Mediation Bill 2021: Empowering Dispute Resolution In India's Insolvency Framework

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Abstract

This article provides an overview of the significance of mediation in India, particularly in the context of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). It highlights the adoption of the **Mediation Bill 2021**, to promote accessible and popular mediation practices. The Singapore Convention on Mediation and its benefits for enforcing settlement agreements globally are discussed. The successful incorporation of mediation in insolvency processes in the United States of America, the United Kingdom, the European Union, Japan, Singapore, and Australia offers valuable insights for India. The article also emphasizes the need for effective measures to address delays in the application of the Corporate Insolvency Resolution Process ("**CIRP**") and the importance of voluntary participation in mediation. It also highlights the importance of formalizing mediation within the IBC and addressing challenges related to pre-litigation mediation, exceptional circumstances, international mediation, and the modification of moratorium provisions. Overall, mediation is recognized as a valuable tool for efficient dispute resolution and stakeholder protection in insolvency cases.

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1. Introduction

Arbitration has indeed been a preferred tool for dispute resolution in India. Arbitration is not a new practice or notion of dispute resolution in India. It has been practiced by monarchs since the Vedic

era. Arbitration gained popularity during the Industrial Revolution era because of the massive backlog of pending cases. Today, arbitration is governed by the Arbitration and Conciliation Act, 1996. In the case of ***Babar Ali v. Union of India and Others***[1], the Supreme Court upheld the constitutional validity of the Arbitration and Conciliation Act[2].

Mediation is also a method of alternative dispute resolution in which the disputing parties try to reach a settlement with the help of a mediator, rather than going to court. On **December 20, 2021**, the Rajya Sabha debated and ultimately introduced the **Mediation Bill, 2021**. The Bill's objective is to make mediation, especially professional mediation for dispute resolution, more accessible and popular in India. In addition, it aspires to normalize online mediation in India and make it more accessible for Indians. This Bill aims to bring a codified law on mediation to India, where none previously existed, and to provide for the enforcement of settlement agreements reached through mediation.

The purpose of the Insolvency and Bankruptcy Code 2016 ("**IBC**") was to prevent financially distressed businesses from going bankrupt by way of resolution or liquidation. The Standing Committee on Finance for 2020-21 has reported that NCLT has considerable pending cases.[3] Long delays in resolution mean that creditors will have to incur larger haircuts. The Committee also observed that there were **13,740** bankruptcy cases pending with NCLTs as of August 2021.[4] In addition, more than two-thirds **(71%)** of these cases have been pending for longer than 180 days.[5] Despite the IBC's authorized period of 180 days, which can be extended to 270 days in exceptional circumstances, the Resolution process in some cases of liquidation under the IBC has exceeded 450 days, according to the record of cases until March 2022.[6] The number of cases filed in the courtroom must be reduced rather than the number of NCLT benches increased.

Since mediation is recognized by law and can resolve disputes more quickly than the court system, it is a useful alternative to litigation for settling IBC matters. In some cases, mediation even saves money. Additionally, it excludes the advertising component, which frees up a substantial sum of the amount that may be put toward protecting legitimate corporate debtors from the stigma of bankruptcy. In India, the mediation process under IBC is unregulated by any rules or procedures. Therefore, it differs depending on the regulations of each High Court. The MSME Development Act, 2006[7], and the Companies Act, 2013[8], both exhibit mediation provisions; nevertheless, pre-litigation mediation processes are the Civil Procedure Code regulates unregulated, and post-litigation mediation. Employees and operational creditors would also benefit from early-stage mediation because it would help save their jobs and increase the possibility that they will receive some payment. It would alleviate the workload of the overburdened NCLTs/NCLATs and assist preserve the value of assets from prolonged insolvency processes.[9]

Therefore, in order to protect the interests of Financial Creditors and Corporate Debtors, it is necessary that the Mediation Bill 2021 be enacted, as it will provide a legitimate platform for reaching a mutually agreeable settlement.

2. Significance Of The Singapore Convention On Mediation

The United Nations adopted the **United Nations Convention on International Settlement Agreements resulting from Mediation**, known as the "***Singapore Convention on Mediation***", in December 2018.[10] It is applicable to mediated settlement agreements reached on a global level. It creates a uniform legal structure for the capacity to rely on and enforce settlement agreements.

Articles 1, 3, 5, 6(1), 8, 9, 28(8), and 50(9) highlight significant provisions of this Convention.[11] It will benefit the corporate world and trade connections by facilitating a quicker and cheaper method of settling disagreements.

3. Insolvency Mediation: A Catalyst For Recovery And Stakeholder Protection

The IBC 2016 proposes an extremely effective approach for assuring recovery from defaulters by financial institutions through the integration of formal mediation into the pre-filing or post-filing phase of the insolvency process. Even though it might not solve the problem of delays right away, especially at the level of the NCLT, it might help reduce the amount of haircuts that banks are required to take. Other stakeholders, like employees and operational creditors, would also gain from early-stage mediation because it would help preserve jobs and increase the possibility that they would receive some payment. It will also assist protect asset values that would otherwise drop owing to delays in the insolvency proceedings, while also easing the burden on the already overburdened NCLTs and NCLATs.

As of June 2022, **643** CIRP applications had been withdrawn, and **774** CIRP cases had been decided, including via settlement. When contrasted to the total of **3637** cases that have been resolved so far and the **1999** cases that will still be open by the end of June 2022, these figures are noteworthy.[12] There has been a change in behaviour among stakeholders as a result of IBC, with **22411** CIRP applications totalling 7.10 lakh crores being addressed before admission.[13]

4. Successful International Mediation Practices In Insolvency Processes

- **United States of America:** The United States has long been among the foremost nations in insolvency and bankruptcy mediation, including cross-border insolvency, group insolvency, resolution plans, etc. The **Alternative Dispute Resolution Act** was enacted by the US Congress in **1998**. More than half of all US bankruptcy courts approve mediation.

  Mediation has been successful in insolvency cases in the USA, as seen in the ***Lehman Brothers Holdings Inc. v. Elevator Holdings***[14] bankruptcy in 2008, where out of 77 mediation proceedings, only 4 ended without a settlement. The use of mediation helps creditors save time and money while also maximizing value.

  In the same way, mediation was a huge success in the international insolvency case of ***In re: MF Global Holdings Ltd.***[15], and it led to the conceived global settlement, in which the creditors of MF Global secured over 1 billion dollars in total distributions.

- **United Kingdom:** The **Chancery Courts Guide** supports the use of ADR approaches, including mediation.[16] It establishes a requirement for legal professionals to consider adopting ADR approaches and keep their clients informed of economical options for settling disputes. When parties are being unreasonable in their refusal to pursue ADR, the court has the authority to instruct the parties to take efforts that are reasonable in order to consider ADR.[17]
- **European Union:** ADR is widely accepted, and many EU members utilize ADR for resolving disputes at pre-insolvency stages.
- **Japan:** The only body that has the authority to grant permission for mediation in turnaround matters is the **Japanese Association of Turnaround Professionals** (“**JATP**”).[18] The

Turnaround ADR system is an approach that is designed to promote negotiations between insolvent debtors and their financial creditors, with the negotiation being supervised by licensed mediators. A lawyer, an accountant, and either a consultant or another lawyer are the members of the mediation panel that is responsible for overseeing the entirety of the ADR process.

- **Singapore:** The Singapore government proposed mediation in insolvency situations in 2017. The recommended approach includes the use of mediation centres and enhancing panels with experienced mediators in cross-border restructuring.
- **Australia:** The **Federal Court of Australia Act 1976** allows courts to refer parties to mediation with or without their consent u/s **53A**.[19] In accordance with the **Civil Dispute Resolution Act**, **2011**, a 'Genuine Steps Statement' must be filed prior to filing an application with a Commonwealth Court. The statement must specify what steps were taken to resolve disputes between the parties or the reason why they have not been settled.

These international examples demonstrate the efficiency and benefits of incorporating mediation within the insolvency process, offering valuable insights for the adoption and enhancement of mediation practices within the Indian context.

It is crucial to acknowledge that certain domains within the realm of expeditious litigation disposal are currently experiencing setbacks. Therefore, any subsequent measures undertaken within the Mediation Bill 2021 must be meticulously designed and implemented to guarantee their efficiency. It is imperative that the proposed provisions are foolproof, as the goal is to establish an effective mechanism rather than adding to the existing array of ineffective frameworks. Comprehensive scrutiny and careful consideration are essential to ensure that the Mediation Bill 2021 achieves its intended purpose of providing a robust and successful avenue for dispute resolution.

5. Mediation: A Means To Reduce Delays In The CIRP

The Corporate Insolvency Resolution Process ("**CIRP**") may experience delays due to various reasons. Despite the legal timeframe of 180 days[20] (extendable by 90 days with an additional 60 days)[21], practical issues often lead to exceeding this limit.[22]

Out of the **4,500** admitted cases, only 14% have been resolved, 38% are ongoing, and 63% have been closed.[23] Among the closed cases, 75% resulted in liquidation due to pre-existing issues, reducing the chances of recovery. In ongoing cases, 75% have exceeded 270 days, with an average duration of over 400 days.[24]

In a similar vein, the formalities that ultimately resulted in a liquidation order took an average of 412 days. On average, the duration of the liquidation processes was 456 days, whereas the duration of the voluntary liquidations was 422 days.[25]

In the recent verdict of ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another***[26], the Supreme Court recognized that parties suffer from hurdles due to a sluggish CIRP, which impacts the subsequent execution of the plan.

Some primary factors contributing to delays at the stage of admission of the application to initiate CIRP are:

- **Inadequate Capacity of Resolution Professionals/Litigants:** Cases are often prevented from being admitted into the Corporate Insolvency Resolution Process (CIRP) due to various reasons. One common practice is when promoters of defaulting entities arrange for their associates to buy out the company at a discounted price, making it difficult for financial or operational creditors to initiate CIRP proceedings.
- **Non-cooperation of stakeholders:** Lack of stakeholder cooperation, including the corporate debtor, financial creditors, or operational creditors, can hinder the CIRP progress. Disagreements and non-compliance with the resolution plan can cause delays. However, in ***Ashwini Mehra, RP of Educomp Infrastructure & School Management Ltd. v. Vinod Kumar Dandona and Others***[27], the NCLAT ruled that the Corporate Debtor is liable for punishments u/s 70 of the Code for failing to submit the information and not cooperating with the RP.
- **Lack of operational benches:** The Supreme Court noted that out of the sanctioned strength of 63 members, only 39 spots were currently filled, and the decline in members would be considered disruptive to the effective operation of the Tribunals.[28]
- **Wide range of cases:** The NCLT has the authority to adjudicate cases arising under the Companies Act, 2013, and dissatisfied parties can appeal to the NCLAT. NCLAT also handles appeals for orders from the National Financial Reporting Authority ("**NFRA**") and the Competition Commission of India ("**CCI**"). This workload on NCLTs and NCLATs leads to inefficiency in timely insolvency proceedings.[29] Thus, it is necessary to reevaluate the responsibilities of tribunals in the CIRP.

Mediation can be used at any step of the CIRP, even after it has begun, in order to minimize delays and identify alternative resolutions.

"Supreme Court in the ***Patil Automation Private Limited and Others v. Rakheja Engineers Private Limited*** decided that statutory pre-litigation mediation u/s 12A of the Commercial Courts Act is mandatory, and that failure to comply with the section may result in the rejection of a suit under Order VII Rule 11 of the CPC, 1908."[30] The Court can exercise this power suo moto.

Mediation can be helpful in the following ways:

- **Promoting negotiations:** The use of a neutral mediator makes it possible to have structured negotiations within the CIRP through mediation. It encourages open dialogue and makes it easier to find solutions that are acceptable to all parties, avoiding the need for protracted court proceedings. In the case of ***Parvinder Singh v. Intec Capital Ltd. and Another***[31], the NCLAT reached a decision on the subject matter through mediation and was provided with the report. The Appellate Tribunal came to the conclusion that the terms of the settlement ought to be considered as its directives and orders.
- **Faster dispute resolution:** Mediation offers a faster resolution compared to traditional legal proceedings. By bypassing formal court processes, parties can focus on reaching a settlement more efficiently, potentially minimizing delays in the overall CIRP timeline.
- **Maintaining control:** Mediation empowers stakeholders by giving them greater control over the dispute resolution outcome. They actively participate in shaping a resolution that reflects their interests, fostering a sense of ownership and cooperation. This collaborative approach can contribute to minimizing delays in the process.
- **Preserving relationships:** Mediation in the CIRP involves multiple stakeholders, fostering

constructive dialogue, and preserving working relationships. By avoiding adversarial proceedings, parties are more inclined to collaborate and find mutually beneficial solutions, benefiting all involved.

- **Confidentiality:** Confidentiality in mediation allows parties to share information openly, promoting an efficient exchange of information and potentially expediting the resolution process.
- **Cost-effective:** Mediation offers a cost-effective alternative to litigation in the insolvency process. By engaging a neutral mediator, parties can resolve disputes in a timely and cost-efficient manner, reducing the overall expenses associated with legal proceedings.

Thus, the Mediation Bill 2021 proposes the utilization of mediation as a means of settling disputes within the IBC 2016, both prior to and after the CIRP. Parties are required to attempt settlement through mediation before approaching the court within a specified timeframe. If parties can come to an agreement, such an agreement carries the same weight in legal terms as a precedent from a court. However, the provision that allows parties who are unwilling to participate in mediation to step away from the process might make it less effective. The willingness of the parties involved is essential to the success of mediation if it is to be effective in reducing delays. Although the settlement of some disagreements could continue to call for the involvement of court proceedings, the CIRP recognizes mediation as a beneficial alternative or supplementary approach.

6. The Mediation Bill 2021: A Threat To The Quintessence of IBC 2016?

The primary objective behind the implementation of the Insolvency and Bankruptcy Code 2016 ("**IBC**") was to ensure expeditious recovery, minimize the erosion of recovery value, and maximize the interests of all stakeholders involved. However, a significant impediment encountered in the IBC process is the delay in adhering to prescribed timelines, primarily attributable to a backlog of cases at the NCLTs and the NCLATs. The stipulated period of 14 days for admission of CIRP applications frequently exceeds a duration of one year. Furthermore, the accumulation of various interlocutory applications, the scarcity of judges, administrative difficulties, and excessive workloads at the NCLT level collectively contribute to protraction in the insolvency proceedings.

Conversely, mediation emerges as a widely favoured alternative dispute resolution mechanism in India due to its cost-effectiveness and time efficiency as compared to litigation. The involvement of a neutral mediator facilitates effective communication between disputing parties, enables the exploration of viable alternatives, and facilitates the attainment of a mutually agreeable resolution. The determination of outcomes rests solely within the purview of the involved parties without external intervention. Mediation operates on a voluntary basis, ensures confidentiality, and operates within a predetermined timeframe.

The Bill's applicability, as per section 2, conforms to the provided list of categories. Moreover, the Indian Judiciary has consistently acknowledged the efficacy of ADR systems as expeditious and cost-effective means for resolving disputes.

In his address at the India-Singapore Mediation Summit 2021, the **Hon'ble Justice N.V. Ramana** emphasized the potential role of mediation and highlighted the absence of specific legislation governing mediation in India. Although India possesses the Arbitration and Conciliation Act 1996, the mediation practice has thus far been tacitly incorporated within other enactments such as the Civil Procedure Code, 1908, Companies Act, 2013, Arbitration and Conciliation Act, 1996, and

Commercial Courts Act, 2015. In this context, the introduction of the Mediation Bill 2021 in the Rajya Sabha is an appropriate and commendable step forward that poses no threat to the essence of the IBC 2016. The Mediation Bill will be of substantial help to the IBC 2016 in resolving insolvency matters. However, it is imperative to address the identified anomalies in the Bill prior to its further progression.[32]

7. Mediation In The Context of IBC: Key Elements And Challenges

- **Mandatory Pre-Litigation Mediation: Objectives, Voluntary Nature, and Potential Implications**

The legislation mandates parties to partake in pre-litigation mediation for a minimum of two sessions[33]. While this requirement aims to alleviate the burden on the judiciary, it is important to note that mediation is inherently a voluntary process, necessitating the mutual consent of both parties to commence proceedings.[34] However, compelling parties to remain engaged in mediation against their will may potentially give rise to additional litigation and contribute to the protraction of case resolution.

- **Ambiguity Surrounding 'Exceptional Circumstances' in Clause 8: Potential for Misuse and the Need for Clarity**

Clause 8 of the Bill addresses the provision for bypassing the pre-litigation mediation requirement in situations deemed as 'exceptional circumstances'. However, a significant concern arises from the absence of explicit criteria or definitions to determine the qualification of such circumstances as 'exceptional'. This omission has the potential to be exploited by parties displaying reluctance towards engaging in mediation, resulting in misuse of this provision.

To mitigate this risk, it is imperative to provide clear and unambiguous guidelines within the legislation to ascertain the precise circumstances that qualify as 'exceptional', thereby ensuring transparency and preventing abuse.

- **Applicability of the Bill to International Mediations and Challenges in Enforcing Settlement Agreements**

The Bill includes provisions for international mediation of commercial disputes conducted in India, involving at least one foreign party. Nevertheless, circumstances may arise where mediation occurs outside India, with an Indian party involved. In such instances, the enforcement of settlement agreements becomes challenging within the jurisdiction of India. The Bill specifies that mediated settlement agreements are enforceable in a manner similar to court judgments or decrees but does not extend this provision to settlement agreements arising from international mediations conducted outside India. It should be noted that the Singapore Convention on Mediation offers a structure for the enforcement of settlement agreements resulting from international mediation across borders. India signed the Convention on August 7, 2019, but the ratification process is still pending.

- **Enhancing the Effectiveness of Mediation in Insolvency and Bankruptcy Cases: Necessity for Modifying Moratorium Provisions and Establishing Legal Framework**

In order to ensure the efficacy of mediation in matters pertaining to insolvency and bankruptcy, it is

imperative to appropriately amend the existing moratorium provisions within the country's Insolvency and Bankruptcy Code 2016. These regulations presently necessitate the halting of ongoing civil legal proceedings until the completion of the Corporate Insolvency Resolution Process. Additionally, it is vital to implement provisions specifically designed for mediation, which cover the binding nature of mediated agreements and define the roles, rights, and obligations of insolvency professionals, stakeholders, and other relevant parties. These steps will offer essential legal backing to extrajudicial mediation, promoting adherence to agreements and ensuring effective implementation.

Mediation carried out within a structured insolvency resolution process has the potential to offer greater benefits compared to lengthy plans for business restructuring or liquidation. The realization has grown that in cases involving insolvent housing construction companies, the interests of homebuyers could have been better safeguarded through the adoption of mediation. Given the gravity of insolvency matters, exemplified by the collapse of ***Lehman Brothers***[35] and its consequential role in triggering the 2008 financial crisis, it is imperative to afford mediation a fair and equitable opportunity to prevail.[36]

8. Conclusion

Arbitration and mediation have long been recognized as effective alternative dispute resolution methods in India. The Arbitration and Conciliation Act, 1996, governs arbitration, while the recently introduced Mediation Bill, 2021, aims to make mediation more accessible and popular, particularly through online mediation. These alternative methods offer faster resolution and potential cost savings compared to traditional litigation.

In India, the Insolvency and Bankruptcy Code, 2016, was enacted with the purpose of preventing businesses from going bankrupt by establishing a structure for either resolution or liquidation. Since IBC is fairly new legislation, the jurisprudence underlying it is still developing and being modified as a result of experiences learned throughout its implementation. Since the IBC 2016 does not include any alternative dispute resolution processes, such as Mediation, the parties involved are left with just one viable option: a formal insolvency resolution procedure. The Mediation Bill of 2021 can play a big role in getting mediation incorporated into the Code, which seems like an ideal proposal in light of the aforementioned reasons for it. To the degree achievable, IBC 2016 may be amended to include mediation as part of the insolvency process because of the positive, affordable, and quick outcomes it can generate. By combining formal and informal means of resolution, this hybrid system would benefit all parties involved by easing the load on the judicial system and saving expenses.

One significant development in the field of mediation is the Singapore Convention on Mediation, adopted by the United Nations in 2018. It offers an efficient method for recovery and reduces financial losses for financial institutions while promoting the resolution of disputes in a timely and cost-effective manner.

International examples, such as the United States of America, Singapore, European Union, etc. demonstrate the effectiveness and benefits of incorporating mediation within the insolvency process. These countries have successfully integrated mediation into their respective frameworks, resulting in time and cost savings, maximized value, and successful settlements. India can draw valuable insights from these international examples to adopt and enhance mediation practices within the Indian context.

The main objective of IBC 2016 is to prevent the collapse of a distressed company. Together, the Code and ADR mechanisms like Mediation can get the work done faster and better. Mediation between parties to enable fast resolution of conflicts and the Mediation Bill 2021 to make the resolution legally binding are both necessary in the present environment of overburdened courts and tribunals. The proposed e-Mediation process under the Mediation Bill 2021 could gain traction as technology continues to advance rapidly. It is hoped that mediation, when combined with a formal insolvency procedure, will become the preferred method of dispute resolution across cultures, jurisdictions, and borders.

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