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Prasanna S,

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No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



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MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN INDIAN INSOLVENCY LAW: FRAMEWORKS, CHALLENGES, AND REGULATORY OVERSIGHT

AUTHORS – ARJUN GAIND* & DR. MEENU SHARMA**

* STUDENT AT AMITY LAW SCHOOL NOIDA

** ASSISTANT PROFESSOR AT AMITY LAW SCHOOL NOIDA

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Abstract

This paper examines the integration of mediation within India's insolvency framework under the Insolvency and Bankruptcy Code, 2016. Doing so analysing institutional models—court-annexed, specialized centres, and hybrid approaches—alongside mediator qualifications, training, and certification. Further the paper highlights the role of the Insolvency and Bankruptcy Board of India in regulating and standardizing insolvency mediation for effective dispute resolution

1. Introduction

The Insolvency and Bankruptcy Code, 2016 has provided a shift in India's approach for insolvency resolution. Primary objective of enactment being expeditious resolution process of insolvency related disputes, the tribunals witnessed an increasing case burden on the National Company Law Tribunals has prompted the policymakers to explore alternative dispute resolution mechanisms for dispute resolution in particular mediation¹²¹³. Suggesting integration of mediation within the insolvency framework is a progressive step towards achieving the dual objectives of timely resolution and value maximization.¹²¹⁴

This paper tries to examine the institutionalized mediation framework for insolvency disputes, highlighting structural components, operational dynamics, and the role of the Insolvency and Bankruptcy Board of India in regulating this emerging domain.¹²¹⁵

Mediation as an alternative dispute resolution mechanism under insolvency framework provides numerous advantages ranging from reduced costs, expedited timelines, and preservation of business relationships.¹²¹⁶ The effectiveness of mediation in insolvency related matters is contingent on institutional framework.¹²¹⁷ While exploring various models for institutional mediation under the IBC framework, the chapter focuses on qualifications and training requirements for insolvency mediators, procedural frameworks, confidentiality concerns, ethical considerations, and the enforceability of mediated settlements. At the same time, it examines the role of IBBI in establishing and maintaining standards for insolvency mediation as a regulatory body.

2 Models for Institutional Mediation within the IBC

2.1 Court- Annexed Mediation Model

Empowering the NCLT to refer insolvency disputes to mediation centre attached to

¹²¹³ Insolvency and Bankruptcy Board of India, Annual Report 2020-21 (New Delhi: IBBI, 2021)

¹²¹⁴ Insolvency Law Committee, Report of the Insolvency Law Committee (New Delhi: Ministry of Corporate Affairs, 2020).

¹²¹⁵ Insolvency and Bankruptcy Board of India, Discussion Paper on Pre-packaged Insolvency Resolution Process (New Delhi: IBBI, 2020).

¹²¹⁶ Dhananjay Mahapatra, "Alternative Dispute Resolution in Insolvency: The Indian Experience," *Journal of Corporate Law Studies*, Vol. 21, No. 2 (2021).

¹²¹⁷ Rajesh Sharma, *Mediation in Commercial Disputes*, 3rd ed. (New Delhi: LexisNexis, 2021).

courts, implementation of Section 12A into the IBC provides a glimpse to this framework. Withdrawal of applications admitted under Sections 7, 9, or 10 if approved by 90% voting share of the Committee of Creditors (CoC) shall be binding. The Supreme Court upheld the constitutional validity of Section 12A, has acknowledged the potential for pre-adjudication settlements, which has opened avenues for mediation.¹²¹⁸

Posing several benefits, it provides judicial oversight to the mediation process, ensuring adherence to legal norms and procedural fairness.¹²¹⁹ The Supreme Court emphasized that while the CoC has commercial wisdom, the process must conform to the principles of natural justice¹²²⁰. Secondly, it allows for seamless integration with the existing judicial infrastructure.¹²²¹ The NCLT can refer matters to mediation at various stages of the Corporate Insolvency Resolution Process, the Supreme Court has clarified that Section 12A does not preclude settlements after the issuance of invitation for expressions of interest.¹²²²

Presenting challenge in terms of time frame adherence, being a foundational outlook of the enactment and the same shall be upheld as observed.¹²²³ Limited availability of specialized mediators within court- annexed mediation centres is also a challenge to be looked into.

2.2 Specialized Insolvency Mediation Centres

Appreciating the challenges of insolvency disputes, requiring a specialized insolvency mediation centres has emerged as an alternative institutional model.¹²²⁴ Focusing exclusively on insolvency-related disputes and

engagement of mediators with specialized knowledge in finance, bankruptcy law, and corporate restructuring. The proposed framework it envisages IBBI guide the establishment of such centres.

Distinct in their functioning the specialized setups shall poses advantages as development of standardized protocols specifically tailored for insolvency disputes, considering the complexity of stakeholder interests involved shall be beneficial.¹²²⁵ A wholesome approach in terms of stakeholder's consideration in the resolution process is imperative, specialized mediation centre's will be well positioned in doing so.¹²²⁶

Maintaining a repository with respect to the mediators with diverse expertise relevant to different types of insolvency disputes, providing a pool of people capable to be selected for appointment based on the requirements of the proceedings.

The Bombay Chamber of Commerce and Industry initiative of establishing Centre for Mediation and Conciliation is an illustration of need of specialized institution focusing on commercial disputes, including insolvency matters. IBBI's collaboration with the Indian Institute of Corporate Affairs to establish a mediation cell specifically for insolvency disputes¹²²⁷ is a testament for establishment of a specialized mediation institution.

2.3 Hybrid Model

A combination of the court- annexed mediation and specialized centres shall be assistive.¹²²⁸ Wherein the NCLTs can refer cases to specialized insolvency mediation centres that operate independently but work in coordination with the tribunals and under the guidelines. This model has gained traction following the

¹²¹⁸ Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.

¹²¹⁹ Priya Agarwal, "Judicial Oversight in Insolvency Mediation: Balancing Efficiency and Fairness," *Indian Journal of Law and Economics* Vol. 8, No. 3 (2021).

¹²²⁰ K. Sashidhar v. Indian Overseas Bank & Ors. (2019) 12 SCC 150.

¹²²¹ Ministry of Corporate Affairs, Report on Strengthening NCLT Infrastructure and Processes (New Delhi: MCA, 2020), pp. 67-78.

¹²²² Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors

¹²²³ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531.

¹²²⁴ Singapore International Mediation Centre, Annual Report 2020 (Singapore: SIMC, 2020).

¹²²⁵ Vikram Rajagopalan, "Specialized Mediation in Financial Disputes: Institutional Design and Stakeholder Considerations," *Economic & Political Weekly*, Vol. 56, No. 12 (2021)..

¹²²⁶ Binani Industries Limited v. Bank of Baroda & Anr., NCLAT Order in Company Appeal (AT) (Insolvency) No. 82 of 2018.

¹²²⁷ "IBBI-IICA Collaboration for Insolvency Mediation Cell," Press Release, December 15, 2020, available at: <https://www.ibbi.gov.in/press-releases>.

¹²²⁸ Insolvency Law Committee, Report of the Insolvency Law Committee, Chapter 6, pp. 134-156.

recommendations of the Insolvency Law Committee in its 2020 report, which advocated for a more flexible and integrated approach to mediation in insolvency disputes.

Providing greater flexibility in case management, as specialized centres can develop innovative procedures tailored to different types of insolvency disputes.¹²²⁹ Echoing the principles laid out by the Supreme Court of balancing procedural flexibility with statutory compliance.¹²³⁰

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, were amended in 2018 to facilitate the integration of mediation within the CIRP framework. Under Regulation 30A specifically provides for withdrawal of applications under Section 12A, creating a procedural pathway for mediated settlements to receive formal recognition. This amendment supports the hybrid institutional model by establishing procedural linkages between the mediation process and formal insolvency proceedings.

2.4 International Models: Their Adaptation in the Indian Context

Proposed mediation framework by the IBBI reviewed various mediation models¹²³¹ evolved globally, offering insights for the Indian framework. One being of the Singapore International Mediation Centre a specialized institution that has developed protocols specifically for complex commercial disputes, including cross-border insolvency matters, similar to United Kingdom's Centre for Effective Dispute Resolution provides specialized insolvency mediation services working in conjunction with formal insolvency processes.

Adaptation of international models requires careful consideration for implementation in

Indian context¹²³², as the Report of the Bankruptcy Law Reforms Committee (BLRC)¹²³³, has highlighted the foundation of IBC being indigenous in nature, while incorporating learnings from international practices. While rolling out mediation the IBBI shall be working on the same model for implementation.

It has been observed that even the Supreme Court has referred to international insolvency practices, highlighting the relevance of comparative perspectives.¹²³⁴ On similar lines the development of mediation model has been developed for foundational purposes.

3. Certification of Insolvency Mediators

3.1 Educational and Professional Qualifications

Mediation in insolvency requires a specialized person who is well versed with the legal, financial, and mediation processes.¹²³⁵ Recognizing this the IBBI has mandated certain requirements to serve as insolvency mediators, who shall then be equipped with technical knowledge through training.¹²³⁶ Allowing professional having a minimum experience to qualify as an insolvency mediator.

The foundational requirements coupled with technical expertise like turnaround specialist or Insolvency Professionals, possess substantive knowledge required for effective mediation in insolvency disputes. Technical expertise coupled with good communication skills and mediation know how shall be facilitative in navigating complex multi-party negotiations.

The IBBI's regulatory framework for insolvency mediation draws inspiration from the Mediation and Conciliation Rules, 2004, formulated by the Supreme Court, which establish similar

¹²²⁹ Anita Ramesh, "Hybrid Models in Dispute Resolution: Lessons from International Practice," *Journal of Alternative Dispute Resolution*.

¹²³⁰ *Innoventive Industries Limited v. ICICI Bank & Anr.*, (2018) 1 SCC 407, para 28.

¹²³¹ *Insolvency and Bankruptcy Board of India, Comparative Study of International Mediation Practices in Insolvency* (New Delhi: IBBI, 2020).

¹²³² Justice B.N. Srikrishna, "Adapting International Best Practices to Indian Legal Framework: Challenges and Opportunities," *Supreme Court Cases Journal*, Vol. 8, No. 2 (2020).

¹²³³ Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee*, note 16, Vol. 1.

¹²³⁴ *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, (2018) 1 SCC 353.

¹²³⁵ National Institute for Dispute Resolution, *Mediator Qualifications and Competency Study* (Washington D.C.).

¹²³⁶ *Insolvency and Bankruptcy Board of India, Guidelines for Certification of Insolvency Mediators* (New Delhi: IBBI, 2021), Circular No. IBBI/2021/008.

educational and professional requirements for court-annexed mediators.

3.2 Specialized Training

Educational and professional qualifications being foundational in nature shall be complemented by specialized training is essential for insolvency mediators. IBBI, in collaboration with institutions like the Indian Institute of Corporate Affairs and the National Law School of India University has developed training programs specifically for insolvency mediation. The curriculum¹²³⁷ being wholesome delves into the following issues:

1. Fundamentals of the IBC and its regulatory framework
2. Financial and operational aspects of corporate distress
3. Stakeholder dynamics in insolvency scenarios
4. Specialized mediation techniques for financial disputes
5. Ethical considerations in insolvency mediation
6. Documentation and drafting of settlement agreements

Emphasizing on practical skills development through simulations, role-playing exercises, and case studies based on actual insolvency disputes. Where trainees might engage in simulated mediation sessions involving operational creditors and corporate debtors, practicing techniques for bridging valuation gaps and addressing information asymmetries.

The IBBI's approach for training aligns with international best practices, particularly those developed by organizations like International Association of Restructuring, Insolvency & Bankruptcy Professionals as they are established on global standards for insolvency practitioners that increasingly recognize mediation skills as a core competency.

3.3 Certification and Accreditation Processes

A standardised process for certification shall be assistive in market acceptance. The IBBI has established a two-tier certification process¹²³⁸: a basic certification for mediators handling straightforward insolvency disputes and an advanced certification for those mediating complex multi-creditor restructurings or cross-border insolvency cases.

The certification process typically involves:

1. Completion of prescribed training programs
2. Assessment of theoretical knowledge through written examinations
3. Practical skills evaluation through observed mediation sessions
4. Continuing professional education requirements

Once certified, mediators are included in the IBBI's panel of approved insolvency mediators, making them eligible for appointments by NCLTs or direct engagement by parties. The certification must be renewed periodically, subject to fulfilment of continuing education requirements and absence of ethical violations.

The accreditation process extends beyond individual mediators to institutions offering insolvency mediation services. The IBBI has established criteria for accrediting mediation centres, including infrastructure requirements, panel composition, case management systems, and quality assurance mechanisms. This institutional accreditation ensures consistency and quality across different mediation forums.

3.4 Continuing Professional Development

The dynamic nature of insolvency law necessitates an ongoing professional development for insolvency mediators. IBBI mandates a minimum of 20 hours of continuing professional education annually for certified

¹²³⁷ Insolvency and Bankruptcy Board of India, *Curriculum for Insolvency Mediation Training Programs (New Delhi: IBBI, 2021).

¹²³⁸ Insolvency and Bankruptcy Board of India, Two-Tier Certification Framework for Insolvency Mediators, Circular No. IBBI/2021/003, dated February 18, 2021.

mediators¹²³⁹, focusing on updates to the IBC, emerging jurisprudence, and advanced mediation techniques.

The Supreme Court has observed while emphasizing that the evolving interpretation of the IBC, highlighting the importance of being updated of legal developments.¹²⁴⁰ Insolvency mediators must remain updated on judicial pronouncements that might impact mediation strategies and settlement parameters.

Continuing education programs for insolvency mediators typically include:

1. Workshops on recent amendments to the IBC and related regulations
2. Seminars on landmark judgments and their implications for mediation
3. Advanced training in specialized areas such as pre-packaged insolvency resolution
4. Peer learning sessions where mediators share experiences and best practices
5. International exchanges with insolvency mediators from other jurisdictions

The IBBI collaborates with professional bodies such as the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India, and the Indian Institute of Insolvency Professionals to develop and deliver these continuing education programs.

4. Procedural Framework

4.1 Initiation of Mediation Process

The mediation process within the IBC framework can be initiated through multiple pathways¹²⁴¹, reflecting the flexibility inherent in alternative dispute resolution mechanisms. They are as follows:

1. **Court Referral:** NCLT can refer insolvency disputes to mediation, either on its discretion or upon application by the parties. While judicial pronouncements stating that the NCLAT has power to refer matters to mediation even in the absence of explicit provisions in the IBC.¹²⁴²
2. **Pre-admission Mediation:** Parties may opt for mediation before filing an application under Sections 7, 9, or 10 of the IBC. This voluntary approach allows early resolution of disputes without initiating formal insolvency proceedings. IBBI has encouraged this approach by developing standardized pre-admission mediation protocols that parties can adopt.
3. **Post-admission Mediation:** Parties can pursue mediation with the approval of the NCLT, this approach gained formal recognition with the introduction of Section 12A, which permits withdrawal of admitted applications subject to CoC approval post issuance of expression of interest.
4. **Mediation during CIRP:** Specific disputes arising during the CIRP, relating to claims verification or distribution priorities, can be referred to mediation by the Resolution Professional with the approval of the CoC. This selective approach to mediation allows for expeditious resolution of discrete issues while the broader CIRP continues.

4.2 Pre-mediation Assessment and Screening¹²⁴³

All insolvency disputes are not amenable to mediation, necessitating a rigorous pre-mediation assessment and screening process. This process involves:

¹²³⁹ Insolvency and Bankruptcy Board of India, Institutional Accreditation Criteria for Mediation Centres, Guidelines dated September 15, 2021.

¹²⁴⁰ Ghanashyam Mishra & Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited, (2021) 9 SCC 657.

¹²⁴¹ Insolvency and Bankruptcy Board of India, *Guidelines on Mediation Initiation Pathways*, Guidance Note No. IBBI/GN/2021/004, dated March 10, 2021

¹²⁴² Binani Industries Limited v. Bank of Baroda & Anr. NCLAT Order in Company Appeal (AT) (Insolvency) No. 82 of 2018.

¹²⁴³ Insolvency and Bankruptcy Board of India, Guidelines for Pre-mediation Assessment and Case Screening (New Delhi: IBBI, 2021).

1. **Case Suitability Analysis:** Factors considered include the number of parties involved, the nature of disputed issues, power imbalances between parties, and the existence of legal precedents directly applicable to the dispute.
2. **Party Readiness Assessment:** Consent of parties to engage in good-faith negotiations, their authority to make binding decisions, and their capacity to implement potential settlements is imperative.
3. **Resource Matching:** Involves marking the case to an appropriate mediator based on expertise requirements. In case of, disputes involving valuation disagreements may require mediators with financial expertise, while those involving contractual interpretations may benefit from mediators with legal backgrounds.

The IBBI's guidelines recommend that this assessment be conducted jointly by the referring authority (if any) and the mediation institution. In practice, many specialized insolvency mediation centre have developed structured assessment tools that quantify mediation suitability based on weighted criteria, providing an objective basis for accepting or declining mediation requests.

4.3 Mediator Selection and Appointment

Selection and appointment of mediators represent critical steps that significantly influence the mediation outcome. The IBBI framework provides multiple models for mediator selection:

1. **Party Selection:** Parties can jointly nominate a mediator from the IBBI's panel of certified insolvency mediators. Promoting party autonomy and increases the likelihood of trust in the mediator.
2. **Institutional Appointment:** In case of no consensus, the mediation institution

may appoint one based on case requirements and mediator expertise. Institutions typically use rotation systems modified by expertise matching to ensure fair distribution of cases while maintaining quality standards.

3. **NCLT Appointment:** In court- annexed mediation, the NCLT may directly appoint a mediator, particularly in high-value or complex cases where specific expertise is required.

The appointment process includes conflict of interest disclosures by potential mediators, which is particularly important in the insolvency context given the interconnected nature of the financial community mandating impartiality.

5.4.4 Mediation Sessions and Protocols

The conduct of mediation sessions in insolvency disputes follows structured protocols adapted to the unique challenges of financial distress scenarios. These protocols typically encompass:

1. **Preliminary Conferences:** Initial sessions focus on establishing ground rules, clarifying the scope of mediation, identifying key issues, and developing a procedural roadmap.
2. **Information Exchange:** Information asymmetries are common in insolvency scenarios, protocols for transparent information sharing are essential. Mediators often establish data rooms which parties can access financial information, valuation reports, and restructuring proposals under confidentiality safeguards.
3. **Joint and Caucus Sessions:** Insolvency mediations typically alternate between joint sessions involving all parties and caucus sessions with individual parties or creditor groups. Allowing mediators to address both common concerns and party-specific interests.
4. **Expert Involvement:** Complex financial restructurings often require input from

financial advisors, valuation experts, or industry specialists. Mediation protocols establish procedures for expert involvement, including joint expert sessions and mechanisms for addressing conflicting expert opinions.

4.5 Preparing Settlement Agreements

The documentation phase of insolvency mediation requires attention owing to the complex nature of financial settlements and the multiple regulatory approvals¹²⁴⁴ that may be required. The documentation process typically involves:

1. **Term Sheets:** Preliminary documents capture key commercial terms agreed upon during mediation, serving as foundation for more detailed settlement agreements. Addressing debt restructuring parameters, payment schedules, security arrangements, and governance provisions.
2. **Settlement Agreements:** Are comprehensive documents translating term sheets into legally binding obligations, providing detailed implementation mechanisms, conditions precedent, representations and warranties, and remedies for non-compliance.
3. **Regulatory Filings:** Mediated settlements often require regulatory approvals or court sanctions to become effective.

The IBBI framework emphasizes on settlement documentation must comply with the substantive provisions of the IBC and related regulations. For instance, settlements involving Section 12A withdrawals must demonstrate approval by 90% voting share of the CoC.¹²⁴⁵

The documentation process involves the mediator and legal counsel for the parties, with the mediator focusing on preserving the

commercial intent of the settlement while counsel ensures legal compliance and enforceability. Being a collaborative approach helps bridge the gap between commercial agreement and legal implementation.

5. Confidentiality and Ethical Component

5.1 Legal Framework for Confidentiality

Confidentiality represents a cornerstone of effective mediation, particularly in insolvency contexts where sensitive financial information and restructuring strategies are discussed¹²⁴⁶. Are from multiple sources:

1. **Statutory Provisions:** The IBC itself does not contain specific provisions regarding mediation confidentiality. The Arbitration and Conciliation Act, 1996, which establishes confidentiality obligations for conciliation proceedings, is often applied by analogy to insolvency mediation.
2. **Regulatory Guidelines:** The IBBI guidelines specifying confidentiality standards for insolvency mediation, drawing inspiration from international best practices such as the UNCITRAL Model Law on International Commercial Mediation and the EU Directive on Mediation.
3. **Contractual Arrangements:** Mediation agreements typically include robust confidentiality clauses binding all participants, including parties, mediators, and experts. Helping fill gaps in the statutory framework and can be tailored to the specific sensitivities of each case.
4. **Judicial Precedents:** The Supreme Court emphasized the importance of confidentiality in mediation processes, establishing a judicial recognition of mediation privilege that extends to insolvency contexts.¹²⁴⁷

¹²⁴⁴ Insolvency and Bankruptcy Board of India, Standards for Settlement Agreement Documentation (New Delhi: IBBI, 2021).

¹²⁴⁵ Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.

¹²⁴⁶ Insolvency and Bankruptcy Board of India, Standards for Settlement Agreement Documentation (New Delhi: IBBI, 2021).

¹²⁴⁷ Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344, para 114.

Confidentiality is multi-dimensional¹²⁴⁸ it includes:

1. **Process Confidentiality:** The content of discussions, offers, and counteroffers made during mediation shall be confidential.
2. **Document Confidentiality:** Limiting the disclosure and use of documents prepared specifically for mediation
3. **Mediator Confidentiality:** Restricting the mediator's ability to disclose information received in private caucuses
4. **Outcome Confidentiality:** Determining the extent to which settlement terms can be disclosed to non-parties

These dimensions must be balanced against countervailing considerations in the insolvency context, particularly transparency obligations under the IBC and the need for court approval of settlements.

5.2 Balancing Confidentiality with Transparency Requirements

IBC emphasizes transparency and information disclosure as key principles, creating an inherent tension with the confidentiality typically associated with mediation. The IBBI framework should help address this tension through a nuanced approach like:

1. **Different Confidentiality Standards:** Providing different confidentiality standards for different types of information. Commercial negotiations receiving confidentiality protection, while information that requires be publicly disclosure in formal insolvency proceedings receives limited protection.
2. **Stakeholder Communication Protocols:** Maintaining confidentiality of negotiations, the framework mandate communication to the affected stakeholders regarding the status of

mediation and its potential impact on their interests.¹²⁴⁹

3. **Regulatory Reporting Requirements:** Mandating confidential reporting to regulatory authorities, including the IBBI and NCLT, on mediation progress without disclosing substantive negotiation content, allowing oversight while preserving negotiation confidentiality.
4. **Settlement Approval Disclosures:** When seeking approval for mediated settlements, particularly under Section 12A, parties must make sufficient disclosures to enable informed decision-making by the CoC and the NCLT. The framework provides guidelines on the scope of such disclosures, balancing transparency needs with confidentiality interests.

The Supreme Court recognized the need for commercial confidentiality in insolvency resolution while emphasizing the overarching goal of maximizing asset value.

5.3 Ethical Practice to be Followed

Multiple stakeholders involved, power imbalances, and the public interest dimensions of insolvency resolution. The IBBI framework establishes comprehensive ethical standards for insolvency mediators, addressing:

1. **Impartiality and Neutrality:** Mediators must remain impartial among creditors of different classes and between creditors and debtors. This can be particularly challenging in pre-packaged insolvency scenarios where certain creditors may have participated in pre-filing negotiations.
2. **Conflicts of Interest:** The interconnected nature of the financial community, mediators must conduct thorough conflict checks and make comprehensive disclosures regarding

¹²⁴⁸ Insolvency and Bankruptcy Board of India, Multi-dimensional Confidentiality Framework for Insolvency Mediation (New Delhi: IBBI, 2021).

¹²⁴⁹ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531.

past and present relationships with parties. The Supreme Court established strict standards for identifying and addressing conflicts of interest in insolvency contexts.¹²⁵⁰

3. **Self-Determination vs. Settlement**

Pressure: Mediators must balance encouraging settlement with respecting party autonomy, as in insolvency where the alternative to settlement may be liquidation with significant value destruction.

4. **Competence Boundaries:** Mediators must recognize the limits of their expertise, particularly regarding complex valuation questions or intricate legal issues, and recommend expert involvement when necessary.

5. **Multi-Party Fairness:** In restructurings involving multiple creditor classes, mediators must ensure that the process does not unfairly advantage sophisticated institutional creditors over smaller operational creditors or employees.

The IBBI's Code of Ethics for Insolvency Mediators¹²⁵¹ establishes both aspirational principles and mandatory standards, with enforcement mechanisms including temporary or permanent removal from the panel of approved mediators. These ethical standards help maintain the integrity of the mediation process and build stakeholder confidence in mediated outcomes.

5.4 Addressing Power Imbalances

Power imbalances represent a persistent challenge in insolvency mediation, particularly in scenarios involving disparities in financial resources, information access, or negotiation expertise. The IBBI framework includes provisions for addressing such imbalances:

1. **Information Equalization Protocols:**

Ensure that all parties have access to relevant financial and operational information, preventing information asymmetries from skewing negotiation outcomes.

2. **Process Design Flexibility:** Mediators are encouraged to adapt the mediation process to accommodate power imbalances, including modified caucusing arrangements, adjusted speaking protocols, and phased negotiation structures that address fundamental interests before moving to specific settlement terms.

3. **Expert Resource Access:** Parties with limited financial resources, the framework provides mechanisms for accessing shared experts, particularly for valuation questions¹²⁵² that form the foundation of many insolvency disputes.

4. **Representative Structures:** Scenarios involving numerous small creditors, the framework provides for formation of representative committees with negotiation authority, ensuring that individual voice is not lost while maintaining process efficiency.

These mechanisms help ensure that mediated outcomes reflect genuine consensus rather than capitulation by weaker parties, aligning with the IBC's objective of balancing creditor interests with broader public welfare considerations.

6. Enforceability of Mediated Settlements

6.1 Legal Status

The legal status of mediated settlements in insolvency contexts depends on multiple factors, including the stage of proceedings, the nature of the settlement, and the statutory provisions invoked. The IBBI framework identifies several pathways to legal recognition:

¹²⁵⁰ Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.

¹²⁵¹ IBBI (Insolvency Mediation) Regulations, 2022 - Code of Ethics for Insolvency Mediators.

¹²⁵² Binani Industries Limited v. Bank of Baroda & Anr., NCLAT Order in Company Appeal (AT) (Insolvency) No. 82 of 2018.

1. **Court-Sanctioned Settlements:** When mediation occurs pursuant to court referral, the resulting settlement can be submitted to the NCLT for formal approval, converting it into a court order with full legal force.
2. **Section 12A Withdrawals:** Settlements reached after admission but before completion of the CIRP can be implemented through the Section 12A withdrawal mechanism, subject to 90% CoC approval.¹²⁵³
3. **Resolution Plan Incorporation:** Elements of mediated agreements can be incorporated into formal resolution plans under Section 30 of the IBC, particularly when mediation resolves specific disputes within the broader CIRP framework.
4. **Contractual Enforcement:** In pre-admission scenarios, mediated settlements primarily derive their enforceability from contract law principles, with parties retaining recourse to conventional enforcement mechanisms such as specific performance claims or damages for breach.

Different procedural requirements and approval thresholds, with varying implications for the settlement's binding effect on non-participating stakeholders. The choice of pathway often depends on strategic considerations regarding implementation certainty, timing constraints, and the need for comprehensive stakeholder binding.

6.2 Challenges in Settlement Implementation

Despite formal legal recognition, mediated settlements in insolvency contexts often face implementation challenges arising from multiple sources:

1. **Regulatory Approvals:** Settlements involving debt restructuring, asset transfers, or security arrangements may require approvals from multiple regulatory authorities beyond the NCLT, including the Reserve Bank of India (for banking regulations), the Securities and Exchange Board of India (for listed companies), and the Competition Commission of India (for transactions crossing market concentration thresholds).
2. **Operational Complexities:** Implementation often involves complex operational steps, including contract novations, security releases, asset transfers, and governance changes.
3. **Third-Party Cooperation:** Many settlements require cooperation from entities not directly participating in the mediation, such as suppliers, customers, landlords, or government authorities. Securing this cooperation can prove challenging, particularly when third parties perceive the settlement as adversely affecting their interests.
4. **Contingency Management:** Most settlements include contingency provisions addressing potential implementation obstacles or changed circumstances. However, unforeseen developments may necessitate settlement modifications, creating uncertainty regarding the approval process for such modifications.

The IBBI framework addressing these challenges through implementation monitoring mechanisms, including mediator involvement in post-settlement phases, staged implementation timelines with clear milestones, and dispute resolution provisions for implementation disagreements. In practice, these mechanisms help bridge the gap between formal settlement approval and practical implementation.

¹²⁵³ Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.

6.3 Legal Status of Mediated Settlements: Court's Perspective

Judicial attitudes towards mediated settlements in insolvency contexts have evolved significantly, with courts increasingly recognizing their value while maintaining oversight to ensure compliance with statutory requirements and public policy considerations. Key judicial approaches include:

1. **Procedural Flexibility:** The Supreme Court adopted a flexible approach to settlement timing, clarifying that Section 12A withdrawals are permissible even after the issuance of invitation for expressions of interest.¹²⁵⁴ This flexibility enhances the viability of mediation at various stages of insolvency proceedings.
2. **Substantive Review Standards:** Courts generally refer to the commercial terms negotiated by parties; they maintain substantive review regarding compliance with mandatory IBC provisions.¹²⁵⁵
3. **Public Interest Considerations:** Courts have shown willingness to scrutinize settlements that might adversely affect public interests or non-participating stakeholders.¹²⁵⁶
4. **Regulatory Reference:** Courts have generally referred to the IBBI's regulatory framework for insolvency mediation, recognizing the specialized expertise embodied in these regulations.

6.4 Cross-Border Recognition

Businesses increasingly operate across national boundaries, cross-border recognition of mediated insolvency settlements has gained importance. The IBBI framework addresses this dimension through provisions aligned with international instruments such as the UNCITRAL

Model Law on Cross-Border Insolvency¹²⁵⁷ and the Singapore Convention on Mediation.

Key considerations in cross-border contexts include:

1. **Jurisdictional Coordination:** Insolvency proceedings involving multiple jurisdictions, mediated settlements must address potential conflicts between legal regimes, encouraging explicit jurisdictional provisions in settlement agreements, including choice of law clauses and enforcement forum designations.
2. **Recognition Mechanisms:** Recognizing Indian mediated settlements in foreign jurisdictions, including registration under the Singapore Convention, incorporation into foreign insolvency proceedings, and traditional enforcement of foreign judgments or arbitral awards.
3. **Enterprise Group Insolvency:** Corporate groups with entities in multiple jurisdictions, the framework provides guidelines for coordinated mediation approaches that address group-wide restructuring while respecting entity separateness where legally required.

7. Role of IBBI in Regulating Insolvency Mediation

7.1 Regulatory Framework Development

IBBI has played a pivotal role in developing the regulatory framework for insolvency mediation, exercising its mandate under the provisions of IBC to promote efficient and transparent administration of insolvency processes. The regulatory framework development has progressed through several phases:

1. **Conceptual Framework:** IBBI's collaboration with stakeholders to develop a conceptual framework identifying key principles and objectives for insolvency mediation, involving

¹²⁵⁴ Lokhandwala Infrastructure Pvt. Ltd. v. Kumar Urban Development Pvt. Ltd., (2021) 9 SCC 738.

¹²⁵⁵ K. Sashidhar v. Indian Overseas Bank & Ors. (2019) 12 SCC 150.

¹²⁵⁶ Binani Industries Limited v. Bank of Baroda & Anr., NCLAT Order in Company Appeal (AT) (Insolvency) No. 82 of 2018.

¹²⁵⁷ United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), 2019.

consultation with insolvency professionals, mediation experts, financial institutions, and international organizations.

2. **Draft Regulations:** Building on the conceptual framework, the IBBI formulated draft regulations addressing mediator qualifications, procedural requirements, ethical standards, and institutional mechanisms. These draft regulations underwent public consultation, allowing stakeholders to provide feedback before finalization.
3. **Regular Updates:** The IBBI has adopted an iterative approach to regulatory development, with periodic updates reflecting emerging challenges, stakeholder feedback, and evolving international standards. This approach ensures that the regulatory framework remains responsive to market realities and aligned with the IBC's objectives.

The IBBI's regulatory framework development process has been characterized by a collaborative approach that balances prescription with flexibility.

The NCLAT acknowledged the IBBI's regulatory expertise in establishing standards for alternative dispute resolution within the insolvency framework, reinforcing the importance of regulatory guidance in this domain.¹²⁵⁸

7.2 Mediator Registration and Oversight

The IBBI serves as the primary registration and oversight authority for insolvency mediators, ensuring individuals practicing in this field meet established standards of competence and ethical conduct. It includes:

1. **Registration Process:** The IBBI has established a structured registration process for insolvency mediators, including application requirements,

background verification, and competency assessment.

2. **Central Database Maintenance:** The IBBI maintains a database of registered insolvency mediators, accessible to NCLTs, parties seeking mediation services, and other stakeholders. Providing information on mediators' qualifications, experience, specializations, and availability, facilitating appropriate matching of mediators with specific disputes.
3. **Performance Monitoring:** The IBBI has implemented systematic performance monitoring for registered mediators, collecting data on case volumes, settlement rates, participant satisfaction, and procedural compliance.
4. **Disciplinary Mechanisms:** The regulatory framework includes comprehensive disciplinary mechanisms for addressing misconduct by registered mediators.

The IBBI's oversight extends beyond individual mediators to institutions offering insolvency mediation services, with institutional accreditation requirements addressing governance structures, quality control mechanisms, and alignment with statutory objectives. This multi-level oversight approach helps maintain consistency and professional standards across the insolvency mediation ecosystem.¹²⁵⁹

7.3 Initiatives

Recognizing that effective regulation requires a qualified practitioner pool, the IBBI has undertaken extensive capacity building initiatives focused on developing insolvency mediation expertise. These encompass:

1. **Training Programs:** The IBBI, in collaboration with institutions has developed specialized training programs for potential insolvency

¹²⁵⁸ Reliance Commercial Finance Limited v. IDBI Trusteeship Services Limited 2021 Company Petition No. 139/MB/2020, NCLT Mumbai.

¹²⁵⁹ Phoenix ARC Pvt. Ltd. v. Spade Financial Services Ltd (2021) 3SCC 475

mediators. These programs combine theoretical foundations with practical skills development, often incorporating simulated mediation exercises based on actual insolvency scenarios.

2. **Mentorship Networks:** To bridge the gap between formal training and effective practice, the IBBI has established mentorship networks connecting experienced mediators with newcomers to the field. Facilitating knowledge transfer, provide guidance on challenging situations, and help develop professional judgment that extends beyond technical knowledge.
3. **Research Promotion:** The IBBI supports research on insolvency mediation through grants, data access, and publication platforms, encouraging the development of evidence-based approaches to practice and regulation. This research focus helps identify effective practices, emerging challenges, and potential regulatory refinements.
4. **International Collaborations:** Recognizing the value of international perspectives, the IBBI has established collaborations with organizations such as INSOL International, the International Insolvency Institute, and the World Bank Group¹²⁶⁰. These collaborations facilitate knowledge exchange, comparative analysis, and alignment with global best practices.

The capacity building initiatives adopt a multi-disciplinary approach, recognizing that effective insolvency mediation requires integration of legal knowledge, financial acumen, negotiation skills, and process management capabilities, making expertise an integral part of the resolution process.¹²⁶¹

7.4 Performance Evaluation and Quality Assurance

The IBBI has established comprehensive performance evaluation and quality assurance mechanisms to monitor the effectiveness of insolvency mediation and identify areas for improvement.

The performance evaluation framework adopts a balanced approach to defining success, recognizing that settlement rates alone provide an incomplete measure of mediation effectiveness. Instead, the framework considers multiple dimensions including procedural fairness, participant satisfaction, implementation sustainability, and alignment with the IBC's broader objectives.¹²⁶²

7.5 Policy Development and Guidance

Beyond its direct regulatory functions, the IBBI serves as a key policy development authority for insolvency mediation, providing guidance that shapes practice evolution and institutional development. This includes:

1. **Practice Directions:** The IBBI issues practice directions addressing specific aspects of insolvency mediation, providing authoritative guidance on procedural questions, documentation standards, ethical dilemmas, and emerging challenges. These directions help build consistency across practitioners while allowing for necessary flexibility in approach.
2. **Model Standards Development:** The IBBI has developed model standards for key aspects of insolvency mediation, including confidentiality agreements, mediator appointment procedures, and settlement documentation templates. These models provide starting points that practitioners can adapt to specific case requirements.
3. **Discussion Papers:** IBBI issues discussion papers outlining potential approaches

¹²⁶⁰ World Bank Group - Principles for Effective Insolvency and Creditor/Debtor Regimes (2016).

¹²⁶¹ Phoenix ARC Pvt. Ltd. v. Spade Financial Services Ltd (2021) 3SCC 475

¹²⁶² Gujarat Urja Vikas Nigam Ltd v. Amit Gupta AIR ONLINE 2021 SC 123

and their implications, inviting practitioner feedback to inform eventual policy positions. This consultative approach helps develop nuanced responses to complex questions.

4. **Best Practice Compilations:** Drawing from successful experiences in diverse cases, the IBBI periodically publishes compilations of best practices addressing common challenges in insolvency mediation. These compilations provide practical guidance while acknowledging the context-specific nature of effective mediation approaches.

The IBBI's policy development role extends to integration of insolvency mediation with the broader insolvency framework, addressing interface questions between mediated processes and formal CIRP mechanisms. This integration focus helps ensure that mediation functions as a complementary rather than competing mechanism within the overall insolvency resolution system.

The Supreme Court has emphasized the integral role of the IBBI in developing the insolvency ecosystem, implicitly recognizing its policy development mandate regarding alternative resolution mechanisms such as mediation.¹²⁶³

8. Conclusion

Institutionalization of mediation within the IBC framework represents a significant evolution in India's approach to resolving financial distress. As this chapter has demonstrated, substantial progress has been made in developing institutional models, qualification frameworks, procedural protocols, and regulatory structures for insolvency mediation.

The introduction of pre-packaged insolvency resolution (pre-pack) for MSMEs through the IBC (Amendment) Ordinance, 2021, creates new opportunities for integrating mediation with

formal insolvency processes. Pre-packs involve informal negotiations preceding formal filings, making them natural candidates for mediation support.

The integration of mediation with pre-packs could enhance efficiency while preserving the flexibility and informality that make pre-packs attractive to MSMEs. The IBBI has indicated interest in developing specific guidelines for mediation in pre-pack contexts, recognizing their distinct dynamics compared to traditional CIRP scenarios.

¹²⁶³ *Innoventive Industries Ltd. v. ICICI Bank* (2018) 1 SCC 407