Article

The Harmonization of Insolvency Mediation in the EU. A brief comparative analysis

Karen Barriga Villavicencio

PhD, Professor of Private International Law and Alternative Dispute Resolution (ADR) at Universidad Rey Juan Carlos in Madrid, Spain. Her academic expertise lies in cross-border conflict resolution, focusing on mediation and arbitration within international and commercial contexts. Dr. Barriga has a distinguished background in mediation, particularly in insolvency and commercial disputes, contributing to both the theoretical and practical advancement of ADR methods. In addition to her teaching role, she serves as Academic Secretary for mediation training programs at the university and has supervised various academic projects addressing international legal conflicts and innovative applications of international law Email: karen.barriga@urjc.es

Received 03 January 2024, Accepted 01 Febrary 2024

KEYWORDS:

Directive, regulation, insolvency, pre-bankruptcy, negotiator, mediator

ABSTRACT:

The harmonization of International Trade Law is a very complicated challenge for both the EU regulator and the national legislators of the Member States. Trying to unify legal and economic criteria in territories with different realities and needs becomes an objective to be met in the long term. The Restructuring and Insolvency Directive aims to begin the path towards legislative alignment in this special branch of commercial law in which alternative dispute resolution methods, in particular negotiation/mediation/conciliation, will play an essential role in the pre-bankruptcy proceedings to prevent debtors from falling into liquidation procedures and overcoming the situation of economic crisis. In this work, we carry out an analysis of these attempts at harmonization in some legal systems in our environment.

PALABRAS CLAVES:

Directiva, regulación, insolvencia, concurso de acreedores, negociador, mediador.

RESUMEN:

La armonización del Derecho Mercantil Internacional es un reto muy complicado tanto para el regulador comunitario como para los legisladores nacionales de los Estados Miembros. Intentar unificar criterios jurídicos y económicos en territorios con realidades y necesidades distintas se convierte en un objetivo a cumplir a largo plazo. Con la Directiva de Reestructuración e Insolvencia se pretende iniciar el camino para la armonización en esta rama especial del derecho mercantil en el que los Métodos alternativos de resolución de conflictos, en particular la negociación/ mediación/ conciliación jugarán un papel esencial en los procedimientos pre- concursales para evitar que deudor caiga en procedimientos liquidatarios y superen la situación de crisis económica .En este trabajo, realizamos un análisis de estos intentos de armonización en algunos ordenamientos jurídicos de nuestro entorno.

MOTS CLES :

Directive, règlement, insolvabilité, pré-faillite, négociateur, médiateur

RESUME :

L'harmonisation du droit commercial international est un défi très complexe, tant pour le régulateur de l'UE que pour les législateurs nationaux des États membres. Essayer d'unifier les critères juridiques et économiques dans des territoires aux réalités et aux besoins différents devient un objectif à atteindre à long terme. La directive sur la restructuration et l'insolvabilité vise à ouvrir la voie vers l'alignement législatif dans cette branche particulière du droit commercial dans laquelle les méthodes alternatives de résolution des litiges, en particulier la négociation/médiation/conciliation, joueront un rôle essentiel dans les procédures de pré-faillite pour éviter que les débiteurs ne tombent dans des procédures de liquidation et pour surmonter la situation de crise économique. Dans ce travail, nous effectuons une analyse de ces tentatives d'harmonisation dans certains systèmes juridiques de notre environnement.

CREATIVE COMMONS LICENSE

This work is licensed under a Creative Commons Attribution 4.0 International License.

Contents:

1 INTRODUCTION; 2 STATE OF THE ART AND ANALYSIS; 2.1 ITALY; 2.2 GERMANY; 2.3 FRANCE; 3 CONCLUSIONS; 4 BIBLIOGRAPHY

1 INTRODUCTION

One of the most complex objectives of the European Union is the unification of Private Law. The ideal of creating and consolidating a Single Market for the economic and political growth and integration of the Member States is a task that is gradually being achieved, despite the great difficulties that this entails. The diversity of national laws or the multitude of complex issues that can arise in the civil and commercial sphere have been an obstacle to this harmonization.

In commercial law in particular, the effects of globalization have contributed to the legislative alignment of certain aspects of property law, such as international contracts (sale, transport, distribution, etc.) or the operation of public registers. Organization and systematization, promoted by the United Nations Commission on International Trade Law (UNCITRAL) and the Institute for the Unification of Private Law (UNIDROIT), which have made it possible to consolidate International Commercial Law.

However, not all areas of commercial law have been fully aligned. In particular, one of the most controversial areas is that of insolvency, which is essential in the context of a Single Market (there are more and more companies carrying out economic activities with cross-border implications) (Rojo, 2023, p.1). In recent years, the European Union has made great efforts to develop a uniform legal regime for insolvency, with particular emphasis on the development of pre-bankruptcy institutions and the promotion of ADR. This is based on the premise that the flexibility, speed and cost-effectiveness of the latter make them ideal for resolving business crisis before they lead to liquidation procedures (Garbayo, 2021, p.93).

In this respect, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)[1] (which is currently expected to be renewed by the Proposal for a Directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law[2]). It has strengthened the pre-bankruptcy institutions, but it has not unified these mechanisms in the European framework, leaving a wide margin for national legislators to adapt and implement them. As a result, in Europe, we find that institutions such as bankruptcy mediation are reflected in different ways in different countries, and sometimes in a confusing legal system that does not seem to allow time for their implementation.

With all this, in this work we carry out a comparative legal study between some European legislation such as Spanish, Italian, German and French in pre-bankruptcy matters, focusing on the institution of negotiation and insolvency mediation as a tool to overcome situations of bankruptcy.

2 STATE OF THE ART AND ANALYSIS

With the Restructuring and Insolvency Directive, the European legislator attempted to harmonize part of the bankruptcy legislation, in particular that relating to preventive measures in the event of insolvency, the so-called pre-bankruptcy legislation. The aim of the Directive was to define the basic principles of the matter and to allow each Member State to maintain the specific features of the legislation in each area of law that could be affected by

[1] DOUE nº 172- 26 June 2019.DOUE-L-2019-81090.

[2] COM (2022) nº702- 2022/0408.

bankruptcy law (civil law, labour law, tax law, etc.). The objective was clear: to unify a legal framework that favours the recovery of companies in crisis or at risk of being in crisis.

In Spain, the Directive was transposed by Law 16/2022 of 5 September, which reformed the text of the Bankruptcy Law,[3] introducing as its main innovations the negotiation of restructuring agreements in the pre-bankruptcy phase and the Special Procedure for Micro-enterprises.

These measures focus on providing a legal framework that is flexible enough to allow debtors and creditors to negotiate restructuring and continuity plans aimed at managing the crisis in a timely manner, thereby avoiding the debtor's insolvency. At the same time, it adds a number of rules aimed at strengthening the agreement in order to avoid certain deadlock situations (Álvarez, 2023, p.7).

In this context, ADRs become more important, as out-of-court negotiation tools are advocated, in particular negotiation and references to insolvency mediation. One of the main ideas behind the Restructuring and Insolvency Directive is that the best way to avoid insolvency situations is to reach agreements between debtors and creditors.

The Directive unifies the concept of insolvency and adds a prior state of insolvency - the likelihood of insolvency. This concept seeks to extend the time margin for negotiations between debtors and creditors, recognizing that their success depends to a large extent on whether the insolvency situation is less imminent but there is a reasonable risk of a possible economic crisis in the future (Campuzano, 2023, p.153).

Since the negotiation between the debtor and the creditors is, therefore, the basis on which the entire insolvency procedure is structured, there is an obvious need for a figure who can assist the parties in this negotiation, either because the circumstances make the negotiation too complex, or because the parties do not have sufficient knowledge to understand the conflict and its possible solutions. This is precisely the role of the insolvency mediator, a figure that already existed in Spanish legal system before the transposition of the Directive (within the framework of a pre-insolvency procedure: the Out-of-Court Payment Agreement).

In the previous Spanish bankruptcy regime, the out-of-court payment agreement was instrumentalized through the figure of the insolvency mediator, whose presence was mandatory in this procedure. The scope of this institution was certainly limited, both objectively and subjectively. With regard to the latter, the procedure was limited to debtors with fewer than fifty creditors and whose initial estimate of assets and liabilities did not exceed five million euros (Boldó, 2021, p.161). On the other hand, the content of the agreement reached through this procedure could only consist of a release and/or postponement, leaving out other possible agreements that could have been beneficial to prevent the debtor's insolvency. According to the latest data published up to 2019, the number of insolvency mediations was very low (less than 180 files dealt with[4]). The initial mistrust of this tool for managing debtors' insolvency has been allayed by successive reforms, but this has not been enough to make it an effective alternative.

Although the Out-of-Court Payment Agreement was limited to a very specific case, for the insolvency of small debtors or small companies, the truth is that its incorporation and development in our law was not exempt from criticism from the doctrine and expert mediators and bankruptcies (De la Vega, 2012). The name of the procedure, the lack of a legal statute, the transformation of the role of the mediator into that of a bankruptcy administrator in view of the failure of the negotiations, and the lack of usefulness were sufficient reasons for the legislator to take advantage of the transposition of the Restructuring and Insolvency

[3] Official State Gazette, nº. 214- September 6, 2022.

[4] General Council of Economists. Atlas Concursal. 2019

Directive, which will abolish this figure but retain the bankruptcy mediator in the Special Procedure for Micro-enterprises, with a similar motivation.

The Special Procedure for Micro-enterprises is designed to provide solutions to the economic crisis of small and medium-sized enterprises, (which make up the majority of the business fabric[5]) by designing a simplified procedure, reduced in cost and with the least intervention of professionals. For this reason, the insolvency mediator has become a voluntary figure within this new procedure, along with other professionals who can assist debtors and creditors in their negotiations. The role of the mediator has therefore gone from being a mandatory figure in the pre-bankruptcy procedure to being a voluntary figure within a special insolvency procedure, which has not led the legislator to develop a specific legal regime for this figure. mistake already made with the Out-of-Court Payment Agreement

Given the short time that has elapsed since its incorporation into Spanish law and the reduced scope of its application, it is very difficult to assess the impact of this figure. Looking to the future, we do not rule out the possibility that the legislator will need to clarify aspects of this figure (as has already happened with the Out-of-Court Payment Agreement) in order to increase confidence in it.

However, one of the most controversial elements of the bankruptcy mediator is that the law equates his activity with that of the bankruptcy administrator, thus giving value to specialized training in business administration over training focused on conflict management and resolution. In this regard, the majority doctrine has already indicated, in relation to the bankruptcy mediator, that the legal regime of the civil and commercial mediator, regulated in Law 5/2012 of 12 July on Mediation in Civil and Commercial Matters, applies to him in a complementary manner[6] (Sotelo, 2016, p.80). And the law seems to dissociate the concept of the bankruptcy mediator from that of the civil and commercial mediator, if we look at it from the perspective that the former is limited to a procedure that we cannot consider out of court (it requires the intervention of a judge), but the key point is to understand the work carried out by the bankruptcy mediator as a conflict manager and communication facilitator. Therefore, in our opinion, if we look at the purpose pursued by this figure, he should be required to have the skills inherent to civil and commercial mediation.

The Law 5/2012 is also a consequence of the transposition of the EU Harmonization Directive on Mediation in Civil and Commercial Matters[7]. Although mediation was already being developed in Spain through regional regulations that regulated sectoral mediation procedures (family and consumer), it is true that a national regulation was needed to promote this institution. In this way, mediation was presented as a complement to the administration of justice and also as a method of relieving the courts of cases which, by their very nature, could be resolved amicably and in a way that better satisfies the interests and needs of the parties to the dispute.

In fact, general experience in civil and commercial matters has shown that the resolution of conflicts through a process led by a professional mediator ends up giving greater overall satisfaction to the parties involved than their judicial solutions, mainly due to its speed, cost, flexibility and confidentiality (Gonzalo, & Suñez, 2024, p.41). As a result, mediation has now been extended to other areas such as bankruptcy, criminal law, administrative law, etc.

Another criticism of this institution stems from the interpretation given to the term mediation and is that, particularly in the field of bankruptcy, terms such as negotiation or conciliation are used interchangeably (alternative methods of conflict resolution with their own

---

[5] Spanish Ministry for Industry and Tourism stats. https://industria.gob.es/es-es/estadisticas/paginas/estadisticas-y-publicaciones-sobre-pyme.aspx.

[6] Official State Gazette, nº. 162 September 7, 2012.

[7] DOUE nº. 136, May 24, 2008.

characteristics). The Spanish Bankruptcy Law, in Article 702, states that the mediator's role is to conduct a negotiation. The same thing happens at the international level, in legislation such as the French one, the term conciliator is used literally to refer to the third party who helps the parties to negotiate. This is why we understand that, despite this apparent confusion between ADR, it is important to understand that mediation is a facilitated negotiation and that the third party, unrelated to the parties, is the manager of the conflict. As the classic definitions point out, the mediator is the one who is empowered to help the disputing parties voluntarily reach their own mutually acceptable solution (Moore, 1995, p.48), and that, depending on the field in which it operates, in this case bankruptcy, it can adopt the facilitative and direct style typical of the Harvard School of Negotiation (Sepúlveda, 2012, p.253).

Internationally, these methods were not unknown; in some legal systems they were included in the civil code, while in others there was a lack of rules defining both the principles and the bases for their application[8] (Gonzalo, 2021, p.63). Only arbitration has established itself as a common method of resolving international commercial contracts because of the advantages it offers and, above all, because of the removal of legal barriers and national judicial obstacles (Gonzalo, 2023, p.516). For all these reasons, it is not new to hear calls for the ADR to be fully incorporated into the legislation of the Member States and in areas of law as complex as bankruptcy law.

In other legal systems, which we briefly analyze below, we see how each legislator has adapted its bankruptcy rules to the Restructuring and Insolvency Directive and, in line with the Community mandate, has instrumentalized and strengthened pre-trial negotiation mechanisms.

2.1 ITALY

The Italian legislator's attempts to modernize its judicial system in the field of insolvency are reflected in the successive reforms in this area. Italy was one of the first countries to introduce out-of-court insolvency solutions into its legal system, thereby encouraging debtors to deal with the crisis promptly (Pacchi, 2014, p.274).

Prior to the Restructuring and Insolvency Directive, Italian bankruptcy law was governed by the "Legge Fallimentare", which, since 2005, has provided for corporate reorganisation instruments in the event of an anticipated crisis of the debtor ("preconcordato" or "preventive concordato in bianco or with riserva", which, under Art. 161 Legge Fallimentare; after the 2012 reform, it was configured as a negotiation instrument between debtors and creditors).

[8] The regulatory framework for mediation in the different Member States has been developed gradually. In Germany with the Mediation Law of July 26, 2012, Gaceta Jurídica Federal 1.577 (Mediationgesetz). In Austria with the Mediation Law, Gaceta nº 29/2003 (Bundesgesetz über Mediation in Zivilrechtssachen). In Belgium, in the Belgian Judicial Code octubrer 10,1967. In Bulgaria with the Mediation Law and Regulations nº 2 -March 15, 2007 (Закона за медиацията). In Chipre, with the Law 159 (I)/2012. In Croactia, with tthe Mediation Law (Narodne novine), nº.18/11. In Denmark, with the Law nº467-june 12, 2009. In Slovakia with the Law nº 420/2004 (zákon č. 420/2004 Z.z. o mediácii a o doplnení niektorých zákonov). En Slovenia (ZARSS, nº 97/09 y 40/12 – ZUJF). In Estonia, with the Mediation Law february, 12.2009 No. 562 (Lepitusseadus). In Finland, with the Law 1015 /2005. In France with the Law 2016-1547, (loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle). In Grece, with the Law 4640/2019. In Hungary with the Law LV de 2002 (a közvetítői tevékenységről szóló 2002. évi LV. törvény). En Ireland with the Mediation Act 2017. In Italy, with the Law n.º 162- november 10, de 2014. In Latvia, with the LawJuly, 2011 (Mediācijas padome). In Lithuaniawiht the Mediation and Conciliation Law X-1702 july, 9. 2008 (Civilinių ginčų taikinamojo tarpininkavimo įstatymas. In Luxembourg, Law – febrero24, 2012. In Malta, in the chapter 474-Mediation Law 2004. En Netherlands withh the Reglament MfN de 2017. In Poland, with the Law september10, 2015 (Dz.U. 2015 poz. 1595). In Portugal with the Law n.º 29/2013, In Republic Czech with the Law 202/2012 .In Rumania Law 192/2006, En Sweden, Mediation Law, 2008(Medlingslag).

However, the overly broad nature of the rules in this area led the Council of Ministers in 2017 to adopt a single text on insolvency and business crises, which deals with the whole issue of bankruptcy and the specific early warning systems. It is worth noting that this provision does not distinguish between pre-bankruptcy and bankruptcy proceedings, but rather seeks to include them in the insolvency crisis regulation procedure at the request of the debtor, thus approaching the North American insolvency model (Garnacho, 2023, p.3).

On 22 May 2022, the Codice della crisi d'impresa (Business Crisis Code) entered into force, partially applicable from 2019 and partially supplementing and repealing the Legge Fallimentare. This Crisis Code had to be adapted to the Restructuring and Insolvency Directive, thus opening up a series of regulatory possibilities, ranging from out-of-court agreements negotiated without judicial intervention (piani attestati di Risanamento art. 56), to agreements subject to judicial approval (Accordi di ristrutturazione dei debiti and the Piano di ristrutturazione art. 64 bis and sig), to the minor agreement (concordato minor art. 74 and sig), which attempts to speed up the procedure to such an extent that not even a hearing is possible (Pacchi, 2022, p.30).

All these instruments must be accompanied by a certificate from an independent third party verifying the data and the viability of the plan. This is also required for Accordi di ristrutturazione dei debiti (Fedele, 2019, p.67). However, Italian law does not regulate the legal status of this independent professional who, by virtue of his functions, could be closer to an auditor or a mediator trained in economic knowledge. On the other hand, in general terms, art. 19 allows that once the insolvency procedure has been opened, the court may grant the debtor a period of ninety days (extendable) to reach a negotiated solution to the business crisis; what the article describes is that it is necessary to prove that positive results have been achieved in the negotiations, although the law does not make it mandatory, we understand that the parties can be assisted by a mediator who could also certify these positive results.

As we can see, the Italian legislator does not institutionalize the insolvency mediator, but it attaches great importance to the negotiations that lead to the conclusion of one of the pre-bankruptcy plans that help to overcome the economic crisis. Now, as in the rest of the legal systems of the Member States, we will have to wait a while to assess whether the previous negotiations conducted in these institutions (or not by a third party) have been sufficient to overcome the debtor's economic crisis.

2.2 GERMANY

In Germany, the Insolvency Directive has been implemented by the Act on the Framework for the Stabilisation and Restructuring of Enterprises (StaRUG), which entered into force on 1 January 2009. This regulation consolidates all pre-insolvency law. It is noteworthy that this regulation devotes a separate section to the professional in charge of resolving the conflict between the debtor and the creditors, who, without being called a insolvency mediator in the technical sense, does so in a practical sense (Sanierungsmoderator).

In this sense, German law is similar to Spanish law in that the intervention of this professional is not mandatory, but the mediator is placed on the same level as other professionals who can assist debtors and creditors. Article 96 of the StaRUG states that this third party is chosen by the court and is subject to its guidelines. The law also deals with the appointment, remuneration and possible revocation of the ombudsman, as well as with his main functions, which, according to the law, are to mediate between the debtor and the creditors in order to find a solution to overcome economic and financial difficulties. The law also defines certain powers, such as access to the debtor's accounting documents and, in general, to all necessary information.

However, although the regulation of this mediator/negotiator is much broader and more complete than in Spanish law, it is not responsible for its legal regime. For example, the law does not say anything about the training of this professional (article 94 only states that he must be an appropriate natural person with commercial and independent capacity), it only establishes certain obligations, such as a general duty of loyalty and good faith and the obligation to submit a monthly report on the state of negotiations.

On the other hand, the regulation of the German bankruptcy procedure can be found in the Insolvenzordnung – InsO It should be pointed out that this provision lays down a special procedure for contests involving non-business persons. In this case, art. 105 1.1 points out that, among the requirements for requesting the opening of bankruptcy, it is necessary that the debtor has made an attempt to reach an out-of-court agreement with the creditors in the six months prior to the request. It also adds that the proposed plan must be attached and the main reasons for its failure must be explained (Skauradszum, 2022, p.63).

This reference to out-of-court agreements does not necessarily imply that the agreement has been reached through a mediation process, but it does require direct negotiation between the parties or through a third party that helps them to manage their situation. This idea is linked to the 2012 Mediationsgesetz which is limited to establishing the principles of mediation and does not limit the areas in which it can be used. This means that a insolvency mediator can be proposed by the parties for out-of-court negotiations with creditors, and if no agreement is reached in the mediation process, the requirement of Article 105.1 would be fulfilled.

In contrast to other legal systems, insolvency mediation is established here as a genuine extrajudicial procedure. Consequently, the procedure established by the German system is based on a relationship of subsidiarity. On the one hand, the out-of-court solution involves the management of the debtor's economic difficulties, essentially a pre-bankruptcy negotiation/mediation, in a positive sense, and, on the other hand, it involves the obligation to initiate judicial proceedings, and thus a procedural step, since it is only by presenting this certificate that bankruptcy proceedings are initiated.

As we can see here, the German legislator is considering insolvency mediation in the most open way but has not yet delved into its legal regulation. Practice will certainly make it necessary for successive reforms to complete this picture.

2.3 FRANCE

Even before the transposition of the Restructuring and Insolvency Directive, the French legislator's approach to the prevention and treatment of the pre-bankruptcy situation (Droit de entreprises en difficulté) was remarkable, as it provided for different procedures and instruments according to the type of debtor and promoted negotiation in the management and resolution of conflicts.

Since the 1980s, its legislative development in this field has progressively increased and has been provided for in various legal instruments, such as Law 84/148 of 1 March 1984 on Prévention et réglement amiable des enterprises dans difficulté the French bankruptcy law itself Redressement et liquidation judiciaire Law 85/98 of 25 January 1998, also in the Consumer Code «Code de la Consommation Outside the scope of application of the Consumer Code, the Commercial Code, in Title I of Book VI, signed on the difficulties of enterprises, regulates the treatment of insolvency in the preventive phase. and over-indebtedness of traders, artisans, farmers and self-employed professionals by two extrajudicial means: the ad hoc mandate and the conciliation procedure, which implies the

intervention of a third party to help them reach an amicable agreement with their creditors (López, 2015, p.201).

As part of the transposition of the Restructuring and Insolvency Directive, Book VI of the French Commercial Code was amended by the decree of 15 September 2002. Ordinance (decreto) French law provides for two types of procedures in the event of a corporate crisis: On the one hand, there is an ad hoc out-of-court procedure (albeit supervised by a judicial representative), which is confidential and flexible. It is aimed at negotiations between debtors and creditors. On the other hand, there are judicial procedures, which provide for four types of procedure depending on the stage of the insolvency. The first is the conciliation procedure, to which we shall return later. The second one is called safeguard for the debtor who, without being in a situation of insolvency, has difficulties that cannot be overcome (Art. L620). This procedure, although less flexible than the previous one, is also aimed at reaching an agreement that saves the debtor from insolvency. The third is a company rescue procedure (Art. L631 et seq.), which is designed for companies in a situation of ongoing insolvency, with the aim of continuing the company's activities, maintaining employment and settling debts. Finally, the liquidation procedure (art. L640 et seq.) is applied in cases of insolvency where recovery is manifestly impossible.

It should be noted that the subjective scope of these procedures is the entrepreneur, whether natural or legal person; the insolvency of the non-business debtor has a separate regulation. It is worth noting, however, that French law does not discriminate in its procedures because of factors such as the number of employees or the size of the debt.

There is a place in the conciliation procedure for the figure of the conciliator or, in this case, the insolvency conciliator. The use of this name is correct in this case, since art. L611-7 states that his task is to promote an agreement between the debtor and the creditors but adds that he may also make any proposal relating to the safeguarding of the business, the continuation of economic activity and the maintenance of employment. In other words, the law not only allows this figure to manage the conflict and facilitate the agreement, but also allows you to make more specific proposals during the negotiations, which may include a total or partial transfer of the company. If we compare it with Spanish law, French law gives this figure many of the powers attributed to restructuring experts and experts in the collection of takeover bids.

If the debtor requests this procedure, the intervention of the conciliator is obligatory and is chosen by the judge, although it can be proposed by the debtor. In this sense, it should be noted that the objective prerequisite of this procedure is that the debtor is in legal, economic or financial difficulties, proven or foreseeable, and that he has not been in a situation of non-payment for more than forty-five days. (Article L611-4). This concept is more diffuse than the already broad concept of probability of insolvency used in other legal systems and may conflict with the requirement of the safeguard procedure. For this reason, the law provides that even if the debtor has initiated the safeguard procedure, the court must urge him to request the opening of the conciliation procedure if the debtor's situation does not reveal difficulties that he cannot overcome (Art. L621- 1). This mention is noteworthy because it shows a clear commitment on the part of the legislator to conciliation in cases where it considers that the debtor's situation leaves him some room for maneuver.

In parallel with the German system, the French code gives the conciliator the power to request any information from the debtor. There is also a duty of confidentiality and an obligation to report regularly to the court (although, unlike German law, there is no time limit).

Turning to the less clear part of the act the chapter does not regulate any legal regime for the conciliator, nor any positive requirements to be able to exercise this function. Only a series of incompatibilities and prohibitions are mentioned, such as the fact of having received any kind of remuneration from the debtor or one of the creditors during the previous twenty-four

months. But nothing is said about his training, despite his extensive duties. The rule is also silent on the procedure, except that it empowers the conciliator to inform the judge that it is not possible to reach an agreement, thus ending the procedure.

Although the regulation of this figure in France is perhaps the most complete of our neighbouring countries, its regulation still leaves a deadlock with regard to the legal regime of the professional, whether he is called a conciliator or a bankruptcy mediator. It is noteworthy, however, that this figure is not framed in a special abbreviated procedure or intended for small businesses, but rather that it marks the state of solvency of the debtor as an application criterion. Although this may be the key to the success of the arrangement, it remains a very difficult criterion to determine in practice.

3 CONCLUSIONS

Despite attempts to harmonize insolvency law between Member States, differences in the design of pre-bankruptcy and bankruptcy procedures are justified by different economic, legal and institutional realities. With the Restructuring and Insolvency Directive, procedures have been redesigned to allow debtors and creditors to resolve their insolvency problems through flexible tools that facilitate direct or assisted negotiation of a possible agreement before resorting to liquidation procedures.

The European model is based on the recognition of alternative dispute resolution methods such as negotiation and mediation in the field of bankruptcy. Spain, Italy, Germany and France have tried to set up institutions that encourage the parties to reach possible agreements, but recognition in national legislation has not been fully developed, which in practice can create uncertainty and mistrust, as has already happened with the previous bankruptcy rules.

The most striking thing about the analysis carried out is that none of the laws regulates the legal regime of the bankruptcy mediator/negotiator/conciliator. In this sense, the vague reference in the Spanish law, which equates the mediator with the restructuring expert, turns out to be the most complete norm in terms of legal regime. This only highlights the need for a complete regulation of this figure, focusing on three aspects that these regulations overlook: their training, their comparison with the civil and commercial mediator and the liability regime.

Another striking finding is the disparity in the scope of application of the bankruptcy mediator/negotiator/conciliator. While some regulations provide for them in specific procedures, others provide for them in a general way. This makes it difficult to determine when the intervention of this professional is most appropriate. It is therefore necessary to clarify the scope of action of this figure in order to decide between: a professional who can help in any type of crisis management procedure, or an essential figure on which a specific procedure is based.

In any case, it will be the out of court and judicial practice in this matter that will demonstrate the effectiveness and efficiency of the European legislator's desire for harmonization.

4 BIBLIOGRAPHY

ÁLVAREZ MARTÍNEZ, G. I (2023) El Procedimiento especial para microempresas. Revista de Derecho Mercantil, nº 329.

BOLDÓ RODA, C. (2021) El acuerdo extrajudicial de pagos. Derecho Concursal y segunda optunidad. Tirant lo Blanch.

CAMPUZANO LAGUILLO, A.B. (2023.) El estado de insolvencia. La Probabilidad de insolvencia. Estudios de Derecho de Sociedades y de Derecho Concursal. Libro en homenaje al profesor Jesús Quintero González. Universidad de Valladolid.

DE LA VEGA, J. (2012) Mediación civil y mercantil: la ley 5/2012, de mediación en asuntos civiles y mercantiles, y la jurisprudencia del tribunal supremo sobre mediación. cuestiones de la mediación concursal. Revista Crítica de Derecho Inmobiliario, nº 733.

EMBID IRUJO, J. Mª. (2015) Breve esbozo sobre el significado de la resolución extrajudicial de conflictos en el moderno Derecho Mercantil» en Mediación Mercantil. BOLDÓ RODA C (Dir.), ANDREU MARTÍ. M. (Coord.).Tirant lo Blanch. Valencia.

FEDELE, R. (2019) Gli strumenti di regolazione della crisi: gli accordi, en aa.vv., Codice della crisi d'impresa e dell'insolvenza. Commento al decreto legislativo 12 gennaio. N.14 (dir. Giorgetti), Pisa.

GARBAYO BLANCH, J.(2021) La Directiva (UE) 2019/1023: Marcos de Reestructuración Prevenctiva: Facilitación y Consecuencias. En La directiva de la (UE) 2019/1023 sobre insolvencia (Estudios desde diferentes ordenamientos). Tirant lo Blanch.

GARNACHO CABANILLAS, L. (2023) Italian model for transposition of the community directive on preventive restructuring on companies. En Revisa E- Mercatoria, nº 22.

GONZALO QUIROGA, M.

- (2021) Marco regulatorio comunitario en materia de mediación En Práctica de mediación: España. Tirant lo Blanch México.

- (2023). La inteligencia artificial en el arbitraje internacional 2.0. Oportunidades y desafíos en un futuro que ya es presente. Cuadernos de derecho transnacional, 15(2) 516-550.

GONZALO QUIROGA, M.& SUÑEZ TEJERA, Y. (2024) Innovación y resolución de conflictos: la intersección entre las nuevas tecnologías, la inteligencia artificial y los métodos alternativos. ONBC.

LÓPEZ SAN LUIS, R. (2015) El tratamiento del sobreendeudamiento de los particulares en Francia. Revista de Derecho Civil, nº 2.

PACCHI, S.,

- (2014) Las soluciones negociadas como respuesta a la insolvencia empresarial (reformas en el Derecho Comparado y crisis económica): La solución dictada por el legislador italiano», en GARCÍA-CRUCES (Dir.), AA. VV., en Las soluciones negociadas como respuestas a la insolvencia empresarial, ed. Thomson Reuters-Aranzadi, Cizur Menor.
- (2022) La legislación concursal italiana de frente a la directiva UE2019/1023", en aa.vv., El Derecho Concursal y la transposición de la Directiva sobre Reestruct¬ración Preventiva (dir. Garnacho y Arias), Wolters Kluwer.

ROJO FERNÁNDEZ, A.J. (2023) Los problemas de la armonización de la legislación concursal española. Revista de derecho mercantil,nº.328.

SEPÚLVEDA, D. P,(2012) La Negociación Cooperativa, una Aproximación al Modelo Harvard de Negociación», en Revista Chilena de Derecho y Ciencia Política, nº3.

SKAURADSZUM, D. (2022) Challenges of the transposition on the Directive on preventive restructuring frameworks in German Law. El Derecho Concursal y la transposición de la Directiva sobre Reestruct¬ración Preventiva (dir. Garnacho y Arias), Wolters Kluwer.

SOTELO, H (2016) La mediación concursal, especialidad de la medicación civil y mercantil. Icade: Revista de la Facultad de Derecho,nº 98.