



Integration of alternative dispute resolution mechanisms in corporate insolvency law

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Abstract

Alternative dispute resolution is a widely used mechanism by the parties for resolution of commercial disputes. Over time, myriad organisations and institutions have been developed that provide services for specialized ADR. Times and again, it has been realised that insolvency resolution processes especially for corporate debtors can be complex and cumbersome. While, there are certain declarations and other matters relating to insolvency that could not be resolved by private tribunal, the subject-matter of which is exclusively under the state's authority to adjudicate. Some of the disputes that arise among the stakeholders could be resolved by private forums, these may include pre-insolvency arbitration agreements, and disputes among creditors and/or class (es) of creditors. In this paper the author has outlined how the conflicting objectives of insolvency law and ADR mechanisms could be harmonised, and how ADR is being used as a mode of dispute resolution in India and other countries.

Keywords: corporate insolvency; ADR; business law; interface

Introduction

“The notion that most people want black-robed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”^[5]

The insolvency resolution mechanism rather than seeking to maximize the profits of the creditors should rather make sure that interests of all stakeholders are satisfied. This view calls for a more flexible approach for insolvency resolution process than mere adjudication of entitlements and liabilities. The use of Alternative dispute resolution mechanisms (including arbitration) in strengthening the possibility of business restructuring has increased worldwide. On the global landscape, insolvency resolution in *Lehman brothers* and *Nortel* have already created much awareness towards inclusion of alternative dispute resolution mechanisms in resolving insolvency related disputes. The benefits being multi-fold, have attracted many developing and developed countries to integrate ADR in their insolvency resolution laws.

United States of America, United Kingdom, Singapore, and Hong Kong already have well-defined policy and precedents determining the contours of integration of corporate insolvency and restructuring with alternative dispute resolution mechanisms. The Insolvency regimes are being considered as reliable throughout the globe and with increase in number of insolvency filings, the complexity and size of the cases is also increasing.

Harmonising the conflicting objectives

The main objective of insolvency resolution regimes lies in collective mechanisms for insolvency resolution, wherein various stakeholders and the community interest at large has a role to play in the process and decisions are made by a committee of creditors. The committee of creditors consists of creditors (in India, financial creditors) who are well-equipped with knowledge and

information of working of the corporate debtor and hence collectively decide the fate of the debtor. This decision making is done under the supervision of insolvency professionals by making negotiations among conflicting interests. The insolvency professional work under the supervision of the concerned NCLT. On the other hand, the ADR mechanisms are private and consensual in nature. Meaning thereby the dispute resolution is done by a third party wherein the courts have no role to play. Also, it cannot always be assumed that all the creditors would agree to adopt ADR mechanisms for resolution.

The harmonization of the given conflicting objectives of the two regimes can be discussed in a three-legged approach.

Firstly, with increase in number of insolvency matters the size and complexity has also increased, so use of ADR can help resolving multiple issues amongst creditors or classes of creditors in lesser time. The discussion regarding role of alternative dispute resolution mechanisms in insolvency proceedings can be bifurcated into two broad headings:

1. Enforcement of pre-petition arbitration agreement between the debtor and third-parties.
2. Use of alternative dispute resolution mechanisms, in combination with or in alternate of, insolvency resolution process.

Secondly, inclusion of mediation brings out another conflict of confidentiality of proceedings. Nonetheless, some general observations may be seen. Though mediation cannot resolve all disputes, it may help in reduction of disputes and hence the costs of proceedings.

Also, it may address the need of fulfilment of public interest. Lastly, mediation establishes a structured process of resolution whereby affording opportunity to multiple parties to participate and when done in court supervision the threats of non-consensual settlements may be mitigated.

Thirdly, ADR procedures afford confidentiality to the whole process which would allow debtors to resolve disputes out-of-court and thereby preserving business interests. Also, arbitration conventions and protocols could be utilised in enforcing resolutions to cross-border disputes that may face obstacles in recognition and enforcement. Protocols may also promote cooperation and communication among the various courts involved in an international insolvency case.

International Scenario

United States of America has been the torchbearer in inclusion of alternative dispute resolution mechanisms in insolvency disputes. As early as 1986 the Southern District of California had established its bankruptcy mediation program^[10]. Alternative dispute resolution in insolvency is governed separately under the Arbitration laws of the country and not *per se* as a part of bankruptcy laws. This affords significant power to local judicial authorities to make parties resolve their disputes^[28]. Also, certain non-core disputes may be referred to arbitration as well^[11, 29].

A recent comparative study of European Union reveals that there are three ways for resolving insolvency disputes^[11], workouts, pre-insolvency proceedings, and Formal (restructuring and insolvency) proceedings^[9].

Singapore has also strengthened its position as the International centre for debt restructuring^[13]. Their apex court decided upon arbitrability of disputes arising in insolvency^[19] and held that issues that concern stakeholders other than party to arbitral proceedings shall not be referred to arbitration. Further the 2016 report, recommended that mediation may be used effectively in resolving individual creditor disputes, similar claims mediation and planned mediation, and that arbitration can be utilised as a mechanism for resolution of cross-border and/or post insolvency disputes.^[6] The academic discourse in Singapore is rich and further improvisation in the mechanism is also being discussed by way of introduction of court-ordered mediation^[4]. Further, new legislation for insolvency and debt restructuring has been adopted in Singapore which contain special provision for alternative dispute resolution mechanisms in corporate insolvency^[32]. Further, the discourse for adoption of international arbitral proceedings to facilitate cross-border insolvency has been elevated in past decade^[30], also the UNCITRAL has been requested to initiate projects on intersection of the two disciplines^[12].

Indian Scenario

The contribution of National Company Law Tribunals (NCLTs) and National Company Law Appellate Tribunal (NCLAT) has been pivotal in carrying out the most important functions in the insolvency resolution ecosystem while ensuring fulfilment of the main objectives of insolvency law.

Having regard to certain facts as on 30th of June 2020, 1094 CIRPs out of 2108 ongoing CIRPs have been pending since more than 270 days, which clearly points out the delay in resolution in majority of the proceedings. Also, that 250 CIRPs have been resolved till June 2020 and the average time taken is around 380 days (after excluding time excluded by adjudicating authorities). These facts clearly show that the present insolvency resolution process in India, though is more efficient than prior regimes, but still demands avant-garde changes in order to cater the needs of the time. As per the IBBI's April-June newsletter of 2020 further

points out that 4 cases were withdrawn for want of financial resources to carry-on the resolution process^[14]. Further, though there is no data on the fact yet, but owing to the cultural taboo initiation of insolvency resolution process against a corporate debtor must have effect on their market reputation and good will as well. Due to the pendency of insolvency matters, hearing in companies' cases are also getting delayed, leading to many shareholder deadlocks in companies^[18].

The inclination of Indian judiciary towards inclusion of alternate dispute resolution mechanism is evident from the judgment in *Afcons Infrastructure Ltd. and Ors. V. Cherman Varkey Construction Co. (P) Ltd. and Ors.*^[2], wherein the court employed 'exceptional construction' to effectively implement s 89 of Code of Civil Procedure, 1908.

Also, in *Binani Industries Limited Vs. Bank of Baroda & Anr.* [Company appeal (at) (insolvency) no. 82 of 2018], the NCLAT clarified the objectives of the Code as under: "The first order objective is "resolution". The second order objective is "maximisation of value of assets of the 'Corporate Debtor'" and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objective is sacrosanct." Thereby highlighting that in insolvency matters, the first objective of law is to ensure resolution of insolvency and the interpretation of the term resolution can be safely extended to dispute resolution mechanisms as well because the motive behind adoption of ADR mechanisms is also, in case of insolvency, to resolve the insolvency and related disputes.

In *M/s. Phoenix Global DMCC v. M/s. A&A Trading International Pvt. Ltd.*^[25] the Chennai Bench of NCLT decided to exercise its inherent powers under rule 11 of NCLT rules 2016 to let the applicant withdraw its application for initiation for insolvency. While the NCLT Kolkata bench opposed the view and held that neither of the parties can withdraw the application once it has been admitted^[23]. The ongoing debate further reached NCLAT^[22] and then the Supreme Court settled the issue by holding the position that applications once admitted cannot be withdrawn, but in the instant case the court invoked its powers under article 142 of Constitution of India and allowed withdrawal by consent^[20]. Thereafter the Insolvency Law Committee in its report dated march 2018 pitched-in for amendment to the code whereby the s 12A was introduced to facilitate withdrawal of admitted applications and was held constitutional by the apex court^[31].

Owing to the burden on the adjudicating authorities, it is now being discussed in the corridors that the Ministry for Corporate Affairs is planning to identify benches specifically for IBC and Company matters, also a provision for dedicated benches is also in the vision. The experts in India are looking forward to mediation as an alternative to the process given under the code.

In the meanwhile, another new arrangement has been opted by the NCLAT in *Parvinder Singh v. Intec Capital Ltd and Anr.*^[24], wherein the tribunal appointed (Retd.) Justice A.K. Sikhari as the mediator for insolvency resolution of the corporate debtor while putting a stay at the corporate insolvency resolution process as envisaged in the code.

The position of pre-petition disputes is starkly different for financial creditor/corporate debtor than the operational creditors. An application u/s 9 won't be admitted if there is a pre-existing dispute^[21] between the parties. For petitions u/s 7 and 10, referral of pre-petition disputes to arbitral proceedings has been negated

in India ^[3] until recently. The NCLT Bombay bench vide its judgment ^[16] on 9th of June has referred a dispute to arbitration after rejecting the application filed before it under s 7 of the code. Although the IBBI has been working on introducing time-bound mediation in particular cases of Individual Insolvency resolution ^[15].

Although the new arrangement in India furthers the motive of using alternative dispute resolution mechanism in corporate insolvency resolution process. But the relevant jurisprudence in India is yet far from utilizing the potential of alternative dispute resolution mechanisms to its fullest, as the present set-up does not promote referral of disputes to alternative dispute resolution mechanisms and is inclined towards not enforcing the pre-petition arbitration agreements between creditor(s) and corporate debtor.

Conclusion

ADR mechanisms have been adopted by some jurisdictions in their domestic insolvency matters, and could also be used for cross-border insolvency if an international protocol is established for the same. Though usage of the mechanisms varies from jurisdiction to jurisdiction, some common methods are out-of-court settlements and court annexed ADRs. The mechanisms could be utilized in resolving myriad complex issues and disputes in insolvency resolution. Indian tribunal and apex court have also shown their inclination towards adoption of ADR mechanisms but there is no settled precedent in place for the same.

In the Authors opinion, well established ADR regime could be further utilised in India on the lines of USA and Singapore, also it will facilitate quick insolvency resolutions as time is of essence in corporate insolvency resolution processes.

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