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Arbitration & Mediation in Insolvency Proceedings: A Necessary Reform or a Stumbling Block?

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The Insolvency and Bankruptcy Code, 2016 (IBC), and the Arbitration and Conciliation Act, 1996 (ACA), have legislative and procedural contradictions addressed in this paper by the authors, particularly regarding mediation and other alternative dispute resolution methods. Although mediation is recognised by Indian law and courts, recent judicial trends show a rising preference for the IBC's overriding jurisdiction, as seen in the cases of 'Indus Biotech and K. Kishan[1], which raises contentions about the incorporation of ADR, particularly in the event of insolvency. The research further examines whether implementing pre-admission mediation for creditors is consistent with the objectives of the IBC, particularly the equitable asset distribution mechanism outlined in Section 53[2] of the waterfall and the time-bound nature of the Corporate Insolvency Resolution Process (CIRP) under Section 12[3]. Mediation's voluntary and non-binding nature may jeopardise court consistency and insolvency time limits despite its flexibility and potential for an early settlement. The authors also contend that current statutory recovery frameworks, regulatory restrictions, and the unenforceability of mediated settlements render it improbable that financial creditors, particularly public sector banks, would consider mediation. The paper concludes that although mediation helps reduce the number of cases and encourages amicable resolution, it needs to be integrated with IBC timelines,

[1] *Indus Biotech Pvt. Ltd. v Kotak India Venture (Offshore) Fund* AIR 2021 SCC 1638
[2] Insolvency and Bankruptcy Code 2016, s 53
[3] Insolvency and Bankruptcy Code 2016, s 12

have a meticulously laid statutory framework, and have limited judicial intervention to ensure that it enhances rather than detracts from the Code's primary aims of stakeholder value maximisation and timely resolution.[4]

Keywords: *ibbi, mediation, ibc, arbitration, legislative inconsistencies.*

INTRODUCTION

Through mediation, a neutral third party is brought into the process of resolution between two parties that are in dispute.[5] A mediator's role is to assist the parties in resolving their differences amicably by reaching a mutually agreeable solution.[6] The parties' settlement attained through mediation is not legally binding, and the mediator does not have the authority to issue a decision.[7] It is undeniable that mediation has a plethora of benefits for all the parties present in the dispute and the courts. The parties receive an opportunity to evaluate their common interests in an amicable setting, while the courts benefit by lessening the burden of proceedings through ADR professionals.[8]

In cases of insolvency, mediation can significantly increase the effectiveness of CIRP procedures by settling conflicts between several creditors while fostering harmonious settlement amongst various stakeholders. It can assist in reducing expenses and delays, which enhances the possibility that the corporate debtor will successfully restructure and provide higher returns to creditors.[9] This is especially crucial when a financially distressed

[4] Ayesha Nacario Gupta, 'IBBI Recommends Mediation: Integration of ADR with IBC Laws' (*NLIU CBCL*, 12 July 2024) <https://cbcl.nliu.ac.in/insolvency-law/ibbi-recommends-mediation-integration-of-adr-with-ibc-laws/> accessed 19 June 2025
[5] Navin K Pahwa, 'CORPORATE INSOLVENCY: ITS OPERATIONS AND EMERGING PROBLEMS' (2018) 30(2) National Law School of India Review <https://www.jstor.org/stable/26743939> accessed 17 September 2025
[6] Rajiv Mani, 'Mediation in Insolvency Matters' (*Insolvency and Bankruptcy Board of India*) <https://ibbi.gov.in/uploads/resources/1acc8439aab101c013221a481fe108a6.pdf> accessed 15 June 2025
[7] Ruchika Chitravanshi, 'IBBI Proposes Mediation Mechanism for Operational Creditors in IBC' *Business Standard* (05 November 2024) <https://www.business-standard.com/companies/news/ibbi-proposes-mediation-mechanism-for-operational-creditors-in-ibc-124110500878_1.html> accessed 14 June 2025
[8] *Ibid*
[9] Misha et al., 'Applying mediation in corporate insolvency situations in India' (*Shardul Amarchand Mangaldas*, 01 May 2022) <https://www.amsshardul.com/insight/applying-mediation-in-corporate-insolvency-situations-in-india-2/> accessed 19 June 2025

but profitable company is looking for informal, out-of-court remedies during the pre-commencement stage.[10]

The combination of mediation and IBC legislation would help reduce the caseload and ensure that every insolvency mediation is resolved within predetermined time limits, since the CIRP procedure outlined in the code is not adversarial in nature. The Code's primary goal is to safeguard stakeholders' interests while ensuring that enough measures are taken to protect the corporate debtor from the liquidation process. In its report[11], the expert committee made several recommendations for the use of voluntary mediation, marking a paradigm shift away from traditional litigation by resorting to settle insolvency disputes amicably and using alternative dispute resolution (ADR) to help corporate debtors resurrect their businesses. Therefore, the incorporation of mediation into the IBC is considered a much-needed reform to the laws about insolvency. However, there are a few less-talked-about pitfalls in the implementation of mediation as a remedy in cases of IBC.

RESEARCH QUESTIONS

1. What are the legislative inconsistencies between the Arbitration & Conciliation Act, 1996, and the Insolvency & Bankruptcy Code, 2016, and the impediments posed by them in resorting to ADR during insolvency?
2. Whether mediation can be opted for as an effective dispute resolution, not causing deterrence to the time-bound CIRP objective of the code under section 12.
3. Does pre-admission mediation of creditors with the corporate debtor align with the legislative intent of the waterfall mechanism?
4. Whether any statutory provisions could incentivise Financial Creditors, particularly public sector banks, to adopt mediation.

[10] Insolvency and Bankruptcy Board of India, *Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016* (2024)
[11] Pallavi Mishra, 'IBBI Committee Proposes Framework For Voluntary Mediation Under IBC' *Live Law* (16 February 2024) <https://www.livelaw.in/ibc-cases/ibbi-committee-proposes-framework-for-voluntary-mediation-under-ibc-249715> accessed 25 June 2025

RESEARCH OBJECTIVES

1. To study the intricacies and inconsistencies in the Arbitration & Conciliation Act, 1996, and the Insolvency & Bankruptcy Code, 2016, and their impact on insolvency resolution.
2. To evaluate whether mediation will be an effective resolution mechanism with respect to the timely resolution objective of the enactment of the code.
3. To study the impact of pre-admission mediation by creditors or a class of them on the waterfall mechanism.
4. To recommend a specialised legislative and institutional framework for mediation in insolvency that ensures enforceability, efficiency, and alignment with the code's objectives.

RESEARCH METHODOLOGY

This Research involves both Doctrine and Non-Doctrine Methodology:

Doctrinal: The research shall discuss the legal framework of the Arbitration & Conciliation Act, 1996, and Insolvency & Bankruptcy Code, 2016, with special focus on inconsistencies of sections 7 and 9 of the code and S. 8 of the act. Books, journals, articles, case laws, judgments, and other reports shall be considered primary and secondary sources to critically analyse the legal statutes. The researcher will study the regulatory framework of the alternate dispute resolution mechanism in Insolvency disputes between the Debtors and Creditors.

Non-Doctrinal: Discussion Method: The researcher will engage with peers, academicians, researchers, practitioners, and regulators to pinpoint gaps in the current framework and collect suggestions for enhancements.

Tools and Techniques: Interviews and Group Discussions: Semi-structured and focused group discussions will be conducted to obtain qualitative insights into the gaps.

Rules of Citation: The research will adopt the 21st edition of the Bluebook: A Uniform System of Citation for referencing all sources.

HYPOTHESES

While mediation has the potential to expedite dispute resolution in insolvency proceedings, reduce judicial burden, and foster amicable settlements, its voluntary and non-binding nature, combined with legislative inconsistencies between the Insolvency and Bankruptcy Code, 2016, and the Arbitration and Conciliation Act, 1996, may hinder its effective integration.[12] Unless supported by a comprehensive statutory framework, time-bound enforceability, and adequate incentives for both financial and operational creditors.[13] The incorporation of mediation within the IBC framework risks undermining the Code's core objectives of timely resolution, equitable distribution under the waterfall mechanism, and stakeholder value maximisation.

LITERATURE REVIEW

Navin K. Pahwa - Corporate Insolvency: Its Operations and Emerging Problems:[14] 'Insolvency' is another name for the process of financial death and rebirth. In 2016, the Legislature took notice of the gap and stated that the then-existing framework of rules and forums was insufficient to aid various creditors in recovering or restructuring debt effectively. The primary objective of the code is to streamline and amend the laws about the restructuring and insolvency resolution of individuals, partnership firms, and corporate entities in a time-bound manner to maximise the value of their assets, encourage entrepreneurship, increase credit availability, and balance the interests of all parties involved, including changing the priority order for paying government debts. The code also sought the establishment of an Indian Bankruptcy and Insolvency Board (IBBI).

Pitamber Yadav and Sanyam Gupta - Streamlining Insolvency Through Mediation in India: Key Takeaways from the IBBI's 2024 Report:[15] The enactment of the Insolvency & Bankruptcy Code, 2016, sought to enhance creditor recovery rates as well as promote

[12] Sanya Khera, 'Mediation in Insolvency Resolution: A Boon or Bane?' (2024) NLUAS Law Journal <https://nualslawjournal.com/2024/07/19/mediation-in-insolvency-resolution-a-boon-or-bane/> accessed 25 June 2025

[13] Stephen Baister et al., 'Is mediation suited to the resolution of insolvency litigation?' (*Three Stone*, 29 May 2023) <https://threestone.law/is-mediation-suited-to-the-resolution-of-insolvency-litigation/> accessed 25 June 2025

[14] Pahwa (n 5)

[15] Pitamber Yadav and Sanyam Gupta, 'Streamlining Insolvency Through Mediation in India: Key Takeaways from the IBBI's 2024 Report' (2024) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5060666> accessed 19 June 2025

entrepreneurship by lowering the risk of corporate deaths due to financial distress. Nevertheless, the IBC has had challenges in spite of its success, especially with regard to prolonged litigation and disagreements among stakeholders. Long-running court cases frequently cause inefficiencies and delays in the resolution process, which compromise the IBC's primary goals of speedy restructuring, revival, and asset value maximisation. The IBBI expert committee acknowledged these pitfalls and suggested incorporating mediation within the IBC framework to speed up dispute settlement and cut down on litigation-related obstacles.

Tirtharaj Basu Ray - Mediation - The Need of the Hour in India:[16] The traditional litigation judicial system is not only time-consuming but also very expensive. In order to relieve the huge burden on courts, which have an enormous number of cases pending before them every day, the need for an alternate system of dispute resolution arose. The ADR system is not only less time-consuming and less expensive but also less formal. However, only a certain category of cases can be resolved with this process. Disputes such as matrimonial disputes, including divorce or maintenance, or custody matters, dissolution of an incorporated company, insolvency matters, etc., or matters involving criminal questions or substantial questions of law cannot be subjected to resolution through binding ADR like arbitration. Therefore, there are restrictions and limitations on the kind of disputes that can be resolved through ADRS. The system of alternative dispute resolution merely complements the burden of traditional courts and does not replace them.

Ayesha Nacario Gupta - IBBI Recommends Mediation: Integration of ADR with IBC Laws:[17] The committee report is a commendable attempt by the IBBI to recognise the salient features of Alternative Dispute Resolution mechanisms. The framework offered by the committee headed by Shri. T.K. Viswanathan marks the first step in developing a legislative framework that enhances the efficacy and efficiency of India's current insolvency laws. In order to ensure an expedited settlement of matters before NCLT, this paper logically calls for the use of ADR procedures to settle disputes pertaining to insolvency and bankruptcy.

[16] Tirtharaj Basu Ray, 'Mediation - The Need of the Hour in India' (2020) 3(4) International Journal of Law Management & Humanities 390 <https://ijlmh.com/wp-content/uploads/MEDIATION-%E2%80%93-The-Need-of-the-Hour-in-India.pdf> accessed 19 June 2025

[17] Gupta (n 4)

The combination of mediation and IBC legislation will help streamline the caseload and ensure every insolvency mediation is resolved within predetermined timeframes because the CIRP procedure outlined in the code is not combative in nature. The Code's primary objective is to protect stakeholders' interests while ensuring that enough safeguards are taken to preserve the corporate debtor's security from the liquidation process. As a result, the expert committee's report includes a number of recommendations for the use of voluntary mediation, marking a significant shift away from traditional litigation by choosing to settle insolvency disputes amicably and using ADR's advantages to help corporate debtors resurrect their businesses. Therefore, the incorporation of mediation into the IBC is a much-needed amendment to the regulations about insolvency.

Pinki Krishnarao Churad - Alternative Dispute Resolution: Types, Benefits and Drawbacks:[18] Meditation, a voluntary process facilitated by a neutral third party, aims to help parties find common ground and reach an amicable solution. The process is informal, and the neutral third party is known as the mediator, and he/she does not possess any binding powers over the parties. Unlike a judge or arbitrator, the mediator does not make decisions or impose settlements on the parties. In Guru Nanak Foundation v Rattan Singh & Sons, it was observed: Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedier for the resolution of disputes, avoiding procedural claptrap, and this led to the Arbitration Act 1940.

However, the way in which the proceedings under the Act are conducted, and without exception, challenged in the courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity at every stage, providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has, by the decisions of the court, been clothed with the Legalese of unforeseeable complexity. Therefore, what was made to promote access to speedy justice is

[18] Pinki Krishnarao Churad, 'Alternative Dispute Resolution: Types, Benefits and Drawback' (2024) 7(3) International Journal of Law Management and Humanities 951 <https://ijlmh.com/wp-content/uploads/Alternative-Dispute-Resolution-Types-Benefits-and-Drawback.pdf> accessed 19 June 2025

gradually turning into unnecessary complexities, defeating the whole purpose of developing ADR in the first place.

Sanya Khera - Mediation in Insolvency Resolution: A Bane or Boon?[19] The Arbitration and Conciliation Act (ACA) established the arbitration framework in India in 1996, and it is also applicable to insolvency cases. As previously stated, many people still believe that arbitration is the same as or a substitute for mediation, even though this is untrue. Our legislators' emphasis on arbitration is also somewhat accountable for this. However, the way the Corporate Insolvency Resolution Process (CIRP) operates presents a clear conflict between the arbitration and insolvency regimes as soon as it comes to legitimate disputes/differences among parties in case of any default. Although the objective of harmonious construction of statutes has been largely embraced under the law, Indian courts have often failed to reconcile the conflicts between the two acts. The judiciary has the power to refer disputing parties bound by an arbitration agreement necessarily to an arbitration tribunal under §8 of the ACA. By weaving the two acts together, legislators were hoping to push forward economic reforms by changing the way disputes are settled in the corporate sector. However, because §7 of the IBC (on commencing CIRP) and §8 of the ACA (on directing parties to arbitration) are both binding, it becomes impossible to formulate the two acts coherently.

Ashish Kumar, Lokesh Malik and Atika Chaturvedi - Interplay between Insolvency and Bankruptcy Code 2016 and Mediation: Mediation's lack of legally binding force has been an ongoing challenge. This issue was brought to light in the context of the Indian Bar Association in the case of **Sunil Kumar Dahiya v Union of India.** In that instance, mediation resulted in a settlement that was approved by more than 80% of creditors; nevertheless, one creditor later contested the deal, prompting CIRP. Due to the mediation settlement's non-binding nature, the corporate debtor encountered difficulties. In a related case, Col. P.K. Uberoi (Retd.) & Anr v Vigneshwara Developwell Pvt. Ltd. & Ors,[20] the Delhi High Court ultimately determined the outcome of this dispute, upholding the plan that the parties had agreed upon through mediation.

The extent to which mediation was applied in the aforementioned case, however, was as a mechanism to revive corporate actions before the High Court and was not coupled with the

[19] Khera (n 12)
[20] Col. *P.K. Uberoi (Retd.) & Anr. v Vigneshwara Developwell Pvt. Ltd. & Ors* (2020) SCC OnLine Del 399

IBC regulations. Such MSA agreements could assist in resolving issues and provide a more speedy and economical resolution procedure than prolonged litigation if they were granted legal status and binding force. The IBC also emphasises a time-driven strategy, which is in line with these agreements since they can be enforced without the involvement of the courts. The interruption of mediation in the IBC framework is anticipated to increase as the Mediation Act gathers traction, to resolve conflicts that are commercial or otherwise. This will result in more resolutions and less litigation.

Stephen Baister, Katherine Hallett and Matthew Marsh - Is Mediation suited to the Resolution of Insolvency Litigation?[21] To ease the burden on the courts and also to prevent delays in IBC proceedings beyond the stipulated time period, the Insolvency and Bankruptcy Board of India (IBBI) has proposed the route of voluntary mediation to operational creditors for settling their claims. In case of failure of mediation settlement, the mediator will prepare a non-settlement report, which shall be annexed with the application for initiation of Corporate Insolvency Resolution Process (CIRP) before the adjudicating authority (AA), the IBBI said, stating that this will help in speeding up the process of Insolvency proceedings. Under the IBC Code, 2016, the CIRP process shall be wrapped up within one hundred and eighty days from the date the application of CIRP is admitted.

This can be extended by the Resolution Professional (RP), with the prior approval of CoC. However, the total CIRP period, including the extensions, cannot go beyond 330 days. However, in practice, it rarely happens that the CIRP process of an incorporated company is concluded within the set timelines as per the Code. The complexities and formalities of preparing the non-settlement report if the OCs opt for the voluntary mediation route will only further delay the process and hence beat the whole purpose of the stringent deadlines under the Code.

Ruchika Chitravanshi - IBBI proposes Mediation Mechanism for Operational Creditors in IBC:[22] As per data from the Adjudicating Authority (AA), out of twenty-one thousand four hundred and sixty-six cases initiated under S.9 of the IBC Code, 2016 – CIRP initiated by Operational Creditors (OCs), only 3,818 were admitted as of April 30 for that financial year. Most of the operational creditors are interested in getting their claims settled anyway, rather

[21] Baister (n 13)
[22] Chitravanshi (n 7)

than caring about the fate of the incorporated company or pursuing admission or resolution of the corporate debtor.

The IBBI commented that with its proposal, A large number of Section 9 cases were settled before admission, and the CIRP pre-admission settlement rate for operational creditors (OCs) had been higher than at any other stage. However, as per S.53 of the IBC Code, 2016, i.e., the waterfall mechanism, the priority given to the OCs of distribution of proceeds from the sale of liquidation assets is less than that of Financial Creditors. That is to say, only after settling the claims of FCs and OCs can they claim their settlement from the rest of the liquidation assets. However, by opening up the route of voluntary mediation, OCs can escape the waterfall mechanism very conveniently, and their claims are settled even before the initiation of CIRP proceedings and any payments made to FCs per se. Therefore, implementing this proposal will not only act as a loophole and compromise the provisions under the IBC Code, but also disrupt the harmonious construction between the two acts.

Misha - Applying Mediation in Corporate Insolvency Situations in India:[23] The absence of statutory or legislative provisions or incentives to participate in mediation is one of the challenges to the widespread use of mediation in insolvency matters. Financial creditors in India would rather use formal, statutory debt recovery procedures since they are subject to RBI regulation. Because they have enough statutory provisions to use for debt recovery, banking institutions have little incentive to participate in mediation. In the lack of regulatory measures that either oblige lenders to truly seek mediation for certain issues or give the option to use mediation to resolve their disputes, our interviews with legal professionals indicated that lenders are reluctant to adopt mediation. Furthermore, there is an explicit lack of internal organisational flexibility in instances involving financial creditors, particularly public sector banks. As a result, these creditors may choose to seek an order from a court rather than participate in an informal process for insolvency problems. Despite court encouragement, our examination of Singaporean legislation reveals that, in the absence of the relevant requirements, parties have seldom ever resorted to mediation in insolvency cases.

[23] Misha (n 9)

Amir Bavani, Rishika Kumar and Anirban Aly Mandal - Scope of Mediation in Insolvency Proceedings – Bespoke approach for the complete Code:[24] According to the Committee, the mediation framework under the Code would best operate as a self-contained blueprint within the Code, meaning that mediation should be used and included as an ADR tool in accordance with the Code's fundamental objective, intent, and object if it were supported by a standalone infrastructure. The paper bases its justification of this notion on two main lines of reasoning. First, according to the research, the Code is a singular generis piece of legislation that was specifically designed to maximise value, balance the interests of all parties involved, and resolve a stressed corporate organisation.

Therefore, the Committee determined that the use of umbrella legislation, like the Act, was inappropriate and ineffective. Second, the analysis emphasised how the Code's insolvency procedures involving rem rights and the Act's general application would endanger the rights of all parties concerned, particularly in light of the Mediation Act of 2023's strict confidentiality requirements. The paper also clearly outlines how to establish an independent, institutional framework for insolvency mediation. Entry 13 of the First Schedule of the Mediation Act, 2023, states that any dispute subject matter notified by the Central Government would not be covered by the Act. To insulate mediation proceedings under the Code from the Act itself, the Expert Committee has therefore explicitly recommended in its report either changing the Act or issuing a specific notification under Entry 13 of the First Schedule.

ANALYSIS

Legislative Inconsistencies in the Insolvency & Bankruptcy Code, 2016 and the Arbitration and Conciliation Act, 1996: According to multiple Indian statutes, mediation has a statutory standing, and Indian courts recognised it in a number of their judgments. In 2002, Section 89,[25] which allows for the referring of pending court cases to Alternative Dispute Resolution, was added.

[24] Amir Bavani et al., 'Scope of Mediation in Insolvency Proceedings – Bespoke approach for the complete Code' (*IBC Laws*, 20 May 2024) <https://ibclaw.in/scope-of-mediation-in-insolvency-proceedings-bespoke-approach-for-the-complete-code-by-amir-bavani-rishika-kumar-and-anirban-aly-mandal/> accessed 08 June 2025

[25] Code of Civil Procedure 1908, s 89

A clear clash between the arbitration and insolvency frameworks may be observed in the way the Corporate Insolvency Resolution Process (CIRP) operates when it comes to settling disputes between parties in the event of a default. Even though the Indian judicial system has long supported the idea of harmonious construction of legislation, the courts have often failed to reconcile the disparities between the two acts. Section 8,[26] Section 11 of the Arbitration and Conciliation Act empowers the courts to send parties in dispute who are bound by an arbitration agreement to an arbitration tribunal. The lawmaker's primary objective in harmonising both statutes was to promote economic transformations by changing the way disputes are settled in the business sector. However, §7 of the IBC (on initiating CIRP through the adjudicating authority, i.e. NCLT) and §8 of the ACA (on directing parties to arbitration) are both legally binding; it becomes challenging to construct the two statutes harmoniously.

In the case of Indus Biotech v Kotak India Venture, a three-member bench of the Hon'ble Supreme Court of India (SC) failed to reach a middle ground considering both the acts. The Court pronounced an almost arbitrary decision while deciding on the case's merits, giving IBC overriding power.[27] Over the ACA simply because the former was passed later. A similar ruling was held in K. Kishan v Vijay Nirman Company Pvt. Ltd.[28] The overriding effect of IBC, 2016, has been reiterated in a number of cases. In State Tax Officer v Rainbow Papers, the court held that IBC shall override the Gujarat Value Added Tax Act.[29]

The notion of balancing out two seemingly conflicting statutory provisions is significantly violated by the Court's reasoning. In addition to breaking the fundamental rule of statutory interpretation, this judgment undermines the certainty and consistency necessary for efficient dispute resolution, thus undermining India's already fragile ADR system. It undermines the core idea of party autonomy that promotes arbitration and calls into question the validity of arbitration agreements. Regardless, the IBC's overriding effect has an adequate legal and judicial backing. Section 238 of the IBC makes it abundantly clear that the Code's provisions will take precedence over any inconsistencies in legislation in effect.

[26] Arbitration and Conciliation Act 1996, s 8
[27] Insolvency and Bankruptcy Code 2016, s 238
[28] *K. Kishan v Vijay Nirman Company Pvt. Ltd* AIRONLINE 2018 SC 1241
[29] Gujarat Value Added Tax Act 2003

The legislative purpose to give insolvency resolution precedence over Alternative Dispute Resolution procedures, such as arbitration, is reflected in this non-obstante clause. The rationale stems from the fact that insolvency proceedings are time-bound, cooperative, and designed to maximise the value of assets while also ensuring that the interests of all stakeholders involved are safeguarded. Arbitration generally fails to provide the urgency and thorough stakeholder involvement required for an efficient insolvency resolution because it is a party-driven and voluntary process. To prevent conflicting judgments and ensure an integrated resolution mechanism, the Supreme Court stressed in Alchemist Asset Reconstruction Co. Ltd. v Hotel Gaudavan Pvt. Ltd.[30] that all proceedings, including those under arbitration, must yield to the insolvency process once the CIRP is initiated. This interpretation supports the IBC's objectives of establishing a uniform and creditor-in-control framework since arbitration cannot supersede the National Company Law Tribunal's (NCLT) insolvency process.

Moreover, in 2022, when analysing NCLT's jurisdiction under the Code (under Section 60[31] as the Adjudicating Authority) To refer cases to mediation, the NCLAT ruled that NCLT's authority under Section 442[32] is restricted to the Companies Act 2013 and does not apply to Code provisions[33], as the Adjudicating Authority, NCLT is not specifically authorised by the Code to refer cases for mediation.

FURTHER DELAY IN THE CONCLUSION OF INSOLVENCY PROCEEDINGS

Section 12[34] deals with the time limit for completion of the insolvency process under Chapter III[35]. As per Section 12(1)[36], the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application.

The NCLAT, in the case of SBI v Jet Airways (India) Limited,[37] also pointed out the importance of concluding the CIRP process within the stipulated time, i.e. one hundred &

[30] *Alchemist Asset Reconstruction Co. Ltd. v Hotel Gaudavan (P) Ltd.* (2018) 16 SCC 94
[31] Insolvency and Bankruptcy Code 2016, s 60
[32] Companies Act 2013, s 442
[33] *White Stock Limited v Prajay Holdings Private Limited* MANU/NL/0677/2022
[34] Insolvency and Bankruptcy Code 2016, s 12
[35] Insolvency and Bankruptcy Code 2016, ch III
[36] Insolvency and Bankruptcy Code 2016, s 12(1)
[37] *SBI v Jet Airways (India) Limited* CP No 2205/2019

eighty days. However, this time period can be extended beyond 180 days if the resolution professional (RP) files an application for the same on the instructions of the committee of creditors (CoC) (resolution passed by special majority). The adjudicating authority may extend the process by not more than ninety days if it deems fit. In any circumstance, the CIRP process shall not go beyond three hundred thirty days under the law.

The courts have time and again brought to attention the importance of winding up the CIRP process within the prescribed time limit. In Prowess International Pvt. Ltd. v Parker Hannifin India Pvt. Ltd., the court stated that the outer limit for thirty-three hundred and thirty days is for exceptional circumstances. The members of the CoC are expected to expedite the CIRP Process and should not wait for the statutory period of one hundred and eighty/two hundred and seventy days to get over.

The provision for the time limit to conclude the CIRP Process is mentioned in the Code, as it is crucial to maximise the assets of the corporate debtors as well as balance the interests of all stakeholders.[38] Timely resolution offers a bundle of benefits, including promoting entrepreneurship, ensuring value maximisation and credit availability, and avoiding the liquidation stage. Moreover, it is extremely important for the financial creditors, such as banks, who have invested, to get their claims back within due time, as the national economy is connected with them. Any deteriorating impact on banks will also directly affect the public at large, irrespective of their association with the company going into CIRP.[39]

Mediation has affirmed its relevance with international organisations like the UN and World Bank, encouraging its utilisation. It is argued that since mediation is an informal setting among parties that helps them reach an amicable solution that is tailored and unique to their needs, it shall also benefit the creditor-debtor relationship that the traditional CIRP Process does not offer. While bringing/opening the mediation route before the initiation of the CIRP Process can offer benefits, it comes with substantial challenges as well.

Firstly, mediation is a voluntary mode of dispute resolution. The parties are free to choose this mode of resolving their conflicts, and the decision is not arbitrary. The parties to the dispute can choose to abide by the decision and get it legally sanctioned or not. Mediation

[38] Yadav (n 15)
[39] Insolvency and Bankruptcy Board of India (n 10)

can only take place when both parties voluntarily agree to it. In cases of insolvency proceedings, the parties may mutually agree on anything with respect to claims or might refuse to abide by it in the end, thereby wasting time.[40]

Moreover, in relation to the above issue itself, the parties might also try to elongate the time period and delay the CIRP Process eventually, thus making the stipulated time period of 330 days redundant.[41] Also, if the parties are free to walk away from the mediation at any stage, it may result in further sheer wastage of time, as parties might often decide not to abide by the decision of the mediation after going through the whole process and attempting to settle claims through it for weeks or even months. Hence, the stipulated time period for concluding the negotiation runs in tandem with the main goal of timely resolution or revival of a company under IBC. Therefore, taking the mediation route not only delays the CIRP Process, but it also does not guarantee the settlement of claims.

Changing the IBC's dedicated time periods is one tenable alternative. Depending on the type of dispute and its current stage, the adjudicating courts may make such changes.[42] However, since the courts will have to make up the lost time by expediting their hearings if the mediation fails, it is necessary to determine if the time spent in mediation should be factored into the resolution timeline.

CREDITORS RESORT TO MEDIATION – NOT DETRIMENTAL TO WATERFALL MECHANISM?

Mediation is considered an approach to expediting the National Company Law Tribunal's admission process by efficiently resolving conflicts between the operational creditors and the corporate debtor. In the January 2024 report, an expert committee recommended pre-institutional mediation as a first step before filing insolvency applications with the NCLT, and the IBBI regulations have incorporated those recommendations. According to the expert committee's report on the Framework for Use of Mediation under the Insolvency and Bankruptcy Code 2016[43], which was headed by former Legal Affairs Secretary T K

[40] Mani (n 6)
[41] Bavani (n 24)
[42] Ashish Kumar et al., 'Interplay between Insolvency and Bankruptcy Code 2016 and Mediation' *Bar & Bench* (05 February 2025) <https://www.barandbench.com/view-point/interplay-between-insolvency-and-bankruptcy-code-mediation> accessed 15 June 2025
[43] Insolvency and Bankruptcy Board of India (n 10)

Vishwanathan, mediation should be made available under the Code as an alternative dispute resolution procedure within the parameters of the current statutory timelines and procedures.

In order to enable operational creditors to resort to voluntary mediation prior to initiating insolvency proceedings against a company, the Insolvency and Bankruptcy Board of India (IBBI) has recommended amended regulations. The core objective is to decrease insolvency procedure inefficiencies and delays and relieve the burden on the judiciary. As reported by an AA[44] only 3,818 cases were admitted in the adjudicating authority as of April 31, 2024, out of 21,466 applications under Section 9, initiation of insolvency by an operational creditor, as the rest were resolved before their admission. The CIRP pre-admission settlement rate for operational creditors (OCs) was higher than at any previous stage, and many Section 9[45] cases were resolved before admission. The IBBI report states that operational creditors tend to be more interested in recovering claims than in filing an insolvency application or reviving the corporate debtor in insolvency cases that have been initiated by them.

However, the waterfall mechanism has been stressed by a number of cases. Swiss Ribbons v Union of India[46], while upholding the constitutional validity of section 53[47] of the code, not to be violative of Article 14, deemed the preference of payment as an intelligible differentia. The court stated: It will be obvious that the rationale behind differentiating between operational debts, which are unsecured, and financial debts, which are secured, lies in the relative significance of the two debt kinds in relation to the goal the Insolvency Code seeks to accomplish. It has previously been demonstrated that paying off debts stimulates the economy by allowing banks and other financial institutions to use the money they receive to lend to other business owners and entrepreneurs for their investments. This rationale makes a clear distinction between operational creditors, which are unsecured, and financial debts, which are directly tied to the goal the Code aims to achieve.

[44] 'Discussion paper on Mediation by the operational creditors (OCs) before approaching Adjudicating Authority (AA) for filing Section 9 application' (*Insolvency and Bankruptcy Board of India*) <https://ibbi.gov.in/uploads/whatsnew/5432fd4873e30cdb2e4ab4802454565c.pdf> accessed 15 June 2025
[45] Insolvency and Bankruptcy Code 2016, s 9
[46] *Swiss Ribbons v Union of India* (2019) SCC Online SC 73
[47] Insolvency and Bankruptcy Code 2016, s 53

In the Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & Ors,[48] it was adjudicated again, upholding the importance of the waterfall mechanism, that the National Company Law Tribunal (NCLT) didn't have the residual jurisdiction to reject a resolution plan because it was opined to be unfair or unjust to a specific class of creditors. The NCLT is required to approve the resolution plan as long as the interests of each class of creditors have been properly taken into account and treated in conformity with the waterfall approach described in Section 53 of the IBC, as well as the assessment of each creditor's security interests.

In light of the IBC's integrated insolvency framework, the IBBI recommends proposing mediation for operational creditors before commencing insolvency proceedings, which could pose significant challenges, even though it aims to decrease the timeline of the process and reduce the burden on tribunals. The waterfall method under Section 53 prescribes a fair, equitable distribution of assets among all creditors. This very system, however, becomes prone to being jeopardised if individual creditors use mediation to resolve their claims before the admission of insolvency. Rather than a revival of the company, operational creditors would prefer an early resolution, as highlighted by the board, per se. When a corporate debtor enters insolvency, however, these settlements, which would take place outside of the formal resolution process, may lead to disproportionate settlements defeating the intent of the Waterfall Mechanism.

LACK OF EXISTING STATUTORY PROVISIONS/INCENTIVES TO CHOOSE THE MEDIATION ROUTE

Financial creditors are governed by the RBI in India. They tend to prefer to opt for more formal statutory provisions for debt recovery rather than relying on mediation. Mediation, being a less formal and non-binding procedure, seems less appealing or a less-preferred approach taken up by financial creditors, especially banks.[49] The availability of statutory recovery provisions and a perceived lack of internal flexibility, particularly in public sector banks, are the reasons for this preference, which may favour court orders over unofficial

[48] *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & Ors* AIRONLINE 2019 SC 1494
[49] Gupta (n 4)

bankruptcy procedures. Without clear legal provisions permitting or mandating mediation for specific concerns, lenders are also reluctant to use it.

Financial institutions have little incentive to participate in mediation when there are adequate statutory provisions for debt recovery. Although mediation has the potential to be advantageous, it might necessitate a change in internal procedures and a readiness to consider different avenues for resolution, which not all lenders may find desirable. The use of mediation or other informal debt collection procedures may occasionally be impeded by a lack of internal organisational flexibility, especially in public sector institutions. Instead of navigating the complexity of alternative dispute resolution, these institutions might find it easier to follow established procedures and secure court rulings.

Although, as was already indicated, mediation has been included in several laws, there is currently no all-encompassing framework that regulates mediation. Because the enforceability and breach of mediated settlements are unclear, lenders are reluctant to include mediation as a dispute resolution mechanism in their contracts. The idea that mediation is not a substitute for litigation is further reinforced by the ambiguity surrounding the enforceability of a mediated settlement. Furthermore, the results of mediated settlements in insolvency proceedings may also impact the rights of third parties. For example, in the case of claims mediation, litigation may be preferable because mediation cannot bind third parties. Moreover, only a handful of specialised organisations with skilled, empanelled mediators with expertise in insolvency mediation exist. The curriculum at educational institutions does not currently contain mediation because it is not recognised as a separate profession. Regional disparities also contribute to capacity-related challenges.

There is a lack of trust in mediation for insolvency procedures by the financial institutions as well. Section 7[50] deals with the initiation of the CIRP Process against the corporate debtor by the financial creditors and states that When a default occurs, a financial creditor usually gives an application to the Adjudicating Authority immediately to initiate the corporate insolvency resolution process against a corporate debtor, either by themselves or in conjunction with

[50] Insolvency and Bankruptcy Code 2016, s 7

other financial creditors or any other individual acting on the financial creditor's behalf as may be notified by the Central Government.[51]

Since there are statutory provisions already in place to ensure relief to the financial creditors, and they're also given preference while settling claims, there is no reason or incentive for them to resort to mediation to get their claims settled, per se. It is also likely that financial creditors, especially banks, may get disadvantaged by deviating from the statutory legal provisions and opting for mediation, since mediation is an informal process that requires compromise and adjustments from both sides in order to reach an amicable solution/agreement.[52] Therefore, huge financial institutions like public sector banks would refrain from compromising on their settlement of claims when they can get the full amount without any adjustments just by choosing the traditional legal route under the IBC Code, 2016.

FINDINGS AND RESULTS

The Arbitration and Conciliation Act 1996 and the Insolvency and Bankruptcy Code 2016 are in contradiction with one another. The autonomy of arbitration has been undermined by courts' recurrent judgments of the IBC's overriding effect, even if they agreed with a harmonious interpretation. The gap undermines the certainty of conflict resolution and exposes the judiciary's insufficient readiness to include alternative dispute resolution (ADR) in insolvency procedures. As we discussed above, one of the key challenges of opting for mediation for the settlement of claims is the voluntary and non-binding nature of mediation that does not guarantee the settlement of claims and instead, might further delay the whole insolvency process, per se. Therefore, altering the time frames specified by the IBC could be a reasonable approach.

Depending on the type of dispute and its current stage, the adjudicating courts may make such changes. However, since the courts will have to make up the lost time by expediting their hearings if the mediation fails, it is necessary to determine if the time spent in mediation should be factored into the resolution timeline. Both positive and negative effects may result

[51] Chitravanshi (n 7)
[52] Gupta (n 4)

from this; the former in preventing needless delays, and the latter in terms of the quality of the investigation and the ensuing verdict.

It is true that before filing for insolvency under the IBC, mediation for operational creditors might speed up dispute resolution and reduce the workload for AAs. Although the IBBI and an expert committee approve pre-admission mediation, there persist concerns that this could jeopardise the Code's waterfall mechanism for equitable distribution of assets because certain creditors value speedy recovery over the corporate debtor's revival.

Another challenge is the lack of incentive for financial creditors, especially public sector banks, to take the mediation route when statutory provisions for the settlement of claims already exist. In this sense, mediation has been incorporated into the statutes of several international countries, including the United States, the United Kingdom, France, and Japan, as a means of resolving disputes in their respective insolvency proceedings.[53]

Including clauses in the Code that give the Adjudicating Authority the authority to recommend and send parties to mediation in suitable situations or to settle specific disputes may also be beneficial in India. However, given that mediation may not be helpful in all instances, Adjudicating Authorities must take note of the same and use mediation where it will aid in decreasing time and costs for parties, and there should be no necessity or duty to mediate.[54] The RBI circular and the Code[55], respectively, may specifically acknowledge that parties may employ mediators to reach a negotiated settlement plan or basic resolution plan, as the case may be, for opting out of out-of-court procedures like the June 7 Circular[56] or for pre-packs.

RECOMMENDATIONS & SUGGESTIONS

Both the statutes, i.e., A&C Act 1996 and IBC 2016, should be construed in a way to determine how the inconsistencies between §7 & §9 of the Code and §8 of the ACA

[53] Misha (n 9)
[54] Khera (n 12)
[55] Insolvency and Bankruptcy Code 2016
[56] Yogesh Dayal, 'RBI releases Prudential Framework for Resolution of Stressed Assets' (*Reserve Bank of India*, 07 June 2019) <https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=47248> accessed 10 June 2025

are resolved. Harmonious construction of both statutes shall ensure that any resort to ADR does not cause delays in the insolvency resolution.

The National Company Law Tribunal (NCLT) should be given explicit authority under §60 to refer cases to mediation through a dedicated, independent, and tailored mediation framework within the code. This framework would be subject to a stringent, time-bound completion window as the tribunal may deem fit, which would be included within the 330-day CIRP limit. According to §53, pre-admission mediated settlements by operational creditors or any class of creditors, for that matter, should adhere to the waterfall mechanism's legislative intent and be obligated to disclose the same to the adjudicating authority to ensure transparency.

Statutory incentives, including expedited resolution, reduced adjudication expenses, and IBBI-approved frameworks, ought to be introduced, and an institution of qualified insolvency mediators shall be established to encourage financial creditors, particularly public sector banks, to opt for mediation. In addition to including mediation training for the Insolvency Professionals, the IBBI should create a body of certified insolvency-specialised mediators. Subject to NCLT approval, mediated settlements in insolvency should be given binding and enforceable status to preserve the practicality of the ADR as an insolvency resolution mechanism.

CONCLUSION

Mediation, being a voluntary and informal mode of dispute resolution, has been gaining attention as people move from traditional litigation methods that are not only lengthy but also quite expensive. People prefer alternative modes of dispute resolution since they are convenient for them, and the solution/decision arrived at through these processes is unique to their problems or issues. Arbitration and Mediation have tapped into all kinds of conflicts and are being promoted for insolvency disputes as well. However, given the benefits of taking the route of ADRS for insolvency matters, it comes with its own challenges that cannot be ignored and need to be considered before taking any such step.