Original Article
ISSN (Online): 2582-7472

ShodhKosh: Journal of Visual and Performing Arts
July 2024 5(7), 887–896

DEMYSTIFYING THE MYTHS OF SMOOTH EXIT: DECODING TIMELINE OF CORPORATE INSOLVENCY RESOLUTION PROCESS IN INDIA

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DOI
10.29121/shodhkosh.v5.i7.2024.4655

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

ABSTRACT

The enactment of the Insolvency and Bankruptcy Code signalled a transformative shift in addressing financial distress. Intended to rectify deficiencies in previous bankruptcy regimes, the Code aimed to instigate a cultural metamorphosis within the insolvency resolution process. Nonetheless, despite its ambitious objectives, the IBC has encountered its share of challenges. Adhering to the timeline is one of the many challenges faced by the Code. The paper explores the concept of time bound resolution process under the Code and identifies the challenges in adhering the timeline provisions. The authors highlight the importance of time bound resolution and analyse the impact of delayed resolution on the stakeholders and the market. The research contributes by pointing out the loopholes in the law and the system and exploring alternatives for corporate insolvency resolution process. The paper concludes with the suggestion of amendments that the Code must undergo to pass the test of time.

Keywords: Corporate Insolvency, Resolution, Market, Timeline, Bankruptcy, Financial Distress, Stakeholders

1. INTRODUCTION

Today, certain people file for bankruptcy, businesses and individuals, and it no longer has the stigma it once had. Now it's almost considered wise, a way to regroup and come back again.

1.1. DAVID DINKINS (1970)

The functioning of market is based on the motion of credit. The target of any insolvency regulation is to make credit available to the ones in need and take it from ones who have failed to manage it. Market comprises of both corporates and individuals and regulating the cycle of credit for both are two different procedures. Economy of a nation is determined by the participation of both individuals and corporates, the need to have a sound insolvency procedure to regulate both is a sine qua non.

In any market economy, the field of insolvency is considered abundant. It has flourished with time. The insolvency regime in India is no exception. It has continued to evolve with changing market dynamics and in its current form stands at its best till now. The Insolvency and Bankruptcy Code, 2016 (IBC/Code) is a legislation which highlights the need of a uniform Insolvency and Bankruptcy law in India. Based on the UNCITRAL Guide to Insolvency Law, drafted by the Banking Law Reform Committee (2015), the Code is a systematic law that covers all the aspects of market and stakeholders in its ambit.

2. INSOLVENCY LAW AS IT WAS – PRE IBC

The Indian insolvency and bankruptcy regime witnessed a transformation in form of enactment of Insolvency and Bankruptcy Code in 2016. Prior to the advent of the IBC, India grappled with a fragmented legal framework that failed to adequately address the complexities of financially distressed companies. The multitude of legislations, though pinpointed specific needs of the stakeholders and market, contributed a regulatory environment.

To create and prosper a rehabilitation environment for industries, the Sick Industrial Companies Act, 1985 (SICA) was put in place. The Companies Act, 1956, proposed to establish a distinct winding up procedures. The provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) expedited the recovery of debts by financial institutions. This scattered legal framework led to ambiguity and conflicts among the stakeholders. Moreover, many of these statutes, including SICA, faltered in achieving swift restructuring with due consideration for both creditors and debtors. India's consistent low rankings in the World Bank's Ease of Doing Business Index[i], in resolving insolvencies, underscored the inefficiencies of the prevailing system. Though the government had envisaged resolution through SICA but the same was not even in near sight. Timeline was not followed leading to further deterioration of the overall business landscape. The unwarranted and uncertain delays caused a fear among creditors. A culture of lending with no repayment was becoming a common practice. Foreign investors were reluctant to invest or lend to Indian enterprises because SICA was being used as a shelter by the defaulters to halt the process for uncertainty, without any guarantee of resolution or repayment.

3. ESTABLISHMENT OF NEW REGIME- IBC

The law of insolvency in India took a leap with the enactment of IBC. The Code provides a one stop solution for all who are on the verge of insolvency. It has separate chapters which elaborate on the treatment of insolvency of corporates and individuals (Personal Guarantors to Corporate Debtors, Sole Proprietorship, Partnership Firms, and other individuals). The procedures prescribed for the corporate and individuals are different. For the insolvency resolution of corporates, the Code has provided Corporate Insolvency Resolution Process (CIRP) which marks the shift from earlier debtor-in-possession model to creditor-in-control model while for individuals it provides Individual Insolvency Resolution Process (IIRP) which follows debtor-in-possession model as of now. The provisions of Corporate Insolvency Resolution came into force on December 1, 2016, while those of insolvency resolution and bankruptcy of personal guarantors to corporate debtors (CDs) came into effect on December 1, 2019. Insolvency and bankruptcy provisions for other category of individuals are yet to be notified (as on the date of this publication).

Taking a que from earlier legislations, the aim of the Code is to enhance coherence in law and make the Indian insolvency regime more conscious of stakeholder's rights while promoting lucid development of economy.

To remedy the deficiencies in the erstwhile procedures, the Bankruptcy Law Reform Committee under the aegis of Ministry of Finance was set up in 2014, with Dr. T.K. Viswanathan as the chairperson. The Committee's report comprised of two parts where in Part I and the draft Insolvency and Bankruptcy Bill, 2015 (Part II), laid the groundwork for insolvency reform. Following subsequent revisions and amendments, the IBC emerged as a consolidated law aimed at streamlining insolvency resolution and liquidation processes.

By introducing a well-structured code defining insolvency and bankruptcy, demonstrating transparent and explicit resolution procedures, and eliminating delays in judicial relief, the Code aspired to overhaul the landscape of debt resolution in India. The IBC has been a distinct advantage in the domain of financial regulations with a momentous excursion to its credit and a genuine endeavour to determine major economic problems. In addition to the fact that all the necessary components were set up in rather a short measure of time, these components of the system have advanced what's more, endured over the extreme long haul.

The Code by instituting an early trigger mechanism provides a structured and time bound corporate insolvency resolution procedure. The time bound factor is the one which indicates the precedent the law intends to establish. Providing a time bound resolution procedure is one of the main objectives of the Code. The resolution process can be initiated by a payment default exceeding specified thresholds for corporate debtors and individuals or partnership firms. Financial creditors are empowered to file applications based on default occurrences, prompting a defined moratorium period. An Insolvency Resolution Professional (IRP) is appointed to oversee the debtor's affairs and provide for smooth conclusion of Resolution Process. The IRP strives to harmonize goals of resolution and liquidation. Should a resolution plan, sanctioned by the necessary majority of financial creditors, become unfeasible or nonviable, liquidation proceedings will follow.[ii].

In the liquidation phase, secured creditors retain the prerogative to enforce their security interests, albeit at the expense of relinquishing priority in asset distribution. The IBC establishes a definitive order of priority for asset distribution among various creditor classes, signalling a departure from preceding regulations. However, the overwhelming caseload with the AAs, particularly in major cities like Delhi and Mumbai, has resulted in adjudication delays. Despite endeavors to bolster bench capacity and establish regional branches, the persisting vacancies and impending retirements among judicial and technical members continue to pose concerns regarding the tribunal's ability to manage the growing workload.

4. TIMELINE UNDER THE CODE

Section 12(1) of the Code provides 180 days of time for completion of CIRP (from the date of admission of the application of initiation of CIRP). The timeline, however, can be extended by the AA on the application of the RP provided CoC has passed a resolution for the same. In an attempt to solve the persisting issue of breach of timeline, the Code was amended to provide a fixed duration of 330 days for which any CIRP may be extended inclusive of the time taken by other legislative procedures, failing which the AA shall commence the liquidation procedure as given under chapter III of the Code.

The revision to Section 12 of the Code mandates the conclusion of the CIRP within a maximum span of 330 days, inclusive of any extensions granted. Thus, the original time limit of 180 days + 90 days remains intact, with the aim of granting an extra 60 days (330-270). In instances where the IRP of the CD is ongoing and surpasses the 330-day timeframe, it must be finalized within 90 days from the commencement date of the IBC (Amendment) Act, 2019.

The Code stipulates a completion period of 180 days for the CIRP, extendable by a maximum of 90 days to reach a total of 270 days. However, the duration of 614 days taken for CIRP closure upon approval of resolution plans and 456 days taken for liquidation plan closure far exceeds the statutory expectations. Moreover, the ongoing CIRPs, comprising over 1300 cases, accounting for 64% of ongoing cases, have been outstanding for more than 270 days, suggesting that they would surpass the statutory resolution time limit. This underscores the urgent necessity to significantly reduce closure timelines to align them with statutory requirements.

5. BREACH OF TIMELINES

Delay in resolution process can be attributed to multiple factors. Since the resolution process works in stages where at every stage, a particular component is responsible to take it forward, the role of each component is a must. At every stage there should be speed, which is also the essence of the Code.

CRISIL Ratings have reported that the between March 2019 to September 2023, average time of resolution increased has from 324 days to 653 days (much higher than the stipulated time of 330 days) and recovery rates have fallen from 43% to 32%. This decrease in recovery rates and increase in time of resolution has been a concern for the stakeholders. According to CRISIL, a) limited judicial bench strength and delays in identifying and acknowledging default, b) significant delay in the pre-IBC admission stage which has increased from 450 days in fiscal 2019 to 650 days in fiscal 2022, has supressed recovery rates.

Firstly, the sheer volume of cases inundating the NCLT, particularly in metropolitan cities like Delhi and Mumbai, has overwhelmed the AAs, leading to backlog and delays.[iii] The burgeoning caseload, coupled with a shortage of judicial and technical members, has hindered the timely disposal of cases, exacerbating the problem of delays.

Furthermore, procedural complexities inherent in the resolution process, such as intricate negotiations among creditors, evaluation of resolution plans, and judicial interventions, have contributed to sluggish progress. Disputes arising during the resolution proceedings often necessitate extensive litigation, prolonging the timeframe for resolution and exacerbating delays.[iv]

The report of the Standing Committee on Finance (2020-2021)[v] highlights significant challenges within the corporate insolvency resolution process (CIRP), particularly regarding delays in two key stages: the admission of an application for initiating CIRP and the approval of resolution plans by the NCLT.[vi] The delays at the plan approval stage are particularly concerning due to systemic issues that hinder the timely resolution of insolvency cases.

One major issue identified is the misuse of residuary powers by the AA, leading to unnecessary judicial intervention in commercial matters. This often occurs when stakeholders file applications seeking declarations of law and guidance, which prolongs the resolution process. Additionally, an adversarial approach taken by stakeholders further exacerbates the problem, resulting in numerous pending interim applications before the NCLTs. These complexities not only impede the resolution process but also make it challenging for the AA to prioritize resolution plan approval effectively.

Another significant challenge lies within the CoC, which is tasked with approving resolution plans before they are submitted to the NCLT. The CoC comprises of financial creditors who may have divergent interests and limitations. For instance, public sector banks may face internal organizational constraints that impacts their ability to make purely commercial decisions. This lack of flexibility can hinder the CoC's ability to act in the collective interests of all stakeholders.[vii]

The Report highlights the issue of unnecessary lawsuits initiated by the management of the CD, which can delay the approval process by challenging the eligibility of resolution applicants or the constitution of the CoC. Such legal challenges not only prolong the resolution process but also undermine the integrity of the insolvency framework.

Challenges pertaining to the quality and readiness of information provided by the debtor, creditor coordination, and the availability of qualified IPs have impeded the expeditious resolution of cases. Inadequate infrastructure and technological deficiencies within the insolvency ecosystem have further compounded the problem, hindering efficient case management and exacerbating delays[viii].

In the case of Surendra Trading Company v. Juggilal Kamlapat Jute Mills Co. Ltd. & Ors., [ix] the Supreme Court deliberated on the essence of timeline provisions within the Code. The key points highlighted in the observations of the Supreme Court are:

Interpretation of Procedural Laws: The Court stresses that procedural laws, such as those outlined in the Civil Procedure Code (CPC) or any other procedural statute, should not be interpreted in a manner that would leave the court powerless in exceptional circumstances where justice must prevail. This indicates that procedural rules are meant to aid justice rather than act as strict mandates.

Nature of Provisions in IBC: The Court observes that certain provisions of the IBC, namely sections 7(5), 9(5), and 10(4), are procedural in nature. As such, they should not be considered mandates of law but rather guidelines to facilitate the expeditious disposal of cases. However, the Court also acknowledges the importance of adhering to these provisions to prevent undue delay in proceedings.

Balanced Approach: While recognizing the importance of adhering to prescribed timelines under the IBC, the Court also acknowledges the need for a balanced approach. It suggests that in appropriate cases, where there are valid reasons, the Adjudicating Authority may admit or reject a petition even after the prescribed period, provided that reasons for such decision are recorded in writing.

Fairness and Justice: The Court underscores the importance of expediting the hearing process without compromising fairness. It acknowledges that while setting time limits may impose a restriction on the applicant, it does not preclude the court's power to extend such time limits when necessary. The fairness of proceedings remains a fundamental aspect of justice that cannot be sacrificed for the sake of expediency.

At the same time while mentioning that limits should not hamper with fairness and justice the following judgement highlights the importance of timely resolution under IBC. Ashish Chaturvedi Ex-Director, A to Z Barter Pvt. Ltd. v. Inox Leisure Ltd[x]., the NCLAT revoked an order of the NCLT which denied an extension of time to the RP for initiating the Corporate Insolvency Resolution Process (CIRP). Here are the key points highlighted in the decision:

Speedy Resolution: The NCLAT emphasized the importance of speedy resolution in the effective functioning of the IBC. Timely resolution is crucial to maintain the integrity of the bankruptcy process and to safeguard the interests of all stakeholders involved.

Limitations on Time Extensions: Section 12(3) of the IBC specifies that the timeline for the CIRP should not be extended more than once. Additionally, the authorities involved are expected to adhere to the timeframe outlined in Regulation 40(A) of the IBBI (CIRP for corporate person) Regulations 2016 as closely as possible.

Exceptional Circumstances: However, the NCLAT recognized that in certain extraordinary circumstances, the Adjudicating Authority (typically the NCLT) has the discretion to extend the CIRP beyond the time limit prescribed in Section 12(3) of the IBC. Such extensions can only be granted through an application by the Insolvency Resolution Professional (IRP) based on the recommendation of the Committee of Creditors (CoC), as outlined in sub-sections 2 and 3 of Section 12 of the IBC.

Similarly in the case of National Spot Exchange Limited v. Anil Kohli[xi], the Supreme Court declined to condone a delay of 44 days beyond the limitation period for filing an appeal, as required by section 61(2) of the Insolvency and Bankruptcy Code (IBC). Section 61(2) of the IBC mandates that any appeal against an order of the National Company Law Tribunal (NCLT) must be filed within 30 days. The proviso to this section allows for an additional 15-day period if there is sufficient cause for the delay.

The Supreme Court clarified that the appellate tribunal (in this case, the National Company Law Appellate Tribunal, or NCLAT) has no jurisdiction to condone a delay exceeding 15 days beyond the initial 30-day period, as per the scheme of the Code. The Court emphasized that it cannot insert new provisions or carve out exceptions if they are not explicitly provided for in the legislation. Even if a delay is due to genuine reasons like accident or illness, the Court cannot condone it beyond the statutory limit set by the Code.

Despite the appellant's plea to exercise the Court's power under Article 142 of the Constitution to condone the delay, the Supreme Court did not delve into the factual aspects of the case or discuss whether such jurisdiction could be invoked. Instead, it strictly adhered to the provisions of the IBC regarding the timeline for filing appeals and the limitations on the appellate tribunal's powers.

6. HERE'S A BREAKDOWN OF THE KEY POINTS AND CHALLENGES IN TIMELY DELAY

Non-Adherence to Timelines: Section 12(2) of the IBC mandates a strict timeline of 180 days for the completion of the CIRP, extendable by 90 days if required.[xii] However, there have been instances where these timelines have been exceeded, such as in the Quinn Logistics India Pvt. Ltd v. Mack Soft Tech Pvt. Ltd[xiii]. Delays in resolution processes, like the Essar Steel case[xiv], have questioned the significance of these timelines.[xv] Time is the essence of the Code and hence, breach of timeline puts a question on the efficiency of the Code.

Impact of Delay on Creditors: The delays in the admission stage of insolvency proceedings, with NCLTs taking an average of 280 days instead of the mandated 14 days, lead to asset alienation and prevent value maximization.[xvi] This hampers the purpose of the moratorium after admission, negatively affecting creditors' interests.

Practical Difficulties and Timeframe: The existing timeline of 270 days for resolution is deemed too short for large corporate entities dealing with complex issues. Comparisons with timelines in the US and the UK suggest the need for a re-evaluation.[xvii] The new amendment promising a resolution completion process of 120 days for MSMEs appears promising.

Difficulty in Approving Resolution Plans: Difficulty in approving resolution plans within the prescribed time frames has led to significant delays in debt recovery. Some early cases resulted in abysmal recovery to creditors, raising concerns about the effectiveness of the IBC in protecting creditors' rights.[xviii]

Impact on Creditor Recovery: The rush to arrive at a resolution plan within the short timeframe of 270 days often leads to significant haircuts for creditors, affecting their recovery rates. This can be seen in cases where resolution values are lower than liquidation values, forcing creditors to accept unfavourable terms.[xix]

Judicial delays: The reliance on judicial discretion and the resulting delays in the resolution process under the IBC have indeed posed significant challenges to achieving its twin objectives of time-bound insolvency resolution and asset value maximization. While judicial discretion is essential in certain circumstances, its overuse or misapplication can lead to prolonged legal battles that undermine the very purpose of the IBC. Judgments like Vidarbha Industries Power Ltd. v.

Axis Bank[xx] have extended discretionary powers to the NCLT, allowing for additional grounds to be considered at the admission stage of insolvency applications. While this may seem reasonable in theory, it often leads to prolonged legal proceedings, further delaying the resolution process. Such delays not only hinder the timely resolution of insolvency cases but also erode the value of assets, thereby diminishing the recovery prospects for creditors. This problematic approach exacerbates the challenges faced by stakeholders involved in the insolvency resolution process. The prolonged legal battles not only increase costs but also create uncertainty, ultimately undermining investor confidence and the effectiveness of the IBC itself. Furthermore, the discrepancy between legislative intent and judicial interpretation only adds to the confusion and inefficiency of the process.

IBC and inclusion of different creditors: Inclusion of different creditors under the umbrella of financial creditors may dilute the rights of banks and financial institutions, hindering their ability to effectively recover debts and potentially defeating the objectives of the Code. Under the IBC, a resolution plan can only be presented to the CoC if it satisfies the conditions specified under section 30(2). This means that any dilution of the pool of assets, whether through including additional creditors or other means, could result in reduced recovery amounts for banks and financial institutions, both in resolution and liquidation scenarios. This is because the distribution of assets under section 53 is based on a hierarchy prescribed by the Code. Moreover, if there are multiple divisions of proceeds within the same class of creditors, it could further diminish the prospects of recovery for banks and financial institutions. This could potentially push these creditors to explore alternative means for debt recovery under section 52 of the Code. When judicial interpretation expands the definition of financial creditors beyond the legislative intent of the Code, it can severely impact the rights of banks and financial institutions.[xxi] Such interpretations may lead to fragmentation within the class of financial creditors, ultimately reducing the recovery prospects for these crucial stakeholders in the insolvency resolution process. Therefore, it is essential to ensure that the original legislative intent of the Code is upheld to protect the interests of banks and financial institutions and to maintain the effectiveness of the insolvency resolution framework.

Several factors contribute to this imbalance. Firstly, the reluctance of stakeholders, including creditors and resolution applicants, to engage in the resolution process owing to apprehensions regarding haircuts, regulatory uncertainties, and litigious environments, has thwarted efforts to achieve consensual resolutions. In cases where resolution plans fail to garner requisite approval from the COC or face legal challenges, the inevitable recourse is liquidation, resulting in suboptimal outcomes for all stakeholders involved.

Furthermore, the lack of a conducive ecosystem for distressed asset transactions, including limited investor appetite, inadequate market depth, and regulatory bottlenecks, has constrained the viability of resolution plans, pushing insolvent firms towards liquidation as a last resort.[xxii]

While the Code represented a significant leap forward in India's insolvency landscape, its efficacy has been marred by persistent setbacks, including delays in timelines and a disproportionate ratio of liquidations to resolutions. Addressing these challenges necessitates a concerted effort from all stakeholders, including regulatory authorities, adjudicating bodies, creditors, and resolution professionals, to streamline processes, enhance infrastructure, and foster a conducive environment for successful resolution outcomes. Only through collaborative efforts can the true potential of the Code be realized in facilitating the rehabilitation and revitalization of financially distressed entities, thereby fostering a vibrant and resilient economy.

7. COPING WITH THE CHANGES

The objective of the Code is clear: to facilitate the reorganization and resolution of stressed corporate entities in a time-bound manner, while maximizing the value of their assets, promoting entrepreneurship, and improving credit availability in the economy. While the objective remains singular, the benefits derived from achieving this objective are manifold.

The Tinbergen Rule[xxiii] underscores the importance of having clear and distinct policies to achieve specific goals. In the context of stress resolution, different frameworks like the RBI's prudential framework, the Companies Act 2013, and the IBC offer different benefits. For instance, the IBC prioritizes unsecured financial debts above government dues, promoting alternative finance sources like corporate bonds[xxiv].

The IBC provides two avenues for stress resolution: through the rescue of the company via a resolution plan or through its closure via liquidation. The decision between these options depends on the viability of the company's business. If viable, the market can find a resolution plan to revive it; if not, liquidation releases resources for optimal allocation elsewhere. Both resolution plans and liquidation serve the same economic purpose: resolving stress by optimizing resource utilization.

Liquidation, though often seen negatively, is a legitimate means of resolving stress, akin to ‘creative destruction’, rejuvenating the market economy. While the IBC encourages exploring resolution plans first due to the irreversible nature of liquidation, it does not guarantee the revival of every stressed company or full recovery for creditors. The outcome, whether a resolution plan or liquidation, depends on the company's viability.

It's important to recognize the achievements of the IBC, even if some cases end in liquidation or partial recovery for creditors. Legacy cases may skew perceptions, but the IBC has shown promising results. Companies rescued by resolution plans have reduced creditors' haircuts and recovered more than the liquidation value. As we move forward and address distress early, the potential for complete recovery increases significantly.

The recent performance of the NCLT in processing insolvency cases indicates significant progress in the resolution landscape under the Code. In the financial year 2023-24, the IBBI data highlights a remarkable growth in the number of resolutions plans approved by the NCLT. The total number of approved resolution plans at the end of FY 2023-24 stands at 269 marking a consequential increase of 42% approval from the previous financial year.[xxv]This surge in approvals reflects an improved efficiency and effectiveness in the insolvency resolution framework.[xxvi]

These positive developments are crucial for instilling confidence in the efficacy of the IBC and demonstrating its ability to facilitate debt resolution while maximizing asset value. The increase in resolution cases and improved recovery rates[xxvii] are encouraging signs for stakeholders and contribute to the overall effectiveness of the insolvency resolution process.

The challenges in the current mechanism cannot be ignored as the Code has now taken its shape in the ecosystem. Hence, addressing the issues as they occur is pertinent for the market as well as the stakeholders. A law is alive only when it is used. An unused law is a dead law. And therefore, to stay alive, the Code should not only mould itself with the developing market needs but should also pluck out the concerns before they take root. Breach of timeline is one such concern that needs immediate redressal.

The total time given under the Code for completion of CIRP is 330 days, but the current trend of delay in resolution process is contrary to the objectives that the code seeks to achieve. As per IBBI data, the average time of completion of resolution process stands at 679 days. Further, the data also provides to establish a correlation between the time taken for completion of resolution process and the recovery rates. For 140 cases which were resolved in 330 days, the recovery rates stood at 49.22%, while for 354 cases resolved between 330 to 599 days, the rate of recovery is 35.98%. For 453 cases that took more than 600 days the recovery rates stood at 26.11%, establishing the fact that cases that were resolved within timeframe ended up with high recovery rates while those taking more time of resolution ended with lower recovery rates.[xxviii]

Though Prepackaged Insolvency Resolution Procedure (PPIRP) has been introduced by the Code, but that same has failed to garner the interest of the stakeholders due to multiple possible reasons.[xxix] Also, currently PPIRP is only applicable registered MSMEs. Sole Proprietorships and Partnerships though registered as MSME cannot avail the benefit of PPIRP. However, a huge percentage of the MSMEs are unregistered[xxx], thereby the stakes of PPIRP being underutilised in solving the issues in CIRP are high. If the government expands the applicability of PPIRP to corporates the same would at least provide a safe and secured alternative to the struggling entities.

There are two routes suggested for resolving the issue of timeline breach. One route involves segregation and treatment, while the other refers to out of court procedure. When referring to segregation, the suggestion is to segregate the whole process of resolution and work on the loopholes independently. For instance, the capacity of the AA should be increased to provide for speedy functioning. Given the diverse application of IBC and the adjudicatory role of the NCLT, more benches should be established in tier two cities. Similarly, the presence of RPs should be ensured in every notch of the country. The regulator, i.e. the IBBI should put in more efforts to incorporate tech savvy procedures.

Furthermore, the second suggested route is that of Mediation. Alternative Dispute Resolution (ADR) processes like mediation are generally quicker than traditional litigation. Mediation provides a platform for stakeholders to address negative emotions, feel heard, and work towards mutually acceptable solutions, thereby preserving relationships.

Countries like the United States, where mediation is frequently employed in insolvency cases, demonstrate its effectiveness in resolving complex disputes.[xxxi] Mediation can result in resolution plans that are more stakeholderfriendly and innovative compared to typical plans resulting from CIRP. It allows for the inclusion of solutions tailored to both commercial and emotional issues between the parties, fostering better stakeholder cooperation and support.

India already has legal provisions in place to encourage settlement of disputes and referral to ADR processes. Section 89 of the Civil Procedure Code, 1908 allows courts to encourage out of court settlement by utilising various ADR processes. The Companies Act, 2013 provides for the establishment of mediation and conciliation panels. The Companies (Mediation and Conciliation) Rules, 2016 provide for timely completion of mediation or conciliation, ensuring that the process remains within a time limit. This aligns with one of the core values of the IBC, which prioritizes timeliness in resolving insolvency cases.

8. MEDIATION OFFERS SEVERAL SIGNIFICANT BENEFITS IN AN INSOLVENCY SCENARIO[xxxii]

Efficiency Enhancement: Mediation as a tool for insolvency resolution seeks to provide relief to multiple creditor disputes and achieving consensus among the stakeholders. This efficiency minimizes delays and costs, thereby increasing the likelihood of successful restructuring outcomes for financially distressed but viable businesses.

Pre-Insolvency Stage: In the pre-insolvency stage, mediation can be a valuable tool for exploring informal workout options. Particularly in jurisdictions lacking effective pre-insolvency frameworks, mediation can facilitate resolution without formal court proceedings, thereby preserving the viability of businesses.

Formal Insolvency Context: In formal insolvency proceedings, a mediator can assist in negotiating and implementing reorganization plans acceptable to the majority of creditors. By building consensus and trust between debtors and creditors, mediation enhances the development of restructuring plans.

Democratic Decision-Making: Mediation functions as a form of democratic decision-making, facilitating consensus and creditor majorities inherent in insolvency regulatory regimes. It helps achieve collective agreement essential for bankruptcy and insolvency proceedings.

Reduction of Delays: Mediation reduces delays encountered in formal insolvency processes, such as those under the Insolvency and Bankruptcy Code 2016 in India. By mitigating litigation and fostering negotiations, mediation expedites the approval of restructuring plans.

Innovative Solutions: Mediation encourages innovative and out-of-the-box solutions compared to traditional insolvency processes. Resolution plans developed through mediation tend to be more creative and tailored to the specific needs of the parties involved.

Procedural Cohesion and Coordination: Mediation provides procedural cohesion and coordination for complex creditor claims, avoiding years of expensive litigation and diminishing property for creditors. It offers a structured approach to resolving disputes, which is particularly beneficial in complex cross-border settings with competing claims in multiple jurisdictions.

These examples illustrate how mediation has been instrumental in achieving more efficient outcomes in large cross-border and other insolvency cases:

MF Global Holdings[xxxiii]: Mediation facilitated agreements between entities undergoing competing insolvency processes in the United States and the United Kingdom, avoiding costly litigation, and maximizing returns for creditors.

Lehman Brothers Holdings[xxxiv]: Court-appointed mediators helped resolve complex disputes with numerous counterparties, leading to settlements that resulted in over US$2 billion in additional proceeds for creditors.

China Fishery Group[xxxv]: Judge Drain acted as a mediator in this Chapter 11 case, which saw a successful restructuring plan confirmed in June 2021, thanks to mediation's effectiveness in resolving complex trade finance claims.

Boy Scouts of America: Mediation played a crucial role in negotiating and resolving disputes, including 82,209 claims of scouting-related sexual abuse. Mediated settlements established a compensation fund of US$2.48 billion, providing non-consensual releases for tens of thousands of abuse claims, thus streamlining the process and mitigating costs.

Moving forward, continued efforts to enhance the processing capacity of NCLT and streamline the insolvency resolution framework will be essential to sustain this momentum and ensure timely resolution of stressed assets. A well-researched and well-planned strategy should be implemented by the government to enhance the performance of the Code and thereby resolve the issue of breach of timeline. Mediation, if introduced as a mechanism under the Code, can be more defined and have universal application i.e., it can apply to Corporates, MSMEs, Individuals, Sole Proprietorship and Partnership firms at once. Mediation model if implemented can change the dynamics of the insolvency ecosystem in India.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

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