MEDIATION IN INSOLVENCY DISPUTES: FURTHERING SPEEDY RESOLUTION UNDER THE INSOLVENCY & BANKRUPTCY CODE

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The Insolvency and Bankruptcy Code, 2016 (IBC) revolutionised the resolution of distressed businesses in India by consolidating fragmented laws and establishing a time-bound process for insolvency proceedings. However, despite its progress, the system remains burdened with delays and inefficiencies, as evidenced by the substantial backlog at National Company Law Tribunals (NCLTs) and the inability to meet statutory deadlines. This paper explores the integration of mediation as a viable alternative dispute resolution mechanism within the IBC framework. Mediation, already recognised globally for its effectiveness in resolving insolvency disputes, offers a time-efficient and cost-effective solution that preserves relationships and maximises asset value. The study examines the role of mediation in addressing systemic bottlenecks, drawing on best practices, judicial precedents, and recent legislative developments like the Mediation Act, 2023. By analysing domestic and international case studies, the paper highlights the potential of mediation to alleviate the burden on adjudicatory bodies, enhance the efficiency of insolvency resolutions, and fulfil the IBC's original objective of ensuring timely and fair outcomes for all stakeholders.

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I. INTRODUCTION

The enactment of the Insolvency and Bankruptcy Code, 2016 (‘**IBC**’ or ‘**Code**’) marked a pivotal moment for the recovery of struggling businesses in India. Prior to the IBC, the insolvency mechanism in India was fragmented across various laws, often leading to lengthy and inefficient procedures. Insolvency often lost its existence under the guise of recovery proceedings. While insolvency proceedings are completely anti-theses to the recovery process, however, it is more often than not that the insolvency process is initiated to ensure speedy recovery under the threat of losing control of the debtor. The subject matter of both the said processes was completely different and governed by different statutes. The need for the IBC arose from the shortcomings of the legal system in effectively addressing the growing number of non-performing assets (‘**NPAs**’) in the banking sector. Following extensive discussions on how to manage the existing issues and tackle financial distress in struggling companies, whether through resolution or liquidation, the Bankruptcy Law Reforms Committee (‘**BLRC**’) proposed an insolvency framework. They advocated for a gradual approach, considering the evolving challenges and international best practices, while also taking into account the current state of insolvency processes and their maturity.

Following the BLRC's suggestions, the Code was implemented in the year 2016 as a comprehensive law aimed at consolidating and amending laws concerning the resolution of insolvency for corporate entities, partnership firms, and bankruptcy for individuals within specified timeframes. Essentially, the Code aimed to tackle existing challenges by offering a unified structure that simplifies insolvency proceedings, enhances asset value, fosters entrepreneurship, and credit availability, and ensures a fair balance of interests among all the involved parties.

IBC superseded several antiquated laws and regulations related to insolvency and bankruptcy, including the Sick Industrial Companies (Special Provisions) Act of 1985 (‘**SICA**’) and some provisions of the Companies Act, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), the Recovery of Debts due to Banks and Financial Institutions Act

(RDDBFI Act), 1993, etc. Due to the fragmented presence of various laws on this subject, there were different adjudicatory forums leading to complexities and inordinate delays in the timely resolution of disputes often leading to the devaluation of assets and further entangling of issues by the time a matter was finally decided.

Corporate Insolvency Resolution Process ('**CIRP**') is a unique process provided under the IBC for the resolution of the insolvency of a corporate debtor. In order to reach the stage of liquidation, except for voluntary liquidation, the corporate debtor has to go through the CIRP. Besides the matters relating to CIRP, the National Company Law Tribunal/s ('**NCLT**' or '**NCLTs**') are also saddled with the responsibility to adjudicate disputes regarding matters under SICA (which remained undecided on the date of enactment of IBC), oppression and mismanagement under the Companies Act, shareholder disputes, disputes relating to manner of operations of the company, management and business of the company, actions taken by the Registrar of Companies ('**ROC**'), striking off the companies, etc. These matters were earlier adjudicated by High Courts ('**HC**') ordinarily, often taking an enormous amount of time. There have been company petitions pending in the HCs for over a decade and this issue also formed the basis for establishing a specialised forum to expeditiously decide disputes relating to company matters. With the IBC coming into effect, all of these matters were transferred to NCLT to decongest HCs. It is thus, evident that the NCLTs have a huge roster of cases to be decided whereas there is one principal bench with only nine regional benches at Ahmedabad, Prayagraj, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata, and Mumbai; and five other benches at Cuttack, Jaipur, Kochi, Amravati, and Indore. Typically, in each regional bench, there is only one courtroom having one judicial member and one technical member to decide such wide-ranging matters, which are a mix of insolvency matters where IBC has provided a mandatory timeline for resolution and company matters that are of no less importance considering the interest of stakeholders. This situation has been causing an inordinate delay in the disposal of cases by NCLT and attracting criticism from the stakeholders who see no difference in the pre and post IBC regime.

The overarching effect of IBC over other disputes was to ensure that IBC would be a one-stop solution for disputes concerning insolvency and bankruptcy matters and also of matters relating to winding up, liquidation, mergers, acquisitions, amalgamations, oppression, and mismanagement, ROC arising disputes which otherwise were being handled by different forums such as Company Law Board and HCs. However, the number of benches in a regional bench and the strength of members to decide these matters is not commensurate with the caseload and this has led to IBC not achieving its goal of providing speedy resolution.

In the Economic Survey of India for the period 2022-23, it was recognised that over the last seven years, the IBC has consistently contributed to improving the business environment in India. Its ability to ensure timely resolutions for corporations, thereby facilitating smooth exits, has proven instrumental in helping the financial system absorb external shocks, including tightening global financial conditions and high volatility in financial markets.[1]

While the law and application of the IBC in India have progressed to encompass entire value chains, aiming to address business distress and facilitate insolvency resolutions through a 'creditor-in-control' model and collective deliberation process within statutory deadlines, challenges persist. Despite marked improvements in insolvency resolution outcomes over seven years of implementation, the IBC processes remain time-consuming, contentious, and resource intensive. Time consumed for final disposal of matters still remains a bone of contention and it may not be incorrect to state that none of the applications under Section 7 and Section 9 IBC have ever been admitted or rejected within the 14-day time period prescribed under the said provisions.

In the fiscal year 2022-23, the average duration for the NCLT to approve resolution plans from the commencement of the CIRP was 831 days (including excluded time) and 682 days (excluding excluded time) for 180 cases. As of March 2023, 92% of CIRPs had exceeded the statutory timeline of 270 days for completion under the IBC.[2]

The Section 7[3] and Section 9[4] of IBC clearly mention a time limit of 14 days for the admission or rejection of the application for Corporate Insolvency Resolution. However, the data from 2020-2022 shows that not even a single application has been

[1] 'The Economic Survey of India 2022-2023', (Department of Economic Affair, Ministry of Finance, Government of India, 31 Jan 2023) 116. <https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> last accessed 11 November 2023.
[2] 'Annual Report 2022-23' (*Insolvency and Bankruptcy Board of India*) 22 < Initial Pages.pmd> last accessed 11 November 2023.
[3] Insolvency and Bankruptcy Code 2016, s 7.
[4] Insolvency and Bankruptcy Code 2016, s 9.

accepted or rejected within the prescribed time limit of 14 days. It is understandable that such delay could be caused because of the requirement that the adjudicating authority needs to ascertain whether there exists a debt or not and also test the application on other factors mentioned in the Code, however, the fact remains that there is a time period prescribed in the Code which has not been met.[5] The IBBI in its consultation paper published data relating to time consumed in deciding applications under Section 9 of the Code which is as follows:

Year	2020-21	2021-22
Application admitted under Section 9	153	207
Average time taken for Admission from date of filing (days)	468	650
No. Of applications where it took more than 1 year	54	39
No. Of applications where it took between 1 to 2 years	84	86
No. Of applications where admission took more than 2 years	15	82

The above-mentioned data clearly depicts that the timeline mentioned in the Code has not been followed even in a single case. Although the Financial year saw a commendable improvement in the number of cases approved for resolution, there is still a lot of ground to cover. As of March 2024, the total number of CIRP cases

[5] Insolvency and Bankruptcy Board of India, 'Consultation Paper on issues related to reducing delays in the Corporate Insolvency Resolution Process' (*Insolvency and Bankruptcy Board of India*, 13 April 2022) 1.

admitted since the commencement of the code is 7567, out of which 1920 are still ongoing.[6]

The total time, ideally should be 330 days including the extensions provided for the completion of the CIRP. However, in most cases, the admissibility of the application itself takes more than a year, as is evident from the data presented above.

While the resolution process within the IBC is intended to be a non-adversarial process, its practical implementation in India has become increasingly litigious. This shift is primarily attributable to various contentious matters brought before the NCLT for resolution by parties such as the corporate debtor (‘**CD**’), both financial creditors (‘**FC**’) and operational creditors (‘**OC**’), members of the Committee of Creditors (‘**CoC**’), and occasionally, the appointed Resolution Professional (‘**RP**’) overseeing the CIRP. Additionally, the involvement of third parties filing applications under Section 60(5) of the IBC further contributes to the proliferation of litigation during the CIRP.[7] Consequently, this situation gives rise to numerous systemic bottlenecks and results in cascading delays in the resolution process, exacerbating the backlog of cases.

Very often it is felt that IBC needs a pre-adjudication process to filter out certain kinds of disputes before they reach the Bench/adjudicating authority. Such cases are matters relating to oppression and mismanagement which require tedious fact-finding exercise taking a huge amount of time for conducting a trial-like exercise. These can be resolved by court-appointed umpires or mediators and would some a lot of judicial time since anyway by the time these matters are finally decided much damage is already done. Another form of dispute falling in the above-said category is the proceedings under Section 7 and Section 9 of the code since these are anyway proceedings initiated under the guise of recovery. If that is so, then mediation or conciliation is the best form of resolution of dispute rather than engaging the Adjudicating Authority. Doing so will only further the cause of justice under IBC since post-admission settlements are already recognised under the code. Not just post-admission settlements but in a lot of cases the settlement is made during the pendency of dispute before the adjudicating authority and the cases are disposed of accordingly.

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[6] Insolvency and Bankruptcy Board of India, ‘Insolvency and Bankruptcy News’ (*Insolvency and Bankruptcy Board of India*, 2024) 11, 12.

[7] Insolvency and Bankruptcy Code 2016, s 60(5).

The solution to this above is mediation, which is already a practice prevailing in other countries to tackle the backlog in insolvency cases, for example, in 2017, Singapore also recommended the use of mediation in insolvency resolution to transform into an international insolvency resolution hub.[8]

II. MEDIATION

Against this backdrop, the Insolvency and Bankruptcy Board of India (‘**IBBI**’) engaged in formal dialogues and consultations with stakeholders regarding the potential integration of mediation within the IBC framework in India. During these discussions, it was observed that the IBC was not explicitly exempted from the scope of the Mediation Bill of 2021. Consequently, a recommendation was made to introduce a facilitating provision for mediation within the Code, allowing the IBBI to outline the specifics of the mediation framework under the Code.[9]

The IBBI established an Expert Committee[10] (‘**Committee**’) chaired by Dr. T. K. Viswanathan (Former Secretary General, Lok Sabha Secretariat and Former Law Secretary). Its members included Mr. Sudhaker Shukla (Whole Time Member, IBBI), Dr. Rajiv Mani (Additional Secretary, Ministry of Law and Justice), Mr. Bahram Vakil (Founder and Partner, AZB & Partners), Mr. Shardul S Shroff (Executive Chairman, Shardul Amarchand Mangaldas), Mr. Sumant Batra (Founder Partner, Kesar Dass B. & Associates), and Mr. Satyajit Roul (Joint Director, Ministry of Corporate Affairs), with Mr. Santosh K. Shukla (Executive Director, IBBI) serving as its member secretary. The Committee's mandate was to develop a comprehensive framework to define the scope for the utilisation of mediation under the Code, and subsequently present its recommendations.

The Committee employed a comprehensive approach, which involved internal discussions, consultations with experts, and engagement with representatives from various industries and academia. It scrutinised the current Alternative Dispute

[8] Justice AK Sikri & Anuroop Omkar, ‘Mediation In Corporate Insolvency: A Game Changer’ (*Business World*, 24 July 2024, 02:30 PM) <https://businessworld.in/article/mediation-in-corporate-insolvency-a-game-changer-171872> .
[9] Insolvency and Bankruptcy Board of India, ‘Report of the Colloquium On Functioning And Strengthening Of The IBC Ecosystem’ 43 <Report 12-12-22.indd>.
[10] IBBI Order No. Board-22/2/2023-IBBI/8937, ‘Constitution of expert committee to propose a detailed framework for use of mediation under the Insolvency and Bankruptcy Code, 2016’ (*Insolvency Board of* India, 6 March 2023).

Resolution (‘**ADR**’) landscape in India, studied global literature, and analysed best practices concerning insolvency mediation processes. This methodology aimed to gain deeper insights into the utilisation, functionality, and potential challenges associated with insolvency mediation frameworks.

The Committee thoroughly reviewed and discussed several versions of the Report before finalising it in its current state. As the Mediation Act, 2023 (‘**2023 Act**’) was introduced in Parliament in July 2023 and enacted in September 2023, while the Committee's recommendations were in an advanced drafting stage, the Committee decided it was prudent to reassess and reconsider its recommendations in light of the 2023 Act for the present Report. However, the Committee strived to ensure that its recommendations align with the provisions of the 2023 Act. These recommendations do not seek to supersede or conflict with the Act in any way.

Mediation as a method of dispute resolution for Insolvency and related matters could surely be seen as the emerging alternative to court marathons. Mediation involves the engagement of an impartial third party to facilitate the negotiation and settlement of a dispute, aiming to resolve conflicts among two or more parties. Typically, mediation begins with the mutual consent of the involved parties, through a pre-agreed contractual clause, by referral from a court or tribunal, or as a mandatory requirement under the law. As an ADR mechanism, mediation is widely recognised for enhancing the efficiency of dispute resolution and providing flexibility to the parties involved. It enables parties to explore mutually acceptable commercial resolutions to business disputes, without direct intervention from the courts.[11]

The mediation process maintains a flexible, private, and confidential environment. Such characteristics encourage the preservation of relationships between the involved parties. In numerous cases, mediation proves to be more cost-effective and time-efficient compared to litigation or other alternative dispute resolution methods like arbitration.[12]

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[11] Mondaq, ‘United States: What Is Mediation and Why Mediate?’ (*Mondaq*, 15 July 2021) <https://www.mondaq.com/unitedstates/insolvencybankruptcy/1091428/what-is-mediation-and-why-mediate> last accessed 11 November 2023.

[12] Salem Advocate Bar Association T N v Union of India (Salem II) (2005) 6 SCC 344; Afcons Infrastructure Limited & Anr versus Cherian Varkey Construction Company Private Limited and Ors (Afcons) (2010) 8 SCC 24.

Depending on the nature of the conflict and the level of involvement by the mediator, various mediation models can be employed, including facilitative, evaluative, court-mandated, and transformative approaches. In these scenarios, a mediator is tasked with several functions, as outlined in the Consumer Handbook on Mediation:

1. Establishing an environment conducive to the mediation process.
2. Clarifying the mediation process and establishing ground rules.
3. Facilitating communication between the parties using diverse communication techniques.
4. Identifying and addressing obstacles to communication between the parties.
5. Collecting information about the dispute.
6. Identifying the underlying interests of the parties involved.
7. Maintaining control over the process and guiding focused discussions.
8. Managing interactions between the parties.
9. Assisting parties in documenting agreements on disputed points.[13]

In India, mediators commonly employ a blended approach, incorporating elements from both facilitative and evaluative mediation models. Facilitative mediation, a traditional method, involves the mediator assisting parties in negotiations without expressing personal views on the dispute's merits. Additionally, in a facilitative role, the mediator guides parties to consider the implications of not reaching a settlement, such as potential litigation and evaluates the merits of the case. The mediator encourages parties to explore alternative solutions and motivates them to agree on mutually acceptable terms.[14]

Conversely, evaluative mediation assigns a more active role to the mediator. Drawing on their expertise in specific sectors, mediators in this model assess the strengths and weaknesses of each party's case based on legal principles. Typically, the mediator guides parties through reality-testing exercises, evaluating potential outcomes if the

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[13] Ashok R. Patil, 'Consumer Handbook on Mediation (FAQ)' (Ministry of Consumer Affairs, Food and Public Distribution and Chair on Consumer Law and Practice, National Law School of India University, 2021 https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook_Mediation.pdf last accessed 10 November 2023.

[14] Misha, Shreya Prakash, and Kritika Poddar, 'Applying Mediation in Corporate Insolvency Situations in India' (Insolvency and Bankruptcy Board of India Publication, 2022) https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf last accessed 10 May 2023.

case were to proceed to court. However, it is important to note that the ultimate decision to settle rests with the parties involved.

During its discussions, the Committee observed that the 2023 Act encompasses mediation in disputes, whether commercial or otherwise, and offers provisions for exclusions, inclusions, or modifications to the existing mediation framework to ensure consistency in the process. The 2023 Act mandates that the process be established and officially announced by either the Central Government or the Mediation Council of India. However, this implementation is still pending.

In the interim, the Committee observed that before the enactment of the 2023 Act, mediation procedures lacked unified regulation under a single legislation in India, leading to variations across different forums and statutes. Generally, the Committee acknowledges that the mediation process comprises multiple stages that can be adjusted to achieve the intended results.

The essence of IBC was *stricto sensu* timely resolution of disputes and today, the said essence has not only been diluted but lost. Today, IBC is a lost cause inasmuch as the NCLTs all over the country are heavily backlogged, and timely resolution of disputes is a rarest of the rarest cases. This situation although unfortunate and deplorable, however, is not something that cannot be resolved. Means of resolution of the current bottleneck require to be explored, with greater inclusion of ADR. In light of the recent legislative developments, we require deeper research to understand the role ADR mechanisms can play in resolving IBC-related disputes.

III. RECOMMENDATIONS OF THE EXPERT COMMITTEE ON THE FRAMEWORK FOR USE OF MEDIATION UNDER IBC

The Expert committee in its report laid out a framework for the incorporation of the mediation process in the Insolvency and Bankruptcy Code proceedings. The Committee suggested that a mediation framework within the Code should ideally function as a self-contained system, complete with its own infrastructure to fully support the Code's objectives. Given that in-rem rights and public interest factors are frequently implicated at various stages of proceedings under the Code, the Committee sees a strong basis for pursuing an exemption, either by amending the 2023 Act directly or through a notification under Entry 13 of the First Schedule to the Act.

Additionally, the Committee recommended a gradual introduction of voluntary mediation as a dispute resolution tool within the Code, ensuring that this addition respects the timelines of the existing insolvency resolution processes.

IV. JUDICIAL PRECEDENCE

In *Pioneer Infrastructure v. Union of India*,[15] the SC ruled that proceedings under the IBC are classified as proceedings *in rem*. Since it is well-established that in rem proceedings, due to their public interest nature, cannot be referred to arbitration under Section 8 of the Arbitration Act, this principle can reasonably be extended to suggest that mediation may also be unsuitable. This rule originated with the landmark case *Vidya Drolia and Others v. Durga Trading Company*,[16] which examined the types of disputes eligible for ADR. In this case, the Court clarified the difference between *in rem* and *in personam* disputes, specifically identifying insolvency disputes as non-arbitrable.

Private, confidential settlements for matters that are *in rem* appear contradictory to the settled principles of law upheld by Indian courts.[17] The introduction of the Mediation Bill, 2021, raised expectations for a unified mediation framework within India. However, Schedule II clearly restricts certain types of disputes from mediation, including those related to family and industrial matters, resulting in a relatively limited scope for the legislation. Consequently, its practical effectiveness remains uncertain, and it may not serve as a reliable foundation for assessing whether mediation could be extended to insolvency-related disputes.

It is also untrue that the process of mediation is a completely new process in the field of insolvency, in Indian Courts. There have been instances where the parties have opted for mediation in Insolvency cases. In *Parvinder Singh v. Intec Capital Ltd.*,[18] a Section 7 application against Jagtar Singh & Sons Hydraulic Private Limited, was subsequently admitted by the Adjudicating Authority. Parvinder Singh, representing the promoters of the Corporate Debtor, appealed, indicating their readiness to settle

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[15] Pioneer Infrastructure v Union of India (2019) SCC Online SC 1005.

[16] Vidya Drolia and Ord v Durga Trading Company (2019) SCC Online SC 358.

[17] Aakriti Anurag Tewari, 'Situating Mediation within India's Insolvency Framework: An Innovative and Efficient Intervention' (*Anusandhan* Exploring new perspectives on Insolvency, 2022) < 599cf8fb50be73f518fca467311304db.pdf > 1-16.

[18] Parvinder Singh v Intec Capital Ltd (2019) SCC OnLine NCLAT 1365.

the financial creditor's claims before the Committee of Creditors was formed. The Hon'ble NCLAT directed the interim resolution professional to ensure the corporate debtor continued operations and not to form the Committee of Creditors. Since both parties agreed to mediation, a retired judge was appointed to facilitate the settlement discussions. Following mediation proceedings, a settlement was achieved, and the NCLAT ordered that the mediator's recorded terms be treated as its binding order, to be followed by all parties. Additionally, it was stipulated that the corporate insolvency process could be revived by the petitioner if the settlement terms were breached. The NCLAT instructed the interim resolution professional to allow the corporate debtor's Board of Directors to manage operations, provided that no assets, movable or immovable, would be sold, transferred, or encumbered by the Corporate Debtor or its officers during the settlement period.

V. CONCLUSION

Considering the fact that the IBC was enacted solely with the intent of ensuring time bound resolution mechanism and that NCLT and the appellate tribunal were constituted to carry out the functions under the IBC, it is no more a secret that the said forums are saddled with the humongous caseload and unreasonable expectations to carry out functions under the code. There is so much to do with such little resources and means, especially time. It is seen that the induction of mediation in the present IBC regime will resolve a lot of issues related to the delay in proceedings and better resolution of disputes. Mediation is a time-bound proceeding that resolves the issue in the least amount of time with the best possible outcome. Mediation has proven to be a catalyst for speedy and effective dispute resolution even those relating to cross-border insolvency matters. For example, in MF global holdings case,[19] for several undertakings undergoing insolvency processes in the U.S.A. and U.K., a court-appointed mediator facilitated the agreement between the stakeholders present in different countries. This ensured the maximisation of asset value and avoided long-drawn cross-border expensive litigation. In Lehman Brothers case, the U.S. Bankrupt court appointed mediators to facilitate the resolution of complex commercial disputes involving over two hundred stakeholders.[20] In the said proceedings, out of 77

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[19] *In re MF Global Holdings Ltd* 469 B.R. 177 (Bankr. S.D.N.Y. 2012).
[20] In re Lehman Brothers Holdings Inc 415 B.R. 77 (N.D.N.Y. 2009).

proceedings, 73 were closed successfully in terms of the settlement reached in mediation. The examples are innumerable, and it is high time that India also acts swiftly to give way for mediation insolvency and company-related disputes. India is the future, and it must lead by example.