Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

Scope of Mediation under the IBC

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Received 22 January 2023; *Accepted* 13 February 2022; *Published* 17 February 2022

This paper focuses on the scope of mediation in the Indian ecosystem comparatively sustained in foreign jurisdictions. The paper explores the methods used in mediation concerning Corporate Insolvency. Referring to other similar research, this paper underquotes the resolutions discussed in them and gives an idea of mediation in insolvency matters in its entirety. A previous paper dealing with mediation in insolvency matters[1], discusses, in brief, the need for mediation in contemporary times owing to the huge pendency in cases in India. However, there is a need to discuss the role of mediation specifically in MSMEs, and the ever-growing potential and need for it. The objective is to analyse the future and scope of mediation in corporate disputes. Should Mediation be given a fair chance for IBC in India?

Keywords: *ibc, mediation, corporate insolvency, cirp.*

BACKGROUND

India's current insolvency law system has proven to be ground-breaking legislation for resolving corporate crises. Earlier, discussions of industrial insolvency or bankruptcy primarily concentrated on the Sick Industrial Enterprises (Special Provisions) Act, 1985[2] (SICA), a rescue

[1] Rajiv Mani, 'Mediation in Insolvency Matters, Insolvency and Bankruptcy Regime in India A Narrative' [2020] Insolvency and Bankruptcy Board of India articles 6
[2] Sick Industrial Enterprises (Special Provisions) Act 1985

and rehabilitation law for industrial companies. But it was hampered by legislative roadblocks, which resulted in significant delays and inefficiencies. The IBC was aimed at maximizing the value of a company's assets to save it from bankruptcy rather than just serving as a plain recovery law for creditors. Despite being a development over its predecessors, the IBC has not been able to achieve its goals. Ironically, the IBC's court-centric framework causes constant delays in the settlement process because of disputes between many parties. The Reserve Bank of India recognizes IBC[3] as one of its report's most commonly used processes for recovering from corporate distress. The problem of increasing non-performing assets began to disappear when the IBC was adopted.

The NCLTs are the bodies authorised to make decisions on insolvency and liquidation proceedings. However, because the Company Law Board's tasks were moved to the NCLT upon its course, the NCLT has been overworked. The NCLTs have had twin responsibilities in carrying out their IBC and Companies Act obligations. As of September 2020, more than 1,440 cases have been in the pipeline for more than 270 days out of the 1,942 cases that were being resolved.[4] Due to the pending work and incoming new matters, the NCLT's efficiency in resolving insolvency proceedings has decreased. Globally, it's altered over the past several decades as more bankruptcy issues are settled using ADR processes, particularly mediation, rather than just through adjudication. In mediation, the disputing parties are encouraged to settle their differences via dialogue rather than going to court.

The introduction of mediation in the insolvency process aims to provide an alternate method for resolving disputes between the corporate debtor and its creditors, allowing for a faster and more cost-effective resolution. Mediation can be initiated at any stage of the insolvency process, and the resolution professional is required to inform the parties of the option of mediation. The mediation process is conducted by a panel of mediators appointed by the Insolvency and Bankruptcy Board of India (IBBI).

[3] Insolvency and Bankruptcy Code 2016
[4] Mohit Kapoor & Ruchita Krishnan, 'Mediation: The panacea for case pendency under the IBC' (*Bar & Bench*, 2022) <https://www.barandbench.com/law-firms/view-point/mediation-the-panacea-for-case-pendency-under-the-ibc> accessed 11 January 2023

CONTEMPORARY NATURE OF MEDIATION IN IBC

USE OF ADR MECHANISM IN INSOLVENCY DISPUTES IN FOREIGN JURISDICTIONS

Insolvency Mediations are an appropriate technique to resolve insolvency disputes when comparing the insolvency regime of India to those of other countries. Pre-pack insolvency is a well-developed concept in European Union member states that enables the creditor and the debtor to create a restructuring plan before starting any legal processes. Countries such as France, Germany, and Italy also allow using one of the ADR techniques to reorganize and restructure a distressed corporate debtor. In addition, the Singaporean government proposed mediation in bankruptcy proceedings as early as 2017[5]. The committee responsible recommended using mediation centres and enhanced the panels of these centres to include mediators with experience in cross-border restructuring. Another well-known example is the Lehman Brothers lawsuit from 2008[6]. As of 2016, Lehman Brothers reacquired $333 million out of $9 billion through mediation.

In nations like the USA, mediation became a factor in insolvency cases in 1986 when the California bankruptcy court implemented the mediation program. Due to the many successful ADR instances, the rise in bankruptcy cases, and the high expenses associated with litigation, a legislative framework for ADR was developed. The Alternative Dispute Resolution Act in 1998[7], which mandated that every federal district court permit ADR in "all civil actions, including adversary proceedings in bankruptcy," was a significant legal step toward using ADR in insolvency matters in the US.

There are various findings in ways of incorporating mediation into insolvency matters, such as the use of efficient insolvency tools used and different characteristics of informal restructurings alongside semi-formal (hybrid) debt restructurings adopted in Italy and other main European

[5] Singapore Mediation Act 2017
[6] Andrew Ross Sorkin, 'Lehman Files for Bankruptcy; Merrill is Sold' (*New York Times*, 2008) <https://www.nytimes.com/2008/09/15/business/15lehman.html> accessed 25 September 2022
[7] US Alternative Dispute Resolution Act 1998

countries.[8] Such findings back the use of mediation as a way to train debtors and creditors to a new Rescue Culture.

SCOPE OF MEDIATION IN INSOLVENCY PROCEEDINGS IN INDIA

Mediation has already made history when the Supreme Court recently referred the Ayodhya Dispute to mediation[9]. Additionally, The National Company Law Appellate Tribunal in India in the case of V.K. Parvinder Singh v Intec Capital Ltd. & Anr[10] required both parties to appear before the mediator, Hon. Mr. Justice (Retd.) a former judge of the Honorable Supreme Court. The Indian Government has implemented several legal measures to advance mediation in the nation in the modern period to stay up with the globalisation of trade. A framework for the cross-border enforcement of settlement agreements reached through international mediation is provided by the Singapore Convention on Mediation. India has signed the convention but has not yet ratified it.

The Companies Act, 2013[11], which provides for the setting up of mediation for matters highlighted by the NCLT and NCLAT, combined with Section 89 of the Civil Procedure Code, 1908[12], encourages the employment of pertinent alternative dispute resolution processes[13]. Tribunals could strongly advise mediation in light of the existing legal framework, particularly in situations when stakeholder relations are at issue. Section 12A of the Commercial Courts Act, 2015[14] provides for Pre-Institution Mediation in commercial disputes.

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[8] Lucarelli Paola & Ilaria Forestieri, 'The Three Targets of Insolvency Mediation: Dispute Resolution, Agreement Facilitation, Corporate Distress Management' (*Transnational Dispute Management*, 2017) <https://www.transnational-dispute-management.com/article.asp?key=2494> accessed 10 January 2023

[9] *M Siddiq (D) Thr Lrs v Mahant Suresh Das* (2019) 9 SCC 1440

[10] *Parvinder Singh v Intec Capital Ltd & Anr* Company Appeal [2019] (AT) (Insolvency) No 968

[11] Companies Act 2013

[12] Civil Procedure Code 1908, s 89

[13] Justice AK Sikri & Anuroop Omkar, 'Mediation in Corporate Insolvency: A Game Changer' (*BW BusinessWorld*, 14 June 2019) <https://www.businessworld.in/article/Mediation-In-Corporate-Insolvency-A-Game-Changer/14-06-2019-171872/> accessed 25 September 2022

[14] Commercial Courts Act 2015, s 12A

MEDIATION BILL, 2021

Due to the difficulties encountered in this domain, the recent introduction of the Draft Mediation Bill, 2021[15] is a step in the effective path for the settlement of insolvency. Pre-litigation mediation in civil or commercial disputes is effectively required under the Bill, which demands that parties attempt to resolve their differences through mediation before going to any court or tribunal. The mediation procedure must also be finished within 180 days, however, that time frame may be extended by an additional 180 days. Although mediation has been designated as the preferred method of resolving disputes, if after two mediation sessions the parties are still unable to agree, they are free to go before a court or tribunal. Although the Parliament has not yet approved this Bill, it might be the long-awaited answer to the CIRPs' ongoing case pendency issue. The bill mandates the central government to approve any regulations adopted by the respective Councils of the Institute of Company Secretaries of India (ICSI) and the Institute of Chartered Accountants of India (ICAI) about mediation.

INSOLVENCY AND MSMEs

Shortly, mediation and arbitration may replace litigation as people's first and preferred means of resolving issues, especially for MSMEs. As the pre-pack framework gains experience in the MSME setting, it is anticipated that it will even be made relevant to bigger business segments. The corporate insolvency resolution process (CIRP), as initially intended, was meant to be a last resort. However, CIRP emerged as a preferred choice due to the nature of the Indian environment. In this situation, it may be argued that the pre-pack structure, negotiated settlement, and mediation are preferable routes to a transparent and out-of-court resolution over CIRP[16]. The IBC has already offered incentives for parties to negotiate and settle out of court even after initiating a CIRP Process[17]. Section 18 of the Micro, Small, and Medium Enterprises

[15] Mediation Bill [RS] 2021
[16] Dr Ashok Haldia, 'IBC: A Dynamic Framework, Now Shaping for Version 2' (*The Chartered Accountant*, 2021) <https://www.iiipicai.in/wp-content/uploads/2021/11/IBC-A-Dynamic-Framework-Now-Shaping-for-Version-2.pdf> accessed 22 September 2022
[17] Kamalnath & Ors, 'Adding Mediation to India's Corporate Resolution Process' (*Wiley Online Library*, 2021) <https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1450> accessed 22 September 2022

(MSME) Development Act, 2006[18] mandates conciliation when disputes arise on payments to MSMEs.

ADVANTAGES OF MEDIATION, IN INSOLVENCY CASES

The assets in question continue to depreciate, and tensions amongst parties only grow as a result of the lengthy nature of CIRP procedures before the tribunals. This is particularly troubling because continuing business relationships is crucial to a company's ability to thrive following an insolvency settlement. Through comprehensive communication amongst all parties involved, a resolution may be found without harming business relationships. It was discovered that agreements resulting from mediation typically produce voluntary compliance and uphold goodwill between the parties. The intricacy of litigation under the IBC makes it a cost and time and constructive alternative as well.[19]

In the insolvency context, using Mediation focuses on three main goals, (a) resolution of the plan and bankruptcy-related disputes; (b) facilitation of negotiations on a restructuring plan; (c) prevention of insolvency. In adjudication, a judgement that is final and conclusive must be made in each instance. When an insolvency (bankruptcy) action is filed, the debtor is often wound up, which causes the problem with the common pool to remain unsolved. Because neither the mediator nor the parties are authorised to decide the issue, mediation is sometimes not legally binding without the parties' assent. Some scholars think that ADR encourages conflict resolution rather than achieving a conclusion (like a res judicata decision in court). In other words, mediation enables the parties to analyse their positions and plan for the eventual settlement of the conflict. Even if mediation doesn't result in a settlement right away, the parties' views about their stances may change, which may eventually result in a settlement. Through mediation, the parties are encouraged to negotiate and come to a consensus.

[18] Micro, Small and Medium Enterprises (MSME) Development Act 2006, s 18
[19] Chitra Narayan, 'The best way to settle corporate disputes' (*Hindu Business Line*, 18 January 2018) <https://www.thehindubusinessline.com/opinion/the-best-way-to-settle-corporate-disputes/article10010263.ece#:~:text=Mediation%20can%20be%20used%20in,since%20the%20resolution%20is%20consensual> accessed 11 January 2023

CONCLUSION

A court-ordered mediation on a case-by-case basis will be more appropriate than mandatory pre-litigation mediation for all sorts of insolvency cases because the IBC is a relatively new legal statute and mediation is still evolving in the country. The creation of court rules on the insolvency mediation trigger is necessary for this situation. The court referral of insolvency cases to mediation as required by the Code should be covered by these rules. These can be created by developing predetermined criteria of income, asset, and debt parameters. Considering everything, it is possible to frame the conclusion that bankruptcy legislation may be improved by implementing a time-bound mediation process that includes debt negotiation and settlement to create a strong insolvency resolution system in the country. Mediation is considered a success when the party's resolve is acceptable to all parties within a time frame that is shorter than the insolvency process.