (CH) (INS.) No. 246 / 2021.

to maintain the delicate balance between the policy objectives of the Indian Arbitration and Conciliation Act, 1996 ('Arbitration Act') and the IBC.

E. English law, BVI law and Indian law – harmony in operation?

The Arbitration Act shares the policy objectives of the UK Arbitration Act, 1996 and the BVI Arbitration Act, 2013. In that it is designed to place arbitration at an overriding preference over all other forms of dispute resolution mechanisms. Arbitration has been classified as a special statute that overrides other general statutes.[44] The difficulty between insolvency and arbitration arises because the IBC has also been designed as a special statute, meant to override other laws.[45] However, the insolvency laws of the UK and BVI are different from that of the IBC. The IBC provides separate tests for financial creditors and operational creditors.

Indian case law is aligned with the UK and BVI position for operational creditors – in that a 'genuine' dispute has to exist for the adjudicating authority to refer the matter to arbitration. The adjudicating authority is not required to decide on the claim or value of the debt, but rather the genuineness of the dispute to the debt. If satisfied that a genuine debt exists, the adjudicating authority has to exercise its discretion in favour of arbitration.

However, in case of a financial debt, the adjudicating authority is required to determine based on the information available if there is a default. This is a wholistic determination in a summary procedure for admitting the application. The standard of enquiry is the existence of a default. Even if the default is disputed, the mere existence of the default is sufficient for the adjudicating authority to admit the application.

In *Sian*, the UKPC examined the term 'action' in section 18 of the BVI Arbitration Act vis-à-vis the BVI insolvency Act. It held that an application for insolvency is not something that an arbitration tribunal could decide. Section 8 of the Arbitration Act contains similar wording in favour of arbitration, with the use of the term 'matter'. In *Indus Biotech*, the Supreme Court followed the general approach of the IBC in examining 'default' over 'dispute' and held that a matter becomes in rem (and therefore non-arbitrable) after the insolvency application is admitted. Conversely, till the time the insolvency application is admitted, the matter is arbitrable.

44 *See In Re: Interplay between Arbitration Agreements under the Arbitration And Conciliation Act, 1996 and the Indian Stamp Act, 1899* 2023 SCC Online SC 1666.

45 *A. Navinchandra Steels Pvt. Ltd. v. SREI Equipment Finance Limited*, AIR 2021 SC 1180.

The IBC has been designed to intentionally treat provide differential treatment to financial creditors and operational creditors. Financial creditors were viewed as having easier access to information to prove the default of the corporate debtor.[46] This differential treatment is, prima facie, paradoxical to the pro-arbitration stance otherwise sought to be espoused by the Arbitration Act and the Supreme Court in recent years.

The wording and scheme of the IBC for financial debts – as it stands today – is clear. The adjudicating authority has to examine if there is a default, and admit the application if it comes to a positive finding. The IBC envisions that this decision has to be made within 14 days of the application. The ground reality is that this timeline has become redundant. In 2017, the Supreme Court ruled that this timeline is only directory.[47] The complexity of transactions and high case load, combined with a lack of fully staffed adjudicating authorities has resulted in a substantial delay in determining if there has been a default. This delay has now led to the Indian government mulling granting 'interim moratorium' to protect the corporate debtor's assets[48] and the promotion of mediation within the insolvency process.[49]

Sian gives impetus for the Indian legislature to consider arbitration as a viable alternative. The high threshold for arbitration may well be reduced by mandating that the adjudicating authorities decide on the existence of 'genuine dispute' instead of 'default'. Given the high value of the debts and the sophistication of the parties involved, it is likely that contracts for financial debts contain arbitration agreements. The proactive use of arbitration may reduce the caseload of the adjudicating authority, and harmonize Indian law with insolvency law in England & Wales and the BVI. It will also allow for comprehensively settling cross claims and counterclaims before insolvency needs to be invoked.

The IBC in its present avatar also empowers the adjudicating authority to deal with any related contractual disputes to the insolvency if the CIRP commences. In *Tata Consultancy Services Ltd v. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited*,[50] the Supreme Court relied on *Indus Biotech* and emphasized section 60(5)(c) of the IBC that empowers the adjudicating authority to decide any dispute that arises in context of an

46 The Report of the Bankruptcy Law Reforms Committee (4 Nov. 2015), para. 5.2.1.

47 *M/s Surendra Trading Company v. M/s Juggail Kampat Jute Mills Company Ltd and Ors* (2017) 16 SCC 143.

48 The Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India (Feb. 2020), para. 5.4.

49 Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, Report of Expert Committee constituted by the Insolvency and Bankruptcy Board of India, 31 Jan. 2024, at 14–18.

50 2021 SCC Online SC 1113.

insolvency proceeding. The Supreme Court held that '*Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor*'.[51] Till the time arbitration becomes a viable option, the corporate debtor may use this provision to seek a resolution of the broader disputes with the creditor.

F. Conclusion

The similarity in the English, BVI and Indian tests to be applied for commencing insolvency proceedings for operational debts is a welcome change. Operational debts – as construed by the IBC – are considered to be far more numerous and commonplace as commercial transactions. Arbitration agreements are also more commonly adopted in commercial transactions that would be classified as an 'operational debt' for the IBC. This similarity in approach will likely have three immediate effects for companies registered under the jurisdiction of English law, BVI law and Indian law:

(1) Increased confidence in contractual compliance: Insolvency for Indian, UK and BVI entities is now a very real possibility in case a debt is proven to exist and is not disputed on genuine grounds. As such, this will likely lead to increased compliance in contractual obligations unless the grounds for breach are substantial and genuine.
(2) Strengthening of the arbitration process: Commercial transactions that incorporate institutional rules will likely see a decrease in jurisdictional objections prior to the appointment of the arbitral tribunal, if arbitration is initiated after an insolvency application has been rejected by an insolvency court in India, UK or the BVI on the ground that there is a genuine dispute to the debt. Arbitral tribunals constituted thereafter will also be less likely to reject their jurisdiction over the dispute.
(3) Potential for specialist institutional rules for proof of debt claims: The similarity in law will also allow operational creditors to pursue expedited 'proof of debt' arbitrations. Arbitral institutions may look to develop rules designed to allow for expedited resolution of claims that, albeit genuinely disputed, may be decided on a documents-only basis or in a summary procedure with a set timeframe. This would lead to consequent time and cost reductions in the entire dispute resolution process for companies across India, UK and BVI.

51 *Ibid.*, para. 28.

The *Sian* decision gives a shot in the arm for dispute resolution especially in countries that follow the common law tradition. Arbitration remains as the only legally enforceable mode of dispute resolution across signatories of the New York Convention. However, the disharmony in the national insolvency laws meant increased parallel litigation leading to increased legal costs for all entities to a dispute. While the harmony brought by *Sian* will not prohibit a party from initiating parallel litigation, it will certainly reduce the risks involved and make arbitration more attractive as a one stop for resolution of the disputes.