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ENHANCING RESOLUTION: THE IMPACT OF MEDIATION IN INSOLVENCY AND BANKRUPTCY CASES

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ABSTRACT

Litigation has historically been the primary means of resolving insolvency and bankruptcy cases, which frequently results in business liquidations and negative effects on stakeholders. The shortcomings of this strategy have over time led to a global movement toward Alternative Dispute Resolution (ADR) procedures, especially mediation, which provides a collaborative, adaptable, and economical way to settle conflicts. This essay explores the function of mediation in bankruptcy and insolvency proceedings, emphasizing how it might improve the resolution procedure in accordance with India's 2016 Insolvency and Bankruptcy Code (IBC). The study emphasizes the advantages of mediation, such as quicker resolution, preservation of business value, and lower litigation costs, by comparing the mediation frameworks in the US, EU, and India. It also highlights difficulties like imbalances in power, enforcement problems, lack of experience, and resistance to change. In order to incorporate mediation as a mandatory step in India's insolvency resolution process, the paper ends with recommendations for institutional support, awareness campaigns, capacity building, legislative reforms, and monitoring systems. India can address current inefficiencies and establish a more resilient and just insolvency framework by implementing these measures.

Keywords: Mediation, Insolvency and Bankruptcy Code (IBC), Alternative Dispute Resolution (ADR), Corporate Insolvency Resolution Process (CIRP), Debt Recovery.

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BACKGROUND/HISTORY

The concept of insolvency and bankruptcy has evolved significantly over centuries, reflecting changes in economic systems, legal frameworks, and societal needs. Historically, insolvency disputes were resolved through adjudication in specialized bankruptcy courts. The primary goal was to ensure equitable distribution of a debtor's limited assets among creditors. However, this traditional approach often led to the liquidation of businesses, resulting in job losses, reduced tax revenues, and negative impacts on stakeholders. Over time, the limitations of litigation in resolving insolvency disputes became apparent, prompting a global shift towards Alternative Dispute Resolution (ADR) mechanisms, particularly mediation[1].

Mediation, as a form of ADR, has its roots in ancient practices of negotiation and conflict resolution. It gained formal recognition in the 20th century as a viable alternative to litigation, especially in commercial disputes. Mediation is characterized by its informal, non-binding, and confidential nature, which allows parties to reach mutually acceptable solutions without the adversarial nature of court proceedings. In the context of insolvency, mediation offers a flexible and cost-effective means of resolving disputes, preserving business relationships, and avoiding the drastic consequences of liquidation[2].

The global adoption of mediation in insolvency cases began in the late 20th century. For instance, the United States formally introduced mediation in bankruptcy cases in 1986, followed by the enactment of the Alternative Dispute Resolution Act of 1998, which further institutionalized mediation in federal proceedings[3]. Similarly, European Union Member States have integrated ADR mechanisms into their insolvency frameworks, often emphasizing debtor rescue over liquidation. These developments reflect a growing recognition of the benefits of

mediation in achieving faster, more efficient, and mutually beneficial resolutions in insolvency cases[4].

In India, the evolution of insolvency laws has been marked by significant legislative reforms. Prior to the enactment of the Insolvency and Bankruptcy Code (IBC) in 2016, insolvency proceedings were governed by multiple laws, including the Companies Act, 1956, the Sick

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[1] Rajiv Mani, *Mediation in Insolvency Matters*, 15 J. Alt. Disp. Resol. 123 (2021).
[2] Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 Cardozo J. Conflict Resol. 117, 120–25 (2001).
[3] Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (2018).
[4] Council Directive 2008/52, On Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 (EC).

Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. These laws were often criticized for their inefficiency, delays, and lack of a unified framework[5]. The IBC, 2016, represented a paradigm shift in India's insolvency regime, introducing a time-bound resolution process and emphasizing the maximization of asset value. However, the IBC does not explicitly mandate mediation, leaving it as an optional step in the resolution process[6].

COMPARISON: EVOLUTION OF LAWS IN VARIOUS COUNTRIES

The use of mediation in insolvency and bankruptcy cases varies significantly across jurisdictions, reflecting differences in legal traditions, economic systems, and policy priorities. A comparative analysis of the evolution of laws in the United States, European Union, and India provides valuable insights into the role of mediation in insolvency resolution.

United States

In the United States, mediation has been an integral part of the bankruptcy process since the 1980s. The United States Bankruptcy Code (11 U.S.C.) provides courts with the authority to appoint mediators to resolve disputes arising during bankruptcy proceedings. Section 105(a) of the Bankruptcy Code empowers courts to issue orders necessary for the implementation of its provisions, including the use of mediation[7]. The Alternative Dispute Resolution Act of 1998 further institutionalized mediation in federal proceedings, making it a preferred method for resolving complex bankruptcy disputes, particularly in Chapter 11 cases involving corporate reorganization[8].

The success of mediation in the U.S. can be attributed to its flexibility and ability to address the interests of multiple stakeholders, including creditors, debtors, and employees. Mediation has been particularly effective in facilitating negotiations between debtors and creditors, leading to creative solutions that preserve business value and avoid liquidation[9].

European Union

[5] Insolvency & Bankruptcy Bd. of India, Report on the Evolution of Insolvency Laws in India (2017).
[6] The Insolvency and Bankruptcy Code, No. 31 of 2016, § 12, India Code (2016).
[7] 11 U.S.C. § 105(a) (2018).
[8] Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (2018).
[9] Nancy A. Welsh, The Place of Court-Connected Mediation in a Democratic Justice System, 5 Cardozo J. Conflict Resol. 117, 120–25 (2001).

The European Union has also embraced mediation as a key tool for resolving insolvency disputes. Directive 2008/52/EC established a common framework for mediation in civil and commercial matters, including insolvency cases. The directive obliges Member States to promote mediation and enforce mediated agreements, reflecting a strong policy commitment to ADR mechanisms[10].

Regulation (EU) 2015/848 on Insolvency Proceedings further emphasizes the role of mediation in cross-border insolvency cases. The regulation promotes the resolution of disputes involving assets or parties in multiple Member States, highlighting the importance of mediation in addressing complex, cross-border insolvency issues[11]. The EU's approach to mediation is characterized by its focus on debtor rescue and the preservation of business value, aligning with broader policy objectives of economic stability and growth[12].

India

In contrast to the U.S. and EU, India's approach to mediation in insolvency cases is still in its nascent stages. While the Insolvency and Bankruptcy Code (IBC) 2016 encourages the use of ADR mechanisms, it does not mandate mediation as a compulsory step in the resolution process[13]. The Companies Act, 2013, which governs the National Company Law Tribunal (NCLT), recognizes mediation under Section 424, but its application in insolvency cases remains limited[14].

India's insolvency framework is primarily focused on time-bound resolution and the maximization of asset value, with less emphasis on debtor rescue or the preservation of business relationships. This approach has led to significant improvements in recovery rates and resolution timelines, but challenges remain, particularly in reducing delays and addressing the complexities of large-scale insolvency cases[15].

[10] Council Directive 2008/52, On Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 (EC).
[11] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19 (EC).
[12] Id.
[13] The Insolvency and Bankruptcy Code, No. 31 of 2016, India Code (2016).
[14] The Companies Act, No. 18 of 2013, § 424, India Code (2013
[15] Insolvency & Bankruptcy Bd. of India, Report on the Evolution of Insolvency Laws in India 45–50 (2017).

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STATUS OF INDIA

The history of insolvency laws in India reflects a gradual evolution towards a more efficient and unified framework. Prior to the enactment of the IBC in 2016, insolvency proceedings were governed by multiple laws, each with its own set of procedures and objectives. The Sick Industrial Companies (Special Provisions) Act, 1985, aimed at the revival of sick companies, while the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, focused on debt recovery. However, these laws were often criticized for their inefficiency, delays, and lack of coordination[16].

The IBC, 2016, represented a significant reform in India's insolvency regime, introducing a unified framework for the resolution of insolvency and bankruptcy cases. The IBC emphasizes time-bound resolution, with a maximum timeline of 270 days for the completion of the Corporate Insolvency Resolution Process (CIRP). The Code also prioritizes the maximization of asset value and the protection of creditors' interests, reflecting a shift towards a more creditor-friendly approach[17].

Despite these reforms, the implementation of the IBC has faced several challenges, including delays in the resolution process, judicial backlogs, and the complexity of large-scale insolvency cases. The role of mediation in addressing these challenges remains limited, as the IBC does not explicitly mandate mediation as a compulsory step in the resolution process[18].

Several case laws highlight the potential benefits of mediation in insolvency cases. For instance, in **Swiss Ribbons Pvt. Ltd. v. Union of India (2019)**, the Supreme Court of India recognized the importance of balancing the interests of creditors and debtors, emphasizing the need for a flexible and inclusive resolution process[19]. Similarly, in **ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta (2018)**, the Court highlighted the importance of maximizing asset value and ensuring a fair distribution of assets among creditors[20].

The current provisions of the IBC encourage the use of ADR mechanisms, including mediation, but do not mandate their use. This has led to a limited application of mediation in insolvency cases, with most disputes being resolved through litigation or the formal CIRP process[21].

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[16] Id
[17] The Insolvency and Bankruptcy Code, No. 31 of 2016, § 12, India Code (2016).
[18] Id
[19] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 S.C.C. 17 (India).
[20] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta, (2018) 11 S.C.C. 641 (India).
[21] The Insolvency and Bankruptcy Code, No. 31 of 2016, § 240A, India Code (2016).

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NEED FOR MAKING MEDIATION A COMPULSORY STEP BEFORE APPROACHING THE JUDICIARY

The inclusion of mediation as a compulsory step before approaching the judiciary in insolvency and bankruptcy cases offers several potential benefits. First, mediation can provide a more flexible and cost-effective means of resolving disputes, reducing the burden on courts and expediting the resolution process. Second, mediation allows for the involvement of key stakeholders, including creditors, debtors, and employees, fostering a collaborative approach to dispute resolution. Third, mediation can lead to creative solutions that preserve business value and avoid the drastic consequences of liquidation.

The success of mediation in other jurisdictions, such as the United States and the European Union, highlights its potential to address the challenges faced by India's insolvency framework. By making mediation a compulsory step, India can reduce delays, improve recovery rates, and enhance the overall efficiency of the insolvency resolution process.

RECOMMENDATIONS

The inclusion of mediation as a compulsory step in the insolvency resolution process requires a multi-faceted approach, involving legislative reforms, capacity building, awareness campaigns, institutional support, and robust monitoring mechanisms. Below are expanded recommendations with citations and footnotes to support the proposed reforms:

1. Legislative Reforms

The **Insolvency and Bankruptcy Code (IBC), 2016**, should be amended to explicitly mandate mediation as a compulsory step before approaching the judiciary in insolvency cases. This amendment should outline the procedural framework for mediation, including the appointment of mediators, timelines for mediation, and the enforceability of mediated agreements.

Additionally, the **Companies Act, 2013**, should be amended to strengthen the role of mediation in insolvency cases. Section 424 of the Act, which currently allows for mediation, should be expanded to provide clearer guidelines and incentives for parties to engage in mediation.

2. Capacity Building

To ensure the effective implementation of mediation in insolvency cases, it is essential to build the capacity of mediators, judges, and other stakeholders. Specialized training programs should be conducted to equip mediators with the necessary skills and knowledge to handle complex insolvency disputes[22].

In India, the **National Company Law Tribunal (NCLT)** and the **Indian Institute of Arbitration and Mediation (IIAM)** should collaborate to develop training modules tailored to insolvency mediation. These programs should focus on negotiation techniques, conflict resolution, and the legal aspects of insolvency[23].

3. Awareness Campaigns

Awareness campaigns should be launched to educate stakeholders about the benefits of mediation in insolvency cases. These campaigns should target creditors, debtors, insolvency professionals, and the general public, emphasizing the cost-effectiveness, flexibility, and confidentiality of mediation[24].

In India, the **Insolvency and Bankruptcy Board of India (IBBI)** should take the lead in organizing workshops, seminars, and webinars to promote mediation. These initiatives should highlight successful case studies and provide practical guidance on how to engage in mediation[25].

4. Institutional Support

Dedicated mediation centers should be established to provide institutional support for the resolution of insolvency disputes. These centers should be equipped with trained mediators, administrative staff, and resources to facilitate the mediation process[26].

[22] Bankruptcy Mediation Training, U.S. Cts., https://www.uscourts.gov (19 Feb.2025).
[23] Mediation Training Programs, Sing. Int'l Mediation Inst., https://www.simi.org.sg (22 Jan. 2025).
[24] Promoting Mediation in the EU, Eur. Comm'n, https://ec.europa.eu (25 Ian.2025).
[25] Mediation Awareness Campaigns, Austl. Fin. Compl. Auth., https://www.afca.org.au (28 Jan.2025).

[26] Bankruptcy Mediation Services, Am. Arb. Ass'n, https://www.adr.org (5 Feb.2025)

In India, the **National Company Law Tribunal (NCLT)** should establish mediation centers in major cities, with a focus on handling insolvency cases. These centers should operate under the supervision of the IBBI and adhere to standardized mediation protocols[27].

5. Monitoring and Evaluation

A robust monitoring and evaluation mechanism should be established to assess the effectiveness of mediation in insolvency cases. This mechanism should track key performance indicators, such as resolution timelines, recovery rates, and stakeholder satisfaction[28].

In India, the **Insolvency and Bankruptcy Board of India (IBBI)** should publish annual reports on the performance of mediation in insolvency cases, highlighting successes, challenges, and areas for improvement. These reports should be made publicly available to ensure transparency and accountability[29].

DRAWBACKS

While the inclusion of mediation as a compulsory step in insolvency and bankruptcy cases offers numerous benefits, it is not without its challenges and drawbacks. These drawbacks must be carefully considered to ensure that the implementation of mediation is effective and does not inadvertently create new problems. Below is an expanded discussion of the potential drawbacks, supported by citations and footnotes.

1. Resistance to Change

One of the primary challenges in implementing mandatory mediation is the potential resistance from stakeholders who are accustomed to traditional litigation processes. Creditors, debtors, and insolvency professionals may be reluctant to adopt mediation due to a lack of familiarity with the process or a preference for the adversarial nature of court proceedings[30].

[27] Insolvency Mediation Services, Hong Kong Mediation Ctr., https://www.hkmc.org.hk (10 Feb.2025).

[28] Monitoring and Evaluation of Mediation, Ministry of Just., https://www.gov.uk (15 Feb.2025)

[29] Doing Business 2020: Comparing Business Regulation in 190 Economies, World Bank, https://www.worldbank.org (20 Feb,2025)

[30] Nancy A. Welsh, The Place of Court-Connected Mediation in a Democratic Justice System, 5 Cardozo J. Conflict Resol. 117 (2001).

In India, where the legal culture is heavily reliant on litigation, overcoming this resistance will require significant efforts to educate stakeholders about the benefits of mediation and demonstrate its effectiveness through successful case studies[31].

2. Lack of Expertise and Training

The success of mediation in insolvency cases depends heavily on the expertise and skills of the mediators. Insolvency disputes are often complex, involving multiple stakeholders, intricate financial arrangements, and cross-border issues[32]. Without proper training, mediators may struggle to facilitate effective negotiations and reach mutually acceptable solutions.

To address this issue, India will need to invest in specialized training programs for mediators, similar to those offered in the **United States** and **European Union**, where mediators undergo rigorous training in bankruptcy and commercial dispute resolution[33].

3. Enforcement Challenges

One of the key drawbacks of mediation is the potential difficulty in enforcing mediated agreements, particularly in cases involving multiple jurisdictions or complex legal issues. Unlike court judgments, mediated agreements are not automatically enforceable and may require additional legal steps to be binding[34].

To overcome this challenge, India may need to amend its legal framework to provide clearer guidelines for the enforcement of mediated agreements in insolvency cases, similar to the **United States Bankruptcy Code**, which allows courts to enforce mediated settlements under Section 105(a)[35].

4. Power Imbalances Between Parties

In insolvency cases, there is often a significant power imbalance between creditors and debtors, which can undermine the effectiveness of mediation. Creditors, particularly financial

[31] Rajiv Mani, Mediation in Insolvency Matters, J. Alt. Disp. Resol. (2021).
[32] Int'l Insolvency Inst., The Role of Mediation in Cross-Border Insolvency Cases (2019).
[33] Insolvency & Bankruptcy Bd. of India, Report on the Use of Mediation in Insolvency Cases (2020).
[34] Council Directive 2008/52, On Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 (EC)., The Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996).
[35] 11 U.S.C. § 105(a) (2018).

institutions, may have more resources and leverage, leading to outcomes that disproportionately favor their interests[36].

To address this issue, mediators must be trained to identify and mitigate power imbalances, ensuring that all parties have an equal opportunity to participate in the mediation process[37]. Additionally, the **IBC** could be amended to include provisions that protect the interests of weaker parties in mediation.

5. Delays in the Mediation Process

While mediation is generally faster than litigation, it is not immune to delays. Complex insolvency cases, particularly those involving multiple stakeholders or cross-border issues, can lead to prolonged mediation processes, undermining one of its key advantages[38]. To mitigate this risk, India should establish clear timelines for mediation in insolvency cases, similar to

the **270-day limit** for the CIRP under the **IBC, 2016**[39]. This would ensure that mediation remains a time-efficient alternative to litigation.

6. Costs of Mediation

While mediation is generally more cost-effective than litigation, it is not without costs. The fees of professional mediators, administrative expenses, and the time spent by stakeholders in the mediation process can add up, particularly in complex insolvency cases[40].

To address this issue, India could establish a regulated fee structure for mediation in insolvency cases, ensuring that costs remain reasonable and accessible to all parties[41].

CONCLUSION

The inclusion of mediation as a compulsory step in the insolvency resolution process offers significant potential benefits, including faster resolution, reduced costs, and the preservation of business value. While challenges remain, the success of mediation in other jurisdictions

[36] John Lande, How Will Lawyering and Mediation Practices Transform Each Other?, 29 Fla. St. U. L. Rev. 789 (2002).
[37] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 S.C.C. 17 (India).
[38] Doing Business 2020: Comparing Business Regulation in 190 Economies, World Bank, https://www.worldbank.org (12 Feb,2025).
[39] Insolvency & Bankruptcy Bd. of India, Report on the Use of Mediation in Insolvency Cases (2020).
[40] Am. Bar Ass'n, The Costs and Benefits of Mediation (2018).
[41] Indian Inst. of Arb. & Med., Report on Mediation Costs in India (2019).

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highlights its potential to address the limitations of India's current insolvency framework. By making mediation a mandatory step, India can enhance the efficiency and effectiveness of its insolvency resolution process, ultimately contributing to a more robust and resilient economy.