

## Mediation in Bankruptcy Cases

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.” – Abraham Lincoln

### Insolvency and Bankruptcy Code

The Insolvency and Bankruptcy Code 2016, (IBC) was enacted for protecting the interests of creditors in recovering their dues in a time bound manner and reducing the Non-Performing Assets (NPA’s). This Act has given power to the creditors to take over control of the debtor corporates and work out a resolution plan for reorganisation and revival of the company. The Insolvency professionals appointed in terms of the Code, take control of the company, its management and its assets on behalf of the creditors. This is a time bound process and the whole process is expected to be complete in 180 days, extendable by a maximum of 90 days.



The enactment of this code has enabled many a creditor to approach the Insolvency Board for filing bankruptcy cases, leading to piling up of cases, delays in resolution beyond the stipulated time, backlog and pendency as there are not enough benches to decide the matters. In view of this, there is a proposal to amend the IBC code to bring in mediation. This may be mandated for cases with a certain value.



Mediation is an important alternate dispute resolution mechanism. It is a confidential and voluntary process wherein parties communicate and negotiate through a neutral third-party mediator. It is a cost effective and expeditious process. It is a process that helps all stake holders participate in the process directly.

### Jet Airways before NCLT

Jet Airways one of the leading airlines in the country, stopped flying from April this year as they could not raise any further cash/loan for their operations. As per facts reported in media, even before the airline stopped flying there were a couple of attempts by their joint venture partner, Etihad and some other corporates such as Hinduja’s for reviving the airlines. There was an attempt by the consortium of lenders led by



State Bank of India (SBI), which also tried a resolution package for reviving the airlines. None of these plans worked and finally the lenders led by SBI approached the National Company Law Tribunal (NCLT) for bankruptcy proceeding against Jet Airways, in terms of the Insolvency and Bankruptcy Code, 2016.

### Benefits of Mediation in Bankruptcy Cases

- **Preserving the value of the corporate debtor** - When a case is filed for bankruptcy, because of the negative publicity, the value of the corporate debtor is reduced considerably as goodwill and brand value is affected. Jet Airways share value got eroded considerably on the filing of the petition by the lenders at NCLT. In contrast if the case had been mediated, the confidentiality of the process would have helped the company maintain confidentiality of its sensitive and financial information helping it retain its brand value and good will.
- **Cost Effective** - Internationally, bankruptcy proceedings are mediated. Some of the famous cases such as Enron and Lehman brothers have been mediated as part of the bankruptcy proceedings. Mediation in bankruptcy cases is cost effective. “In September 2008, Lehman Brothers filed for Chapter 11 bankruptcy. A Lehman Brothers’ arm dealing in derivatives, was counterparty to at least 1.2 million derivative transactions with over 6,500 different parties. In September 2009, the court ordered compulsory mediation for the derivative contract disputes. As of 2016, 110 mediations have brought in \$333 million for Lehman Brothers’ estate, from outstanding claims of about \$9 billion.”<sup>1</sup>
- **Uniformity in Cross Border Disputes** - Cross border disputes such as Lehman Brothers, can result in different jurisdictions dealing with the legal issues differently. During the process of mediation, it is possible for parties to negotiate and apply uniform settlement process. In the case of Jet Airways, too while proceedings have been initiated in India by the SBI led consortium for recovery, parallel proceeding for sale of one of its confiscated jets has been started by the Dutch Insolvency Court Administrator. The said administrator has approached NCLT. It has agreed not to sell the confiscated asset. “Dutch insolvency court administrator has agreed before the NCLAT not to sell the confiscated assets of debt-ridden Jet Airways.”<sup>2</sup> In case the matter had been mediated such a situation would not have arisen. The parties could have negotiated a moratorium on disposal of assets across borders till the dispute was settled through mediation between all stake holders concerned.

<sup>1</sup> <http://www.businessworld.in/article/Mediation-In-Corporate-Insolvency-A-Game-Changer/14-06-2019-171872/>

<sup>2</sup> <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/dutch-bankruptcy-administrator-moves-nclat-on-jet-airways-matter/articleshow/70189058.cms>

Globally countries are adopting mediation as an important dispute resolution mechanism.” In 2017, Singapore also recommended use of mediation in insolvency resolution to transform into an international insolvency resolution hub.”<sup>3</sup>

Based on the global experience and the benefits of mediation in dealing with bankruptcy cases it is hoped that the proposed amendments to IBC code are brought in at the earliest to help quick and cost effective resolution.

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- ❖ *The above article is the 17<sup>th</sup> part of a series of knowledge sharing initiative on Mediation contributed by Ms. Saradha Kumar, Advocate on behalf of CAMP (<http://campmediation.in>). She is currently attached with CAMP ARBITRATION AND MEDIATION PRACTICE Pvt. Ltd. in practising and propagating mediation as an effective mechanism for dispute resolution.*
  - ❖ *CAMP is a pioneering institution providing private mediation services so that disputing parties can settle their disputes amicably. Envisioned by Laila T Ollapally, it is run by a group of legal professionals including retired judges, senior mediators from the Bangalore Mediation Centre and senior partners of law firms who are committed to resolving disputes efficiently and successfully.*
  - ❖ *CAMP is recognized by the Union Ministry of Law and Justice as a qualified mediation service provider for government disputes as well as by the International Mediation Institute (IMI) as a Qualifying Assessment Program (QAP). IMI is the leading international institution for setting professional standards for mediators and collaborative dispute resolution processes.*

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<sup>3</sup> <http://www.businessworld.in/article/Mediation-In-Corporate-Insolvency-A-Game-Changer/14-06-2019-171872/>