

# A Comprehensive Exploration Over The Efficacy Of Dispute Resolution Mechanism In Resolving Insolvency Disputes In India

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## ABSTRACT

The prevailing method for resolving insolvency disputes, adjudication, presents notable challenges such as the common pool problem, business disruption, and high litigation costs. This prompts the question of whether insolvency disputes can find resolution without adjudication, through online dispute resolution mechanisms. Dispute resolution mechanism has emerged as a viable counterweight to adjudication in insolvency cases, offering avenues to circumvent its inherent shortcomings. Unlike adjudication, dispute resolution mechanism endeavors to achieve a peaceful settlement, fostering agreements between debtors and creditors. Additionally, it aims to reconcile conflicting interests inherent in insolvency cases, namely, the continuation of the debtor's business and the satisfaction of creditors' claims. Furthermore, dispute resolution mechanism proceedings offer privacy, keeping disputes out of the public eye. Leading pro-debtor nations such as the United States of America and France have already implemented Dispute Resolution mechanisms for insolvency disputes, paving the way for its potential adoption and development in other jurisdictions. This paper delves into the promise and efficacy of dispute resolution mechanism in revolutionizing insolvency dispute resolution, drawing insights from successful implementations in key jurisdictions.

**Keywords:** Insolvency, Dispute Resolution, Online Dispute Resolution, Common Pool Problem, Creditor Satisfaction, Pro-Debtor Mechanisms.

## INTRODUCTION

Insolvency disputes revolve around financial matters, as creditors seek repayment from debtors facing financial difficulties. These disputes arise when an insolvency case is initiated, leading creditors to vie for a portion of the limited pool of assets (*estate*), which often falls short of satisfying all claims (*commonly known as the common pool problem*). As a result, debtors face liquidation, marking the demise of the business, loss of employment, and diminished tax contributions. Negotiation in this scenario typically yields no winners, as both parties stand to lose.

Traditionally, the resolution of insolvency disputes has been confined to the courts, where adjudication ensures equitable treatment of creditors' claims (*pari passu*), equitable collection and distribution of assets, and swift liquidation of insolvent entities (Singh, 2021). However, the landscape has evolved in recent decades, witnessing a shift towards resolving insolvency disputes through Alternative Dispute Resolution (ADR) methods in addition to adjudication. Legislators often opt for either pro-debtor or pro-creditor insolvency regimes, with ADR incentivizing negotiation and deterring adjudication.

This research aims to scrutinize the utilization of ADR models in insolvency disputes and assess their alignment with fundamental principles of insolvency law. Despite the acceptance of ADR in various forms for insolvency disputes, questions linger regarding the parties' autonomy in setting debt repayment conditions and the prerequisites for such agreements. How can ADR ensure equitable outcomes in these disputes?

The research objectives include:

1. Analyzing the emergence and evolution of ADR in insolvency disputes and the way forward to ODR

2. Understanding the ADR mechanisms for insolvency disputes in France and the United States, highlighting their effectiveness and shortcomings.
3. Evaluating the harmonization of collective and individual interests in insolvency disputes
4. Role of ODR in Insolvency Disputes in India

### **THE DEVELOPMENT OF ADR IN INSOLVENCY DISPUTES**

The evolution of alternative dispute resolution (ADR) in insolvency cases marks a significant departure from traditional litigation, with roots tracing back to the civil and socioeconomic changes of the 1960s in the United States. Initially employed to resolve community and family disputes, mediation gradually found its place in the insolvency arena following the seminal Pound Conference. Harvard Professor Frank Sander's conceptualization of the "multi-door courthouse" emphasized the exploration of diverse dispute resolution methods beyond adjudication (Omar, 2002). Sander's vision underscored three foundational principles of ADR, the availability of various procedures, the potential for their individual or combined application, and the imperative of effectiveness.

Formal integration of ADR, particularly mediation, into insolvency proceedings began in 1986 with the establishment of the mediation program by the Bankruptcy Court for the Southern District of California. Notable instances, such as the Greyhound Lines Inc. bankruptcy case, exemplified the effectiveness of multi-party dispute resolution frameworks. In the Greyhound case, a structured ADR process comprising claim submission, negotiation, mediation, and arbitration facilitated swift resolution of claims, avoiding protracted litigation and promoting mutually beneficial outcomes.

The momentum towards ADR gained further impetus with legislative interventions, notably the enactment of the Alternative Dispute Resolution Act in 1998 in the United States. This legislation mandated the authorization of ADR in all civil actions, including adversary proceedings in bankruptcy, laying the groundwork for widespread adoption of ADR mechanisms (Williams, 2020). Subsequent initiatives, such as the requirement for mediation attempts in certain adversary proceedings by the Bankruptcy Court for the District of Delaware, underscored the growing reliance on ADR in insolvency cases.

On the European front, recognition of the necessity for a novel insolvency dispute resolution mechanism prompted legislative action, exemplified by the Proposal for a Directive on Insolvency, Restructuring, and Second Chance. This directive aims to harmonize insolvency regulation across EU Member States and foster innovative approaches to business rescue. Within individual Member States, pre-insolvency dispute resolution methods have emerged, such as France's ad hoc mandate and conciliation procedures and Germany's insolvency plan procedure, facilitating debtor rescue through negotiation.

The surge in ADR utilization within insolvency contexts reflects a broader imperative to mitigate insolvency caseloads and ensure market stability. ADR's capacity to preserve employment, optimize resource utilization, and sustain business relationships underscores its pivotal role in fostering a robust civil and corporate legal framework (Kashyap, Jaswani, & Bhandari, 2019). Ultimately, ADR has transcended its status as a mere adjunct to adjudication, emerging as a cornerstone mechanism for addressing the complexities of insolvency disputes and promoting negotiated debt resolution over adversarial litigation.

### **THE MAIN ADVANTAGES OF DISPUTE RESOLUTION MECHANISM IN INSOLVENCY CASES**

In dispute resolution mechanism, Alternative Dispute Resolution (ADR) stands apart from adjudication, constituting a diverse array of processes geared towards settling legal disputes through compromise with third-party facilitation, often without significant judicial involvement. While various ADR forms exist, the presence of a third-party mediator, conciliator, or negotiator typically proves indispensable. Unlike adjudication, where court proceedings are presided over by a judge under strict procedural regulations, ADR places a premium on negotiation skills and the good faith engagement of disputing parties, thereby fostering a more flexible and collaborative approach to conflict resolution (Aggrieved Shareholders as Creditors: An Unmapped Coordinate in the Cartography of Australian Insolvency Law, 2008).

*Firstly*, ADR holds the promise of a win-win outcome, reducing the likelihood of a lose-lose scenario. Through negotiation overseen by a neutral third party, ADR facilitates the satisfaction of principal claims by both parties, fostering mutual concessions and creative problem-solving. In stark contrast, adjudication often devolves into a winner/loser paradigm, risking the rupture of commercial relationships and imposing financial and psychological tolls on the litigants.

*Secondly*, unlike adjudication, where finality of judgment is paramount, ADR does not always aim for definitive resolution. ADR proceedings may remain non-binding, allowing parties to explore settlement options without the pressure of immediate closure. This flexibility enables parties to reassess their positions and potentially

reach a resolution in the future, fostering a more cooperative and forward-looking approach to dispute resolution (Spain, 2010).

*Thirdly*, ADR maintains the confidentiality and privacy of proceedings, preserving the normalcy of relationships between parties. By conducting proceedings in private settings, ADR safeguards sensitive commercial information and avoids the adverse publicity often associated with adjudication. In contrast, adjudication typically entails public scrutiny, with court proceedings accessible to the public unless under exceptional circumstances.

*Fourthly*, ADR offers flexibility, empowering parties to tailor procedural and substantive rules to suit their specific needs and circumstances. Parties have the autonomy to craft bespoke solutions through persuasion, fostering a sense of ownership and investment in the resolution process (Spector, 1997). Conversely, adjudication imposes rigid procedural constraints, potentially impeding swift and effective dispute resolution, particularly in insolvency cases where time is of the essence.

In essence, ADR circumvents many of the drawbacks inherent in adjudication, including cost escalation, publicity concerns, and inflexibility, particularly salient in insolvency disputes. By incentivizing efficient and collaborative resolution, ADR conserves debtor assets, minimizes business disruption, and promotes mutually beneficial outcomes, underscoring its value as a preferred mechanism for resolving complex legal disputes.

### THE APPLICATION OF ADR IN INSOLVENCY DISPUTES

The Dispute Resolution Mechanism, where ADR presents an appealing avenue for resolving business disputes, yet its applicability to insolvency cases remains a subject of inquiry. Insolvency disputes are characterized by their public interest, involvement of multiple stakeholders, prioritization of claims, and stringent asset distribution regulations (Kalas & Herwig, 2000). The question arises: Can ADR effectively address these complexities?

A recent comparative analysis identifies three primary avenues for resolving insolvency disputes:

- **Workouts:** Involving negotiations between the debtor and creditors to devise a solution for the debtor's financial distress.
- **Pre-insolvency proceedings:** Aimed at rescuing the debtor's business with minimal or no judicial intervention.
- **Formal restructuring and insolvency proceedings:** Legal processes established to manage insolvency situations.

While all three methods target insolvency resolution, their approaches and objectives diverge significantly. Although ADR may have a role to play in each mechanism, its most notable application appears to lie in pre-insolvency proceedings, where it can potentially obviate the need for adjudication. This article sheds light on key features of these mechanisms and explores the pivotal role of ADR within them.

- **Workouts**

In workouts, the debtor engages in negotiations with creditors regarding debt repayment while still maintaining solvency. Although the debtor's insolvency is anticipated, it is not immediate, and creditors are not at risk of losing their payments. As such, a stay of enforcement against the debtor is typically not invoked, and business operations continue uninterrupted.

Workout agreements encompass various strategies to resolve disputes, including refinancing, contractual amendments, asset swaps, and equity transactions. Essentially, the debtor seeks to renegotiate debt repayment terms with creditors (Gill, 2014). Governed primarily by contract law principles, workouts generally exclude insolvency regulations, except for certain procedural considerations.

Judicial intervention in workouts is infrequent, and parties engage in direct bargaining over debt repayment terms. The selection of specific forms of Alternative Dispute Resolution (ADR) depends on the preferences of the parties or legislative provisions. For instance, mediation and judicial settlement conferences are viable options as workouts usually do not necessitate extensive financial analysis.

An illustrative example of a workout scenario is the ad hoc mandate (*mandat ad hoc*) utilized within the French insolvency framework. Contract law principles prevail in workouts, affording parties the autonomy to negotiate terms of debt repayment to their mutual satisfaction.

- **Pre-Insolvency Proceedings**

The present mechanism represents a structured approach within the judicial system aimed at rescuing distressed businesses, with a primary focus on insolvency law rather than contractual obligations (Eidenmueller, 2023). This category encompasses two distinct procedures:

### **1. Workout Supporting Proceedings**

These proceedings involve limited tools for debt negotiation and typically engage only a select group of creditors, excluding shareholders. Unlike restructuring proceedings, workout supporting proceedings do not require an insolvency threshold test (Madaus, 2018). As such, there is no automatic stay of claims against the debtor, and any resulting agreement only binds the creditors directly involved.

### **2. Restructuring Proceedings**

In contrast, restructuring proceedings encompass a comprehensive array of dispute resolution mechanisms and involve all creditors. An insolvency threshold test is applicable here. Consequently, restructuring proceedings may trigger a stay of claims against the debtor, and any agreement reached binds all creditors, ensuring a more holistic approach to resolving insolvency.

The essential difference between these two forms lies in their impact on both the debtor's business and the claims of creditors. In workout supporting proceedings, judicial involvement is minimal, with the court primarily facilitating procedural matters such as case initiation, mediator appointment, and agreement confirmation (Schwartz, 1987). Resolution of disputes primarily relies on the negotiation skills of the involved parties. On the other hand, restructuring proceedings entail a more active judicial role in overseeing dispute resolution.

While the solvency of the debtor is generally a prerequisite for initiating pre-insolvency proceedings, specific criteria may vary depending on national legislation. For instance, in France, the conciliation procedure may be applicable even in cases of cash-flow insolvency for a limited period, typically up to 45 days. Additionally, in certain circumstances, a stay of enforcement against the debtor may be established to provide breathing room for restructuring efforts and negotiation processes.

#### **• Formal Proceedings**

The formal proceedings encompass structured insolvency processes designed to address the debtor's financial distress systematically. Unlike workouts and pre-insolvency proceedings, the primary objective here is not to rescue the debtor but rather to manage insolvency issues effectively (Nigam & Boughanmi, 2017). In formal proceedings, insolvency law takes precedence, and negotiations between the debtor and creditors are governed by mandatory regulations, limiting flexibility.

Although Alternative Dispute Resolution (ADR) holds potential across all phases of insolvency disputes, its significance is particularly pronounced in the earlier stages, such as workouts and pre-insolvency proceedings. In these phases, ADR mechanisms offer the possibility of averting the need for formal insolvency adjudication and the subsequent winding up of the insolvent entity.

The utilization of ADR in insolvency disputes has gained traction, notably in jurisdictions like the United States and France. Both countries have established insolvency frameworks with a pro-debtor orientation, emphasizing the preservation of the debtor's business continuity (Olujobi, 2021). This article delves into an examination of key ADR models employed in insolvency cases, shedding light on their applicability and effectiveness in mitigating disputes within the insolvency context.

## **ADR MODELS FOR INSOLVENCY DISPUTES IN THE UNITED STATES**

The United States stands as the cradle of Alternative Dispute Resolution (ADR) in the context of bankruptcy proceedings (Stempel, 1996). Originating from diverse legal domains such as labor, commercial, civil rights, environmental, and family law, ADR methodologies witnessed a surge in adoption during the 1970s and 1980s. These methods, including multi-party negotiation, mediation, arbitration, and hybrid processes, laid the groundwork for the modern ADR landscape in insolvency disputes.

Bankruptcy law in the United States pivots on the principles of equitable treatment for creditors and providing debtors with a fresh start, enabling companies to reinvent themselves. Central to this ethos is the objective of business recovery. A significant avenue for achieving this objective lies in mediation, often initiated through court orders directing parties to engage in ADR. Nearly half of the bankruptcy courts in the United States have local rules mandating mediation in specified matters, underscoring its integral role in the resolution process (Salehijam, 2019). These local rules empower bankruptcy courts to establish court-annexed ADR procedures, exemplified by initiatives like Local Rule 9019-5a (Mediation) of the United States Bankruptcy Court for the District of Delaware.

Bankruptcy proceedings in the United States are chiefly governed by the Bankruptcy Reform Act of 1978, codified as Title 11 of the United States Code. Within this framework, Chapter 7 governs liquidation, while Chapter 11 regulates reorganization, facilitating negotiations between debtors and creditors to formulate reorganization plans.

While the Bankruptcy Code itself does not prescribe ADR mechanisms, the Alternative Dispute Resolution Act of 1998 empowers district courts to utilize ADR in all civil actions, including adversary proceedings in bankruptcy. This legislative mandate underscores the imperative for district courts to offer diverse ADR processes, ranging from mediation to arbitration, fostering efficient dispute resolution (Vaccari, 2018).



Chapter 11 of the Bankruptcy Code provides for the commencement of reorganization proceedings, either voluntarily by the debtor or involuntarily by creditors under specific conditions. Notably, voluntary filings predominate, with creditors initiating a mere one percent of bankruptcy cases. Upon filing, an automatic stay of all collection actions ensues, providing breathing space for negotiation and resolution (Balp, 2018). Among the various ADR modalities employed in bankruptcy cases, mediation emerges as the most prevalent, facilitating resolution across a spectrum of complexities, from straightforward claim objections to intricate multi-party Chapter 11 plan negotiations.

The integration of ADR into bankruptcy proceedings in the United States exemplifies a proactive approach towards resolving insolvency disputes while preserving business viability and safeguarding the interests of creditors and debtors alike (Gandotra, 2023). This paper delves into the evolution, legal framework, and practical applications of ADR in bankruptcy cases, analyzing its efficacy and implications within the broader context of insolvency law and practice in the United States.

### • *Evolution of ADR in Bankruptcy Cases*

ADR in bankruptcy cases in the United States traces its roots to the broader landscape of alternative dispute resolution methodologies that gained prominence in various legal domains during the latter half of the twentieth century. The proliferation of ADR methods such as mediation, arbitration, and negotiation across diverse practice areas provided a fertile ground for their adoption within bankruptcy proceedings. The inherent flexibility and efficiency of ADR mechanisms appealed to stakeholders seeking expeditious and amicable resolution of disputes, thereby augmenting their utilization in the bankruptcy context (Frost, 1998).

The institutionalization of ADR within the framework of bankruptcy law in the United States can be attributed to both legislative initiatives and judicial precedent. The enactment of the Alternative Dispute Resolution Act of 1998 represented a seminal milestone, granting district courts the authority to incorporate ADR processes into bankruptcy proceedings (Arslan, 2020). This legislative mandate not only conferred legal legitimacy upon ADR in the bankruptcy context but also underscored its intrinsic value as a means of enhancing access to justice and promoting efficiency in dispute resolution.

Additionally, judicial endorsement and advocacy played a pivotal role in advancing the integration of ADR into bankruptcy practice. Bankruptcy courts across the United States recognized the advantages of ADR in streamlining proceedings, alleviating docket congestion, and fostering cooperative engagement among parties (Tennille, 2011). Judicial directives and local rules mandating ADR participation in specified matters further solidified the institutionalization of ADR within bankruptcy proceedings, signaling a paradigm shift towards a more collaborative and pragmatic approach to resolving insolvency disputes.

### • *Legal Framework*

The legal framework governing ADR in bankruptcy cases in the United States is delineated by a combination of statutory provisions, court rules, and judicial precedent. At the heart of this framework lies the Bankruptcy Code, promulgated under the Bankruptcy Reform Act of 1978 and codified as Title 11 of the United States Code. While the Bankruptcy Code primarily governs substantive rights and procedures in bankruptcy cases, it does not explicitly prescribe specific ADR mechanisms or procedures.

However, the Alternative Dispute Resolution Act of 1998 constitutes a pivotal component of the legal framework for ADR in bankruptcy cases. This statute empowers district courts to utilize ADR in all civil actions, including adversary proceedings in bankruptcy, thereby authorizing the integration of ADR processes into the fabric of bankruptcy practice. Pursuant to this legislative mandate, district courts are vested with discretion to implement diverse ADR processes, ranging from mediation to arbitration, tailored to the exigencies of individual cases.

In addition to statutory provisions, court rules and local rules play a significant role in shaping the contours of ADR practice within bankruptcy proceedings. Many bankruptcy courts have adopted local rules or general orders mandating ADR participation in specified matters, reflecting a proactive approach towards promoting the use of ADR as a means of expediting case resolution and minimizing litigation costs (Weinstein, 1996). These local rules empower bankruptcy courts to establish court-annexed ADR procedures, facilitating the seamless integration of ADR into the adjudicatory process.

### • *Practical Applications*

In practice, ADR has become an integral component of bankruptcy proceedings in the United States, offering parties a flexible and efficient means of resolving disputes while preserving business continuity and maximizing asset recovery. Mediation, in particular, has emerged as a preferred ADR modality in bankruptcy cases, owing to its collaborative nature and potential for achieving consensual resolutions. Bankruptcy courts routinely refer parties to mediation, either through court orders or local rules mandating ADR participation in specified matters.

Mediation in bankruptcy cases typically involves the appointment of a neutral mediator tasked with facilitating communication and negotiation between the parties to reach a mutually acceptable resolution. Mediation sessions may encompass a wide range of issues, including claim objections, plan negotiations, asset valuations, and creditor disputes (McWilliam, 2018). The mediator's role is not only to facilitate dialogue but also to explore creative solutions and assist parties in identifying common ground, with the ultimate aim of reaching a settlement that addresses the parties' interests and concerns.

The utilization of mediation in bankruptcy cases offers several distinct advantages over traditional litigation. By providing a forum for confidential and candid discussions, mediation allows parties to explore innovative settlement options that may not be available through adversarial proceedings (Chodosh, 1997). Moreover, mediation promotes cost-effective dispute resolution by mitigating the expenses associated with protracted litigation, including attorney fees, court costs, and expert witness fees.

Furthermore, mediation fosters a collaborative atmosphere conducive to preserving business relationships and facilitating post-bankruptcy restructuring efforts. By empowering parties to actively participate in the resolution process and retain control over the outcome, mediation engenders a sense of ownership and buy-in, thereby enhancing the likelihood of compliance with negotiated agreements and minimizing the risk of future disputes.

In addition to mediation, other ADR modalities such as arbitration and early neutral evaluation may also find application in bankruptcy cases, depending on the nature and complexity of the dispute. Arbitration offers a streamlined adjudicatory process whereby parties submit their claims to a neutral arbitrator for binding resolution, circumventing the need for protracted litigation in court (Plass, 2018). Early neutral evaluation, on the other hand, entails the appointment of a neutral evaluator to assess the merits of the case and provide non-binding recommendations to facilitate settlement negotiations.

The integration of dispute resolution mechanism into bankruptcy proceedings in the United States represents a paradigm shift towards a more collaborative and pragmatic approach to resolving insolvency disputes. Originating from diverse legal domains and gaining prominence during the latter half of the twentieth century, ADR methodologies such as mediation, arbitration, and negotiation offer parties a flexible and efficient means of achieving consensual resolutions while preserving business continuity and maximizing asset recovery (Connaughay, 1999).

The legal framework governing ADR in bankruptcy cases is delineated by a combination of statutory provisions, court rules, and judicial precedent. While the Bankruptcy Code itself does not prescribe specific ADR mechanisms, the Alternative Dispute Resolution Act of 1998 empowers district courts to utilize ADR in all civil actions, including adversary proceedings in bankruptcy, thereby institutionalizing ADR within the bankruptcy framework.

In practice, mediation has emerged as a preferred ADR modality in bankruptcy cases, offering parties a confidential and collaborative forum for resolving disputes. By facilitating communication, exploration of creative solutions, and active participation in the resolution process, mediation promotes cost-effective dispute resolution and preserves business relationships, thereby enhancing the likelihood of successful post-bankruptcy restructuring efforts (Plass, *Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties*, 2016).

The integration of ADR into bankruptcy proceedings underscores a proactive approach towards achieving efficient and equitable outcomes while safeguarding the interests of creditors and debtors alike. As ADR continues to evolve and gain acceptance within the bankruptcy framework, its role as a cornerstone of insolvency dispute resolution is poised to grow, offering parties a viable alternative to traditional litigation and fostering a culture of cooperation and consensus-building in the pursuit of equitable resolutions.

### **ADR IN INSOLVENCY DISPUTES IN FRANCE**

France has undergone a transformative journey in its approach to insolvency law, transitioning from a punitive regime focused solely on creditor interests to a more holistic framework aimed at preserving the interests of both the company and its creditors. Since the 1990s, this paradigm shift has been reinforced by legislative reforms, culminating in the codification of the French insolvency regime under Book VI of the French Commercial Code in 2006.

Central to the French insolvency regime are diverse procedures tailored to the financial circumstances of the debtor, ranging from court-assisted pre-insolvency proceedings to formal insolvency proceedings. These procedures, delineated under the French Commercial Code, provide a structured framework for negotiations between debtors and creditors, overseen either by the court or a court-appointed intermediary (Lippman, 1972). Within this framework, alternative dispute resolution (ADR) mechanisms play a pivotal role, offering parties a confidential and flexible avenue for resolving insolvency disputes while striving to preserve business continuity.

This paper delves into the intricacies of ADR in French insolvency disputes, exploring the legal framework, practical applications, and implications of court-assisted pre-insolvency proceedings, namely the *ad hoc*

mandate and conciliation. By analyzing the confidentiality, flexibility, and success rates of these procedures, this paper aims to elucidate the evolving landscape of ADR in French insolvency law and its impact on stakeholder outcomes.

The French insolvency regime, governed primarily by Book VI of the French Commercial Code, encompasses a spectrum of procedures designed to address the diverse financial challenges faced by debtors. At the heart of this framework lie court-assisted pre-insolvency proceedings, offering debtors and creditors an opportunity to negotiate amicable agreements under the supervision of the court or a court-appointed intermediary.

The ad hoc mandate and conciliation procedures serve as cornerstones of court-assisted pre-insolvency proceedings, providing debtors with mechanisms to address economic, legal, or financial difficulties before insolvency becomes imminent (Satz, 2007). Unlike formal insolvency proceedings, these procedures prioritize confidentiality and flexibility, affording parties the autonomy to negotiate tailored solutions conducive to business rescue.

Confidentiality is a hallmark of court-assisted pre-insolvency proceedings, shielding negotiations between debtors and principal creditors from public scrutiny. The French Court of Cassation has underscored the importance of confidentiality in preserving the integrity of ADR processes, emphasizing that media disclosure of conciliation or ad hoc mandate proceedings may compromise the outcome of negotiations. This commitment to confidentiality reflects a recognition of the sensitive nature of insolvency disputes and the need to safeguard stakeholder interests.

Flexibility is another key attribute of court-assisted pre-insolvency proceedings, empowering parties to craft bespoke agreements tailored to the unique circumstances of each case. The French Commercial Code refrains from prescribing specific terms or modalities for agreement, instead prioritizing the overarching goal of preserving the debtor's business (Sturmer, 1998). This flexibility allows parties to explore innovative solutions and adapt negotiations to evolving economic realities, fostering a spirit of collaboration and pragmatism in the resolution process.

In practice, court-assisted pre-insolvency proceedings have emerged as effective tools for mitigating the adverse effects of financial distress and facilitating consensual resolutions between debtors and creditors. The ad hoc mandate and conciliation procedures, characterized by their confidentiality and flexibility, offer debtors a lifeline to address financial difficulties proactively and preserve business continuity.

The ad hoc mandate empowers debtors to initiate negotiations with principal creditors under the auspices of the court, providing a structured framework for dialogue and agreement. Similarly, conciliation proceedings facilitate open communication and collaboration between debtors and creditors, guided by a court-appointed conciliator tasked with facilitating consensus and mediating disputes.

The success of court-assisted pre-insolvency proceedings is evidenced by their widespread adoption and favourable outcomes in practice. In 2015 alone, approximately 1,000 conciliation procedures were initiated in France, boasting a success rate of around 70 percent. These figures underscore the efficacy of ADR mechanisms in resolving insolvency disputes and preserving the interests of both debtors and creditors.

The evolution of ADR in French insolvency law reflects a broader shift towards a more balanced and nuanced approach to addressing financial distress (Zekos, 2022). By prioritizing confidentiality, flexibility, and stakeholder engagement, court-assisted pre-insolvency proceedings offer a pathway to amicable resolution while mitigating the disruptive effects of insolvency.

As France continues to refine its insolvency regime and adapt to evolving economic realities, the role of ADR in insolvency disputes is poised to expand further. By fostering a culture of collaboration and consensus-building, ADR mechanisms contribute to the resilience and sustainability of businesses, safeguarding the interests of all stakeholders in the insolvency process.

The integration of ADR into French insolvency law represents a progressive step towards enhancing access to justice, promoting efficiency, and fostering equitable outcomes in the resolution of insolvency disputes. As ADR continues to gain traction as a preferred method of dispute resolution, its role in French insolvency law is likely to become increasingly pronounced, shaping the future landscape of insolvency practice in France and beyond.

## THE AD HOC MANDATE IN FRENCH INSOLVENCY LAW

The ad hoc mandate serves as a crucial mechanism in French insolvency law, facilitating negotiations between debtors and primary creditors to reach a restructuring agreement. Designed specifically for cash-flow solvent companies facing economic, legal, or financial challenges, this procedure aims to preserve business continuity while addressing underlying financial difficulties (Belarus, 2019).

Commencement of the ad hoc mandate procedure is initiated by a debtor's submission to the president of a commercial court, who subsequently issues an order outlining the scope and duration of the procedure. Notably, the commencement of the ad hoc mandate is conducted under strict confidentiality, ensuring privacy and discretion in the negotiation process. Additionally, the president of the commercial court possesses the authority to request pertinent financial documents from public institutions, enabling a comprehensive assessment of the debtor's financial situation.

Central to the ad hoc mandate procedure is the appointment of an ad hoc nominee (*mandataire ad hoc*), tasked with assisting the debtor's management in navigating negotiations with principal creditors. The ad hoc nominee plays a pivotal role in facilitating dialogue and consensus-building, with the ultimate objective of reaching a mutually beneficial agreement that enables the debtor to sustain its operations (Rosenberg, 2010). Unlike formal insolvency proceedings, the ad hoc mandate does not impose a specific timeframe for resolution, affording parties the flexibility to engage in comprehensive negotiations tailored to their unique circumstances. Crucially, participation in the ad hoc mandate procedure is voluntary, and creditors who opt not to engage in negotiations are not bound by any resulting agreement. Furthermore, the accrual of interests on outstanding debts remains unaffected during the negotiation period, preserving the financial rights of all parties involved.

The ad hoc mandate procedure concludes through one of three possible outcomes:

1. No resolution is achieved, leading to the discontinuation of alternative dispute resolution (ADR) efforts.
2. A restructuring agreement is successfully reached under the auspices of the ad hoc mandate, providing a framework for addressing the debtor's financial challenges.
3. If negotiations prove unsuccessful, parties may opt to transition to the conciliation procedure, leveraging additional mechanisms for dispute resolution.

Often regarded as a preliminary stage for the conciliation procedure, the ad hoc mandate serves as an initial opportunity for parties to explore potential solutions without the constraints of a predefined timeline. However, the procedure holds the potential to culminate in a resolution if consensus is reached between the debtor and principal creditors, thereby effectively concluding the dispute.

The ad hoc mandate embodies a proactive approach to insolvency resolution, offering a confidential and flexible framework for negotiation that prioritizes the preservation of business interests. By fostering constructive dialogue and empowering parties to seek mutually beneficial solutions, the ad hoc mandate plays a pivotal role in mitigating the adverse effects of financial distress and promoting the sustainability of businesses facing economic challenges in France.

## INDIVIDUAL AND COLLECTIVE INTERESTS IN INSOLVENCY DISPUTES

Insolvency, or bankruptcy, cases present complex challenges due to the involvement of multiple stakeholders, including debtors, secured and unsecured creditors, bankruptcy administrators (trustees), and co-obligators (Chodosh, 1997). Amidst this complexity, alternative dispute resolution (ADR) offers a potential avenue for reconciling conflicting interests and achieving resolution. However, questions arise regarding the extent to which ADR can accommodate the diverse interests of all creditors while adhering to principles like *pari passu*. In many jurisdictions, including the United States and France, ADR in insolvency cases diverges from traditional adjudication. Unlike insolvency adjudication, where all creditors typically participate, ADR often involves negotiations between the debtor and principal creditors, potentially averting the initiation of formal insolvency proceedings. For example, in the United States, ADR is deployed across various contexts in insolvency disputes, ranging from reorganization plan negotiations to single-creditor and multiple-creditor claims.

One notable feature of ADR in insolvency cases is the concept of a "cramdown," where a debtor reaches an agreement with certain creditors, and the terms of that agreement are enforced against non-participating creditors. This mechanism underscores the significance of court supervision in ensuring equitable outcomes (Gill, 2014). In court-supervised ADR, a cramdown can be effectuated, binding non-signatory creditors to the terms of the agreement. However, absent court involvement, the agreement lacks enforceability against non-participating creditors, highlighting the pivotal role of judicial oversight.

France employs ADR mechanisms such as the ad hoc mandate and conciliation primarily to resolve disputes between debtors and principal creditors. While the Code de commerce does not explicitly define "principal creditors," they are typically those holding the majority of claims and capable of initiating insolvency proceedings. Notably, creditors not involved in ADR proceedings may be bound by resulting agreements if endorsed by the court (Arslan, 2020). In France, as in the United States, court endorsement ensures alignment with insolvency law principles and safeguards creditor interests.

Chapter 11 of the U.S. Bankruptcy Code also recognizes the cramdown procedure, enabling confirmation of a reorganization plan despite objections from certain creditors. However, the "Best Interests of Creditors" test ensures statutory protection for dissenting creditors, guaranteeing equitable treatment under the reorganization plan (Alle, 2022). This provision underscores the court's role in safeguarding creditor rights and upholding fairness in insolvency proceedings.

While ADR and cramdown mechanisms offer avenues for resolving insolvency disputes, judicial oversight is essential to ensure adherence to insolvency law principles. Courts play a critical role in reviewing agreements, assessing their lawfulness, and safeguarding the interests of all stakeholders. Whether in France or the United States, court involvement enhances the legitimacy and enforceability of ADR outcomes, promoting equitable



distribution of debtor assets and upholding the principles of insolvency law. Conversely, agreements reached without court supervision lack enforceability against non-participating parties, highlighting the importance of judicial oversight in insolvency dispute resolution.

### **APPLICATION OF CONTRACT LAW IN INSOLVENCY DISPUTES**

The objective of dispute resolution mechanism in insolvency disputes is to achieve a peaceful settlement that satisfies the interests of creditors while enabling the debtor to continue business operations. However, the application of contract law principles in insolvency cases raises questions about the extent to which these principles should govern ADR outcomes (Krohn, 2021). This article explores the application of freedom of contract in insolvency disputes under the United States bankruptcy regime, particularly focusing on reorganization plans established under Chapter 11.

Chapter 11 of the United States Bankruptcy Code prioritizes debtor reorganization over liquidation, emphasizing the continuation of business activities. Reorganization plans, negotiated between debtors and creditors, must adhere to mandatory requirements to ensure fairness and equality among creditors. The overarching goal is to strike a balance between the economic recovery of the debtor and the preservation of creditors' legal rights.

Reorganization plans play a crucial role in facilitating the restart of business operations, with the court overseeing the approval process. While the resolution primarily depends on the parties, judicial intervention ensures that the plan aligns with the objectives of Chapter 11 and safeguards the interests of all stakeholders (Seymour, 2021). Only debtors are authorized to propose reorganization plans to the court, subject to certain timelines and good faith requirements.

These plans often involve modifications to debtor/creditor obligations, such as changes in debt terms and creditor equity conversion. The principle of freedom of contract governs these negotiations, allowing parties to reach agreements within the framework of Chapter 11 objectives. However, the court's review ensures that the plan maintains a balance between satisfying creditors' claims and preserving the debtor's business continuity. The good faith requirement is integral to evaluating reorganization plans, ensuring alignment with Chapter 11's objectives. Plans must aim to maximize property available to creditors, discourage debtor misconduct, and achieve fairness and justice (Block-Lieb, 2013). The feasibility requirement further reinforces the need for realistic and workable plans that enable the debtor to fulfill obligations and restore business operations.

Judicial scrutiny of reorganization plans extends to assessing their probability of success, complexity, and impact on creditor interests. The court's evaluation considers the debtor's financial capacity, ongoing litigation, and market viability post-reorganization. These criteria restrict the application of freedom of contract, emphasizing the need for plans that balance debtor and creditor interests while ensuring long-term viability (Madaus, *Reconsidering the Shareholder's Role in Corporate Reorganisations under Insolvency Law*<sup>†</sup>, 2013).

The principle of freedom of contract in Chapter 11 bankruptcy is tempered by statutory requirements and judicial oversight. While parties have flexibility in negotiating reorganization plans, these agreements must align with Chapter 11 objectives and pass judicial scrutiny. ADR mechanisms facilitate efficient negotiations, enabling parties to reach agreements that promote business continuity and satisfy creditor interests (Seymour, 2021).

Similarly, in French insolvency law, peaceful settlements between debtors and principal creditors aim to ensure business continuity. However, such agreements must not infringe upon the rights of non-signatory parties, with insolvency measures available if agreements are not fulfilled (Chodosh, 1997). The ADR mechanism serves as a critical tool in insolvency proceedings, fostering efficient negotiations and promoting the interests of all stakeholders while ensuring compliance with relevant legal frameworks.

### **INSIGHTS FROM THE EXPERT COMMITTEE REPORT FOR MEDIATION IN IBC**

The Expert Committee, chaired by Dr. T.K. Viswanathan, was appointed by the Insolvency and Bankruptcy Board of India (IBBI) to formulate a comprehensive mediation framework under the Insolvency and Bankruptcy Code, 2016. Other members included Mr. Sudhaker Shukla, Dr. Rajiv Mani, Mr. Bahram Vakil, Mr. Shardul S Shroff, Mr. Sumant Batra, and Mr. Satyajit Roul, with Mr. Santosh K. Shukla serving as the member secretary. The committee's mandate was to propose a framework addressing key aspects such as the mandatory or voluntary nature of mediation, integration of mediation within specified timelines, circumstances for referral to mediation, enforcement mechanisms, cost coverage, operational guidelines, infrastructure support, and any other pertinent issues.

The Committee observed that there are no explicit constraints in the Mediation Act 2023 regarding the implementation of a mediation system under any legislation like the Insolvency and Bankruptcy Code (IBC) (Ven, 2023). In this context, the Committee explored the feasibility of directly applying the provisions of the 2023 Act to the IBC for insolvency mediation. However, after thorough deliberation and analysis of the 2023 Act's framework, the Committee concluded that a standardized mediation process prescribed by the 2023 Act would not align with the objectives of the IBC. This misalignment is primarily due to the statutory timelines mandated by the IBC, which are inherently incompatible with those stipulated in the 2023 Act. Additionally,

the Committee noted that merely excluding the IBC from the scope of the 2023 Act's First Schedule may not suffice, as a separate mediation mechanism tailored for insolvency cases would still be necessary under the IBC. Consequently, the Committee suggests that it would be more practical to develop a self-contained framework for insolvency mediations within the ambit of the IBC.

The IBC is a specialized beneficial legislation with the object of revival of stressed enterprises through time-bound insolvency resolution processes [*ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1*]. The Committee extensively deliberated on the feasibility of pre-institutional mediation in insolvency cases and concluded that it might not align with the fundamental principles of the Insolvency and Bankruptcy Code (IBC). The provisions of the Code become applicable only after a statutory default has transpired, and an application has been submitted to commence insolvency proceedings. Consequently, any mediation conducted before such an application would not fall within the purview of the Code and would not be categorized as 'insolvency mediation' per se. As a result, it cannot be enforced in the same manner as mediations conducted after the initiation of insolvency proceedings under the Code.

(Kamalnath, 2019). Predictability, reliability, and certainty in the mediation process are paramount for its efficacy. Therefore, all parties opting for mediation under the IBC should have access to standardized procedures and skilled mediators.

The Committee proposes empowering the Central Government to prescribe rules for conducting mediation under the IBC. This can be achieved through an amendment to the Code, introducing a provision allowing for mediation. These regulations would encompass the fundamental aspects of the proposed mediation framework, granting the Insolvency and Bankruptcy Board of India (IBBI) the authority to stipulate procedural requirements.

Furthermore, the Committee suggests considering the delegation of this power to the National Company Law Tribunal (NCLT) to formulate their own mediation rules, similar to the process followed at the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), which has been successful. These rules would establish a specialized mediation framework tailored for insolvency mediation under the IBC, adaptable based on implementation experiences.

Recognizing the future potential of online dispute resolution (ODR), the Committee emphasizes its adoption. ODR incorporates advanced technological tools, including artificial intelligence and machine learning, to facilitate efficient dispute resolution (Alessa, 2022). E-mediation, a subset of ODR, is recommended for adoption, as it offers benefits such as e-meetings and e-filings, promoting a paperless mediation environment (Kahungi, 2023). This aligns with the Niti Aayog Expert Committee's recommendation to amend the IBC to recognize e-mediation through ODR service providers.

The operational framework should be flexible, allowing for both physical and online sessions based on the parties' preferences. Embracing a hybrid or online mode as the standard practice would enhance efficiency, meet timelines prescribed under the IBC, and reduce the overall cost of dispute resolution.

## CONCLUSION

The discourse on Alternative Dispute Resolution (ADR) in the context of insolvency law, as explored through various excerpts and analyses, underscores the intricate balance between legal frameworks, procedural mechanisms, and practical considerations. Across jurisdictions like the United States and France, expert committees and legislative bodies have grappled with tailoring ADR mechanisms to suit the unique demands of insolvency proceedings. The deliberations of expert committees, such as the one chaired by Dr. T.K. Viswanathan and the Committee on the Insolvency and Bankruptcy Code, 2016, highlight the multifaceted challenges and opportunities inherent in integrating mediation into insolvency regimes. These discussions touch upon fundamental aspects such as the applicability of ADR models, the role of standardization in mediation procedures, and the potential of online dispute resolution (ODR) to enhance efficiency and accessibility.

The deliberations emphasizing the need for flexibility, adaptability, and innovation in designing ADR frameworks for insolvency disputes. Recommendations put forth by expert committees advocate for a nuanced approach that acknowledges the distinct characteristics of insolvency proceedings while aligning with broader legal principles and objectives. Furthermore, the discourse underscores the importance of regulatory empowerment, institutional support, and stakeholder engagement in facilitating the effective implementation of ADR mechanisms within insolvency frameworks. By harnessing technology, embracing standardized procedures, and fostering a conducive environment for mediation, stakeholders can enhance access to justice, promote fairness, and expedite the resolution of disputes in insolvency cases.

The Committee advocates for the adoption of online dispute resolution (ODR), particularly e-mediation, to leverage advanced technological tools for efficient and paperless dispute resolution. Recognizing the potential of ODR to streamline processes and reduce costs, the Committee proposes amendments to the IBC to formally recognize and facilitate e-mediation through ODR service providers. The Committee's recommendations underscore the need for a flexible and adaptive approach to mediation under the IBC, balancing traditional

practices with innovative solutions to meet the evolving needs of insolvency proceedings. By embracing standardized procedures, empowering regulatory bodies, and leveraging technology, the proposed framework seeks to enhance access to justice, promote timely resolution of disputes, and ultimately contribute to the efficient functioning of the insolvency ecosystem.

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