

Bridging the Broken Bench

Insolvency Mediation- An Emerging Trend for Fast-Track Solutions Across Borders

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Introduction

Mediation as a dispute resolution method gained its popularity in insolvency disputes after the Pound Conference (1976) wherein Frank Sander a Harvard professor introduced the concept of 'multi-door courthouse' and emphasized the use of different dispute resolution methods by the aggrieved parties. According to Frank engaging in 'alternative door' with a 'rich variety of different processes' is an effective tool for conflict resolution; different 'doors' that is different procedures provide different dispute resolution mechanisms which can be either used singly or in combination.

One of the predominant reasons for the delay in judicial decisions is the filing of a plethora of interlocutory applications at each stage of the litigation process, eventually unnecessarily burdens the limited judicial capacity. To reduce the judicial overload, it is imperative that out-of-court workouts get due attention. Post global pandemic, the quest to evolve and include mediation procedure in insolvency disputes has increased more than ever. Mediation is recognized and has been successfully used as a tool to resolve high profile and complex cases which makes it to be the best practice in insolvency processes. Mediation operates in accordance with the Latin maxim '*Lex dilaciones abhorret*,' which means 'Justice delayed is justice denied'. However, mediation providers are still working towards the development of specialized schemes and protocols to meet the needs of parties involved in insolvency disputes.

In the past few years, the global landscape of dispute resolution in insolvency cases has undergone a significant transformation, marked by the proliferation of mediation practices and adoption across various jurisdictions. From pioneering initiatives in the United States to emerging frameworks in countries like Singapore and India, the utilization of mediation as a tool for resolving complex insolvency and commercial disputes has gained momentum worldwide.

The United States stands as an early adopter and trailblazer in integrating mediation into its insolvency regime. Since the introduction of mediation programs in the late 1980s, the U.S. courts have embraced out-of-court settlements for bankruptcy cases. Legislative mandates such as the 1998 Alternative Dispute Resolution Act further solidified the role of mediation in resolving civil actions, including bankruptcy disputes. Following in the footsteps of the U.S., European countries like the Netherlands have witnessed a surge in insolvency mediation initiatives. Landmark judgments and pilot projects have demonstrated the efficacy of mediation in expediting bankruptcy proceedings and fostering consensus among stakeholders. Similarly, Singapore has emerged as a hub for mediation in insolvency cases, leveraging legislative reforms to bolster its insolvency framework and promote amicable resolutions.

Japan introduced a turnaround ADR mechanism which provided distressed companies with a lifeline to negotiate with creditors and pursue rehabilitation outside the confines of formal bankruptcy proceedings. In Spain and France, the shift towards mediation also reflects a

broadier trend towards embracing alternative dispute resolution methods in the insolvency sector.

In India, mediation practice holds deep-rooted cultural significance and is increasingly recognized as a potent tool for resolving commercial disputes as well. Since time immemorial, conflicts between joint families or a clan living together were resolved by the eldest member of the group to come to a mutual settlement later, the concept of Panchayats was introduced in the Indian Villages. Recent legislative reforms, such as the enactment of the Mediation Act in 2023, underscore the government's commitment to fostering a robust mediation culture in the country. However, challenges remain in integrating mediation into the Insolvency and Bankruptcy Code, this article draws attention towards the need for the implementation of a standalone statute and nuanced strategies for insolvency mediation under the Code to balance efficiency with procedural safeguards.

Through a deep analysis of mediation practices across diverse jurisdictions, this article aims to elucidate the evolving landscape of insolvency dispute resolution and identify emerging trends and best practices. By examining the regulatory frameworks, case studies, and institutional mechanisms driving the global evolution of mediation practices, this study seeks to offer insights into the transformative potential of mediation in reshaping the contours of insolvency law and practice worldwide.

The Global Cornerstone of Swift Insolvency dispute resolution

The concept of mediation in insolvency law has been introduced rapidly around the globe in the last ten years. Apart from creating a win-win situation and rapidly resolving the claims, mediators can also act as a facilitator between debtors and creditors especially in pre-insolvency mediation safeguarding the company from declaring bankruptcy and tarnishing its image. Mediation is gaining its importance as an out of court mechanism and established itself as a significant part of insolvency proceedings and restructuring around the world, it has now resorted to be a “best practice” feature for modern insolvency reforms.

The outbreak of COVID-19 also played a significant part in promoting mediation procedures over litigation. Post-pandemic the spike in filing of insolvency disputes increased and along with that the adoption of simplified and flexible restructuring and insolvency processes also increased. In May 2020 due to the severe impact of the COVID-19 pandemic on the aviation industry. One of the largest airlines in Latin America, *LATAM Airlines Group*¹ filed for Chapter 11 bankruptcy protection. In January 2021, LATAM Airlines Group announced that it had reached an agreement with its creditors to resolve its insolvency through a mediation process. Under the terms of the agreement, which was upheld by the U.S. Bankruptcy Court for the Southern District of New York, LATAM Airlines Group agreed to pay its creditors in full over a period of time, using a combination of cash and new debt. In addition, the company agreed to participate in a mediation process aimed at resolving any disputes that might arise during the implementation of the agreement. By resolving its insolvency through a mediation process, LATAM Airlines Group was able to avoid the potentially lengthy and costly litigation process that often accompanies bankruptcy proceedings.

The mediation process also allows the parties to work together and find a mutually acceptable solution, which is likely to result in a more sustainable and amicable outcome for all parties

¹ *In re Latam Airlines Grp. S.A.*, 22-CV-2556 (JMF) (S.D.N.Y. May. 10, 2022)

involved. In 2013, *Greyhound Lines² Inc.* - a US based company, filed for insolvency and as a result, numerous claimants who had experienced property damage and personal injury in traffic accidents involving Greyhound vehicles brought forth claims. In order to resolve the dispute, the company set up a pre-reorganization Mediation plan and successfully mediated with each creditor individually.

Beyond USA, the power of mediation as a flexible insolvency tool remained largely untapped until recently. Although, now many jurisdictions are actively implementing ADR laws and using its collaborative approach to promote speedy resolution around the globe. For example, India recently enacted the Mediation Act of 2023, it is an umbrella legislation that covers all sorts of disputes including commercial. The 2023 Act aims to, amongst others, “...*promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise ...*”³.

In the United Kingdom, the Insolvency Act 1986 provides for a range of ADR methods, including mediation, to be used in insolvency cases. In addition, the government has established the Insolvency Service Mediation Scheme⁴, which provides a free, confidential mediation service to parties involved in insolvency disputes. Similarly, in Canada, the Bankruptcy and Insolvency Act⁵ provides for mediation as an option for resolving disputes in insolvency cases. Some provinces have established their own mediation programs to help parties reach a settlement. The 2017 Liberian Insolvency & Restructuring Law incorporates court-annexed mediation in insolvency disputes⁶.

The surge in ADR for insolvency disputes isn't just about easing court burdens and bridging the gap between the disputed parties it reflects a global need for speedier resolutions and delivery of prompt/timely justice. Using mediation for dispute redressal in insolvency matters will not only swiftly close the case and reduces their number but also bolster market stability, considering the ripple effects they have on the entire economic ecosystem.

Insolvency Mediation Across Borders

The evolution of mediation has been concretely shaped in various countries that have integrated it into their judicature.

USA

Pioneering the use of mediation in insolvency, the US courts accepted out of court settlements for bankruptcy cases since the Southern District of California introduced the mediation program in 1986 which in turn paved the way for broader applicability adoption. The 1998 Alternative Dispute Resolution Act cemented this progress by requiring all federal courts to consider ADR for "all civil actions," including bankruptcy cases⁷. Notably, the Delaware U.S. Bankruptcy courts made mediation a compulsory step for specific [insolvency](#)

² *Cushing v. Greyhound Lines, Inc.*, 371 Ill. Dec. 941, 991 N.E.2d 28, 2013 Ill. App. 103197 (Ill. App. Ct. 2013)

³ The Preamble of Mediation Act, 2023 provides for the intended kind of disputes that would be covered by the 2023 Act as “... commercial or otherwise...”. While the term “commercial” has been defined in the 2023 Act, the term otherwise remains open to interpretation.

⁴ A Guide to Civil Mediation, available at: <https://www.gov.uk/guidance/a-guide-to-civil-mediation>

⁵ Available at: <https://laws-lois.justice.gc.ca/eng/acts/b-3/page-15.html>

⁶ Article 8.25 of Liberian Insolvency & Restructuring Law, January 2017.

⁷ Section 654 of the Alternative Dispute Resolution Act of 1998 (28 U.S.C.A)

[disputes](#)⁸, demonstrating its growing acceptance as a valuable tool. By 2009, more than half of the US bankruptcy courts had permitted mediation either by local rules or orders⁹

US being one of the early adopters of mediation, has facilitated "win-win" outcomes in various multiparty disputes, allowing debtors to address each creditor individually and find mutually beneficial solutions.

The applicability of mediation procedure has successfully resolved complex cases with large pools of claims which created a boost in resolving insolvency disputes. The *Lehman Brothers case*¹⁰ (2008) is the historic and landmark example of the largest and most complex cross-border bankruptcy proceedings involving cross-border disputes.

In 2010, Lehman Brothers Holdings Inc. (LBHI) and Lehman Brothers International (Europe) (LBIE) engaged in a mediation process to resolve a dispute over the distribution of assets. LBHI and LBIE were in disagreement over the allocation of billions of dollars in assets between the U.S. and European subsidiaries of the company. The mediation process was overseen by a court-appointed mediator and was conducted over the course of several months. The parties engaged in numerous rounds of negotiations, and eventually reached a settlement agreement that resolved the dispute. The settlement agreement was approved by the court in 2012. However, the use of mediation in the Lehman Brothers case demonstrates how alternative dispute resolution methods, such as mediation, can be effective in resolving complex and high-stakes disputes.

Currently, mediation or other forms of ADR are used to settle more than half of the cases filed in the USA for insolvency or reorganisation¹¹. US Bankruptcy Code has widely implemented mediation at several stages of Chapter 11 proceedings¹².

The most distinct feature of alternative dispute resolution (ADR) in insolvency disputes is that there is no need for all the creditors to get involved in dispute resolution. In contrast to insolvency litigation, the debtor usually resolves the dispute with the principal creditors, without initiating a formal insolvency proceeding. For instance, in USA, ADR is utilized in three contexts for insolvency disputes¹³:

- To resolve disputes and achieve a consensus with respect to plans for reorganization;
- For single creditor disputes; and
- For multiple-creditor claims of the same nature.

The widespread adoption of dispute resolution methods and early implementation of legal framework has led USA to effectively resolve complex cases, and foster collaborative and efficient outcomes in the insolvency process.

⁸ 2 Marcos A. Ramos, "Delaware Bankruptcy Court: Mandatory Mediation Update", Bankruptcy & Insolvency Litigation, American Bar Association, Spring 2013, Vol. 18 No. 3.

⁹ 0 Schnitzer E. (2019), "Bankruptcy Mediation", Norton Journal of Bankruptcy Law and Practice, Vol.28.

¹⁰ *In re Lehman Brothers Holdings, Inc.*, 415 B.R. 77 (N.D.N.Y. 2009)

¹¹ Moulshri Shrivastava, 'Insolvency Mediation: an effective tool for corporate insolvency dispute?', available at: <https://samistilegal.in/insolvency-mediation-an-effective-tool-for-corporate-insolvency-dispute/>

¹² Misha, Shreya Prakash, and Kritika Poddar, 'Applying Mediation in Corporate Insolvency Situations in India', available at: <https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf>

¹³ International Insolvency Institute, International ADR 2.0: Big Solutions for Big Problems.

Netherlands

After US, insolvency mediation has also been on the rise in Europe, specifically Netherlands. In 2018, the Court of Appeal of 's-Hertogenbosch gave a landmark judgment¹⁴ on insolvency and bankruptcy of a tiling company. In this case, the Court discussed the possibility of an amicable settlement by the parties and whether mediation can be an option. This was the first published Dutch judgment in which 'insolvency mediation' was mentioned by the court.

Back in 2012, a pilot project called 'Mediation in Bankruptcy Liquidation Cases' was initiated by the District Court in Amsterdam¹⁵. The project aimed to explore if mediation could expedite and streamline resolving disputes within bankruptcy proceedings. The results were impressive: mediation proved to be a successful solution in [over 70% of the cases](#). Following this success, Amsterdam continued promoting mediation, and other courts in Rotterdam, Midden-Nederland, and The Hague followed suit with their own pilots. This approach tackles various insolvency-related issues, including director liability, shareholder disagreements, and disputes with tax authorities.

Singapore

In Singapore, mediation is increasingly being used as a means of resolving disputes in insolvency cases. The Singapore Mediation Centre (SMC) is one of the primary organizations that provides mediation services in Singapore, including in insolvency cases. Singapore Companies Act provides a safety net for struggling businesses through judicial management. A company in financial distress may apply for judicial management, which involves the appointment of a judicial manager who then takes the helm, navigating troubled waters alongside creditors and stakeholders. During the process, the judicial manager smoothes the path to a viable restructuring plan, and mediation becomes a valuable tool between the parties, fostering communication and consensus.

Although there is no formal insolvency mediation legislation in the country, In May 2017, Singapore unveiled significant reforms to its insolvency and debt restructuring laws through amendments to its Companies Act, which reinforced its existing framework by adopting the features of Chapter 11 of the US Bankruptcy including as super-priority rescue financing,

¹⁴ Case number 200.204.211/01, available at:

<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHSHE:2018:3746&showbutton=true&keyword=insolventmediation>

¹⁵ Prof. Bob Wessels- Mediation in Restructuring and Insolvency, available at:

<https://insolvencylawacademy.com/mediation-in-restructuring-and-insolvency/#:~:text=In%20the%20Netherlands%2C%20since%202012%2C%20a%20pilot%20project%20called%20'Mediation%20in%20Bankruptcy&text=Amsterdam%20in%202012%2C%20but%20its%20results%20have%20not%20been%20evaluated%20yet.>

enhanced moratorium against creditor action and a cram-down mechanism for approval over certain dissenting creditors.¹⁶

In 2019, the benefits of plan mediation were recognized by the Singapore High Court in *Re IM Skaugen SE*¹⁷ and the observations were made by Honourable Justice Kannan Ramesh: *“Another aspect, which surprisingly has not been resorted to by debtors and creditors, is to enlist the help of an experienced and skilled insolvency mediator to develop the restructuring plan, whether it be an individual or group restructuring plan... I see tremendous utility in deploying the services of a neutral third party skilled in mediation techniques, and with the relevant domain knowledge.”*¹⁸

Japan

An out-of-court mechanism was introduced in Japan in 2007 known as turnaround ADR, that aims to promote corporate restructuring and rehabilitation. The mechanism is designed to help companies on the brink to avoid bankruptcy by providing a way for them to negotiate with creditors and other stakeholders in a more efficient and effective manner. Turnaround ADR is now known as the Act on Strengthening Industrial Competitiveness, which was amended in 2015 in order to expand its scope and strengthen its effectiveness. The Act provides for the establishment of a system for supporting the rehabilitation of distressed companies through the use of various methods, including ADR. It is seen as an emerging tool for promoting corporate rehabilitation and helping to prevent bankruptcies in Japan. The turnaround ADR mechanism has been used successfully in a number of cases, and its continued use is likely to be an important part of the country's efforts to maintain and enhance its industrial competitiveness in the years to come. The turnaround procedure is guided by a certified private organization known as The Japan Association of Turnaround Professionals (JATP). Turnaround ADR is designed to facilitate negotiations between a distressed debtor and its financial creditors under mediators licensed by the Ministry of Economy, Trade and Industry and the Ministry of Justice. The Japanese Association of Turnaround Professionals (JATP) is the only licensed organization that can mediate Turnaround ADR cases so far in Japan¹⁹. Reportedly, the out of court workouts are increasingly preferred over the procedures provided in the Japanese insolvency law. Between 2007 and 2016, 55 turnaround cases were filed under the Japanese Turnaround ADR scheme²⁰.

Spain

Spanish insolvency proceedings streamline the process by having a single entry point. However, there are only two possible outcomes: reaching a composition agreement or company

¹⁶ Mediation in Singapore Insolvency Matters, available at: <https://www.withersworldwide.com/en-gb/insight/read/mediation-in-singapore-insolvency-matters>

¹⁷ [2019] 3 SLR 979

¹⁸ ADR in Insolvency Proceedings, available at: [https://ccla.smu.edu.sg/sgri/blog/2023/02/07/adr-insolvency-proceedings#:~:text=The%20advantages%20of%20Plan%20Mediation%20haves%20been,Skaugen%20SE%20\[2019\]%203%20SLR%20979%2C%20where](https://ccla.smu.edu.sg/sgri/blog/2023/02/07/adr-insolvency-proceedings#:~:text=The%20advantages%20of%20Plan%20Mediation%20haves%20been,Skaugen%20SE%20[2019]%203%20SLR%20979%2C%20where)

¹⁹ The Insolvency Review: Japan (2019) by Tomohiro Okawa, Nagashima Ohno & Tsunematsu, available at: <https://insolvencylawacademy.com/wp-content/uploads/2022/09/The-Insolvency-Review-Japan.pdf>

²⁰ Shin-Ichiro Abe, “Japan”, The Strategic View—Corporate Restructuring 2016, <http://www.strategicview.co.uk/strategic-view/corporate-restructuring/the-strategic-view-corporate-restructuring-2016/Japan>

liquidation²¹. Interestingly, Spanish law allows deciding on pursuing either option right from the beginning of the proceedings.

In 2013, Spain amended its Insolvency Act to include an extrajudicial procedure known as the Out-of-Court Payment Agreement (OCPA) or Insolvency Mediation. The objective of this procedure is to facilitate an agreement between the debtor and its creditors outside of the court system, with the aim of avoiding formal insolvency proceedings. The OCPA is a voluntary and confidential process that is initiated by the debtor, who must be facing financial difficulties or insolvency. The debtor proposes a payment plan to its creditors, which is then negotiated and finalized with the assistance of a mediator. The debtor has flexibility in choosing the mediator for an OCPA. This individual can be a qualified professional jointly appointed by the parties or a neutral mediator nominated by the Spanish Ministry of Justice. The scope of the OCPA can be comprehensive, encompassing all the debtor's creditors, or it can be tailored to address the concerns of a specific creditor group. If a consensual agreement is reached during the OCPA, it becomes binding on all involved parties and enforceable through the court system. Should negotiations reach an impasse, the debtor retains the option to initiate formal insolvency proceedings. The OCPA has been viewed as a positive development in Spain's insolvency framework, serving as a viable alternative to formal bankruptcy procedures and fostering the utilization of mediation as a valuable tool for resolving financial distress.

France

The increasing preference for adopting mediation procedures rather than complex litigation is gradually influencing the insolvency sector for resolving insolvency disputes and restructuring matters. It can also be a tool in pre-insolvency procedures which is a prominent practice in European countries for the past two decades. In France, pre-insolvency proceedings also known as [Ad Hoc Mediation and Conciliation](#) have existed in practice for many years and were formally introduced into the insolvency law in 2005²². During recent insolvency reforms, many emerging market countries have incorporated *ad hoc* mediation as a tool for resolving insolvency proceedings, Serbia being one of them. The French Insolvency Law also facilitates the debtors and their creditors in reaching a restructuring agreement with the help of third-party intervention.

Earlier, French insolvency law focused on protecting both the company and its creditors. But since 2006, Book VI of the French Commercial Code (“Code de Commerce”) has shifted gears, prioritizing the debtor with a more supportive system. The code offers the following approach for dealing with financial difficulty²³:

- i. Court-assisted pre-insolvency proceedings;
- ii. Court-controlled pre-insolvency proceedings; &

²¹ Available at: <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-2/article/spain#:~:text=Finally%2C%20there%20is%20the%20out,will%20appoint%20an%20insolvency%20mediator>

²² Mediation in the Context of (Approaching) Insolvency: A Review on the Global Upswing. Available at: [https://insolventmediation.nl/media/uploads/file/18-Mediation-in-the-context-of-\(approaching\)-Insolvency-A-review-of-the-Global-Upswing.pdf](https://insolventmediation.nl/media/uploads/file/18-Mediation-in-the-context-of-(approaching)-Insolvency-A-review-of-the-Global-Upswing.pdf)

²³ IBBI report on use of mediation in insolvency, available at: <https://ibbi.gov.in/uploads/whatsnew/1256aa8a9e2c89bd09d8186dae2e6019.pdf>

iii. Insolvency (bankruptcy) proceedings.

In the last two decades mediation in insolvency sector has gradually paved its way, and currently, it is the most recognized and incorporated form of alternative dispute resolution around the world for instance even in Australia, the Corporations Act 2001 provides for voluntary administration²⁴, a process in which a company in financial distress can appoint an administrator to take control of its affairs and investigate its financial position. During this process, creditors can engage in mediation to resolve disputes and negotiate a restructuring plan. The gradual inclusion of mediation or out-of-court mechanisms in new laws portrays it as an emerging trend, increasingly considered as a best practice.

The contours mediation in India

Mediation is not conflict management as understood by professional groups nor is it disposal of cases as conceived by judicial administrators. It is the handling of human relations in a responsive and positive manner for the good of the people and the betterment of the community. India, a country with a strong sense of community and cooperation, unsurprisingly holds a long tradition of mediation in various forms. Mediation, Conciliation and Arbitration, in their unstructured form are historically more ancient than the present day Anglo-Saxon adversarial system of law. The concept of mediation has strong roots in Indian ethos and family structures - rooted in community-based practices and conciliatory approaches. Mediation gained great popularity amongst businessmen during pre-British Rule in India. The *Mahajans* were the respected, impartial and prudent businessmen who used to resolve the disputes between member businessmen through mediation by the end of the day and were by turn, readily available at business centers to mediate the disputes between the members. The modern legislative theory of arbitration by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided agreeably to such usages and customs as were approved by the conscience of the virtuous and followed by the people in general. This procedure recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntarism, which again, is the basis of modern mediation procedures.

However, with the growth of complexity of commerce, trade relations, societal associations and widespread formalization of legal processes, mediation has evolved its own standards in Indian society. Mediation is thus envisioned to alleviate court congestion, which is currently a pressing issue, and to promote the growth of a mediation culture, particularly in insolvency disputes. The use of mediation is no longer limited to matrimonial, family, and labour disputes; it has become a prominent aspect of dispute resolution mechanisms. A robust mediation culture, backed by legal frameworks, offers relief to parties involved in disputes by facilitating settlements before or during the early stages of legal proceedings. Before 2023 there was no standalone legislation for mediation in India, apart from a few statutes containing mediation provisions, such as the Code of Civil Procedure, 1908, the Arbitration and Conciliation Act, 1996, the Companies Act, 2013, the Commercial Courts Act, 2015, and the Consumer

²⁴ Voluntary administration: A guide for creditors, available at: <https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/voluntary-administration-a-guide-for-creditors/>

Protection Act, 2019. The Mediation and Conciliation Project Committee of the Supreme Court of India describes mediation as a tried and tested alternative for conflict resolution²⁵.

Mediation offers a more efficient and cost-effective means of resolving disputes than traditional litigation. For instance, in the Insolvency case of *V.K. Parvinder Singh Vs. Intec Capital Ltd. and Anr.* (2019)²⁶ the Appellant Tribunal (NCLAT) set aside the order given by Adjudicating Authority (NCLT) and after the parties consent, referred the case to mediate for the settlement claims of financial creditors. Hon'ble Mr. Justice (Retd.) A. K. Sikri, Former Judge of the Hon'ble Supreme Court was appointed as the mediator and after the successful mediation, the Hon'ble Appellate Tribunal held that the mediation report should be regarded as the Appellate Tribunal's directions and order. The successful mediation in this case set a precedent for future insolvency disputes. The willingness of the parties to mediate, the appointment of an experienced mediator, and the subsequent judicial encouragement were key factors in the success of this mediation.

Later in 2021, the Supreme Court of India also showed proclivity towards encouraging mediation for insolvency disputes brought before it on appeal. In the case of *ZKN Traders Pvt Ltd v Kishore Shankar Signapurkar Ltd.*²⁷ the Apex Court was appealed against the NCLAT's (National Company Law Appellate Tribunal) decision to set aside the order issued by the NCLT (National Company Law Tribunal) admitting a case under Section 9 of the IBC. The Supreme Court referred this matter to mediation.

The enforcement of the Mediation Act in September 2023 marks a significant milestone in India's dispute resolution landscape, aiming to foster a culture of mediation across various sectors, including commercial and community disputes. It aims to promote, encourage, and facilitate mediation, especially institutional mediation, to resolve disputes, commercial and otherwise. Further, the Act encourages community mediation and makes online mediation an acceptable and cost-effective process. The Act takes a wide-ranging approach, addressing key areas like how mediation institutions operate, establishing a regulatory body, setting standards for mediation providers, outlining qualifications and training for mediators, incorporating online and community mediation options, facilitating cross-border dispute resolution, promoting voluntary mediation before litigation, and ensuring enforcement of mediation agreements. In terms of the impact on other existing statutes, the Act provides a list of statutes that will have an “*overriding effect for conduct of mediation or conciliation notwithstanding anything inconsistent therewith contained in any other law for the time being in force, and any instrument having force of law*” under the provisions envisaged in Section 55 (1) & Second Schedule of the Act.

However, the exclusion of the Insolvency and Bankruptcy Code of India, 2016 (IBC) from the Second Schedule of the Act has created ambiguity regarding the application of mediation in insolvency cases. This is particularly significant given the IBC's critical role in the efficient and time-bound resolution of insolvency and bankruptcy matters. The Code is a special legislation for the resolution of insolvency and bankruptcy in India, whose efficiency is deeply rooted in its independent, self-contained, and all-encompassing nature. Although, there have been instances of mediation of insolvency matters²⁸, currently the Code does not specifically provide for mediation. Recently this year, the Expert Committee of the Insolvency and

²⁵ Available at: <https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf>

²⁶ Company Appeal (AT) (Insolvency) No. 968 of 2019

²⁷ 2021 SCC Online SC 3160

²⁸ *Supra* note 22

Bankruptcy Board of India (IBBI) released a report in January²⁹ on the framework of the use of mediation under IBC, the point of contention being that a stand-alone clause under the IBC Code would allow for a more tailored strategy to better address the complex demands of the insolvency cases and to potentially streamline the resolution process. Various recommendations were also made in regard to the phased implementation of voluntary mediation in the Code along with the exclusion of the Code from the Mediation Act as the timeline currently envisaged under the Act (120 days along with an extension of 60 days) does not align with the primary object of the Code, i.e., time bound revival of stressed enterprises and maximizing the value of the debtor. Unscrupulous parties may invoke mediation in order to derail the insolvency process and institutions under the Code would have less control over the delay caused by the parties.

Certainly, the proposed phased implementation of voluntary mediation within the IBC, along with its exclusion from the Mediation Act, aims to align the mediation process with the IBC's objectives of swift resolution and value maximization of the debtor's assets.

Global organizations

Not only particular nations but also various organizations are working towards generating a tandem of frameworks and guidelines for institutions and countries to follow while resolving insolvency disputes. For example, the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) are the two main international bodies recognized as the global pillars for insolvency systems, recently have identified the advantages of out-of-court mechanisms in two key publications. The 2021 revised edition of the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes³⁰, unveiled key recommendations and mentioned that in order to enhance workout negotiations the leverage to informal techniques, such as voluntary negotiation, mediation or informal dispute resolution must be adopted. Similarly, the 2021 UNCITRAL Legislative Recommendations on the Insolvency of Micro and Small Enterprises³¹, identifies the use of mediation and conciliation to lower barriers of access to [insolvency proceedings](#).

Conclusions

The intersection of mediation into insolvency proceedings across various jurisdictions underscores a global trend towards more efficient, cost-effective, and collaborative dispute resolution mechanisms. The United States, as an early adopter, has set a global standard with well-established frameworks and widespread acceptance of mediation in bankruptcy cases. European countries like the Netherlands and Spain, along with Singapore, Japan, and Australia,

²⁹ IBBI Expert Committee Report on Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, available at: <https://ibbi.gov.in/uploads/whatsnew/1256aa8a9e2c89bd09d8186dae2e6019.pdf>

³⁰ Principles For Effective Insolvency And Creditor/ Debtor Regimes. Available at: <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

³¹ UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises, Available at: <https://uncitral.un.org/en/irimse#:~:text=The%20Legislative%20Recommendations%20on%20Insolvency,and%20to%20respond%20to%20the>

have followed suit by adapting the mediation process to fit their own unique legal and cultural contexts

The common ground for the promotion of insolvency mediation in various jurisdictions was the emphasis on efficiency and cost savings, the strong judicial support for mediation, and the focus on achieving consensual and mutually beneficial outcomes for debtors and creditors. What sets them apart from each other is their distinct features and differences in the implementation and development of the framework. For instance, U.S. and France have long-standing, developed systems, while Singapore and the Netherlands are in the process of integrating and refining their approaches. Japan's unique Turnaround ADR mechanism and Spain's Out-of-Court procedure highlight tailored solutions to specific insolvency challenges. Meanwhile in India, the Mediation Act represents a progressive step towards institutionalizing mediation in the country but careful consideration and tailored integration are essential for its application within the insolvency domain. This will ensure that the mediation process complements, rather than conflicts with, the IBC's framework, thereby preserving the efficiency and integrity of insolvency resolutions in India.

The widespread adoption and success of mediation in insolvency cases illustrate its value as a tool for resolving complex financial disputes. By fostering open communication, confidentiality, and flexibility, mediation helps avoid the adversarial nature of traditional litigation and promotes a more harmonious resolution process. As global economies continue to evolve, the trend towards mediation in insolvency proceedings is likely to expand, further solidifying its role as a best practice in the field of dispute resolution.
