NEGOTIATING CORPORATE DEBT RESTRUCTURING: THE ROLE OF ADR MECHANISMS UNDER INDIA'S INSOLVENCY FRAMEWORK

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ABSTRACT

The Insolvency & Bankruptcy Code (IBC)[2] has completely upheavaltered the way business cases in India are resolved. The IBC is bringing a perspective on how business disputes can be resolved with a modern outlook. The complexities of the IBC have generated problems such as limiting because of legal disputes, delays, and loss of value when large organizations go belly-up. The implementation of a structured negotiation/mediation procedure, along with other alternatives for dispute resolution (ADR),[3]has also gained popularity globally, as the mechanism has the advantage of providing protection on value, a consensus-driven resolution for businesses, and reducing delays. This research paper proposes to examine how the blend of different alternatives for dispute resolution with the law of bankruptcy in India might result in efficiency, along with increased productivity, in handling cases of corporate debt. This research investigates theoretical bases on which alternative dispute resolution is based, calculates how alternative dispute resolution might be fit within legal insolvency machinery, with findings from experiences abroad, such as Chapter 11[4] mediation systems in the United States of America, the culture of business restructuring in the United Kingdom, and the judicial mediation system in Singapore, providing valuable insights. The research on models in India, from cases involving Jet Airways[5], IL&FS[6], and DHFL[7], provides a perspective on how the existing mechanics in India might have been changed with a proper structure of alternative dispute resolution mechanisms in practice. This research article introduces how mediation, with a negotiated restructuring technique, might need to be introduced in pre-M efficiencies in India's Insolvency &

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[2] Insolvency and Bankruptcy Code, 2016.
[3] Arbitration and Conciliation Act, 1996.
[4] U.S.C.,1101–1174 (2018) (Chapter 11, U.S. Bankruptcy Code).
[5] Jet Airways (India) Ltd. v. State Bank of India, CP (IB) No. 2205/MB/2019 (NCLT Mum.).
[6] Union of India v. IL&FS Ltd., (2019) SCC OnLine SC 1118.
[7] Piramal Capital & Hous. Fin. Ltd. v. DHFL, (2021) SCC OnLine SC 722.

Bankruptcy Code (IBC). The research concludes with proposals on how the environment on the law, structure, and acceptance of alternative dispute resolution mechanisms in insolvency cases might need to be adjusted, providing a balancing perspective on business success, with a rightful perspective on securing value for different creditors.

I. INTRODUCTION

Corporate insolvency systems around the world increasingly recognize that adversarial legal processes alone cannot deliver effective business rescue or maximize creditor value. India's Despite being a well-structured act, IBC has been enduring severe backlogs and delays in the process of recovery. litigation, and no consistent results in resolution. Most cases dealing with large corporations extend far into beyond the required 180–330-day period[8], defeating the very purpose of the Code to ensure value Preservation Distressed assets tend to depreciate during protracted litigations, and the economic viability of resolution plans decreases, turning possibly salvageable enterprises into liquidation cases[9]. Against this backdrop, ADR offers a constructive alternative. Mediation, Negotiation and conciliation[10] can help the parties get together on pragmatic restructuring. solutions outside or alongside formal adjudication. Around the world, ADR has increasingly become a central part of insolvency practice however, in India, ADR remains peripheral and underdeveloped within corporate resolution frameworks.

This paper argues that incorporating ADR into the insolvency landscape of India is no longer Optional. It is an important step toward addressing bottlenecks in creditor coordination, reducing over-reliance on courts and guarantee faster, more consensual restructuring of distressed corporates. From statutory structure analysis to practical experiences, and also analysing international best practices that would help in the integration. Against this background of disincentives in professional practices, this study narrates in concrete terms how ADR mechanisms can strengthen. The immediate relevance of the book to India's insolvency ecosystem becomes even more relevant with distressed debt volumes continuing to rise in a post-pandemic economy.

II. THE CORPORATE INSOLVENCY LANDSCAPE IN INDIA

Evolution in the realm of corporate insolvency in India was a great leap from having piecemeal

[8] IBC Brief powering with information (volume 2),2023.
[9] Essar Steel (India) Ltd. v. Satish Kumar Gupta, (2020) 8 SCC.
[10] Insolvency Law Comm., Report of the Insolvency Law Committee 17–18 (2018).

enforcement mechanisms to a unified creditors-centric legislation. In the period preceding the IBC, multiple legal systems like SICA[11], RDDBFI[12], and SARFAESI[13] allowed the banks to take up recovery, although there was quite possible failure in the efficient restructuring of the distressed firm. With the arrival of IBC in the year 2016, a well-defined framework underlining time-bound resolution, professional oversight, and collective decisions by creditors came into being.

Despite this ambitiousness of the Code, some of the intractable structural and operational challenges persist. The Insolvency resolution professionals have to sort out elaborate claims, conflicting creditor priorities, and outdated records of accounts. A CoC, mainly comprising financial institutions, decides on commercial issues; however, at times, disputes within, questions over valuation, and rival bidders result in litigious outcomes at tribunals. This argumentative pattern reduces the mutual scope for negotiations when several stakeholders with dissimilar expectations try to settle without a supportive structure. Thus, several high-ticket cases like those of Essar Steel[14], Bhushan Power[15], and Amtek Auto[16] took judicial delays over and above the required 270 days, thereby decrease the recovery percentage and increasing business indecision[17].

Also, no overarching pre-insolvency restructuring mechanism exists under the Indian insolvency regime[18]. Incentivizing early negotiations between lenders and distressed borrowers were the RBI-driven frameworks like the CDR[19] system, the SDR[20] scheme, and the JLF[21]. However, each of these mechanisms had several limitations in terms of enforceability, fair representation, and independence. The failure of these mechanisms produced an environment where creditors relied by and large on the IBC as the main route for recovery even where negotiated outcomes are better. The result is a bankruptcy ecosystem that often depend on litigation, disputed claims, and statutory timelines. If ADR mechanisms are inaugurated

[11] Sick Industrial Companies (Special Provisions) Act, 1985.
[12] Reconstruction of Damaged/Distressed Banks and Financial Institutions.
[13] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
[14] Essar Steel (India) Ltd. v. Satish Kumar Gupta, (2020) 8 SCC.
[15] Bhushan Power & Steel Ltd. v. Satish Kumar Gupta, (2021) 6 SCC 1.
[16] Amtek Auto Ltd. v. Dinkar T. Venkatasubramanian, (2021) SCC OnLine SC 47.
[17] Insolvency & Bankruptcy Bd. of India, Five Years of Insolvency and Bankruptcy Code 22–25 (2021).
[18] Insolvency Law Comm., Report of the Insolvency Law Committee 17–18 (2018).
[19] Reserve Bank of India, Corporate Debt Restructuring (CDR) Mechanism (Aug. 23, 2001).
[20] Reserve Bank of India, Strategic Debt Restructuring Scheme (June 8, 2015).
[21] Reserve Bank of India, Framework for Revitalising Distressed Assets in the Economy (Feb. 26, 2014).

meaningfully, they can stun these systemic failings by permitting negotiations long before bankruptcy proceedings become inevitable.

III. UNDERSTANDING ADR WITHIN CORPORATE DEBT RESTRUCTURING

The Alternative Dispute Resolution authority in India represents a crossroads in the evolving insolvency authority. While the Insolvency and Bankruptcy Code of India has matured, from the pendency of cases to the fragmented discussions of the creditors, the loopholes are becoming more remarkable automatically causing destruction of value during litigation[22]. The ADR authorities answer the need for a remedy for such troubles. The authority has the potential to convert the indebted reconstruction of a corporate debtor from a rigid statutory process into a result-oriented process with the instruments of facilitated negotiation, communication, and problem-solving.

The usefulness of ADR is not only procedural but also has a potential realigning effect on incentives. Mediation, assisted negotiation, and the like might reduce hard bargaining[23], remove uncertainties on the valuation dispute, and provide a forum where the interests of the creditors and debtors can come together to examine whether a liquidated solution is apt for a maximum return within a judicial forum. This, from a purely economic point of view, is sensible but, more importantly, the need of the hour to protect healthy businesses that are otherwise threatened with liquidations owing to procedural inefficiencies. The incorporation of the use of ADR within a pre-insolvency regime, as also within the IBC regime, would thus facilitate a two-track mechanism that fosters cooperation within a pre-insolvency regime but retains judicial assistance when there is no consensus within the IBC regime.

There has been a good uptake of such hybrid models internationally in the implementation. In fact, countries such as the United States, the United Kingdom, and the country of Singapore have been able to show that the melding of ADR-alternative insolvency law results in faster, stable, and more sustainable outcomes. For mediation as a tool for non-court settlements, there has been a setting of the tone in India pegged on following suit, but there is a need to make a transition from this piecemeal approach.

The development of the capacity structure is also a consideration that might play a highly

[22] Insolvency and Bankruptcy Board of India, Annual Report 2022-23, Ch. 3 (2023).
[23] Insolvency and Bankruptcy Board of India (IBBI), Framework for Use of Mediation under the IBC, 2024.

significant role in ensuring the success of a mindset shift with support from the ADR mechanism. Insolvency specialists, bankers, and attorneys need to make themselves aware that mediation is a secondary consideration in the context of insolvency law, but it is, in fact, a requirement. For that reason, apart from that, a cultural acceptance is also a significant part that might contribute toward ensuring that a mindset shift occurs on a cultural level. Corporate India has generally treated insolvency as a struggle involving rights, as opposed to a problem that has a solution with various individuals on a common platform[24].

Ultimately, the incorporation of ADR within the Insolvency authority in India is a procedural matter, which essentially represents a standard shift in the handling of financial distress. In a post-pandemic economic state that has leverage, markets with unpredictability and increase as in number of distressed debts, an authority that is capable, negotiation-friendly, and restructuring-focused would be one which is set on a trajectory meant for the upgrade of economic value, clarifying the judiciary from cases, and putting finances on stable ground. If civilised, the Insolvency Resolution Process in relation to ADR could be one of the mightiest regimes within the saving authorities that has the potential to make a situation that is essentially marked with insolvency suitable for a revival.

IV. INTERFACE BETWEEN ADR AND THE INDIAN INSOLVENCY FRAMEWORK

The relationship between ADR and the Insolvency administration in India is partial and unclear. The IBC, though introduced as a complete overhaul of the diverse Insolvency laws in India, has intentionally left mediation, conciliation, or ADR mechanisms altogether untouched as a part of its legal structure. This has been significant in the context of cross-border insolvency mechanisms, where ADR has come to form a necessary part of handling claims and plan negotiation sessions. It is worth noting that under the provisions of the IBC, there is no such provision that equips the Insolvency tribunals with the necessary power to refer parties to mediation, leave alone specifics in the practice of how ADR might be invoked, how a mediation result might be enforceable. This has led to a situation where the Insolvency tribunals and Insolvency professionals proceed with utmost reservation on invoking practices under ADR on a Sua sponte basis, for fear of exceeding the scope of the law or inviting an Appeal.

[24] Live Law, Corporate India and Insolvency Culture: ADR as a Solution, Feb. 2024.

Although the Code relies on no ADR mechanism, a similar section in the Companies Act, 2013, Section 442[25] provides for a mediation and conciliation panel, which the NCLT can refer cases to. This section has been called on rarely within the realm of insolvency cases, although NCLT is the adjudicating authority within cases involving corporate insolvency. This is because, on a conceptual level, insolvency is regarded as a collective enforcement mechanism wherein prior legal priorities and rights of parties are pre-determined, thereby precluding the need for negotiation. Another reason is procedural, as mediation within the Companies Act is a mechanism introduced specifically for disputes involving shareholders, managerial, and operational disputes, but not within the multi-creditor, Tim-sensitive arena of corporate insolvency. This has led to a lack of presence of mediators with backgrounds in insolvency on the Section 442 panels, as a lack of adoption of the mechanism within the insolvency sector as a useful tool. Hence, although theoretically available, the use of the mechanism is effectually zero within IBC.

Despite such operational difficulties, there are possibilities of pre-insolvency and limited possibilities of ADR. The most necessary step is the pre-filing requirement of the Corporate Insolvency Resolution Process (CIRP). Even before the acceptance of Section 7[26] or Section 9[27] application, the creditors and debtors have complete freedom to reach agreements, set debts, or find mediations. Section 12A[28] of the IBC facilitates a resolution even after the initiation of the CIRP, subject to 90% agreement from the CoC to withdraw the CIRP process[29]. Although Section 12A seems to facilitate a negotiated resolution, it has no mediation mechanism inbuilt, but relies solely on the voting game of the CoC. This leads to two inferences: firstly, that mediation is generally informal, with no mediation, thereby increasing the chance of conflict or failure; secondly, that the very high voting threshold significantly hampers its applicability. The lack of a mechanism of mediation to bring together the creditors makes Section 12A more of an exception rather than a real means of a resolution plan.

Section 14 of the IBC[30] imposes a moratorium, which significantly impacts the application of ADR in CIRP. Once applied, all arbitrations, contractual forms of dispute resolution, as well

[25] Companies Act, No. 18 of 2013, sec. 442 (providing for mediation and conciliation panels that NCLT may refer disputes to).
[26] Insolvency and Bankruptcy Code, 2016, sec.7 (Initiation by Financial Creditor).
[27] Insolvency and Bankruptcy Code, 2016, sec. 9 (Initiation by Operational Creditor).
[28] Insolvency and Bankruptcy Code, 2016, sec.12A (allowing withdrawal).
[29] Insolvency and Bankruptcy Board of India, Report on Section 12A Applications and Pre-CIRP Settlements (2022).
[30] Insolvency and Bankruptcy Code, 2016, sec. 14 (moratorium during CIRP).

as third-party negotiations, are compulsorily stayed. This is aimed at ensuring the protection of the debtor's property throughout the insolvency process, which also is intended to be administered from a single forum. In that sense, this cooperation consequently divests the contractual right to ADR, forcing all disputes, commercial, financial, or operational, into a judicially controlled forum. Further, this impacts only priority disputes and escape transactions, though limiting only, but it stops the use of mediation by creditors and debtors concerning disputes that are not within the interests of the collective insolvency mass, even when such disputes are not relevant to the insolvency estate per se. As stated, the judiciary has reiterated, through the line of jurisprudence, that insolvency is a 'core proceeding' which, as such, is non-arbitrable under private law, where the use of ADR, instead, plays a residual role to the statutory regime introduced[31]. Ultimately, this points to the need for a specific statutory solution to mediation, rather than being led by contractual arrangements that necessarily become nugatory once membership is subscribed.

In 2021, another streamlining within the insolvency law put in place a pre-pack insolvency procedure specifically for micro, small, and medium businesses (MSMEs)[32]. The pre-pack is a form of negotiation pre-insolvency scheme between debtors and creditors prior to initiation of the insolvency process. From most other parts of the world, especially in the UK, it is known that pre-packs are a hybrid mechanism with elements of negotiation, mediation, and judiciary supervision. While the pre-pack scheme in India introduces some elements, the limited scope within the MSMEs[33] dilutes the overall significance of the scheme. The pre-pack thus indicates that India can very well handle negotiation-driven restructurings, an essential part within the ADR concept itself. Thus, the pre-pack system would need to be complemented with full mediation within the pre-commencement stages of pre-packs so as to make India follow the international shift in the practices of reforms.

The possibility of ADR in managing one of the longest challenges under the Indian insolvency regime-that there are different classes of creditors with different interests-can hardly be underestimated[34]. The CoC meeting discussions are replete with disagreements over valuation, priority, feasibility, and cooperation from the promoters. Often, such disagreements spill over

[3131] Essar Steel India Ltd. v. Satish Kumar Gupta, (2019) 8 SCC 531.
[32] Insolvency and Bankruptcy Board of India, Pre-Pack Insolvency Resolution Process for MSMEs: Guidelines and Implementation, 2021.
[33] Insolvency and Bankruptcy Code, 2021, sec 54A (introducing pre-pack insolvency for MSMEs).
[34] Discussion Paper on Mediation and ADR in Corporate Insolvency, 2023.

into litigation, which, in turn, puts pressure on NCLT and therefore delays the approval of plans. Perhaps a well-structured mediation may help as a neutral forum for discussion on arguable issues among financial, operational, foreign, as also resolution applicants with the help of a well-trained mediator. A mediator's role is not to have judgments passed, but that there is a route to the dispelling of myths, clear realization of economic realities, and movement from contentious behaviour. This would especially help when a section of minority creditors has a small portion of the debt but the ability to block, delay, even when such plans are feasible themselves.

Despite all this, the incorporation of ADR into the IBC has to be recognized with a certain degree of legality[35]. This is because the judiciary, as well as people who are aware of cases of insolvency, need certain guidelines concerning the process of initiating mediation, the process of identifying mediators, the procedural safeguards, as well as how the mediation agreement would affect the voting rights of the Creditors' Committee and the authorisation from the Tribunal. In the event that such changes are not created, the procedures concerning ADR are bound to remain unused, as concerned individuals are afraid that the mediation agreement is bound to be set aside on appeal, which would find it as invalid, on the grounds that it is contrary to the compulsory obligations under the Code.

V. ADR IN PRE-INSOLVENCY NEGOTIATIONS: A PRACTICAL FRAMEWORK

Pre-insolvency negotiations are one of the most promising and least-accessed opportunities for the use of Alternative Dispute Resolution (ADR) in the Indian restructuring market. While the other formal Corporate Insolvency Resolution Process (CIRP) which is strictly organized and time-bound, pre-insolvency negotiations are still open, voluntary, and can be adjusted to the commercial realities of the distressed enterprise. These negotiations enable parties to interact with financial difficulties before the situation gets out of hand and leads to a default-driven insolvency proceeding, thus saving enterprise value and avoiding the negative image associated with insolvency admission. In a number of legal systems, restructuring that leads to success is done not in the court but at the negotiation tables where creditors and debtors jointly consider the possibilities of a turnaround. Nevertheless, the Indian system has not established such procedures yet, although practitioners have been repeatedly advising that early and facilitated

[35] The Mediation Act, 2023.

negotiation could drastically reduce the caseload of NCLT and give better economic results[36].

A practical framework for pre-insolvency ADR would begin with structured early identification of financial distress. Many Indian companies do not maintain effective early warning systems, and creditors are often the last to know when liquidity stress has reached a point of no return. A formal system that promotes voluntary early disclosure-maybe under regulatory incentives-allow mediation to begin at a time when the business can be saved. Once distress is identified, the second step under this framework would be the independent appointment of a mediator who has sufficient commercial or insolvency experience. The mediator has a critical role because, unlike a normal dispute between two businesses, in insolvency, there are complicated credit hierarchies, diverse interests, as well as varying risk profiles. The financially literate mediator ensures that parties are assisted in making sense of cash flow models, challenging assumptions, as well as the feasibility of a plan.

The second foundational element of any effective pre-insolvency ADR is confidentiality. Debtors are naturally unwilling to disclose publicly their financial condition, since to do so can spook suppliers, employees, and customers. Creditors will also very often have internal risk analyses which they will be hesitant to disclose or other strategic priorities. An explanation of the mediation agreement concerning confidentiality would provide a safe environment for communication with no limits on freedom of speech, with nothing to fear from a future trial concerning prejudice. A mediation contract related to confidentiality would create a secure place for parties to communicate without restrictions on speech, and with nothing to worry about during a future trial related to prejudice. By having an unbiased mediator, it ensures that all information provided through mediation will be for the intention of finding a resolution, rather than for the purpose of gaining an advantage in trial[37].

Once mediation is under way, one of the principal functions it serves is to reduce valuation disputes. Almost every restructuring conflict has valuation at its core. When a creditor believes that a debtor is undervaluing an asset or when a debtor feels that a creditor is overvaluing an asset, reaching an agreement can be difficult. However, mediation provides an opportunity to discuss these dissimilarities in a neutral environment as well as providing a method to question premises used by either party and to provide an expert analysis. In particular, mediation is

[36] Insolvency and Bankruptcy Board of India, Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016.
[37] Insolvency and Bankruptcy Code, 2016, sec.12A.

useful for industries with highly volatile assets such as real estate, aviation, or infrastructure, where values change dramatically. The input of a third party provides a different perspective that enables both sides to reach accord, assumptions, and debtor capacities. This becomes one of the major challenges that often arise during negotiations to resolve pre-insolvency Issues, is opposition from creditors. There are various types of creditors in India such as banks, bond holders, trade creditors, equipment financing companies, non-bank financial institutions (NBFIs) and foreign lenders. These creditors have different rights under the law and may have different priorities with respect to the distribution of property. Presently, there is no formal dispute resolution or coordination process that allows for creditors to collectively assist one another in recovering debts owed to them. As such, disputes involving India's creditor classes are often resolved in step by step, without the assistance of written agreements that would define the inter-creditor relationship and create a framework for resolving disputes. Mediation provides the opportunity to engage in a coordinated discussion among multiple creditors, allowing all creditor classes to have the opportunity to participate in any discussions concerning the proposed Restructuring; Mediators of Mediation will reference commercial requirements to convince the parties involved in the negotiations to compromise by explaining that an agreement to maintain some of the proposed Restructuring Options could be beneficial, but cannot provide the certainty associated with the Cleanest Possible Resolution or Liquidation depending on pending Recovery Levels. A second Key Benefit of When Mediating the Creditor Community Prior to Bankruptcy Proceedings Instead of Following through on a Tribunal's Instructions to Manage Creditor's Workings and Propose an Alternate Plan of Action to Resolve Creditor Disputes with an Individual Creditors Claims, provides the Debtor with the ability to Submit Any and All Plans that Could Have Been presented during Bankruptcy Proceedings to Resolve Restructuring Options But would not Have Otherwise Been Accepted by the Debtor. In the Event of Bankruptcy Proceedings, the Resolving Creditor to Pursue the Proposed Restructuring Options is not the Current Managing Director, and therefore, it would not be Deemed an Offers to Restructure the Business; Rather, the Resolving Creditors did provide an Opportunity for a Business Owner to Develop their Own Restructuring Plans.

Internationally, the best pre-insolvency (ADR) is as a preventative measure against filing for insolvency rather than a means of addressing insolvency once filed. The EU, through its Preventive Restructuring Directive (2019), has actively supported the use of ADR through negotiation and mediation, pushing member states to create Mediated and Non-Statutory pre-court restructuring into law, with some member states mandating mediation before filing for

insolvency. Similar early intervention methodologies to creating ADR restructuring platforms are being established in Singapore as they have been in the U.S. for years. Mediation as part of the pre-filing restructuring process is also prevalent in the U.S. with a long-established tradition of Mediation-Induced Workouts as it pertains to pre-Chapter 11 bankruptcy[38].

For India, a fully functioning pre-insolvency ADR system would be an excellent step forward. Presently, the Pre-Packaged Insolvency Programme for Micro, Small and Medium Enterprises (MSMEs) aligns with the vision of a fully functioning pre-insolvency ADR and is limited in application at this time[39]. Expanding this model of the pre-packaged insolvency process, including a pre-facilitated mediation process, will encourage earlier initial negotiations between the debtor and creditors and limit the number of unsecured claims filed in the Insolvency Resolution Process (CIRP) and thereby lessening the burden on the National Company Law Tribunal (NCLT) benches by representing those issues within the timeframe established under non-statutory requirements to pursue pre-insolvency ADR. The timing of ADR is a critical element in developing a mediation process, as it serves as a closed, value-preserving, reasonable, and financially sound venue to resolve financial distress before insolvency is inevitable.

VI. CASE ANALYSIS: INDIAN AND INTERNATIONAL PRACTICE

The Indian insolvency framework has a number of highly notable cases, which show the potential as well as the demerits of the existing framework, particularly in relation to the availability of an adequate ADR mechanism.

The cases of Jet Airways, DHFL, IL&FS, etc., clearly show that the lack of facilitated negotiation has been a significant reason that has led to delays, degradation, as well as discontent on the part of stakeholders. The international experiences, on the other hand, clearly show that mediation, insofar as the cases involving insolvency are concerned, has been highly effective in order to reduce conflict, as well as increase efficiency.

The Jet Airways[40] insolvency is one of the most visible cases that depict how disputes can occasion a destruction of enterprise value. The formerly biggest private airline in India, Jet

[38] 11 U.S.C. sec.105 (U.S. Bankruptcy Code).
[39] Insolvency and Bankruptcy Code, 2016, sec. 54A.
[40] Jet Airways (India) Ltd. v. State Bank of India, CP (IB) No. 2205/MB/2019 (NCLT Mum.).

Airways, defaulted on insolvency in 2019, involving a network of parties that are financial, operational, aircraft, employee, and international. The matter is further complicated by the initiated, concurrent insolvency cases from a Dutch court, involving a conflict of jurisdiction with the NCLT's jurisdiction. The nonexistence of a facilitated cross-border mediation solution occasioned a situation whereby the coordination for cooperation on a cross-border scale between the Dutch administrator and the Indian resolution professional occasioned discussions that are unfacilitated. At the same time, with the rising disputes on aircraft return, employee claims, and mutual recognition of insolvency status, the airline's aircraft fleet diminished, routes permanently closed, and brand value, which is initially strong, withered quickly with the inactivity that is prolonged. It is apparent that a facilitated mediation solution, which is administered either by NCLT or a cross-border, private, neutral, third-party mediator, would have occasioned cooperation from the onset, enabled a common front with various parties, who are creditors, and arrested the situation from undergoing periods that are prolonged with dormancy. The eventual applicants in the resolution process faced hurdles in reviving the airline, which are further complicated by the prolongations that exist in unfacilitated discussions.

The highly notable DHFL (Dewan Housing Finance Limited)[41], a leading insolvency case within the financial services industry in India, is another case that points towards the difficulties that come with purely adversarial resolution procedures. Being the first financial service sector entity that experienced a resolution under a special arrangement that came from the RBI, it naturally assumed a certain degree of extraordinary importance within the system. Despite receiving a huge support from the Committee of Creditors, the process suddenly came to a standstill owing to legal disputes from other bidders, as well as the promoters themselves. The conflict, which involved claims of impropriety in the bidding, assessment, as well as a dispute with regard to the promoters' rights, culminated in a series of courtroom quarrels within NCLT, NCLAT, and even Supreme Courts. Even though the Code has managed to produce a positive result, it has certainly been slowed down significantly owing to the detours that came with legal disputes. Mediated negotiations, which would have occurred within the preliminary stages of the proceedings, involving bidders, creditors, as well as the administrators, may have probably cleared the ambiguity, reduced litigation grounds, as well as facilitated a smoother bidding process.

[41] Piramal Capital & Hous. Fin. Ltd. v. DHFL, (2021) SCC OnLine SC 722.

IL&FS (Infrastructure Leasing & Financial Services)[42] remains one of the most complicated cases of a financial failure in India even today, involving over 300 group companies, a strong network of inter-company guarantees, and a huge number of debtors possessing different types of financial securities. The judicial system has temporarily ceased all litigation proceedings before different forums to allow a newly appointed government board to prepare a plan for a resolution. The presence of no group insolvency law or alternative dispute resolution mechanisms available in India has made all negotiations a series of unofficial discussions, bilateral settlements, and court-monitored mediations. The absence of a comprehensive facilitated negotiation procedure has caused huge delays, particularly in the negotiation of cross-border disputes involving debts, sovereign funds, and loans on infrastructure development projects[43]. Although the government and judiciary were able to prevent a disorderly failure, the entire process of a resolution took a lengthy amount of time, particularly in securing settlements with the creditors. It is assumed that a properly organized mediation service, especially in handling financial negotiations involving different parties, could have provided a useful platform to deal with disputes arising from mutual dependence, assessments of different assets, and debtor claims.

Internationally accepted practices for cases concerning corporate restructuring are poles apart from what happens in India. The Chapter 11 procedure followed in the United States has been actively embracing mediation as a technique, not on an occasional but on a regular basis. The judiciary has been actively involving mediators in cases that relate to large debts, mass tort claims, as well as inter-creditor disputes. For cases involving General Motors and Lehman Brothers, mediation has been an essential element in reducing claims for valuation, which has culminated in plans being confirmed with alacrity. The judiciary has been very enthusiastic about mediation because of the realization that commercial disputes resolved behind closed doors, with a professional who is competent in law and finance, are bound to be resolved faster than in a courtroom trial.

The Singapore Model is another enlightening one that can be learned from. In Singapore, with the Insolvency, Restructuring, and Dissolution Act, parties are referred to mediators from the Singapore Mediation Centre by the courts[44]. In this case, mediation is a very integral part of

[42] Union of India v. IL&FS Ltd., (2019) SCC OnLine SC 1118.
[43] Insolvency and Bankruptcy Board of India, Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016 (Report of the Expert Committee, Jan. 31, 2024).
[44] Insolvency, Restructuring and Dissolution Act 2018, sec. 26–30.

the entire process. In this regard, because the courts are actively monitoring the process, all parties involved know that a mediation agreement has force of law. This, in the end, is a situation where an agreement with the assistance of alternative dispute resolution mechanisms has a notable impact of lessening the court's caseload, restraining liquidations, and encouraging resort to restructuring.

The United Kingdom arrangement scheme, as well as the schemes based on a Company Voluntary Arrangement (CVA), also facilitate the role of structured negotiation[45]. Although such schemes are dependent on voting thresholds, a business practice that pervades such schemes is inclusive of a background that is characterized by intensive pre-filing negotiations involving the concerned creditors. Mediation, whether informal or formal, is a recognized technique for convincing adversary creditor groups, especially when disputes pertaining to valuation are sought to be reduced prior to presenting a scheme to a judge for evaluation. It is essential to underscore that consensus-building is facilitated with a consideration for judicial evaluation, wherein the most fundamental disputes are already resolved at the evaluation stage.

Collectively, these cross-country instances establish a norm that deliberative, failed insolvency systems embracing mediation are quicker, cost less in litigation, and preserve more economic values than systems that depend on adjudication alone. The Indian situation is extremely instructive on this count. The instances of Jet Airways, DHFL, and IL&FS trace how, in the lack of mediation, disputes amongst creditors, jurisdictional issues, and procedural glitches might vitiate into systemic issues. The implication, therefore, of introducing alternative dispute resolution mechanisms, such as mediation, within the parlance of the Indian insolvency regime is that models predating disputes, which are pre-disputes themselves, are amicably resolved via mediation, would in no way make the insolvency regime unnecessary but would, in fact, substantially enhance it with a salutary mechanism that has all the potential to amicably resolve commercial disputes on a pre-disputes level, a level which is pre-disputes themselves, thus amicably resolvable. This, therefore, is no longer a nice-to-have within the wake of rising distress balances in India but, in fact, is the sine qua non requirement for a robust restructuring sector.

VII. LIMITATIONS AND STRUCTURAL BARRIERS TO ADR IN INDIA'S

[45] Insolvency Act 1986, Part I, Ch. III.

INSOLVENCY SYSTEM

The IBC lacks legal support for agreements that result from mediation, making it a challenge to state that such agreements are bound to be upheld[46]. For instance, banks may fear that although a dispute has been settled via dispute resolution, a third party might come in and void the agreement. Also, people within the insolvency sector might not have information regarding mediation, making them believe that it is not an ideal process.

The problem is that the Indian financial systems are more concerned with litigation, paperwork, rather than, say, discussions. They are people who avoid risks, face regulations, are used to solving problems in a courtroom.

Furthermore, in scenarios involving multiple lenders, such as secured, unsecured, operating, and foreign lenders, they might not wish to come to a compromise agreement unless the promise of an equitable outcome is legally secured. Lastly, in the CIRP process, the quick turnaround is such that the service delivery within the alternative dispute resolution mechanism might look less useful because it is a process that prolongs.

VIII. REFORMS AND RECOMMENDATIONS FOR A COHERENT ADR–INSOLVENCY MODEL

Legal changes can now be affected in India to make mediation and negotiated restructuring under the IBC work for ADR. A separate chapter on mediation in insolvency may provide clarity on the mediation procedure, mediator qualifications, and enforcement of mediated settlement agreements. The Tribunal should have powers to refer the dispute to mediation, especially in issues related to valuation, disputes among creditors, and plan negotiations.

Institutional reforms must be in the form of appointment of specialized insolvency mediators and establishment of a mediation secretariat within the NCLT. Pre-insolvency mediation can be made mandatory for operational creditor claims of a certain threshold level, similar to pre-litigation mediation requirements in commercial disputes. In addition, the pre-packaged insolvency regime should not be limited to MSMEs and mediation should be one of the integral parts. Equally crucial would be the change in the culture. Training programs for insolvency professionals, education modules for judges, and regulatory incentives for cooperative

[46] Insolvency and Bankruptcy Code, 2016, sec. 7, 9, 12A, 54A.

rearrangement may make shift in market behaviour toward ADR-friendly methods. The introduction of mediation in the insolvency processes in India would enable sustainable, speedier, and value-incremental resolutions.

IX. CONCLUSION

The Alternative Dispute Resolution regime is at a crossroads in the developing insolvency regime in India. The Insolvency and Bankruptcy Code has come of age, and the shortcomings of a purely adversarial, cases-court-at-the-centre approach are becoming more pronounced, from pendency of cases to fragmented creditor discussions and, often, destruction of value during prolonged litigation[47]. The need for a cure to these ails is met by the ADR regime. It has the potential to transform the debt reconstruction of a corporate debtor from a rigid, statutory process to a result-oriented one with the means of facilitated negotiation, communication, and problem-solving.

The utility of ADR is not merely procedural but has the potential to realign incentives. Mediation, facilitated negotiation, and the like may soften hard bargaining, clarify disputes on valuation, and serve as a platform where the interests of the creditors and debtors can come together to probe whether a liquidated solution would serve a maximum return within a judicial setting. This approach, from a purely economic perspective, is sound but, more importantly, necessary to preserve sound businesses that are otherwise threatened with liquidation because of procedural inefficiencies. The incorporation of ADR within a pre-insolvency framework, as well as within the IBC structure, would thus enable India to develop a two-track system that promotes cooperation in a pre-insolvency setting but maintains judicial intervention when a consensus is not forthcoming.

Internationally, there is consistent support for such hybrid models. Countries such as the United States, the United Kingdom, and Singapore have proven that the convergence of alternative dispute resolution (ADR) with insolvency law delivers faster, more stable, and sustainable results. Such models indicate that mediation does not substitute judicial power but is a tool that increases it because, in effect, mediation leads to only disputes that have legal overtones being brought before the judiciary, with the rest being resolved by conversation. India, in a way, has set the tone to follow the same path but requires a shift from this piecemeal adoption of

[47] Jet Airways (India) Ltd. v. State Bank of India, CP 2205/MB/2019.

mediation as a tool in non-court settlements.

The establishment of institutional capacity is also a factor that might play a pivotal role in ensuring the success of an ADR-supported restructuring mindset. Insolvency experts, bankers, and lawyers need to realize that mediation is not merely a subsidiary element in the realm of insolvency but is, in fact, a necessary component. Other than that, a cultural acceptance is also an essential part that might contribute towards ensuring that a mindset shift happens on an overall cultural base. Corporate India has generally considered insolvency a struggle for rights, as against a problem that needs a solution with multiple parties together on a common platform[48].

In the end, the incorporation of ADR in the Insolvency Regime in India is a procedural issue that is, in fact, a structural shift in the way that financial distress is approached. In a post-pandemic economic environment characterized by leverage, uncertain markets, and an increase in the level of distressed debts, a regime that is capable, negotiation-friendly, and cantered on restructuring is a way forward that is aimed at optimizing economic value, relieving the judiciary from the burden of handling cases, and enhancing financial stability[49]. If nurtured, cultivated, and accepted, the Insolvency Resolution Process under ADR can become one of the most potent tools in India's rescue regime, which has the potential to turn what is essentially a situation characterized by insolvency into a situation that is suitable for a revival.

[48] Insolvency and Bankruptcy Code, 2016, sec. 54A.
[49] Ibid.