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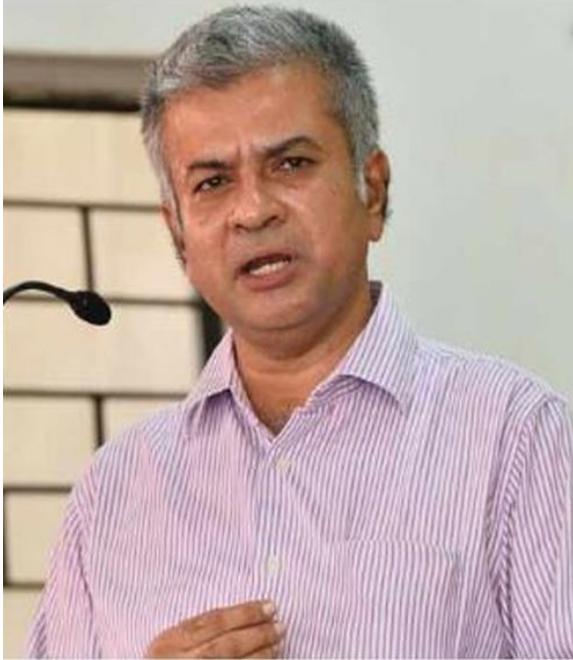
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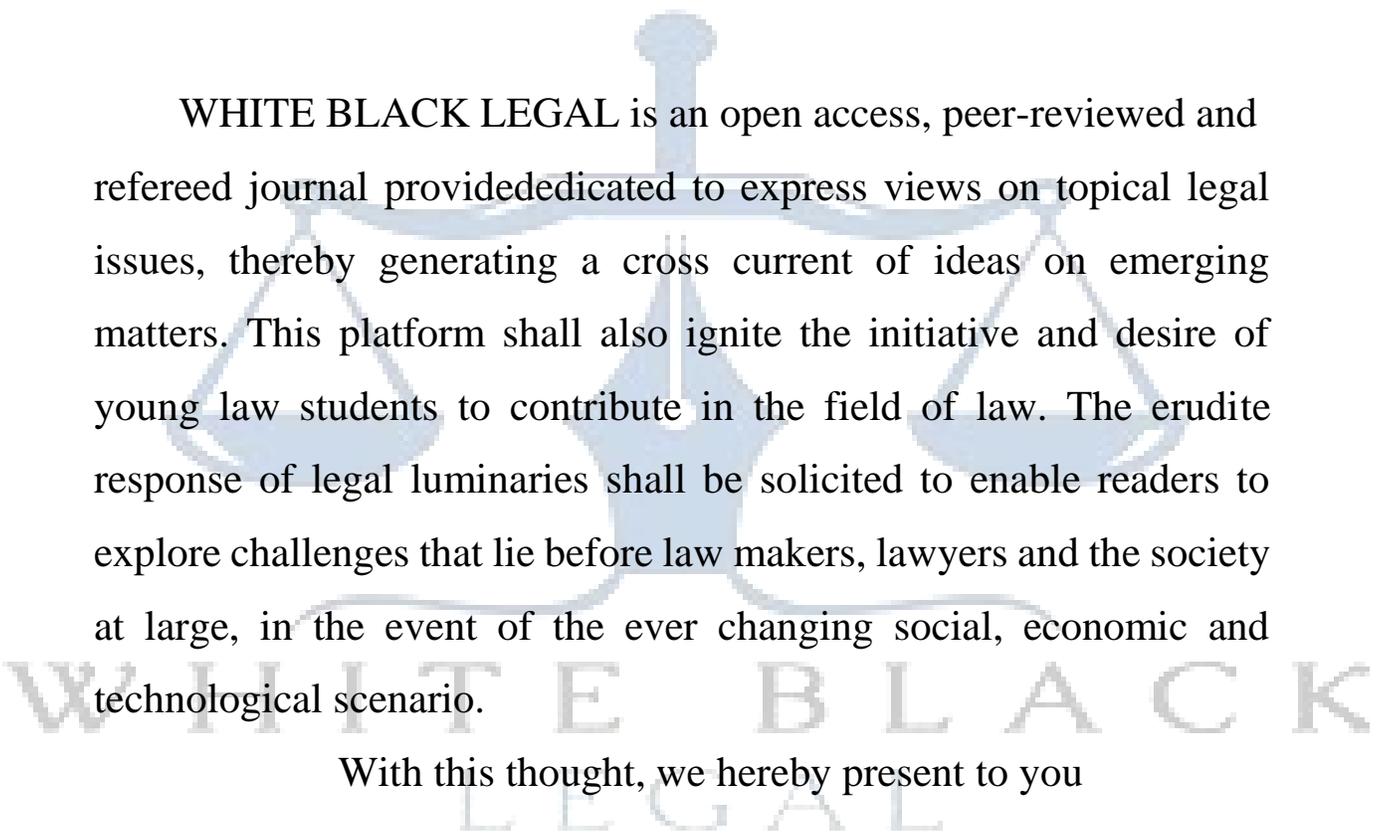
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **WIN-WIN IN A LOSING SITUATION? A LOOK AT ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN INSOLVENCY IN INDIA**

AUTHORED BY - MS. MANIKA GANDHI<sup>1</sup> & DR. SHIPRA GUPTA<sup>2</sup>

## **ABSTRACT**

The Indian economic ecosystem has witnessed a significant increase in insolvency cases, largely influenced by complex business environments and fluctuating market dynamics. This surge has strained the existing judicial infrastructure, leading to prolonged litigation processes that often undermine the effectiveness of insolvency resolutions.<sup>3</sup> The Insolvency and Bankruptcy Code, 2016, marks a significant departure from earlier, less structured insolvency procedures, establishing a consolidated framework aimed at expediting and simplifying the process. However, the burgeoning caseload of the National Company Law Tribunal (NCLT) and the protracted nature of many insolvency resolutions under the IBC highlight the critical need for alternative dispute resolution (ADR) mechanisms to alleviate the judicial burden and enhance the efficiency of insolvency resolutions.<sup>4</sup>

The Insolvency and Bankruptcy Code (IBC) was enacted to address the complexities and inefficiencies plaguing the earlier insolvency resolution regime in India. By streamlining the process and setting clear timelines, the IBC aims to improve the ease of doing business and enhance creditor recoveries.<sup>5</sup> Concurrently, ADR mechanisms such as mediation, arbitration, and conciliation have been recognized globally for their ability to resolve disputes efficiently outside

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<sup>3</sup> Sreyan Chatterjee, Gausia Shaikh and Bhargavi Zaveri, 'Watching India's Insolvency Reforms: A New Dataset of Insolvency Cases' (Indira Gandhi Institute of Development Research Working Paper, Mumbai, 2017).

<sup>4</sup> Jyotirmoy Banerjee and Roopesh Kumar, 'A Comprehensive Exploration Over The Efficacy Of Dispute Resolution Mechanism In Resolving Insolvency Disputes In India' (2023) 29 Educational Administration: Theory and Practice 384.

<sup>5</sup> Kanishk Chaudhry, *Uncoding The Code: A Guide to the Indian Insolvency & Bankruptcy Code 2016* (OrangeBooks Publication, 2024)..

the traditional courtroom setting, thereby reducing the burden on judicial systems.<sup>6</sup>

Despite the innovations introduced by the IBC, the insolvency resolution process in India still faces significant challenges, primarily due to the high volume of cases and the lengthy durations of court proceedings.<sup>7</sup> This inefficiency undermines the very objectives of the IBC and highlights the necessity for integrating effective ADR mechanisms that can provide quicker, less adversarial, and cost-effective resolutions in insolvency cases.<sup>8</sup>

The objective of this paper is to explore the integration of ADR into the insolvency resolution process under the IBC, with a focus on analyzing the role and efficacy of ADR mechanisms in the context of insolvency, examining the statutory framework and judicial precedents that support or impede the use of ADR in insolvency proceedings and drawing on international best practices to propose reforms that could enhance the effectiveness of ADR in the Indian insolvency resolution framework.

This paper delves into the potential of ADR to serve as a complement to the existing insolvency framework, with various dispute methods. These mechanisms are scrutinized for their capacity to offer less adversarial, more cost-effective, and faster resolutions compared to conventional judicial proceedings. The discussion extends to the statutory recognition of ADR in the IBC, particularly sections that implicitly encourage or facilitate the use of ADR, including the recent amendments that introduce pre-pack insolvency schemes for Micro Small, and Medium Enterprises (MSMEs). These schemes inherently embody ADR principles by promoting them between debtors and creditors before formal insolvency proceedings.

Furthermore, the paper explores the integration of ADR into insolvency procedures through case law analysis. Landmark judgments, such as those in *Swiss Ribbons Pvt. Ltd. v. Union of India*<sup>9</sup> and *Essar Steel India Ltd. v. Satish Kumar Gupta*<sup>10</sup>, are examined to elucidate judicial attitudes towards

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<sup>6</sup> Remigijus Jokubauskas, 'Alternative Dispute Resolution in Insolvency Disputes' (2017) 9 *Socialinių mokslų studijos* 244.

<sup>7</sup> Shivam Goel, 'The Insolvency and Bankruptcy Code, 2016: Problems & Challenges' (2017) 3 *Imperial Journal of Interdisciplinary Research (IJIR)* 2454-1362.

<sup>8</sup> *Supra* note 6.

<sup>9</sup> [2019] 4 SCC 17

<sup>10</sup> [2019] 2 SCC 1

the application of ADR in insolvency scenarios. These cases demonstrate the courts' growing acknowledgment of ADR's utility in resolving disputes that are fundamentally commercial, which often underpin insolvency cases.

The analysis also includes a critique of the challenges faced in meshing ADR with insolvency processes. Among these are the jurisdictional conflicts that arise when arbitration clauses in contracts collide with the insolvency proceedings. The resolution of such conflicts, as illustrated in *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd*<sup>11</sup> and *Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd*<sup>12</sup>, offers insights into the evolving jurisprudence in this area, which increasingly favours a pragmatic approach that upholds the efficacy of ADR while respecting the overarching framework of the IBC.

In examining global practices, the paper identifies successful models of ADR in insolvency from jurisdictions like Singapore and the UK, where ADR mechanisms are deeply ingrained within the insolvency resolution framework. Lessons drawn from these international experiences suggest pathways for integrating ADR more effectively into the Indian context, with potential reforms including legislative amendments and enhanced judicial training on ADR.

Adopting a doctrinal research approach, this study extensively reviews literature, statutory laws, and landmark judgments relevant to both ADR and insolvency proceedings under the IBC. A comparative analysis will be conducted with international jurisdictions where ADR is effectively integrated into insolvency laws, such as Singapore and the UK. This methodology will allow for a thorough examination of the potential for ADR to improve the insolvency resolution process in India, culminating in evidence-based recommendations for legal reforms and policy adjustments.

The integration of ADR into India's insolvency framework appears not only feasible but beneficial. By fostering a more collaborative atmosphere in insolvency resolutions, ADR has the potential to transform a traditionally adversarial process into a more conciliatory and efficient one. The paper proposes a set of policy recommendations aimed at facilitating this integration, which include

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<sup>11</sup> AIR 2011 SUPREME COURT 2507

<sup>12</sup> CIVIL APPEAL NO. 818 OF 2018

enhancing legal provisions that mandate or encourage ADR and fostering a culture of peaceful settlement through various ADR methods.

*Keywords: Insolvency, Alternate Dispute Resolution, ADR, insolvency proceedings, mediation, arbitration, conciliation.*

## I. INTRODUCTION

The journey of insolvency laws in India is a testament to the country's evolving economic landscape and its efforts to create a robust framework for resolving financial distress. The historical background and evolution of these laws reflect a progression from fragmented and archaic legislations to a comprehensive and modern insolvency regime designed to address the complexities of contemporary business environments.<sup>13</sup>

In the pre-independence era, insolvency laws in India were primarily governed by two statutes: the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. These laws were modeled on the English Bankruptcy Acts of 1883 and 1890, reflecting the colonial influence on India's legal system. However, these statutes were limited in scope and applicability, primarily focusing on individual insolvency rather than corporate insolvency, and were often criticized for their procedural inefficiencies and prolonged timelines.<sup>14</sup>

Post-independence, the need for a more structured approach to insolvency became evident as India embarked on industrialization and economic expansion. The Companies Act, 1956, introduced provisions for winding up companies, which marked the first significant step towards addressing corporate insolvency. However, these provisions were primarily liquidation-oriented and did not offer a comprehensive framework for restructuring or rehabilitation of distressed companies. This limitation became increasingly apparent as India opened up its economy in the 1990s, leading to a surge in corporate activities and the concomitant rise in financial distress cases.<sup>15</sup>

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<sup>13</sup> Supra note 5.

<sup>14</sup> Rashi Shukla, 'Individual Insolvency-The Next Big Thing' (2020) 4 Int'l JL Mgmt. & Human. 2179

<sup>15</sup> Nimrit Kang and Nitin Nayar, 'The Evolution of Corporate Bankruptcy Law in India' (2004) Money and Finance 2003 37.

The Sick Industrial Companies (Special Provisions) Act (SICA), 1985, was enacted to address the problem of sick industrial companies and their revival. SICA aimed to detect sickness in industrial companies and provide for their speedy rehabilitation. However, SICA was criticized for its procedural delays and the inefficacy of the Board for Industrial and Financial Reconstruction (BIFR), the body established under SICA to oversee the revival of sick companies. The inability of SICA to effectively resolve cases of industrial sickness highlighted the need for more comprehensive insolvency legislation.<sup>16</sup>

The Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI), 1993, commonly known as the Debt Recovery Tribunal (DRT) Act, was another significant legislative development aimed at expediting the recovery of debts. The Act established Debt Recovery Tribunals (DRTs) and Debt Recovery Appellate Tribunals (DRATs) to provide a specialized forum for the speedy adjudication and recovery of debts due to banks and financial institutions. While the DRTs improved the recovery process, they did not address the broader aspects of insolvency and restructuring.<sup>17</sup>

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002, empowered banks and financial institutions to recover their non-performing assets (NPAs) without the intervention of courts. SARFAESI provided mechanisms for asset reconstruction, securitization of financial assets, and enforcement of security interests, enabling faster recovery of dues. However, SARFAESI primarily catered to secured creditors and did not provide a holistic framework for insolvency resolution, leaving gaps in the insolvency regime.<sup>18</sup>

The Companies Act, 2013, introduced several provisions aimed at improving corporate governance and insolvency resolution. Sections 253 to 269 of the Companies Act, 2013, provided for the revival and rehabilitation of sick companies, replacing the provisions of SICA. The Act

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<sup>16</sup> S Pardhasaradhi, 'Corporate Sickness: Critical Analysis of SICA Vs IBC: A Study' (2020) 10(2) IPE Journal of Management 73.

<sup>17</sup> Akshita Sharma, 'A Study on the Working of the Debt Recovery Tribunals (DRT) in India and Its Way Ahead' (2022) 3 Jus Corpus LJ 193.

<sup>18</sup> Danish Hasnain, 'A Conceptual Approach to Sarfaesi Act, 2002: Its Evolution, Characteristics and Efficacy' (2014) 4(9) Asian Journal of Research in Banking and Finance 238.

aimed to simplify the process and reduce delays by empowering the National Company Law Tribunal (NCLT) to handle cases of revival and rehabilitation. Despite these improvements, the need for a consolidated and comprehensive insolvency framework remained.<sup>19</sup>

The most transformative development in the history of insolvency laws in India came with the enactment of the Insolvency and Bankruptcy Code (IBC), 2016. The IBC was a response to the inadequacies of existing laws and aimed to consolidate and amend laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner. The objective was to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders.<sup>20</sup>

One of the standout features of the IBC is the establishment of a time-bound insolvency resolution process. Under Section 12 of the IBC, the corporate insolvency resolution process (CIRP) must be completed within 180 days, extendable by 90 days, to ensure expeditious resolution. This feature was designed to address the issue of protracted legal battles and the consequent erosion of asset value, which plagued the previous insolvency regime.<sup>21</sup>

Another significant feature of the IBC is the introduction of the creditor-in-control model, which shifted the balance of power from debtors to creditors. The formation of the Committee of Creditors (CoC), comprising financial creditors, empowered those with a vested interest in the resolution process to make crucial decisions regarding the fate of the distressed entity. This model aimed to align the interests of creditors, ensuring that the resolution plans were commercially viable and sustainable.<sup>22</sup>

The IBC also introduced the concept of insolvency professionals (IPs), who play a pivotal role in managing the insolvency resolution process. These professionals, regulated by the Insolvency and Bankruptcy Board of India (IBBI), are tasked with overseeing the entire process, from the initiation

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<sup>19</sup> Vivek Tyagi Datta and Manipadma, 'Regulatory Framework of Corporate Insolvency in India: The Road Ahead' (Apeejay Business Review) 5.

<sup>20</sup> Ibid

<sup>21</sup> Kunal Singh and Muskan Singh, 'Insolvency and Bankruptcy Code (IBC) in India and Its Impact on the Economy' (2022) 3 Jus Corpus LJ 485.

<sup>22</sup> Jibin Jose, Snehal S Herwadkar, Prabal Bilantu and Shihab Abdul Razak, 'Does Greater Creditor Protection Affect Firm Borrowings? Evidence from IBC' (2020) 14(2) Margin: The Journal of Applied Economic Research 212.

of insolvency proceedings to the implementation of the resolution plan. The role of IPs is crucial in ensuring transparency, efficiency, and compliance with legal requirements.<sup>23</sup>

The objectives of the IBC are manifold. Firstly, it aims to maximize the value of assets of the corporate debtor, ensuring that the interests of all stakeholders, including creditors and shareholders, are protected. Secondly, the IBC seeks to promote entrepreneurship by providing a clear exit mechanism for failing businesses, thereby encouraging innovation and risk-taking. Thirdly, the IBC aims to enhance the availability of credit by creating a predictable and efficient insolvency framework, which reassures lenders about the recoverability of their investments in the event of default.<sup>24</sup>

Judicial interpretation has played a significant role in shaping the IBC. In *Swiss Ribbons Pvt. Ltd. v. Union of India*<sup>25</sup>, the Supreme Court upheld the constitutional validity of the IBC, emphasizing its objective of timely resolution and asset maximization. The court highlighted the importance of the CoC and the role of financial creditors in the resolution process, reinforcing the principles of the creditor-in-control model.

Another landmark case is *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*<sup>26</sup>, where the Supreme Court clarified the eligibility criteria for resolution applicants under Section 29A of the IBC. The judgment underscored the need to ensure that only credible and capable applicants are allowed to participate in the resolution process, thereby enhancing the chances of successful rehabilitation of distressed entities.

Internationally, the adoption of the UNCITRAL Model Law on Cross-Border Insolvency in 2018 further strengthened India's insolvency framework. The Model Law provides a legal framework for dealing with cross-border insolvency cases, promoting cooperation and coordination between Indian and foreign courts. This development has facilitated more effective resolution of cross-

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<sup>23</sup> Abhishek Mittapally and Kokila Jayaram, 'A Study of Insolvency Professionals in India' in *Insolvency and Bankruptcy Regime in India: A Narrative* (Insolvency and Bankruptcy Board of India, New Delhi, 2020) 199.

<sup>24</sup> Abhiman Das, Anurag K Agarwal, Joshy Jacob, Sanket Mohapatra, Saket Hishikar, Saakshi Bangar, Sandeep Parekh, Sudarshana Basu and U K Sinha, 'Insolvency and Bankruptcy Reforms: The Way Forward' (2022) 45(2) *Vikalpa* 115.no. 2 (2022): 115-131.

<sup>25</sup> [2019] 4 SCC 17

<sup>26</sup> [2019] 2 SCC 1

border insolvency issues, aligning India's insolvency regime with global best practices.<sup>27</sup>

The economic impact of the IBC has been significant. By providing a clear, predictable, and efficient insolvency resolution process, the IBC has enhanced investor confidence and improved the overall business environment in India. This, in turn, has had a positive impact on credit availability, as financial institutions are more willing to lend when they have confidence in the mechanisms for recovering their investments in the event of default.<sup>28</sup>

Despite these achievements, the insolvency framework in India continues to face challenges. One of the primary issues is the backlog of cases in the National Company Law Tribunals (NCLTs), which threatens to undermine the time-bound resolution process envisioned by the IBC.<sup>29</sup> Addressing this issue requires not only increasing the capacity of NCLTs but also promoting the use of Alternative Dispute Resolution (ADR) mechanisms to alleviate the burden on the judicial system.<sup>30</sup>

Another challenge is the need for greater awareness and understanding of the insolvency process among stakeholders, particularly MSMEs. Providing education and training on the provisions of the IBC and the benefits of timely resolution can help mitigate the stigma associated with insolvency and encourage more proactive engagement with the insolvency framework.<sup>31</sup>

The context and importance of insolvency issues in India are deeply intertwined with the country's economic development and the evolving regulatory landscape. The introduction of the IBC has marked a significant shift towards a more efficient and effective insolvency regime, promoting timely resolution and protecting the interests of all stakeholders. While challenges remain, the

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<sup>27</sup> United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross border Insolvency, 1997.

<sup>28</sup> Supra note 21.

<sup>29</sup> Hitesh Kumar Thakkar, Pranay Agarwal and Urmi Shah, 'Efficacy of Adjudication Process of Corporate Insolvency Resolution Process (CIRP): Law and Economics of National Company Law Tribunal (NCLT)' (2023) 14(2) Asian Journal of Law and Economics 189.

<sup>30</sup> Neelam Tyagi, 'Indian Perspective on Arbitrability of Insolvency Disputes: Intersection, Intervention and Interpretation for Synergy Among Both Regimes' (2023) 8(1) Ramanujan International Journal of Business and Research 70.

<sup>31</sup> Aurelio Gurrea-Martínez, 'Implementing an Insolvency Framework for Micro and Small Firms' (2021) 30 International Insolvency Review S46.

continued evolution and refinement of the insolvency framework, supported by judicial interpretation and international cooperation, hold the promise of a more resilient and robust economic environment in India.

## **II. UNDERSTANDING THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS IN INSOLVENCY RESOLUTIONS**

Alternative Dispute Resolution (ADR) mechanisms, such as mediation, arbitration, and conciliation, have emerged as pivotal tools in the realm of insolvency resolutions. These mechanisms offer a departure from the traditional adversarial and often protracted litigation processes, providing more collaborative, expedient, and cost-effective solutions to financial distress. The role of ADR in insolvency is increasingly recognized for its potential to facilitate amicable settlements, preserve business relationships, and maximize asset value, making it a crucial component of the modern insolvency framework in India.<sup>32</sup>

The introduction of the Insolvency and Bankruptcy Code (IBC) in 2016 revolutionized the insolvency landscape in India by establishing a structured and time-bound process for insolvency resolution. While the IBC primarily focuses on litigation-based resolution through the National Company Law Tribunal (NCLT), it also recognizes the potential of ADR mechanisms in streamlining and expediting the resolution process. The growing acceptance of ADR in insolvency is driven by its ability to address the inefficiencies and delays often associated with traditional court proceedings.<sup>33</sup>

Mediation is one of the most prominent ADR mechanisms utilized in insolvency resolutions. It involves a neutral third party who facilitates negotiations between the disputing parties to help them reach a mutually acceptable agreement. The role of mediation in insolvency was underscored in the landmark case of *Swiss Ribbons Pvt. Ltd. v. Union of India*<sup>34</sup>, where the Supreme Court highlighted its importance in reducing the burden on the judiciary and expediting the resolution

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<sup>32</sup> U Dhivya, 'Pivotal Significance of Alternative Dispute Resolution Within the Realm of Financial Institutions' (2024) *Journal of Law and Legal Research Development* 1.

<sup>33</sup> Thomas J Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1(3) *Journal of Empirical Legal Studies* 843.

<sup>34</sup> [2019] 4 SCC 17

process. Mediation provides a confidential and non-adversarial environment, enabling parties to openly discuss their issues and explore innovative solutions without the fear of litigation consequences. The Insolvency Law Committee's 2024 report recommended incorporating mediation as a formal mechanism within the IBC framework to enhance the efficiency of the resolution process.<sup>35</sup>

Arbitration, another key ADR mechanism, has gained traction in the context of insolvency, particularly for resolving disputes that are incidental to the insolvency process. While arbitration traditionally faced resistance in insolvency matters due to the collective nature of insolvency proceedings, recent jurisprudence has paved the way for its broader application. In *Indus Biotech Private Limited v. Kotak India Venture Fund*<sup>36</sup>, the Supreme Court ruled that contractual disputes arising in the context of insolvency, which do not directly affect the collective interests of creditors, can be referred to arbitration. This decision highlighted the potential of arbitration to address specific disputes within the broader insolvency framework, thereby reducing the litigation burden on insolvency courts.

Conciliation, though less frequently utilized, also plays a significant role in insolvency resolutions. Under Section 442 of the Companies Act, 2013, the establishment of a Mediation and Conciliation Panel provides a formal structure for the amicable settlement of disputes.<sup>37</sup> While not specific to insolvency, this provision has been leveraged in cases where parties seek to avoid the adversarial nature of litigation. Conciliation offers a flexible and informal approach to dispute resolution, allowing parties to negotiate terms that are mutually beneficial and practical.

The use of ADR mechanisms in insolvency resolutions offers several advantages. Firstly, ADR provides a more collaborative and less adversarial approach to dispute resolution. This is particularly important in insolvency cases, where preserving business relationships and maximizing asset value are critical objectives. Secondly, ADR mechanisms are generally faster

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<sup>35</sup> Insolvency and Bankruptcy Board of India, *Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, Report of the Expert Committee* (Jan 2024).

<sup>36</sup> [2021] 6 SCC 436

<sup>37</sup> Section 442 of the Companies Act, 2013, deals with the establishment of the Mediation and Conciliation Panel by the Central Government for the mediation between parties during disputes under the Act. This panel aids in amicable settlements to expedite dispute resolution and reduce litigation.

and more cost-effective than traditional litigation. This helps to avoid the delays and expenses associated with court proceedings, ensuring that the value of the debtor's assets is not further eroded. Thirdly, ADR offers greater flexibility, allowing parties to tailor the resolution process to their specific needs and circumstances.<sup>38</sup>

Internationally, the use of ADR in insolvency has been well-established, providing valuable insights for India's evolving insolvency framework. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, adopted by India in 2018, encourages the use of mediation and arbitration in cross-border insolvency disputes.<sup>39</sup> Articles 27 and 30 of the Model Law promote cooperation and direct communication between courts and insolvency practitioners of different jurisdictions, often involving ADR mechanisms. This international framework underscores the importance of ADR in facilitating efficient and harmonious resolution of cross-border insolvency cases.<sup>40</sup>

A notable example of the practical application of ADR in cross-border insolvency is the case of *Jet Airways (India) Ltd. (Offshore Regional Hub of Airlines Financial Support Services (Mauritius) Ltd.) v. State Bank of India*<sup>41</sup>. In this case, the NCLT allowed for a cross-border insolvency protocol that incorporated elements of mediation and cooperation between Indian and Dutch insolvency proceedings. This case highlighted how ADR mechanisms could be effectively used to coordinate complex cross-border insolvency cases, ensuring a more streamlined and efficient resolution process.

Despite the evident advantages, the adoption of ADR mechanisms in insolvency resolutions in India faces several challenges. One of the primary obstacles is the lack of legislative clarity and structural support. While the IBC and other related laws provide some scope for ADR, there is a need for more explicit guidelines and formal integration of ADR mechanisms within the insolvency framework. This would provide greater certainty and encourage wider adoption of

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<sup>38</sup> Supra note 6.

<sup>39</sup> Ishaan Madaan and Christian Campbell (eds), *Crossroads of Insolvency and Arbitration* (Kluwer Law International BV, 2022).

<sup>40</sup> United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997.

<sup>41</sup> [2019] SCC OnLine NCLT 348

ADR in insolvency cases.<sup>42</sup>

Another challenge is the cultural reluctance among stakeholders to embrace ADR. There is often a lack of awareness and trust in these mechanisms, which can hinder their adoption. Building confidence in ADR requires concerted efforts from regulators, practitioners, and the judiciary to promote its advantages and demonstrate its effectiveness through successful case studies.<sup>43</sup> Additionally, training and capacity building for mediators, arbitrators, and conciliators specializing in insolvency matters are crucial. The complexity of insolvency cases demands a deep understanding of financial, legal, and commercial aspects, necessitating specialized training programs and accreditation for ADR professionals in this field.<sup>44</sup>

Understanding the role of ADR mechanisms in insolvency resolutions is essential for fostering a more efficient and effective insolvency framework in India. Mediation, arbitration, and conciliation offer promising alternatives to traditional litigation, providing more collaborative, expedient, and cost-effective solutions to financial distress. The integration of ADR within the framework of the IBC and other related laws can enhance the effectiveness of the insolvency resolution process, promoting timely resolution and protecting the interests of all stakeholders. While challenges remain, the continued evolution and refinement of ADR mechanisms, supported by legislative reforms and capacity building, hold the potential to transform the insolvency resolution landscape in India, aligning it with global best practices and fostering a more resilient and responsive economic environment.<sup>45</sup>

### **III. INTEGRATING ADR WITHIN THE IBC FRAMEWORK**

The integration of Alternative Dispute Resolution (ADR) mechanisms within the Insolvency and Bankruptcy Code (IBC) framework represents a progressive shift in India's approach to insolvency resolution. While traditional court-based insolvency processes have been the norm, the

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<sup>42</sup> Supra note 30

<sup>43</sup> Supra note 4.

<sup>44</sup> Salma Ben Ayed, Giovanni Matteucci and Tran Van Nam, 'Mediation and Insolvency, with a Focus on Developing Countries' in *Compromiso con los Objetivos de Desarrollo Sostenible (Commitment to the SDGs-Sustainable Development Goals)* (JM Bosch Editor, Spain, 2021).

<sup>45</sup> Shashank Saksena, 'COVID-19 Pandemic: Non-Traditional Resolution Mechanisms for Resolving Businesses' (2021) 331-339 <https://ibbi.gov.in/uploads/resources/c54536f716a196361b5acdc584096e0b.pdf> accessed 30 July 2024.

introduction of ADR mechanisms such as mediation, arbitration, and conciliation has gained traction for their potential to provide quicker, more cost-effective, and less adversarial resolutions. The legislative landscape supporting ADR in insolvency has evolved to accommodate these mechanisms, reflecting a broader trend towards modernization and efficiency in insolvency proceedings.<sup>46</sup>

The IBC, which came into force in 2016, was designed to overhaul the existing insolvency framework in India. It introduced a time-bound process for insolvency resolution aimed at maximizing the value of the debtor's assets and ensuring a better return for creditors.<sup>47</sup> The emphasis on speedy resolutions has created a conducive environment for the adoption of ADR mechanisms, which can resolve disputes more rapidly than traditional litigation. Although the IBC itself does not explicitly mandate ADR, it provides the flexibility needed for incorporating these mechanisms through judicial interpretations and complementary legislative provisions.<sup>48</sup>

Mediation has emerged as a crucial ADR mechanism within the insolvency context. Unlike traditional litigation, mediation offers a confidential and non-adversarial setting, which can be particularly beneficial in insolvency cases where preserving business relationships and trust is essential.<sup>49</sup> Legislative support for mediation in insolvency can be seen in the Companies Act, 2013. Section 442 of the Act empowers the Central Government to maintain a Mediation and Conciliation Panel for the voluntary mediation of disputes, including those arising in insolvency contexts.<sup>50</sup> The Insolvency Law Committee's report in 2024 recommended formalizing the use of mediation within the IBC framework, suggesting amendments to make mediation a more structured part of the insolvency process.<sup>51</sup>

Arbitration is another ADR mechanism that has seen increasing relevance in insolvency. The Arbitration and Conciliation Act, 1996, which governs arbitration in India, has been instrumental

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<sup>46</sup> Supra note 6.

<sup>47</sup> Supra note 24.

<sup>48</sup> Supra note 4.

<sup>49</sup> Supra note 44.

<sup>50</sup> Supra note 37.

<sup>51</sup> Supra note 35.

in supporting arbitration in commercial disputes, including those arising during insolvency.<sup>52</sup> While the collective nature of insolvency initially posed challenges to arbitration, recent judicial rulings have facilitated its use. The case of *KSL and Industries Ltd. v. Arihant Threads Ltd*<sup>53</sup>, where the NCLT referred certain disputes to arbitration while continuing with the insolvency process, exemplifies this trend. The ruling indicated that arbitration could proceed concurrently with insolvency proceedings, provided it did not impede the collective resolution process mandated by the IBC.

Conciliation, although less frequently utilized than mediation or arbitration, holds promise for resolving insolvency disputes amicably. The Companies Act, 2013, under Section 442, also supports conciliation by establishing a framework for the amicable settlement of disputes.<sup>54</sup> The role of conciliation in insolvency is further supported by the Ministry of Corporate Affairs' efforts to promote it through various guidelines and initiatives. By incorporating conciliation into the insolvency framework, parties can resolve disputes more informally and flexibly, which can be particularly useful in complex cases involving multiple stakeholders.<sup>55</sup>

Internationally, the adoption of ADR mechanisms in insolvency is supported by frameworks such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency.<sup>56</sup> India's adoption of the Model Law in 2018 underscored its commitment to aligning with global best practices. Articles 27 and 30 of the Model Law encourage cooperation and direct communication between courts and insolvency practitioners of different jurisdictions, often through ADR mechanisms. This international framework supports the use of mediation and arbitration in cross-border insolvency disputes, promoting efficient and harmonious resolutions.<sup>57</sup>

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<sup>52</sup> Wolfgang Kuhn, 'Arbitration and Insolvency' (2011) 5 *Disp Resol Int'l* 203.

<sup>53</sup> [2015] SCC OnLine NCLT 4

<sup>54</sup> *Supra* note 50.

<sup>55</sup> Akshaya Kamalnath, 'Corporate Insolvency Resolution Law in India-A Proposal to Overcome the "Initiation Problem"' (2019) 88 *UMKC L Rev* 631.

<sup>56</sup> United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997.

<sup>57</sup> Insolvency and Bankruptcy Board of India, 'The Case for Cooperation and Communication in Cross-Border Insolvency Proceedings' <https://ibbi.gov.in/uploads/resources/783a7a063499e21c0165fd151f936431.pdf> accessed 30 July 2024.

A specific legislative development supporting ADR in cross-border insolvency is found in the draft Cross-Border Insolvency Regulations, which the Ministry of Corporate Affairs released for public consultation. These draft regulations, aligned with the UNCITRAL Model Law, propose mechanisms for cooperation between Indian and foreign courts and insolvency practitioners, explicitly endorsing the use of ADR to resolve disputes arising in cross-border insolvency cases.<sup>58</sup>

The rise of ADR mechanisms in insolvency is also driven by the need to address the backlog of cases in the National Company Law Tribunals (NCLTs). The heavy caseload and limited capacity of NCLTs have led to significant delays in insolvency resolutions, undermining the IBC's objective of time-bound processes. By incorporating ADR mechanisms, the legislative framework can alleviate the burden on NCLTs, ensuring more efficient and timely resolutions.<sup>59</sup> For instance, the NCLAT, in the case of *Innoventive Industries Ltd. v. ICICI Bank*<sup>60</sup>, acknowledged the potential of ADR in easing the caseload and expediting resolutions, encouraging parties to consider mediation and arbitration.

Another legislative provision that indirectly supports ADR in insolvency is the Financial Resolution and Deposit Insurance (FRDI) Bill, 2017. Although the Bill has not been enacted, it proposes a comprehensive framework for the resolution of financial firms, including provisions for the use of ADR mechanisms. The FRDI Bill's emphasis on early resolution and minimizing disruptions to the financial system aligns with the broader goals of the IBC and highlights the legislative intent to integrate ADR within the insolvency framework.<sup>61</sup>

Despite the legislative support, the integration of ADR mechanisms in insolvency faces challenges such as the need for more explicit guidelines, cultural resistance, and the requirement for specialized training for mediators, arbitrators, and conciliators. Addressing these challenges requires coordinated efforts from lawmakers, the judiciary, and insolvency professionals.

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<sup>58</sup> Government of India, Ministry of Corporate Affairs, available at [https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder\\_20062018.pdf](https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf) accessed 30 July 2024.

<sup>59</sup> Insolvency and Bankruptcy Board of India, 'Exploring New Perspectives on Insolvency' <https://www.ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf> accessed 30 July 2024.

<sup>60</sup> [2018] 1 SCC 407

<sup>61</sup> The Financial Resolution and Deposit Insurance Bill, 2017, available at [https://dea.gov.in/sites/default/files/FRDI%20Bill%20as%20introduced%20in%20Lok%20Sabha\\_Eng\\_0.pdf](https://dea.gov.in/sites/default/files/FRDI%20Bill%20as%20introduced%20in%20Lok%20Sabha_Eng_0.pdf) accessed 30 July 2024.

Legislative amendments to the IBC, along with awareness campaigns and capacity-building initiatives, can enhance the adoption and effectiveness of ADR mechanisms in insolvency.<sup>62</sup>

The legislative provisions supporting ADR in insolvency are critical for integrating these mechanisms within the IBC framework. Mediation, arbitration, and conciliation offer viable alternatives to traditional litigation, providing faster, more cost-effective, and collaborative resolutions to insolvency disputes. By refining legislative support and addressing the challenges to ADR adoption, India can transform its insolvency resolution landscape, aligning it with global best practices and fostering a more resilient economic environment.<sup>63</sup>

#### **IV. MEDIATION AS A COMPLEMENTARY MECHANISM UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016: A STRATEGIC SHIFT**

The Insolvency and Bankruptcy Code, 2016 (IBC) has been a transformative reform for the insolvency regime in India, significantly improving the resolution of distressed assets and strengthening the country's investment climate. However, despite its success, the IBC processes remain time-consuming, adversarial, and resource intensive. To address these challenges, the Insolvency and Bankruptcy Board of India (IBBI) constituted an Expert Committee to explore the integration of mediation as an alternative dispute resolution (ADR) mechanism within the IBC framework. The Committee's report, titled "Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016," outlines a comprehensive strategy for implementing mediation to enhance the efficiency of insolvency proceedings.<sup>64</sup>

##### **The Need for Mediation in Insolvency Resolution**

The IBC was enacted to consolidate and amend laws relating to reorganization and insolvency resolution of corporate entities, partnerships, and individuals in a time-bound manner. Its core objectives include maximizing the value of assets, promoting entrepreneurship, and balancing the interests of all stakeholders. While the IBC has achieved significant improvements in insolvency

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<sup>62</sup> Supra note 6.

<sup>63</sup> Supra note 4.

<sup>64</sup> Supra note 51.

resolution outcomes, the processes remain fraught with delays and litigious disputes.<sup>65</sup>

The Economic Survey of India 2022-23 acknowledged that over the past seven years, the IBC has supported the 'ease of doing business' in India and facilitated time-bound resolutions for corporations, aiding the financial system in absorbing external shocks and maintaining stability.<sup>66</sup> However, despite these advancements, the average time taken for approval of resolution plans remains high, with many cases exceeding the statutory timelines. This is primarily due to the proliferation of interlocutory applications and contentious issues brought before the National Company Law Tribunal (NCLT) by various parties, including corporate debtors, creditors, and third parties.<sup>67</sup>

In this context, the introduction of mediation as a complementary mechanism to the existing IBC processes can address these challenges by offering a more efficient, flexible, and collaborative approach to dispute resolution. Mediation, being a non-adversarial process, can help maintain business relationships, reduce the stigma of insolvency, and promote amicable settlements.<sup>68</sup>

### **The Existing Mediation Landscape in India**

Mediation has been incorporated into various Indian laws, including the Civil Procedure Code, Arbitration and Conciliation Act, Commercial Courts Act, Consumer Protection Act, Companies Act, and others. The Mediation Act, 2023, further strengthens the mediation framework by providing a comprehensive legal structure for mediation processes in India. However, the IBC does not yet include mediation as a legislated mandate.<sup>69</sup>

The Expert Committee's report highlights the potential benefits of mediation in the insolvency

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<sup>65</sup> Prof Sivakumar, 'Insolvency and Bankruptcy Framework: India Perspective' (2019) 9(2) KLRI Journal of Law and Legislation.

<sup>66</sup> Economic Survey of India 2022-23 <https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> accessed 11 November 2023.

<sup>67</sup> Investment Information and Credit Rating Agency Press Release dated May 17, 2024, available at <https://www.icra.in/CommonService/OpenMediaS3?Key=6962fa25-2d04-4a06-b6f7-dd98f9a6e8fe> accessed 30 July 2024.

<sup>68</sup> Supra note 35.

<sup>69</sup> Legislative Note No.2 9 /LN/Ref./December/2022, 'The Mediation Bill, 2021' [https://loksabhadocs.nic.in/Refinput/New\\_Reference\\_Notes/English/19122022\\_103126\\_102120526.pdf](https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/19122022_103126_102120526.pdf) accessed 29 July 2024.

context by reviewing international practices. It notes that other jurisdictions have successfully adopted mediation in their insolvency regimes, resulting in more efficient dispute resolution and reduced judicial burdens. For instance, the United States, the European Union, and Singapore have integrated mediation into their insolvency frameworks, achieving notable success in maintaining business relationships and resolving conflicts amicably.<sup>70</sup>

### **Recommendations of the Expert Committee<sup>71</sup>**

The Committee recommends a phased introduction of voluntary mediation under the IBC, ensuring that it does not compromise the statutory timelines of insolvency processes. Key recommendations include:

**Voluntary Mediation:** The Committee suggests that mediation should be a voluntary process, initiated by mutual consent of the parties involved. This approach respects the autonomy of the parties and encourages them to seek amicable solutions without court intervention.

**Self-Contained Framework:** The mediation framework should operate independently within the IBC, with its own infrastructure and rules. This self-contained framework will ensure that the objectives of the IBC are met without interfering with the existing processes.

**Role of NCLT:** The NCLT should have the authority to refer disputes to mediation, and mediated settlement agreements (MSAs) should be enforceable under the IBC. This will provide a formal mechanism for integrating mediation into the insolvency resolution process.

**Mediator Qualifications:** The pool of mediators should include retired NCLT/NCLAT members, senior advocates, ex-officials of financial regulators, and experienced insolvency professionals. Adequate training and a code of ethics for mediators are essential for the successful implementation of the framework.

**Operational Infrastructure:** Establish a dedicated NCLT-annexed mediation cell to manage and oversee insolvency mediations. This cell should have the necessary infrastructure, including e-filing and e-meetings, to facilitate efficient mediation processes.

**Enforcement and Costs:** Mediation costs should be borne by the parties involved, and costs

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<sup>70</sup> Department of Consumer Affairs, 'Consumer Handbook on Mediation' [https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook\\_Mediation.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook_Mediation.pdf) accessed 15 July 2024.

<sup>71</sup> Shreya Prakash Misha and Kritika Poddar, 'Applying Mediation in Corporate Insolvency Situations in India' <https://www.ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf> accessed 28 July 2024.

incurred during the Corporate Insolvency Resolution Process (CIRP) should be excluded from insolvency resolution process costs. Parties should approach the NCLT for enforcement of MSAs without instituting separate legal proceedings.

### **Potential Advantages of Mediation under the IBC<sup>72</sup>**

Mediation offers several advantages over traditional litigation and arbitration in the context of insolvency resolution. These include:

**Time and Cost Efficiency:** Mediation is generally quicker and more cost-effective than litigation or arbitration. It allows parties to resolve disputes without lengthy court proceedings, reducing the overall time and costs involved in the insolvency resolution process.

**Preservation of Business Relationships:** Mediation is a non-adversarial process that promotes collaboration and mutual understanding between parties. This helps preserve business relationships, which can be crucial for the ongoing viability of the corporate debtor.

**Confidentiality:** Mediation proceedings are confidential, protecting sensitive business information and reducing the potential for reputational damage. This confidentiality encourages open and honest communication between parties, facilitating more effective dispute resolution.

**Flexibility and Autonomy:** Mediation offers flexibility in terms of process and outcomes, allowing parties to tailor the proceedings to their specific needs and circumstances. Parties have greater control over the resolution process and can agree on mutually acceptable solutions.

**Reduced Judicial Burden:** By diverting disputes from the courts to mediation, the judicial burden on the NCLT and other courts can be significantly reduced. This allows the judiciary to focus on more complex and contentious cases, improving overall efficiency.

The Expert Committee's recommendations for integrating mediation into the IBC represent a strategic shift towards a more efficient, flexible, and collaborative insolvency resolution process. By offering a complementary mechanism to the existing IBC framework, mediation can address delays, reduce judicial burdens, and promote amicable settlements, ultimately enhancing the effectiveness of the insolvency regime in India. The phased introduction of voluntary mediation, supported by a robust operational infrastructure and qualified mediators, will provide a solid foundation for the successful implementation of mediation in insolvency proceedings.

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<sup>72</sup> Wilk M, 'Mediation of a Bankruptcy Case' *American Bankruptcy Institute Journal* (May) <https://www.abi.org/abi-journal/mediation-of-a-bankruptcy-case> accessed 30 July 2024.

## V. THE VIABILITY OF ARBITRATION IN INSOLVENCY MATTERS IN INDIA

Insolvency and bankruptcy laws are critical for the economic stability of any nation. They provide mechanisms to reorganize distressed companies, ensuring that they can either be revived or liquidated in an orderly manner.<sup>73</sup> India's Insolvency and Bankruptcy Code, 2016 (IBC), was enacted with the objective of effective revival and reorganization of corporate debtors. While the IBC has made significant strides in addressing insolvency issues, it has largely left out arbitration as a viable mechanism for resolving insolvency disputes. This article explores the potential of incorporating arbitration and other Alternative Dispute Resolution (ADR) mechanisms into India's insolvency framework, drawing comparisons with international practices.<sup>74</sup>

### Current Framework and Challenges

The IBC currently focuses on a creditor-in-possession approach, where insolvency matters are resolved through judicial proceedings involving the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), and the Supreme Court of India. This framework can be lengthy and costly, often exacerbating the financial distress of the involved parties.<sup>75</sup>

One major drawback is the non-arbitrability of insolvency disputes under the current Indian legal framework. The judiciary has consistently ruled that insolvency matters, being public policy issues, are non-arbitrable. This stance is rooted in the belief that insolvency proceedings involve collective rights and affect third parties, thus requiring adjudication by specialized tribunals rather than private arbitrators.<sup>76</sup>

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<sup>73</sup> Régis Blazy, Bertrand Chopard and Agnès Fimayer, 'Bankruptcy Law: A Mechanism of Governance for Financially Distressed Firms' (2008) 25 *European Journal of Law and Economics* 253

<sup>74</sup> Parul, 'Arbitration: A Viable Option for Insolvency Matters' (2022) 3(1) *Indraprastha Law Review*.

<sup>75</sup> M P Mohan, 'Director Liability Framework During Borderline Insolvency and Corporate Failure in India' (2022) 18 *U Pa Asian L Rev* 32.

<sup>76</sup> Aman Lekhi and Pranay Lekhi, 'The Objective Non-arbitrability of Insolvency Related Disputes' in *Austrian Yearbook on International Arbitration 2022* (MANZ'sche Verlags-und Universitätsbuchhandlung GmbH, 2022)3.

## **International Perspectives on Arbitration in Insolvency<sup>77</sup>**

Several countries have successfully integrated arbitration into their insolvency frameworks, demonstrating its potential benefits. For instance, in England, insolvency matters can be arbitrated provided they do not engage third-party rights or represent matters of public interest. The landmark case of *Fulham Football Club (1987) Ltd v. Richards*<sup>78</sup> affirmed that disputes between shareholders could be resolved through arbitration, provided they do not involve winding-up orders affecting third parties.

Similarly, Chile has amended its insolvency laws to include arbitration, allowing parties to choose arbitration for reorganization proceedings while reserving liquidation proceedings for courts. This hybrid approach aims to reduce the burden on bankruptcy courts and expedite the resolution process.<sup>79</sup>

In Switzerland, Article 177 of the Swiss Private International Law Act allows for the arbitration of any dispute involving property, including insolvency matters, except for core insolvency issues such as the initiation of insolvency proceedings and the appointment of trustees.<sup>80</sup>

## **VI. PRE-PACKAGED INSOLVENCY RESOLUTION: AN ADR-LIKE APPROACH**

India has recently adopted the Pre-Packaged Insolvency Resolution Process (PPIRP) for Micro, Small, and Medium Enterprises (MSMEs). This process, which allows for an informal, out-of-court settlement, shares similarities with ADR mechanisms. It offers greater flexibility and lower costs compared to the Corporate Insolvency Resolution Process (CIRP) under the IBC. The adoption of PPIRP reflects a growing recognition of the benefits of alternative dispute resolution methods in insolvency contexts.<sup>81</sup>

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<sup>77</sup> Samuel Bufford, 'International Insolvency Law & International Arbitration-A Preliminary Perspective' (2014) 23 *Journal of Bankruptcy Law & Practice* 670, Penn State Law Research Paper No. 2-2015.

<sup>78</sup> [2011] EWCA Civ 855

<sup>79</sup> Adam Brenneman, Pamela Arce, Pablo Mori Bregante and David Z Schwartz, 'You Have Options: The Use of Alternative Dispute Resolution in Insolvency Proceedings' (2017) 13 *Pratt's J Bankr L* 336.

<sup>80</sup> Crenguta Leaua and Corina Tanase, 'Arbitration and Insolvency in Civil Law European Countries' in *Construction Law in the 21st Century* (Informa Law from Routledge, 2025) 224.

<sup>81</sup> *Supra* note 79.

## **Benefits of ADR in Insolvency Matters<sup>82</sup>**

**Cost-Effectiveness:** ADR mechanisms, including arbitration, are generally more cost-effective than court proceedings. In insolvency cases, where funds are often limited, reducing legal costs can be crucial for the survival of distressed companies.

**Timeliness:** ADR processes are typically faster than judicial proceedings. This speed can be vital in insolvency cases, where timely resolution is essential to maximize the value of the debtor's assets and facilitate restructuring efforts.

**Privacy and Confidentiality:** ADR proceedings are private, which can protect the reputation of the distressed company and encourage more open and constructive negotiations between parties.

**Flexibility and Party Autonomy:** ADR allows parties to choose their arbitrators or mediators and to tailor the process to their specific needs. This flexibility can lead to more satisfactory outcomes for all parties involved.

## **Judicial Precedents and Legislative Recommendations**

Indian courts have shown reluctance to embrace ADR in insolvency matters. *In A. Ayyasamy v. A. Paramasivam & Ors.*<sup>83</sup>, the Supreme Court held that certain matters, including insolvency, are non-arbitrable due to their public policy implications. However, in *Indus Biotech Private Limited v. Kotak India Venture Fund*<sup>84</sup>, the Court allowed arbitration in a specific insolvency dispute, indicating a potential shift towards greater acceptance of ADR in certain contexts.

Legislative amendments are needed to create a clear framework for the use of ADR in insolvency matters. Such amendments should delineate the types of insolvency issues that can be arbitrated and establish guidelines for integrating ADR with existing judicial processes. This would provide creditors and debtors with more options for resolving disputes, potentially improving the efficiency

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<sup>82</sup> Supra note 6.

<sup>83</sup> (2016) 10 SCC 386.

<sup>84</sup> (2021) 6 SCC 436.

and effectiveness of the insolvency resolution process.<sup>85</sup>

Incorporating arbitration and other ADR mechanisms into India's insolvency framework could significantly enhance the resolution process. By providing a faster, more cost-effective, and flexible alternative to traditional court proceedings, ADR can help distressed companies recover more quickly and efficiently. While the current legal framework poses challenges to the arbitrability of insolvency matters, international examples demonstrate that these challenges can be overcome. Legislative reforms and judicial openness to ADR could make India a more attractive destination for business and investment, ultimately contributing to economic stability and growth.<sup>86</sup>

While the integration of ADR in insolvency proceedings is not without its challenges, the potential benefits make it a viable and necessary option. By learning from international practices and making targeted legislative changes, India can enhance its insolvency resolution framework and better support distressed companies in their recovery efforts.<sup>87</sup>

## **VII. CHALLENGES IN IMPLEMENTING ADR IN INSOLVENCY PROCEEDINGS**

The integration of Alternative Dispute Resolution (ADR) mechanisms in insolvency proceedings holds significant promise for expediting resolutions, reducing litigation costs, and fostering a more cooperative environment among stakeholders. However, despite the evident advantages, the implementation of ADR in insolvency proceedings faces numerous challenges. These challenges range from legislative ambiguities and structural deficiencies to cultural resistance and practical difficulties, all of which need to be addressed to realize the full potential of ADR in insolvency.<sup>88</sup>

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<sup>85</sup> Ralph R Mabey, Charles J Tabb and Ira S Dizengoff, 'Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR' (1994) 46 SCL Rev 1259.

<sup>86</sup> U Dhivya, 'Pivotal Significance of Alternative Dispute Resolution Within the Realm of Financial Institutions' (2024) Journal of Law and Legal Research Development 1.

<sup>87</sup> 'Keep The Option Of Going To Courts As Last Resort': CJI NV Ramana Emphasizes Importance Of ADR Mechanisms (LiveLaw, 2022) <https://www.livelaw.in/top-stories/keep-option-of-going-to-courts-as-last-resort-cji-nv-ramana-186938> accessed 8 July 2024.

<sup>88</sup> Rajiv Mani, 'Mediation in Insolvency Matters' (2020) 297-205.

One of the primary challenges in implementing ADR in insolvency proceedings is the lack of explicit legislative provisions mandating its use. While the Insolvency and Bankruptcy Code (IBC), 2016, provides a robust framework for insolvency resolution, it does not explicitly incorporate ADR mechanisms such as mediation, arbitration, and conciliation. This legislative gap creates uncertainty and limits the formal adoption of ADR within the insolvency process. For ADR to be effectively integrated, amendments to the IBC are necessary to provide clear guidelines and procedural rules for its application in insolvency cases.<sup>89</sup>

Another significant challenge is the structural limitations of the current insolvency framework. The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) are the primary adjudicating bodies for insolvency cases under the IBC. These tribunals are already burdened with a heavy caseload, leading to delays in proceedings. Introducing ADR mechanisms would require additional resources, specialized training, and dedicated infrastructure to support mediation and arbitration processes. Without these structural enhancements, the effective implementation of ADR in insolvency proceedings remains constrained.<sup>90</sup>

Cultural resistance and lack of awareness among stakeholders also pose considerable challenges to the adoption of ADR in insolvency. In India, there is a strong preference for litigation as the primary means of dispute resolution. This is partly due to a lack of familiarity with ADR processes and a perception that litigation is more authoritative and binding. To overcome this cultural resistance, it is essential to promote awareness about the benefits of ADR, such as faster resolution times, lower costs, and the preservation of business relationships. Educational initiatives and advocacy by legal practitioners, insolvency professionals, and regulators can help shift the mindset towards embracing ADR.<sup>91</sup>

The complexity of insolvency cases presents another challenge for ADR implementation. Insolvency proceedings often involve multiple parties with conflicting interests, extensive financial documentation, and intricate legal issues. Mediating or arbitrating such complex disputes requires specialized expertise and experience. There is a need for a pool of qualified mediators and

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<sup>89</sup> Ibid

<sup>90</sup> Supra note 35.

<sup>91</sup> Ibid

arbitrators who are well-versed in insolvency law, financial restructuring, and commercial negotiations. Developing such expertise requires targeted training programs and accreditation processes to ensure that ADR professionals can effectively handle the complexities of insolvency cases.<sup>92</sup>

Moreover, the collective nature of insolvency proceedings can complicate the use of ADR. Insolvency resolutions typically involve the interests of various creditors, employees, shareholders, and other stakeholders. Achieving a consensus through ADR mechanisms like mediation or arbitration can be challenging when there are diverse and potentially conflicting interests. Ensuring that all parties are adequately represented, and that the resolution process remains fair and transparent is crucial. This necessitates a carefully designed ADR framework that can accommodate the collective decision-making inherent in insolvency proceedings.<sup>93</sup>

Another challenge is the enforceability of ADR outcomes in the context of insolvency. While arbitration awards and mediated settlements can be binding, their enforcement within the insolvency framework may face legal and procedural hurdles. For instance, the IBC mandates certain procedural requirements and approvals from the NCLT for resolutions to be valid. Integrating ADR outcomes into this framework requires clear legal provisions that ensure ADR resolutions are recognized and enforceable under the IBC. This involves aligning ADR processes with the statutory requirements of the insolvency regime to avoid conflicts and ensure seamless implementation.<sup>94</sup>

The role of insolvency professionals (IPs) in facilitating ADR also needs to be clearly defined and supported. IPs play a crucial role in managing the insolvency resolution process, and their involvement in ADR can enhance its effectiveness. However, the current regulatory framework does not provide specific guidelines for IPs to engage in ADR processes. Clarifying the role of IPs in facilitating mediation, arbitration, and conciliation, and providing them with the necessary training and support, can significantly enhance the integration of ADR in insolvency

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<sup>92</sup> Ibid

<sup>93</sup> Supra note 6

<sup>94</sup> Supra note 90.

proceedings.<sup>95</sup>

Furthermore, there is a need for robust institutional support to promote ADR in insolvency. Establishing dedicated mediation and arbitration centres within the insolvency framework can provide the necessary infrastructure and expertise to handle ADR cases. These centers can serve as neutral venues for conducting ADR proceedings and offer administrative and logistical support. Institutionalizing ADR within the insolvency framework can also help standardize processes, maintain quality, and ensure consistency in outcomes.<sup>96</sup>

The international dimension of insolvency cases adds another layer of complexity to the implementation of ADR. Cross-border insolvency cases require coordination and cooperation between jurisdictions, which can be challenging to achieve through ADR mechanisms. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency by India in 2018 provides a framework for international cooperation, but practical challenges remain. Harmonizing ADR processes across different legal systems and ensuring mutual recognition and enforcement of ADR outcomes in cross-border cases require further legal and procedural alignment.<sup>97</sup>

While the integration of ADR mechanisms within the IBC framework offers significant potential for improving the efficiency and effectiveness of insolvency resolutions, several challenges need to be addressed. Legislative amendments, structural enhancements, cultural shifts, specialized training, and institutional support are essential to overcome these challenges. By addressing these issues, India can create a more robust and resilient insolvency resolution framework that leverages the benefits of ADR, aligns with global best practices, and fosters a more cooperative and efficient approach to resolving financial distress.

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<sup>95</sup> Ibid

<sup>96</sup> Supra note 32.

<sup>97</sup> Etinosa Igbinenikaro and Adefolake Olachi Adewusi, 'Developing International Policy Guidelines for Managing Cross-Border Insolvencies in the Digital Economy' (2024) 6(4) International Journal of Management & Entrepreneurship Research 1034.

## VIII. LEARNING FROM INTERNATIONAL BEST PRACTICES

### ADR IN INSOLVENCY FRAMEWORKS: THE SINGAPORE MODEL

The incorporation of Alternative Dispute Resolution (ADR) mechanisms into insolvency frameworks has been gaining traction globally as jurisdictions seek more efficient and effective ways to handle financial distress. Singapore, in particular, has emerged as a leading example with its innovative and comprehensive approach to integrating ADR within its insolvency framework. The Singapore model provides valuable insights into how ADR can be effectively employed to enhance the insolvency resolution process, reduce litigation burdens, and foster a collaborative environment among stakeholders.<sup>98</sup>

Singapore's legal framework for insolvency and restructuring is governed by the Insolvency, Restructuring, and Dissolution Act (IRDA), which came into force in July 2020. The IRDA consolidates the country's insolvency laws and introduces several provisions aimed at promoting the use of ADR in insolvency proceedings. One of the key features of the IRDA is its explicit encouragement of mediation as a primary tool for resolving disputes in insolvency cases. This legislative support underscores Singapore's commitment to leveraging ADR to achieve more efficient and consensual resolutions.<sup>99</sup>

The Singapore International Commercial Court (SICC) and the Singapore International Arbitration Centre (SIAC) play pivotal roles in supporting ADR within the insolvency framework. The SICC provides a specialized forum for handling complex cross-border insolvency disputes, while the SIAC offers world-class arbitration services. Both institutions are integral to Singapore's strategy of positioning itself as a global hub for dispute resolution. Their involvement ensures that insolvency cases can benefit from the expertise and efficiency that ADR mechanisms provide.<sup>100</sup>

Mediation is a cornerstone of the Singapore model for ADR in insolvency. The Singapore Mediation Centre (SMC) and the Singapore International Mediation Centre (SIMC) are key

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<sup>98</sup> James M Peck, 'Singapore Academy of Law Distinguished Speaker Lecture 2019-"Plan Mediation as an Effective Restructuring Tool"' (2020) 32 SAclJ 23.

<sup>99</sup> Aurelio Gurrea-Martinez and Kai Luck, 'Developments in Singapore's Insolvency and Restructuring Regime' (2021) 33(2) Australian Restructuring Insolvency & Turnaround Association Journal 18.

<sup>100</sup> Muruga Perumal Ramaswamy and João Ribeiro, 'Harmonising Trade Law to Enable Private Sector Regional Development.'

institutions that facilitate mediation in insolvency cases. The SMC and SIMC offer structured mediation processes with trained mediators who specialize in insolvency and restructuring matters. This institutional support ensures that mediation is conducted professionally and effectively, providing a viable alternative to litigation. Additionally, the courts in Singapore actively encourage parties to consider mediation, often directing them to these centers to explore settlement options.<sup>101</sup>

One of the notable innovations in the Singapore model is the use of judicial management as an alternative to liquidation. Under the IRDA, judicial management allows a company in financial distress to be placed under the control of a judicial manager, who seeks to rehabilitate the company or achieve a better outcome for creditors than liquidation. Judicial management proceedings often involve ADR mechanisms to resolve disputes and facilitate the restructuring process. The ability to use mediation and arbitration within judicial management underscores the flexibility and adaptability of the Singapore model.<sup>102</sup>

The IRDA also provides for the use of schemes of arrangement, which are court-approved agreements between a company and its creditors to restructure the company's debts. Schemes of arrangement in Singapore often incorporate ADR mechanisms to negotiate and finalize the terms of the arrangement. This integration of ADR within formal restructuring processes highlights the comprehensive nature of the Singapore model, ensuring that ADR is not just an optional add-on but an integral part of the insolvency resolution toolkit.<sup>103</sup>

Arbitration is another key component of Singapore's ADR framework in insolvency. The IRDA recognizes the validity of arbitration agreements and allows insolvency practitioners to refer disputes to arbitration, provided they do not conflict with the collective interests of creditors. This provision aligns with the broader trend of using arbitration to resolve specific disputes within the insolvency context, such as contractual issues that do not affect the overall restructuring process. The involvement of the SIAC ensures that arbitration proceedings are conducted efficiently and

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<sup>101</sup> Nadja Alexander, Vakhtang Giorgadze and Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (2022)

<sup>102</sup> *Supra* note 99.

<sup>103</sup> *Ibid*

professionally, further enhancing the attractiveness of ADR in insolvency cases.<sup>104</sup>

Singapore's approach to cross-border insolvency also exemplifies the effective integration of ADR mechanisms. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency facilitates cooperation and coordination between Singaporean courts and foreign jurisdictions. This framework encourages the use of mediation and arbitration to resolve cross-border insolvency disputes, promoting a more harmonious and efficient resolution process. The ability to leverage ADR in cross-border cases is particularly important given the increasingly global nature of business and finance.<sup>105</sup>

One of the key advantages of the Singapore model is its emphasis on training and accreditation for ADR professionals. The SMC, SIMC, and SIAC offer specialized training programs for mediators and arbitrators, ensuring that they are equipped with the skills and knowledge required to handle complex insolvency cases. This focus on professional development helps maintain high standards in ADR processes and builds confidence among stakeholders in the efficacy of mediation and arbitration.<sup>106</sup>

Moreover, Singapore's legal and institutional framework for ADR in insolvency is supported by a strong policy environment. The government actively promotes Singapore as a center for international dispute resolution, providing financial incentives and regulatory support to attract businesses and legal practitioners. This policy support enhances the overall ecosystem for ADR, ensuring that it is well-integrated into the insolvency framework and accessible to stakeholders.<sup>107</sup>

Despite the strengths of the Singapore model, there are challenges that need to be addressed to further enhance the integration of ADR in insolvency. One of the primary challenges is ensuring that all stakeholders, particularly smaller creditors and debtors, are aware of and have access to

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<sup>104</sup> Norton Rose Fulbright, 'The Role and Potential for Arbitration in Cross-Border Insolvency Disputes' (Norton Rose Fulbright, February 2024) <https://www.nortonrosefulbright.com/en/knowledge/publications/012345/the-role-and-potential-for-arbitration-in-cross-border-insolvency-disputes> accessed 30 July 2024.

<sup>105</sup> Gerard McCormack and Wan Wai Yee, 'The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms' (2018) 54 *Tex Int'l LJ* 273.

<sup>106</sup> Gloria Lim, 'International Commercial Mediation: The Singapore Model' (2019) 31 *Singapore Academy of Law Journal* 377.

<sup>107</sup> *Ibid*

ADR mechanisms. Outreach and education efforts are essential to promote the benefits of ADR and encourage its use across the board. Additionally, there is a need for continuous monitoring and evaluation of ADR processes to ensure that they remain effective and responsive to the evolving needs of insolvency practitioners and stakeholders.<sup>108</sup>

The Singapore model for integrating ADR within the insolvency framework offers a comprehensive and innovative approach that can serve as a benchmark for other jurisdictions. The legislative support provided by the IRDA, coupled with the involvement of specialized institutions like the SICC, SIAC, SMC, and SIMC, ensures that ADR mechanisms are effectively utilized in insolvency proceedings. The emphasis on mediation, arbitration, and judicial management, along with robust cross-border insolvency provisions, highlights the flexibility and adaptability of the Singapore model. By addressing the challenges and continuing to promote ADR, Singapore can further enhance its position as a global leader in insolvency resolution and dispute management.

#### **ADR IN INSOLVENCY FRAMEWORKS: THE UK MODEL**

The integration of Alternative Dispute Resolution (ADR) mechanisms within insolvency frameworks is a global trend aimed at enhancing efficiency, reducing costs, and fostering a more collaborative approach to resolving financial distress. The United Kingdom (UK) has developed a robust and sophisticated model for incorporating ADR in its insolvency processes. This model leverages mediation, arbitration, and other ADR techniques to streamline insolvency proceedings, promote creditor-debtor negotiations, and facilitate consensual solutions. The UK model offers valuable insights into the effective use of ADR in insolvency and can serve as a benchmark for other jurisdictions.<sup>109</sup>

The UK insolvency regime is primarily governed by the Insolvency Act 1986, the Insolvency Rules 2016, and the Companies Act 2006. These legislative frameworks provide the foundation for insolvency proceedings and support the integration of ADR mechanisms. While the legislation itself does not mandate the use of ADR, it provides sufficient flexibility for courts and insolvency

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<sup>108</sup> Supra note 106

<sup>109</sup> John Armour and Horst Eidenmüller, 'The Rise of the European Restructuring Directive: Challenges and Opportunities' (2020) 1 European Company and Financial Law Review 1.

practitioners to employ these mechanisms to achieve efficient and effective resolutions.<sup>110</sup>

Mediation is a key component of the UK's ADR framework in insolvency. The courts in the UK actively encourage parties to consider mediation before resorting to litigation. The Civil Procedure Rules (CPR) and Practice Direction on Pre-Action Conduct and Protocols require parties to explore ADR options, including mediation, before commencing court proceedings. This pre-action protocol promotes early settlement discussions and helps parties avoid the costs and delays associated with litigation. The emphasis on mediation is further reinforced by the courts' willingness to impose cost penalties on parties who unreasonably refuse to mediate, as seen in the landmark case of *Halsey v Milton Keynes General NHS Trust*<sup>111</sup>, where the Court of Appeal highlighted the benefits of mediation and set out guidelines for its use in civil disputes.<sup>112</sup>

Arbitration also plays a significant role in the UK's insolvency framework. The Arbitration Act 1996 provides a comprehensive legal framework for arbitration, allowing insolvency practitioners to refer disputes to arbitration where appropriate. Arbitration is particularly useful for resolving complex commercial disputes that arise during insolvency, such as contractual disagreements or valuation issues. The flexibility and confidentiality of arbitration make it an attractive alternative to court proceedings, enabling parties to resolve disputes more efficiently and discreetly. In the context of insolvency, arbitration can be employed to resolve specific disputes without disrupting the overall insolvency process, thereby preserving the collective interests of creditors.<sup>113</sup>

The UK has also pioneered the use of schemes of arrangement and company voluntary arrangements (CVAs), which often incorporate ADR mechanisms. A scheme of arrangement, governed by Part 26 of the Companies Act 2006, allows a company to restructure its debts with the approval of creditors and the court. The process often involves negotiations and mediations to reach a consensual agreement. Similarly, CVAs, under Part 1 of the Insolvency Act 1986, enable

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<sup>110</sup> Horst G M Eidenmüller, *Comparative Corporate Insolvency Law*, 2nd edn (European Corporate Governance Institute - Law Working Paper No. 738/2023, 7 November 2023) <https://ssrn.com/abstract=4625897> accessed 30 July 2024.

<sup>111</sup> [2004] EWCA Civ 576

<sup>112</sup> Penny Brooker and Anthony Lavers, 'Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom' (2005) 5 Pepp Disp Resol LJ 161.

<sup>113</sup> Richard Bamforth and Kushal Gandhi, 'Insolvency and Arbitration: A Collision of Two Worlds?' in *Arbitration and Insolvency* (Edward Elgar Publishing, 2024) 1.

a company to reach a binding agreement with its creditors to pay off debts over time. The CVA process typically involves extensive negotiations and may use mediation to resolve any disputes that arise during the formulation of the arrangement.

The UK's cross-border insolvency framework, based on the Cross-Border Insolvency Regulations 2006, which incorporates the UNCITRAL Model Law on Cross-Border Insolvency, further supports the use of ADR. These regulations facilitate cooperation and coordination between UK courts and foreign jurisdictions, promoting the use of mediation and arbitration to resolve cross-border insolvency disputes. The case of *Re OJSC International Bank of Azerbaijan*,<sup>114</sup> exemplifies the application of cross-border insolvency principles, where the UK High Court recognized the importance of international cooperation and the potential for ADR mechanisms to resolve complex cross-border insolvency issues.

One of the notable features of the UK model is the establishment of the Insolvency Mediation Pilot Scheme by the Insolvency Service. Launched in 2016, this pilot scheme aimed to test the effectiveness of mediation in insolvency cases, particularly those involving bankruptcy and individual voluntary arrangements (IVAs). The pilot demonstrated the potential for mediation to achieve faster and more cost-effective resolutions, with high satisfaction rates among participants. The positive outcomes of the pilot have led to calls for the permanent adoption of mediation in insolvency proceedings, highlighting the growing acceptance of ADR in the UK insolvency framework.

The role of insolvency practitioners (IPs) is crucial in integrating ADR within the UK insolvency framework. IPs, regulated by professional bodies such as the Insolvency Practitioners Association (IPA) and the Association of Business Recovery Professionals (R3), are trained to facilitate negotiations and mediate disputes. Their involvement ensures that ADR processes are conducted professionally and ethically, maintaining the integrity of the insolvency proceedings. IPs play a pivotal role in promoting the use of ADR, guiding parties through mediation and arbitration, and helping to achieve consensual outcomes.<sup>115</sup>

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<sup>114</sup> [2018] EWHC 59 (Ch)

<sup>115</sup> Susan Morgan, 'Rescuing Companies or Their Creditors: Understanding the Role of the CVA as a Rescue Procedure in the UK' (PhD thesis, University of Nottingham).

Despite the strengths of the UK model, there are challenges in implementing ADR in insolvency proceedings. One of the primary challenges is the cultural resistance to ADR among some stakeholders, who may perceive litigation as more authoritative and binding. Overcoming this resistance requires continuous education and awareness initiatives to highlight the benefits of ADR, such as reduced costs, faster resolutions, and the preservation of business relationships. The courts and professional bodies must continue to advocate for ADR and provide support to parties considering its use.<sup>116</sup>

Another challenge is the need for specialized training for mediators and arbitrators in insolvency matters. The complexity of insolvency cases demands a deep understanding of financial, legal, and commercial aspects. Developing a pool of ADR professionals with expertise in insolvency requires targeted training programs and accreditation processes. The Insolvency Service and professional bodies can play a significant role in providing these training opportunities and ensuring high standards in ADR practice.<sup>117</sup>

The UK model for integrating ADR within the insolvency framework demonstrates a sophisticated and comprehensive approach that leverages mediation, arbitration, and other ADR mechanisms to enhance the efficiency and effectiveness of insolvency proceedings. The legislative support provided by the Insolvency Act 1986, the Companies Act 2006, and the Arbitration Act 1996, coupled with the proactive encouragement by the courts and the involvement of specialized institutions, ensures that ADR is an integral part of the UK insolvency resolution process. By addressing the challenges and continuing to promote ADR, the UK can further strengthen its insolvency framework, aligning it with global best practices and fostering a more cooperative and efficient approach to resolving financial distress.

## **LEARNING FROM INTERNATIONAL BEST PRACTICES: LESSONS AND RECOMMENDATIONS FOR INDIA**

The integration of Alternative Dispute Resolution (ADR) mechanisms within insolvency frameworks has proven successful in various jurisdictions, offering valuable lessons for India as it

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<sup>116</sup> Supra note 113.

<sup>117</sup> M Veder and Paul J Omar, *Teaching and Research in International Insolvency Law: Challenges and Opportunities* (INSOL Europe, 2015).

seeks to enhance its insolvency resolution processes. By examining international best practices, particularly from countries like the United Kingdom, Singapore, and the United States, India can draw several lessons and implement recommendations to improve its ADR integration within the Insolvency and Bankruptcy Code (IBC), 2016. These insights can help address existing challenges, streamline insolvency proceedings, and foster a more efficient and collaborative insolvency framework.<sup>118</sup>

One of the primary lessons from international best practices is the importance of explicit legislative support for ADR in insolvency proceedings. The UK's Insolvency Act 1986 and the Arbitration Act 1996 provide an exploration legal framework that allows for the integration of ADR mechanisms like mediation and arbitration. In contrast, the IBC does not explicitly mandate or extensively detail the use of ADR. To emulate the UK's success, India should consider amending the IBC to include clear provisions that encourage and facilitate the use of ADR in insolvency cases. Such amendments could outline the procedural rules for mediation and arbitration, specify the circumstances under which these mechanisms should be employed, and establish guidelines for their implementation.<sup>119</sup>

Another key lesson is the role of specialized institutions in supporting ADR. Singapore's model, which includes the Singapore International Commercial Court (SICC) and the Singapore International Arbitration Centre (SIAC), highlights the importance of having dedicated institutions that can handle complex insolvency disputes through ADR. India can benefit from establishing similar specialized centres for insolvency mediation and arbitration. These institutions would provide the necessary infrastructure, expertise, and administrative support to ensure that ADR processes are conducted efficiently and effectively. Additionally, these centres could offer training and accreditation for mediators and arbitrators specializing in insolvency, enhancing the quality and credibility of ADR in this context.

Cultural acceptance and awareness of ADR are crucial for its successful integration. In many jurisdictions, there is a strong emphasis on promoting ADR as a viable alternative to litigation.

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<sup>118</sup> Supra note 51.

<sup>119</sup> Supra note 110

The UK's Civil Procedure Rules (CPR) and Practice Direction on Pre-Action Conduct and Protocols require parties to explore ADR options before initiating court proceedings, encouraging early settlement and reducing the burden on courts. India can adopt similar pre-action protocols that mandate parties to consider mediation or arbitration before resorting to litigation in insolvency cases. This approach would help foster a culture of ADR, making it a default option rather than an afterthought.<sup>120</sup>

The involvement of insolvency practitioners (IPs) in facilitating ADR is another critical factor. In jurisdictions like the UK and Singapore, IPs play a pivotal role in guiding parties through mediation and arbitration processes. They are trained to manage disputes and negotiate settlements, ensuring that the interests of all stakeholders are represented. India should enhance the role of IPs within its insolvency framework by providing them with specialized training in ADR techniques. Regulatory bodies such as the Insolvency and Bankruptcy Board of India (IBBI) could develop accreditation programs for IPs, equipping them with the skills needed to effectively mediate and arbitrate insolvency disputes.<sup>121</sup>

The UK's use of schemes of arrangement and company voluntary arrangements (CVAs) demonstrates the effectiveness of structured negotiation processes in insolvency. These mechanisms allow companies to restructure their debts through negotiated agreements with creditors, often facilitated by mediators. India can incorporate similar mechanisms within the IBC, providing a legal framework for pre-packaged insolvency resolutions that rely on ADR. This would enable companies to negotiate and implement restructuring plans more efficiently, avoiding the delays and costs associated with formal insolvency proceedings.<sup>122</sup>

Cross-border insolvency presents unique challenges that can be addressed through international cooperation and ADR. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency by jurisdictions like the UK and Singapore facilitates cooperation between courts and insolvency practitioners in different countries. India has also adopted this Model Law, but its practical

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<sup>120</sup> Supra note 59

<sup>121</sup> Richard Marney, Timothy Stubbs, Richard Marney and Timothy Stubbs, 'Legal Issues in Restructurings' in *Corporate Debt Restructuring in Emerging Markets: A Practical Post-Pandemic Guide* (2021) 253.

<sup>122</sup> Supra note 115.

implementation can be strengthened by promoting ADR in cross-border cases. Establishing protocols for mediation and arbitration in cross-border insolvency can help resolve disputes more harmoniously, ensuring that the interests of creditors and debtors are balanced across jurisdictions.<sup>123</sup>

The United States' experience with ADR in bankruptcy proceedings offers additional insights. The U.S. Bankruptcy Code encourages the use of ADR mechanisms, such as mediation, to resolve disputes arising during bankruptcy. Courts in the U.S. frequently refer parties to mediation, recognizing its potential to achieve consensual outcomes. India can learn from the U.S. by implementing court-annexed mediation programs within the NCLT and NCLAT. These programs would formalize the referral process, ensuring that parties in insolvency cases have access to qualified mediators who can facilitate settlements.<sup>124</sup>

Despite the clear benefits of ADR, several challenges must be addressed to ensure its successful integration within the Indian insolvency framework. One significant challenge is the lack of standardized ADR procedures tailored to insolvency. Developing comprehensive guidelines that outline the steps and timelines for mediation and arbitration in insolvency cases can help overcome this issue. These guidelines should be designed to ensure consistency and fairness in ADR processes, providing clear directions for parties and mediators.<sup>125</sup>

Another challenge is ensuring the enforceability of ADR outcomes within the IBC framework. While arbitration awards and mediated settlements can be binding, their integration into the formal insolvency process must be seamless. Amendments to the IBC should clarify how ADR outcomes are to be treated within insolvency proceedings, ensuring that they are recognized and enforceable. This would provide certainty to parties engaging in ADR, encouraging wider adoption of these mechanisms.<sup>126</sup>

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<sup>123</sup> Etinosa Igbinenikaro and Adefolake Olachi Adewusi, 'Developing International Policy Guidelines for Managing Cross-Border Insolvencies in the Digital Economy' (2024) 6(4) International Journal of Management & Entrepreneurship Research 1034.

<sup>124</sup> Ralph R Mabey, Charles J Tabb and Ira S Dizengoff, 'Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR' (1994) 46 SCL Rev 1259.

<sup>125</sup> Supra note 4

<sup>126</sup> Ibid

To promote the use of ADR, India should also focus on capacity building and public awareness. Educational initiatives, workshops, and seminars on ADR in insolvency can help demystify these processes and highlight their benefits. Collaboration with international organizations and experts can provide valuable knowledge and best practices, helping to build a robust ADR ecosystem in India.<sup>127</sup>

Learning from international best practices in integrating ADR within insolvency frameworks offers valuable lessons and recommendations for India. By amending the IBC to include explicit ADR provisions, establishing specialized institutions, enhancing the role of insolvency practitioners, and promoting a culture of ADR, India can significantly improve its insolvency resolution processes. Addressing challenges such as the lack of standardized procedures and ensuring enforceability of ADR outcomes will further strengthen the framework. By adopting these recommendations, India can create a more efficient, collaborative, and effective insolvency system that aligns with global best practices.

## IX. CONCLUSION

The increasing recognition of Alternative Dispute Resolution (ADR) mechanisms within the context of insolvency in India marks a significant step towards modernizing and enhancing the efficiency of the country's insolvency framework. The adoption of ADR methods such as mediation, arbitration, and conciliation offers a promising alternative to traditional litigation, addressing many of the inefficiencies and delays associated with the court-based insolvency resolution process. As India continues to refine its insolvency laws, particularly through the Insolvency and Bankruptcy Code (IBC) of 2016, the integration of ADR mechanisms provides a viable pathway to achieving quicker, more cost-effective, and amicable resolutions in financial distress situations.

One of the critical benefits of ADR in insolvency is its ability to foster a collaborative rather than adversarial environment. Traditional litigation can often exacerbate conflicts between debtors and creditors, leading to protracted disputes and further deterioration of the debtor's assets. In contrast,

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<sup>127</sup> Susan Thomas (ed), *Insolvency and Bankruptcy Reforms in India* (Springer, 2022).

ADR mechanisms promote dialogue and negotiation, enabling parties to work together towards mutually beneficial solutions. This collaborative approach is particularly advantageous in preserving business relationships and maintaining the value of the debtor's assets, which are essential for successful reorganization and recovery.

Mediation, as a form of ADR, has shown considerable promise in resolving insolvency disputes. By involving a neutral third party to facilitate negotiations, mediation helps parties explore creative solutions that might not be achievable through litigation. The flexibility and confidentiality of mediation make it an attractive option for stakeholders who seek to resolve their disputes efficiently and discreetly. The landmark case of *Swiss Ribbons Pvt. Ltd. v. Union of India*<sup>128</sup>, underscored the potential of mediation in the Indian insolvency context, with the Supreme Court highlighting its benefits in reducing judicial burden and expediting resolutions.

Arbitration, another key ADR mechanism, offers a structured yet flexible process for resolving specific disputes within insolvency proceedings. The Arbitration and Conciliation Act, 1996, provides a robust legal framework for arbitration in India, allowing parties to resolve contractual and commercial disputes that arise during insolvency. While arbitration traditionally faced skepticism due to its perceived conflict with the collective nature of insolvency proceedings, recent judicial interpretations have facilitated its use. The case of *Indus Biotech Private Limited v. Kotak India Venture Fund*<sup>129</sup>, demonstrated that arbitration could effectively address disputes incidental to insolvency, provided they do not impact the collective rights of creditors.

Conciliation, though less frequently employed, holds significant potential in the insolvency context. The Companies Act, 2013, under Section 442, provides for the establishment of a Mediation and Conciliation Panel, which can be leveraged to resolve disputes amicably. The flexibility and informality of conciliation make it a suitable mechanism for addressing complex insolvency issues that require nuanced and bespoke solutions. The recommendations of the Insolvency Law Committee to formally integrate conciliation within the IBC framework further underscore its relevance and potential benefits.

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<sup>128</sup> [2019] 4 SCC 17

<sup>129</sup> [2021] 6 SCC 436

Despite these advantages, the implementation of ADR in insolvency proceedings in India faces several challenges. One of the primary obstacles is the lack of explicit legislative provisions mandating ADR within the IBC. While the IBC emphasizes timely resolution, it does not provide detailed guidelines for incorporating mediation, arbitration, or conciliation. Amending the IBC to include clear procedural rules and mandates for ADR would provide the necessary legal framework to support its broader adoption.

Another challenge is the structural limitations of the current insolvency infrastructure. The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) are already overburdened with caseloads, leading to delays in insolvency proceedings. To effectively integrate ADR, there needs to be a dedicated infrastructure and specialized training for mediators, arbitrators, and conciliators in insolvency matters. Establishing specialized ADR centres and providing targeted training programs can help build the necessary capacity and expertise to handle complex insolvency cases.

Cultural resistance and lack of awareness among stakeholders also hinder the adoption of ADR. There is a prevalent perception that litigation is more authoritative and binding, which discourages parties from exploring alternative mechanisms. To overcome this resistance, it is essential to promote awareness about the benefits of ADR and demonstrate its effectiveness through successful case studies. Educational initiatives and advocacy by legal practitioners, insolvency professionals, and regulatory bodies can help shift the mindset toward embracing ADR.

The role of insolvency professionals (IPs) is crucial in facilitating ADR. IPs are pivotal in managing the insolvency resolution process and can play a significant role in guiding parties towards ADR mechanisms. Providing IPs with specialized training in ADR techniques and equipping them with the skills to mediate and arbitrate disputes can enhance the overall effectiveness of the insolvency resolution process. Regulatory bodies such as the Insolvency and Bankruptcy Board of India (IBBI) can develop accreditation programs for IPs, ensuring high standards of practice in ADR.

India can also draw valuable lessons from international best practices. The UK's model, with its

comprehensive legal framework and specialized institutions like the Insolvency Service's Mediation Pilot Scheme, demonstrates the potential of ADR in achieving faster and more cost-effective insolvency resolutions. Similarly, Singapore's integration of ADR within its insolvency framework, supported by institutions like the Singapore International Commercial Court (SICC) and the Singapore International Arbitration Centre (SIAC), highlights the benefits of having dedicated infrastructure and expertise.

The US bankruptcy system, which encourages the use of mediation through court-annexed programs, offers another example of how ADR can be effectively integrated within insolvency proceedings. Implementing similar court-annexed mediation programs within the NCLT and NCLAT can provide formal referral processes, ensuring that parties in insolvency cases have access to qualified mediators who can facilitate settlements.

Cross-border insolvency presents unique challenges that can be addressed through international cooperation and ADR. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency by India provides a framework for cooperation between courts and insolvency practitioners in different jurisdictions. Promoting the use of ADR in cross-border insolvency cases can help resolve disputes more harmoniously and efficiently, balancing the interests of creditors and debtors across jurisdictions.

Integrating ADR mechanisms within the Indian insolvency framework offers a promising pathway to achieving more efficient, cost-effective, and collaborative resolutions. By amending the IBC to include explicit provisions for ADR, establishing specialized infrastructure, promoting awareness, and drawing lessons from international best practices, India can enhance its insolvency resolution process. Addressing the challenges and leveraging the benefits of ADR will help create a more resilient and responsive insolvency system, aligning with global standards and fostering a win-win situation for all stakeholders involved in financial distress.

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