Introduction

With the advent of the Insolvency and Bankruptcy Code, 2016 (‘Code/IBC’), the framework for resolution of stressed assets and corporate entities was transformed into a streamlined, risk-friendly and timebound endeavor. The ecosystem of commerce in India has thrived since as risk confidence amongst lenders, suppliers and investors to support the entrepreneurial spirit has strengthened. That being said, at the heart of the Code, “dispute” resolution is still an impediment to the implementation of the inherent ethos of the Code – value maximization of the assets of the Corporate Debtor and speedy resolution of the stressed entity. Even though the IBC prescribes for a time limit of one-hundred and eighty (180) days for completion of the Corporate Insolvency Resolution Process (‘CIRP’), with a mandate for a one-time extension of ninety (90) days, these timelines, as enunciated under Section 12 of the Code read with Regulation 40 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (‘CIRP Regulations’) have been held to be not mandatory in nature[1]. Naturally, the eventual resolution of a Corporate Debtor still remains to be a long-drawn out process marred by protracted litigation between the stakeholders of the Corporate Debtor. According to an Economic Times report[2], “Resolution timelines continued to increase for OCs [Operational Creditors] and FCs [Financial Creditors], with the highest being 635 and 643 days for OCs and FCs, respectively,” as of August, 2023.

The biggest contributor to this factum of delay can be identified as the wide array of disputes that are brought before the Hon’ble National Company Law Tribunal (‘NCLT’) vis-à-vis the conduct of the CIRP, by the Corporate Debtor’s stakeholders as well as any remote party under Section 60(5) of the Code. This is where mediation as a dispute resolution tool presents itself before the Code as a worthy inductee to aid and transform the incumbent insolvency regime and preach the gospel of non-adversarial, amicable dispute resolution so as to foster efficient and robust outcomes in insolvency cases. This article shall endeavor to chart the (i) advent of mediation as a Dispute Resolution Mechanism in India, (ii) the framework of mediation under the Code as suggested by the Expert Committee, and (iii) dissect the framework as considered and discussed under the Report[3] in light of the groundbreaking Mediation Act, 2023.

Evolution of mediation in India and the Mediation Act, 2023

Mediation as a process is designed to facilitate communication and negotiation between parties to assist them in reaching a voluntary “win-win” resolution to their conflicts. The Dispute Resolution landscape in India is also no stranger to mediation as a tool for amicable, collaborative resolution of conflicts. For instance, even prior to the British Rule in India, commercial disputes between merchants, traders and the likes were settled through a form of mediation headed by the Mahajans, who were known to be prudent, impartial and respected businessmen. Back in those days, commercial disputes were de facto referred to mediation. If a merchant did initiate proceedings in a
Court of law before referring the dispute to mediation, then, the merchant would be sanctioned by dismemberment from the Association[4].

In the more modern context, legislative recognition was first afforded to mediation under the Industrial Disputes Act, 1947, wherein a comprehensive framework for mediation proceedings were provided for. For instance, the conciliators appointed under Section 4 of the Act are “charged with the duty of mediating in and promoting the settlement of industrial disputes”. The Arbitration and Conciliation Act, 1996 was a watershed moment for Alternate Dispute Resolution mechanisms (‘ADR’) in India. However, mediation of disputes was not included in this legislative package. Thereafter, in 1999, the Indian Parliament passed the Code of Civil Procedure Amendment Act of 1999 inserting Section 89 in the Code of Civil Procedure, 1908 (‘CPC’) providing for reference of cases pending in the courts to ADR, which for the first time included mediation. The contours of mediation as an ADR mechanism were strengthened for commercial disputes with the amendment of the Commercial Courts Act, 2015, whereby, Section 12-A was introduced. In essence, Section 12-A of the Act mandates pre-litigation mediation. Therefore, a suit cannot be filed under the Act without the parties first attempting to resolves their disputes vide mediation. The only exception to this rule being the prayer of any party for an urgent interim relief in the matter.

In more recent times, mediation has been afforded recognition as a premier dispute resolution mechanism, and the importance of amicable settlement of conflicts outside the purview of Courts has also been taken cognizance of by the legislature. Hence, On September 15, 2023, the Central Government notified the Mediation Act, 2023[5] (‘Act’). Thereafter, on October 9, 2023, the Ministry of Law and Justice notified that certain provisions of the Mediation Act, 2023 have come into force – these provisions included; provisions relating to the Mediation Council of India, the Mediation Fund, power of the Central Government to issue directions, power to make rules and regulations, amongst others.

Before we delve into the framework for mediation as envisaged and discussed by the Expert Committee in its report, it is appropriate to first extract the salient features of the Act as the fate of the two apropos mediation under the Code are interwoven. The most novel conception under the Act is the introduction of Mediated Settlement Agreements (‘MSA’). An MSA essentially is an agreement between the parties recording the terms of settlement in pursuance of resolution of some or all of the disputes between such parties, and authenticated by the mediator[6]. Under the aegis of the Act, as per Section 20, such MSAs can also be registered giving the proceedings under the Act, and the final outcome further credence. Additionally, the Act envisages the mediation process under the Act to be a timebound process with a period of one-hundred and twenty (120) days from the first appearance before the mediator fixed as the timeline for completion of the mediation proceedings. The period of mediation may be extended for a further period as agreed by the parties, but not exceeding sixty (60) days[7]. Furthermore, the Act also provides for strict standards of confidentiality and provisions for future implementation of online mediation under Section 22 and Chapter VII of the Act, respectively.

**The Expert Committee Report on mediation framework under the Insolvency and Bankruptcy Code**

The Expert Committee report has bifurcated its recommendations vis-à-vis inculcation of mediation as an ADR methodology under the Code. According to the report, the Insolvency and Bankruptcy
Board of India (‘IBBI’) shall have the powers to make rules and regulations and to formulate the procedures for implementation of mediation under the Code. This is in contrast with the Act which prescribes the ‘Mediation Council of India’ (as established under the Act) to be the regulatory body for mediation in India. Further, the report also suggests a phased implementation of voluntary mediation between the parties.

One of the most important aspects that the expert committee discusses in its report is the recognition and enforcement of the MSAs. As per the Act, MSAs can, at the will of the parties be registered before an Authority as will be notified by the Central Government and the enforcement of the same, de hors of registration, shall be done in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a judgment or decree passed by a Court[8]. Under the aegis of the recommendations of the Expert Committee “MSAs to be enforced by way of incorporation of MSA in an order of the NCLT (or the appellate authority), similar to the existing process under Rule 8 of the AA Rules, 2016 (withdrawal process prescribed for preadmission matters).” Moreover, at the post-admission stage, the settlements will be afforded legal credence by being recorded in the order of the NCLT, as per Section 12A of the Code. In case of any breach of the terms of the settlement, the parties have the liberty to approach the NCLT for revival of the CIRP. This, too, is a detour from the provisions of the Act as the Expert Committee has also suggested a self-contained framework to be established for recognition and enforcement of MSAs under the Code.

Moving on, the Expert Committee report has also given weightage to the timelines as prescribed by the Code. The bulwark of proceedings under the Code has been its timebound resolution structure from its very inception. Keeping the same in mind, the Expert Committee opined that the provisions of Section 18 of the Act vis-à-vis the timelines for completion of mediation proceedings may not be suited to the end goal of the Code. The major apprehension of the Expert Committee was with respect to mediation being used as a tool to delay adjudication by the parties at various stages. Hence, the Committee was of the opinion that the timelines of insolvency mediations were best suited to run parallelly alongside the statutory timelines under the Code. To this end, the report formulated an illustration to exposit the afore-stated recommendation – mediations during the post-institution but pre-admission stage shall stand automatically terminated within 30 days of its reference or upon admission of the Corporate Debtor into CIRP by an order of the NCLT, whichever is earlier.

Other notable inclusions and recommendations made by the Expert Committee with respect to the induction of mediation as an ADR mechanism under the Code includes exclusion of insolvency mediation costs from the purview of CIRP costs, creation of a pool of mediators comprising of inter alia retired members of NCLT/NCLAT, experienced legal practitioners in the domain of insolvency law and technical experts in insolvency, accounting, valuation etc., along with facilitation of their training, and the advent of online mediation as a way forward for mediation under the Code.

**A standalone Code for Insolvency Mediation**

Throughout the elaborate report presented by the Expert Committee, one underlying theme that stands out is the independency from the Mediation Act, 2023 the Committee urges on maintaining when it comes to insolvency mediation. A bare perusal of the report’s recommendations as encapsulated hereinafore would clearly demonstrate that the Expert Committee wants to develop a bespoke framework for insolvency mediation and not be bound by the provisions of the Mediation Act.

In the Committee’s own words, “The mediation framework under the Code would best operate as a self-contained blueprint within the Code,” whereby, an independent infrastructure would enable the inclusion of mediation as an ADR tool to be in line with the inherent aim, intent and object of the Code. The report relies on two primary pillars of arguments to rationalize this hypothesis. Firstly, the report categorizes the Code as a sui generis piece of legislation that was tailor-made for the express purposes of value maximization, balancing the interests of all the stakeholders and for resolution of a stressed corporate entity. Hence, the application of an “umbrella legislation” such as the Act was deemed to be not suitable and inefficient by the Committee. Secondly, the report emphasized on how the insolvency proceedings under the Code involved in rem rights and blanket application of the Act would jeopardize the rights of stakeholders involved, especially under the stringent confidentiality norms of the Mediation Act, 2023. The report makes the mode of achieving an independent, institutional insolvency mediation framework abundantly clear, too. Under the Mediation Act, 2023, Entry 13 of the First Schedule provides for any subject matter of dispute which is notified by the Central Government to be excluded from the ambit of the Act. Hence, the Expert Committee in its report has unequivocally suggested amending the Act or making a specific notification under Entry 13 of the First Schedule, exempting mediation proceedings under the Code from the Act itself.

**Conclusion**

Mediation has become an undeniable need of the hour within the domains of insolvency and bankruptcy law and with the Mediation Act, 2023, the Indian legal system was injected with a functional and institutional model of ADR that could be supplemented to negate the issues plaguing traditional litigation across various fora of adjudication and disciplines of law. However, with the Expert Committee’s report on Mediation as an ADR tool under the Code, the Mediation Act, 2023 is seemingly side-stepped to accommodate a more tailor-made framework for resolution of disputes arising out of the CIRP/Liquidation of a Corporate Debtor such as claims collation, inter-creditor disputes, third-party disputes etc. It will be interesting to see whether a standalone framework made from scratch would yield favorable results or reliance upon an already formulated legislation singularly concerned with mediation in the Indian context would have been a better starting point.

**Reference:**


Section 19, Mediation Act, 2023

Section 18, Mediation Act, 2023

Section 27(2), Mediation Act, 2023.

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