



**INSOLVENCY
LAW ACADEMY**

An Indian Institute of Excellence in Insolvency



INSOL
India



SYNTHESIS NOTE

**GOA ROUNDTABLE
ON MEDIATION IN INSOLVENCY**

Monday, 12th February 2024, IIULER Campus, Goa

Mediation offers parties the opportunity to reach mutually agreeable commercial solutions to business disputes without the intervention of the courts.¹ The use of mediation for the resolution of disputes is no longer a future trend, it is widely used as an effective and efficient alternative dispute resolution process. On the sides of Insolvency Law Academy's (ILA) Annual Conference in Goa, an *International Roundtable on Mediation in Insolvency* was organized by ILA, and India International University for Legal Educational and Research on 12 February, 2024 (Roundtable). Held in collaboration with INSOL India, many international experts attended the Roundtable (*Refer Annexure A for list of participants*). The Roundtable discussed international developments in this area, including formalization and development of the Mediation Act, 2023 (Mediation Act), and developments around the use of mediation in India (*Refer Annexure B - the schedule of Roundtable*).

Mediation is the new norm in insolvency

Mediation offers many benefits. The mediation process is usually flexible, private and confidential. The nature of this process promotes the 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.² It provides strong incentives for both parties to engage in fast and efficient dispute resolution and look for a common business solution.³

The Roundtable noted that mediation has emerged as an effective tool of dispute resolution in insolvency processes across many jurisdictions and has attained the status of '*Appropriate Dispute Resolution*' mechanism in insolvency systems. Mediation is also widely used in pre-insolvency and out-of-court insolvency processes. The United States has been an early adopter of mediation and has used it to resolve many high-profile disputes. The courts in the United Kingdom have advocated the use of mediation in suitable situations.⁴ The European Union has placed great emphasis on mediation in restructuring procedures with the intent of promoting the comprehensive recovery of industries.⁵ The Singapore High Court has acknowledged the benefits of plan mediation.⁶ In 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring noted in a study that mediation might be used successfully in restructuring proceedings in a variety of situations.⁷ 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.⁸ Italy has also established a particular mediation process for financial, banking, and commercial disputes.⁹ Many other countries are making use of mediation in one way or another.

Applicability of mediation in insolvency laws in India

Insolvency resolution under the Insolvency and Bankruptcy Code 2016 (Code) is not an adversarial process, yet implementation-wise, it has become litigious in India. 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 capacity of the National Company Law Tribunal. This creates several systemic bottlenecks and leads to cascading delays in the resolution process and increasing pendency.¹⁰

While the applicability of mediation in insolvency has gradually increased around the globe, mediation has still not been used extensively in insolvency proceedings in India. To reduce the judicial overload, mediation should get due attention. The Roundtable noted the recommendations made in this regard by the IBBI Expert Committee in its report.¹¹ The participants were of the unanimous view that mediation in insolvency is not only necessary for reducing the conflict but also for providing a better solution to the problem. It is likely to help overcome some of the inherent shortcomings of adjudication (e.g., cost, publicity, lack of flexibility) in insolvency disputes. This is valuable because the debtor's assets are not wasted on litigation and other costs. The participants expressed hope that the recommendations of the IBBI Expert Committee will be implemented at the earliest.

Exclusion of the Code from Mediation Act, 2023

The Mediation Act is based on a 'one-size-fits-all' approach. The participants expressed that the mediation process envisaged under the Mediation Act would not be suitable for the insolvency resolution processes under the Code. The timeline for the completion of the mediation procedure of 120 days (along with an extension of 60 days) currently envisaged under the Mediation Act is not aligned with the primary object of the Code, i.e., time-bound revival of stressed enterprises and maximizing the value of the debtor.

Unscrupulous parties may invoke mediation to derail the insolvency process. Institutions under the Code would have less control over the delay caused by the parties. Entry 13 of the First Schedule to the Mediation Act allows the Central Government to exclude by notification the subject matter of dispute that may be kept out of the purview of the Mediation Act. The Roundtable concurred with the IBBI Expert Committee recommendation for the exclusion of the Code from the Mediation Act and for a comprehensive mediation framework within the Code itself.

Other matters

The Roundtable noted the IBBI Expert Committee recommended a 'stage-based' and phased introduction approach to apply and implement mediation in Code. The participants agreed on the phased implementation of voluntary mediation. The need for proper training, robust infrastructure, and capacity building in the sphere of mediation was also discussed in the Roundtable. Noting that the skills required by a mediator for a successful and effective resolution of a dispute are crucial for the success of mediation, the participants emphasised the need for developing a cadre of trained mediators. The Roundtable noted the establishment of the Arun Jaitley Mediation Centre (AJMC) as part of the mediation infrastructure and recommended that the training programmes can be undertaken under the auspices of AJMC.

¹ '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.

² Refer *Salem Advocate Bar Association, T.N. versus Union of India (Salem II)*, (2005) 6 SCC 344; and *Afcons Infrastructure Limited and another versus Cherian Varkey Construction Company Private Limited and others (Afcons)*, (2010) 8 SCC 24.

³ Mediation in Insolvency Matters, Rajiv Mani,
<https://ibbi.gov.in/uploads/resources/1acc8439aab101c013221a481fe108a6.pdf>

⁴ Mediation and insolvency, Centre for Effective Dispute Resolution, October, 2020.

⁵ 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.

⁶ Re IM Skaugen SE, [2019] 3 SLR 979.

⁷ 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.

⁸ Ibid.

⁹ Giovanni Matteucci, 'Mediation in Bankruptcy: Opportunities in Italy', available at: <http://www.adrmaremma.it/matteucci02.pdf> last accessed 08 April 2023.

¹⁰ Report of IBBI Expert Committee on Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, January, 2024 <https://ibbi.gov.in/uploads/whatsnew/1256aa8a9e2c89bd09d8186dae2e6019.pdf>

¹¹ Supra

ANNEXURE A - LIST OF PARTICIPANTS

Hon'ble Justice A.K. Sikri (Chair)

Former Judge, Supreme Court of India

Hon'ble Justice Sanjay Kishan Kaul

Former Judge, Supreme Court of India

Dr. M.S. Sahoo

Former Distinguished Professor; National Law University Delhi;
Former Chairperson, IBBI

Sudhaker Shukla

Whole Time Member, Insolvency and Bankruptcy Board of India

Prof. (Dr.) R. Venkata Rao

Vice Chancellor, India International University of Legal
Education and Research (IIULER), Goa

Sumant Batra

President Insolvency Law Academy

Scott Atkins

President, INSOL International, Australia

Nicholas H Moller

Principal Counsel, Asian Development Bank, Philippines

Dinkar Venkatasubramanian

Partner, EY India

James Sprayregan

Founder Kirkland & Ellis Worldwide Restructuring Group, USA

Iram Majid

Mediator, Asia Pacific Centre for Mediation and Arbitration

Dr. Virginia Torrie

Estey Chair, university of Saskatchewan College of Law; Editor-in-Chief, Banking and Finance Law Review, Canada

Suharsh Sinha

Partner, AZB & Partners

Steven Kargman

Founder & President, Kargman Associates, USA

Swarupma Chaturvedi

Senior Advocate, Supreme Court of India; Former Assistant
Professor (Law), NLSIU Bangalore

Sanjeev Ahuja

President, Solutions & Resolutions Forum (Founder-Missing
Bridge)

Dr. Yashomati Ghosh

Associate Professor of Law, IIULER, Goa

Din Nath Parajuli

Campus Chief, Nepal Law Campus, Nepal

Vijay Jayshwal

Assistant Professor of Law, Nepal Law Campus, Nepal

Saroj Giri

Assistant Professor of Law, Nepal Law Campus, Nepal

Saroj Ghimire

Assistant Professor of Law, Nepal Law Campus, Nepal

Kishwor Sapkota

Assistant Professor of Law, Nepal Law Campus, Nepal

Dr. Anirban Chakraborty

Professor of Law, IIULER, Goa

Dr. Padma Singh

Associate Professor of Law, IIULER, Goa

Dr. Riyanka Baral

Associate Professor of Law, IIULER, Goa

ANNEXURE B - SCHEDULE OF PROGRAMME

Timeslot	Session	Speakers
10:00 - 10:45	Welcome Remarks	Prof. (Dr.) R. Venkata Rao , Vice Chancellor, India International University of Legal Education and Research (IIULER)
	Opening Comments	Sumant Batra , President, Insolvency Law Academy
	Keynote Address	Hon'ble Justice Sanjay Kishan Kaul , Former Judge, Supreme Court of India
10:45 - 11:30	Mediation Act, 2023: An overview	Iram Majid , Executive Director, Asia Pacific Centre for Arbitration and Mediation
11:30 - 11:45	Tea Break	
11:45 - 12:30	Global: Trends in Mediation in Insolvency	Scott Atkins , President, INSOL International
		James Sprayregan , Founder, Kirkland & Ellis Worldwide Restructuring Group
12:30 - 13:20	India: Future of Mediation in Insolvency	Sudhaker Shukla , Whole Time Member, Insolvency and Bankruptcy Board of India
		Anita Shah Akella , Joint Secretary, Ministry of Corporate Affairs
		Hon'ble Justice A.K. Sikri , Former Judge, Supreme Court of India, Chairman, ILA Global Advisory Board
13:20 - 14:10	Lunch	
14:10 - 14:50	India: Future of Mediation in Insolvency (Continued)	Sanjeev Ahuja , President, Solutions & Resolutions Forum, Founder-Missing Bridge
		Suharsh Sinha , Partner, AZB Partners
14:50 - 15:00	Closing Remarks	Dinkar Venkatasubramanian , Partner, EY India
		Sumant Batra , President, Insolvency Law Academy



About Insolvency Law Academy

Insolvency Law Academy (ILA) is a unit of Sumant Batra Insolvency Law Academy, a public charitable trust registered under the Indian Trusts Act, 1882. ILA is an independent Indian institute of excellence in insolvency. As a think tank and research institute, ILA seeks to contribute to robust policy making and enhancement of standards in the insolvency industry through cutting-edge research, innovation and development of best practices. ILA is developing a community in pursuit of education, research and scholarship in the field of insolvency.



About IIULER

India International University of Legal Education and Research (IIULER), Goa is an initiative of Bar Council of India Trust for promotion of education (Legal and Professional) and reforms in law and for improvement of research, social and clinical training. A first-of-its-kind international legal education institute in the country to offer multi-disciplinary courses (under-graduate, post-graduate and research-based courses along with multiple customised, creative law learning programmes) with proper integration of law.



About INSOL India

INSOL India is an independent leadership body representing practitioners and other associated professionals specialising in the fields of restructuring, insolvency and turnaround. It is an association with an architecture that facilitates key stakeholders to come together and share experiences while preserving their independence.

INSOL India is a member association of INSOL International - the global federation of insolvency, restructuring and turnaround fraternity. With over 10000 members located in over 90 countries, INSOL is a truly global organisation influencing the global restructuring practice and policy.

www.insolvencylawacademy.com



Insolvency Law Academy

5, Mathura Road, Jangpura-A, New Delhi-110014

Email: message@insolvencylawacademy.com



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