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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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MEDIATION IN INSOLVENCY LAW: A COMPARATIVE STUDY REGARDING THE EUROPEAN UNION AND BRAZIL

by **Luiz Gustavo BACELAR**[1], Lawyer specializing in the corporate legal area, registered at the Brazilian Bar Association, and the Portuguese Bar Association ; Professor at the Institute of Education and Research of São Paulo (Insper), University of Cascavel/PR and FIA – São Paulo

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The Mediation in Insolvency Law and its comparative study, regarding the European Union, starts in this study at the new Brazilian Insolvency Law introduced and privileged mediation as an important mechanism to assist debtors and given in the search for the best collective solution for dispute resolution, including through digital media, such as the ODR - Online Dispute Resolution.

In this scenario, this presentation will demonstrate EU and Brazilian main bullets of the mediation in insolvency.

§ 1 – OVERVIEW OF MEDIATION IN BRAZILIAN INSOLVENCY LAW AND COMPARATIVE LAW

Following EU legislation, the new Brazilian Insolvency Law introduced and favored mediation as an important mechanism to help debtors and creditors in finding the best collective solution for resolving disputes, including through digital means such as ODR – Online Dispute Resolution.

Restructuring and insolvency processes are expensive, inflexible and bureaucratic.

To break this paradigm, the most modern insolvency laws started to encourage negotiation in restructuring and insolvency processes, as a means of avoiding bankruptcy.

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According to the economic analysis of law, the insolvency procedure should be a means to articulate the negotiation between parties with conflicting interests, reducing transaction costs, time and informational asymmetries.
In this context, mediation becomes an important instrument to increase efficiency of the restructuring and insolvency processes.
The process of mediation is completely controlled by the parties since the mediator is only a medium to facilitate the process of reaching an amicable settlement. A mediator's suggestions are not binding on either of the parties. Mediation as a form of Alternate Dispute Resolution (ADR) and has also been recognized by the EU and Brazilian courts while pronouncing judgments.
Alternative dispute resolutions (ADR), denotes a wide range of dispute resolution processes and techniques that parties can use to settle disputes, with the help of a third party.
They are used for disagreeing parties who cannot come to an agreement short of litigation.
It is a tool to help resolve disputes alongside the court system itself.
Mediation is a form of Alternate Dispute Resolution (ADR) in which a third neutral party attempts to assist the disputed parties in reaching an amicable settlement and a mutually acceptable a mutually acceptable agreement.
It is the most uncomplicated method of dispute resolution, where the third-party acts as a mediator to resolve the dispute between the parties by using the means of communication and negotiation.
It is the intervention of an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute[2].
The process of mediation is completely controlled by the parties and the mediator is only a medium to facilitate the process of reaching an amicable settlement.
A mediator's suggestions are not binding on either of the parties.
It avoids the confrontation between the parties that is inherent to judicial proceedings. The parties are invited to initiate or summarize dialogue and to avoid confrontation.

A) Resolution Disputes in Comparison

The resolution of the dispute depends on the parties agreeing an agreement; if they cannot agree, they can proceed to court. The mediator does not impose a solution. It is faster and cheaper than a judicial procedure. Can use technology and online techniques to facilitate the resolution of disputes between the parties, which makes the procedure faster, and more effective?

[2] Ch. W. MOORE, *The Mediation Process: Practical Strategies for Resolving Conflict.* 4 ed. EUA: John Wiley and Sons, 2014.

Brazil: Conciliation, mediation, and other consensual conflict resolution methods should be encouraged by judges, lawyers, public defenders, and members of the Public Ministry, including during the course of judicial proceedings (Law 13.105/2015).

France: offers a negotiated solution, an agreement of the debtor with its main creditors. It provides for 4 more or less negotiated solutions: conciliation; safeguard as creditors committees; accelerated financial safeguard and accelerated safeguard.

Spain: *acuerdo extrajudicial de pago* – « concursal mediation ». Extrajudicial procedure outside the intervention of the Judiciary, initially conceived for small companies and non-traders as an alternative to the solution in concursal, tending to remove, in pre-concursal seat, the insolvency (lei 25/2017).

Portugal: establishes a series of procedures to promote the out-of-court reorganisation of companies, - by concluding an agreement between the company and all (or some) of its creditors, representing at least 50% of the total debt of the company, and enable it to recover its financial situation (178/2012).

We can conclude that mediation in insolvency is beneficial because it brings benefits like celerity, efficiency, economy, extraterritorial efficacies, and legal security.

B) Definition of Mediation in the Comparative Law

Mediation is defined as a consensual means of dealing with disputes, in which an impartial third-party acts to facilitate communication between those involved, allowing them, based on the perception of their respective situations, to envision productive solutions as a solution to their conflict.
The National Council of Justice conceptualizes the institute of mediation as:

> « [...] a negotiation facilitated or catalyzed by a third party. Some authors prefer more complete definitions, suggesting that mediation is a self-composition process whereby the parties to the dispute are assisted by a neutral third party to the conflict or by a panel of people with no interest in the cause, to arrive at a composition ».[3]

In summary, the judicial reorganization is the process by which the debtor proposes the renegotiation of its debts through a reorganization plan, through which it will propose various means of reorganizing its business and restructuring its liabilities, and such plan shall be approved by the qualified majority of your creditors.

[3] Conselho Nacional de Justiça (CNJ), 2021: available at https://www.cnj.jus.br. Access on 20 dec. 2021.

The judicial reorganization proposes to balance the interests of the debtor, creditors and even third parties, enabling and requiring cooperation between all, in order to deliberate the means of reorganization at the General Meeting of Creditors that results in an approved plan, in a real negotiation environment, making its nature compatible with the institute of mediation.

Thus, mediation also emerges as an important mechanism for promoting the interest of all those involved in business recovery, which makes clear the synergy between the business recovery institutes and that of mediation.

Marcelo Barbosa Sacramone's collection is nothing else:

> « In judicial reorganization, conciliation and mediation are important to help debtors and creditors in the search for the best collective solution to overcome the economic crisis that affects business activities and as a way to obtain greater satisfaction of credits by creditors ».[4]

In Brazilian legislation, it is important to emphasize that the Code of Civil Procedure, applied as a subsidiary to the Insolvency Law Microsystem (art. 189 of Law 11.101/2005), provides in its art. 3, § 3, that « conciliation, mediation and other methods of consensual conflict resolution shall be encouraged by judges, lawyers, public defenders and members of the Public Ministry, including in the course of the judicial process ».

However, we cannot forget that, unlike the processes governed by the Code of Civil Procedure, usually bilateral in nature, in the recovery environment, the solution of the debtor's business crisis implies the solution of conflicts between multiple parties and interests.

Section II-A introduced by Law 14,112 of 2020, affirmed the use of mediation and conciliation in reorganization proceedings, although since the advent of the CPC in 2015, such alternative methods of conflict resolution were already encouraged by numerous judges, notably working in courts bankruptcy and judicial reorganization specialists.

We reinforce that, even before the enactment of Law 14.112/2020, Statement 45, approved in the 1st Conference on Prevention and Extrajudicial Dispute Resolution of the Federal Justice Council, already established that mediation and conciliation are compatible with judicial, extrajudicial and the bankruptcy of the entrepreneur and the business society, as well as in cases of over-indebtedness, subject to legal restrictions.

Likewise, the National Council of Justice, through its Recommendation 58, proposed the use of mediation, in order to assist in the resolution of any and all conflicts between the entrepreneur/company, in reorganization or bankrupt, and its

[4] M. B. SACRAMONE, *Comentários à Lei de Recuperação de Empresas e Falência*, São Paulo: Saraiva Jur, 2021.

creditors, suppliers, partners, shareholders and third parties interested in the process.

It is thus demonstrated that the purpose of judicial reorganization is to ensure the debtor's economic and financial crisis is overcome, creating a favorable environment for debtors, creditors and other interested parties to reconcile their respective interests, aligning the directions of the business, of their respective assets and payment of debts, through a restructuring plan to be analyzed, debated and approved in a democratic manner through the deliberation of the creditors, thus satisfying the interest of all involved, as well illustrated by Joice Ruiz Bernier:

> « By allowing the debtor to recover from economic and financial problems while keeping the company in business, it is possible to guarantee the satisfaction of the interests of creditors, suppliers, workers, among others more interested in the permanence of the economic and/or social relationship with the company, than with the immediate satisfaction of its revenue ».[5]

Mediation is defined as a consensual means of dealing with disputes, in which an impartial third-party acts to facilitate communication between those involved, allowing them, based on the perception of their respective situations, to envision productive solutions as a solution to their conflict.

The National Council of Justice conceptualizes the institute of mediation as:

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In summary, the judicial reorganization is the process by which the debtor proposes the renegotiation of its debts through a reorganization plan, through which it will propose various means of reorganizing its business and restructuring its liabilities, and such plan shall be approved by the qualified majority of your creditors.

The judicial reorganization proposes to balance the interests of the debtor, creditors and even third parties, enabling and requiring cooperation between all, in order to deliberate the means of reorganization at the General Meeting of Creditors that results in an approved plan, in a real negotiation environment, making its nature compatible with the institute of mediation.

Thus, mediation also emerges as an important mechanism for promoting the interest of all those involved in business recovery,

[5] J. R. BERNIER, *Administrador Judicial na Recuperação Judicial e na Falência*, São Paulo: Quartier Latin, 2016.

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>
> This is because keeping the company in business can increase the chances of receiving its credits in full - the value of the company in activity, measured, among other means, by the discounted cash flow, may be substantially greater than the company's value for forced liquidation, which would increase the chances of receiving your credit in full. In other words, the goods organized for the exercise of business activity acquire a surplus value that, in general, is lost in the case of simple liquidation; and the restoration of the company in economic and financial crisis will only be possible with the consideration of the interests of the company, workers and other creditors, in favor of the benefit of the community".[7]

In this context, issues such as conciliation, mediation and arbitration deserve in-depth studies not only in the context of Brazilian civil procedural law, but in other areas such as insolvency law. As Cassio Scarpinella points out:

> « [...] The specialists of these 'alternative' means seek to identify more or less appropriate means for resolving the various conflicts, varying the techniques according to the vicissitude of the conflict or, even combining them, it seems to be more correct to treat them as means suitable for conflict resolution ».
>
> Likewise, the issue of access to justice « cannot be studied within the narrow limits of access to existing judicial bodies. It is not just about enabling access to justice as a state institution, but about enabling access to a fair legal order ».

It should be noted that, from the granting of the judicial reorganization processing, creditors now have full prominence, as they can widely oversee the process by requesting information to the Trustee or the debtor, mainly through the analysis of the documents contained in the records, of the mandatory monthly accounting information.

[7] J. R. BERNIER, *Administrador Judicial na Recuperação Judicial e na Falência*, São Paulo: Quartier Latin, 2016.

Furthermore, the protagonism of creditors resides mainly in their ability to approve or reject the restructuring proposal presented by the debtor, which can occur tacitly, that is, without presenting an objection to the proposed plan or, through the vote in the meeting or adhesion term, a situation in which the judicial reorganization plan will be discussed and negotiated, in order to meet and compose the interests of all those involved.

Negotiation between creditors and debtors is truly the central pillar in the judicial reorganization process. And the solution found by market agents to overcome the debtor's crisis must be respected. That is why the existence of the principle of Sovereignty of Decision of Creditors is affirmed in the General Meeting of Creditors.

Creditors must decide in a sovereign manner in relation to the economic feasibility of the judicial reorganization plan, approving, modifying or rejecting the proposal and the means of uplift presented by the debtor.

§ 2 – THE WILL FOR BUILDING CONSENSUS AND THE BUSINESS RECOVERY LAW.

The system introduced in the reform of the Bankruptcy and Business Recovery Law establishes through its art. 20-B that mediation may be proposed in advance, that is, before the request for judicial reorganization, or incidentally in processes already in progress, being admitted in cases of disputes between the debtor's partners and shareholders, as well as in litigation that involve creditors not subject to judicial reorganization or even involve non-bankruptcy creditors.

The list established by the aforementioned art. 20-B points out the following possibilities for carrying out such non-adversarial methods, which, it should be noted, do not require the existence of an ongoing judicial process for its establishment:

> « (i) in disputes involving creditors who are not able to be subject to judicial reorganization and in the pre-procedural and procedural stages of disputes between partners and shareholders of a company in difficulty or in a judicial reorganization process;
> (ii) in conflicts involving municipal, district, state or federal public entities, and/or concessionaires or permit holders of public services in judicial recovery and regulatory bodies;
> (iii) in the event of out-of-court claims against companies undergoing judicial reorganization in force in a state of public calamity, in order to allow the continuity of the provision of essential services;
> (vi) prior to the filing, for the negotiation of debts and forms of payment between the company in difficulty and its creditors. In the latter case, companies that meet the

> requirements for judicial reorganization are entitled to obtain urgent precautionary relief ».

It remains clear that, despite art. 20-B of Law 11.101/2005, specifying some situations in which mediation may be used in company recovery processes, it should be clarified that these are just examples, given that there is no impediment to the use of other « hypotheses in which the matters are available to the parties and do not affect the rights of third parties ».

It becomes noticeable that, even with the enunciation of norms of mandatory guidelines, as Antonio Evangelista de Souza Netto and Samantha Mendes Longo well state, there are no specific and detailed rules on the use of mediation or other adequate methods of conflict resolution, and the judicial reorganization process « has essentially a negotiating nature, as creditors and debtors must negotiate and adjust the new forms of payment of debts ».

These authors also focused on the study of bankruptcy recovery processes through mediation, such as the case of Oi and Livraria Saraiva. In relation to the Bookstore:

> This mediation made it possible to adjust the judicial reorganization plan before its deliberation at the meeting, in order to meet the needs of creditors, according to the interests of each class, without neglecting the financial reality of the company.

In other words, the institute under study is an important mechanism to assist in the negotiation of the judicial reorganization plan, increasing its chances of approval by the General Meeting of Creditors without the need for successive suspensions of the meeting, so that debtor and creditors can agree, together.

Such hypothesis was already implemented in an innovative way by the 2nd Bankruptcy and Judicial Reorganization Court, in the aforementioned judicial reorganization of Livraria Saraiva, which, through mediation hearings, allowed creditors to manifest themselves before the reorganization plan was put to a vote by the Conclave Assemblear.

Likewise, mediation can be an important instrument for negotiating an extrajudicial recovery plan, so that the quorum for its ratification is reached.

Likewise, the mediation procedure is effective in resolving conflicts arising in the hypothesis of establishing consolidation in a procedural or substantial manner.

In addition, mediation can be used to resolve conflicts that arise in the execution of the judicial reorganization plan, which in its wake may contain a clause, which must be express, that allows for the resolution of disputes through this means of conflict resolution, it being certain that, those that arise, after the biennial period, provided for in the caput of art. 61 of Law 11.101/2005,

shall be mediated in accordance with the rules established by arts. 16 and 23 of the Mediation Law.
It should be noted that the plan may provide for the adhesion of creditors to the proposal contained therein, however, there is no way for it to previously stipulate any change in the value or original conditions of payment of the credit, thus subsuming the rule outlined in art. 45, § 3, of Law 11.101/2005.

CONCLUSION

It is therefore concluded, as presented, by the indisputable relevance of mediation to the judicial reorganization process, both previously and during said process, aiming, thus, for a more peaceful and truly committed solution in view of the double need to guarantee creditors the right to receipt of their amounts due and to ensure that the debtor can maintain and continue their activities so dear to the continuation of the country's economic development.
Although Law 11.101/2005 exemplifies some hypotheses for the use of mediation, there is no impediment for this institute of conflict resolution to be used in order to avoid costs and speed up insolvency proceedings, always in order to reach a solution more suited to all interested parties, making these achievements more democratic and efficient.