



भारतीय दिवाला और शोधन अक्षमता बोर्ड

Insolvency and Bankruptcy Board of India

Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016

Report of the Expert Committee

JANUARY 2024

Report

on

**Framework for Use of Mediation under the Insolvency and
Bankruptcy Code, 2016**

by

**Expert Committee constituted by the
Insolvency and Bankruptcy Board of India**

31 January 2024

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Date: 31 January 2024

To
The Chairperson
Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan,
Shankar Market, Connaught Circus
New Delhi -110001

Dear Sir,

It is our privilege to submit this comprehensive report of the Expert Committee constituted by the Insolvency and Bankruptcy Board of India (IBBI) by Order Board-22/2/2023-IBBI/8937 dated 6 March 2023. The Committee's mandate was to examine the scope of use of mediation in respect of processes under the Insolvency and Bankruptcy Code, 2016 (the "Code" or "IBC") and submit its recommendations thereon.

In this report, the Committee presents its recommendations on the likely framework for the introduction of mediation as a complementary mechanism for the resolution of disputes around the processes under the Code. The Committee has rigorously examined the mediation landscape, including the newly enacted Mediation Act, 2023, to assess the potential for use of mediation in various insolvency, bankruptcy, and liquidation processes under the Code. During the course of its deliberations, the Committee thoroughly studied the application of mediation in other jurisdictions and conducted discussions with stakeholders from industry and academia.

While mediation is well entrenched in the Indian legal system, the Mediation Act, 2023 further fortifies the regime. However, mediation does not exist as a legislated mandate under the Code. In its formal introduction to the insolvency regime, the Committee has taken a mindfully cautious approach and endeavoured to balance the fundamental objectives of the Code, i.e., "*time-bound reorganization*" and "*maximization of value*", with autonomy to parties to voluntarily opt for the 'out-of-court' mediation process to enhance the efficiency of the insolvency resolution process.

The Committee envisions that this report will provide considered perspectives on bespoke application of mediation to the processes under the Code and the overall institutional framework for its phased implementation.

Yours sincerely,


Dr. T.K. Viswanathan
Chairperson

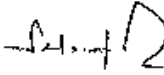

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TABLE OF CONTENTS

PREFACE	8
ACKNOWLEDGMENTS	11
FUNDAMENTAL OBJECTIVES OF THE FRAMEWORK.....	13
SUMMARY OF RECOMMENDATIONS OF THE COMMITTEE	14
1. CHAPTER I: INTRODUCTION	19
<i>A. Background to the Report: Setting the Context.....</i>	<i>19</i>
<i>B. Constitution of the Committee.....</i>	<i>21</i>
<i>C. Committee’s Working Methodology and its Deliberations.....</i>	<i>21</i>
<i>D. Structure of the Report</i>	<i>23</i>
2. CHAPTER II: BRIEF INTRODUCTION TO MEDIATION	24
<i>A. Mediation as ADR Process</i>	<i>24</i>
<i>B. Difference between mediation, conciliation and adjudication.....</i>	<i>26</i>
<i>C. Mediation Process</i>	<i>29</i>
3. CHAPTER III: EXISTING MEDIATION LANDSCAPE IN INDIA	32
<i>A. Background of Mediation in India.....</i>	<i>33</i>
<i>B. Umbrella Legislation on Mediation under Indian Law</i>	<i>35</i>
<i>C. Mediation under Other Legislations</i>	<i>39</i>
<i>Civil Procedure Code, 1908</i>	<i>39</i>
<i>Arbitration and Conciliation Act, 1996.....</i>	<i>40</i>
<i>Commercial Courts Act, 2015</i>	<i>41</i>
<i>Consumer Protection Act, 2019.....</i>	<i>43</i>
<i>Companies Act, 2013.....</i>	<i>44</i>
<i>Telecom Regulatory Authority of India Act, 1997.....</i>	<i>47</i>
<i>D. Singapore Convention on Mediation – India as signatory.....</i>	<i>49</i>
4. CHAPTER IV: INSOLVENCY MEDIATION REGIMES IN OTHER RELEVANT JURISDICTIONS	50
5. CHAPTER V: INSOLVENCY MEDIATION FRAMEWORK IN INDIA.....	54
<i>A. Current Status and Statistics under the Code – Withdrawal, Settlement and Mediation ...</i>	<i>55</i>
<i>B. Insolvency Mediation in India: the 2023 Act & the Code</i>	<i>61</i>
<i>a. Applicability of 2023 Act to insolvency mediation.....</i>	<i>61</i>
<i>b. Insolvency Mediation to be Bespoke and Self Contained within the Code.....</i>	<i>63</i>
<i>C. Insolvency Mediation Framework under the Code</i>	<i>70</i>
<i>a. Approach to insolvency mediation framework.....</i>	<i>70</i>

b. Key Identified Factors.....	72
c. Recommendations.....	72
I. Mediation under IBC - mandatory or voluntary:.....	72
II. Dovetailing mediation into the timelines specified by the Code.....	74
III. Processes, stages and circumstances under the Code that are fit for reference to mediation.....	74
a. Mediation in Corporate Insolvency Resolution Process	75
(i) Stage I: Pre-commencement stage:.....	75
(ii) Stage II: Post-commencement / admission of CIRP	79
(iii) Stage III: Approval of Resolution Plan	85
(iv) Stage IV: Implementation of Resolution Plan.....	86
(v) Stage V: Liquidation Stage.....	87
b. Pre-packaged resolution process	87
c. Fast-track Corporate Insolvency Resolution Process:	88
d. Cross Border and Group Insolvency cases:	88
(i) Cross border insolvencies	88
(ii) Group insolvencies	89
e. Individual Insolvency.....	90
IV. Other Umbrella Issues	91
a. Private & Confidential Nature of Mediation vis-a-vis Third Party Rights & Rights In Rem	91
b. Impact of Moratorium	92
c. Impact on disqualification and restrictions under Section 29A.....	92
d. Specific Exclusion of Certain Disputes from the ambit of Mediation	93
V. Enforcement mechanism for mediation outcomes.....	93
VI. Making mediation process under IBC cost-effective	95
VII. Mediators – Qualifications and Criteria.....	97
VIII. Robust operational framework for mediation under IBC.....	100
IX. Facilitation of adequate infrastructure support to implement mediation under the Code.....	103
ANNEXURE I: CONSTITUTION OF THE COMMITTEE.....	105
ANNEXURE II: LIST OF ABBREVIATIONS	107
ANNEXURE III: SUMMARY OF INTERNATIONAL JURISPRUDENCE REVIEWED BY THE COMMITTEE.....	108
A. United States of America (USA).....	108

<i>B. The European Union</i>	114
<i>C. Italy</i>	115
<i>D. France</i>	117
<i>E. Spain</i>	119
<i>F. United Kingdom</i>	120
<i>G. Romania</i>	121
<i>H. Greece</i>	122
<i>I. Japan</i>	122
<i>J. Singapore</i>	123
<i>K. UNCITRAL Model Law on International Commercial Mediation</i>	125
<i>L. Germany</i>	126

PREFACE

In the recent past, IBC has emerged as a transformative reform as it has provided a framework for dignified exit of stressed assets and thereby strengthened India's position as an investment destination. The IBC adopts a resolution-oriented approach, outcomes of which have been evaluated based on – time taken, preservation of asset value, and recovery amounts for the creditors. The data up to September 2023¹ indicates that in matters under approved resolution plans, over Rs 3.16 lakh crores have been realised by the creditors. The fear of losing control over the corporate debtor has led to over 26000 applications, with Rs 9.33 lakh crore of debt being settled before the cases reached the admission stage before the NCLT. Overall, there has been a change in outlook of the stakeholders – 'insolvency resolution culture' (to say so) has found its feet in India. The success of IBC, besides enhancing trust in the insolvency resolution process and improving the revival of stressed assets in India, also marks an institutional shift in the perception of justice delivery systems in India.

While the IBC envisages time-bound resolution and prescribes timelines for important activities, considerable delays² have been observed at each stage – from the date of default to filing, from filing to admission, and from admission to final resolution. The predominant cause of delay has been the filing of a plethora of interlocutory applications at each stage of the process, eventually unnecessarily burdening the limited judicial capacity. To reduce the judicial overload, it is imperative that out-of-court workouts get due attention.

To improve efficacy of delivery process and achieve further robust outcomes, in 2022 the IBBI engaged with the industry stakeholders, where mediation was one of the identified frontier areas, adoption of which has brought about discernible changes in insolvency regimes of other jurisdictions. The Committee was constituted with this background to look into the use of mediation under the Code and suggest a framework for effective implementation. While mediation itself is not a panacea or an absolute pre-cursor to resolve all matters under the Code, there are no doubts that loss of enterprise and its asset value, as well as disruption to the affairs of the CD, can be minimized with the mutually agreeable 'problem solving approach.'

The intrinsic function of mediation emphasizes the value of mediation as an end in itself. For the parties to a dispute or a prospective one, strong mediation culture supported by legislative framework provides respite in terms of settlement before initiation or at early stages of contentious proceedings. Mediation is thus expected to aid in decongesting court dockets, which is the need of

¹ Available at <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf> last accessed 19 December 2023.

² A report published by CRISIL Rating, available at: <https://www.crisilratings.com/en/home/newsroom/press-releases/2023/11/in-7-years-ibs-has-improved-credit-culture-room-for-strengthening-remains.html> last accessed 19 December 2023.

the hour and also foster an increased impetus towards development of ‘mediation culture’ in insolvency disputes.

The use of mediation only in matrimonial, family, and labour disputes is no longer a “future trend”. While mediation as a dispute resolution mechanism has as such been in the spotlight over the past years, during the term of the Committee, the Mediation Act, 2023³ (“**2023 Act**”) was enacted. This further strengthened mediation’s efficacy and pronounced use for resolution of disputes outside the ‘court’.

Given that the overall landscape of insolvency resolution in other jurisdictions is different, the best practices emerging from various jurisdictions needed to be tweaked in the Indian context, and therefore, the Committee has taken a bespoke approach to achieve the desired objective of reducing delays and increasing the efficiency of the process through the introduction of a mediation framework within the overall scheme of the Code. The Committee has not made any recommendations that are not in line with the objectives and the spirit of the Mediation Act, 2023. Instead, the Committee’s recommendations are to be read in conjunction with the said Act to improve the mediation landscape in India, albeit with a focus on insolvency resolution under the Code.

In the Indian insolvency regime, unlike many other jurisdictions, there is an overbearing need to balance the efficiency of the system with the public interest involved in distressed assets. This is especially true as most financial stakes are from public sector banks, who are the key creditors seeking to rescue corporate debtors. Besides economic rationale, considering the involvement of questions of ethics, probity, and integrity, the Committee felt that gradualism should be inbuilt into the ethos of the mediation framework so proposed.

The Committee has been cautious to lean towards a phased introduction of mediation under the Code, with no compromise on the statutory timelines and providing maximum enforceability to mediated outcomes. In the initial phase, the Committee thought it fit that all mediations should be voluntary and provided examples of where, under the Code, to begin with, these mediations may be most beneficial. An essential aspect of the framework will be to establish a relationship between mediation and judicial proceedings, securing the objective of insolvency resolution within set timelines. Mediation can provide a cost-effective way for quick resolution of disputes and make it more likely that parties voluntarily comply with agreements resulting from mediation. Further, this renewed paradigm of dispute resolution will shift the focus from NCLT to the private actors in the process (namely debtors, creditors, and all parties interested). This, in turn, will save precious time for the NCLT to focus on business rescue. In addition, an appointed mediator would play a key role in ensuring the proper functioning of negotiations and the efficient handling of procedures for the benefit of creditors as well as other stakeholders. Thus, it

³ As on the date of publication of this Report, the substantive provisions of 2023 Act are yet to come into force and hence, the actual working of the 2023 Act remains to be seen.

is essential that space for regulatory sandbox to operate mediation may be created through IBBI's formulation of regulations in line with the enabling provision under the Code. This will provide expected agility to the mediation framework and its operability will be much enhanced. The focus will be on creating a framework for reliance, developing capacities, and implementing strategies for both the users and the system to trust, in addition to promoting an expeditious and inexpensive mediation system.

It is expected that mediation will also reflect positively in effective litigation management through cost and delay reduction as well as cash flow management. It would augment procedural, operational and cultural changes in how India resolves insolvency. This is more so intended because, in essence, mediation places heavy reliance on 'human element' of the parties. It appeals to the common object of 'dispute resolution' (i.e., ending conflict and avoiding litigation) with the expectation of balancing all interests during the proceedings. Since mediation is 'party-driven' and outcomes are largely 'self-determined', the cultural mindset shift to explore the maximum possibility of resolution is the key. For instance, it is well recognized that enactment and implementation of IBC over the years has led to mindset change amongst debtors and improvement in debtor-creditor relationship.⁴ The insolvency mediation framework must hence, rather than only being seen as a dispute resolution mechanism, expectedly become a way of introducing debtors and creditors to a new 'rescue culture',⁵ where they have the opportunity to 'amicably resolve' issues at the outset or once the insolvency process commences, at various stages within the timelines of IBC as the insolvency process runs parallelly.

The Committee, through this report, aims to provide a structured framework for integrating mediation into the functioning of the Code. The Committee acknowledges that it is challenging to envision specific situations that may arise during the course, and therefore it is expected that this mediation framework will also evolve with time and align with emerging market conditions. Though the Committee has endeavoured to study every facet associated with insolvency mediation in great detail, some aspects may be examined at later stages once the framework for the first phase is in place. We sincerely hope that the Committee's recommendations at this stage enable the implementation of mediation, which serves as an out-of-court dispute resolution tool for early settlement of disputes and thus reduces the caseload of the Adjudicating Authority.



(Dr. T.K. Viswanathan)
Chairperson, Expert Committee

⁴ Economic Survey of India (2022-23).

⁵ This term is used in a paper written in context of Italian insolvency mediation regime: Lucarelli, Paola and Ilaria, Forestieri, '*The Three Targets of Insolvency Mediation: Dispute Resolution, Agreement Facilitation*', Corporate Distress Management (December 14, 2017). TDM 4 (2017) Special Issue on Comparative and International Perspectives on Mediation in Insolvency Matters, Available at SSRN: <https://ssrn.com/abstract=3087979>.

ACKNOWLEDGMENTS

I would like to express my profound gratitude to the esteemed members of the Committee, who have engaged in tireless discussions and at times, debated various possibilities of mediation framework for the insolvency regime in India. The task under the purview of the Committee was enormous, diverse, and multi-faceted. It required astute understanding of the insolvency laws in India, concept and use of mediation in India under various laws, the collective oversight of stakeholders' perspective and the international experience (including roadblocks) in implementing mediation process in insolvency laws. The Committee has been successful in accomplishing this task and this could not have been possible without the efforts and intellectual inputs provided by all members. This has been one of the longest deliberations, where the quality of discourse has only been superlatively surpassed by the enthusiasm of each member.

This Report has been made possible due to the unwavering support, dedication, and expertise of the members of the IBBI team led by Mr. Sudhaker Shukla, which was tasked with the management of Committee meetings and deliberations and assisting the members with research, drafting, and reviewing of the Report. Mr. Sudhaker Shukla's dedication to finesse multiple reiterations of the draft has been unparalleled. Mr. Santosh Shukla, the member-secretary of the Committee, has contributed immensely to shaping the Report, especially with his insights into framing the mediation insolvency process for actual on-ground implementation. The Committee also wishes to compliment Ms. Medha Shekar for her unstinted support during the deliberations and her assistance with the drafting of the Report. The Committee is also grateful to Mr. Asit Behera, Mr. Om Prakash, and Ms. Ajanta Gupta for their valuable research inputs.

The Committee also extends its gratitude to the experts who participated in discussions and provided their perspectives on seminal issues, which involved patient responses to queries raised by the Committee. We thank the Hon'ble judges (present and former) of the US Bankruptcy Courts, the American Bankruptcy Institute, Prof. Antony Casey (Donald M. Ephraim Professor of Law and Economics and faculty director of the Center on Law and Finance at the University of Chicago, US), Mr. Shreyas Jayasimha (Partner, Aarna Law) and Mr. Sanjeev Ahuja (Insolvency Professional and Mediator) for their contributions.

The Committee would also like to place on record the valuable assistance provided by the team at the Vidhi Centre of Legal Policy, comprising Ms. Shruti Khanijow, Ms. Shreya Tripathy, and Mr. Daksh Aggarwal, during the deliberations of the Committee, with holistic research and in the drafting of this Report. The Committee especially compliments Ms. Shruti Khanijow for facilitating the deliberations of the Committee with her in-depth research and drafting. The Committee is hopeful that these recommendations for the insolvency mediation framework will provide a solid ground for implementation of mediation as an ADR process under the Code.



(Dr. T.K. Viswanathan)
Chairperson, Expert Committee

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FUNDAMENTAL OBJECTIVES OF THE FRAMEWORK



Aimed at expediting resolution of insolvency cases and related disputes by legislative recognition of voluntary mediation under the Code

Reduction of caseload of the NCLT docket



Providing a specialist mechanism and infrastructure (including specialist mediators) for resolving insolvency disputes under the Code

Timelines under the Code to remain sacrosanct: Mediation to be a parallel process



Phased Implementation: Reference of identified genre of disputes to mediation under the Code

Increasing awareness of stakeholders and users in resolution of disputes *via* mediation under the Code



Fostering insolvency mediation culture and building confidence by encouraging the use of mediation, especially in bilateral issues

SUMMARY OF RECOMMENDATIONS OF THE COMMITTEE

S. No.	Framework Element	Key Recommendations
		• <i>The mediation framework under the Code would best operate as a self-contained blueprint within the Code, with independent infrastructure to ensure that the objectives of the Code are met.</i> • <i>Since in-rem rights and aspects of public interest get involved at many stages during the proceedings under the Code, there is a strong case for seeking exemption by making a specific amendment to the 2023 Act or through a notification under Entry 13 of the First Schedule to the 2023 Act.</i> • <i>The Committee recommends the phased introduction of voluntary mediation as a dispute resolution mechanism under the Code while maintaining the sanctity of the timelines for various existing insolvency resolution processes.</i> • <i>The core essence of the framework is its independence and flexibility to provide room for quick incorporation of implementational learning.</i>
1.	Self-contained framework of mediation under the Code and Exclusion of the Code from application of the Mediation Act, 2023	i. Enabling provisions for: (a) introduction of mediation as ADR method under the Code within existing statutory timelines and processes; (b) delegation of powers to Central Government and IBBI for making rules, regulations, notifications, etc., as may be required; (c) establishment of the (in-house) mediation secretariat at the NCLT; (d) specifying timelines for mediation; (e) clarifying role of the NCLT as AA , i.e., no scope for extension of timelines for mediation under the Code, interim relief, etc.; (f) recognition and enforcement of Mediated Settlement Agreements (“MSA”) under the Code; and (g) impact on moratorium. ii. The mediation process envisaged under the 2023 Act, based on a ‘one-size-fits-all’ approach, may not be made applicable to the insolvency resolution processes under the Code. While Entry 13 of the First Schedule to the 2023 Act, allows the Central Government to exclude by notification the subject matter of dispute that may be kept out of the purview of the Act, for abundant clarity, proceedings under the Code may be specifically excluded from the realm of the 2023 Act.
2.	Rules by Central	Central Government may prescribe <i>via</i> rules: (a) the basic

	Government	structure of the insolvency mediation framework, including specifying categories of disputes that are considered ‘mediable’ (if required); (b) the establishment of an NCLT-annexed insolvency mediation cell/secretariat; (c) creating an infrastructure (including e-filings, e-hearings, etc.); (d) minimum qualifications for mediator appointments; etc.; (e) offering OCs to mediate by suitably modifying the Form prescribed under the existing relevant Rules, etc. For any mediations conducted by the parties at appellate <i>fora</i> level under the Code (i.e., NCLAT or the Supreme Court), similar provisions may be made.
3.	Regulatory Framework by IBBI	i. The IBBI regulations must be aligned with the enabling provision to be introduced in the Code. ii. IBBI to specify procedures for: (a) the conduct of mediations (including automatic termination of mediation where timelines have expired); (b) the process of mediator appointment and removal; (c) the functioning of the secretariat; (d) capacity-building programmes for mediators; (e) the enforcement of MSAs, etc.
4.	Reference to mediation: Mandatory or Voluntary	Voluntary mediation, i.e., reference of a dispute to mediation by consensus of parties, will be the most suitable method to settle insolvency disputes.
5.	Stage of Reference:	i. Voluntary mediation for post-institution matters filed by the OCs and enforcement of MSAs with the approval of NCLT. ii. At the present stage, voluntary mediation provisions may not include the CIRP applications filed by FCs/ CD itself. iii. Post institution reference of specific disputes/conflicts during the insolvency resolution process (‘process disputes’). These may include claims collation, inter-creditor issues, etc.
6.	Competent Authority to Refer: NCLT or Parties by Mutual Consent	i. Reference at <u>pre-institution stage</u> by parties voluntary and falls outside the scope of the Code, but remains subject to the dispute being identified as fit for mediation, for example, individual insolvency resolution process. While filing the application, reference to attempts at mediation undertaken, if any,

		needs to be mentioned in the application. ii. Reference <u>post-institution but pre-commencement</u> by parties with express intimation to the NCLT, subject to automatic termination of mediators' mandate at the admission/ commencement of CIRP or 30 days from reference to mediation, whichever is earlier. iii. Reference of '<u>process disputes</u>' post-commencement by 66% majority of the CoC, or by the creditor in case of claims collation process, subject to automatic termination of mediators' mandate at the expiry of timeline of underlying stage under the Code. Post-commencement, the current process of settlement under Section 12A would not be impacted by the mediation framework at the present stage. iv. Reference of disputes during plan implementation stage, as prescribed under the Code or Rules.
7.	Subject Matter for Reference:	<i>Identified insolvency resolution processes:</i> • CIRP, selective reference of applications by OCs and Corporate Applicants • Pre-packs • Fast track CIRP • Individual insolvency – PG to CD cases • Individual insolvency (other than PG to CD cases (as and when rolled out)) <i>Identified process disputes within the processes:</i> • CIRP: Claims collation process, inter-creditor issues at the CoC level, Applications filed under Section 60(5) of the Code, etc. • Individual insolvencies: avoidance actions (where no allegations of fraud are raised)
8.	Timelines	Timelines for insolvency mediation, as introduced and enabled for identified disputes and insolvency resolution processes, to run parallel with the statutory timelines under the Code. For example, any mediation (ongoing or commencing) during the post-institution but pre-commencement stage of CIRP will necessarily be subject to automatic termination of mediator's mandate within 30 days' of its reference or upon NCLT's admission of the CIRP, whichever is earlier.
9.	Operational	i. Establishment of a dedicated and specialized NCLT-

	Infrastructure	annexed insolvency mediation cell with an independent secretariat to administer, oversee, and manage the conduct of insolvency mediations under the Code. ii. Provisions for staff, personnel, systems, including for the e-mediation process. iii. Adequate infrastructure, such as e-meetings and e-filings, for the conduct of online or paperless mediation (where appropriate).
10.	Enforcement of Mediated Settlement Agreement	i. Parties to approach the Adjudicating Authority (or the relevant appellate authority) without instituting separate legal proceedings, for enforcement of MSAs. 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 pre-admission matters). ii. At the post-admission stage, process disputes can be settled as per Section 12A of the Code. Here, settlements are given statutory sanctity by being recorded in the order of the NCLT. In case of breach, the aggrieved party has the option to approach the NCLT for revival of CIRP.
11.	Costs	i. Costs arising in connection with the mediation process to be borne by the parties equally. or as may be mutually agreed amongst them. ii. Costs incurred for the conduct of mediation during the CIRP process to be excluded from the purview of insolvency resolution process costs. iii. Introducing provisions for reimbursing expenses incurred by the parties at the NCLT (or NCLAT or the Supreme Court).
12.	Mediators	i. Pool of mediators to include: (a) retired members of the NCLT/NCLAT; (b) senior advocates and/or advocates with advocacy experience in more than ten (10) successful insolvency proceedings; (c) ex-senior officials of financial sector regulators, such as IBBI, or scheduled commercial banks; and (d) insolvency professionals with more than ten (10) years of experience. As additional pool of mediators, the

		following can be included: (a) legal practitioners with at least ten (10) years of experience in insolvency disputes; (b) persons with experience as mediators or in mediation advocacy in commercial disputes for at least ten (10) years; and (c) persons with technical expertise in insolvency, accounting, valuation, and industry operations possessing experience of at least ten (10) years may also be included in the pool of mediators. ii. Adequate training to be provided to the mediators for conduct of mediation under the Code. A Code of Ethics for Mediators may be formulated to enable mediators to perform their duties while upholding principles of professional ethics.
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1. CHAPTER I: INTRODUCTION

A. *Background to the Report: Setting the Context*

- 1.1. The enactment of Insolvency and Bankruptcy Code, 2016 (“**IBC**” or “**Code**”) was a watershed moment for recovery of distressed business enterprises in India. Prior to IBC, the insolvency framework in India was fragmented across multiple legislations and often resulted in lengthy and inefficient processes. IBC was passed in the backdrop of the legal system’s inadequacy to effectively resolve the mounting non-performing assets (“**NPAs**”) in the banking sector. After intensive deliberations on the way ahead to manage extant issues and address financial stress in chronically sick companies through either resolution or liquidation, the Bankruptcy Law Reforms Committee (“**BLRC**”) recommended an insolvency law framework and suggested adoption of a gradual approach in context of the emerging challenges and best practices across the jurisdictions, keeping in view the status of stabilisation and maturity of insolvency processes.
- 1.2. Based on BLRC’s recommendations, the Code was enacted in 2016 as a comprehensive legislation to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate entities, partnership firms, and individuals in a time-bound manner. At its core, the Code sought to address prevailing issues by providing a consolidated framework that streamlines insolvency and bankruptcy processes, maximizes the value of assets, promotes entrepreneurship and availability of credit, and balances the interests of all stakeholders.
- 1.3. The Economic Survey of India (2022-23) acknowledged that over the past seven years, the IBC has continued to support the ‘*ease of doing business*’ in India and its stated strengths of facilitating easy exit with time bound resolutions for corporations have aided the financial system absorb external spill overs, tightening global financial conditions and high volatility in financial markets.⁶
- 1.4. Progressively, the law and practice of the IBC in India has matured to focus on entire value chains. It has sought to address enterprise sickness and facilitate insolvency resolution through ‘creditor-in-control’ model and collective deliberation process within statutory timelines. However, despite significant improvement in insolvency resolution outcomes over seven years of its implementation⁷, the IBC processes are still time-

⁶ Para 4.72, ‘*The Economic Survey of India 2022-2023*’, available at: <https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> last accessed 11 November 2023 (“**The Economic Survey**”).

⁷ Para 4.30, *The Economic Survey*: “As per the RBI data, in FY 22, the total amount recovered by SCBs under IBC has been the highest compared to other channels such as Lok Adalat’s, SARFAESI Act and DRTs in this period.”

consuming, adversarial, and resource-intensive. In FY 22-23, the average time taken for approval of resolution plan by the National Company Law Tribunal (“NCLT”) from the date of commencement of corporate insolvency resolution process (“CIRP”) for 180 cases was 831 days (including excluded time) and 682 days (excluding excluded time).⁸ As of March’23, approximately 67% of CIRPs have already been ongoing for more than 270 days, i.e., the statutory timeline for completion of the CIRP under IBC.⁹

- 1.5. Insolvency resolution under the IBC is not an adversarial process, yet implementation-wise, it has become litigious in India. This is primarily due to multiple contentious issues brought before the NCLT for resolution by parties such as the corporate debtor (“CD”), creditors, including financial creditors (“FC”) and operational creditors (“OC”) alike, members of the Committee of Creditors (“CoC”), and at times, the appointed Resolution Professional (“RP”) for the conduct of the CIRP. Third parties filing applications under Section 60(5) of the IBC also contribute to the proliferation of litigation during CIRP. Thus, this creates several systemic bottlenecks and leads to cascading delays in the resolution process and increasing pendency.
- 1.6. In terms of efficient systems and the delivery of robust outcomes in insolvency cases, other jurisdictions have benefited from the adoption of alternate dispute resolution (“ADR”) mechanisms under their respective insolvency laws.¹⁰ Noticeably, the introduction of a non-adversarial approach helps in maintaining cordiality in business relationships and saves the CD from the stigma of insolvency while resolving conflicting interests through amicable settlement.
- 1.7. In this background, formal discussions and deliberations on application of mediation in the IBC ecosystem in India were held with the stakeholders by the Insolvency and Bankruptcy Board of India (“IBBI”).¹¹ The stakeholders were of the view that mediation can play a vital role in addressing persisting challenges by offering a more efficient, flexible, cost-effective and collaborative approach. Given its advantages, matters which the parties can resolve amicably and perhaps ‘out of court’ through party driven solutions, must utilise mediation. In light of the international best practices and the potential benefits of mediation, the stakeholders noted that it is crucial to explore applicability of mediation under the IBC. At the time of discussion, the (then version) of

⁸ Page 19, IBBI Quarterly Newsletter January - March 2023, available at: <https://ibbi.gov.in/uploads/publication/51cd3268be50c04f9745bb3959b09a89.pdf> last accessed 10 November 2023 (“IBBI FY 22-23 Q4 Report”).

⁹ Page 17, IBBI FY 22-23 Q4 Report.

¹⁰ This Report in Chapter IV and Annexure III briefly discusses select jurisdictions where mediation forms part of respective insolvency regimes, as noted and discussed by the Committee.

¹¹ Para 8 (I), ‘Report of the Colloquium on Functioning and Strengthening of the IBC Ecosystem’, November 2022 available at <https://ibbi.gov.in/uploads/resources/f0cca521f619483efb1c372ccf000b8a.pdf> last accessed 10 December 2023 (“Colloquium Report”).

Mediation Bill 2021 was pending before the Rajya Sabha and the Mediation Act, 2023 (“**2023 Act**”) had not been enacted. It was noted then that IBC was not specifically excluded from the ambit of the then Mediation Bill, 2021 and therefore it was recommended that an enabling provision for mediation may be introduced in the Code, with the IBBI framing details of the mediation framework under the Code.¹²

B. Constitution of the Committee

- 1.8. This Expert Committee¹³ was constituted by IBBI under the Chairpersonship of Dr. T.K. Viswanathan (Former Secretary General, Lok Sabha Secretariat and Former Law Secretary), with Mr. Sudhaker Shukla (Whole Time Member, IBBI), Dr. Rajiv Mani (Additional Secretary, Ministry of Law and Justice), Mr. Bahram Vakil (Founder and Partner, AZB & Partners), Mr. Shardul S Shroff (Executive Chairman, Shardul Amarchand Mangaldas), Mr. Sumant Batra (Founder Partner, Kesar Dass B. & Associates), Mr. Satyajit Roul (Joint Director, Ministry of Corporate Affairs), as its members and Mr. Santosh K. Shukla (Executive Director, IBBI), as its member secretary to propose a detailed framework and scope for use of mediation under the Code and submit its recommendations.
- 1.9. The Committee’s mandate as per the terms of reference is to ‘...*recommend a mediation framework for use in various processes under the Code that inter alia addresses the following issues:*
- a. *Choice of mediation to be mandatory or voluntary.*
 - b. *Creating space for mediation within the timelines specified by the Code.*
 - c. *Circumstances and stages under which mediation can be referred.*
 - d. *Enforcement mechanism for mediation outcomes.*
 - e. *Meeting the cost of mediation.*
 - f. *Operational framework.*
 - g. *Infrastructure support.*
 - h. *Any other issue which the Expert Committee may like to highlight.’*

C. Committee’s Working Methodology and its Deliberations

- 1.10. The Committee adopted holistic methodology including internal meetings, engagement with experts and representative stakeholders from industry as well as academia, examined existing mediation landscape in India, global literature and best practices on insolvency

¹² Paras 8.8 to 8.10, Colloquium Report.

¹³ IBBI Order No. Board-22/2/2023-IBBI/8937 dated 6 March 2023 titled ‘*Constitution of expert committee to propose a detailed framework for use of mediation under the Insolvency and Bankruptcy Code, 2016*’.

mediation processes, to better understand the use, operability and challenges that have and may come up in insolvency mediation frameworks.

- 1.11. The Committee held eight meetings between 17 April 2023 and 9 October 2023. The initial deliberations of the Committee were informed by an internally circulated non-paper on context and background issues. During its meetings, the Committee discussed the scope and operability of mediation as a dispute resolution process under the Code and deliberated on the policy issues arising out of the concerns raised by the members with regard to the private settlement of disputes amongst select parties on public interest, third party rights, and the *in rem* nature of the proceedings under the IBC, particularly post-admission of CIRP.
- 1.12. The Committee's deliberations were further enriched from the insights of stakeholders, experts and the research team. The Committee interacted with Prof. Anthony Casey, Mr. Sanjeev Ahuja and Mr. Shreyas Jayasimha, who shared perspectives from industry and academia on both practical and theoretical aspects of inclusion of mediation under insolvency law. A meeting was also held with the American Bankruptcy Institute, where a discussion on the American experience with insolvency mediation was held with the sitting and the retired judges of the Bankruptcy Courts in the United States.
- 1.13. The Committee delved into statistical data and available jurisprudence to assess the extent and use of mediation, if any, for settlement of insolvency matters under the Code. The Committee also reviewed Indian law and studied international experience on use of mediation in insolvency resolution. This assessment has assisted the Committee in identifying the best use case(s) for mediation in insolvency matters, and recommend the most viable framework for formal introduction of mediation in Indian insolvency regime. The Committee spent considerable time on the most suitable method of adoption of mediation in insolvency disputes, i.e., whether it would be a 'one-size-fits-all' solution or a bespoke one for each process under the Code, or would it have tailored application to specific aspects of the Code.
- 1.14. Several iterations of the Report were reviewed and discussed by the Committee, before its finalization in the present form. Given that the 2023 Act was introduced in the Parliament in July 2023 and enacted in September 2023, when the Committee's recommendations were in advanced drafting stage, the Committee thought it fit to re-examine and revisit its recommendations *qua* the 2023 Act in its present Report. However, it has been the Committee's endeavour that its recommendations are in consonance with the 2023 Act. The recommendations do not attempt to override the Act or be in contradiction of the Act.

D. Structure of the Report

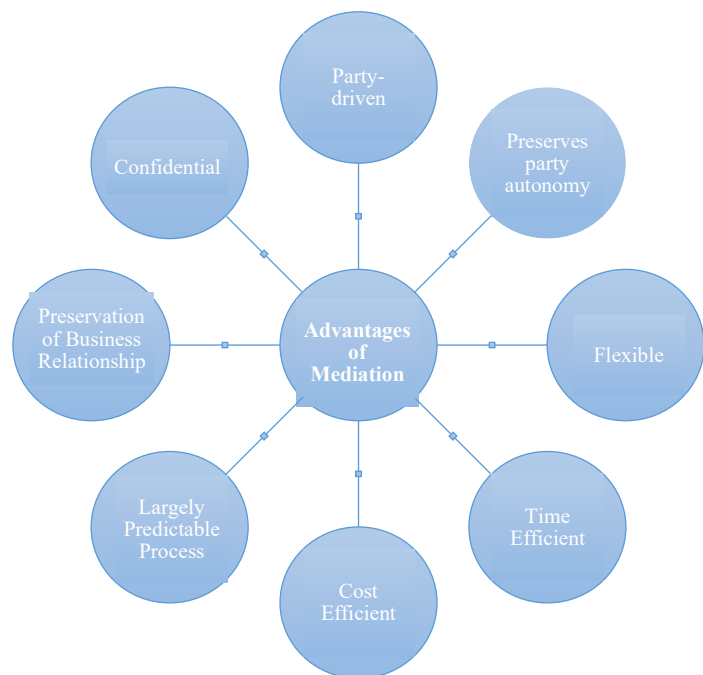
- 1.15. This Report is divided into five chapters, including this *Chapter I* that provides a broad context to the Committee's constitution and its workings. *Chapter II* provides a brief background on mediation as an ADR mechanism, its main features and the key advantages of adoption of mediation under the IBC.
- 1.16. *Chapter III* provides an overview of the legal landscape of mediation in India including the 2023 Act, key legislations and practices that were reviewed by the Committee. The discussion in this Part continues to include 'other key legislations' in India with mediation provisions, since they continue to be in effect as of the date of this Report. While the 2023 Act suitably amends mediation provisions under these legislations to align or exempt them from the applicability of the 2023 Act, the said provisions of the 2023 Act are yet to come into force.
- 1.17. *Chapter IV* summarily lays out international position in other jurisdictions where insolvency legislations and practices where mediation mechanisms form part of respective insolvency resolution processes, especially as they were studied/noted by the Committee. It will be relevant to note here that most jurisdictions have a negotiation-based regime for resolution of corporate stress. Court interventions are comparatively lesser than the extant Indian regime. The application of mediation in such jurisdictions is rather direct, with a pro-active debtor and usually in a 'debtor-in-possession' model.
- 1.18. Lastly, *Chapter V* summarises the scope of recommendations and the Committee's approach to its mandate. The recommendations on the insolvency mediation under the 2023 Act, broad policy issues and the suggested framework are then set out under this Part.

2. CHAPTER II: BRIEF INTRODUCTION TO MEDIATION

A. *Mediation as ADR Process*

2.1. Mediation is the use of a neutral third party to facilitate the negotiated settlement of a dispute and resolve conflicts between two or more parties.¹⁴ Typically, mediation is initiated by mutual consent of the parties, or by a pre-agreed contractual clause, or by reference of the court or tribunal, or by a mandatory requirement under the law. Mediation as an ADR process is well known for improving the efficiency of dispute resolution and offering flexibility to the parties. It offers an opportunity to parties to reach mutually agreeable commercial solutions to business disputes without intervention of courts.¹⁵

2.2. In a party-driven procedure like mediation, the mediator's job is to help the parties involved have discussions and complete transparency to reach a mutually agreeable resolution. In a successful mediation,¹⁶ the mediator's role is usually to help the parties detach from the issues, surmount obstacles, and promote smooth communication. The mediator may help the parties deliberate various creative settlements options and assist them in reaching a final



¹⁴ Legislative Note No.2 9 /LN/Ref./December/2022, 'The Mediation Bill, 2021', available at: https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/19122022_103126_102120526.pdf last accessed 10 November 2023.

¹⁵ 'United States: What Is Mediation And Why Mediate?', Mondaq, 15 July 2021 available at: <https://www.mondaq.com/unitedstates/insolvencybankruptcy/1091428/what-is-mediation-and-why-mediate> last accessed 11 November 2023: "... Mediation is not a "winner take all" process, as is most litigation. The parties to a mediation can craft a resolution that includes things that no court could consider or utilize (as those things are not within the boundaries of the litigation)".

¹⁶ Traditionally, a successful mediation would mean actual settlement of a dispute. However, it cannot be lost sight of the fact that even without a 'settlement agreement' there can be a successful process that rather relies on how the parties 'feel' about the case coming out of the process. The chances of parties settling the issues during early stages of litigation remain high.

settlement agreement.¹⁷ In other words, a mediator facilitates the parties to self-determine an agreed position by mutual discussion without suggesting what should be the solution. Thus, the role of a mediator as an impartial and neutral third person is facilitative rather than suggestive.

- 2.3. The mediation process is usually flexible, private and confidential. The nature of this process promotes preservation of relationships between the parties. In many instances, mediation is more cost and time efficient than other dispute resolution processes such as litigation and arbitration.¹⁸
- 2.4. Basis the type of conflict and degree of intervention/ participation by the mediator, there are various models of mediation that can be adopted, of which a few are (a) facilitative, (b) evaluative, (c) court-mandated, and (d) transformative. A mediator in these scenarios will be required to perform the following functions, as observed in the Consumer Handbook on Mediation:
- a. *“Create a conducive environment for the mediation process.*
 - b. *Explain the process and ground rules of mediation.*
 - c. *Facilitate communication between the parties using various communication techniques.*
 - d. *Identify the obstacles to communication between the parties and remove them.*
 - e. *Gather information about the dispute.*
 - f. *Identify the underlying interests.*
 - g. *Maintain control over the process and guiding focused discussion.*
 - h. *Manage interaction between parties.*
 - i. *Assists parties to reduce the agreement on disputes points into writing.”*¹⁹
- 2.5. In India, the most common methods considered by mediators appear to be an adaptive mix of both facilitative and evaluative models. *Facilitative* mediation is a more traditional form of mediation wherein the mediator's job is to assist the parties in their negotiations without expressing their views on the dispute at hand – merits or

¹⁷ Wilk M., ‘*Mediation of a Bankruptcy Case*’, American Bankruptcy Institute Journal, May 2013.

¹⁸ The judgments of Supreme Court of India, including those which hold importance in evolution of mediation in India are not elaborated here for brevity. The relevant elements are mentioned in context of the discussion in this Report, where required. Most relevant judgments reviewed would include (a) *Salem Advocate Bar Association, T.N. versus Union of India (Salem II)*, (2005) 6 SCC 344, and (b) *Afcons Infrastructure Limited and another versus Cherian Varkey Construction Company Private Limited and others (Afcons)*, (2010) 8 SCC 24 (“**Afcons Infrastructure case**”).

¹⁹ Prof. (Dr.) Ashok R. Patil, ‘Consumer Handbook on Mediation (FAQ)’, available at: https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook_Mediation.pdf last accessed 10 November 2023.

otherwise.²⁰ In addition to the above, in a *facilitative role*, mediator facilitates the process of mediation by assisting parties to consider consequence of non-settlement, i.e., litigation and evaluation of merits of the case. The mediator encourages the parties to consider options in case of non-settlement and motivates them to agree on mutually acceptable settlement. Conversely, *evaluative* mediation envisions a more prominent role for the mediator. With their sector-specific knowledge, mediators in this model assist the parties by assessing the merits and demerits of their case as per the given legal position.²¹ Usually, the mediator will also help and guide the parties to evaluate their case through reality – testing and will evaluate and predict the impact of not settling (for example, possible outcomes before court). That said, the decision to settle remains with the parties.

- 2.6. In some cases, parties are referred to mediation by a court in the interest of promoting a speedy and cost-efficient outcome, and these are known as court-mandated mediations²² (explained below). Despite the reference by a court of law, the decision to mediate and/or settle remains with the parties.
- 2.7. *Transformative* mediation, one of the models of mediation, places particular emphasis on two key interpersonal processes - empowerment and recognition. In addition to working to enable parties to recognise each other's position, the mediator seeks to empower parties to make their own decisions.²³

B. *Difference between mediation, conciliation and adjudication*

- 2.8. In this section, a comparative assessment of key facets of mediation, conciliation and adjudication have been highlighted below.²⁴ Many texts in ADR jurisprudence (in India and globally) consider it to be synonymous with mediation, which is understandably not the position under Indian law especially after *Afcons Infrastructure* case which clarified fundamental differences between the two under the CPC.²⁵ The Committee therefore noted below the existing position:

²⁰ Misha, Shreya Prakash, and Kritika Poddar, '*Applying Mediation in Corporate Insolvency Situations in India*', available at: <https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf> last accessed 10 May 202 (IBBI Publication, 2022).

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ These differences are indicative only and do not cover all specific legislations under which mediation, arbitration or adjudication are conducted: '*Mediation Training Manual of India*' by the Mediation and Conciliation Project Committee, Supreme Court of India.

²⁵ Please refer to the *Afcons* judgment (cited above at Note 18) which explains the terms in context of CPC and their import under Indian law.

Key Element	Mediation	Conciliation	Adjudication
Nature of the process	Non-adversarial	Non-adversarial	Adversarial
Role of the third party	Mainly facilitative	Active and suggestive, not just facilitative.	Active. Outcome is adjudicated <i>via</i> a binding judgment.
Role of the disputing parties	Actively and directly involved.	Actively and directly involved.	Not actively and directly involved. Requires legal representation in most cases.
Law governing procedure and decision	Depends on applicable process. Typically, the procedure and settlement are not controlled, governed or restricted by statutory authority. The 2023 Act provides for Mediation Council of India to amongst others, provide for the manner of conduct of mediation proceedings <i>vide</i> relevant rules. These are yet to be notified. Generally, the procedure is flexible, and parties are at	Section 61 of the Arbitration and Conciliation Act, 1996 (“1996 Act”) provides for the procedure. ²⁶ Procedure under other applicable laws may also apply.	Procedure and settlement are governed, restricted by specific provisions of applicable statutes.

²⁶ By the 2023 Act, the provisions on conciliation (i.e. Sections 61 to 81) under the 1996 Act are sought to be substituted a provision which states that reference to ‘conciliation’ under the 1996 Act shall be construed as a reference to ‘mediation’ as provided under the 2023 Act. However, these provisions are yet to be notified.

	liberty to decide outcome of the process.		
Consent of the parties	The 2023 Act provides for mediation to be a consensual and voluntary process, except where specifically excluded such as the Commercial Courts Act, 2015 that provides for mandatory pre-institutional mediation. As on date, most legislations provide for voluntary and consensual mediation.	The consent of the parties is mandatory for referring a case to conciliation under the 1996 Act.	The Agreement of parties, if any, is enforceable as it is and controlled by provisions of the relevant statutes. Consent of the parties is immaterial.
The decision / outcome of process	A mutually acceptable agreement between the parties is the only prerequisite for a binding settlement. The settlement is not appealable before any court / tribunal. Limited grounds exist for setting it aside.	Conciliation order/decreed is not appealable. The referral court applies discretion to assess scope of conciliation. Limited grounds exist for setting it aside.	Decision is binding on the parties and may be challenged by the way of appeal/ revision, if the applicable law permits.
Nature of Outcome	The principles of Order XXIII Rule 3, CPC for passing decree or order in terms of agreement	A decree of a court as per Section 74 of the 1996 Act would be drawn and binding.	Decision of the court is binding and enforceable.

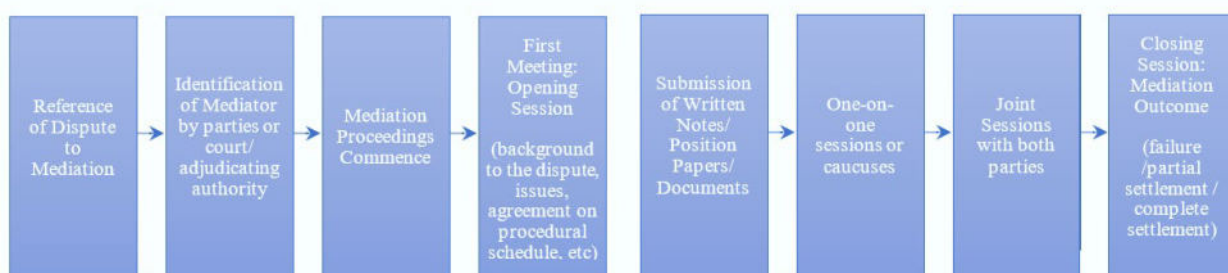
	apply. The 2023 Act provides for registration of mediated settlement agreements (“MSAs”), at the options of parties. These MSAs continue to be enforceable as contracts.		
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C. *Mediation Process*

2.9. The Committee during its deliberations noted that the 2023 Act, in its scope, covers mediation in disputes, “*commercial or otherwise*” and provides for exclusions/inclusions/modifications to the existing realm of mediation for uniformity of process. The 2023 Act provides for the process to be formulated and notified by the Central Government or by the Mediation Council of India. This is yet to fructify.

2.10. Meanwhile, the Committee noted that prior to the 2023 Act, the process of mediation was not governed by a single legislation in India and varied across *fora* and statutes. In general, the Committee notes that the mediation process involves several stages that may be modified to achieve the desired outcome.

2.11. A typical mediation in India would involve the following steps:



2.12. A brief description of the steps represented above is as under:²⁷

- a. Introductory and opening session: The mediator and the parties introduce themselves during this session. The mediator outlines the procedure they plan to execute to carry

²⁷ Supra at 20 (Misha *et al.*).

- out the mediation. Getting the parties' trust and fostering an atmosphere that supports fruitful negotiations are the main goals of this session.
- b. One-on-one sessions or caucuses: Each party has a separate private session with the mediator. This encourages parties to divulge confidential information to the mediator, enabling them to fairly and openly evaluate the underlying interests of each party. These sessions can be conducted once or multiple times, and either before or after the joint sessions. These sessions may be used to bring parties closer on trickier issues, where consensus may not have been achieved in joint sessions.
 - c. Joint sessions: Following one-on-one sessions, the mediator often conducts joint sessions where the parties can discuss and present their cases to each other. This creates room for moderated discussion and provides the opportunity for a mediator to diffuse any potential roadblock.
 - d. Closing session:
 - i. If the parties reach a settlement agreement, the mediator ensures that the agreement is reduced in writing and signed by each party in their presence. At times if the law or reference document requires, the mediator is also expected to submit a report closing the mediation and recording its observations on the process and procedure followed.
 - ii. Depending on the reference statement, the matter may either be referred to court or arbitration if the parties are unable to resolve their dispute. The parties do not reveal or use any statements made during the mediation in a court of law. They remain confidential.

D. Potential Advantages of Mediation under the Code²⁸

- 2.13. Time and Cost Efficiency: Mediation offers a quicker and more cost-effective alternative to traditional litigation. While the IBC sets a time limit of 180 days (extendable up to 270 days and with an outer limit of 330 days) for completing the CIRP, the actual resolution process often takes longer due to various factors such as delays in court proceedings, appeals, and settlement negotiations.²⁹ Mediation can help parties resolve disputes more efficiently by engaging in facilitated discussions (with a timeline), thereby reducing the time and costs associated with lengthy court battles and the insolvency resolution process.
- 2.14. Flexibility and Party Autonomy: Unlike litigation, mediation allows parties to tailor the dispute resolution process to suit their needs and preferences, subject to the contours of law. Parties can choose the mediator, the applicable rules, and the process for conducting

²⁸ Please note that these are general advantages.

²⁹ IBBI FY 22-23 Q4 Report.

the mediation, ensuring a more customized and effective resolution mechanism. This flexibility and party autonomy are particularly valuable in insolvency and bankruptcy matters, where parties often have unique interests and concerns that require tailored solutions.

- 2.15. Preservation of Business Relationships: Mediation is a collaborative dispute resolution process that encourages open communication and mutual problem-solving, thereby fostering a more amicable resolution of disputes. This is particularly important in insolvency and bankruptcy matters, where preserving business relationships can be critical to the successful restructuring or resolution of the debtor company.
- 2.16. Confidentiality: Mediation proceedings are typically confidential, ensuring that sensitive financial and business information is not disclosed to the public or competitors. This is especially important in insolvency matters, where the public disclosure of details of a company's financial difficulties may adversely impact its reputation and business operations. Confidentiality in mediation can help preserve the CD's value and protect the interests of the stakeholders involved.

3. CHAPTER III: EXISTING MEDIATION LANDSCAPE IN INDIA

- 3.1. Currently, there are no specific provisions for mediation of insolvency and bankruptcy disputes under the IBC. The recently enacted umbrella legislation on mediation, the 2023 Act aims to, amongst others, “...*promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise* ...”.³⁰ The 2023 Act recognises and provides a framework for mediations conducted in disputes “commercial or otherwise”. While the mediation of such disputes is voluntary and consensual under the 2023 Act, it promotes and provides infrastructural support as well as validity to mediated settlement agreements.
- 3.2. Mediation as a process succeeds on the bed-rock of parties’ willingness to resolve dispute amicably and repose trust in the process. The ‘success rates’ of mediations in commercial or other civil matters are often generic references as availability of robust data is a challenge. To this end, the Committee noted that mediation as ADR process does not appear to be sufficiently known to disputing parties beyond matrimonial, family or labour disputes. In absence of robust system of trained and efficient specialized mediators, not only the parties but also the judges and/or courts might have been reluctant to refer parties to mediation especially in commercial cases. That said, even with the enactment of 2023 Act, a cultural change is still necessary to bring forth mediation as a trusted dispute resolution process.
- 3.3. In its deliberations, the Committee specifically examined (a) scope and extent of the changes introduced by the 2023 Act and, (b) the existing legal landscape in India to understand the manner, scope and extent of use of mediation as dispute resolution process by disputing parties, specifically under other statutory frameworks. This exercise was conducted with an intent to understand implementational frameworks, challenges, and to gauge how the perception (and success) of mediation under these statutory frameworks has matured over time. These learnings / observations guided the Committee’s deliberations on key structural issues on introduction and implementation of mediation under the IBC. The Committee noted that after looking into the gaps within the existing legal framework, the 2023 Act has been enacted to regulate various facets of mediation within the Indian legal system.

³⁰ 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.

A. Background of Mediation in India

- 3.4. The concept of mediation is not new for the Indian justice system. It has been practised in the Panchayat system for centuries, where respected elders of the village facilitated mediation between the parties. Such traditional mediation is practiced in Indian villages even today. The members of the business associations used to request impartial and well-respected businessmen known as *Mahajans* to assist in settling disputes using an informal process, which combined mediation and arbitration.³¹ Later, the British introduced ADR systems in India to settle disputes between intra-governmental entities, between government agencies and undertakings, in labour disputes, and in public utility service disputes.
- 3.5. The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are “*charged with the duty of mediating in and promoting the settlement of Industrial disputes.*” While the term ‘mediation’ was expressly included, detailed procedures were prescribed for conciliation proceedings under the said legislation.
- 3.6. In 1987, Indian legislature made headway by formally recognising ADR mechanisms under the Legal Services Authorities Act, 1987 and constituting the National Legal Services Authority as a central authority with the Chief Justice of India as its Patron-in-Chief. No express provision for mediation was provided amongst ADR processes.
- 3.7. In 1996, the Indian parliament enacted the Arbitration and Conciliation Act, 1996, containing elaborate provisions for the arbitration and conciliation of disputes arising out of legal relationships, whether or not they were contractual, as well as for all related proceedings. However, mediation of disputes was not included in this legislation. The 1996 Act outlined the procedures for initiating conciliation proceedings, appointing conciliators, receiving the assistance of a suitable institution to recommend names or even appoint conciliators, submitting statements to the conciliator, and the conciliator's role in assisting the parties in negotiating a settlement of disputes between the parties.
- 3.8. In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Section 89 in the CPC providing for reference of cases pending in the courts to ADR which for the first time included mediation.³² Since then, court-annexed mediation and conciliation centres have also been established at several courts in India. The mediations administered by such centres have seen higher rates of acceptance amongst disputing parties, as against externally conducted court-referred mediations, where the court merely refers the matter

³¹ Supra at 19 (Consumer Handbook).

³² This amendment was brought into force with effect from 1 July 2002.

to an external mediator. A brief summary of the process and salient features of such mediation undertaken at such centres is as under:

- a. *“In court-annexed mediation, the mediation services are provided by the judicial machinery as a part and parcel of the same judicial proceeding.*
- b. *The judges, lawyers and litigants become participants giving them a ‘feeling’ that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes.*
- c. *This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service.*
- d. *In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in such cases which are referred through courts, the effort of dispensing justice is said to have become well-coordinated.”*³³

3.9. The Committee notes from the available data that even though the above mechanism exists, the number of references have not been very encouraging, perhaps given the lack of ‘mediation culture’ and availability of trained mediators, amongst others. For instance, only 4.29% of all freshly instituted cases, 31,441 in number before Bangalore High Court were referred to Bangalore Mediation Centre between 2011-2015.³⁴ Similarly, the Delhi High Court Mediation and Conciliation Centre was referred 13,646 cases constituting 2.66% of all cases in Delhi High Court during the same time period.³⁵ As for Allahabad High Court Mediation and Conciliation Centre, 11,618 cases (0.85% of all freshly instituted cases before the High Court) were referred to mediation during 2011-15.³⁶

3.10. It is imperative to note that while the 2023 Act is watershed in terms of the legislative intent of formalizing mediation framework in India, over the past decade, mediation has been actively included in a range of other legislations, whether consensual or mandatory,

³³ Jharkhand State Legal Services Authority, ‘Mediation Manual’, available at: https://jhalsa.org/pdfs/Reading_Materials/mediation_manual.pdf last accessed 10 November 2023.

³⁴ Prasanna, Alok and others, ‘Strengthening Mediation in India – A Report on Court-Connected Mediations’, Vidhi Centre for Legal Policy, July 2017, available at: <https://vidhilegalpolicy.in/research/2017-7-17-strengthening-meditation-in-india-a-report-on-court-connected-meditations/> last accessed 10 November 2023.

³⁵ Ibid.

³⁶ Ibid.

including the CPC,³⁷ Consumer Protection Act, 2019,³⁸ the Commercial Courts Act, 2015 (as amended),³⁹ and the Companies Act, 2013.⁴⁰ As a growing practice, newer legislations and court procedures have evolved to specifically provide for mediation as an option for dispute resolution. These legislations are discussed in some detail below.

B. Umbrella Legislation on Mediation under Indian Law

- 3.11. The Mediation Act, 2023⁴¹ received the assent of the President of India on September 14, 2023, and was published for general information on September 15, 2023. The primary objective of the Act is to promote and facilitate mediation, especially institutional mediation, to resolve disputes, commercial and otherwise. The Act aims to encourage mediation on a voluntary and consensual basis before litigation, and at the same time, it safeguards the rights of litigants to approach competent adjudicatory forums/courts for urgent interim relief. The mediation process is envisioned to shield the confidentiality of the mediation undertaken and provide immunity against its disclosure in certain cases.
- 3.12. The Act comprehensively covers several aspects, including the contours of institutional mediation, the creation of a regulatory body, specifying the criteria for the recognition of entities conducting mediation, the role, qualifications, and training of mediators, online mediation, community mediation, the settlement of cross-border disputes, voluntary pre-litigation mediation, and the enforcement of mediated settlement agreements.
- 3.13. The salient features of the 2023 Act, are as under:
 - a. *Applicability of the 2023 Act under Section 2* – Essentially, the 2023 Act is applicable where mediation is conducted in India. It also encompasses international mediation, i.e. cases in which one party is of a nationality other than Indian nationality. In addition, it applies to a dispute in which the Central Government, a State Government, or their agency, entity, etc. is a party. Notably, disputes other than commercial disputes, as notified by the Central Government or State Government, wherein such Government(s) is a party, fall within the ambit of the Act and hence can be mediated.
 - b. *International Mediation under Section 3(g)* – It refers to mediation pertaining to a commercial dispute, wherein at least one party: i) in the case of an individual, they are a national of any country other than India; ii) in the case of a body corporate or an

³⁷ Section 89, Code of Civil Procedure, 1908.

³⁸ Sections 37, 74-81, Consumer Protection Act, 2019.

³⁹ Section 12A, Commercial Courts Act, 2015.

⁴⁰ Section 442, Companies Act, 2013.

⁴¹ The Mediation Act, 2023, available at: <https://egazette.gov.in/WriteReadData/2023/248775.pdf> last accessed 16 September 2023.

- association of individuals, it has a place of business outside India; and iii) is the government of a foreign country.
- c. *Definition of Mediation under Section 3(h)* – Mediation is defined as the process, “*whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation, or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as a mediator, who does not have the authority to impose a settlement upon the parties to the dispute.*” Here, it is imperative to note that the terms ‘conciliation’ and ‘mediation’ can now be used interchangeably.
 - d. *Definition of Mediator under Section 3(i)* – A mediator is a person “*appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council.*”
 - e. *Mediation Agreement under Section 4* – A mediation agreement could be in the form of a clause in a contract, or it might be a separate agreement. It will always be in writing, regardless of what shape it takes.
 - f. *Pre-litigation Mediation under Section 5* – The Act provides that whether any mediation agreement exists or not, any party, before filing any suit or proceeding of a civil or commercial nature in any court, may voluntarily and with mutual consent take steps to resolve the disputes through pre-litigation mediation. The provision carries a proviso that matters of commercial disputes of Specified Value will be undertaken in accordance with the provisions of Section 12A of the Commercial Courts Act, 2015, and the rules made thereunder. Moreover, the Act specifies that pre-litigation mediation will apply to the tribunals notified by the Central Government or a State Government. Importantly, mediation can be conducted by a mediator: (i) selected by the parties; (ii) empanelled by court-annexed mediation centres; (iii) empanelled by an authority constituted under the Legal Services Authority Act, 1987; or (iv) empanelled by a Mediation Service Provider. While mediation carried out in accordance with (i) above is ad-hoc mediation, the others are examples of institutional mediation.
 - g. *Disputes or Matters not fit for Mediation under Section 6* – The Act provides an indicative list (under the First Schedule to the Act) of disputes or matters that cannot be referred to mediation except for some compoundable offences, including matrimonial offences, if deemed appropriate. Settlements arrived at in these cases will not have the effect of a judgement or decree of the Court. It further provides that where third party rights (of parties not involved in mediation) or suits where rights *in rem* are impacted will not be fit matters to mediate. Interestingly, this First Schedule to the 2023 Act, excludes applicability to certain specialized statutes. For example matters before regulatory authorities (including specialized tribunals) under the Competition Act, 2002, National Green Tribunal Act, 2010, Electricity Act, 2003,

- Telecom Regulatory Authority of India Act, 1997, Securities and Exchange Board of India Act, 1992, Petroleum and Natural Gas Regulatory Board Act, 2006. Most importantly, under entry 13, it provides that the Central Government may, by notification, amend this list to include “*Any other subject matter of dispute ...*”.
- h. *Power of Court or Tribunal to refer Parties to Mediation under Section 7* – The court or tribunal may, at any stage of proceeding, refer the parties to mediation irrespective of whether they failed to resolve the dispute. Additionally, when referred to mediation by the court or tribunal, it may pass a suitable interim order to protect the interests of any party.
 - i. *Territorial Jurisdiction to Undertake Mediation under Section 13* – Mediation under the Act will take place within the territorial jurisdiction of the court or tribunal of competent jurisdiction unless parties mutually consent to conduct mediation at any place outside the said territorial jurisdiction or by way of online mediation.
 - j. *Conduct of Mediation under Section 15* – The Act provides that the mediator will assist the parties in an independent, neutral, and impartial manner in their attempt to reach an amicable settlement of their dispute. Equally, a mediator will always uphold the principles of objectivity and fairness while facilitating mediation. It further provides that the mediator shall not be bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872.
 - k. *Time Limit for Completion of Mediation under Section 18* – The Act provides that mediation must be completed within a period of one hundred and twenty days from the date fixed for the first appearance before the mediator, and the period can be extended by a further period of sixty days with the mutual consent of the parties.
 - l. *Mediated Settlement Agreement under Section 19* – According to this provision, a mediated settlement agreement includes an agreement in writing between the parties and authenticated by the mediator. It is relevant to note that the said agreement may extend beyond the disputes referred to mediation
 - m. *Confidentiality under Section 22* – The mediator, mediation service provider, the parties, and participants in the mediation must keep confidential all matters connected with the mediation proceedings. That said, the provision does not prevent a mediator from compiling or disclosing general information pertaining to matters that have been the subject of mediation for research, reporting, or training purposes. The information disclosed must not explicitly or implicitly identify a party or participants or the specific disputes in the mediation.
 - n. *Enforcement of Mediated Settlement Agreement under Section 27* – The Act stipulates that a mediated settlement agreement resulting from mediation is final and binding and is enforceable in accordance with the provisions of the Code of Civil Procedure, 1908, much like if it were a judgment or decree passed by a court.
 - o. *Challenge to Mediated Settlement Agreement under Section 28* – The Act provides that mediated settlement agreement can be challenged on the grounds of fraud, corruption, impersonation or where mediation is conducted in a dispute or matter not fit for mediation. Such a challenge can be made within ninety days from the date the

- party filing the application challenging the agreement receives a copy of the mediated settlement agreement.
- p. *Online Mediation under Section 30* – The Act provides that online mediation, including pre-litigation mediation, may be conducted at any stage of mediation with the written consent of the parties. The elements of integrity of proceedings and confidentiality must be maintained during the conduct of online mediation at all times.
 - q. *Mediation Council of India (“MCI”) under Sections 31 & 38* – The Act provides for the establishment of the MCI, headquartered in Delhi or any other place as may be notified by the Central Government. The objects of MCI would be, *inter alia*, to promote mediation and to develop India as a robust centre for domestic and international mediation, make regulations for registration of mediators, grade mediation service providers, specify criteria for recognition of mediation institutes and mediation service providers, hold training workshops and courses in the area of mediation, etc.
 - r. *Mediation Service Provider under Sections 40 and 41* – The Act provides that a mediation service provider (“MSP”) may be a body or an organisation facilitating the conduct of mediation, an authority constituted under the Legal Services Authorities Act, 1987, or a court-annexed mediation centre. An MSP is required to perform numerous functions, such as accrediting mediators, maintaining a panel of mediators, offering the services of mediators, providing the necessary secretarial assistance and infrastructure for the efficient conduct of mediation, facilitating the registration of mediated settlement agreements, etc.
 - s. *Community Mediation under Section 43* – The Act provides for community mediation, with the prior mutual consent of parties, for the resolution of disputes that are likely to affect peace, harmony, and tranquillity amongst the residents or families of any area or locality. The provision empowers the concerned authority constituted under the Legal Services Authorities Act, 1987, or the District Magistrate or the Sub-Divisional Magistrate, to constitute a panel of three mediators for conducting the community mediation.
 - t. *Power of Government to Frame Schemes or Guidelines under Section 48* – The Act confers on the Central Government or State Government the power to frame any scheme or guidelines for resolution of any dispute through mediation or conciliation in cases where the Central Government or State Government or any of its entities or agencies is one of the parties.
 - u. *Provisions of the Act to have Overriding Effect on Mediation or Conciliation Contained in Other Laws under Section 55* – The Act expressly provides that the provisions of the Act have an overriding effect for the conduct of mediation or conciliation contained in other laws except those mentioned in the Second Schedule. The enactments placed in the Second Schedule have a tested conciliation and

- mediation mechanism, e.g., the Industrial Disputes Act, 1947, and the Family Courts Act, 1984, and therefore have been excluded. The Central Government is empowered to amend the Schedule by way of notification.
- v. *Consequential Amendments under Sections 58-65* – The 2023 Act makes consequential amendments to the Indian Contract Act 1872, the Arbitration and Conciliation Act, 1996, the Code of Civil Procedure, 1908, the Commercial Courts Act, 2015, the Legal Services Authorities Act, 1987, the Consumer Protection Act, 2019, the Companies Act, 2013 and the Micro, Small and Medium Enterprises Development Act, 2006.
- 3.14. On October 9, 2023, the Ministry of Law and Justice notified certain provisions of the Act by way of gazette notification, namely Sections 1, 3, 26, 31 to 38, 45 to 47, 50 to 54, and 56 to 57.⁴²

C. Mediation under Other Legislations

- 3.15. The statutes containing mediation provisions, such as the CPC, the 1996 Act, the Companies Act, 2013, the Commercial Courts Act, 2015, and the Consumer Protection Act, 2019, as they currently are, have been examined by the Committee and are briefly laid out for the benefit of reference. The Committee notes that the 2023 Act in Fourth to Tenth Schedules has suitably amended the provisions of these statutes to intertwine and align them with the 2023 Act, such that there is no conflict between them. In fact, the process and infrastructure under 2023 Act is to be utilized for mediation under provisions of these legislations, including the rules regarding mediators.

Civil Procedure Code, 1908

- 3.16. In the year 1999, Section 89 was inserted in the CPC.⁴³ According to CPC Section 89(1), if the court determines that there are elements of a settlement that might be acceptable to

⁴² Notification S.O. 4384(E)., available at: <https://egazette.gov.in/WriteReadData/2023/249277.pdf> last accessed 10 October 2023.

⁴³ 89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:--

(a) arbitration;
 (b) conciliation;
 (c) judicial settlement including settlement through Lok Adalat: or
 (d) mediation.

(2) Where a dispute has been referred--

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

the parties in a particular case, it must formulate the terms and conditions of settlement and provide them to the parties for their observations. Following receipt of their observations, the court may reformulate the terms and conditions of a potential settlement and refer the same for consideration for either:

- a. arbitration;
- b. conciliation;
- c. judicial settlement including settlement through Lok Adalat; or
- d. mediation.⁴⁴

3.17. Both conciliation and mediation are specifically included in Section 89 of the CPC. Section 89(2)(a) states that the Arbitration and Conciliation Act, 1996 will apply in cases where a dispute is referred for either arbitration or conciliation. According to Section 89(2)(d), where a dispute is referred for mediation, the court will bring into effect a compromise between the parties and follow such procedure as may be prescribed. These procedures are usually prescribed by respective High Courts and District Courts in form of rules with the National Legal Services Authorities or their state counterparts acting as nodal agencies. There is also a growing trend of such mediations being undertaken and conducted by the court annexed mediation centres (briefly discussed above).

3.18. The 2023 Act substitutes the newer provision where conciliation has been subsumed into mediation. Further, compromise is a separate provision, unrelated to mediation. The amended Section 89(2)(b) provides that a civil court shall “... *refer the parties to mediation, to the court-annexed mediation centre or any other mediation service provider or any mediator, as per the option of the parties, and thereafter the provisions of the Mediation Act, 2023 shall apply as if the proceedings for mediation were referred for settlement under the provisions of that Act ...*”.

Arbitration and Conciliation Act, 1996

3.19. Apart from instances where the arbitrator or arbitral tribunals use mediation to encourage settlement during the arbitral proceedings, the 1996 Act does not apply to mediation.

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

⁴⁴ Arjun Natarajan, ‘Part 2: Mediation and Conciliation Can Be Used Interchangeably In India – Moorings, If Any, Of This Narrative’, available at: <https://speakingofmediation.wordpress.com/2017/05/11/part-2-mediation-and-conciliation-can-be-used-interchangeably-in-india-moorings-if-any-of-this-narrative-by-arjun-natarajan/> last accessed 10 November 2023.

Notably, Section 30 of the 1996 Act distinctly refers to mediation and conciliation but does not specifically provide for mediation. Similar observation is made for Section 43D. Evidently, the 1996 Act recognises the difference between these mechanisms and does not intend to use the words ‘mediation’ and ‘conciliation’ interchangeably. The 1996 Act has an entire part dedicated to conciliation i.e., Part III, which is on the lines of UNCITRAL Conciliation Rules of 1980 which does not equate it to mediation.

- 3.20. In the 2023 Act, *vide* the Sixth Schedule, references to mediation/ conciliation have been omitted from Section 43D. Further, process provisions from Part III of the 1996 Act which referred to conciliation have been deleted. Instead, the following provision has been introduced bringing all commercial mediations within the ambit of 2023 Act:

“... 61. Reference of conciliation in enactments.—

(1) Any provision, in any other enactment for the time being in force, providing for resolution of disputes through conciliation in accordance with the provisions of this Act, shall be construed as reference to mediation as provided under the Mediation Act, 2023.

(2) Conciliation as provided under this Act and the Code of Civil Procedure, 1908 (5 of 1908), shall be construed as mediation referred to in clause (h) of section 3 of the Mediation Act, 2023. ...”

Commercial Courts Act, 2015

- 3.21. The Commercial Courts Act, 2015 *vide* an amendment (retrospectively applied from 2018) provides for mandatory pre-institutional mediation in certain classes of commercial suits, where no urgent relief is sought. The provision is extracted below for convenient reference:

12A. Pre-Institution Mediation and Settlement.-- (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

3.22. The Supreme Court has ruled that this provision is not merely procedural and must be complied with before any recourse can be sought under the said Act. A commercial suit must be dismissed under Order VII Rule 11 of the CPC if pre-institutional mediation is not invoked.⁴⁵ Thus, mandating exhaustion of remedy under Section 12A – in letter and in spirit by the parties. For implementation of the above mechanism, Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 support the process and provide for detailed procedure of reference and conduct of such mediations.

3.23. It is worth noting that the authorities administering the mediations herein are usually the High Court or the District Court mediation centres under whose jurisdiction the commercial case is instituted.

3.24. By the Ninth Schedule, the 2023 Act substitutes Section 12A of the Commercial Courts Act, 2015 and aligns it with the Mediation Act, 2023. It is pertinent to mention that pre-institutional mandatory mediation under Section 12A of the Commercial Courts Act, 2015 remains an exception to the general rule under Section of the 2023 Act. The substituting provision is as under:

“... 12A. Pre-litigation Mediation and Settlement.—

(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-litigation mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) For the purposes of pre-litigation mediation, the Central Government may, by notification, authorise— (i) the Authority, constituted under the Legal Services Authorities Act, 1987 (39 of 1987); or (ii) a mediation service provider as defined under clause (m) of section 3 of the Mediation Act, 2023.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority or mediation service provider authorised by the Central

⁴⁵ *M/s Patil Automation Private Limited and Ors. v. Rakheja Engineers Private Ltd.*, 2022 SCC OnLine SC 1028.

Government under sub-section (2) shall complete the process of mediation within a period of one hundred and twenty days from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of sixty days with the consent of the parties: Provided further that, the period during which the parties spent for pre-litigation mediation shall not be computed for the purposes of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties and the mediator.

(5) The mediated settlement agreement arrived at under this section shall be dealt with in accordance with the provisions of sections 27 and 28 of the Mediation Act, 2023. ...”.

Consumer Protection Act, 2019

- 3.25. The Consumer Protection Act, 2019 was published in the official gazette on 9 August 2019 and came into force on 20 July 2020, replacing the previous Consumer Protection Act, 1986. The Consumer Protection Act, 2019 introduced the provision where the relevant commission can refer a consumer dispute for mediation, when there is a scope of settlement between the parties.⁴⁶ However, parties to the mediation are given a time frame of 5 days to accept or reject the process of mediation, as consent is vital for it.⁴⁷ Once a dispute is referred to mediation, the fee paid to the Commission for dispute redressal is refunded to the parties.⁴⁸
- 3.26. Briefly stated, the process of mediation under this legislation is as under:⁴⁹
- a. *“Held at a ‘Consumer Mediation Cell’ which would have a panel of mediators to settle disputes. This cell maintains a list of cases and records⁵⁰ of the proceedings.⁵¹*
 - b. *Every mediator is expected to act fairly and judiciously while deciding the matter.⁵² A fee is also paid to the mediator before the proceedings begin.⁵³*
 - c. *Mediation is conducted in the presence of both parties⁵⁴ and will remain confidential.⁵⁵*

⁴⁶ Section 37(1), Consumer Protection Act, 2019.

⁴⁷ Section 37(2), Consumer Protection Act, 2019.

⁴⁸ Rule 5, Consumer Protection (Mediation) Rules, 2020.

⁴⁹ Nyaaya India, ‘Mediation as a mode of Consumer Dispute Settlement’, available at: <https://nyaaya.org/legal-explainer/mediation-as-a-mode-of-consumer-dispute-settlement/> last accessed 10 November 2023.

⁵⁰ Regulation 11(7), Consumer Protection (Mediation) Regulations, 2020.

⁵¹ Section 74, Consumer Protection Act, 2019.

⁵² Section 77, Consumer Protection Act, 2019.

⁵³ Rule 8(6), Consumer Protection (Mediation) Rules, 2020.

⁵⁴ Regulation 11(1), Consumer Protection (Mediation) Regulations, 2020.

- d. *The parties must provide all the relevant information and documents to the mediator.*⁵⁶
- e. *If the parties come to an agreement after the mediation proceedings within 3 months*⁵⁷, *a ‘settlement report’ would be forwarded to the Commission along with the signatures of the parties.*⁵⁸ *The concerned Commission is required to pass an order within the 7 days of receiving the ‘settlement report’ of the parties.*⁵⁹
- f. *In case no agreement has been reached through mediation, the same is communicated to the relevant Commission through a report of proceedings. The Commission would then hear the issues of the concerned consumer dispute and decide the matter.*⁶⁰
- g. *A dispute cannot be taken to other proceedings, like arbitration or court litigation, once it has undergone the mediation procedure.*⁶¹

In addition to the above, there are particular exclusion with respect to disputes that cannot be referred to mediation.

- 3.27. By way of Tenth Schedule under the 2023 Act, the above process under the Consumer Protection Act, 2019 has been substantially replaced and the mediation process under this legislation (unless specifically stated) has been subsumed within 2023 Act. Chapter V, which primarily provided for mediation has been omitted. With respect to reference to mediation, the substituted provision states that “...(t)he District Commission or State Commission or the National Commission, as the case may be, shall either on an application by the parties at any stage of proceedings refer the disputes for settlement by mediation under the Mediation Act, 2023. ...” Further, the substituted provision introduces Section 37A which now deals with ‘settlement through mediation’ and ‘recording settlement and passing of order.’

Companies Act, 2013

- 3.28. Section 442 of the Companies Act, 2013 provides for reference of disputes under the said Act to mediator panels and empowers the Central Government to notify rules for its implementation. The provision is extracted here for convenient reference:

“ ...Section 442: Mediation and Conciliation Panel.

(1) *The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such*

⁵⁵ Regulation 12, Consumer Protection (Mediation) Regulations, 2020.

⁵⁶ Regulation 11(6), Consumer Protection (Mediation) Regulations, 2020.

⁵⁷ Regulation 11(2), Consumer Protection (Mediation) Regulations, 2020.

⁵⁸ Sections 80 (1) and 80 (2), Consumer Protection Act, 2019.

⁵⁹ Section 81(1), Consumer Protection Act, 2019.

⁶⁰ Sections 80(3) and 81(3), Consumer Protection Act, 2019.

⁶¹ Rule 6, Consumer Protection (Mediation) Rules, 2020.

qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(5) The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(6) Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be. ...”.

- 3.29. To implement the provision, the Ministry of Corporate Affairs has notified Companies (Mediation and Conciliation) Rules, 2016 that govern the empanelment of personnel as mediators or conciliators.⁶² Under the said Rules, the mediator/conciliator is mandated to attempt to facilitate the voluntary resolution of the dispute(s) by the parties and communicate the views of each party to the other. It also emphasises that mediators will not impose any terms of settlement on the parties but rather allow them to make decisions.
- 3.30. In accordance with the aforementioned Rules, the Regional Director shall prepare a panel of experts willing and qualified to be appointed as mediators or conciliators. For this purpose, he or she will solicit applications from persons wishing to be empanelled as mediators or conciliators every year during February and update the panel, which shall be

⁶² The Rules and the notifications for empanelment along with the requirements are available at: <https://www.mca.gov.in/content/mca/global/en/mediation-conciliation.html>.

effective from April 1 of every year. Rule 4 provides for qualifications for empanelment, where the following categories are mentioned:

- a. a retired judge of the Supreme Court of India or of a High Court or a District and Sessions Court; or
- b. a retired member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or
- c. has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years-experience; or
- d. is a qualified legal practitioner for not less than ten years; or
- e. is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary; or
- f. has been a Member or President of any State Consumer Forum; or
- g. is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation

- 3.31. A perusal of the notified panel mediators/ conciliators would indicate that the pool of individuals is diverse and largely consists of practicing advocates in the regions notified by respective Regional Directors for different regions.⁶³
- 3.32. In 2022, while interpreting the jurisdiction of NCLT under the Code (under Section 60 as ‘Adjudicating Authority’) to refer matters to mediation, the NCLAT ruled that the power to NCLT under Section 442 is limited to the Companies Act, 2013 and does not extend to provisions under the Code.⁶⁴ There is no specific provision, power or jurisdiction conferred on NCLT as the ‘Adjudicating Authority’ under the Code to refer matters to mediation therein.
- 3.33. Under the Eighth Schedule of 2023 Act, Section 442 stands substituted by the following and thus, is now governed by the 2023 Act and the process therein. The process above, including in the rules explained, would stand replaced:

“442. Reference to mediation.—

(1) Any of the parties to a proceedings before the Central Government, Tribunal or the Appellate Tribunal may, at any time apply to the Central Government, Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees, if any, as may be prescribed, for referring the matter pertaining to such proceedings for mediation and the Central Government, Tribunal or the Appellate Tribunal, as the

⁶³ Ibid.

⁶⁴ *White Stock Limited v. Prajay Holdings Private Limited*, Company Appeal (AT)(CH) (Ins) No. 271 of 2022 (NCLAT).

case may be, shall refer the matter to mediation to be conducted under the provisions of the Mediation Act, 2023.

(2) Nothing in this section shall prevent the Central Government, Tribunal or the Appellate Tribunal before which any proceeding is pending from referring any matter pertaining to such proceeding suo motu to mediation to be conducted under the provisions of the Mediation Act, 2023 as the Central Government, Tribunal or the Appellate Tribunal, deems fit.

(3) The mediator or mediation service provider shall file the mediated settlement agreement arrived at between the parties with the Central Government or the Tribunal or the Appellate Tribunal under the Act.

(4) The Central Government or the Tribunal or the Appellate Tribunal shall pass an order or judgment making the said mediated settlement agreement as part thereof.

(5) The fee of the mediator shall be such as may be prescribed. ...”.

Telecom Regulatory Authority of India Act, 1997

- 3.34. Mediation center annexed to the Telecom Disputes Settlement and Appellate Tribunal (“TDSAT”) has been set up under this legislation and TDSAT has laid down procedures for the functioning of this centre in exercise of the powers under Section 16(1).⁶⁵ Notified on 12 December 2005 (and as amended), the procedures will apply to all mediations connected with any petition or proceeding before the TDSAT including pre-litigation matters.
- 3.35. The TDSAT may refer the case for mediation with the consensus of parties, where it appears that elements of a settlement through mediation that may be acceptable to parties exist. This reference may be made after recording admissions and denials of the parties to a Petition or any proceeding, at the first hearing or at any subsequent hearing.⁶⁶ While referring the matter to the mediation centre, the TDSAT may “...give such guidance as it deems fit to the parties, by drawing their attention to the following relevant factors which parties should take into account, before they exercise their option to go for mediation, namely:
- i. that it will be to the advantage of the parties, so far as time and expense are concerned, rather than seeking a trial on the disputes arising in the Petition;*
 - ii. that, where there is a relationship between the parties which requires to be preserved, commercial or otherwise;*

⁶⁵ Telecom Regulatory Authority of India Act, 1997.

⁶⁶ Procedure-(i)- Procedure for directing Parties to opt for mediation, Procedure for Filing Petition / Appeal before TDSAT.

iii. *that, where parties are interested in a final settlement which may lead to a compromise. ...*⁶⁷.

- 3.36. The procedure further lays down that the where a petition has been referred for mediation and has not been settled or where the mediator feels that that it would not be in the interests of justice to continue with the mediation, they may refer it back to the TDSAT. The TDSAT is required to constitute a Panel of Mediators (within 30 days of coming into force), the list of which must be published by the Tribunal with details of “...*qualifications of the mediators and their professional or technical experience in different fields*”.⁶⁸ The procedure also provides exhaustive criteria for qualification of mediators for the panel. When a matter is referred for mediation, the sole mediator or joint-mediators are appointed at the consent of the parties.
- 3.37. With regard to the procedure for mediation, parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings. But where the parties do not agree on any particular procedure to be followed by the mediator, default procedure to be followed by the mediator is prescribed under the procedure. This procedure requires the mediator to fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present. The mediator is required to hold the mediation at the place prescribed by TDSAT or the place where the parties and the mediator jointly agree. The mediator is at liberty to conduct joint or separate meetings with the parties.⁶⁹
- 3.38. The Procedure provides a time limit of 60 days for conclusion of the mediation proceedings from the first date on which the parties appeared before the mediator. This time period may be exceeded by 30 days, if the mediator of her own accord or upon hearing all the parties deems it necessary. The data maintained by TDSAT indicates that reference to disputes to mediation has had an overall success rate of out of 37.6% since its inception in 2013. Out of the 534 cases referred for mediation between 29 July 2013 to 31 March 2023, 201 cases have been settled. The rest have been referred back to the Tribunal or are under progress.
- 3.39. It is pertinent to note that the above process of mediation before the TDSAT remains as such and is specifically excluded from the ambit of the 2023 Act under the First Schedule. As per Entry 8 of First Schedule to the 2023 Act, “... *proceedings before the Telecom Regulatory Authority of India, under the Telecom Regulatory Authority of India*

⁶⁷ Procedure-(ii)- Tribunal to give guidance to parties while referring the matter to Mediation Center, Procedure for Filing Petition / Appeal before TDSAT.

⁶⁸ Procedure (v), Procedure for Filing Petition / Appeal before TDSAT.

⁶⁹ Procedure (xii), Procedure for Filing Petition / Appeal before TDSAT.

Act, 1997 (24 of 1997) or the Telecom Disputes Settlement and Appellate Tribunal established under Section 14 of that Act ...” are not fit for mediation.

D. Singapore Convention on Mediation – India as signatory

- 3.40. India is a signatory⁷⁰ to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation (“SCM”),⁷¹ *“which applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. It provides a harmonised framework for the enforcement and invocation of international settlement agreements resulting from mediation.”*⁷²
- 3.41. The SCM is yet to be ratified by India.⁷³ The insolvency mediation framework, in as much as enforcement of cross-border settlements is concerned, may benefit from it, as it ensures that an internationally mediated settlement agreement reached by parties becomes binding and enforceable under a simplified and streamlined procedure.

⁷⁰ Available at: <https://www.singaporeconvention.org/jurisdictions>.

⁷¹ Text of the convention is available at: [https://www.singaporeconvention.org/convention/text#:~:text=United%20Nations%20Convention%20on%20International%20Settlement%20Agreements%20Resulting%20from%20Mediation%20\(the%20%E2%80%9CSingapore%20Convention%20on%20Mediation%E2%80%9D\).](https://www.singaporeconvention.org/convention/text#:~:text=United%20Nations%20Convention%20on%20International%20Settlement%20Agreements%20Resulting%20from%20Mediation%20(the%20%E2%80%9CSingapore%20Convention%20on%20Mediation%E2%80%9D).)

⁷² The Convention Text, available at: <https://www.singaporeconvention.org/convention/text> last accessed 10 November 2023.

⁷³ Note: It was stated by the Ministry to the JPC that Mediation Bill, 2021 in any case does not incorporate the elements of SCM at this stage and is drafted on an independent basis. Technically, it may not qualify as express ratification, unless a statement to that effect is made. No such statement is made on the passing of 2023 Act. Separately, SCM is not directly relevant to the report and the reference may be reduced to one paragraph only.

4. CHAPTER IV: INSOLVENCY MEDIATION REGIMES IN OTHER RELEVANT JURISDICTIONS

- 4.1. Many countries have successfully introduced, used and implemented mediation in their insolvency regimes and processes both in their pre-insolvency and insolvency proceedings. In this Chapter, the relevant provisions and highlights from the international regimes studied by the Committee are summarized. A short summary of the international position reviewed by the Committee is presented in this Report at Annexure III, for reference purposes only.
- 4.2. The Committee comprehensively analyzed how other jurisdictions have integrated mediation into their respective bankruptcy regimes. The purpose behind studying international perspectives was to unpack several questions, including (a) what insolvency disputes are likely to be resolved through mediation; (b) which stage of the insolvency process is suitable for mediation; (c) what are the infrastructural requirements to ensure smooth operation of the mediation framework; etc.
- 4.3. The Committee notes that the jurisdictions have been diverse in their experience with implementation, acceptance and success rates of mediation in their insolvency resolution regimes. Typically, mediation has been used at the pre-institution stage of formal proceedings in Japan, to facilitate negotiation and confirmation of plans in the US and the UK,⁷⁴ to evaluate claims and in relation to avoidance actions.⁷⁵ For instance, mediation in the US has worked not only in domestic single debtor cases, including *re Kovalchick*,⁷⁶ wherein disputes between the debtor and secured creditor were referred to mediation, but also in complex cross-border insolvency and group insolvency cases such as *Lehman Bros.* and *Enron*.⁷⁷ The Dutch experience also reflects success of mediation in insolvency cases.
- 4.4. What is overall surprising is the lack of effective data to determine success or otherwise of mediation even in jurisdictions with longer histories of insolvency mediations. In the US, for example, the practices are not uniform and vary across states' as per the local bankruptcy court procedures. To that end, the data remains unreliable. The 'success'

⁷⁴ For instance, in MF Global Holdings Ltd. where separate insolvency proceedings were commenced in the US as well as UK and both estates cross-claimed, Oon & Bazul LLP (2019), "Alternative dispute resolution in insolvency and restructuring proceedings", Lexology.

⁷⁵ Berkoff. et al. (2016), "Bankruptcy Mediation", American Bankruptcy Institute, p.18.

⁷⁶ *Re Kovalchick*, 175 B.R. 863, 870 (Bankr. E.D. Pa. 1994).

⁷⁷ O' Donnell (2012), "Transnational Alternatives: Growing Role of Alternative Dispute Resolution in Transnational Insolvency Cases", presented at Twelfth Annual International Insolvency Conference on "International ADR 2.0: Big Solutions for Big Problems" International Insolvency Institute.

and/or ‘failure’ of mediation on a case-to-case basis appears to be relied upon to cumulatively comment on overall implementational progress of insolvency mediation.

- 4.5. The Committee noted that the US Bankruptcy Courts have successfully used and implemented mediation in insolvency proceedings for over four decades. Interestingly, despite the existence of a federal law, the development of insolvency mediation frameworks was an initiative of the local State Bankruptcy Courts. Prof. Anthony J. Casey, invited by the Committee as expert, brought the Committee’s attention to the fact that different local courts exercise their discretion in establishing their own mediation rules and procedures with the objective of cultivating mediation culture. For example, Local Rule 9019-1 of the United States Bankruptcy Court for the Southern District of New York (“**SDNY**”) outlines the procedures for the court's mediation program. This rule establishes the mediation process, the qualifications of mediators, and confidentiality requirements. Additionally, it clearly states that the Court may order the assignment of a matter to mediation upon its own motion or upon a motion by any party in interest or the U.S. Trustee.⁷⁸ In a similar vein, Local Rule 9019-5 of the United States Bankruptcy Court for the District of Delaware sets down the mediation programme's structure and procedures, including the appointment of mediators, submission of mediation statements, and settlement approval processes.⁷⁹ The rules and directives vary from court to court, and there is no centralised system governing mediation. The Committee noted that the US Bankruptcy Courts thus offers a diverse range of well tested models to look at for the Committee.
- 4.6. For further understanding the practical experience of judges at the US Bankruptcy Courts, the Committee invited experts from the American Bankruptcy Institute and a panel of judges (sitting and retired). The Committee noted that mediation was first introduced in the insolvency process to facilitate the voluntary resolution of inter-creditor disputes. Eventually, it became a ‘conflict management’ tool in a wide array of disputes, such as cash-collateral/DIP financing disputes, plan objections, preferences, fraudulent transfers, objections to discharge, lien priority/avoidance, real estate title contests, equitable subordination, and collection/turnover actions.⁸⁰
- 4.7. In addition to the US, the Committee deconstructed the out-of-court dispute resolution mechanisms prevalent in other countries. The facets such as appointment of mediators,

⁷⁸ Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/ Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, available at: https://www.nysb.uscourts.gov/sites/default/files/pdf/Mediation_Procedures.pdf last accessed 08 April 2023.

⁷⁹ United States Bankruptcy Court, District of Delaware, Rule 9019-5 Mediation, available at: <http://www.deb.uscourts.gov/content/rule-9019-5-mediation> last accessed 08 April 2023.

⁸⁰ Schnitzer E. (2019), “Bankruptcy Mediation”, Norton Journal of Bankruptcy Law and Practice, Vol.28.

duties of a mediator, and training of mediators became the focus of attention for the members. The summary of the Committee's observations is produced below:

- a. *Re appointing mediators*: The Committee considered the flexible procedure prescribed by the French Insolvency Law⁸¹ in appointing a *Mandataire ad hoc* (mediator) by the President of a Court upon the request submitted by the debtor. In France, there exists no mandatory statutory accreditation system or regulatory body for mediators in commercial cases. The Committee opined that it is the responsibility of the mediator to bring mediation to fruition through their expertise and experience. Therefore, mediators must be selected and appointed after careful consideration. The absence of an accreditation or certification mechanism for mediators in insolvency mediation can have serious consequences in the form of the interests of the parties getting jeopardised and the entire process getting compromised.
- b. *Re training of the mediators*: The Committee noted that the Legislative Decree 28/2010 of Italy provides that mediators undergo special training (at least 50 hours) from ADR training centres with prescribed theoretical and practical training. A two-yearly professional update is required for a total duration of not less than 18 hours.⁸² The Committee appreciated the fact that mediators must be put under a rigorous training regime that can allow them to not just augment their knowledge but also unravel the intricacies of their role.
- c. *Re mediator's duties*: In Spain, a mediator is entrusted with the following tasks: i) verification of the existence and amount of the credits; ii) preparation of a payment plan and, where appropriate, a business viability plan; and iii) summoning creditors to discuss and settle the agreement proposal.⁸³ Further, in Japan, the mediators assess the economic viability of the plan and submit a report to the participating financial creditors.⁸⁴
- d. *Re qualifications*: This ranged from laypersons to sitting bankruptcy court judges (as in a few states such as Delaware in the US). The Committee noted the various models (also summarized in Annexure III).

- 4.8. In its review above, the Committee acknowledged that the guidance offered by different states is valuable as the mediation processes in these countries have proved to be a fruitful exercise in reconciling the conflicting interests of the parties involved in the insolvency disputes. Indubitably, conducting a study on different jurisdictions provided

⁸¹ Executive Order n° 2014-326 of 12 March 2014.

⁸² Italian Legislation on Mediation, Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Legal And Parliamentary Affairs, available at: [https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453175/IPOL-JURI_NT\(2011\)453175_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453175/IPOL-JURI_NT(2011)453175_EN.pdf) last accessed 01 June 2023.

⁸³ Paola Lucarelli and Ilaria Forestieri, 'The Three Targets of Insolvency Mediation: Dispute Resolution, Agreement Facilitation, Corporate Distress Management', available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087979 last accessed 04 April 2023.

⁸⁴ Ohno N. et al., 'Insolvency law, policy and procedure', The Insolvency Review: Japan (2021).

the Committee with a deep understanding of various aspects associated with insolvency mediation. **However, the Committee is of the considered opinion that the apparatuses existing in other jurisdictions would not be helpful on substantial aspects such as stages of option to mediate, manner of reference, timelines of mediation process, manner of enforcement of mediation outcomes, etc.** This is because the Code is a *sui generis* insolvency law, modelled on the basis of Indian landscape. Any mediation framework that is designed ought to consider that these aspects are considered and respected as such. For example, CIRP under the Code works on a ‘creditor-in-control’ model as opposed to the ‘debtor-in-possession’ model adopted by most other jurisdictions where mediations have been successful, including the US. Unlike other jurisdictions, under the Code, creditors have better bargaining power, especially after the initiation of the CIRP. The creditors’ committee, consisting of FCs, is considered the repository of power.⁸⁵ The debtors who have lost control of their company would be less inclined to engage in out of court mediation, given an inherent lack of trust in any consensual process when the balance of power is tilted in favour of the creditors. Similarly, creditors would prefer to exercise their decision-making powers and apply their commercial wisdom as CoC.

- 4.9. The Committee also noted that in India, there is a single unified insolvency framework in which the NCLT, a specialised and centralised tribunal with benches in different states, is the exclusive authority for corporate insolvency and liquidation adjudication. Unlike the US, where local courts have a wider room to model their insolvency frameworks, Indian NCLT’s various benches operate on the premise of uniformity and must continue to do so in the interests of procedural certainty. Therefore, it is important to set uniform rules, including mediation programmes that encompass mediators’ qualifications, training specifics, infrastructural requirements, etc.
- 4.10. A few members noted that in terms of public interest aspect involved in an Indian CIRP due to public banks, many nuanced issues of public law and due process also uniquely get involved in Indian insolvencies that cannot be addressed by mediation. Therefore, the framework must be bespoke and consider these aspects.
- 4.11. In Chapter V below, the Committee has kept the above in mind and applied the international perspectives to formulate a bespoke framework for insolvency mediation under the Code.

⁸⁵ *Vallal RCK v. M/s Siva Industries and Anr.*, Civil Appeal Nos. 18111812 of 2022, *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors.*, (2020) 8 SCC 531.

5. CHAPTER V: INSOLVENCY MEDIATION FRAMEWORK IN INDIA

- 5.1. As discussed above in Chapters II, III and IV, mediation as a tool can be effectively employed in insolvency proceedings to assist the current judicial process in dispensing justice and early redressal of disputes. Recommendation B4 of the revised edition of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (April 2021) notes that workout negotiations will typically be enhanced when they leverage informal techniques, such as mediation.⁸⁶ UNCITRAL Legislative Recommendations on the Insolvency of Micro and Small Enterprises (July 2021) also recognise the use of mediation to lower barriers of access to insolvency proceedings. Globally, mediation has been extensively used both prior to commencement of formal corporate insolvency proceedings as well as during these proceedings, particularly when cases involve complex factual and cross-border issues. The most commonly cited jurisdictional examples are the United States under Chapter 11 of the Bankruptcy Code⁸⁷ and the United Kingdom under the Insolvency Act 1986.⁸⁸
- 5.2. This Chapter discusses the proposed insolvency mediation framework. It contains the Committee's discussion and observations in brief, and concludes with the Committee's recommendations.
- 5.3. It is pertinent to note here again that while this Committee's deliberations were ongoing and the final report was underway, 2023 Act was enacted. As on date, only a few procedural provisions (for example those related to Mediation Council of India) have been notified (as discussed in Chapter III above) and the substantive provisions of the 2023 Act are yet to be notified and enforced. The Committee notes that the 2023 Act makes no mention of the Code in as much as it neither expressly excludes nor includes the Code within the ambit. Being an umbrella legislation aimed at implementation and promotion of mediation as dispute resolution mechanism, the Committee reviewed its impact on its mandate, i.e., framework for the use of mediation in insolvency regime.
- 5.4. In view of the above, the Committee's discussions were divided into **three** parts for the purposes of this Report:
- a. The Committee's review of data and statistics of 'settlement' of insolvency matters under the Code, and the role mediation may play to achieve efficient settlement of disputes in line with the Code's objectives.

⁸⁶ Scott Atkins and Kai Adam Luck, 'Mediation as a bankruptcy and insolvency game changer', Norton Rose Fulbright, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/50ba6f9d/mediation-as-a-bankruptcy-and-insolvency-game-changer> last accessed 15 November 2023.

⁸⁷ 11 U.S.C. §§ 101-1532 (2019).

⁸⁸ Insolvency Act 1986, c. 45 (UK).

- b. The impact of the 2023 Act on conduct of mediations in the current insolvency landscape, especially on mediation in matters under the Code.
- c. The Committee's observations and recommendations for a bespoke insolvency mediation framework in India.

For ease of reference, this division is also reflected in recommendations detailed below.

- 5.5. The Committee emphasises that the Committee's recommendations are in consonance with the 2023 Act. The recommendations herein are not inconsistent with and do not attempt to override the 2023 Act.

A. *Current Status and Statistics under the Code – Withdrawal, Settlement and Mediation*

- 5.6. The Committee consciously considered the very essence of the Insolvency and Bankruptcy Code, 2016 (“**Code**” or “**IBC**”), that is timely resolution of cases. It notes that the statutory timelines under the Code were introduced to achieve the Code's salutary objectives, i.e., a shift from the then existing lethargic insolvency landscape, maximisation of asset valuation, promotion of entrepreneurship, increased credit availability and to balance interest of all the stakeholders involved.
- 5.7. The Code mandates that a corporate insolvency resolution process (“**CIRP**”) should be completed within 180 days from the date of admission of the application to initiate CIRP.⁸⁹ The Code provides room for one-time extension of maximum 90 days.⁹⁰ The Supreme Court has emphasised on the maximum statutory time limit of 270 days, beyond which extension should not be given.⁹¹
- 5.8. However, data indicates that as of March 2023 more than 67% of ongoing CIRPs had crossed the statutory timeline.⁹² The average time taken for closure of CIRP – (a) ones leading to resolution plans is approximately 653 days and (b) ones with liquidations is an average of 472 days.⁹³ Litigation in such proceedings appears to be one of the most significant time sinks. Such litigation adds to the case docket of NCLT and the NCLAT, whose jurisdiction includes adjudication of other cases under the Companies Act, 2013 and appeals pertaining to Competition Act, 2002, etc., besides the Code. This delay in resolution process leads to substantive erosion of the asset value, which directly impinges on the intended objectives of the IBC.

⁸⁹ Section 12, Code.

⁹⁰ Ibid.

⁹¹ Amongst others, see *Surendra Trading Company v. M/s. Juggilal Kamlapat Jute Mills Company Limited*, (2017) 16 SCC 143.

⁹² Ibid at 8 (*IBBI FY 22-23 Q4 Report*).

⁹³ IBBI FY23-24 Q2 Report.

- 5.9. In 2019, the IBC was amended with insertion of provisos to Section 12(3)⁹⁴ providing for an outer limit of 330 days for completion of CIRP. However, data indicates that the statutory timeline of 270 (with outer limit of 330 days) for completion of CIRP has been unachievable in most cases, especially the complex insolvency cases (where most have crossed 1000 days' mark). In this regard, even the Supreme Court held this 330-day maximum resolution time limit to be directory and not mandatory in the case of *Essar Steel v. S.K Gupta*,⁹⁵ where an overall timeline of 800 plus days was taken for resolution.
- 5.10. The IBC does not preclude settlements, and in fact recognizes and encourages settlements in accordance with the law. As such, the settlement of disputes under the IBC has statutory recognition under Section 12A of the Code, which enables withdrawal of an application for CIRP after the admission of such application.⁹⁶ Further, perusal of the NCLT orders reflects that powers have been exercised by the NCLT for settlement of disputes under the Code under (a) Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“**AA Rules**”): “...(t)he Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission ...” and (b) under Rule 11 of the NCLT Rules, 2016, i.e., “... inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal...”.
- 5.11. While the option to withdraw application before admission of a CIRP has been present since 2016 under Rule 8 of the AA Rules, it is pertinent to note here that Section 12A has been inserted *vide* an amendment, based on the implementational experience of the Code. The Insolvency Law Committee (“**ILC**”), in its March 2018 report,⁹⁷ specifically noted the need for a provision in the Code or Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP**

⁹⁴ Insolvency and Bankruptcy Code (Amendment) Act 2019, inserted two provisos to Section 12(3) of the Code to provide for overall time limit:

“...Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. ...”.

⁹⁵ (2020) 8 SCC 531.

⁹⁶ It is noted that even when the parties have engaged in mediation post-commencement of CIRP and settled under Section 12A of IBC, at times use of mediation may not reflect in the proceedings before the NCLT or may simply be referred as ‘amicable settlement’: IBBI, *Corporate Insolvency Resolution Processes Withdrawn u/s 12A: as on 31st December, 2022*, available at: <https://ibbi.gov.in/uploads/whatsnew/1a518e9ce1666892b0e12e85026976aa.pdf> last accessed 11 November 2023.

⁹⁷ Available at: https://ibbi.gov.in/ILRReport2603_03042018.pdf last accessed 11 November 2023.

Regulations”) that permits withdrawal of a CIRP application after admission, in view of the judicial practice to grant permission for withdrawal due to a settlement between the applicant creditor and the corporate debtor. Thus, once the CIRP is initiated, the Code aims to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors. Instead, now, Section 12A facilitates withdrawal post-admission if the CoC approves such action by a voting share of ninety per cent. Further, Regulation 30A(1) of the CIRP Regulations enables the withdrawal of applications and settlement both before and after the constitution of the CoC. Besides, the Supreme Court of India, in *Swiss Ribbons v. Union of India*,⁹⁸ clarified that a party can approach the NCLT directly when the CoC is not yet constituted, and the NCLT may use its inherent powers to allow or disallow an application for withdrawal.

5.12. Notably, the data on settlement/ withdrawal of cases under the IBC reflects that many insolvency cases may be capable of ‘out of court’ resolution and thus, unburden the NCLT (and appellate *fora*’s) dockets. The Committee noted that no comprehensive statistical data on use and success rates (or otherwise) of mediation process in insolvency or bankruptcy matters is available.⁹⁹ This may be attributable to absence of specific provision for settlement of such matters by reference to mediation under the Code, as well as the lack of mediation culture in insolvency regime.

5.13. In the absence of a specific provision for mediation under the IBC or otherwise for insolvency disputes, the Committee was of the view that the data (as published by the IBBI and the NCLT) as well as the judicial precedents on settlement of insolvency disputes are helpful.

5.14. The NCLT disposal data for CIRP proceedings between 2017 and 2022¹⁰⁰ reflects that more than 23,500 applications for initiation of CIRP with underlying default of Rs. 7.21 Crores

STAGE OF DISPOSAL	TOTAL NO. OF CASES	AMOUNT INVOLVED (₹ CRORE)
SETTLED BEFORE ADMISSION	23,608	7,21,282
SETTLED AFTER ADMISSION / SEC. 12A	1052	24,601
RESOLUTION PLAN APPROVED	565	3,03,381
TOTAL	25,225	10,49,264*

⁹⁸ (2019) 4 SCC 17.

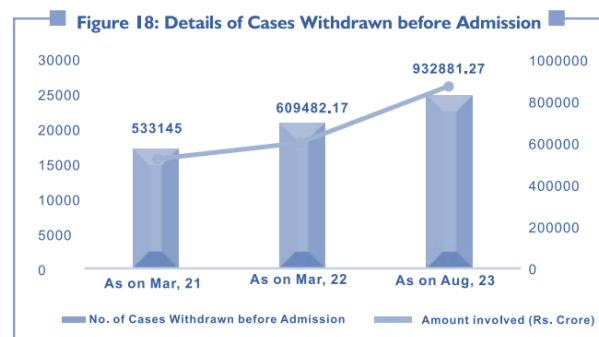
⁹⁹ Similar situation exists with regard to mediation of commercial and contractual disputes. Even though, the Commercial Courts Act, 2015 mandates mediation of commercial disputes at the pre-institution stage (since 2018), its overall success has not been studied at length as on date. An informal consultation with mediators in India indicates that success rates in various mediations involving commercial law issues are varied and largely depended on factors such as the number of parties, the subject matter at stake, situation of relationship between parties, etc. These factors also appear to have a substantial impact on the length of mediation proceedings. These factors were also considered by the Committee during its deliberations.

¹⁰⁰ Available at: <https://nclt.gov.in/section-949559-others> last accessed 10 November 2023.

were resolved after filing of application but before admission. **The settlement rate of CIRP pre-admission has been larger than at any other stages. Such resolved disputes comprise more than 68.74% of the total disposal at NCLT.**

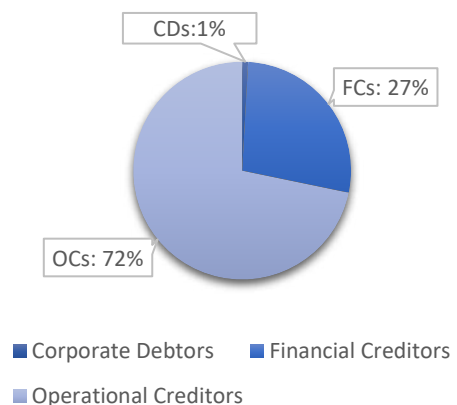
- 5.15. The IBBI FY 23-24 Q2 Report¹⁰¹ notes that as of September 2023, a total of 7054 CIRPs were commenced since the IBC was enacted, where the creditors have realised a total of Rs. 3.16 lakh crores under the resolution plans. Out of these 7054 cases, 5057 have been closed, of which the CD was rescued in (a) 1053 cases that were closed on appeal or review or settled, (b) 947 that were withdrawn under Section 12A of the Code, (c) 808 cases where the resolution plans were approved. In 2249 cases, liquidation was commenced.

- 5.16. This Report further notes that the CDs are now resolving distress in early stages, i.e., (a) when the default is imminent, (b) on receipt of a notice for repayment but before filing an application, (c) after filing of application but before its admission, and (d) even after admission of the application. They are doing their best to avoid consequences of resolution process. The said Report also notes that most companies are rescued at these stages and that **till August 2023, 26518 applications for initiation of CIRPs of CDs having an underlying default of Rs 9.33 lakh crores were withdrawn before their admission.**



- 5.17. The said IBBI FY 23-24 Q2 Report indicates that **about 80% of CIRPs having an underlying default of less than Rs. 1 Crore, were initiated on application by OCs.** This is in contrast with cases having underlying default of Rs. 10 Crores and above, where about 80% of CIRPs were initiated by FCs. The said Report observes that the share of CIRPs initiated by the CDs is gradually declining. The statistics on outcomes of these CIRPs also indicate (as on 30 September 2023) that **of the OC initiated CIRPs, more than**

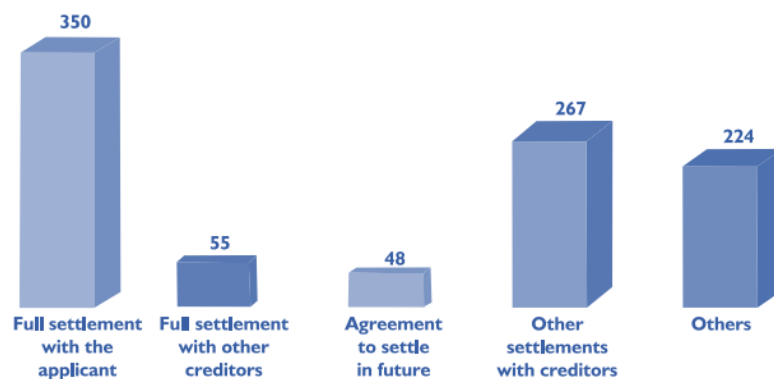
Stakeholder-wise distribution of withdrawn CIRP proceedings as on December 2022



¹⁰¹ Available at: <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf> last accessed on 10 November 2023.

53% were closed on appeal, review or withdrawal. These were more than 70% of the total such appeals, review or withdrawals of CIRPs.

- 5.18. Further assessment of data in the said Report on post-admission withdrawal of CIRP proceedings under Section 12A of the Code indicates that up to September 2023, of 947 such cases, 8 were withdrawn by CDs, 260 by FCs and 679 by OCs.
- 5.19. In terms of timelines of disposal by withdrawal¹⁰², the cases where CIRP was initiated by OCs, the average time spent was the least 132.5 days, with the longest being 1411 days¹⁰³ and the shortest was 3 days¹⁰⁴. In cases where CIRP was initiated by FCs, the average time spent was 248.76 days, the longest was 1546 days¹⁰⁵ and the shortest was 6 days.¹⁰⁶
- 5.20. Figure 7 below indicates the reasons for withdrawal, as available in the IBBI FY 23-24 Q2 Report.¹⁰⁷



- 5.21. It is relevant to note here that the data available appears to consider matters ‘settled’ / ‘withdrawn’ under either Section 12A of the Code, or Rule 8 of the AA Rules, 2016 or Rule 11 of the NCLT Rules, 2016. While the clear distinction is not carved out in all cases and the Committee has not undertaken independent empirical research, this information has been utilised to observe general trend only.
- 5.22. Mediation is not a novel concept in the realm of insolvency matters and appears to have been utilised by the parties. For example, in *VK Parvinder Singh v. Intec Capital Ltd. &*

¹⁰² IBBI, Data on Settlement of CIRP (December 2022), February 2023.

¹⁰³ In the matter of Sahara Q Shop Unique Products Range Limited where settlement was arrived at by parties.

¹⁰⁴ In the matter of Sri Lakshmi Srinivasa Jute Mills Private Limited where Section 9 proceedings were withdrawn due to amicable settlement of case, post appointment of IRP but pre-constitution of CoC. Similar timeline was observed in case of Audax Protective Fabrics Private Limited and NCC Limited.

¹⁰⁵ In the matter of White Metals Limited where settlement was arrived between the creditors and the CD.

¹⁰⁶ In the matter of Columbus Overseas LLP where full settlement was achieved.

¹⁰⁷ Ibid at 91, page 14.

Anr.,¹⁰⁸ prior to the constitution of the CoC, an appeal was filed by representative of the promoters of CD against the admission order passed by the NCLT submitting that they were ready to settle the claims of the FCs. The parties consented to mediate the case and Hon'ble Mr. Justice (Retd.) A. K. Sikri was appointed as mediator in the matter by the NCLAT with mutual consent of the parties. After a successful mediation, a report was placed before the NCLAT which was taken on record. The mediated agreement was subsumed / incorporated in the NCLAT's order, setting the NCLT order admitting the CIRP aside.¹⁰⁹

- 5.23. The NCLAT in another case has held that reference to mediation under debtor-creditor agreement does not take away right of one party to initiate and successfully pursue CIRP.¹¹⁰
- 5.24. Further, the debtor-creditor issues have been considered fit for mediation in the past. In a case before the High Court of Delhi,¹¹¹ the issue of conflict between progress made in mediation conducted in ongoing proceedings before the company court instituted pre-IBC and fresh proceedings instituted by a financial creditor under Section 7 of the IBC post its enactment were considered. In the former, a settlement had been arrived at in the Delhi High Court Mediation and Conciliation Centre, with investors who represent more than 80% of the CD's creditors. This settlement was taken on record and the Court proceeded to the second stage. In latter case, CIRP was commenced, IRP was appointed and a moratorium was declared. The concern was if the CIRP continued, an agreed settlement agreement, which was recognized by the Court and awaited final judgment would be

¹⁰⁸ Company Appeal (AT) (Insolvency) No. 968 of 2019.

¹⁰⁹ Please note that the mediated settlement agreement terms were not followed by the CD, and therefore the FC had approached the NCLT in this regard. The CIRP was revived, and the matter is pending before the NCLT. See *Intec Capital Limited v. Jagtar Singh & Sons Hydraulic Private Limited*, 2021 SCC OnLine NCLT 22664.

¹¹⁰ Mediation clause often forms part of governing contractual relationship between CD and its creditor(s), especially in case of OCs. In one such case, *Sodexo India Services Pvt Limited v M/s Chemizol Additives Pvt Limited (Comp. Appeal (AT) (Insolvency) No. 1094 of 2020) [Mr Harish P. v M/s Chemizol Additives Pvt Limited (Order dated 08.06.2020 in CP(IB) 62/2020, NCLT- Madras was reversed]*, two creditors filed appeals before the NCLAT against orders of the NCLT disposing of applications under Section 9 of the Code directing the CD to make endeavors for resolution in respect of outstanding debt and observing that on CD's failure to do so, OC would be at liberty to invoke arbitration clause contained in the agreement between them. The said clause provided that disputes could be settled either through mediation and conciliation or through arbitration. The NCLT, in its order, took into account the fact that the CD is a solvent company and the initiation of CIRP against it would not solve any purpose. The NCLAT set aside the NCLT order observing that while the CD was a solvent company and an arbitration clause exists in the agreement, Section 238 of the IBC has an overriding effect. A clause for an alternative remedy is not a disabling provision for the OC to seek resolution of a dispute regarding operational debt claimed against the CD through insolvency resolution process under the IBC. The NCLAT held that it was immaterial whether (a) the company was solvent or insolvent qua other creditors, and (b) the petitioner can avail the alternate remedy available in the agreement, which is binding on both the parties. It was further observed that the IBC does not permit the Adjudicating Authority to make a roving enquiry into the aspect of solvency or insolvency of the CD except to the extent of the creditors who trigger the insolvency proceedings.

¹¹¹ *Sunil Kumar Dahiya v Union of India & Ors*, 2019 SCC OnLine Del 11300.

rendered fruitless. In this case, the Court did not decide on the jurisdictional merits of the case and remanded it to the NCLAT, given that it was the appropriate forum with jurisdiction for such an application under the Code. However, it continued to proceed with the company case as it continued to be seized of it, leaving the issues of conflict open.

- 5.25. As of 2021, the Supreme Court of India also appears to have encouraged mediation of insolvency disputes brought before it in appeal.¹¹²
- 5.26. **In view of the above, the Committee notes that the data and judicial orders certainly emphasise existence of strong possibility of insolvency disputes’ mediation for settlement and withdrawal of matters. Further, over the past years, OC initiated CIRPs have demonstrated strong potential for settlement, especially at early pre-admission stages. Such cases, therefore, appear to be fit cases for use of mediation as dispute resolution tool for settlement.**

B. Insolvency Mediation in India: the 2023 Act & the Code

- 5.27. Even though there have been instances of mediation of insolvency matters, the Code does not specifically provide for mediation. 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. Therefore, the Committee, before delving into an appropriate framework for insolvency mediation, thought it fit to assess if the newly enacted 2023 Act impacts mediation under the Code – as on date.
- a. *Applicability of 2023 Act to insolvency mediation*
- 5.28. From a plain reading of the 2023 Act and the consequential amendments made to existing legislations (such as the Companies Act, 2013), the Committee primarily noted the following regarding applicability of the 2023 Act to IBC.
- 5.29. *First*, 2023 Act does not automatically apply to all legislations in India. Its scope is limited to disputes that are “*commercial or otherwise*”. While the term commercial is defined to mean a dispute defined as per Section 2 of the Commercial Courts Act, 2015 (that does not include insolvency matters or proceedings under the IBC), the ambit of the

¹¹² In *ZKN Traders Pvt Ltd v Kishore Shankar Signapurkar Ltd.*, 2021 SCC OnLine SC 3160, the Supreme Court of India was approached against the NCLAT order setting aside the order passed by the NCLT admitting a case under Section 9 of the IBC. This matter was referred to mediation by the Supreme Court of India, but the reference appears to have been unsuccessful in resolution of the case. The matter was remanded to the NCLAT for reconsideration based on CD’s contention that its pleadings were not considered by the NCLAT.

term “*otherwise*” has not been clarified. It doesn’t appear to include IBC, which is a special law.

- 5.30. *Second*, Section 55(1) of the 2023 Act makes it clear that the provisions of the 2023 Act have an overriding effect on provisions of mediation or conciliation as they exist in other laws in force or in an instrument having force of law. The exceptions to this overriding effect have been carved out in the Second Schedule and laws such as the Industrial Disputes Act, 1947, the Industrial Relations Code, 2020, etc., or have been included in the First Schedule as matters not fit for mediation under the 2023 Act. Since no specific provision regarding mediation or conciliation exists in the Code, the 2023 Act cannot possibly override any provision of the Code.¹¹³ The Committee noted that this might be a possibility for the absence of the Code’s specific inclusion within exceptions under the 2023 Act. The Committee also noted that Section 55 does not appear to put an embargo on prospective amendments/ introductions of mediation to the Code.
- 5.31. *Third*, the 2023 Act does not contemplate any restriction on mediation (if any) under the Code or mediation in insolvency matters. As the Code is a special legislation and no specific amendment has been made to enable mediation under the Code as per the 2023 Act, the Code does not appear to be covered by the 2023 Act.
- 5.32. *Fourth*, suitable amendments to align provisions of specific laws have been made *vide* Sections 58 to 65 read with the Third to the Tenth Schedules, for example, the Companies Act, 2013. These pre-existing provisions in the Companies Act, 2013 specifically provide for the conduct of mediation and the jurisdiction of NCLT in relation thereto. Even though NCLT is the same tribunal that sits as Adjudicating Authority under the Code, it has been held that Section 442 of the Companies Act, 2013 does not confer any power on the NCLT to refer parties to mediation under the Code.¹¹⁴ Given this pre-existing jurisprudence and the absence of any specific reference to the Code in the amended provision – Section 442, it may be considered that the Code continues to remain independent.
- 5.33. *Fifth* and last, Sections 2 and 6 of the 2023 Act provide further clarity on applicability and scope of the 2023 Act. Here, disputes / matters before tribunals (including the NCLT) do not appear to be included. The Central Government is vested with the power to notify tribunals which shall be covered under Section 5, for implementation of pre-institution mediation. The Committee is of the view that it even if NCLT is notified therein, specific

¹¹³ Section 238 of the IBC gives the IBC precedence over any inconsistent provisions of existing laws. There is no clarity as to whether the IBC would trump the 2023 Act if the situation were to arise in the future.

¹¹⁴ Supra at 64. Further, the Committee noted that the amendment to Section 442 of the Companies Act, 2013 states that NCLT would apply the 2023 Act, and it remains to be seen if the new provision is interpreted differently.

inclusion of the Code may be required under the 2023 Act to provide substantive application to insolvency matters therein.

5.34. The Committee, therefore, noted that there appears to be no restriction under the 2023 Act on the introduction of a mediation regime under any law such as the Code. To that end, the Committee also examined the possibility of the 2023 Act's application as is to the Code for insolvency mediation. After a detailed discussion and assessment of approach under the 2023 Act, **the Committee is of the considered view that 'one-size-fits-all' mediation process under 2023 Act would not be suitable for insolvency mediation, as the stated objectives of the Code would not be met by it.** This is especially in view of the statutory timeline for processes under the IBC, which is inherently incompatible with the timelines under the 2023 Act. The Committee further noted that exclusion of IBC under the 2023 Act's First Schedule by virtue of Entry 13 may not in itself be sufficient, as in any case, a separate mechanism for insolvency mediations would be required under the IBC. **Therefore, the Committee recommends that it would be prudent to keep insolvency mediations under IBC self-contained.** The details of Committee's reasoning are below in point b and part C.

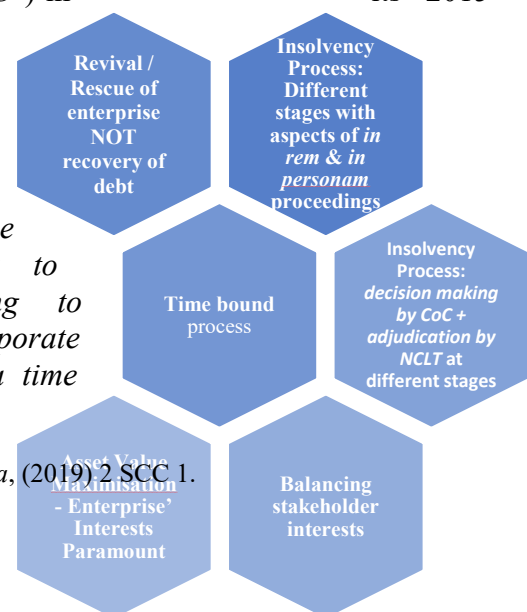
5.35. That said, the Committee has not made any recommendations that are not in line with the objectives and the spirit of the 2023 Act. It believes that fostering mediation culture in India will be a collective effort of the justice dispensation system and the spirit of the 2023 Act must be resonated in the proposed mediation framework under the Code.

b. *Insolvency Mediation to be Bespoke and Self Contained within the Code*

5.36. The IBC is a specialized beneficial legislation with the object of revival of stressed enterprises through time-bound insolvency resolution processes.¹¹⁵

5.37. The Bankruptcy Law Reforms Committee ("BLRC") in its 2015 Report noted the object and purpose of IBC's enactment as under:

" ... The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation. ... The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time



¹¹⁵ *ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta]*, (2019) 2 SCC 1.

bound manner for **maximization of value of assets** of such persons, to promote entrepreneurship, availability of credit and **balance the interests of all the stakeholders** including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for **timely resolution of insolvency and bankruptcy** would support development of credit markets and encourage entrepreneurship. ... **Speed is of essence for the working of the bankruptcy code**, for two reasons. First, while the “calm period” can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. **The longer the delay, the more likely it is that liquidation will be the only answer.** Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, **delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.** ... ”

- 5.38. The Hon’ble Supreme Court of India in *Swiss Ribbons v. Union of India*¹¹⁶ noted above and further observed as follows:

“ 11. ... The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. ... Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. **Timely resolution of a corporate debtor who is in the red, by an effective legal framework**, would go a long way to support the development of credit markets. ...

12. It can thus be seen that the **primary focus of the legislation is to ensure revival and continuation of the corporate debtor** by protecting the corporate debtor from its own management and from a corporate death by liquidation. **The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.** The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, **the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.** ... ”

- 5.39. Mediation is an alternate mode of conflict/ dispute resolution instead of litigation and aims at amicable settlement of such disputes with the simultaneous reduction in cases (and their pendency) before courts/ tribunals. It is the Committee’s view that **to forward and implement the object and purpose of the Code**, its various elements must be carefully aligned with any mediation mechanism that applies to the resolution of matters

¹¹⁶ Supra at 98.

under it. The non-feasibility of 2023 Act framework's implementation under the Code is discussed below.

5.40. ***Timeline of Mediation Proceedings vis a vis the timelines under the Code:***

- a. The Committee observed that the voluntary and consensual mediation procedure with a timeline of 120 days (along with an extension of 60 days)¹¹⁷ as is currently envisaged under the 2023 Act is not aligned with the primary object of IBC, i.e., **time bound revival** of stressed enterprise. The introduction of a 180 days' mediation process may severely displace such timelines and impact the efficiency of resolving corporate insolvency that has been achieved under the IBC thus far.
- b. Further, mediation is a voluntary process and parties may refuse to settle or accept the mediator's suggestion during the course of mediation. A recalcitrant party may intentionally render the mediation process futile while also taking advantage of the longer timelines under the 2023 Act. A few members of the Committee expressed concern that this leaves room for abuse of the opportunity to settle granted by the process of mediation and thus, **postpone the timelines provided in the IBC for completion of a CIRP**.
- c. The Committee observed that while these considerations also exist in other disputes, it is the grave impact of the delay in insolvency proceedings that makes the longer mediation timeline unfit. For example, the 2023 Act's framework will not be sufficient as the delay may also directly affect the **stress status (SMA – 0 to NPA)** of the CD from the time of default and have a cascading effect on the possibility of its revival as a going concern.

5.41. ***Nature of Insolvency Proceedings:*** IBC being a beneficial legislation is **not focused on resolving single contractual breach** of loan agreement or agreement to pay by the CD. The nature of the insolvency resolution proceedings is **not simply recovery of money or assets** unlike other commercial disputes before courts involving similarly placed parties (the creditor and the debtor). Instead, an 'insolvency resolution process' starts with filing of an application by the creditor claiming statutory 'default'. Dispute resolution mechanism under IBC is **separate, independent and specialized to meet the need of revival of the defaulting debtor**. It requires assessment of a stressed asset and balancing stakeholders' interests in a CD, such as creditors of all classes, government bodies, workmen and employees, etc. The mechanism contemplated under the 2023 Act neither contemplates nor seeks to address the **issues of multiple stakeholders to a mediated result**. The Committee was of the view that mediation mechanism under general umbrella law will not be suitable to redress this.

¹¹⁷ Section 18, the 2023 Act.

- 5.42. ***Pre-institutional Mediation falls outside of Insolvency:*** The Committee also discussed at length, the possibility of pre-institutional mediation in insolvency matters, and is of the view that it may not fit well within the spirit of the Code. The remedies under the Code come into effect only after the statutory ‘default’ has occurred and an application has been made to initiate insolvency proceedings. Any mediation prior to such application would fall outside the realm of the Code and technically not be ‘insolvency mediation.’ Thus, it cannot therefore be enforced in the same manner as mediations post the filing of an application under the Code. One Committee member further noted that it would be onerous to enforce mediation outcomes in such cases, as the role of NCLT has not begun pre-application and there may also arise issues of propriety, non-disclosure etc. This aspect of the Committee’s discussion is further elaborated below.
- 5.43. ***Issue of third party and in rem rights:*** IBC involves **various stakeholders’ interests** and requires time bound management of insolvency resolution process, as mentioned above. The Committee notes that the 2023 Act excludes ‘*in rem rights*’ as well as third-party rights from the ambit of ‘cases fit for mediation’ (First Schedule to the 2023 Act). Different stages of the insolvency resolution process have all or a few aspects of ***in rem & in personam*** proceedings and/or rights. A blanket application of mediation process and considerations under the 2023 Act does not provide sufficient clarity or guidance on the scope of mediation during various stages of insolvency resolution processes. For example, where rights of other stakeholders may be jeopardized given the inherent nature of mediation proceedings (i.e., confidentiality). The Committee was of the view that the framework and implementation of insolvency mediation, thus, needs to be modelled to fit the scheme and object of IBC. The mediation framework thus needs to consider these issues.
- 5.44. ***Adjudicatory Body’s Role:*** The Committee discussed various instances where the power of NCLT to refer an insolvency matter to mediation may not operate in the same manner or on the same principles as are applicable to the discretion of courts while referring general commercial disputes. It was of the view that to meet the object and purpose of the IBC, any powers vested in the NCLT for reference to mediation require to be modelled to fit the timelines in the IBC. Otherwise, if the reference by NCLT becomes a mandatory consideration, the whole premise of unburdening the NCLT/NCLAT by introducing mediation into the insolvency resolution framework will be nugatory.
- 5.45. ***Ambit of Mediation Council of India’s role in insolvency mediations under the Code and further implementation:*** The 2023 Act also envisages the setting up of a Mediation Council of India (provisions for which have been notified as on 9 October 2023) which will be tasked with registering mediators and recognising mediation service providers and institutes which train and certify mediators. Insolvency mediation requires specific skill set, training, and qualifications for mediators. The Committee noted that the requirements

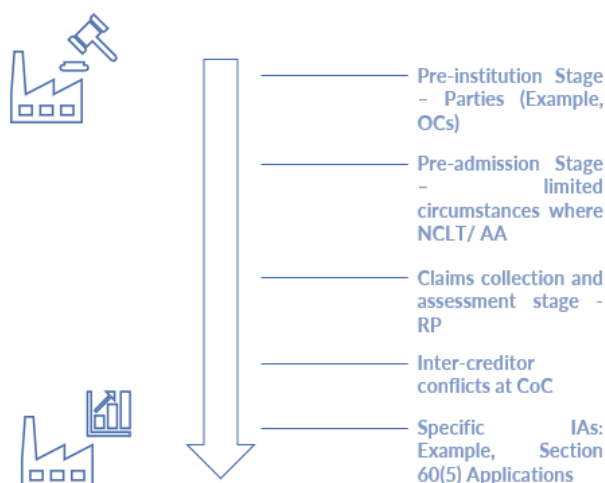
of the conduct of mediation, including swift timelines may be specific to the Code, and thus will need particular carve-outs or separate regulations. Further, members of the Committee observed that it will not be efficient to confer the power to regulate mediators and the insolvency mediation process on an independent regulator, when there is a specialised law for corporate insolvency. It will be problematic as the sharing of authority creates potentially unresolvable problems of priority and the ultimate authority of their decisions.

- 5.46. ***Skillset of Mediators and their Training:*** As mentioned above, the Committee took into account the international experience of successful insolvency mediation frameworks and observed that insolvency mediation requires specialized and domain specific expertise to understand particular issues between the parties. This specific skill set requires focused training in insolvency issues and understanding of the practical consequences of insolvency proceedings under the Code. For example, the public law aspect is unique for corporate bankruptcy since significant financing to Indian corporate debtors is provided by public sector banks, which are capitalised from public funds and taxpayer monies. This interplay of issues is seminal to resolution of issues in the insolvency ecosystem. Therefore, it is essential for the mediator to be specifically experienced in domain and trained with nuances of conducting such mediations for an insolvency mediation to succeed. This has neither been provisioned for, nor contemplated under the 2023 Act. Even if this is introduced *vide* secondary legislation under the 2023 Act, the issues of authority and administration noted above will persist.
- 5.47. ***Bespoke list of excluded matters:*** Specialised laws including regulatory proceedings are excluded from the ambit of 2023 Act under the First Schedule therein such as Competition Act, 2002, TRAI Act, 1997 and SEBI Act, 1992, NGT Act, 2010, and Electricity Act, 2002. This exclusion also includes specialized regulatory regimes where mediation is utilised as ADR process by the respective specialized tribunals (for example, the TDSAT). The First Schedule does not specifically exclude the Code or specific proceedings in its entirety. However, certain aspects of the Code appear to have been excluded under the same First Schedule. For example, Entry 2 (*declaration having effect of right in rem*) and Entry 5 (*disputes which affect rights of a third party who are not a party to the mediation proceedings*). The Committee noted that the Code does not have disputes simpliciter and require cross-section of these issues operating in the same domain and at the same time. The Code is a public interest law, where private issues may impact public monies/interests. The inclusion or exclusion of certain matters will require careful examination and thus, ‘fit for mediation’ cases as well as those that are unfit will require an examined list.
- 5.48. The Committee’s deliberations concluded that since the Code is specialised legislation with stringent timelines and a *sui generis* framework, the application of an umbrella

legislation for mediation such as the 2023 Act does not appear suitable or efficient. Further, sufficient checks and balances will require to be introduced to ensure that mediation is used only in genuine cases and not used as a tool to further delay process under the Code. The binding nature of mediation settlement vis-à-vis the rights of all stakeholders involved also requires specific application at different stages of insolvency resolution processes. For example, post-admission, if a mediation settlement is made binding in nature, it should not affect the *inter-se* priority/rights of creditors.

- 5.49. The Committee further considered whether mediation provisions (or similar models) under specialized legislations (as also discussed in Chapter III) may be as is suitable for application to IBC. The two primary models that currently exist are as under:
- a. Voluntary and Consensual Reference: Empowering the courts or tribunals to refer disputes to mediation
 - i. Section 5, 2023 Act – Voluntary mediation by consent of parties.
 - ii. Section 89, CPC, 1908 - Where an element of a settlement acceptable to parties exists.
 - iii. Section 37, Consumer Protection Act, 2019 - Where an element of a settlement acceptable to parties exists, and their consent is obtained.
 - iv. Section 442, Companies Act, 2013 - Parties can approach for reference to mediation.
 - b. Mandatory mediation: Before instituting proceedings
 - i. Section 12A, Commercial Courts Act, 2015 - Compulsory for parties to mediate before instituting a suit (except in urgent cases). An exception to the rule under the 2023 Act.
- 5.50. Upon extensive discussions, the Committee noted that the principles of the existing models, including the 2023 Act, may be helpful but will not be fit in their entirety for dispute resolution under the IBC.
- 5.51. Taking the above in consideration and after detailed discussion, the Committee agrees that **blanket introduction of mediation as contemplated under 2023 Act does not meet the core elements or objects of IBC. Incorporation of mediation into Indian insolvency regime will require specific, tailor-made mechanism to suit each insolvency resolution process or its constituents.** For example, a CIRP may not benefit from blanket introduction of mediation, but case for mediation's use exists at different stages as under:

Examples of Possible Use Case of Mediation under IBC - CIRP



- 5.52. Therefore, the Committee recommends that the framework for insolvency mediation in India should be incorporated exclusively within the scheme of the IBC, from best governance and implementation perspective. The Committee thus recommends a *‘stage based’* and a phased introduction approach to apply and implement mediation in IBC to address *‘bottle-necks in current regime’*.
- 5.53. It is recommended that provisions for facilitation and conduct of mediation at different stages of different insolvency resolution processes, as well as the enforceability of mediated settlement agreements, be included in the IBC in the form of an enabling provision, and supported by rules made by the Central Government and appropriate regulations of the IBBI. In view of specialized nature of mediation insolvency by skilled mediators and the learnings from its practical implementational, a larger room for regulatory sandbox should be created. Thus, the detailed provisions of this framework such as standards for viability of mediation, mediator’s skill sets, manner and timelines of its procedural conduct and the final agreements must be left within the regulatory domain.
- 5.54. The Committee recommends that for, abundant clarity and to reduce the scope for confusion, proceedings under the Code may be specifically excluded from the 2023 Act and included in the ‘excluding list’ under the First Schedule.¹¹⁸ Alternatively, the

¹¹⁸ Here, it is imperative to note that the Committee also deliberated whether the Second Schedule to the 2023 Act should contain the IBC mediation framework. The members were of the view that currently no existing recognised mediation framework is provided under the Code. Therefore, the question of ‘overriding effect’ cannot be addressed at this stage. Hence, the inclusion of the proposed IBC mediation framework in the Second Schedule would be an unworkable solution at present. This may be considered by the Central Government and appropriate ministries at the time of formalising the framework under the Code, when a simultaneous amendment to the Second Schedule may be workable.

Central Government may, by notification under Entry 13 of the First Schedule to the 2013 Act, exclude IBC from the ambit of the 2023 Act. This will ensure effective conduct of insolvency mediation and implementation of its outcomes.

C. *Insolvency Mediation Framework under the Code*

a. *Approach to insolvency mediation framework*

- 5.55. **The main object of a specialized insolvency mediation framework is to facilitate and recognise mediation as a statutory dispute resolution mechanism for expediting resolution of insolvency disputes that enter the judicial system without compromising the statutory timelines.** The Committee notes that in other jurisdictions mechanisms like CIRP that are court driven have been a last resort measure, i.e., once all other alternatives like negotiation, mediation, neutral evaluation and arbitration are exhausted. In India, this has not been the case thus far. In fact, the use of mediation in insolvency situations has been limited and has not gained traction (as also noted above). The Committee hopes that **the express legislative recognition of mediation under IBC will inculcate trust in the process, foster ‘culture’ of mediation and spread awareness of its use and existence as a credible insolvency disputes’ resolution mechanism.**
- 5.56. The Committee noted that mediation places heavy reliance on ‘human element’ of the parties and appeals to common object of ‘dispute resolution’ (i.e., ending conflict and avoiding litigation) during the proceedings. Since mediation is ‘party driven’, where outcome is largely ‘self-determined’ – the cultural mindset shift to explore maximum possibility of resolution is key. For instance, it is well recognized that enactment and implementation of IBC over the years has led to mindset change amongst debtors and improvement in debtor-creditor relationship.¹¹⁹ The insolvency mediation framework must hence, rather than only being seen as a dispute resolution mechanism, expectedly become a way of introducing debtors and creditors to a new ‘rescue culture’¹²⁰ where they have opportunity to ‘amicably resolve’ issues at the outset or once the insolvency process commences, at various stages on different aspects within the timelines of IBC as the insolvency process runs parallelly.
- 5.57. Thus, it is essential that space for regulatory sandbox to operate may be created through IBBI’s formulation of regulations in line with the enabling provision under the Code. This will provide expected agility to the framework and its operability will be much

¹¹⁹ Para 4.64 of The Economic Survey (2020-21) Vol. 2, available at: https://www.indiabudget.gov.in/budget2021-22/economicsurvey/doc/echapter_vol2.pdf last accessed 11 November 2023.

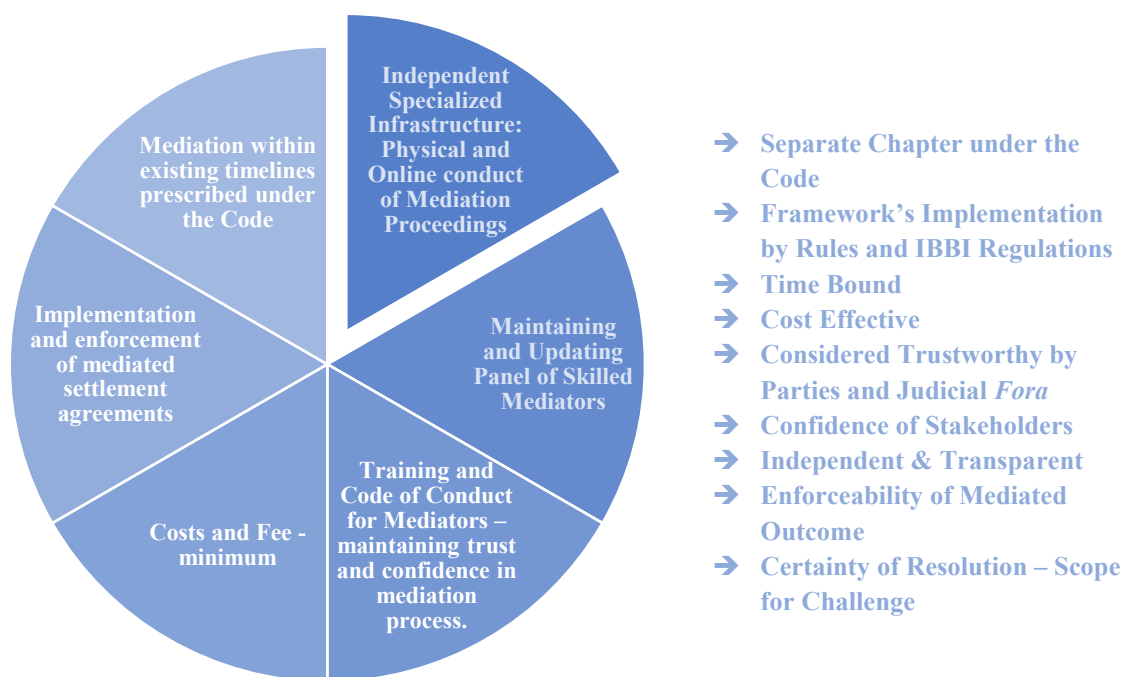
¹²⁰ Supra at 5 (Paola Lucarelli *et al.*).

enhanced. An essential aspect of the framework will be to ensure a sound relationship between mediation and judicial proceedings, in securing the objective of insolvency resolution within shortest timelines. Mediation can provide a cost-effective and quick extrajudicial resolution of disputes and make it more likely that parties voluntarily comply with agreements resulting from mediation. Further, this renewed paradigm of business rescue will move the focus from NCLT – which traditionally has a control role in formal insolvency procedure – to the actors (namely debtors, creditors and all the parties interested), who are the real players of insolvency proceedings.

- 5.58. In addition, an appointed mediator would play a key role and ensure proper functioning of negotiations and the efficient handling of procedures for the benefit of creditors as well as other stakeholders. While mediation itself is not a panacea or way to resolve all the insolvency matters, but there are no doubts that (a) loss of enterprise and asset value, as well as (b) disruption to the affairs of the CD can be minimized with this ‘problem solving approach’.
- 5.59. **The Committee emphasized that the framework must not undo the successes of the Code and should therefore be in line with the Code’s core objectives.**¹²¹ Therefore, the Committee, in recommending the framework, has taken an in-principle approach that **the introduction of mediation under the Code shall be (a) in a phased manner, with room for incorporation of implementational learnings and (b) without compromising the timelines for various insolvency resolution processes under the Code.** In the first phase, the mediation process shall be **voluntary**.
- 5.60. The Committee’s key identified factors, observations, and recommendations for implementation and use of mediation under the Code are detailed below. The Committee’s approach in recommending the framework is to:
- a. identify the possibility and effectiveness of mediation at a particular stage in various insolvency resolution processes,
 - b. introduce mediation without any impact on current statutory timelines under the Code,
 - c. explore the possibility of mediation running parallel to the timelines (in case of specific conflicts during CIRP), and
 - d. assess the impact on third party rights, if any, and ensure due process.

¹²¹ Part C, Chapter V above.

b. *Key Identified Factors*



Key Factors for Successful Operational Implementation of Insolvency Mediation Framework

c. *Recommendations*

I. **Mediation under IBC - mandatory or voluntary:**

- 5.61. One of the key elements under the Committee's mandate were examination of whether reference to mediation under the insolvency mediation framework in India ought to be mandatory or voluntary. This issue was extensively debated and discussed at several meetings of the Committee, including the discussion with the ABI to understand the American perspective on it.
- 5.62. The Committee noted that in principle, while mandatory mediation encourages parties to make a serious attempt at resolving their disputes at an early stage¹²² and eliminates the parties' concerns of appearing weak or uncertain of their success at litigation,¹²³ voluntary mediation respects parties' autonomy and increases the likelihood of successful mediation outcomes since parties engage in the process willingly.

¹²² Kinhal D. and Apoorva (2021), "Mandatory Mediation in India- Resolving to Resolve", Indian Public Policy Review, 2(2): pp. 49-69 last accessed 4 November 2023.

¹²³ Ibid, p.52.

- 5.63. After detailed deliberation on pros and cons of mandatory mediation, the **Committee is of the view that voluntary mediation, i.e., reference of dispute to mediation by consensus of parties will be best suited to the Indian insolvency regime.** This will permit timelines to be preserved as unwilling parties will not be forced to ‘exhaust’ a mandatory pit-stop before approaching the NCLT. At the same time, for the willing parties, it will provide opportunity to engage in a collaborative and problem-solving environment. The Committee noted that even after opting to mediate by consensus, the parties would retain the right to opt-out if they can demonstrate that mediation is unsuitable or unlikely to be successful in their specific circumstances.¹²⁴
- 5.64. The Committee further recommends that **it shall be onus of the parties to approach and inform the NCLT (or the appellate tribunal or the Supreme Court, as the case may be) of their intent and mutual agreement to mediate the dispute.** It is important that the law recognizes that such voluntary mediations would run parallel with the statutory processes and timelines under the Code. The timelines under the Code ought to remain sacrosanct, even when parties engage in mediation. The Committee is of the view that **no provision for stay or extension of statutory timelines by orders of the NCLT due to ongoing mediation may be made at parties’ request or on the tribunal’s own discretion.** This will ensure that parties pursue their chance at mediation seriously. A provision for automatic termination of the mediator’s mandate upon expiry of particular statutory timeline must be provided to ensure sanctity of current IBC timelines that will run parallel to the process.
- 5.65. For example, at the post-institution but pre-commencement/ admission stage, the timeline of 14 days under the Code sets in on the date of filing of CIRP. Should mediation be initiated or continued during the said timeline, the automatic termination of mediation mandate would be either the date of admission under the Code or 30 days, whichever is earlier. In case of specific types of cases during CIRP, for example, at claims’ collation stage, regulations may provide scope for parties to attempt mediation before approaching the NCLT. These will also be fit cases of ‘class mediations’, where possible. Data on settlement of OC initiated proceedings (discussed above) indicates that mediation may be most helpful in case of an OC-initiated CIRP under Section 9 of the Code, especially a single OC dispute where the object of insolvency application is directed towards repayment of operational debt.

¹²⁴ Justice A.K. Sikri, Mediation: A Panacea for Resolution of Insolvency Cases, 21 THE INDIAN JOURNAL OF LAW AND TECHNOLOGY 45, 50-53 (2020).

II. Dovetailing mediation into the timelines specified by the Code

- 5.66. The Code itself provides for efficient timelines to ensure that the insolvency processes under the Code meet the objective of time bound resolution. In that view, mediation timelines for parties to discuss and negotiate may add to the timelines provided under the Code. The Committee considered two options:
- a. Alteration of timelines under the Code to accommodate mediation and to ensure that the mediation process aligns with the overall objectives of the Code. The Committee also discussed scenarios where the timelines could be varied based on the stage and type of issues being referred to mediation. For example, pre-admission timelines may be tighter than the timelines set for mediations concerning inter-creditor issues during the insolvency process. The Committee noted that a series of amendments/modifications to existing provisions under the Code that provide for rights and restrictions (especially disqualifications) linked to prescribed timelines would be required.¹²⁵
 - b. Incorporating mediation as a process that runs parallel with the timelines under the Code and CIRP proceedings before the NCLT. This would be in consonance with the avowed object of the Code for adherence to strict timelines. While, in practice these timelines have not been adhered to and have been held to be directory only, **the Committee is of the view that keeping mediation as a parallel process to CIRP before the NCLT would ensure that no time is lost and no adverse impact is effected on asset value and public interest.**

III. Processes, stages and circumstances under the Code that are fit for reference to mediation

- 5.67. In most insolvency cases, there are early, middle and late case opportunities for mediation. To the extent that parties are comfortable in using mediation to address these issues, mediation may be able to provide a more prompt and less expensive resolution, allowing the case to proceed toward its ultimate resolution.
- 5.68. The Committee noted that appropriate timing for mediation referral may depend on factors such as the readiness of the parties to engage in mediation, the stage of the insolvency proceedings, and the potential impact of mediation on the overall resolution process. To determine fit cases, the Committee considered factors such as the general nature of conflicts/disputes in the process and at a particular stage, parties involved and

¹²⁵For example, the limitation provided under the Code or the calculation of time for disqualification from participation as resolution applicant under Section 29A.

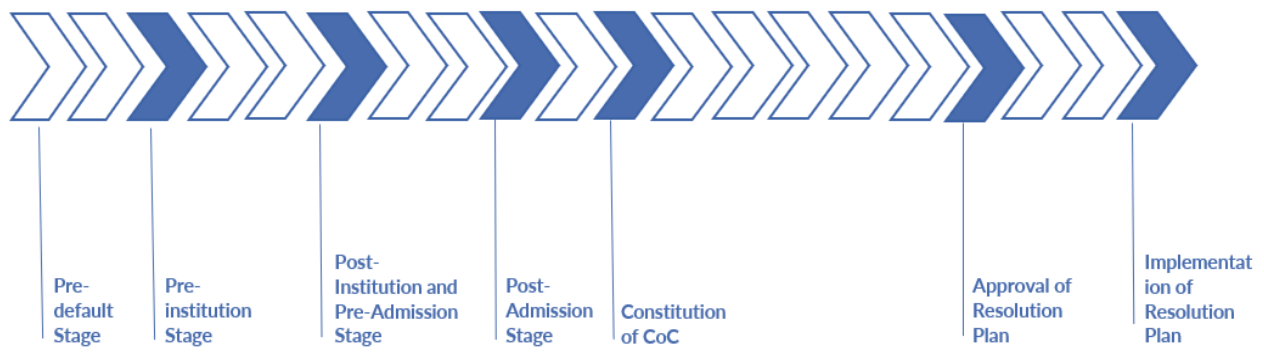
their *inter se* relationships, the potential for a consensual resolution, and the complexity of the financial and technical issues involved.

- 5.69. Recognising the role of mediation in reducing litigation, the Committee was in consensus that stages, areas and parties that engage in mediation must do so in such a manner that the timelines under the Code are not compromised in any way. **The Committee is of the view that fit cases for mediation exist in the following insolvency resolution processes, either with respect to the entire process being undertaken for a CD/corporate applicant or specific conflicts that arise during the process of the particular insolvency resolution process. In particular, the following processes were considered by the Committee:**

- a. CIRP initiated by FCs, OCs and the CD in a tailored manner respectively;
- b. Pre-packaged insolvency resolution process;
- c. Individual insolvencies;
- d. Group companies' insolvencies; and
- e. Cross-border insolvencies.

a. ***Mediation in Corporate Insolvency Resolution Process***

- 5.70. The Committee studied the suitability of application of mediation to CIRP and its implementation under each stage and in respect of particular circumstances/ granular issues during conduct of the CIRP that may be best resolved *via* mediation instead of litigation before the NCLT. For this purpose, the Committee divided the CIRP into several stages as represented below:



(i) ***Stage I: Pre-commencement stage:***

- 5.71. The Committee is of the view that given huge delays at the admission stage, the gap between occurrence of default, the filing and subsequent admission of applications under IBC can be effectively utilised to iron out differences through the mediation process. Further, mediation could be specifically helpful for OCs to resolve disputes with the CD at this stage. With respect to FCs, the Committee noted that several avenues exist for FCs to have amicably resolved the issues before approaching the NCLT under IBC – and in

practice, these are often adverted to before filing an application under Section 7 of the IBC.

- 5.72. For consideration, the Committee grouped pre-commencement / pre-admission stage cases into three categories: (a) pre-default, (b) pre-institution/filing of applications before NCLT, and (c) post-institution/filing but pre-commencement/admission of applications before NCLT.
- 5.73. *Pre-default stage:* The Committee noted that early detection and resolution of stress ties in with the object of the Code. At this stage, restructuring negotiations (with FCs such as scheduled commercial banks under RBI Framework Regulations, 2019) often involve complex financial arrangements and require cooperation among various stakeholders with divergent interests. Mediation can help facilitate constructive dialogue, promote mutual understanding, and enable parties to reach a consensual restructuring agreement that addresses the concerns of all stakeholders. By resolving disputes at the pre-insolvency stage, mediation can potentially prevent the need for formal insolvency proceedings, thereby preserving the debtor company's value and minimizing the adverse impacts on its employees, suppliers, and the broader economy. However, the **Committee is of the view that since this stage falls outside the formal insolvency framework of the Code, the use of mediation here may be encouraged by institutional lenders to achieve faster ‘out of court’ outcomes, where necessary. The Committee strongly feels that the resolution of private disputes amongst debtors and creditors at this stage would be of great help in terms of recovery and resolution without recourse to insolvency.**
- 5.74. *Pre-institution stage:* The Committee was of the unanimous view that **pre-institutional mediation would not strictly fall within the realm of the Code, as the process itself starts when the application upon ‘default’ is made.** However, the Committee also noted several provisions under the Code itself that provide for pre-institution requirements. For example, the notice raising demand under Section 8 of the Code that is sent by the OC to the CD notifying it of the default. It is the Committee’s view that legislated mediation provision for pre-institution stage may not be helpful as parties would presumably engage in negotiations before approaching AA, and would always have the option of reference of their ‘dispute’ to mediation. Here, to foster a culture of mediation, the NCLT, in its rules *vide* amendments to Form 3 (as provided for under Rule 5 of the AA Rules), may include an option for the OC to make an offer to mediate as a best practice. Such mediation may be governed by the 2023 Act, as the framework under the Code would include within its scope the conduct of mediations and the enforcement of MSAs reached between the parties only once the CIRP application is admitted. Furthermore, if the parties attempted mediation but failed, the aforementioned Form may provide that a declaration in the form of an affidavit to that effect be furnished to the

NCLT along with the demand notice and the application filed under Section 9. This may not only keep the NCLT apprised of the specifics of the situation but may also help avoid the conflict of interest at the IRP/RP appointment stage, as the person who served as a mediator cannot be appointed as an IRP or RP. The Committee recommends that **no new rights during CIRP proceedings (if initiated against the CD) can be created by an MSA entered into by the parties at the pre-institution stage. More importantly, the waterfall mechanism under Section 53 cannot be altered by such MSA at any cost.**

- 5.75. The Committee was of consensus that *selective reference to mediation* for large FCs or huge debt defaults may not be helpful and it might further impede the expediency of process to revive CD. This case for *selective reference to mediation* for MSMEs may be explored in limited circumstances, such as where the ‘default’ of smaller quantum (for example, INR 5 to 10 crores) exists, mediation may be provisioned under the Code for all categories of FCs – large or small, to the MSME. These might primarily be bilateral mediations only and may not involve the challenge of balancing third party interests. **The Committee is of the view that pre-institution mediations in cases initiated by FCs may be explored during later phases of implementation of insolvency mediation framework.**
- 5.76. Post-institution but Pre-insolvency commencement (admission) stage: This stage is the intervening period after filing of a CIRP proceeding but prior to the commencement of formal insolvency proceedings under Sections 7, 9 and 10 of the Code with the aim to reach a settlement agreement.
- 5.77. The Committee discussed that voluntary mediation may also be allowed for CIRP applications filed by FCs. Such mediations must be carried out within defined timeframes and with the parties' consent. They noted that there are plenty of instances in which the CD and the concerned FC reached a settlement, even in the later stages of CIRP. Hence, it may be reasonable to introduce mediations involving FCs in the first phase of implementation. However, the Committee noted that in any case, when an FC approaches the NCLT under Section 7 of the Code, it is highly likely that all avenues to resolve the ‘default’ or to restructure the debt have already been explored and exhausted. Mediation might find better use in cases of smaller debt defaults against a single FC and the OCs, where parties may not wish to pursue an insolvency process and believe that ‘mediation’ with a skilled neutral party would facilitate the payment of dues by the CD through restructuring or payment settlement agreements. This will also encourage corporate debtors under stress to project their plans for meeting obligations. **Taking into consideration every aspect, the majority of the Committee is of the view that mediations with FC as one of the parties be explored in the second phase of implementation.** That said, the framework will not discourage mediations where they are ongoing or proposed by the FCs. However, the benefit of the framework at the present

stage (especially MSAs) may not apply to mediations that are not covered by it. If the FCs engage in mediation prior to the commencement of the CIRP proceedings, a declaration to that effect may be furnished to the AA along with the application filed under Section 7. In the said declaration, the names of the mediator, counsels acting for the parties, and any participating third parties may be disclosed. Such intimation will be particularly helpful in assisting with conflict checks at the stage of appointment of the IRP or RP.

- 5.78. In considered view of the Committee, at present, strong case for encouraging use of mediation exists for OC initiated CIRP proceedings as they typically only involve repayment of money claims or disputes surrounding it. These disputes can range from the very straight forward to the highly complex issues, which are often ripe for mediation. The controversies might be about the facts, the applicable law or both and more often than not are cases where the CD just does not want to pay. Mediation here will avoid single OC-CD disputes that lead to the filing of insolvency applications. The Committee is of the view that mediation could be specifically helpful for OCs at this stage, due to their limited rights at the CoC level, as this may be the last avenue to resolve disputes with the CD prior to the appointment of the IRP and the constitution of the CoC.
- 5.79. The Committee agrees that **voluntary or consensual reference to mediation may be permitted with respect to OC initiated CIRP, without any concession on timelines from the NCLT (as discussed above) and with clear provision for automatic termination of mediator's mandate on the date of admission and/or upon expiry of timelines under the Code or 30 days from commencement of mediation, whichever is earlier. It is also recommended that the MSA resulting from such mediations only be permitted if no other CIRP proceeding exists against the CD as of date of NCLT's approval of the MSA.**
- 5.80. In terms of efficiency, multiple OCs' claims against the CD may be clubbed and mediated together (class mediations). The Committee noted that while this stage, in practice, typically lasts longer than the statutorily prescribed timeline, provision for mediation would be practical only if it runs parallel to the CIRP proceedings before the NCLT and does not amount to additional burden for the NCLT docket.
- 5.81. The Committee considered the manner of reference to mediation and was of the view that NCLT's discretion in reference to mediation may not be helpful under the Code and will not meet the object of delay avoidance. It was agreed that both parties here (i.e., the OCs and the CD) may, by consensus, initiate reference to mediation by filing a joint application with the AA that is duly acknowledged by the AA. The regulations prescribed by the IBBI may provide that the NCLT registry may send a copy of this joint application to the NCLT-annexed secretariat for the purposes of conducting mediation. It would

inject efficiency into the process as the NCLT would be informed of the intentions of the parties and allow them to exhaust the option of mediation before admitting the application filed under Section 9 of the Code. Simply put, the purpose is to ensure that the fact of parties exploring possibility of settlement is disclosed before the NCLT and is also recorded in its order for public information. This is particularly relevant as timelines under the Code are running parallelly and have cost implications.

- 5.82. Here, the Committee noted that precedent exists for settlement of cases before admission and the NCLT has been vested with the discretion to permit withdrawal of the application for initiating CIRP made by the OCs, on a request made by them before its admission.¹²⁶ The Committee noted that both NCLT and NCLAT, while have such discretion to permit withdrawal, the settlement between the parties must be voluntary and cannot be compelled by the said tribunals.¹²⁷ As statutory tribunals they are bound by the provisions of the IBC and cannot sit as court of equity. **At this stage, the tribunals may permit settlement via mediation at the option of parties and adjudicate insolvency application strictly as per the mechanism and timelines under IBC.**

(ii) Stage II: Post-commencement / admission of CIRP

- 5.83. This stage involves the period after admission of the CIRP by an order of the NCLT. The Committee was of the view that **limited application of mediation exists at this advanced stage of proceedings as presumably all amicable dispute resolution mechanisms have failed earlier and the dispute as such could not be resolved.**
- 5.84. The Committee considered impact of conducting mediation at this stage on third party *in rem* rights at length. The Committee noted observations of the BLRC that “...(t)he liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution...” meaning thereby that post-admission of an application for CIRP, the proceeding no longer remains a dispute between two parties but rather involves all the creditors of the CD. One member of the Committee observed that the ‘public’ nature of these proceedings post-admission do not make it prudent to conduct mediation, the inherent nature of which is confidential. The Committee noted that Entries 2 and 5 of the First Schedule to the 2023 Act also indicate legislative intent to exclude all disputes capable of having ‘*in rem* rights’ or ‘third-party rights involved’ from mediation. Further, at this stage, even if all parties do participate, abiding by timelines under the Code may be a challenge, and unless all parties are in consensus, mediation may not be helpful for lack of an outcome.

¹²⁶ Rule 8, Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

¹²⁷ *E S Krishnamurthy v Bharath Hi Tech Builders Ltd*, Supreme Court (2021).

- 5.85. In India, **where creditor-led regime is the mainstream and the most utilised insolvency resolution process under the IBC, the use of mediation may practically be limited** as (a) the promoters who have been placed out of control and the directors who are suspended may have turned hostile by this stage and may be unwilling to mediate; and (b) Section 29A of the IBC in any case technically prohibits negotiations with /participation of ineligible promoters.
- 5.86. Therefore, **the Committee is of the view that in the first phase it will be prudent to exclude post-admission stage cases from mediation.** This will be in the interest of an overall assessment of mediation's efficacy as a dispute resolution tool in the insolvency sphere and will also avoid the likelihood of litigations arising during the post-admission stages. The Committee was in consensus that the 'withdrawal of the application' process is an ideal procedural avenue to encourage the use of mediation, as the parties must reach a settlement to withdraw the application and endeavour to employ more creative forms of resolving and withdrawing the insolvency dispute.¹²⁸ That said, **the Committee cautioned that even in later phases, it will be imperative to apply mediation in such a manner that third-party interests are not altered or impacted without their express consent. The Committee clarifies that this will not bar voluntary withdrawal and settlement as it currently exists under the Code, for example, under Section 12A of the Code.**
- 5.87. It is the settled law that commercial wisdom of CoC is sacrosanct. Neither the RP nor NCLT (or other appellate adjudicatory bodies) could sit in appeal over its wisdom on such matters.¹²⁹ CoC may be utilized as procedural check on any unilateral move by either party. This may be achieved reasonably quickly in smaller claims' mediations and/ or where all parties (including the third parties) are ascertainable and convinced that certainty of mediation would be preferable to a litigated outcome. Here, mediation as process can dovetail into the existing provision for settlement and withdrawal and parties may be encouraged to utilize mediation as process to settle and withdraw cases under Section 12A of the Code. **The Committee noted that the reference to mediation here would not be confidential, and third parties, if any impacted, will have the opportunity to participate and raise objections (if any).**
- 5.88. Subject to implementational data in the first phase of mediation framework, the Committee was of the view that due to complexities of process on involvement of third

¹²⁸ Anusandhan, IBBI Publication available at: <https://ibbi.gov.in/uploads/publication/aa0794156d187acc797915be3f2a4a22.pdf> last accessed 10 June 2023.

¹²⁹ *Vallal RCK v. Siva Industries and Holdings Limited and Ors*, Civil Appeal Nos. 1811-1812 of 2022 decided on 03 June, 2022.

parties to the dispute and its cumbersome navigation of issues, the process of mediation does not appear feasible. However, this is left open to be considered at an appropriate time.

Application of Mediation to disputes and issues that arise during conduct of CIRP

- 5.89. The Committee further deliberated on specific dispute/conflict scenarios during the CIRP process, after its commencement, that might benefit from the use of mediation for their resolution and expediting the process. Unlike previous instances of recommended use of mediation (above), the resolution of these disputes/conflicts/issues would not completely obviate the conduct of CIRP. The direct outcome expected with the pronounced use and success of mediation for such disputes is lower rate of litigation of such issues and consequential achievement of efficiency of process – on time and costs. The Committee reviewed use cases that exist in the US and Italian insolvency regimes and have successfully deployed mediation to efficiently resolve such issues.
- 5.90. Re Handover of CD's control and information, books, etc. to the IRP/RP: Regulation 4(2) of the CIRP Regulations stipulates that the personnel of the CD, its promoters or any other person associated with the management of the CD shall provide the information within such time and in such format as sought by the IRP / RP, as the case may be. The current regulation requires cooperation from the CD to provide necessary information. The cooperation and timely communication of such information is crucial for the smooth conduct of the CIRP. However, there are instances where such information is not provided in a timely or efficient manner, and the IRP/RP is constrained to make an application for assistance before the NCLT.¹³⁰ The Committee is of the view that **in such situations, quick reference to mediation, where a neutral third party, facilitates this exchange of information would be helpful to iron out differences between a CD and the IRP/RP.** Since the CIRP Regulations do not lay down how the control and custody of assets and records will be taken over, a mediator's presence in agreeing to such procedure or process might help expedite the process and enable it to be completed in a streamlined and agreeable manner. This mediated agreement on key points of procedure and handover will also be helpful in avoiding any future disputes on this aspect. One member of the Committee noted that here it must be specified that an MSA cannot dilute Section 19(2) of the Code.
- 5.91. Re Claims Collation: The primary procedure for participation in the CIRP for all creditors (specifically, OCs, including workmen, employees and the government) and the

¹³⁰ Section 19(2), IBC.

subsequent liquidation process (should the CIRP fail) is the submission of claims to the IRP/RP.¹³¹ The public announcement calling for claims is a facet of due process, and the moratorium is aimed at protection of the estate's value against individual actions and facilitate insolvency procedures in a fair and orderly manner. Parallely, all creditors participate in submission of their claims to the IRP/RP for consideration of the liabilities owed by the CD against them while resolving insolvency and for distribution of liquidation estate in case of liquidation (if the insolvency resolution fails). Failure to submit the claims results in non-participation, which may have adverse legal effects on such creditors including non-consideration of their claims in the resolution plan and their extinguishment upon its approval.¹³² In case of failure of CIRP, this further extends to the case where CD is dissolved pursuant to liquidation of CD's assets.¹³³

- 5.92. The Committee noted that with respect to claims collation by IRP/RP, numerous applications under Section 60(5) of IBC are filed by entities / individuals who are dissatisfied with full / partial rejection of their claims. Even though these litigations do not put a halt to resolution process which is parallely carried on by the RP and the CoC, the resources of the corporate debtors are drained, value of the assets is depleted, and the substantial time of the resolution professional is consumed in pursuit of these litigations.
- 5.93. The Committee further noted that the RP has no power to resolve such claims within the IBC framework. The disputes during the claims collation process, such as the classification of creditors as FC or OC, the amount of admitted claims, grievances against rejection of claims, corporate guarantees, personal guarantees, etc. can be resolved through the mediation route, thereby saving precious judicial time.
- 5.94. This will also be helpful in resolving inter-creditor disputes which fall in the same category under the distribution waterfall. For example, a category of cases to consider here may be the issue of 'disputed claims' or claims by a party in litigation against the CD. Here, if a notional value is assigned to their claims collectively in the resolution plan (based on their assessment at claims collation stage), mediation will offer the relevant stakeholders/creditors an avenue to resolve their individual entitlement in this pool. It is clarified that disputes between creditors or otherwise in relation to the admission or size of a creditor's claim should not be considered as affecting third parties simply because of the fact that this will have an impact on the CoC's constitution. Another example of a dispute fit for mediation is when an RP has failed to consider an FC's exclusive charge over an asset while computing liquidation value.

¹³¹ Section 13 of the Code.

¹³² *Ghanashyam Mishra v Edelweiss*, 2021 SCC Online SC 313: The Supreme Court of India held that upon approval of the resolution plan, all claims which are not part of the plan stand extinguished.

¹³³ The liquidation process results in dissolution of the company under section 54 of the Code.

- 5.95. **It was agreed by the Committee that in case a creditor is dissatisfied with the decision of the RP, it may refer the issue to NCLT, which will make a reference to mediation if it deems fit (subject to automatic termination of the mediator's mandate upon statutory timelines' expiry).** In such mediations, since RP is the decision-maker in cases of rejection of claims, it cannot act as a mediator, and hence an independent neutral third party must be appointed as a mediator.
- 5.96. In most cases, where claims of same nature can be clubbed and deliberated for settlement (referred to as class mediations), mediation can prove to be a potent efficacious tool. The NCLT, while referring the dispute to mediation, may consider such consolidation of claims.
- 5.97. While mediation is not an adversarial adjudicatory process, it may provide some semblance of 'opportunity of hearing' to the creditors who may not otherwise be able to participate fully in the process, and hence the resolution process may result in reduced litigation. Even though it might not impact the creditors' final realisation of their debt, a more streamlined settlement process may arise when all parties involved feel heard and their concerns are addressed.
- 5.98. Re Inter-Creditor Disputes at CoC level, including plan mediations: The CoC is bestowed with commercial wisdom to resolve insolvency. Mediation as a dispute resolution process appeals to parties for reaching mutually agreeable commercial solutions, without getting into complex legal issues. In other words, here since more than two 'decision makers' are involved, mediation can be seen as a form of "democratic decision-making". In that sense, a neutral third party mediator skilled in subject matter issues is expected to function as a key tool in achieving the consensus and CoC majority (of 66%). Mediation may be able to better facilitate the CoC reach a 'common ground' on specific issues and facilitate early resolution and voting on the processes. Plan mediations have also proven to be successful in the US and Italian contexts, where it is observed that an attempt at mediation can lead to constructive conversation, moderation of positions and eventual consensual resolution.
- 5.99. Given that most inter-creditor issues at the CoC level may largely be driven commercially and are time-sensitive, the **Committee is of the view that mediation, while respecting the party autonomy in commercial aspects of transactions, would be best suited to iron out differences and will serve as a potentially powerful tool by presenting an opportunity to navigate the plan process, address objections, consider competing plans, and overcome other obstacles to approval of a resolution plan by the CoC.**

- 5.100. Since mediation is a commercial tool, the legal validity of all actions and discussions, including the voting process, shall remain as is currently required under the Code. Adjudication by NCLT does not have any role in the plan approval process of the CoC.
- 5.101. **The Committee also noted that the key to the success of such mediations will be (a) mediator appointments with appropriate expertise and skillsets, and (b) a dedicated attempt to reach a resolution through mediation with the conduct of *inter-creditor issues at the CoC level along with CIRP timelines running parallelly.***
- 5.102. Re Interlocutory Applications: The Committee observed that mediation may be an effective process in resolving issues underlying various miscellaneous interlocutory applications (“IAs”) filed by stakeholders during CIRP, where the issue is bi-partite or tri-partite between the CD/ IRP/RP/CoC and the applicant. One view is that this could aid in expediting the closure of CIRP, especially in cases where approval of the resolution plan by the CoC is pending on account of multiple IAs filed before the NCLT. That said, **the Committee noted that mediations involving multiple parties in this category may raise transparency and due process concerns and therefore are not recommended at this phase.**
- 5.103. Ownership of Assets: The Committee noted that often disputes relating to the ownership of assets arise when the RP takes possession of the CD’s assets (or when the liquidator forms the liquidation estate). Such disputes may also involve third parties that are not creditors of the CD, but have interest in the CD’s assets (for example, joint owners of a property). At times, these disputes may threaten the preservation of the CD as a going concern both during the CIRP and under a resolution plan. **The Committee was of the view that RP with consent of the CoC may consider reference of the dispute to mediation, where feasible in such cases, unless an urgent interim relief is required to be pursued for protection and preservation of CD’s assets.**
- 5.104. Re Avoidance proceedings: Members of the Committee discussed that the provisions dealing with avoidance transactions contain generalised and objective criteria. In some cases, mediation may be helpful for parties involved in such transactions due to limited factual disputes requiring adjudication and achieve consensus on disputes facts. Here, mediation can be fruitful on issues of applicability, merits and quantum under question. Countries such as the US (especially Delaware) place emphasis on using mediation to resolve avoidance actions. Since these actions often involve heavy factual determinations by courts, and may involve expenditure of significant time and money, mediation is encouraged as an alternative to court-led dispute resolution for avoidance actions.
- 5.105. Some members were of the view that this is generally an automatic process as facts are largely clear and there is no dispute as such. In such cases, mediation may be an empty

formality as there is no role of party consensus and the action can't be reversed without any order of the NCLT. Mediator will be unable to add value, especially with respect to enforceability. After much deliberation, the Committee was of the view that certain types of causes of action, such as the avoidance of alleged preferential transfers, are often more susceptible to resolution by mediation, because (i) the elements of the claim are generally straight-forward, (ii) the defences are limited by the statute and (iii) the parameters of the facts necessary to support those defences are relatively well-understood by experienced practitioners.

- 5.106. The IBBI Q2 report for 2023 reflects that of the 808 resolved CDs, 200 applications in respect of avoidance transactions to the tune of Rs 1.13 lakh crores have been pending before the NCLT. It is understood that when these disposed of by the NCLT, a likely impact will be observed in the realization value under the resolution plans. Mediation in respect of avoidance actions could help in enlarging the asset pool of debtor, in a cheaper and more time bound manner than typical avoidance actions that often continue, even after the resolution plan has been approved under the Code.
- 5.107. The purpose of mediation is not to reduce the docket of tribunals and courts in matters relating to public policy and governance of public funds, which necessitate judicial adjudication. This may include avoidance actions, given their inherent nature and impact on the overall asset value during the resolution process. The Committee noted observations of the Delhi High Court in *Tata Steel BSL Limited v. Venus Recruiter Private Limited & Ors.* This case indicates that litigation may be the only solution to the problem of avoidance proceedings.
- 5.108. **The Committee was of the view that in the first phase, avoidance actions may not be fit categories for introduction of mediation and might foment, instead of reducing litigation. Further, in case of issues related to avoidance transactions that require examination and assessment of fraud or *mala fide*, mediation will not be fit dispute resolution tool at all.**
- 5.109. *Re Public Purpose*: The Committee recommends that any actions or activities incompatible with 'public purpose' must be expressly excluded from the ambit of mediation. Importantly, the language employed in the Arbitration Act, 1996, can be imported. For instance, Section 34(2)(b)(ii) states that an arbitral award may be set aside if it (i) is obtained by fraud or corruption, or (ii) is against the fundamental policy of Indian law, or (iii) is in conflict with the basic notions of morality or justice.

(iii) Stage III: Approval of Resolution Plan

- 5.110. The Committee noted that the pendency of litigation, challenging rejections of bids or approval of resolution plans by creditors, and unsuccessful resolution applicants delay the

entire process by causing delays in the approval and implementation of resolution plans. The CoC comprises an identified class of FCs, and therefore whenever a resolution plan wipes away the claims of OCs and other stakeholders, such creditors and stakeholders are dissatisfied, and the approval of such a plan is challenged.

- 5.111. While the Committee notes that the NCLT may provide an option to the parties to consider resolving their issues *vide* mediation, specifically major OCs, whose supplies are lifelines for the business of CD, and refers the dispute to mediation only upon consent of the parties if it deems fit. This may help in achieving consensus in the resolution plan, reducing opposition on resolvable issues, and assisting in maintaining relations with the existing stakeholders to some extent. **However, exercising such an option may be futile as it would necessitate the involvement of multiple parties (OCs, CoC, and RA), making it cumbersome for them to reach a consensus. Ultimately, the purpose of avoiding delays may remain unaddressed.**

(iv) Stage IV: Implementation of Resolution Plan

- 5.112. *Post-approval of Resolution Plan:* During implementation of the approved resolution plan by the Successful Resolution Applicant (“SRA”), in case of any dispute or conflict, **the Committee was of the view that a reference to mediation (with a timeline of 30 to 60 days for completion subject to the implementation schedule provided in the resolution plan) prior to approaching the NCLT for liquidation may be made. The Committee, during its deliberations, noted that a mediation clause of this nature may be inserted/ provisioned for in the resolution plan itself, if deemed appropriate at the time of finalisation of the resolution plan.** This may particularly be helpful when no ‘urgent grounds’ for NCLT’s consideration exist (similar to Section 12A of Commercial Courts Act, 2015).
- 5.113. It may be used to facilitate dispute resolution for issues such as priorities in security interests (on a *pari-passu* charge basis), distribution of realisations amongst creditors, etc. Where a situation is likely to lead to litigation, mediation may help creditors find alignment in their interests and settle how their dues should be paid out from a specific kitty allotted by resolution applicants. Here, it is noteworthy to clarify that mediation may be pursued only in relation to the agreed terms contained in the resolution plan, and no other modifications or adjustments (except for the extensions mutually decided) may be made.
- 5.114. Such disputes are likely to be successfully mediated and are more likely to provide agreeable outcomes, as the assumption here is that every party (SRA and any other concerned aggrieved party) has a common objective, i.e. implement the resolution plan to avoid liquidation under Section 33(3) of the Code. At this stage, by facilitating the

smooth implementation of the resolution plan, mediation can contribute to the overall effectiveness and objectives of the IBC.

(v) Stage V: Liquidation Stage

5.115. Since, insolvency usually precedes the liquidation proceedings, it is the considered view of the Committee that any liquidation proceeding initiated would presumably mean that all avenues of revival of enterprise or settlement of creditor dues have been exhausted. Generally, the Committee during its meetings was of the view that the scope of mediation at liquidation stage is the least as all potential issues have either been argued, brought up and decided – thus, nothing remains to mediate. As such, no ‘*mediable*’ dispute would exist at the liquidation stage. The loss of time in exploring mediation at that stage might lead to further loss in value of the enterprise and impede the object of IBC, i.e., value maximization of enterprise. Further, mediation is not particularly helpful in case where no scope of CD continuing exists. **Thus, the Committee was of the view that at the first phase of implementation, mediation at liquidation stage may not be recommended.**

b. *Pre-packaged resolution process*

5.116. The Committee considered whether mediation should be applicable and available to parties under Pre-packs that are exclusively for MSMEs and where negotiation and ‘out of court’ resolution is already the backbone of the process. **In case of Pre-packs, mediators can aid the CD and creditors in negotiating and developing a mutually agreeable strategy for resolution. The Committee was of the view that mediation can be employed for the preparation of a base resolution plan that enters the NCLT approval route upon application.**

5.117. The application of mediation to this process will be to formalize the facilitation of efficient and time bound insolvency resolution. **The Committee recommended that reference to mediation here may be consensual, with expense/cost of mediation to be reimbursed to parties upon successful resolution. The Committee also cautioned that to maintain the sanctity of the process, the mediator must be a neutral third party. The Committee notes that avoidance actions may be kept outside the purview of mediation at the present stage to eliminate scope of judicial scrutiny of MSAs and quicker disposal of mediation proceedings.**

5.118. The Committee noted that Italy, Spain and Japan have developed stylised, ‘out of court’ workout mechanisms in which mediation plays a significant role in helping parties come to a resolution. These ‘out of court’ mechanisms have some features of formal proceedings, such as the extension of a moratorium and cram-down as well.

5.119. Here, reference may be drawn from these systems where subject matter experts are appointed as mediators and are expected to help in the creation of or assessment of repayment/ turnaround plans. The mediator here can adopt different techniques to persuade and assist parties in establishing a common ground for cooperation in the exchange of the financial and other information necessary for meaningful plan negotiations. The mediator can also aid in other managerial aspects of a base plan mediation such as coordination amongst creditors for the purposes of voting on the plans or organising meetings between the debtor and creditors.

c. *Fast-track Corporate Insolvency Resolution Process:*

5.120. The Committee recommends introduction of mediation within the fast-track corporate insolvency resolution process under the Code in the same manner as discussed in Part C above in this Chapter III, subject to the mediation being run parallel with the fast-track CIRP.

d. *Cross Border and Group Insolvency cases:*

5.121. The Committee, during its meetings, noted the international experience and success of mediation in such cases globally. It also noted that such cases are highly intricate and complex, requiring the involvement of specialised technical professionals for ironing out issues. However, a few members observed that mediation may not be suitable for dealing with complicated cross-border insolvency issues, and hence a cautious approach needs to be adopted in the Indian context.

(i) *Cross border insolvencies*

5.122. Experience from large cases in the US such as *Lehman* and *Maxwell Communications* (refer to Part IV A of the Paper) has shown that mediation is very useful in cross-border insolvencies and determination of complex claims where there is a divergence/ uncertainty of legal position. The Committee noted that in such cases, mediation helps in providing a centralized ‘adjudication system’. For instance, in the bankruptcy of *Maxwell Communications*, proceedings were commenced in both the US and the UK, and an ‘examiner’ was appointed to mediate and ‘*resolve conflicts among the jurisdictions and, ultimately, to develop a coordinated plan and scheme that harmonized US and UK insolvency law*’.¹³⁴ In *Lehman Bros.* claims mediation was particularly helpful since it involved complex, factual issues, and had it gone to litigation, could have resulted in different outcomes in different national courts, that could have been conflicting.

¹³⁴ Part IV.

5.123. The Committee noted various academic and industry views that support introduction of mediation and argue that mediation would help make resolving cross border insolvency disputes a far more seamless endeavour, especially in large and complex cases. One such paper¹³⁵ refers to ‘Jet Airways’ insolvency proceedings in 2019, where insolvency proceedings were simultaneously commenced in both India and the Netherlands for the sale of the same assets, i.e., the planes that had been taken over by an Indian nationalized bank. The NCLT, having been apprised of this parallel proceeding, did not commit to liquidating the plane.¹³⁶ The Dutch Trustee challenged the NCLT decision regarding ‘non-recognition’ of Dutch proceedings before the NCLAT. After reviewing the appeal, the NCLAT directed the RP of ‘Jet Airways (India) Limited’ to explore the possibility of having a joint ‘corporate insolvency resolution process’ with the Dutch Trustee (Administrator of ‘Jet Airways (India) Limited’ (Offshore Regional Hub) based on mutual cooperation. Pursuant to the directions of the NCLAT, the RP and the Dutch Trustee entered into an agreement termed the ‘Cross Border Insolvency Protocol’ to facilitate the settlement process. The NCLAT, through its order dated September 26, 2019, approved the aforesaid agreement.¹³⁷ This particular case serves as an illustration of how cross-border insolvency disputes can be settled by enabling coordination and cooperation between the RP and its foreign counterpart.

(ii) Group insolvencies

5.124. In group insolvencies, mediation can facilitate coordination of meetings between the debtors and other key stakeholders, which can result in coordinated reorganization plans. The Committee noted that amongst others, UNCITRAL Model Law on Enterprise Group Insolvency also advocates the use of mediation to resolve disputes between enterprise group members concerning claims, whether arising within or outside the enterprise group.¹³⁸ In such cases, international experience indicates that mediation helps in coordinating different aspects of insolvency proceedings, such as with creditors/CoC for the purposes of voting on the plans or organising meetings between the debtor and creditors, in respect of resolution plans.

5.125. Presently, there is no guidance on how insolvency proceedings instituted in other jurisdictions should be recognised in India and how communication and cooperation between AA and foreign courts can be facilitated. Moreover, India has not yet ratified the UNCITRAL Model Law on Cross-Border Insolvency. Given the current status of

¹³⁵ Gupta, SK, ‘Mediation in Insolvency: A Potential Game Changer’, IPA - ICAI Journal, 2022.

¹³⁶ Company Petition No. 2205 (IB)/MB/2019 in NCLT, Mumbai Bench.

¹³⁷ *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 707 of 2019.

¹³⁸ Article 10, UNCITRAL Model Law on Enterprise Group Insolvency, 2016.

implementation of these mechanisms, **the Committee is of the view that these cases may be dealt with separately at a later time, once overarching cross-border insolvency framework for implementing the same is introduced by the Government. It is clarified that the settlement mechanism, as currently implemented by the parties in such matters, may continue until then.**

e. *Individual Insolvency*

- 5.126. The Committee reviewed Part III of the Code and considered the applicability of mediation to three categories of individuals, namely:- (a) personal guarantors to CDs; (ii) individuals with partnership firms or sole proprietorships, and (iii) other individuals in their personal, non-business capacities (individual insolvencies).
- 5.127. The majority of insolvency and bankruptcy proceedings involving individuals may not involve multiple stakeholders, higher amounts of debt, or contentious issues requiring adjudication by tribunals. The very insolvency process entails the inclusion of sophisticated legal procedure and related legal and financial documents, which lead to incurring heavy costs. Mediation as a tool to resolve issues of insolvency and bankruptcy can eliminate these hassles. The attached issue of stigma regarding insolvency for a person is a larger concern – both culturally and economically, especially when the individual is a small business owner. Individual insolvencies are thus fit cases for mediation.
- 5.128. In this regard, the Committee noted recommendations of IBBI ‘Report of Working Group on Individual Insolvency India’¹³⁹ that mediation and counselling would be useful complementary mechanisms to the structure for individual insolvency in the Code. This report duly noted the problems faced by individuals lacking financial and legal means and experience. The report highlighted the importance of non-judicial assistance in order to encourage the informal negotiation settlements and suggested “*the intervention and assistance of a trained cadre of resolution mediators*”. At the time, the report observed that mediation and counselling frameworks may be introduced in the Code at a future date in context of individual insolvencies.
- 5.129. **The Committee is of considered view that at present it may be best to consider introduction of mediation for insolvency resolution process of individuals. In these, the personal element of ‘debtor’ is involved and helps bring in individual decision making to the table leading to efficient resolution. Further, there are a low number**

¹³⁹ The Report of Reconstituted Working Group, October 2018 available at: https://ibbi.gov.in/uploads/resources/Final_report_of_WG_on_Individual_insolvency-Oct18.pdf last accessed 11 June 2023.

of other stakeholders involved, with usually zero to very few third-party interests, and the capacity of the individual to take decisions is largely independently, which presents a high likelihood of mediation being successful in cases of individual insolvency.

- 5.130. **With respect to the framework for implementation of mediation in individual insolvencies, the Committee recommends that in the first phase, mediation shall be made voluntary at both pre-institution and post-filing stages.** In case of the latter, the mediation ought to run parallel to the procedure under the Code and must be conducted by mediators skilled at the technical issues in the particular case and experienced with resolution of personal estate disputes.
- 5.131. Sections 94 to 120 of the IBC govern the insolvency resolution process in relation to all three categories of individuals. **For the first phase of implementation of insolvency mediation, these proceedings are also fit cases where voluntary mediation may be considered pre-admission, but after submission of the RPs report.** Recently, the Supreme Court of India has held that the RP's report is a facilitative fact collection process, after submission of which the adjudicatory process begins.¹⁴⁰ It may be prudent at present to statutorily facilitate mediation between the parties once such report has been filed under Section 99 of the Code and the parties are amenable to 'settle' the matter 'out of court' within the statutory timelines under Part III of the Code.

IV. Other Umbrella Issues

a. Private & Confidential Nature of Mediation via-a-vis Third Party Rights & Rights In Rem

- 5.132. Usually, the resolution reached at the end of mediation proceedings and entered into by them as agreement is binding on the parties. If court proceedings are underway, typically such MSA would not be considered as final and binding unless taken on record and confirmed by the said court.¹⁴¹ These MSAs bind parties to it and the parties to the proceedings where such orders are passed. In a private dispute, this may not be particularly of concern. However, in insolvency proceedings, an impact of a privately mediated MSA, confirmed by the court/NCLT might have larger ramifications given the 'collective' nature of resolution and '*in rem*' nature of the proceedings.

¹⁴⁰ *Dilip B Jiwrajka v. Union of India and Ors.*, 2023 SCC Online SC 1530.

¹⁴¹ This is the case (a) where the mediation was undertaken at the instance of court without specific provisions of any legislation guiding or mandating conduct of mediation, and also (b) where legislation provides for mediation and the method of resolution of dispute filed before a forum/court.

5.133. The Committee is of the view that the potential conflict and issues that might impact third parties may be bundled in two groups – (a) when such MSA is reached before admission / commencement of CIRP, and (b) when the MSA is reached after admission / commencement of CIRP. In case of former, the dispute remains bilateral between the CD and the creditor, and thus, the confidentiality and private agreement under the MSAs might not impinge on third party or *in rem* rights. The latter might have an element of potential conflict and threat of multiplicity of litigations, if a private and confidential MSA between limited parties (to the exclusion of other known stakeholders) is agreed and enforced towards an outcome of closing the insolvency proceedings or closing rights of the third parties/ *in rem*. Here, procedural justice also suffers as the rights were not represented and considered before closing a decision. The Committee noted that in post ‘commencement’ of insolvency cases, the US practice may be helpful.

5.134. **In view of the above, the Committee is of the view that once such MSA is confirmed by the NCLT and forms part of the judicial order, while it will not directly bind third parties and rights *in rem*, the terms confirmed and agreed to therein will bind the parties to such MSA.** Once such MSA is before the NCLT for confirmation, the salient features of the MSA which may require public knowledge might be released giving opportunity to public and stakeholders to raise objections, if any. The objections raised by the third party will then be assessed on independent grounds and the arguments on *in rem* rights would be heard in this context too. Here, the NCLT may exercise limited discretion to only ascertain the impact on third party rights or rights *in rem*. If the commercial decision agreed to in the MSA limits or narrows the scope of insolvency proceedings, it may separate agreed-upon points in the MSA and distinctly only keep disputed issues *re* third parties alive for its determination.

b. *Impact of Moratorium*

5.135. The Committee discussed the impact of moratorium under Section 14 on the mediation of ongoing CIRP proceedings and **recommends that to enable insolvency mediation parallel to CIRP proceedings, specific exclusion of mediation (whether ongoing or initiated post grant of a moratorium) from the scope of the term “proceedings” under Section 14 (1) (a).**

c. *Impact on disqualification and restrictions under Section 29A*

5.136. The Committee noted that under the present scheme of IBC, the erstwhile promoters and the management of the CD are eligible to settle the matters under section 12A and the bar under section 29A is not applicable to them as the offer made by them to settle the case

comes under the design of section 12A.¹⁴² **However, their eligibility to participate in the CIRP as a resolution applicant will continue to be governed by Section 29A only, and if they are otherwise ineligible to participate in the submission of a resolution plan, mediation cannot be used as a vehicle to overcome this statutory restriction and offer settlement.**¹⁴³

d. Specific Exclusion of Certain Disputes from the ambit of Mediation

5.137. The Committee noted that not all types of disputes are fit for mediation even under IBC and is of the view that at present approach similar to other legislations such as the 2023 Act, where specific exclusions of matters not fit for mediation are provided, may be adopted. In addition to the above, for the present phase, only where specific notification for mediation of a dispute is made under the IBC must be enabled.

5.138. This approach may be revised based on experience of first phase of implementation of mediation framework under the IBC.

V. Enforcement mechanism for mediation outcomes

5.139. Ensuring a robust enforcement mechanism for mediation outcomes is vital for the credibility and effectiveness of mediation under the IBC. The IBC can be suitably amended by inserting an enabling provision providing a statutory basis for the enforceability of MSAs.

5.140. **The Committee is of the view that enforcement of MSAs could be streamlined by allowing parties to directly approach the NCLT or the relevant appellate authority for the enforcement of such agreements, without the need for initiating separate legal proceedings. The process of ‘confirmation’ of MSAs by the Adjudicating Authority, i.e. the NCLT (or appellate fora), shall be mandatory and ought to be strictly completed within a short time period of 7 to 10 days by the ‘confirming’ authority.**

5.141. **The Committee recommends that the MSA be confirmed before the NCLT (or appellate fora) in the same proceedings as the one instituting the case in any mediation conducted within the expressly provided framework under the IBC. It is**

¹⁴² *Andhra Bank v Sterling Biotech*, Company Appeal (AT) (Insolvency) No. 601 of 2019.

¹⁴³ *Bank of Baroda v Sisir Kumar*, Company Appeal (AT) (Insolvency) No. 579 of 2020. This position has also been discussed and confirmed by the Supreme Court in *Arun Kumar Jagatramka v Jindal Steel and Power Ltd.*, 2021 where the court prohibited backdoor entries to otherwise ineligible promoter even *via* a compromise scheme under the Companies Act, 2013 when liquidation proceedings were ongoing.

observed that currently this practice is followed in cases where withdrawals pursuant to settlements between the concerned parties are permitted by the NCLT under Rule 8 of the AA Rules or Section 12A of the Code and Regulation 30A of the CIRP Regulations. In case of any breach of the settlement terms or non-compliance of the orders confirming withdrawal, the aggrieved party may approach the NCLT for re-instatement or revival of the CIRP proceedings.¹⁴⁴ Additionally, there are several other Indian legislations that expressly provide for mediation and implement the framework of ‘court’ confirming MSA on the basis of the mediator’s report.¹⁴⁵ **That said, in the event of inconsistency between an NCLT confirmation order and an MSA, the former must prevail.**

- 5.142. Here, it is important to highlight the key distinction between mediation and the withdrawal mechanism. In contrast to the Section 12A arrangement, which requires statutory approval of 90% of the CoC, the mediation is only deemed effective when both the CD and all of its creditors (100%) agree to it. This implies that the voices of the dissident creditors are heard and that there is no room for cramdown in mediation. In the first phase, this is particularly achievable as the pre-admission stage mediations have determinable parties, including creditors who are already part of the proceedings.
- 5.143. **The Committee notes that recognizing the MSA confirmed by the NCLT as final would incentivise parties to settle the dispute at the earliest, especially in the case of agreements reached at the pre-admission stage.** However, once the MSA has attained finality (after NCLT's confirmation), any challenge to the said settlement agreement must be sparingly permitted and only on limited grounds. In this regard, the Committee suggests that the language employed in Section 28 of the 2023 Act may provide guidance. Section 28(2) lists the grounds on which an MSA can be challenged, including fraud, impersonation, and corruption. Simply put, an MSA can be challenged, for example, if consent is obtained by subterfuge and/or when one party enters into mediation to defraud the other party. In addition to these reasons, at the post-admission stage, the RP may question the validity of the MSA if it violates the *in rem* rights of other creditors or that it constitutes a preference transaction. For instance, the RP can dispute the inclusion of the clause on 'set-off' in the MSA entered into between the CD and its creditor (be it an OC or a FC). Even if the agreement was reached before the commencement of CIRP, it may still have implications at the post-admission stage. In some circumstances, set-offs may be treated as a preference, as they enable one creditor

¹⁴⁴ *Vivek Bansal v. Burda Druck India Pvt. Ltd.* (Company Appeal (AT) (Insolvency) No. 552 of 2020); *M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Ltd.* (Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021).

¹⁴⁵ Section 81 of the Consumer Protection Act 2019; Section 10(2) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013; Section 6(6) of the Maintenance and Welfare of Parents and Senior Citizen Act, 2007; Rule 25 of the Mediation and Conciliation Rules, 2004.

to adjust its portion of the claim against the claim of the CD before any other creditors are paid from the insolvency estate.¹⁴⁶

VI. Making mediation process under IBC cost-effective

- 5.144. Determining a fair and transparent fee structure and payment mechanism for mediation services is essential to ensure accessibility and affordability for all parties involved in insolvency and bankruptcy disputes. In the US, in a few states, insolvency mediation is conducted *pro-bono* and the mediator's fee, if any is determined by consensus of parties with the approval of bankruptcy courts after completion of the mediation. This has contributed to success of insolvency mediations to a great extent. In the Committee's interactions with the American Bankruptcy Institute and a few US Bankruptcy Court judges (sitting and retired), the Committee learnt that the manner of mediators' appointment, their eligibility for such appointments and their fee structures vary across bankruptcy courts in the US. This wider set of skilled persons volunteering to act as mediators (on *pro bono* or *low bono* basis) as well as the scope of sitting bankruptcy court judges to act as mediators in matters has led to keeping mediation costs low and resulted in mediation becoming a popular choice of insolvency disputes resolution.
- 5.145. The Committee notes that, generally, court-mandated mediation at court-annexed mediation centres in India is very cost-effective as it does not entail payment of a court fee¹⁴⁷ or legal or professional fee to a representative, as it is neither mandatory to engage one nor usually required. Moreover, a nominal fee charged at the time of institution of case before the court is directed towards bearing the cost of mediation. The fee of mediators, if any, is also nominal.¹⁴⁸ Under the 2023 Act, the cost of mediation is to be prescribed¹⁴⁹ by the Central Government *vide* separate rules. The 2023 Act also provides that unless the parties have agreed otherwise, the cost of mediation including the fee of mediators and the fee of institutional mediation service provider shall be borne equally between the parties.

¹⁴⁶ In *Vijay V. Iyer v. Bharti Airtel*, the RP contended that set-offs arising from the spectrum transfer agreement and operational service agreements signed by Aircel Ltd. and Airtel Ltd. could not be recognised as they acted as a preference. The NCLT refused to accept the argument and held that all OCs could exercise their pre-existing right to set off (2019 SCC OnLine NCLT 9584). However, the NCLAT, in its brief order, set aside the NCLT's decision and directed Bharti Airtel to pay the amount in full, i.e. the amount without applying set-off (Company Appeal (AT) (Ins) No.530 & 700 of 2019).

¹⁴⁷ According to Section 16 of the Court Fees Act, 1870, the plaintiff is entitled to seek a refund of the court fees (the amount paid in respect of the plaint) in a court-ordered mediation.

¹⁴⁸ For instance, the Consumer Welfare Fund Guidelines, 2023, prescribe that an empanelled mediator will be paid a fee of ₹ 3,000 for successful mediation in the District Commission and ₹ 5,000 for successful mediation in the State Commission.

¹⁴⁹ Section 28, 2023 Act.

5.146. With a specific focus on mediation under the IBC framework, the Committee considers several approaches regarding cost allocation among the parties, including (a) equal sharing of costs; (b) allocation based on the parties' financial capacity at the time of initiation of mediation; and (c) allocation based on the outcome of the mediation process. Before arriving at a conclusion, the members of the Committee put on record some unignorable flaws that both (b) and (c) suffer from:

- a. *Re (b)*: It may lead to unfairness as the 'more financially sound party' would carry the burden of mediation costs. Above all, in most situations, this method will disincentivize the creditors from participating in mediation, as it would compel the creditors to bear the lion's share of the mediation cost since their financial health would be more stable than that of the debtor.
- b. *Re (c)*: If implemented, it may take away the parties' right to act freely and may coerce them to reach a compromise anyhow. To avoid adverse consequences, such as the penalty imposed on the 'non-interested party' or 'non-cooperating' party to incur the mediation expenses, the parties may pretend to participate willingly in mediation. Further, the parties would only make strenuous efforts to produce a positive outcome without examining every aspect with fastidious care. Therefore, the result of the mediation should be independent of the decision on the allocation of costs. The parties must have sufficient room to negotiate and avail the remedy to move the NCLT to either initiate or restore the CIRP proceedings in the event of unsuccessful mediation.

On weighing the merits and demerits of every approach, the Committee unanimously agrees that the parties must bear the expenses in connection with the mediation process in equal shares. Equally important, the parties must have the liberty to mutually decide how the costs ought to be allocated.

5.147. It is observed that CIRP is a complex procedure with numerous financial transactions, sometimes necessitating meticulous scrutiny. This is particularly true for CIRPs involving CDs of significant asset size, where the process costs, known as the insolvency resolution process cost ("IRPC"), can become considerable and intricate. IRPC, as defined under Section 5(13) of the IBC comprises various costs, including the remuneration of the RP, expenses incurred by the RP in running the business of the CD as a going concern, and costs specified under Regulation 31 of the CIRP Regulations, among others. In this context, the Committee considered whether mediation-related costs should be included within the wide bracket of IRPC. To unpack this question, the members studied the American jurisprudence and observed that there are numerous US cases in which the insolvency estate has paid the mediation costs.¹⁵⁰ However, the

¹⁵⁰ For e.g., *In re CF Holding Corp. and Colt's Manufacturing Co.*, Nos. 92-21038, 92-21039 (Bankr. D. Conn.). Also, see Jacob A. Esher, 'Alternative Dispute Resolution in U.S. Bankruptcy Practice', available at:

American practice cannot be blindly adopted in India as the Indian circumstances are different. Given the limited pool of assets that is always insufficient to repay the debt of all the creditors,¹⁵¹ the inclusion of expenses associated with mediation will only diminish the size of the insolvency estate, thereby further reducing the amount fought to be recovered by creditors. Additionally, if mediation costs and fees were identified as part of the IRPC, mischievous parties would abuse the mediation mechanisms by (a) prolonging the proceedings and (b) squandering the CD's resources. **Hence, the Committee is of the view that costs for the conduct of mediation during the CIRP process should be excluded from the purview of the IRPC.**

- 5.148. It is of utmost importance that the parties to mediation are fully aware of the costs involved at the beginning of the mediation process. **Therefore, the Committee proposes that a proper schedule on the costs of mediation must be provided to the parties, containing details on the following: a) registration charges; b) mediator's fee; c) administrative fee; d) cost of travel, boarding, and lodging for mediators; e) additional fees (such as telephone, postage, etc.); and f) applicable taxes.** To make the mediation process cost-efficient, the fee of mediators and administrative costs may be charged on a nominal basis on a similar model as court-annexed mediations. The total cost of mediation should be reasonable and, if possible, proportionate to the significance of the issue or issues in question and the mediator's workload.
- 5.149. To incentivize the operability of successful mediation outcomes, the Committee also considers introducing provisions for reimbursement (or part) of filing fees and other fees spent by the parties at the NCLT. **For this purpose, the Committee recommends the creation of a separate budget or corpus fund to be managed by the mediation secretariat/centre established solely for handling insolvency disputes.** This initiative may prevent mediation from becoming an expensive affair. In the end, it is critical to clarify that this reserve is distinct from the fund utilised for other purposes, such as running mediation awareness programmes, paying honorarium to trainers, or developing infrastructure for e-mediation.

VII. Mediators – Qualifications and Criteria

<https://scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1072&context=umlr> last accessed 03 November 2023.

¹⁵¹ According to the quarterly newsletter (July–September) published by IBBI, the haircut for the creditors relative to their admitted claims was approximately 68% until 30 September 2023.

- 5.150. Effective mediation is centred around a skilled mediator, without whom the process is *fait accompli*. The Committee views the question of ‘*who shall be a mediator*’ as one of the most important elements in the insolvency mediation framework. The ‘rescue culture’ sought to be furthered through the mediation of insolvency disputes will need a credible and skilled set of mediators to instil confidence in the system, both for parties, stakeholders, and judicial bodies. Few members of the Committee are of the view that the concern and fear of public sector banks, which form FCs in medium- and large-scale insolvency proceedings, regarding ‘4Cs’ (control, certainty, confidentiality, and closure) would need to be dispelled by the process, and the framework's inherent ability to do so is prefixed on their ‘confidence’ in the mediator’s ability, skills, transparency, and ethics. The Committee members further note that since the procedure will not be under the NCLT's supervision, it is imperative to ensure that all required safeguards are in place to avoid corruption and uphold ethical standards. Therefore, the alternate dispute resolution framework that is created should not be at the expense of sacrificing the said precepts and principles that have contributed to generating faith in the existing systems.
- 5.151. Unlike the US, where insolvency mediations have gained prominence but the mediator appointment process and criteria vary across States as per the requirements of local bankruptcy courts,¹⁵² India will benefit from a uniform system and panel of mediators that support the NCLT’s insolvency docket. An important distinction between India and other jurisdictions would be that insolvency proceedings here are run on a creditor-in-control model, with RP taking over the CD’s management. In a debtor-in-possession scenario, as adopted by many other jurisdictions, the insolvency mediation considerations are different as the CD is still in control and management of the enterprise. The debtor-creditor relationship dynamics thus vary during different stages of insolvency proceedings. **Taking this factor into consideration, the Committee is of the view that the mediator appointed to conduct the mediation should engage in a constructive dialogue with the RP without compromising objectivity.** Notably, like the mediator, the RP also acts as a neutral person after taking over the reins of the CD. Thus, the mediator should make every possible effort to cooperate with the RP insofar as reaching a settlement and accomplishing the objectives of the IBC are concerned.

¹⁵² It is noted here that while State of California bankruptcy courts seem to operate on a “volunteer” and “skilled” model; Delaware and New York bankruptcy courts adopt a different approach. For instance, according to Rule 2.1.A of the Mediation Procedures of the United States Bankruptcy Court of the Southern District of New York, a person is required to meet the following eligibility criteria to become a mediator: a) must be a member of the bar in any state or the District of Columbia for at least five (5) years; b) must have been authorised to practice for at least four (4) years under the laws of the State of New York as a professional; and c) must be an active member in good standing. Unlike New York, the United States District Court for the District of Delaware prescribes a brief procedure for the selection of mediators. According to the order of the Court of July 23, 2004, the appointment of an individual as a mediator is contingent upon their experience, competence, and acceptability to serve on the panel.

- 5.152. In India, criteria for mediator appointments will require the adoption of tailored, culturally appropriate indicia. The Committee's view is that at the stage of initial implementation, it will be crucial to focus on the eligibility criteria to building the credibility of the mediation system under the IBC. **Given the complex and technical nature of insolvency disputes, the Committee recommends that the pool of mediators include: (a) retired members of the NCLT and NCLAT; (b) senior advocates and/or advocates with advocacy experience in more than ten (10) successful insolvency proceedings; (c) ex-senior officials of financial sector regulators, such as IBBI, or scheduled commercial banks; and (d) insolvency professionals with more than ten (10) years of experience.**
- 5.153. The Committee also takes notice of the common criticism of mediator appointment systems that, by requiring experienced and seasoned experts, deny young and aspirational mediators the opportunity to launch their careers. **To this end, the Committee recommends the formation of an additional pool of mediators comprising: (a) legal practitioners with at least ten (10) years of experience in insolvency disputes; (b) persons with experience as mediators or in mediation advocacy in commercial disputes for at least ten (10) years; and (c) persons with technical expertise in insolvency, accounting, valuation, sectoral, and industry operations possessing experience of at least ten (10) years.**
- 5.154. The Committee is of the view that a mediator's specialist skills and extensive experience must be their hallmarks. They must possess the ability to settle a matter in a 'sagacious' way. Pertinently, an adequate framework for continuous training of mediators to handle technical and specialized insolvency disputes at various stages—before and after the admission of insolvency proceedings—will be a core element of the framework as well. **To equip mediators to perform in the most effective way, the Committee recommends that a comprehensive curriculum be prescribed for their training. The broad topics of study may include the importance of mediation, the role of mediators, the enforceability of agreements, etc. In other words, the training should be well-structured and goal-oriented, and the syllabus should include a suitable balance of theoretical and practical approaches. Equally, the duration of mediation must be specified to ensure that the necessary course content is sufficiently covered. The number of hours can differ according to the level of mediator competence – basic or advanced. The secretariat can be entrusted with the task of designing capacity-building programmes for the mediators. While the secretariat will be the principal authority, it can always import best practices that the MCI will adopt for the purposes of the 2023 Act. Given that the MCI will be a national-level body laying down the standards for the 'continuous education' of mediators under the 2023 Act, it can assist the secretariat in developing legal training and educational**

programmes. Any appointment should be made from empanelled mediators who have undergone a mandatory training facilitated by the Central Government under the IBC, and premised on a declaration of no conflict and confirmation of independence by the empanelled mediator.

- 5.155. The main attributes of any mediator are maintaining the highest standards of probity and showing absolute impartiality while facilitating mediation. Only the unwavering commitment to honesty and integrity of the mediator can infuse the parties with the optimism that the mediation process will produce positive results. **In this light, the Committee proposes creating a Code of Ethics for Mediators, outlining the minimum standards a mediator must adhere to. These standards will govern the mediator's behaviour and enable them to perform their duties while upholding the principles of professional ethics. The secretariat can provide detailed guidance on aspects such as self-determination, confidentiality, conflict of interest, quality and sanctity of the process, practising neutrality, etc. If required, the secretariat can seek MCI's assistance and cooperation in formulating these guidelines.**
- 5.156. **The Committee is of the opinion that the disqualifications from being a mediator must be tailored as per the scheme and object of the insolvency mediation framework, but inspiration can be drawn from the existing regimes under the Companies Act, 2013 and the Consumer Protection Act, 2019.** For example, the criteria for disqualification should include when a mediator is or has become (a) an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending, (b) has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude, (c) has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government, (d) has been punished in any disciplinary proceeding, by the appropriate disciplinary authority, or (e) has, in the opinion of the Central Government, such financial or other interest in the subject matter of dispute or is related to any of the parties, as is likely to affect prejudicially the discharge by him of his functions as a mediator.

VIII. Robust operational framework for mediation under IBC

- 5.157. For the mediation of insolvency proceedings to succeed, like any other dispute resolution mechanism, predictability, reliability, and certainty of the process of mediation are very important. Thus, there must be standardisation of mediation procedures and processes under the IBC. All parties voluntarily opting to mediate their disputes under the IBC must be provided with standardised processes and expertise from the mediators.
- 5.158. **The Committee recommends that the Central Government be empowered to prescribe rules for the conduct of mediation under the IBC. This power can be explicitly granted by amending the Code in the form of introducing an enabling**

provision regarding the permissibility of mediation. This provision will accommodate all the basic tenets of the proposed mediation framework and serve as a source of power for the IBBI to lay down the regulations on the associated procedural requirements. The Committee members also note that the Central Government may mull over delegating this power to the NCLT for preparing their own rules of procedure for mediation, which is very similar to how the mediation process is carried out at the TDSAT, which has been fairly successful over the past ten (10) years. Such rules may lay down a separate and specialised mediation framework for the operation of insolvency mediation under the IBC and remain agile to update themselves based on implementational experience.

5.159. The operational framework may require the framing of rules similar to the Companies (Mediation and Conciliation) Rules, 2016. On careful perusal of these Rules, the Committee members opine that the said rules are a relevant example of an implementational framework. **They recommend that the implementational framework rules provide for appropriate and strict timelines for each step or stage to ensure that there is no delay in the insolvency resolution process under the IBC and that the goal of mediating a dispute parallel to such a process is achieved. In addition to this, the rules must provide for, *inter alia*,**

- a. Manner of reference to mediation of specific insolvency resolution processes and specific disputes thereunder;
- b. Qualifications and disqualification criteria of mediators;
- c. Constitution of panel of mediators and criteria for empanelment;
- d. Code of conduct for mediators, providing for independence, impartiality and non-bias requirements. The Code of Conduct for mediators and guidelines for ethics may be considered along the same lines as the 1996 Act. The committee constituted to draft this Code may also consider internationally recognized principles and best practices, such as the International Mediation Institute's Code of Professional Conduct;¹⁵³
- e. Mediators' streamlined appointment process, including mandatory disclosures and criteria for declaration of conflict of interest;
- f. Manner of conduct of mediation, i.e., appointment of mediator or mediator panels, reference process, hearings and written records, and conclusion of mediation;
- g. Matters of confidentiality and applicable rules of procedure on evidence and admissibility;
- h. Nature of mediators role as 'facilitator' of dispute resolution;
- i. Fee structure for mediators may be considered on fixed hourly sum with a cap on timeline;

¹⁵³ International Mediation Institute, IMI Code of Professional Conduct (2019).

- j. Mediator's performance evaluation in terms of meeting timelines and ensuring cost efficiency;
 - k. Duties of parties and their involvement in the decision-making process;
 - l. Submission of mediator's confidential report to the NCLT;
 - m. MSA and its confirmation process initiated before the NCLT;
 - n. Protection of mediators from frivolous claims for actions taken in good faith; and
 - o. Establishment of a mediation secretariat at the NCLT to support, administer and supervise conduct of insolvency mediations under the IBC.
- 5.160. Lastly, the Committee opines that online dispute resolution ("**ODR**") is the future and that embracing it is the right choice. ODR is not to be confused with e-ADR or technology-enabled ADR. ODR encompasses the use of artificial intelligence and machine learning-powered technological tools, such as script-based solutions, automated dispute resolution, and platforms that are specially designed to address particular categories of conflicts. E-mediation is a subset of ODR employed in several countries, including the European Union,¹⁵⁴ Singapore,¹⁵⁵ China,¹⁵⁶ etc. It is noteworthy to mention that the Niti Aayog Expert Committee on ODR, in its report titled 'Designing the Future of Dispute Resolution', recommended that a suitable amendment be made to the IBC to 'recognize e-mediation by using information and communications technology through ODR service providers.'¹⁵⁷ **The Committee is of the view that facilitating e-meetings and e-filing for the conduct of 'paperless mediation' would help the NCLT switch from a paper-based justice dispensation model to e-filings and hearings and achieve operational efficiency.**¹⁵⁸ **The operational framework should be flexible and allow room for the mediator and the parties (consensually) to consider if physical sessions would be more beneficial. Adoption of hybrid mode or online mode should eventually become the norm, where possible.** Besides, this will assist with meeting

¹⁵⁴ Prof Julia Hörnle, Matthew Hewitson and Illia Chernohorenko, 'Technical Study on Online Dispute Resolution Mechanisms', available at: <https://rm.coe.int/cdcj-technical-study-on-online-dispute-resolution-mechanisms/16809f0079> last accessed 03 November 2023.

¹⁵⁵ Sanjana Hattotuwa and Melissa Conley Tyler, 'An Asian Perspective on Online Mediation', available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=925159 last accessed 03 November 2023.

¹⁵⁶ Guodong Du, 'Beijing Internet Court's First Year at a Glance: Inside China's Internet Courts Series-05', available at: <https://www.chinajusticeobserver.com/a/beijing-internet-courts-first-year-at-a-glance> last accessed 03 November 2023.

¹⁵⁷ Niti Aayog, 'Designing the Future of Dispute Resolution', available at: <https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf> last accessed 03 November 2023.

¹⁵⁸ For e.g.: In October 2017, the Ministry of Micro, Small, and Medium Enterprises introduced the SAMADHAAN portal, offering facilities like e-filing and online settlement of Micro and Small Enterprises' (MSE) dues against public sector enterprises, union ministries, departments, and state governments. The platform has helped resolve 3982 payment-due complaints totalling Rs. 721.59 crores since its launch. See the Report of the Niti Aayog Expert Committee on ODR titled 'Designing the Future of Dispute Resolution'.

timelines under the IBC and prove more time-efficient, consequently resulting in a lower cost of dispute resolution.

IX. Facilitation of adequate infrastructure support to implement mediation under the Code

- 5.161. Effective implementation of mediation under the IBC is nearly impossible without adequate institutional support and infrastructure. It has been noticed that the success and growth of mediation internationally have been largely credited to their efficient infrastructural robustness as well as administrative and secretarial support. An efficient example of this is the US bankruptcy courts.
- 5.162. The Committee considers many alternatives for enabling infrastructural support to manage and administer specialised training and facilities and provide secretarial and administrative support for mediation services, including (a) the establishment of dedicated mediation centres for insolvency and bankruptcy disputes; (b) the delegation of duties and functions to the existing mediation centres; and (c) permitting parties to choose the mediation centre of their preference. Given the statutory rights involved in insolvency matters, the Committee regards the current system of *ad hoc* mediations as unfeasible. Additionally, it was thought fit that since ‘institutionalisation’ of ADR services across legislations and private transactions to achieve efficiency, the same model might benefit propagation of insolvency mediation under the IBC in India. The Committee also notes that the success of the IBC over the past seven years has been lauded internationally, and further adoption of efficient systems would identify and fill the current gaps in the timely progress of insolvency resolution processes.
- 5.163. **After much deliberation, the Committee has concluded that an approach similar to the Commercial Courts Act, 2015, can be adopted, in which state bodies—rather than private entities—serve as the nodal and execution agency for commercial mediations.¹⁵⁹ Under the IBC, mediation secretariat for NCLT and NCLAT may be set up for robust and effective implementation of insolvency mediation under the Code.** This recommendation comes in view of the fact that insolvency is a specialized process requiring strict adherence to statutory timelines and a skilled set of mediators to facilitate dispute resolution. This policy measure will cultivate the much-needed mediation ‘culture’ by making the parties and the judicial system repose faith in the mediation process for such disputes while at some level allaying fears of the ‘4Cs’.

¹⁵⁹ Section 12A(2) of the Commercial Courts Act, 2015 states that “the Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.”

5.164. The Committee notes that, at present, trusting non-State or private mediation centres to conduct mediations is not advisable, as many complications may arise, including the independence of the centre, the bias of mediators, the credibility of the institution, high costs, and failure to address grievances. Therefore, the Committee recommends that, initially, the **tribunal-attached secretariat would be the best placed to implement and administer insolvency mediation. Over a period of time, based on implementational experience, the establishment of specialized mediation centres for insolvency disputes or the reference of insolvency disputes to existing mediation centres may be considered.** It is pertinent to mention that the India International Arbitration Centre Act, 2019 provides for mediation facilities and may be the nodal agency for the implementation of the framework on the ground level.

5.165. In essence, **the Committee notes that the following requirements for secretariat's establishment and functioning are crucial:**

- a. Establishment of physical space to conduct mediation under the IBC. This will serve as the physical office and provide necessary facilities to the parties for conducting hearings, filings, etc., where required at fixed cost basis;
- b. Provision of appointment of officers, staff, and other personnel;
- c. Mediation secretariat/ nodal officers facilitating mediations in e-mode and physical mode, keeping the mediation process to the largest extent online and paperless;
- d. In view of growing significance of ODR, developing technology-enabled mediation platform to facilitate online mediation, particularly in cases involving stakeholders located in different regions;
- e. Filing fees, cost of conduct of mediation and fees of the mediator provisions to be added;
- f. Management of mediation correspondence, conduct and ensuring completion of the process within the specified time periods. The channel for correspondence through email and a dedicated phone line may be established, such that the interested parties, CD and the creditors may be explained the process and the nuances thereof. The secretariat would disseminate public information on mode of filing, mediation process and calculate as well as administer timelines for conduct of mediation;
- g. Acting as interface between the parties and the NCLT in terms of immediate and mandatory transmission of documents, records, MSAs, mediator reports, etc.;
- h. Administering empanelment process based on the criteria notified by the Central Government and maintaining the panel of mediators;
- i. Assisting with the appointment of mediators on a case-to-case basis in view of the rules notified by the Central Government;
- j. Administering and conducting mandatory training of mediators as prescribed by the Central Government;
- k. Maintaining a complaint and grievance redressal process and notifying changes, if any in the mediator panels.

ANNEXURE I: CONSTITUTION OF THE COMMITTEE



भारतीय दिवाला और शोधन अक्षमता बोर्ड Insolvency and Bankruptcy Board of India

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Order

BOARD-22/2/2023-IBBI/ 8937
Dated: 6th March, 2023

Subject – Constitution of expert committee to propose a detailed framework for use of mediation under the Insolvency and Bankruptcy Code, 2016.

In terms of clause (l) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016, an Expert Committee is hereby constituted to examine the scope of use of mediation in respect of processes under the Code and submit its recommendations thereon. The constituents of the Expert Committee are as under:

i.	Dr. T. K. Viswanathan, Former Secretary General, Lok Sabha Secretariat and Former Law Secretary	Chairman
ii.	Mr. Sudhaker Shukla, Whole Time Member, IBBI	Member
iii.	Dr. Rajiv Mani, Additional Secretary, Ministry of Law and Justice	Member
iv.	Mr. Bahram Vakil, Founder & Partner, AZB & Partners	Member
v.	Mr. Shardul S. Shroff, Executive Chairman, Shardul Amarchand Mangaldas	Member
vi.	Mr. Sumant Batra, Founder Partner, Kesar Dass B. & Associates	Member
vii.	Representative of MCA	Member
viii.	Mr. Santosh K. Shukla, Executive Director, IBBI	Member Secretary

2. The terms of reference of the Expert Committee will be broadly to study and recommend a mediation framework for use in various processes under the Code that *inter alia* addresses the following issues:

- Choice of mediation to be mandatory or voluntary.
- Creating space for mediation within the timelines specified by the Code.
- Circumstances and stages under which mediation can be referred.
- Enforcement mechanism for mediation outcomes.
- Meeting the cost of mediation.
- Operational framework.
- Infrastructure support.
- Any other issue which the Expert Committee may like to highlight.

3. The Expert Committee may also invite or co-opt practitioners, experts or individuals who have knowledge or experience in the subject matter. The Expert Committee may also consult other stakeholders as part of its deliberations.

4. Secretariat support to the Expert Committee will be arranged by IBBI. Expenses incurred by non-official members of the Expert Committee towards travel, local conveyance and other allowances will be borne by IBBI as per extant internal policy of IBBI.
5. The Committee may submit its report in three months' time.

(Santosh Shukla)
Executive Director, IBBI
Email: Santoshs.01@ibbi.gov.in

Copy to:

1. All Members of the Expert Committee
2. Chairperson, IBBI
3. Secretary, Ministry of Corporate Affairs

ANNEXURE II: LIST OF ABBREVIATIONS

S.No.	Abbreviation	Reference
1.	2023 Act	The Mediation Act, 2023
2.	AA	Adjudicating Authority
3.	AA Rules	IBC (Adjudicating Authority) Rules, 2016
4.	ABI	American Bankruptcy Institute
5.	ADR	Alternative Dispute Resolution
6.	BLRC	Bankruptcy Law Reforms Committee
7.	CCI	Competition Commission of India
8.	CD	Corporate Debtor
9.	CIRP	Corporate Insolvency Resolution Process
10.	Code or IBC	Insolvency and Bankruptcy Code, 2016
11.	CoC	Committee of Creditors
12.	CPC	Code of Civil Procedure, 1908
13.	DRT	Debt Recovery Tribunal
14.	FC	Financial Creditor
15.	IBBI	Insolvency and Bankruptcy Board of India
16.	ILC	Insolvency Law Committee
17.	INR	Indian Rupee
18.	IRP	Interim Resolution Professional
19.	JPC	Joint Parliamentary Committee
20.	MCI	Mediation Council of India
21.	MSA	Mediated Settlement Agreement
22.	MSP	Mediation Service Provider
23.	MSME	Micro, Small & Medium Enterprises
24.	NCLT	National Company Law Tribunal
25.	NCLT Rules	National Company Law Tribunal Rule, 2016
26.	NCLAT	National Company Law Appellate Tribunal
27.	NGT	National Green Tribunal
28.	OC	Operational Creditor
29.	ODR	Online Dispute Resolution
30.	PG	Personal Guarantor
31.	RA	Resolution Applicant
32.	RP	Resolution Professional
33.	SDNY	Southern District of New York
34.	SRA	Successful Resolution Applicant
35.	TDSAT	Telecom Disputes and Settlement Appellate Tribunal
36.	TRAI	Telecom Regulatory Authority of India

ANNEXURE III: SUMMARY OF INTERNATIONAL JURISPRUDENCE REVIEWED BY THE COMMITTEE

A. *United States of America (USA)*

- 4.1 The USA has been an early adopter of mediation and has used it to resolve many high-profile disputes. Insolvency mediation is widely used in many states as an out-of-court dispute resolution mechanism.
- 4.2 Even though the Bankruptcy Reform Act, 1978 did not establish ADR as the preferred mode of insolvency resolution, pursuant to Section 3(b) of the Alternative Dispute Resolution Act of 1998, district courts were authorised to use ADR in all civil actions, including adversary proceedings in bankruptcy.¹⁶⁰ This law explicitly required that each district court provide “*at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, mini-trial, and arbitration.*”¹⁶¹
- 4.3 By 2009, more than half of the US bankruptcy courts had permitted mediation either by local rules or orders.¹⁶² As a result, mediation became a widely used tool in the bankruptcy process in less than ten years. The Bankruptcy Court for the Southern District of California launched the mediation programme in 1986, which marked the introduction of mediation for insolvency cases.¹⁶³
- 4.4 Simultaneously, there is significant variation in the manner and circumstances under which U.S. courts permit mediation. In 2019, there were 76 districts out of 94 having a local mediation rule and 18 districts without one. While mediation is voluntary in certain courts, it is mandatory in others. Furthermore, several courts have laid down guidelines concerning the timing of mediation in connection with other litigation in the context of bankruptcy. Mediation has been employed to resolve a wide range of bankruptcy disputes, such as cash collateral or DIP financing, plan objections, preferences, etc (as discussed above).¹⁶⁴
- 4.5 The first instance of insolvency mediation in the United States occurred in the *Greyhound Lines Inc.* case, in which the corporate debtor went bankrupt and several creditors filed their claims.¹⁶⁵ To balance the interests of all parties involved, the court ordered pre-

¹⁶⁰ Section 654 of the Alternative Dispute Resolution Act of 1998 (28 U.S.C.A).

¹⁶¹ Remigijus Jokubauskas, ‘Alternative Dispute Resolution in Insolvency Disputes’, available at <https://ojs.mruni.eu/ojs/societal-studies/article/download/4774/4378> last accessed 04 November 2023.

¹⁶² Supra at 80 (Schnitzer E.).

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ 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/> last accessed 04 June 2023.

insolvency mediation, and the arrangement proved successful for all stakeholders.¹⁶⁶ The bankruptcy court in the Southern District of New York established the court-connected mediation programme, with *Macy & Co.* reorganisation serving as one of the initial referees to the process in 1993.¹⁶⁷ Besides, mediation turned out to be the most effective method of *Lehman Brothers'* insolvency resolution with all of their creditors when it filed for Chapter 11 bankruptcy during the financial crisis of 2008.¹⁶⁸ In this matter, at least 1.2 million derivative transactions involving over 6,500 distinct parties were counterparties to a derivatives-dealing division of Lehman Brothers.¹⁶⁹ The court ordered mandatory mediation in September 2009 to resolve issues pertaining to derivative contracts.¹⁷⁰ By 2016, out of over \$9 billion in outstanding claims, 110 mediations had brought the Lehman Brothers estate \$333 million.¹⁷¹ This made it possible for the creditors to get the most value out of the assets in question while also facilitating a speedy and cost-efficient resolution process. This has been largely perceived as the successful resolution of the largest insolvency filing through mediation.¹⁷²

- 4.6 Generally, a joint status conference statement (F7016-A) has to be filed by the parties no later than 14 days before the initial status conference requests in which the litigants inform the court whether or not mediation is requested. At present, a significant number of bankruptcy cases are being ordered to go for mediation. Once ordered, the mediation hearing generally takes place within 60-90 days, allowing the parties and counsel a “gap period” to prepare for the same.
- 4.7 There are now local rules or general orders requiring mediation in specific cases in over half of the US bankruptcy courts. The bankruptcy courts have the authority to lay down local rules for court-annexed ADR procedures. For instance, Local Rule 9019-5a (Mediation) of the United States Bankruptcy Court for the District of Delaware establishes that “*the Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case.*” Below are two examples of the local court rules:

¹⁶⁶ Ibid.

¹⁶⁷ Akshaya Kamalnath and Aprajita Kaul, ‘Adding Mediation to India’s corporate resolution process’, available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1450> accessed 04 November 2023.

¹⁶⁸ Mohit Kapoor and Ruchita Krishnan, ‘Mediation: The panacea for case pendency under the IBC’, available at: <https://www.barandbench.com/law-firms/view-point/mediation-the-panacea-for-case-pendency-under-the-ibc> last accessed 04 June 2023.

¹⁶⁹ Justice A.K. Sikri and Anuroop Omkar, ‘Mediation in Corporate Insolvency: A Game Changer, available at: <https://www.businessworld.in/article/Mediation-In-Corporate-Insolvency-A-Game-Changer/14-06-2019-171872/> last accessed 04 June 2023.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Supra at 168 (Mohit Kapoor *et al.*).

a. United States Bankruptcy Court for the Southern District of New York (“SDNY”):¹⁷³

The SDNY has implemented Local Rule 9019-1, which stipulates the following:

- i. *“By Court Order. The Court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee. The motion by a party in interest must be filed promptly after filing the initial document in the matter. Notwithstanding assignment of a matter or proceeding to mediation, it shall be set for the next appropriate hearing on the Court docket in the normal course of setting required for such a matter.*
- ii. *The parties will ordinarily choose a mediator from the Register for appointment by the Court. If the parties cannot agree upon a mediator within seven (7) days of assignment to mediation, the Court shall appoint a mediator and alternate mediator.*
- iii. *Upon consultation with all attorneys and pro se parties subject to the mediation, the mediator shall fix a reasonable time and place for the initial mediation conference of the parties with the mediator and promptly shall give the attorneys and pro se parties advance written notice of the conference.”*

b. United States Bankruptcy Court for the District of Delaware: The District of Delaware has a similar local rule, known as Local Rule 9019-5.¹⁷⁴ It outlines the following:

- i. *“The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) shall be referred to mandatory mediation. Parties to an adversary proceeding or contested matter may also stipulate to mediation, subject to Court approval.*
- ii. *The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or pro se litigants, but not to the Court.*
- iii. *Upon the filing of a mediator's Certificate of Completion under Local Rule 9019-5(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(g), the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the Court. If the mediation conference does not result*

¹⁷³ Supra at 78.

¹⁷⁴ Supra at 79.

in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the Court's scheduling orders.”

- 4.8 Currently, mediation or other forms of alternative conflict resolution are used to settle more than half of the cases filed in the USA for insolvency or reorganisation.¹⁷⁵ Under the US Bankruptcy Code, mediation has been widely utilised at several stages of Chapter 11 proceedings, often falling under any of the following categories:¹⁷⁶
- a. Claims Mediation: Contingent and unliquidated tort claims, such as those involving property damage and personal injury, have been settled through mediation. One of the first cases where alternative dispute resolution was applied to resolve thousands of claims related to auto accidents was *NLRC v. Greyhound Lines*.¹⁷⁷ The use of mediation was crucial in this case because, without it, the debtor would have been forced to settle these claims in multiple courts with multiple attorneys. After all, the bankruptcy court lacked jurisdiction to handle claims about personal injury and wrongful death. The three steps of the mediation process used in this case were as follows: *first*, the claimants had to fill out a standard claim form; *second*, the parties had to participate in mediation for sixty days if the debtor denied liability or the claim could not be resolved; and *third*, if mediation was unsuccessful, the claimant could pursue arbitration. Thus, this mediation method was used to settle over 95% of the pre-petition tort claims.
 - b. Single creditor mediation: These deal with mediations in connection with single creditors. For instance, in *re Kovalchick*,¹⁷⁸ mediation was used to resolve disputes between the debtor and secured creditor. These mediations might be especially crucial in debtor-possession scenarios when one creditor has the authority to obstruct plans.
 - c. Plan Mediation: When discussing a Chapter 11 payment plan, mediation can be especially beneficial as it allows the parties to quickly come to a decision without interfering with the bankruptcy court's authority to approve the same. This is because the mediator cannot legally determine how the matter will be resolved.¹⁷⁹ Plan mediation can also be used to break the deadlock in the formulation of a plan or to resolve plan-related disputes. In the case of *MF Global Holdings Ltd.*, the US and the UK commenced separate bankruptcy proceedings, with both estates cross-claiming. The resolution in this matter was facilitated via mediation.¹⁸⁰

¹⁷⁵ Supra at 165 (Moulshri Shrivastava).

¹⁷⁶ Supra 20 (Misha *et al.*).

¹⁷⁷ *Greyhound Lines, Inc. v. Rogers* (In *re* Eagle Bus Mfg., Inc.), 62 F.3d 730, 733, 734 n.6 (5th Cir. 1995).

¹⁷⁸ 175 B.R. 863, 870 (Bankr. E.D. Pa. 1994).

¹⁷⁹ Akiba M. *et al.* (2021), ‘Chapter 11 Plan Confirmations and Mediation: The Need For Uniformity Under the Bankruptcy Code’, Business Law Section of the Florida Bar.

¹⁸⁰ Oon & Bazul LLP (2019), “Alternative dispute resolution in insolvency and restructuring proceedings”, Lexology.

- d. Avoidance Actions: The bankruptcy courts have also used mediation to resolve adversarial proceedings such as turnover actions and preference actions. In some jurisdictions, mediation is even mandated for these types of cases.¹⁸¹
- e. Post confirmation of plans: Certain reorganisation plans contain terms about claim mediation after the plan's confirmation. For example, the confirmed reorganisation plan in the *Johns-Manville*¹⁸² case included provisions for claim mediation to handle the claimants' claims and the establishment of a settlement fund to be used for compensating claimants. Likewise, the agreed plan in the matter of *re A.H. Robins*¹⁸³ provided for the creation of a settlement fund for the benefit of the claimants and offered them 'instant settlement offers' in exchange for waiving their claims against the debtor.
- f. Cross-Border insolvency: These are usually centred around the distribution of the estate to international creditors and the synchronisation of bankruptcy processes that are taking place in several jurisdictions. In *Olympia & York Case*, where insolvency proceedings had commenced in both the US and Canada, a mediator was appointed to "(i) harmonize the Canadian and US proceedings; and (ii) bring about a consensus among the parties regarding corporate governance issues".¹⁸⁴
- g. Group Insolvency: These mediations are concerned with settling disputes involving intragroup claims, how those claims are handled in plans, and how various processes are coordinated to enable better value-maximising settlements. For instance, in *Enron*, the appointed examiner applied mediation procedures to resolve plan disputes relating to a group company. The mediation made it easier to prepare a joint plan that would benefit all group debtors. Certain derivative claims were also dealt with through mediation.

4.9 Qualification of Mediators: As per the Alternative Dispute Resolution Act of 1998, every District Court that authorizes the use of ADR mechanisms, must also maintain a qualified and trained "Panel of Neutrals" who may be qualified to mediate on each of the category of procedure offered.¹⁸⁵ The Panel may consist of trained magistrate judges, professional from the private sector, or persons trained in alternative dispute resolution processes. Hence, across most states, mediators need court approval or certification to be able to be mediate.

¹⁸¹ United States Bankruptcy Court, District of Delaware, Rule 9019-5 Mediation.

¹⁸² *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

¹⁸³ *re A.H. Robins*, 88 B.R. 742 (E.D. Va. 1988).

¹⁸⁴ Ontario Court of Justice, Toronto, Case No. B125/92 (26 July 1993), and United States Bankruptcy Court for the Southern District of New York, Case Nos. 92-B-42698-42701 (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

¹⁸⁵ Section 653 of title 28, United States Code.

- 4.10 Most states typically demand 20 to 40 hours of training in addition to adequate credentials and experience. For instance, in the state of Louisiana, one must either possess substantial experience (more than 500 hours) in dispute resolution or be a licenced attorney in the state and have mediated at least 25 cases. In Alabama, a licenced attorney needs to have four years of judicial or legal experience or a bachelor's degree and at least five years of management or administrative experience in a government, corporate, or professional setting, in addition to having served as the mediator in ten mediations, to be eligible to serve as a mediator. Further, the state mandates that mediators finish a 20-hour approved mediation training program.
- 4.11 For example, as per Rule No. 9042-2,¹⁸⁶ to qualify as a mediator it has been provided that the attorney should have experience of at least 5 years as per the District Court of Columbia, must have “*good standing*” in the Federal Courts of the Western District of Washington and they must have served as a principal attorney of record in 10 bankruptcy cases or adversary proceedings from beginning to end. Additionally, the person must be willing to serve as mediator for at least two years from their appointment, must undertake proceedings at least once every quarter and act as mediators on a pro bono basis at least once every two years. Attorneys without bankruptcy experience with the relevant mediation training may also qualify if they meet the other relevant requirements. To qualify as a non-attorney mediator, persons have to submit relevant information pertaining to qualifications, experience and training, along with a justification as to why s/he should be appointed to the Panel of Mediators. They must also qualify with the same certification as set out under Rule 9042- 2(a) (4).
- 4.12 Settlement Agreement: In California, as per Rule 6.4,¹⁸⁷ an oral agreement may be considered to be admissible if the agreement has been recorded by “*a court reporter, tape recorder, or other reliable means of sound recording*” and if the terms of the agreement have stated in the presence of all parties and the mediator, and the terms of the same have been agreed upon by all parties to be binding and finally the terms of the agreement have been written on recorded and signed by all parties within 3 days of the settlement being reached. A written settlement agreement may further be held binding if the same has been signed by the settling parties and their attorneys and the agreement explicitly clearly sets out that the agreement is enforceable/binding. Similarly, as per the procedure followed Southern District of New York, when a settlement is reached between parties, the same has to be in writing, signed by all parties and their representatives to be fully executed.¹⁸⁸

¹⁸⁶ 3.3 of 2.0 of Third Amended General Order No. 95-01, United States Bankruptcy Court for the Central District of California.

¹⁸⁷ 3.3 of 2.0 of Third Amended General Order No. 95-01, United States Bankruptcy Court for the Central District of California.

¹⁸⁸ Section 10, Mediation Program Procedures (6/15/2022).

Regardless, for enforcement of these mediated settlement agreements it is important that they are filed before respective courts and adopted.

B. The European Union

- 4.13 In response to the spread of the economic and financial crisis in 2008, the European Union (“EU”) placed great emphasis on updating and modernising the rules in the field of bankruptcy law by replacing liquidation procedures with restructuring procedures with the intention of promoting comprehensive recovery of industries.¹⁸⁹
- 4.14 With the European Commission's August 2016 report on the application of Directive 2008/52/EC (EU Mediation Directive),¹⁹⁰ the potential of mediation in insolvency was acknowledged throughout the European Union.¹⁹¹ The Commission stated that “...[o]ne area where mediation remains underdeveloped is that of insolvency proceedings. It should be recalled that in its Recommendation on a new approach to business failure and insolvency, the Commission has encouraged the appointment of mediators by courts where they consider it necessary in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan.”¹⁹²
- 4.15 The European Commission further encouraged greater coherence at the national level as well as the border level requiring its Member States to increase the level of harmonization with the aim of reducing the eventual competitive disadvantages due to disparities in national laws. Thus, avoiding the consequential phenomenon of forum shopping as well as the overlap between proceedings.
- 4.16 Furthermore, the Member States have developed the concept of pre-pack insolvency, which allows the debtor and the creditor to work out a restructuring plan before initiating any legal proceedings. This plan is then negotiated and ultimately presented to the court for approval.¹⁹³ The European Commission has also recommended availing of the assistance of court-appointed mediators to facilitate talks towards a restructuring plan.¹⁹⁴

¹⁸⁹ The Role of Mediation in the New EU Approach to Insolvency, available at: <https://www.transnational-dispute-management.com/article.asp?key=2490> last accessed 08 April, 2023.

¹⁹⁰ Report From the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542&from=EN> last accessed 08 April, 2023.

¹⁹¹ Gert-Jan Boon et al, ‘The Mediator in Insolvency Law: Exploring New Terrain’, available at: <https://www.leidenlawblog.nl/articles/the-mediator-in-insolvency-law-exploring-new-terrain> last accessed 08 April 2023.

¹⁹² Ibid.

¹⁹³ Supra at 165 (Moulshri Shrivastava).

¹⁹⁴ Supra at 167 (Akshaya Kamalnath *et al.*).

Additionally, mediation should be encouraged as it is quick, inexpensive, and may produce solutions that are customised to each party's requirements, increasing the likelihood that the parties will abide by the decision (as stated in an earlier directive called the “**Mediation Directive**”).¹⁹⁵

C. Italy

- 4.17 The Italian company law reform, which came into effect in January 2004, established a particular mediation process for financial, banking, and commercial disputes.¹⁹⁶ With the intention of enhancing the effectiveness of the bankruptcy and enforcement framework, the Italian authorities have implemented major reforms over a period of time. Additional changes to the Italian insolvency framework were made in 2007, 2009, 2012, 2015, and 2016 following the significant insolvency reform of 2005.¹⁹⁷
- 4.18 In 2016, a significant advancement was made in the enforcement procedures when out-of-court enforcement for secured loans to businesses was introduced. According to this technique, the creditor can appropriate the collateral or force its sale, but if the loan is paid off, it will always have to compensate the debtor for any extra value. This is considered a significant reform in Italian law as it avoids lengthy court proceedings and shortens the collection period from years to months.¹⁹⁸
- 4.19 The Italian Government replaced the Bankruptcy Act on January 12, 2019, with Legislative Decree No. 14, introducing the ‘Code of Business Crisis and Insolvency’ (“**Italian Code**”).¹⁹⁹ The objective of the Italian Code is to establish instruments that guarantee early detection of the debtor's financial crisis to avert bankruptcy and, in the event that preventive measures are unsuccessful, to manage the bankruptcy with the goal of overcoming the crisis and restoring the company to profitability.²⁰⁰ In addition, on September 28, 2021, the Executive Order and Decreto Legge No. 118/2021 provided a new mechanism for the amicable resolution of business disputes.

¹⁹⁵ Ibid.

¹⁹⁶ Giovanni Matteucci, ‘Mediation in Bankruptcy: Opportunities in Italy’, available at: <http://www.adrmaremma.it/matteucci02.pdf> last accessed 08 April 2023.

¹⁹⁷ José Garrido, ‘IMF Working Paper: Insolvency and Enforcement Reforms in Italy’, available at: <https://www.imf.org/external/pubs/ft/wp/2016/wp16134.pdf> last accessed 08 April 2023.

¹⁹⁸ Ibid.

¹⁹⁹ Tiziana Del Prete, Giuseppe Pastore, ‘Italy’s New Code of the Business Crisis and Insolvency: Focus on early detection of the debtor’s state of crisis and safeguarding the going concern’, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/4e743b56/italys-new-code-of-the-business-crisis-and-insolvency-#:~:text=On January 12, 2019, the,to replace the Bankruptcy Ac> last accessed 01 June 202.

²⁰⁰ Ibid.

- 4.20 Using three distinct pieces of legislation (Article 60 of Law 69/2009, Legislative Decree 28/2010 implementing Article 60, and Ministerial Decree No. 180/2010 implementing the Legislative Decree), the legislators established an organic, integrated system for mediation that expands the use of mediation in all civil and commercial disputes, including cross-border disputes.²⁰¹
- 4.21 Currently, the Legislative Decree 28/2010 provides for “Negotiated Settlement for the solution of business crisis” which includes: a) ‘voluntary’ mediation entered into by the parties; b) judge-ordered mediation; c) mediation as a contractual clause; and d) mediation as a condition of admissibility of civil proceedings. The Decree further provides for the Ministry of Justice to accredit public or private organisations with adequate reliability and efficiency (to be determined by the Ministry).
- 4.22 Three distinct legal instruments for restructuring are available under the law, and their features vary based on the procedure, degree of court involvement, and application of the agreement to creditors who do not participate in the negotiations. The mediation process needs to be completed within three months once the request for the same is filed.
- a. *The Recovery Plan (piano di risanamento attestato)*:²⁰² This is an informal procedure that the debtor may initiate to rebalance the financial situation during a temporary crisis. This can be undertaken by a qualified professional for debt recovery, which is entirely private and confidential. The contractual agreement is also private and confidential. It does not require court approval and is only legally binding on the creditors who are parties to the negotiation.
 - b. *Debt Restructuring Agreement (accordo di ristrutturazione dei debiti)*:²⁰³ This is a semi-formal procedure that involves the court acting as a supervisor. This procedure allows parties a great deal of freedom about the terms of the contract. The nature of this process is private and confidential, and the agreements are binding only on the creditors who have taken part in the negotiating process.
 - c. *Preventive Arrangement with Creditors (concordato preventivo)*:²⁰⁴ The US Bankruptcy Code²⁰⁵ serves as the foundation for this procedure. Using this process, the debtor can negotiate an arrangement with creditors based on a restructuring plan certified by a professional. The arrangement, which includes several operations to

²⁰¹ Italian Legislation on Mediation, Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Legal And Parliamentary Affairs, available at: [https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453175/IPOL-JURI_NT\(2011\)453175_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453175/IPOL-JURI_NT(2011)453175_EN.pdf) last accessed 01 June 2023.

²⁰² Art. 67, par.3, letter d IBL-Legge Fallimentare.

²⁰³ Art.182-bis, IBL-Legge Fallimentare.

²⁰⁴ Art. 160 et seq, IBL-Legge Fallimentare.

²⁰⁵ Chapter 11 - Bankruptcy Basics, available at: <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> last accessed 08 April 2023.

satisfy in whole or in part the creditors, is then presented to a certain majority of creditors for approval. These operations include the sale of assets and the allocation of shares or other financial instruments (referred to as the "liquidation agreement").²⁰⁶ In this process, the petition is examined and sanctioned by the court. In addition, a judicial commissioner and an appointed judge oversee the negotiations related to the restructuring plan.

- 4.23 The Legislative Decree No. 5/2003 includes provisions for voluntary mediation. Mandatory mediation may be required for financial agreements and banking transactions. In the event that mediation fails, the claimant may proceed to court. After filing a motion for mediation, it must be undertaken within three months, failing which the mediator may prepare a settlement proposal. Each party has an additional seven days to accept or reject the proposal's terms.

D. France

- 4.24 Traditionally, the French insolvency law was implemented with the main purpose of preserving the interest of the company and its creditors. However, since 2006, Book VI of the French Commercial Code ("**Code de Commerce**"), which supports a pro-debtor system, has primarily governed France's bankruptcy regime. The *Code de Commerce* provides the following options:
- Court-assisted pre-insolvency proceedings;
 - Court-controlled pre-insolvency proceedings; &
 - Insolvency (bankruptcy) proceedings.
- 4.25 By adding a new chapter on administrative mediation to the Code of Administrative Justice ("**CAJ**"), Ordinance 2021-1193, which came into effect on September 16, 2021, brought the European Directive on preventive restructuring frameworks into French law. In France, the goal of the established practices of out-of-court restructuring proceedings, the *ad hoc* mandate, and conciliation is to facilitate negotiations between the debtor and its principal financial creditors to reach a mutual restructuring agreement and avoid the initiation of regular collective insolvency proceedings.²⁰⁷ Third-party assistance in the workout process, such as that of a mediator or conciliator, is viewed as a good indicator that encourages entrepreneurs to disclose their financial difficulties sooner.²⁰⁸

²⁰⁶ Supra at 5 (Paola Lucarelli *et al.*).

²⁰⁷ Ibid.

²⁰⁸ Ibid.

- 4.26 The French Insolvency Law²⁰⁹ provides a set of arrangements wherein the debtors and their creditors can reach a restructuring agreement with the help of objective third-party intervention.
- a. *Mandat ad hoc*: This flexible process entails the debtor's request for the appointment of a *Mandataire ad hoc* (mediator) by the President of a Court. This is initiated by the debtor in times of financial hardship before the firm is declared insolvent. The President freely decides the duration of the procedure based on the debtor's application. In practice, the process might take up to a year.²¹⁰
 - b. *Conciliation Procedure*: Debtors who are experiencing financial troubles that persist longer than 45 days choose to proceed via this more closely regulated proceeding. The President of the Court appoints a conciliator, who may be selected by the debtor, and their term cannot exceed five months. Reducing the debt of the debtor or rescheduling payments are typical results of these procedures. For the agreement to be enforceable in these proceedings, the President of the Court must approve it. A conciliation proceeding cannot last more than five years.²¹¹
 - c. *Sauvegarde Financière accélérée (“SFA”)*: This is an 'accelerated financial safeguard proceeding' to quickly implement a restructuring plan without compromising the position of non-financial creditors. SFA procedure allows to cram down all creditors, except employees, and not only financial creditors.²¹²
- 4.27 Agreements reached through the proceedings are not binding on third parties. The Court-appointed mediator has no power to enforce the agreement. Hence, in the practice of the French insolvency system, debtors tend to start to conduct negotiations within the *mandat ad hoc*'s framework and request for opening conciliation proceedings when an agreement is about to be reached to be able to benefit from a court-approved decree.
- 4.28 A new Decree No. 2019-1089 on the ‘Certification of Online Conciliation, Mediation and Arbitration Services’²¹³ has been issued to put Article 4 of the Act on Programming and Reforming of the Justice²¹⁴ into effect. According to the aforementioned decree, platforms or organisations wishing to become accredited must submit an application to one of the designated certifying organisations. The application will then be subject to

²⁰⁹ Supra at 81.

²¹⁰ Remigijus Jokubauskas, ‘Alternative Dispute Resolution in Insolvency Disputes’, available at: <https://ojs.mruni.eu/ojs/societal-studies/article/download/4774/4378> last accessed 11 June 2023; David Ehmke, Jennifer Gant, Gert-Jan Boon, Line Langkjaer and Emilie Ghio, ‘The European Union Preventive Restructuring Framework: A Hole in One?’ (2019) 28(2) International Insolvency Review 184, 191.

²¹¹ Ibid.

²¹² French Insolvency Proceedings: La Révolution a Commencé, Gallagher A.; Rousseau A. American Bankruptcy Institute Journal; Alexandria 33.11 (Nov 2014).

²¹³ Published in the Official Journal of the French Republic on 27 Oct. 2019.

²¹⁴ Article 4 offers online platforms supplying conciliation, mediation and arbitration services the possibility to obtain a certification by a specific organism.

documentation and an on-site audit; the certifying organisation will then have the option to either grant certification, request compliance within a specified timeframe, or reject the application. The accreditation is awarded for three years. A body recognised by the French Committee of Accreditation (COFRAC) is the only entity authorised to grant such a certification.

E. Spain

- 4.29 Between 2009 and 2015, the Spanish legislature made many reforms to the country's insolvency system.²¹⁵ Insolvency mediation, known as an ‘Out-of-court payment agreement’ (“**OCA**”), was introduced in September 2013 as an alternative to the formal insolvency proceedings in Spanish law. The provision applies to all insolvent debtors (current insolvency or forthcoming insolvency), irrespective of whether they are natural or legal persons.
- 4.30 The following parties may file for bankruptcy: (a) consumers and sole proprietors whose liabilities do not exceed five million euros; (b) non-financial businesses with fewer than fifty creditors and less than five million euros in assets and liabilities.²¹⁶
- 4.31 The OCA was revised in 2015 to enhance its limited practical application. The objective of the reform was to extend the agreement reached by the debtor with his or her creditors (content and effects) to other types laid down in the Insolvency Act, i.e. insolvency agreements and refinancing agreements. Under the law, while the debtor is negotiating the agreement, creditors are not allowed to institute enforcement proceedings for a period of three months. Furthermore, in the event that a particular voting majority is reached, OCA may be enforced on dissenting creditors.
- 4.32 The OCA also provides for an ‘insolvency mediator’. The position of *Mediador Concursal* (bankruptcy mediator) was introduced to improve the recovery of distressed small and medium-sized businesses (“**SMEs**”). In this instance, the mediator's duties go beyond just settling disputes. They are involved in drafting restructuring plans and performing other supportive activities that are essential to the process's success.²¹⁷
- 4.33 Therefore, to serve as an insolvency mediator, one must possess civil liability insurance and specialised training in negotiation techniques. Additionally, to serve as an insolvency

²¹⁵ Supra at 5 (Paola Lucarelli *et al.*).

²¹⁶ Garcia M. et al. (2020), ‘Analysis of Insolvency Proceedings in Spain against the Backdrop of the Covid-19 Crisis: Insolvency Proceedings, Pre-Insolvency Arrangements and the Insolvency Moratorium’, available at: <https://www.bde.es/f/webbde/SES/Secciones/Publicaciones/PublicacionesSeriadas/DocumentosOcasionales/20/Files/do2029e.pdf> last accessed 04 April 2023.

²¹⁷ Supra at 5 (Paola Lucarelli *et al.*).

practitioner in the subsequent insolvency proceedings that follow the negotiation's failure (referred to as the "consecutive insolvency proceedings"), the insolvency mediator must adhere to the requirements established for insolvency practitioners.²¹⁸

- 4.34 The creditors representing a minimum of 60% of the liabilities must vote in favour of the proposed plan, and 75% must vote in favour of it if the debtor is to transfer assets to repay his debts.²¹⁹ In addition, the Spanish Royal Decree-Law 1/2015, often known as the second opportunity law, brought about various amendments to the voluntary payment settlement rule as well as the mediator's role.²²⁰

F. United Kingdom

- 4.35 The courts in the United Kingdom have advocated the use of mediation in suitable situations.²²¹ The Companies Act of 2006 and the Insolvency Act of 1986 govern the procedures. Moreover, the Chancery Guide, 2016 ("**Guide**") promotes the use of alternative dispute resolution, especially mediation.²²² It places a duty on legal representatives to discuss alternative dispute resolution options with their clients and other relevant parties to settle disputes or resolve specific issues. Therefore, parties are urged to seek out out-of-court mediation by the insolvency practitioners and the court, even when insolvency mediation is not mandatory at any stage.²²³
- 4.36 Generally, courts opt to grant a stay on the proceedings rather than issue an order directing the parties to engage in alternative dispute resolution. The consent of the parties involved determines the duration of the stay. The court may, however, order the parties to take reasonable steps to attempt ADR if they are refusing to explore it without any sound justification.²²⁴
- 4.37 Under the existing provisions, schemes of arrangements²²⁵ are frequently utilised to settle the claims attached to an insolvent entity. In such instances where a creditor or a member requests for mediation within the first 14 days of the appointment of a nominee, the

²¹⁸ Carmen Senés Motilla, 'The Insolvency Mediation in the Spanish Law', available at: <https://www.transnational-dispute-management.com/article.asp?key=2497> last accessed 08 April, 2023.

²¹⁹ Baker McKenzie, 'Global Restructuring and Insolvency Guide', available at: <https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Spain.pdf> last accessed 10 October, 2023.

²²⁰ Supra at 5 (Paola Lucarelli *et al.*).

²²¹ Mediation and insolvency, Centre for Effective Dispute Resolution, October, 2020.

²²² HM Courts & Tribunals Service, Chancery Guide, February, 2016, Chapter 18.1-18.6 (Case management for settlement).

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Schemes of Arrangements refer to a court-approved agreement between the entity and its creditors/shareholders.

nominee is required to provide a report to the court justifying the necessity of such mediation. If the nominee believes that mediation is necessary, a mediator may be appointed within 14 days. Currently, there are no regulatory bodies for overseeing the proceedings and no statutory qualifications necessary to act as a mediator.

G. Romania

- 4.38 The primary legislation governing insolvency and restructuring proceedings in Romania are: (a) Law 85/2014 on preventing insolvency proceedings and insolvency (b) Law 246/2015 on recovery and dissolution of insurers, and (c) European Regulation 2015/848 on Insolvency Proceedings. The Insolvency law is generally influenced by the previous Commercial Code of Romania and the German law with elements from the US Bankruptcy Code.²²⁶ The proceedings are aimed at the restructuring and survival of the debtor while paying the creditors' receivables to the greatest extent possible.
- 4.39 The Romanian Law 319/2009 introduced mediation in insolvency proceedings (**"Concordat"**). Under this law, the parties are mandatorily required to engage in the mediation process as part of the insolvency proceedings. However, if the mediation falls through, the Court may appoint a judicial administrator to manage the reorganization process. The debtor alone may start the procedure by filing a petition with the relevant Court. The Court then appoints an insolvency licensed conciliatory. While mediation is a voluntary process, creditors representing at least two-thirds of the value of the undisputed receivables must agree on the settlement. The settlement then has to be approved by the Court for it to be binding on all parties. If any creditor fails to comply with the settlement, the debtor may approach the Court for its enforcement.
- 4.40 Once appointed, the insolvency professional has a maximum of 60 days to carry out the proceedings which may be extended by another 30 days (but overall never exceeding 90 days) with the consent of the parties. The proceedings are undertaken by a professional mediator who has qualified a prescribed list of qualifications, graduated from a mediator training program or a relevant master's degree level post-university program and has to be accredited by the Romanian Mediation Cell.

²²⁶ Ioan Chiper, The Romanian Insolvency Publication and Registration Requirements under Article 21 and Article 22 of the European Insolvency Regulation.

H. Greece

- 4.41 In October 2020, the Greek Parliament adopted a new Insolvency Law, i.e., the Law for the Settlement of Debts and Provision of a Second Chance²²⁷ that: streamlined the bankruptcy proceedings; harmonized the local proceedings with EU Directive 1023/2019; overhauled the out-of-court workout framework; and established insolvency proceedings for consumers. The Insolvency Law replaced the Bankruptcy Code 2007, i.e., Law 3588/2007.
- 4.42 Law 4469/2017 (which transposes Directive 2008/52/EC) introduced an organized extrajudicial debt-settlement procedure into Greek Law for the first time. The law provides for a mandatory mediation procedure that must be followed before the initiation of insolvency proceedings, failing which the Court may reject the application for formal insolvency proceedings. Where the mediation proceedings do not result in a settlement, the debtor may initiate insolvency proceedings and the court goes on to appoint a liquidator.
- 4.43 Once appointed, the mediator has 90 days to undertake the mediation proceedings which may be extended by another 30 days (never exceeding 120 days) with the consent of the parties. The Law also provides qualifications for the mediators, i.e., the person must have a degree in law, economics or business administration and at least 5 years of working experience in field related to finance, accounting, law or business. The mediator also has to undergo a specialized training program and be accredited as an insolvency mediator by the Ministry of Judicial, Transparency and Human Rights.
- 4.44 Under Greek law, the settlement reached in the insolvency proceedings must be part of the debtor's debt settlement plan which then has to be sanctioned by the Court. Once approved, the debt settlement plan is binding on all parties.

I. Japan

- 4.45 An amendment to the Act on Special Measures for Industrial Revitalisation and Innovation, also known as the “Act on Strengthening Industrial Competitiveness”, introduced the Turnaround ADR out-of-court workout arrangement in 2007. This approach details how financially troubled debtors and their creditors can facilitate negotiations under the supervision of licenced mediators. The first and only organisation

²²⁷ Law 4738/2020 (Official Government Gazette A' 207/27.10.2020).

with a licence to mediate Turnaround ADR disputes is the Japanese Association of Turnaround Professionals ("**JATP**").²²⁸

- 4.46 The debtor must have a business turnaround plan beforehand since the JATP only allows the debtor to move forward with Turnaround ADR in cases where there is a plausible chance of successfully restructuring the debtor's business.²²⁹ A panel of three mediators is appointed to oversee the process- one lawyer, one accountant and one consultant or another lawyer, each with a background in business rehabilitation.²³⁰
- 4.47 Some key characteristics of the process are as follows:
- a. A "standstill notice" is sent by the JATP to the debtor's financial creditors, who the debtor wants to involve in the process after the formal application has been accepted. Usually, the process involves only banks.
 - b. Debtors are expected to pay the trade creditors in the regular course of business necessary to maintain the firm as a going concern, but they are not obliged to pay loan principal once the standstill notice is issued.
 - c. The procedure is usually confidential, except for a few situations involving listed businesses.
- 4.48 The business plan is discussed and voted on by the financial creditors at three different kinds of creditors meetings. A unanimous decision of the creditors is needed to approve the plan. The Turnaround ADR is automatically terminated when one or more creditors reject the proposed plan. The debtor has two options in this situation: (i) use another mediation process known as special conciliation proceedings, which are overseen by a judge and involve attempts to reach an agreement with the dissenting financial creditors; or (ii) file for legal insolvency, which may include civil rehabilitation proceedings under the Civil Rehabilitation Act (Act No. 225 of 1999) or corporate reorganisation proceedings under the Corporate Reorganisation Act (Act No. 154 of 2002).

J. Singapore

- 4.49 The Committee notes that no formal legislative mandate on insolvency mediation exists in Singapore. The Committee's review of existing literature is being summarized here for convenience only.

²²⁸ Supra at 84 (Ohno N.).

²²⁹ Suzuki G. et al. 'Alternative Dispute Resolution Procedures for Turnaround of Business', Japanese Association of Turnaround Professionals Report.1 March 2022.

²³⁰ Abe S., 'Japan's Insolvency Regime Under Covid-19', Kasumigaseki International Law Office (KILO), Lexology.

- 4.50 The Singapore High Court acknowledged the benefits of plan mediation in *Re IM Skaugen SE*,²³¹ as noted 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.*”²³²
- 4.51 In 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring ("Committee") noted in a study that mediation might be used successfully in restructuring proceedings in a variety of situations.²³³ While features from Chapter 11 of the US Bankruptcy Code,²³⁴ such as super-priority rescue financing, an enhanced moratorium against creditor action, and a cram-down mechanism for approval over certain dissenting creditors,²³⁵ were adopted in May 2017 to further improve the insolvency and debt restructuring laws, no legislative action was taken to formally introduce mediation into the insolvency regime.
- 4.52 Nevertheless, the Committee's recommendations are beneficial in placing the practical and implementational aspects of mediation within the framework of the insolvency regime in context. The Committee, in its report, proposed the following forms of mediation:
- a. *Plan mediation*: In this process, a mediator is appointed to assist different stakeholders in reaching an agreement on a restructuring plan or when debtors are facing dual insolvency proceedings in competing jurisdictions.²³⁶ Even if there may not be agreement on all the facts or law, it is vital for the parties to agree on a restructuring plan and the commercial considerations throughout this process.
 - b. *Similar claims mediation*: This process involves the appointment of a mediator to help resolve several claims by reaching a consensus on the relevant laws or facts.²³⁷ With the goal of reducing costs and saving time, this process is a structured mediation protocol that aims to provide resolution for multiple related claims.

²³¹ [2019] 3 SLR 979.

²³² Ibid.

²³³ Kenneth Lim Tao Chung and Chew Jing Wei, ‘ADR in Insolvency Proceedings’, available at: <https://ccla.smu.edu.sg/sgri/blog/2023/02/07/adr-insolvency-proceedings> accessed 08 April, 2023.

²³⁴ Chapter 11 - Bankruptcy Basics, available at: <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> last accessed 08 April 2023.

²³⁵ Justin Yip, ‘Singapore: Mediation In Singapore Insolvency Matters’, available at: <https://www.mondaq.com/insolvencybankruptcy/719838/mediation-in-singapore-insolvency-matters> last accessed 08 April 2023.

²³⁶ Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, Report of the Committee (20 April 2016) at 3.56.

²³⁷ Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, Report of the Committee (20 April 2016) at 3.55.

- c. *Individual creditor disputes* with the debtor within the framework of a multi-creditor restructuring.

4.53 The Committee had also given the following recommendations:

- a. introducing statutory provisions permitting Singapore courts to refer issues related to insolvency proceedings to ADR processes;
- b. local mediation institutions to develop and promulgate rules catering specifically for insolvency-related matters; and
- c. strengthening the panels of these centres to constitute mediators with specialist knowledge in cross-border restructuring.²³⁸

4.54 The Committee has further recommended that institutes such as the Singapore International Mediation Centre and the Singapore International Arbitration Centre should develop and promulgate rules and protocols that cater specifically for insolvency-related matters. Multi-disciplinary teaching of law, business and accountancy should be specifically provided in local universities to develop knowledge and expertise in the insolvency profession. Currently, the Singapore International Mediation Centre acts as the body providing accreditation for mediators. No specific requirements for insolvency mediation have been adopted as such.

K. *UNCITRAL Model Law on International Commercial Mediation*

4.55 The United Nations Commission on International Trade Law (“UNCITRAL”) has developed the Model Law on International Commercial Mediation (2002) and the subsequent amendments in 2018, which provide a framework for the use of mediation in cross-border commercial disputes²³⁹ This Model Law has been adopted by several countries, demonstrating the growing recognition of mediation as an effective dispute resolution mechanism in the international arena. Incorporating the principles of the UNCITRAL Model Law into the IBC can help align India's insolvency and bankruptcy framework with international best practices, promoting the use of mediation in domestic and cross-border insolvency disputes.

4.56 *“To avoid uncertainty resulting from an absence of statutory provisions, the Model Law further provides aspects such as the procedural aspects of mediation, directions for commencement and termination of mediation, for communication between the mediator*

²³⁸ Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, Report of the Committee (20 April 2016) at 3.66, 3.68 and 3.69.

²³⁹ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/18-22579_ebook_1.pdf last accessed 31 May 2023.

*and the parties to the mediation, confidentiality, admissibility of evidence in other proceedings as well as post-mediation issues, etc.”*²⁴⁰

- 4.57 The Commission²⁴¹ noted that “... (e)xperience in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral. The Commission noted that conciliation was being used with success in the case of complex, multiparty disputes. Notable examples of these include disputes arising during insolvency proceedings or disputes whose resolution is essential to avoid the commencement of insolvency proceedings. Such disputes involve issues among creditors or classes of creditors and the debtor or among creditors themselves, a situation often compounded by disputes with debtors or contracting parties of the insolvent debtor. These issues may arise, for example, in connection with the content of a reorganization plan for the insolvent company; claims for avoidance of transactions that result from allegations that a creditor or creditors were treated preferentially; and issues between the insolvency administrator and a debtor’s contracting party regarding the implementation or termination of a contract and the issue of compensation in such situations ...”

L. Germany

- 4.58 The German Insolvency Code, which came into force on January 1, 1999, governs bankruptcy law in Germany. In 2012, 2014, and 2017, the Code underwent significant amendments that introduced new reforms into the regime.²⁴² There is one unified insolvency procedure code in Germany, and it applies to both individuals and companies. Alongside, the German Act of 2021 established the Stabilisation and Restructuring Framework for Businesses ("**StaRUG**"). Due to its ability to ease the restructuring of imminently illiquid companies outside of insolvent proceedings — even when individual creditors disagree — the StaRUG has had a substantial impact on the restructuring landscape in Germany.
- 4.59 The European Parliament and Council's Directive 2008/52/EC, which facilitated access to alternative dispute resolution procedures and encouraged the use of mediation for amicable settlement of disputes, was put into effect by German lawmakers in July 2012.

²⁴⁰ United Nations Commission On International Trade Law, ‘UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018’, available at: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation last accessed 31 May 2023.

²⁴¹ Please note that the terms conciliation and mediation have been used in these reports interchangeably.

²⁴² Dr. Marco Wilhelm, et. al, Mayer Brown, ‘German Insolvency Law– an overview’, available at: https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2016/08/german-insolvency-law--an-overview/files/get-the-full-report/fileattachment/german_insovcency_oct_14_a4.pdf last accessed 31 May 2023.

However, there is no official mechanism in place in the German system that permits the use of mediation in insolvency proceedings.

- 4.60 Currently, German Courts or institutions cannot mandate parties to opt for mediation during or before a Court proceeding. However, on the recommendation of the Court, if the parties decide to opt for mediation, steps may be taken to stay the Court proceedings under Section 278a of the *Zivilprozessordnung* (“ZPO”).²⁴³ The dispute is then transferred to a conciliation judge who facilitates the ADR proceedings but has no decision-making powers.
- 4.61 The debtor may apply for a *Restrukturierungsmoderation*, also known as a restructuring moderation, to facilitate mediation between creditors and debtors when formulating a restructuring plan. The debtor may also decide to collaborate with a restructuring agent, who may be appointed at the creditor's or debtor's request. A settlement agreement can be enforced as a contract since it is deemed a settlement under Section 779 of the German Civil Code (*Bürgerliches Gesetzbuch*). Besides, the settlement may be recorded in a notarized deed (*notarielle Urkunde*), which is a deed of execution, or, if it is concluded by lawyers acting for the parties (*Anwaltsvergleich*), it may be made immediately enforceable through a special procedure, given the consent of the paying party.²⁴⁴
- 4.62 The Mediation Act²⁴⁵ provides the qualifications for a “certified mediator”. The qualification includes an initial training along with regular refresher courses every three years, theoretical knowledge and practical experience to enable the mediator to guide the parties through mediation ‘in a competent manner’. The mediators are further required to at least nine mediation cases, with at least 36 contact hours every three years’ period. Of the mediations, at least three must end up with written agreements and no more than three should be co-mediated. Mediators must also take part in peer review assessments every three years. However, as of yet, there exists no regulatory body to supervise compliance with these provisions.
- 4.63 Currently, there exists no prescribed time limit. The time period and the costs of mediation are contingent on the appointed mediator and the complexity of the proceedings.

²⁴³ Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette).

²⁴⁴ Linklaters, ‘Commercial Mediation in Germany’, available at: <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/germany> last accessed 31 May 2023.

²⁴⁵ Mediation Act of 21 July 2012 (Federal Law Gazette I, p. 1577).