

EMERGENCE OF COMMERCIAL JUSTICE

INSOLVENCY AND ARBITRATION

Vivek Sood

Senior Advocate, Supreme Court of India

Bloomsbury Professional India



Foreword By

Tushar Mehta, Solicitor General of India

Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas

B L O O M S B U R Y

Advance praise for the book

"I found the book to be a valuable insight into solving complex commercial disputes through the prism of the amended Arbitration Act and the new legal tool i.e. the IBC."

*Mukul Rohatgi, SENIOR ADVOCATE &
Former Attorney General for India*

"One of the silver linings to the COVID induced lockdown is the fact that many lawyers have put pen to paper and converted themselves into authors. One such additional offering by my colleague and friend – Mr. Vivek Sood, Senior Advocate, is a book, titled '**Emergence of Commercial Justice: Insolvency & Arbitration**', and I am happy to recommend it to all practitioners of the law that deal with such subjects. It is a book that is written in a modern way endeavouring to simplify complex legal issues and will be an important ready reckoner for all those who wish to familiarize themselves with these branches of law.

I wish the Author and the Book great success."

*R. N. Karanjawala
Managing Partner,
Karanjawala & Co.*

"The advent of the Insolvency and the Bankruptcy code and the unleashing of several significant amendments to the Arbitration act, heralded a new dimension to Commercial law in India. Join Vivek Sood as he takes you on an interesting journey through the important judgments in these areas. Deftly distilling their essence and by presenting them in a simple, yet an elegant style, the author chronicles the contribution of the Judiciary, on aspects that impact the nerve centre of the Nation's economy.

*K.V. Vishwanathan
Senior Advocate &
Former Additional Solicitor General of India*

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B L O O M S B U R Y
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Dedicated

To

Priti Sood

Who has stood by me in all times...

Acknowledgements

No book is an individual effort. Its team work though the author get's most of the credit for it. This is my fourth book over the last twenty years. As before, several individuals have contributed to the creation of this book.

I must give credit to the Judges of the Supreme Court who work tirelessly hearing arguments on complex legal issues, deciding the *lis* between the litigants, and laying down the law for future application across the country. It's a bundle of judicial experience, interpretative creativity, and hard work that come into play when a judgement on a significant question of law is pronounced by the Supreme Court. This book is an analysis of certain landmark judgements delivered by the Supreme Court since 2016 when the Insolvency & Bankruptcy Code, 2016 and Arbitration & Conciliation (Amendment) Act, 2015 came into force. These two statutes mark a new beginning in corporate law and the Supreme Court has put life into the two statutes by its interpretative creativity. Hence has emerged the concept of Commercial Justice in India.

My juniors and interns assisted me in the research for this book, without whose contribution the book would have taken another six months at least. Every chamber of a Senior Counsel is incomplete without hardworking juniors and interns.

My daughter Ms. Ramayni Sood, a fourth year law student at Amity Law School, Delhi worked with me tirelessly on the research and editing of the book. Without her support, the book wouldn't have seen the light of the day.

Hansaveni Sood, my younger daughter kept motivating me to go on and on till I finished the book. My wife Priti's encouragement and support kept up my tempo to finish the work within the time-frame I had set-up. The blessings of my parents have always been with me throughout my life. I owe my success to their sacrifices and farsighted vision apart from providing me with the best of education. Good wishes from my sisters have added value to my pursuits.

I am deeply grateful to Mr. Shardul Shroff, Executive Chairman of Shardul Amarchand Mangaldas & Co and Mr. Tushar Mehta, Solicitor General of India for carving out time to write the Forewords for my book. I am deeply grateful to Mr. Mukul Rohtagi, Senior Advocate and former Attorney General for India, Mr. Raian Karanjwala, Managing Partner

Emergence of Commercial Justice: Insolvency & Arbitration

of Karanjawala & Co and Mr. K.V. Vishwanathan, Senior Advocate and former Additional Solicitor General of India for penning advance praises of my work. These stalwarts have given credibility to my work.

I must also acknowledge the elegant design of the book-cover that has been made by Shilpa Agrawal. Her creative design has enhanced the look of the book.

Above all, I am grateful to Him for placing this book in my destiny.

Vivek Sood

About the author



Vivek Sood is amongst the leading Senior Counsels in India with three decades of experience in diverse areas such as Criminal laws, Commercial Disputes, Arbitration, Insolvency, Information Technology, Media laws and Constitutional law. Vivek Sood is known for arguing the most complex briefs in the High Courts, Tribunals, and the Supreme Court.

Amongst the innumerable briefs that he has argued, many have received wide media coverage and are cited as precedents. His excellence is manifested through the quality of his arguments in the Courts.

Apart from being a busy Senior Counsel, he has authored four books and is amongst the leaders of the Indian Bar who is frequently called upon to speak on legal issues of significance. Sood coined the concept of the 'Fundamental Right to Internet' in his book released in 2011 and the Supreme Court recognized the expression in 2019 while deciding the J&K Internet shutdown case.

Vivek Sood is a multifaceted personality. Apart from a successful law practice, he strongly believes in espousing causes that have a strong social impact, such as, appearing in important Public Interest Litigations as well as assisting the Court as Amicus Curiae in various matters and promoting DNA evidence in the criminal justice system partnering with Ogilvy (India) and Honeywell (USA).

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Foreword

The author Vivek Sood has 'devilled' as my junior advocate several years ago. Whilst he worked with me in his formative years, now that he is a senior counsel and an established author; this fills my heart with great joy and happiness.

Writing a book is no mean task, but writing on the Insolvency and Bankruptcy Code 2016, and the Arbitration & Conciliation Act as an analyst deeply scrutinising latest judgements and complex concepts, of both these commercial hot and topical subjects is stupendous for a practising Senior Advocate.

These are very contemporaneous subjects reviving moribund old laws with modern techniques and tools. These laws are constantly evolving and are being moulded to accommodate for latest judgements from the Indian Judiciary. Vivek classifies these important legislations as "commercial justice" torch bearers. The Hon'ble Supreme Court of India, in a short span of 4 years, has declared the law of Insolvency and restructuring so as to shield it from constitutional challenges of current times. Every change in the law will of course bring new challenges to the Insolvency law.

Arbitration and conciliation has faced several situational hazards including the need for better rules and processes for appointment of independent and impartial arbitrators and the conduct rules for Arbitrators. Institutional arbitration is hugely competitive among Arbitration centres and the countries where the Centres are situated. More refined speedier justicing and processes are being introduced for demonstrating efficient delivery and competency in modern times. Laws of countries are also rapidly being amended for keeping them germane to speedy commercial dispute resolution. Vivek's analysis of these developments and judgements in arbitration law is eloquent and incisive. The clear break from the past law is well demonstrated by his treatise.

I congratulate Vivek for having taken up both these modern laws in the domain of "commercial justice" for writing a contemporaneous book which will appeal to commercial practitioners.

I am sure that his book will be relevant to the judiciary, the practitioners and the students and I look forward to regular updates of this book.

Shardul S. Shroff
Executive Chairman
Shardul Amarchand Mangaldas & Co.

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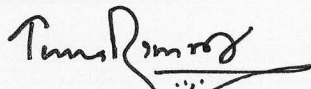
FOREWORD

Rule of law, a necessary facet of Article 14, the guarantee against arbitrariness, involves the sanctity with which the judicial systems treats commercial contracts. A man being bound by his word has a very basic sense of justice about it. This book by Vivek Sood, interrogates these aspects of the law and locates them in two important statutory changes made in the last six years – the Arbitration Act amendments and the Insolvency and bankruptcy Code. In crude terms, the arbitration amendments have strengthened the general contract enforcement regime in the country by making the process time-bound, limiting court interference pre-arbitration and post arbitration. On the other hand, the Insolvency and Bankruptcy Code, a game changer in terms of the law governing corporate death of legal entities, completely changed the landscape of debt contract and how they were treated in commercial parlance in the country. The IBC, enacted in the backdrop of some serious non-performing asset issues plaguing the debt industry in the country, provided a cogent, short and strict creditor in possession approach to insolvency. Both enactments put together, are a representation of the continuous process of the republic of strengthening rule of law in the country and deepening the foray of the justice especially in the commercial sector.

In the context of the Arbitration and Conciliation Act, 1996, the amendment is certainly a positive step towards making arbitration expeditious, efficacious and a cost effective remedy. The new amendments seek to curb the practices leading to wastage of time and making the arbitration process prohibitively a costly affair. The new law also makes the declaration by the arbitrator about his independence and impartiality more realistic as compared to a bare formality under the previous regime. The making the Ld. Arbitrators responsible for delay in the arbitration proceedings, for the reasons attributable to him, ensures that the arbitrators do not take up arbitrations, which are beyond their capacities and works as a deterrent. It can be said that the amendments travel an

extra mile towards reducing the interference of the Court in arbitration proceedings that has been a consistent effort of the legislature since passing of the 1996 Act. Similarly, the Insolvency and Bankruptcy Code, 2016 was brought in to provide a single unified framework to deal with bankruptcy and insolvency by persons other than financial institutions. Prior to the introduction of IBC, the law of insolvency and bankruptcy was spread across several statutes and fora, which rendered the process time consuming and largely ineffective due to dissipation of value of assets. The effect of moratorium on actions undertaken under other statutes, coupled with the overriding provision under the IBC has given it a lot of teeth in order to achieve the object of time bound resolution of insolvency and maximisation of assets of the corporate debtor during the process of resolution.

In this backdrop, this book by Vivek, a scholar of unmatched quality and perseverance, is an important break from the past. The book is a unique in terms of its approach and provides a delicate balance between an academic endeavour and a practitioner's book. Vivek has covered the entire field of legislation and the precedent on the subjects of arbitration and insolvency and further lucidly put together the development of the jurisprudence by mentioning and analysing every major precedent on the subject.



[TUSHAR MEHTA]

Preface

In 2011, I discovered the concept of the 'fundamental right to Internet' as a derivative right emerging from the right to life and liberty guaranteed under Article 21 of the Constitution. The Supreme Court spoke of the fundamental right to Internet in 2019 in reference to the Internet shutdown in Kashmir.

In this work, I have discovered the emergence of 'Commercial Justice' in India over the last five years since 2016. I have found the emergence of this concept but the real credit for evolution of commercial justice goes to the Government of India for bringing into force the two significant legislations- The Insolvency and Bankruptcy Code, 2016 and The Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016); and the Supreme Court of India for putting life and blood into these legislations by creative interpretation and a pro-active approach. The speed with which the Supreme Court has interpreted these legislations is amongst the game-changing elements that have created the concept of Commercial Justice in India. The Supreme Court has brought the law of Arbitration and Insolvency & Bankruptcy Code on par with laws in advanced legal systems across the world and global best practices.

While reading over a hundred judgements on the above subjects of Insolvency & Bankruptcy and Arbitration laws, I selected about twenty of them for analysis herein. Not that the other judgements don't qualify as contributors towards the concept of Commercial Justice, it's the brevity that demanded a selection. I wanted this book not to exceed 250 pages but it has gone far beyond the limit I set for myself. I couldn't add more pages as I felt it would be unfair for the readers. This is not a law commentary or a text book. It's a book that analyses some of the game-changing judgements delivered by the Supreme Court over the last five years from which the concept of Commercial Justice has emerged in India. Today, WE THE PEOPLE can say that the concept of Commercial Justice has emerged alongside Criminal Justice and Civil Justice.

I have divided this book into two parts- Insolvency and Arbitration.

The book starts with the theme that the Insolvency and Bankruptcy Code, 2016 ('IBC') converts the Indian economy from a debtors' paradise to re-shaping it. The pre-IBC era was a creditors' hell and defaulters' paradise that is lost and the economy's rightful position has been restored. The Constitutional validity of several provisions of IBC was challenged

in *Swiss Ribbons* which have been repelled by the Supreme Court in a landmark judgement. The Court has paved the way for the implementation of the law in its true spirit for rehabilitating debt defaulting companies within a time bound schedule. The erstwhile management is kept out of the corporate insolvency resolution process, which is a major departure from the earlier law.

The Supreme Court in *K. Shashidhar* has cemented democracy amongst creditors, by giving paramount importance to the commercial wisdom of the financial creditors to decide the destiny of the ailing company by the process of voting to get the indisposed company back on its feet or let it be liquidated.

In *Innoventive Industries*, the Supreme Court has given paramount status to the IBC over other statutes repugnant to it. The rival non-obstante clauses in the two conflicting statutes have been interpreted in favour of IBC. The IBC shall dominate over other statutes given its importance to the economy.

In *ArcelorMittal-I*, the Supreme Court has laid down the principles with respect to ascertaining the ineligibility criteria for debarring certain persons from submitting a resolution plan and has found the doctrine of lifting the corporate veil as being embedded in IBC.

Should financial creditors and operational creditors be treated equally in matters of payment of dues, in other words, they deserve equal treatment under a resolution plan? Can the NCLT/NCLAT interfere in the distribution of dues amongst creditors that has been decided by voting by the Committee of Creditors (CoC)? The Supreme Court in *ArcelorMittal-II* has decided these issues with crystal clarity.

By creative interpretation of IBC, the Supreme Court in *Pioneer Urban* has held in a landmark judgement that real estate investors who have lost their hard-earned money to defaulting real estate companies are financial creditors and can invoke the IBC. The Court has said that RERA (Real Estate (Regulation and Development) Act, 2016 does not oust IBC but gives parallel remedies to the real estate victims to invoke either or both the statutes.

The Supreme Court in *Mobilox* has said that the IBC is not a money recovery statute and where debts are genuinely found disputable, the petition to the NCLT by the creditor is liable to be rejected. The testes for determining doubtful debts have laid down by the Supreme Court with clarity.

In *Swaraj Infrastructure*, the Supreme Court has permitted the creditors to invoke parallel remedies of debt recovery as well as seeking liquidation of the defaulting company under the respective statutes. It doesn't amount

to blowing hot and cold but blowing hot and hotter which is permissible in law.

In Division-II of the book, I have analysed the development of the law of Arbitration since 2016 when the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) was brought in to amend the Arbitration Act, 1996. The amendments have the effect of positively altering the arbitration landscape in India. The Supreme Court has delivered game-changing judgements over the last five years so as to bring the Arbitration law in India on par with the global scenario.

The Supreme Court in *Pam Developments* rejected a longstanding colonial law in its applicability to the Arbitration law and has brought about parity between private entities and government in arbitration matters.

Independence and impartiality of arbitrators have been declared by the Supreme Court to be the hallmarks of arbitration, in *Voestalpine*. The Supreme Court has emphasized that the time has come for India to send positive signals to the international community that our arbitrators are independent and impartial. The judgements in *HRD Corporation* and *Bharat Broadband* also analyse the 2016 amendments especially the Fifth and Seventh Schedules added to the Arbitration Act by the 2016 Amendments. Best international practices have been emphasised in the Arbitration landscape in India.

When the infrastructure collapses, so does the superstructure. The Supreme Court in *TRF* and *Perkins* has examined the issue whether an ineligible arbitrator under the Fifth/ Seventh Schedules can nominate another arbitrator in terms of the contract between the parties.

In *BCCI v. Kochi Cricket*, the Supreme Court has interpreted section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 which speaks of the applicability of the amendments to arbitrations and proceedings in relation to arbitration proceedings. The Court cautioned the Government not to suspend the application of the said Amendment Act to pending proceedings in the Courts under section 34 (challenge to awards).

The Supreme Court, in a game-changing judgement in *Hindustan Construction Company*, has changed the past era when a challenge to an award amounted to an automatic stay of its implementation. This situation would render arbitral awards like paper decrees having no value till the challenges were decided and this would take years or even decades. The very purpose of expeditious alternative dispute resolution though arbitration would be lost. The Court also struck down section 87 on the ground that the legislature had brought in the regressive legal provision

which had the effect of negating the 2016 amendments to pending proceedings under section 34 and also as the provision had been legislated in spite of the Court having advised against section 87 (then proposed) in *BCCI v. Kochi Cricket*.

The ground of challenging an award for being contrary to public policy had been a vexed issue that has been decided by the Supreme Court in the landmark judgement in *Ssangyong Engineering*. The meaning of 'public policy' has been settled by the Court as also the other grounds of challenge under section 34.

Determining the seat of arbitration has been a vexed issue before the Supreme Court. Principles to find the seat of arbitration have been laid down by the Court in *BGS SGS Soma*. The seat of arbitration determines the jurisdiction of Courts where the parties must go for initiating proceedings in relation to arbitration.

In *Vijay Karia*, the Supreme Court has laid down the principle of 'One bite at the cherry' when it comes to challenging the enforcement of a foreign award in India. The Supreme Court has emphasised on bringing the Indian Arbitration law on par with the New York Convention.

I have endeavoured to demystify complex legal issues in this work. The book is intended for lawyers interested in corporate and commercial laws and students who wish to pursue these branches of law. The book would be useful and interesting to associates and partners of law firms, as well as in-house legal counsel, legal managers, company secretaries, and chartered accountants working in the corporate world.

Vivek Sood.

February 2021

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