

## ALTERNATIVE DISPUTE RESOLUTION IN INSOLVENCY DISPUTES

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**Summary.** *The prevailing insolvency dispute resolution mechanism is adjudication, which has significant shortcomings: the irresolvable common pool problem, disruption of business, and high litigation costs. The question is therefore whether insolvency disputes can be settled without (some extent of) adjudication. Namely, through alternative dispute resolution (ADR), which has become a counterweight to adjudication in insolvency disputes. In contrast to adjudication, ADR makes it possible to avoid the intrinsic shortcomings of adjudication. Firstly, it aims to reach a peaceful settlement resulting in an agreement between the debtor and the creditors; secondly, it aims to reconcile the principle interests in insolvency cases (continuation of the debtor's business and satisfying the creditors' claims); and thirdly, the dispute is not resolved in public. The major pro-debtor countries (the United States of America, France) have introduced ADR mechanisms for insolvency disputes which will serve as the foundation for the development of ADR in insolvency disputes in other countries.*

**Keywords:** *insolvency, insolvency disputes, alternative dispute resolution, adjudication, peaceful settlement, restructuring.*

## 1. Introduction

Insolvency<sup>1</sup> disputes are about money. When a debtor is faced with financial problems, creditors want to be paid what they are owed. An insolvency case is commenced and creditors compete for the limited pool of assets (estate), which is almost never enough to pay everyone (the common pool problem). Consequently, the debtor is liquidated, which means the end of the business, jobs and tax payments. In terms of negotiation, it is a lose-lose situation.

The resolution of insolvency disputes has long been limited to the courts. This is because adjudication ensures equality of the creditors' claims (*pari passu*), fair collection and distribution of the debtor's assets, and prompt liquidation of the insolvent entity. However, this perception has changed over the past few decades, when more insolvency disputes have been resolved not only by adjudication, but also by ADR. Generally, the legislator chooses either a pro-debtor or a pro-creditor insolvency regime.<sup>2</sup> ADR encourages the parties of the dispute to reach an agreement by negotiation and avoid adjudication.

The objective of this research is to analyze which ADR models are used for insolvency disputes and how compatible they are with the main principles of insolvency law. Although ADR (in various forms) has been accepted in insolvency disputes, questions arise over the extent to which the parties are free to agree on the conditions of debt payments, as well as what the requirements are for such agreements. How can ADR ensure a fair balance between the parties in such disputes?

The objectives are:

1. To analyze the emergence and development of ADR in insolvency disputes, as well as the main differences between adjudication and ADR.
2. To examine the ADR mechanism for insolvency disputes in France and the United States.
3. To analyze the reconciliation of collective and individual interests in insolvency disputes as well as application of the main principles of contract law in ADR for insolvency disputes.

## 2. The Development of ADR in Insolvency Disputes

In response to the increase in civil disputes and the socioeconomic changes taking place, mediation began to be used to resolve community and family disputes in the United

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1 In this article, the term "insolvency" covers all situations when a debtor is unable to repay debts as they mature ("cash-flow insolvency"), and/or when liabilities exceed the value of assets ("balance-sheet insolvency"). It shall also cover situations where the purpose of dispute resolution is the rescue or reorganization of the debtor and/or debt adjustment. The term "insolvency dispute" shall refer to all disputes between a debtor and creditors related to repayment of a debt where insolvency law is applicable.

2 Lechne, R. 2002. Waking from the Jurisdictional Nightmare of Multinational Default: the European Council Regulation on Insolvency Proceedings, *Arizona Journal of International and Comparative Law*. 19(3): 975-1024, 977.

States in the 1960s.<sup>3</sup> Though it gained early success, it took a while for it to be used in insolvency disputes. The watershed moment was the Pound Conference, where Harvard Professor Frank Sander introduced the “multi-door courthouse” and encouraged looking for different dispute resolution methods. Instead of walking through the door of a courthouse and commencing adjudication, the parties should look for “alternative doors” which would lead to the same result (resolution of the dispute). He emphasized that there is “a rich variety of different processes, which, I would submit, singly or in combination, may provide far more ‘effective’ conflict resolution.”<sup>4</sup> This quote captures the three basic pillars of ADR. Firstly, different “doors” (procedures) offer different dispute resolution mechanisms. Secondly, those mechanisms can be used “singly or in combination”, meaning that different ADR methods may be used for resolution of the same dispute (and ADR can intertwine with adjudication). Thirdly, it must be effective.

ADR (mediation) was introduced for insolvency cases in 1986, when the Bankruptcy Court for the Southern District of California established the mediation program.<sup>5</sup> A few years later, mediation was used in the United States when Greyhound Lines Inc. went bankrupt and set up a pre-reorganization mediation plan for thousands of claimants who had brought personal injury and property damage claims against the company in connection with traffic accidents involving Greyhound vehicles.<sup>6</sup> This case is a good example of multi-party dispute resolution in which the debtor dealt individually with each creditor.

The ADR procedure in the Greyhound dispute consisted of three separate stages. First, the creditor had to complete a claim form for lost wages, medical bills and other damages (the “offer and exchange stage”). Second, the parties negotiated damages. If the creditor refused to participate in this stage or a final decision was not reached, the parties engaged in mediation for 60 days. Third, if the parties failed to reach an agreement, they had to recourse to arbitration. Half of the claims were resolved in the first stage.<sup>7</sup> This is an example of a win-win negotiation which made it possible to resolve the case promptly, avoid adjudication and litigation costs, reconcile the interests of the parties, and end the dispute peacefully.

In light of the successful examples of ADR, the growing number of bankruptcy cases, and increasing litigation costs, a legal regulation for ADR was established. A major legislative leap towards the use of ADR in insolvency cases was the adoption of the Alternative Dispute Resolution Act in 1998, which required that each federal district court authorize ADR in “all civil actions, including adversary proceedings in bankruptcy.”<sup>8</sup> For instance, in 2004 the Bankruptcy Court for the District of Delaware

3 Welsh N. A. 2010. You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation, Penn State Law Legal Studies Research Paper. 7: 427-461, 431.

4 McAdoo, B., Welsh. N. A., 2005. Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, Nevada Law Journal. 5: 399-431, 402.

5 *Supra* note 3, 441.

6 *Ibid.*

7 Desgrosseilliers. M. L., Shelter, G. 2009. The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy Norton Journal of Bankruptcy Law and Practice. 18(1):19-64, 32.

8 Section 654 of the Alternative Dispute Resolution Act of 1998 (28 U.S.C.A).

established that before certain adversary proceedings, the parties had to attempt to reach an agreement by mediation. As a result, ADR was used in 60 percent of reorganization cases in the United States from 2000 to 2011.<sup>9</sup>

The European Commission acknowledged the need for a new insolvency dispute resolution mechanism in the Proposal for a Directive on Insolvency, Restructuring and Second Chance, which will be the basis for the forthcoming Directive on Harmonization of Insolvency Regulation throughout the EU Member States.<sup>10</sup> This piece of legislation will encourage Member States to look for new ways to rescue businesses and avoid insolvency adjudication. Furthermore, compared with the previous regulation, the new European Insolvency Regulation<sup>11</sup> has broadened the scope of regulation and is applicable to pre-insolvency dispute resolution.<sup>12</sup>

ADR has gradually become accepted among the EU Member States. This is in contrast to ADR in the United States, where it emerged not from case law, but through legislation. A number of EU Member States have introduced pre-insolvency dispute resolution methods which are primarily aimed at rescuing the debtor.<sup>13</sup> For example, French insolvency law provides for two special procedures: the *ad hoc* mandate (*mandat ad hoc*) and conciliation.<sup>14</sup> In Germany, the insolvency plan procedure (*Insolvenzplanverfahren*)<sup>15</sup> enables the debtor and the creditors to conclude an insolvency plan (*Insolvenzplan*) by negotiation.

The growing use of ADR in insolvency disputes has been coupled with the need to reduce the number of insolvency cases and ensure stability in the market (the business rescue culture). Insolvency law is one of the key elements for a well-functioning system of civil and corporate law, and it has significant impact on the entire economic structure.<sup>16</sup> In a socioeconomic sense, preventing a company from going bankrupt (winding up) when it is facing financial difficulties provides the opportunity to continue employment, efficiently utilize all available sources (natural resources, technical equipment) and

9 International Insolvency Institute, International ADR 2.0: Big Solutions for Big Problems [interactive]; [accessed 9 November 2017]. <https://www.iiiglobal.org/sites/default/files/transnationalalternativesgrowingrolesofalternativedisputeresolutionintransnationalinsolvencycases.pdf>.

10 European Commission Proposal for a Directive on Insolvency, Restructuring and Second Chance Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU [interactive] 2016 COM [accessed 8 November 2017]. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0723>>.

11 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141.

12 *Ibid.*, Art. 1(1): *This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation.*

13 European Law Institute, Rescue of Business in Insolvency Law, [interactive] 2017 [accessed 14 October 2017]. <[http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Instrument\\_INSOLVENCY.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf)>.

14 Art. L611-1 L611-16 of the *Code de commerce*. [interactive] [accessed 14 November 2017]. <<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379>>.

15 Art. 217-234 of *Insolvenzordnung*. [interactive] [accessed 14 September 2017]. <<https://www.gesetze-im-internet.de/inso/>>.

16 Wessels, B., Makell, B. A., Kilborn, J. J. 2009. *International Cooperation in Bankruptcy and Insolvency Matters*. Oxford: Oxford University Press, 2.

preserve relationships, such as with small suppliers of goods and buyers/customers of products and services.<sup>17</sup>

In general, ADR has witnessed a major shift in insolvency disputes over the past few decades. It has become a counterweight to adjudication and has gained recognition as a suitable mechanism for addressing the difficulties of insolvency disputes by allowing the parties to negotiate debt repayment instead of filing a lawsuit.

### 3. The Main Advantages of ADR in Insolvency Cases

ADR differs from adjudication. ADR is basically any process designed to resolve a legal dispute by compromise with third-party assistance and without (significant) involvement of the judiciary.<sup>18</sup> Various forms of ADR exist, but the participation of a third party (a conciliator, mediator or negotiator) is usually indispensable. The success of ADR (resolution of the dispute) depends primarily on the negotiation skills and good faith of the parties. This is in contrast to adjudication, where the court conducts proceedings and the litigants must comply with strict procedural laws which may hamper creativity and the effectiveness of dispute resolution.

Firstly, ADR increases the likelihood of a win-win scenario and decreases the likelihood of a lose-lose situation. With ADR, both parties satisfy their principal claims by mitigating their demands to some extent (at least in the short term). ADR is based on negotiations between the parties, supervised by a third party. Negotiations make it possible to “separate the people from the problem”<sup>19</sup> and come to a mutual decision on the problem without (almost) any of the constraints established by law. Adjudication, alas, is based upon a “winner/loser” paradigm,<sup>20</sup> meaning that one of the parties ends up losing the case. This can sever commercial relations and trustworthiness between business partners. Sometimes, adjudication results not only in the financial, but also the psychological depletion of the parties.<sup>21</sup>

Secondly, ultimate resolution of the dispute is not the main goal in some cases. ADR is often not binding upon the parties because neither the mediator nor the parties are authorized to resolve the dispute.<sup>22</sup> Some scholars feel that ADR promotes settlement of the dispute<sup>23</sup> rather than reaching an ultimate resolution (similar to a *res judicata* decision in court). In other words, ADR allows the parties to assess their positions and consider the final resolution of the dispute in the future: “Even if mediation fails to bring a settlement immediately, the shift in the parties’ attitudes regarding their own positions can lead to

17 *Supra* note 16.

18 Woodward, W. J. Jr. 1999. Evaluating Bankruptcy Mediation, *Journal of Dispute Resolution*. 1999(1):1-28, 6.

19 Kelly, E. J., Kaminskiene, N. 2016. Importance of emotional intelligence in negotiation and mediation, *International Comparative Jurisprudence*. 2:55-60, 55.

20 Tennille, B. F., Applebaum L., Nees, A. T. 2010. Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases, *Pepperdine Dispute Resolution Law Journal*. 11(35): 1-90, 66.

21 *Supra* note 3, 439.

22 Esher, J. A. 2009. Alternative Dispute Resolution in U.S. Bankruptcy Practice, *University of Massachusetts Law Review*. 4: 76-89, 79: “the mediator is not authorized to render a decision concerning the outcome of the dispute.”

23 *Supra* note 20, 59.

a settlement in the future.”<sup>24</sup> ADR encourages the parties to bargain and find a mutual solution.<sup>25</sup> In adjudication, a final and binding decision must be rendered in each case. When an insolvency (bankruptcy) case is commenced, it usually results in the winding up of the debtor and triggers the irresolvable common pool problem.

Thirdly, ADR preserves a “normal” relationship between the parties.<sup>26</sup> It is usually a private procedure rather than a public one, allowing the parties to avoid publicity of the dispute. This is particularly valuable incentive in business relations (securing commercial secrets and other relevant information). In contrast, all disputes that require adjudication become public (except in select cases), and the court, as a general rule, has to allow public access to proceedings.

Fourthly, ADR is flexible<sup>27</sup>—it allows the parties to reach an agreement through persuasion, and promotes “party-driven solutions.”<sup>28</sup> The parties can decide upon the procedural and substantive rules of dispute resolution. In adjudication (especially with insolvency cases), the parties are bound by strict procedural rules from which no derogation is permissible. The rules for civil (insolvency) proceedings may decrease the effectiveness of fast dispute settlement.<sup>29</sup>

Overall, ADR makes it possible to avoid some of the inherent shortcomings of adjudication (e.g., cost, publicity, lack of flexibility) in insolvency disputes. This is valuable because the debtor’s assets are not wasted on litigation, trustee salaries and other costs. The commencement of an insolvency case reveals the debtor’s problematic financial situation and hinders business. ADR provides strong incentives for both parties to engage in fast and efficient dispute resolution and look for a common business solution.

#### 4. The Application of ADR in Insolvency Disputes

ADR is an alluring way to resolve business disputes. Yet to what extent can it be used for insolvency cases? Insolvency disputes distinguish by public interest, involvement of numerous persons, ranking of claims, and strict rules for distribution of the debtor’s assets. Is ADR a suitable way to reconcile these differences?

A recent comparative study reveals that there are three ways for resolving insolvency disputes:

- *workouts* (an agreement between the debtor and the creditors on a solution for the debtor’s financial problems);
- *pre-insolvency proceedings* (rescuing the debtor’s business with minimal involvement of the judiciary or none at all);
- *formal* (restructuring and insolvency) *proceedings*.<sup>30</sup>

24 Davis, A. 2009. Moving from Mandatory: Making ADR Voluntary in New York Commercial Division Cases, *Cardozo Journal of Conflict Resolution*. 8: 283-304, 293.

25 *Supra* note 3, 436.

26 *Supra* note 20, 59.

27 Blake, S., Browne, J., Sime, S. (2016), *A Practical Approach to Alternative Dispute Resolution*. Oxford: Oxford University Press, 6.

28 *Supra* note 20, 3.

29 *Supra* note 27, 6.

30 *Supra* note 13.

All three methods aim to resolve insolvency (or probable insolvency), but their means and goals differ considerably. Even though ADR may play an important role in each of these mechanisms, the most significant application of ADR is in pre-insolvency proceedings, which makes it possible to avoid adjudication. Some key features of these mechanisms are highlighted in this article.

### *Workouts*

In workouts, the debtor is still solvent and negotiates with creditors on the repayment of debt(s). The debtor's insolvency is probable, but not imminent.<sup>31</sup> The creditors are therefore not in danger of losing payment of the debt. A stay of enforcement against the debtor is not applicable because the settlement does not usually involve all of the creditors, and the debtor is continuing business activities.

Workout agreements involve different means to resolve the dispute, for instance: re-financing, changes to the debt contract, a property/property swap, a property/equity swap, or an equity/equity swap. In other words, the debtor renegotiates the debt repayment with creditors. Workouts are primarily governed by contract law (freedom of contract), and insolvency laws are not applicable (except for some procedural aspects).

Involvement of the judiciary in workouts is uncommon,<sup>32</sup> and the parties have to bargain over the repayment of debt. Which concrete forms of ADR are used depends on the parties (or the legislator). For instance, mediation and judicial settlement conferences are applicable since the dispute does not require thorough financial analysis. A good example of a workout is the ad hoc mandate (*mandat ad hoc*) in the French insolvency system. In general, contract law is applicable in workouts, which means that the parties are free to agree on the terms of debt repayment.

### *Pre-Insolvency Proceedings*

Pre-insolvency proceedings are judicial proceedings.<sup>33</sup> Although the goal is to rescue the business, pre-insolvency proceedings relate more to the application of insolvency than to contract law. This procedure is divided into two forms:

- *Workout supporting proceedings.* This procedure includes few tools for bargaining over debt and does not affect all creditors (shareholders). Only some creditors are involved. Insolvency threshold test is not applicable;
- *Restructuring proceedings.* This procedure includes numerous dispute resolution methods and all of the creditors are involved. An insolvency threshold test is applicable (an insolvent debtor does not usually have the right to commence this procedure).

The essential difference between these two forms lays in the effect on the debtor's business and the creditor's claims. In workout supporting proceedings, a stay (moratorium) of claims against the debtor is not applicable, since this procedure only concerns certain

31 *Supra* note 13.

32 *In some jurisdictions, courts participate in workouts. For example, in Belgium, Greece and Spain, the court may participate in this procedure in order to ensure the lawfulness of the agreement reached.*

33 *Ibid.*

creditors. Accordingly, the agreement only binds the creditors involved in the proceedings. In restructuring proceedings, it is the opposite. Another difference is the scope of involvement of the judiciary. In workout supporting proceedings, the court plays a minor role (it usually opens the proceedings, appoints the mediator, and confirms the lawfulness of the debt agreement), and resolution of the dispute primarily depends on the negotiation skills of the parties. In the second case, the court plays a more active role in the resolution of the dispute.

Generally, the debtor must be solvent before commencement of this procedure, but this condition depends on national legislation. In France, for instance, the conciliation procedure is applicable even if the debtor is cash-flow insolvent for up to 45 days. A stay of enforcement against a debtor may be established.

### *Formal Proceedings*

The goal of formal insolvency proceedings is to manage the debtor's insolvency problems.<sup>34</sup> In contrast to workouts and pre-insolvency proceedings, the objective here is not to rescue the debtor. In this case, insolvency law plays the principal role, and negotiations between the debtor and the creditors are restricted by mandatory rules.

ADR can play an important role in *any* phase of insolvency disputes. Nevertheless, the author believes that ADR is most important in the first two models because it may make it possible to avoid the commencement of insolvency adjudication and winding up of the insolvent entity.

The use of ADR in insolvency disputes has become common in the United States and France. Both countries have established pro-debtor insolvency regimes which aim to ensure continuity of the debtor's business. Some key models for ADR in insolvency cases are analyzed in this article.

### *ADR Models for Insolvency Disputes in the United States*

The United States is the cradle of ADR in bankruptcy (insolvency) cases.<sup>35</sup> The current model for ADR in insolvency disputes derives from labor, commercial, civil rights, environmental and family law.<sup>36</sup> In the 1970s and 1980s, new methods for the resolution of business disputes emerged, such as "multi-party negotiation, mediation, arbitration and hybrid processes like community consensus building."<sup>37</sup>

The aim of bankruptcy law in the United States is to ensure that the creditors are treated fairly, and that the debtor is given a fresh start ("companies can reinvent themselves").<sup>38</sup> This pro-debtor approach means that the main goal of the bankruptcy regime is to recover business. Mediation is usually commenced when the court issues an order referring the parties to mediation.<sup>39</sup>

34 *Supra* note 13.

35 In the US legal system, the term "bankruptcy" includes the notion of "insolvency". Thus, bankruptcy shall be synonymous with insolvency in this article.

36 Steffek, E.; Unberath, H. ed. 2013. *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*. Oxford Hart Publishing, 430.

37 *Ibid*, 431.

38 Vance, D. 2009. *Corporate Restructuring*. Springer, 243.

39 Atlas, F. N.; Huber, S. K. ed. 2000. *Alternative Dispute Resolution: The Litigator's Handbook*. American Bar Association.

Almost half of the bankruptcy courts now have local rules or general orders requiring mediation in specified matters.<sup>40</sup> It is at the discretion of the bankruptcy courts to establish local rules for court-annexed ADR procedures. For instance, Local Rule 9019-5a (Mediation) of the United States Bankruptcy Court for the District of Delaware establishes that “the Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case.”<sup>41</sup>

In the United States, the bankruptcy procedure is governed primarily by the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The current version of the Bankruptcy Code is codified as Title 11 of the United States Code. Chapter 7 of this code regulates liquidation (winding up of a failing company), and Chapter 11 regulates reorganization, namely—allowing negotiations between a debtor and a creditor(s) which lead to the conclusion of a reorganization plan.<sup>42</sup>

The Bankruptcy Code does not establish ADR, but pursuant to Section 3(b) of the Alternative Dispute Resolution Act of 1998, district courts are authorized to use ADR in all civil actions, including adversary proceedings in bankruptcy.<sup>43</sup> This law explicitly requires that each district court provide “at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, mini-trial, and arbitration.”<sup>44</sup>

The reorganization procedure provided for in Chapter 11 can be commenced voluntarily (when the debtor files a petition with the court)<sup>45</sup> or involuntarily (when three or more creditors whose claims aggregate to more than \$5,000 or one creditor with a claim of \$5,000 or more, if there are less than twelve creditors file a petition).<sup>46</sup> In the latter case, the creditors must show that either the debtor is not paying undisputed debts as they become due, or a guardian or trustee was appointed to take charge of substantially all of the debtors’ property within 120 days prior to filing the petition.<sup>47</sup> If the debtor submits the petition, an automatic stay of all collection actions goes into effect.<sup>48</sup> However, only one percent of bankruptcy cases are filed by creditors.<sup>49</sup> Mediation is the most common form of ADR in bankruptcy cases in the United States and is used

40 *Supra* note 9.

41 Rule 9019-5a Mediation of District court of Delaware. [interactive] [accessed 10 December 2017]. <<http://www.deb.uscourts.gov/mediation-information>>.

42 Art. 1121-1129 of Chapter 11 (11 U.S.C.). [interactive] [accessed 9 December 2017]. <<https://www.law.cornell.edu/uscode/text/11>>.

43 Art. 651 (b) of 28 U.S. Code (Alternative Dispute Resolution Act of 1998) (28 U.S.C.). [interactive] [accessed 4 November 2017]. <https://www.law.cornell.edu/uscode/text/28/651>.

44 Art. 651 (a) of 28 U.S. Code (Alternative Dispute Resolution Act of 1998) (28 U.S.C.).

45 *Supra* note 42, Art. 301(a): “A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.”

46 *Supra* note 42. Art. 303(a): “An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.”

47 Art. 303(h) of U.S. Code 301.

48 *Supra* note 38, 246.

49 Epstein, D., Nickles, S. 2014. Principles of Bankruptcy Law 2<sup>nd</sup> ed. West Academic Publishing, 35.

for everything from “simple claim objections to complex, multi-party Chapter 11 plan negotiations.”<sup>50</sup>

#### *ADR in Insolvency Disputes in France*

For a long time, the French insolvency regime was based on the sanctioning of debtors who fail to pay debts to their creditor(s). Nevertheless, it was established in the 1990s that the main purpose of insolvency law is to “preserve the interests of the company . . . and its creditors, and only secondarily to preserve the interests of the creditors.”<sup>51</sup> Since 2006, the insolvency regime in France has been principally regulated by Book VI of the French Commercial Code (*Code de commerce*).

According to the French insolvency regime, the insolvency procedure that is used basically depends on the financial situation of the debtor. The options are:

- Court-assisted pre-insolvency proceedings (ad hoc mandate and conciliation);
- Court-controlled pre-insolvency proceedings (preservation);
- Insolvency (bankruptcy) proceedings (judicial rescue and judicial liquidation).

In court-assisted pre-insolvency proceedings, negotiations between the debtor and creditors are under the supervision of an ad hoc mandate (*mandat ad hoc*)<sup>52</sup> or a conciliator.<sup>53</sup> In this case, the court has limited powers (commencement and conclusion of proceedings, approval of the agreement over debt repayment). In the other two procedures, the court plays a substantial role and ensures smooth insolvency (pre-insolvency) proceedings which aim to either rescue or liquidate the debtor.

The main goal of the court-assisted pre-insolvency procedure is to reach an amicable agreement between the debtor and the principal creditors.<sup>54</sup> In contrast to preservation (*sauvegard*) and other insolvency proceedings, ADR is not public and does not trigger a stay of claims (order for enforcement) against the debtor. Both the ad hoc mandate and conciliation aim to negotiate the debtor’s economic, legal or financial difficulties only when the debtor is cash-flow solvent.<sup>55</sup> The *Code de commerce* establishes that these procedures can be used when a company is facing difficulties that may jeopardize continuity of its operations (*difficultés de nature à compromettre la continuité de l’exploitation*).<sup>56</sup> Though the law does not define the notion of “*difficultés*”, it relates to the economic, financial or fiscal problems that the debtor has encountered.

Two significant advantages of the ad hoc mandate and conciliation are confidentiality and flexibility.<sup>57</sup> Confidentiality means that all information about the negotiations between the debtor and the principal creditors must be kept confidential. The French Court of Cassation (*Cour de cassation*) has emphasized the importance of

<sup>50</sup> *Supra* note 22, 78.

<sup>51</sup> Faber, D.; Vermunt, N.; Kilborn, J., ed. 2012. Commencement of Insolvency Proceedings, C. Dupoux, C. Nerguararian, National report France. Oxford: Oxford University Press.

<sup>52</sup> *Supra* note 14, Art. L611-3.

<sup>53</sup> *Ibid* Art. L611-6.

<sup>54</sup> *Supra* note 51.

<sup>55</sup> *Except insolvency up to 45 days is allowed in conciliation procedure.*

<sup>56</sup> *Supra* note 14, Art. L611-2.

<sup>57</sup> *Supra* note 51.

this principle. In one case,<sup>58</sup> the Court of Cassation ruled that in the ad hoc mandate and conciliation, confidentiality prevails over the right to expression (public announcement of the debtor's financial situation). It stated that the media does not have a right to publish information about conciliation or the ad hoc mandate and the debtor's financial situation because it may harm the outcome of ADR. After analysis of Article L.611-15 of the *Code de commerce*, the court concluded that: "Because information related to conciliation or the ad hoc mandate is of a confidential nature, the law has restricted the freedom of expression for the legitimate purpose of preventing the financial difficulties of companies."<sup>59</sup> It concluded that in this case, freedom of expression under the European Convention of Human Rights is legitimately restricted.

Flexibility is coupled with the freedom of the parties to reach a peaceful agreement in the way that they desire. The *Code de commerce* does not establish how the parties shall reach an agreement and on what terms, although the peaceful settlement must help the debtor rescue the business.<sup>60</sup>

In both procedures, only the debtor (or management thereof) can apply to the court to commence pre-insolvency proceedings.<sup>61</sup> Creditors are not entitled to do so. Both procedures are used for corporate entities, individuals performing commercial or agricultural business operations, and self-employed persons undertaking non-commercial activities.<sup>62</sup> With conciliation, the debtor's request (*requête*) is submitted to a commercial court (*tribunal de commerce*), while for an ad hoc mandate, the request is submitted to a high court (*tribunal de grande instance*) or a commercial court.

The primary goal of these procedures is to prevent insolvency of the debtor. This is similar to that of Chapter 11 to rescue the business. However, in US bankruptcy law, ADR is used during the bankruptcy procedure (after its commencement). In the French legal system, only a debtor can initiate pre-insolvency proceedings. Both pre-insolvency procedures have proven to be successful in practice. For instance, approximately 1,000 conciliation procedures were opened in France in 2015, and the success rate for these proceedings was approximately 70 percent.<sup>63</sup> Both pre-insolvency procedures are analyzed in this article.

#### The Ad Hoc Mandate (*Mandat ad hoc*)

The aim of the ad hoc mandate is to "negotiate a restructuring agreement between a debtor and the main creditors."<sup>64</sup> This procedure is only permitted for cash-flow solvent

58 Cour de cassation, civile, Chambre commerciale, 15 décembre 2015, No 14-11.500. [interactive] [accessed 4 September 2017]. <<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031652185&fastReqId=74732812&fastPos=1>>.

59 *Ibid.*: "ALORS QU'en conférant aux informations relatives aux procédures de conciliation ou à un mandat ad hoc un caractère secret, la loi a restreint la liberté d'expression dans le but légitime de prévenir les difficultés financières des entreprises."

60 *Supra* note 14, Art. L611-8-II.

61 *Ibid.*, Art. L611-2-I, Article L611-3 I.

62 *Supra* note 51.

63 Directorate General for Internal Policies, *The Commission Insolvency Proposal and its Impact on Creditor's Protection*. [interactive] 2017 [accessed 14 December 2017]. <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL\\_STU\(2017\)583155\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf)>.

64 *Supra* note 51.

companies.<sup>65</sup> It is commenced by a debtor's claim (*demande d'un débiteur*) being submitted to the president of a commercial court,<sup>66</sup> who then begins the procedure by an order which indicates the term and content (*la teneur*) thereof. Commencement of this procedure is strictly confidential. The president of the commercial court has the right to demand relevant documents about the debtor's financial situation from public institutions.<sup>67</sup>

The ad hoc nominee (*mandataire ad hoc*) helps the management reach an agreement that allows the debtor facing economic, legal or financial difficulties to continue operations.<sup>68</sup> In this procedure, a mediator assists the debtor in reaching an agreement with the principal creditors. The *Code de commerce* does not set a time-limit for this procedure. Creditors who do not take part in these negotiations are not bound by the agreement. The accrual of interests is not suspended.<sup>69</sup>

The ad hoc mandate procedure ends in one of three ways:

- A solution is not found and ADR is discontinued;
- An agreement is reached under the ad hoc mandate;
- An agreement is not reached and the conciliation procedure is commenced.

This procedure is often used as a preliminary stage for the conciliation procedure, since it does not have time limit.<sup>70</sup> However, if the debtor and the principal creditors reach an agreement, it ends the dispute.

### Conciliation

Conciliation differs from the ad hoc mandate. Firstly, it is permitted for a cash-flow insolvent debtor if the debtor is insolvent for no more than 45 days before the request is submitted to the court.<sup>71</sup> Thus, the insolvency threshold is applicable. Secondly, it has a strict time limit (four months) which can be extended by one month at the conciliator's request.<sup>72</sup>

A debtor commences conciliation by submitting a request to a commercial court<sup>73</sup> concerning the economic, social and financial situation, financial needs, and means of dealing with it.<sup>74</sup> The opening of this procedure is dependent on three cumulative conditions: the debtor must be engaged in commercial or artisan activities (*une activité commerciale ou artisanale*); the debtor must prove existing or foreseeable judicial, economic or financial difficulty (*une difficulté juridique, économique ou financière, avérée ou prévisible*); and the debtor must be solvent or insolvent only if the cessation of payments has not lasted longer than 45 days (*ne se trouvent pas en cessation des paiements depuis plus de quarante-cinq jours*).

65 *Supra* note 51.

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

Thus, the debtor's financial situation must be thoroughly assessed before the commencement of conciliation. This is the principal requirement that prevents bad faith insolvent debtors from commencing this procedure in order to avoid lawful creditors' claims.

The main participants in conciliation are the debtor, the chairperson of the court, the principal creditors, and the conciliator. The conciliator plays the principal role in negotiations and assists the debtor and the principal creditors (*principaux créanciers*) in reaching an amicable agreement (*un accord amiable*) that allows the debtor's difficulties to be solved.<sup>75</sup> The debtor may nominate a conciliator, but the court has to appoint this person. This is an important opportunity for the debtor to appoint a person who understands the specifics of the particular market or business. The conciliator may present a plan concerning preservation (*sauvegarde*) of the company and continuance of economic activities.<sup>76</sup> The debtor must cooperate with the conciliator. For example, the conciliator has the right to demand any useful information (*tout renseignement utile*).<sup>77</sup>

With the exception of a few cases (when the provisions of the *Code du travail* or the *Code de la sécurité sociale* are applied in the dispute),<sup>78</sup> the law does not establish how amicable agreements should be reached. Thus, the parties agree on the conditions themselves. This liberal approach shows that negotiations are an indispensable part of conciliation. The parties are free to decide on the procedural and substantive rules of the agreement. However, the subject matter of the amicable agreement is the payment of debts which will allow the debtor to continue business.

Conciliation ends in one of these ways:

- An amicable agreement is not reached. In this case, the court terminates conciliation upon receiving the conciliator's report;
- An amicable agreement is reached. In this case, there are two possibilities:
  - i. Acknowledgment.<sup>79</sup> The parties end the negotiations with a joint request (*la requête conjointe*) and the president of the court acknowledges (*constaté*) the agreement. The debtor has to submit a statement (declaration) that it was not insolvent (*en cessation des paiements*) when the agreement was reached or the agreement is terminated (*mettre en fin*). This agreement ends the conciliation procedure.
  - ii. Endorsement.<sup>80</sup> This is a more formal procedure. The debtor files an application to the court for endorsement of the agreement (*homologue*). The court endorses the agreement if three cumulative conditions are met:
    1. the debtor is not cash-flow insolvent or the conciliation agreement puts an end to it;<sup>81</sup>

<sup>75</sup> *Ibid.*, Art. L611-7.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, Art. L611-8-I.

<sup>80</sup> *Ibid.*, Art. L611-8-II.

<sup>81</sup> *Le débiteur n'est pas en cessation des paiements ou l'accord conclu y met fin.*

2. the agreement effectively ensures that the company will continue business;<sup>82</sup>
3. the agreement does not unduly (indirectly) affect the rights of non-signatory creditors.<sup>83</sup>

The acknowledgment or endorsement of an amicable agreement does not mean that its execution remains without control. If the debtor fails to carry out the obligations, the court terminates the pre-insolvency proceedings.<sup>84</sup>

The law establishes some rules related to the execution of the agreement.

Firstly, during execution of the agreement, any legal action against the debtor concerning the movable and immovable property thereof for the purpose of obtaining payment is prohibited.<sup>85</sup> This prohibition is to some extent similar to the stay of pecuniary actions against a debtor when bankruptcy proceedings are commenced in court.

Secondly, the creditors who concluded the agreement have priority over the debtor's other creditors if preservation (*sauvegarde*), judicial rescue (*redressement judiciaire*) or judicial liquidation (*liquidation judiciaire*) proceedings are commenced. Such creditors therefore have priority over other creditors.

Thirdly, the opening of preservation, judicial rescue or judicial liquidation proceedings terminates the amicable agreement concluded under Article L611-8.<sup>86</sup> In this way, the legislator protects the general interests of creditors and establishes checks and balances between the parties.

Thus, the aim of conciliation is to encourage the debtor and the principal creditors to reach a peaceful settlement. The agreement is not publicly announced and the debtor's financial situation is not revealed.

In general, the French insolvency regime reflects the main goals of ADR. Firstly, the law does not establish mandatory norms on how parties are supposed to reach an amicable agreement. Secondly, in both ADR procedures, the court only plays a formal role. This is in stark contrast to formal insolvency proceedings, where the court is usually called upon to participate actively and ensure a smooth insolvency process. Thirdly, the French insolvency regime has established a fair balance for the protection of creditors' and public interests. Though a debtor may be insolvent for up to 45 days, ADR may be commenced. However, the legislator establishes restrictions which prevent a debtor from abusing this system. For instance, if a company is cash-flow insolvent, it is obligated to file for the commencement of judicial reorganization or judicial liquidation within 45 days of the date the company became insolvent (unless conciliation has already been commenced).<sup>87</sup> Even if ADR fails, both parties may reap some benefit from it.

82 *Les termes de l'accord sont de nature à assurer la pérennité de l'activité de l'entreprise.*

83 *L'accord ne porte pas atteinte aux intérêts des créanciers non signataires.*

84 *Supra note 14, Art. L611-10-3: Saisi par l'une des parties à l'accord constaté, le président, du tribunal, s'il constate l'inexécution des engagements résultant de cet accord, prononce la résolution de celui-ci. Dans les mêmes conditions, le tribunal prononce la résolution de l'accord homologué.*

85 *Supra note 14, Art. L611-10-1.*

86 *Supra note 14, Art. L611-12.*

87 *Supra note 51.*

## 5. Individual and Collective Interests in Insolvency Disputes

Insolvency (bankruptcy) cases are collective proceedings<sup>88</sup> in which numerous persons (the debtor, secured and unsecured creditors, a bankruptcy administrator (trustee), co-obligators, etc.) participate. There is therefore a dilemma of how ADR can reconcile the interests of all of the creditors. Should each creditor participate in the ADR procedure? What effect does the agreement between the debtor and some of the creditors have on all of the creditors? Is this compatible with the principle of *pari passu*?

The unique feature of ADR in insolvency cases is that not all of the creditors usually participate in the dispute resolution. In contrast to insolvency adjudication, the debtor usually resolves the dispute with the principal creditors (who are likely to initiate insolvency proceedings), and a formal insolvency case is not initiated. For instance, in the United States, ADR is utilized in three contexts for insolvency disputes: to resolve disputes and achieve a consensus with respect to plans for reorganization; for single-creditor disputes; and for multiple-creditor claims of the same nature.<sup>89</sup> The debtor can negotiate with each creditor individually (like in the Greyhound case), or with a group of creditors to come to a collective agreement. This situation is defined as a “cram-down”. A cramdown is the judicial power to confirm or amend a plan even against the wishes of certain creditors.<sup>90</sup> Thus, when a debtor comes to an agreement with some creditors, the other creditors cannot challenge the agreement and have to comply with it.

However, a cramdown is only possible in court-supervised ADR.<sup>91</sup> If the court is not involved in the ADR (at least in the confirmation of an agreement between the parties), a cramdown is not possible, and thus has no effect over the creditors who did not participate in the ADR procedure. In other words, if the peaceful settlement ending the dispute is not confirmed by the court, it does not have effect over the creditors who are not parties to the agreement.

In France, the application of ADR (ad hoc mandate and conciliation) in pre-insolvency disputes is primarily used to resolve a dispute between the debtor (*le débiteur*) and the principal creditors (*principaux créanciers*).<sup>92</sup> However, the *Code de commerce* says nothing about which creditors shall be regarded as “principal”. The author considers the “principal creditors” to be the creditors who hold the majority of claims against the debtor and can initiate insolvency adjudication. The *Code de commerce* does not establish any rules regarding the protection of creditors who do not participate in ADR procedures. If the court confirms an amicable agreement, it becomes binding upon the creditors who were not involved in the ADR process. In each case (especially in conciliation), the court has to establish whether a balance between the interests of the debtor and the creditors (and between the creditors themselves) is ensured.

88 *Supra* note 39.

89 *Supra* note 9.

90 Wong, D., R. 2012. *Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach* Northwestern University Law Review. 106(4):1927-1957.

91 Carnal, R. O. 2015. *Expedited Corporate Debt Restructuring in the EU* ed. Rodrigo Olivares-Caminal, Expedited Corporate Debt Restructuring R. O. Carnal. Oxford: Oxford University Press.

92 *Supra* note 14, Art. L611-7.

If the parties reach an amicable agreement during the pre-insolvency stage, the court can either acknowledge it without any further analysis or endorse it. In the latter case, a debtor submits the agreement to the court for endorsement (*homologué*). In this case, the court endorses the agreement if three cumulative requirements are met: the debtor is not cash-flow insolvent or the conciliation agreement puts an end thereto; the agreement effectively ensures that the company will continue business; and the agreement does not unduly (indirectly) affect the rights of non-signatory creditors.

Chapter 11 also acknowledges the cramdown procedure. A reorganization plan can be confirmed by the court even if some creditors do not agree with it. Thus, even if ADR fails and non-signatory creditors do not accept the plan, it still becomes binding upon all creditors.<sup>93</sup> However, Section 1129(a)(7) of Chapter 11 provides for the statutory protection of such creditors (the “Best Interests of Creditors” test).<sup>94</sup> Under this requirement, the court must ensure that each creditor (or interest holder) will receive at least as much under the reorganization plan as it would if a Chapter 7 (liquidation) procedure had been opened.

In general, ADR and cramdowns are compatible with the main principles of insolvency law (*pari passu*, fair distribution of debtor’s assets). However, the court plays a crucial role. When an agreement between a debtor and creditor(s) is reached in France or the United States, the court has to review and assess the lawfulness of the agreement in terms of the main principles of insolvency law. The situation is different when the court is not involved in the ADR procedure (usually in the form of workouts). In this case, any agreement between the debtor and one or more creditors does not impact non-signatory parties.

## 6. Application of Contract Law in Insolvency Disputes

The major goal of ADR in insolvency disputes is the conclusion of a peaceful settlement which satisfies the creditors’ interests and allows the debtor to continue business. Since this agreement (peaceful settlement, reorganization plan) is the coordination of the will of the parties (a contract), it is primarily governed by contract law. However, due to the specifics of insolvency disputes, there are questions as to what extent even the major principles of contract law, such as freedom of contract, should be applicable.

Under Chapter 11, bankruptcy courts have to confirm the debtor’s reorganization plan. This article examines how the principle of freedom of contract is applicable in insolvency disputes under the United States insolvency regime.

### *A Reorganization Plan in the US Insolvency System*

The underlying idea of the bankruptcy process in the United States is that debtor reorganization takes precedence over liquidation. Therefore, an agreement between the

<sup>93</sup> *Supra* note 42, Art. 1129(b).

<sup>94</sup> *Supra* note 42, Art. 1129(a)(7)(ii): *With respect to each impaired class of claims or interests each holder of a claim or interest of such class will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.*

parties should be aimed at continuation of the debtor's business. However Chapter 11 establishes some mandatory requirements for reorganization plans.<sup>95</sup> Since these plans are often agreed upon between the debtor and a number of creditors, it is important to ensure fairness and equality (to a reasonable extent) for all of them. Some authors believe that the aim of Chapter 11 is to "strike a balance between the need of a corporate debtor in financial hardship to be made economically sound and the desire to preserve creditors' and stockholders' existing legal rights to the greatest extent possible."<sup>96</sup>

Reorganization plans are meant to ensure the "re-start" of business and commercial activities. Although resolution of the dispute primarily depends on the parties, the court plays a significant role in this procedure. A reorganization plan must be "approved by the bankruptcy judge, and creditors desiring to attack the settlement have to meet the requirements for having standing to oppose the court order."<sup>97</sup> Furthermore it should satisfy the parties' interests and accrue the debtor's assets: "the overarching consideration in ruling on a settlement is whether the settlement is 'fair and equitable' and 'in the best interest of the estate.'<sup>98</sup> Thus, the reorganization plan must ensure a balance between satisfaction of the creditors' claims and continuity of the debtor's business.

Only a debtor can present a reorganization plan to the court. The debtor must file the plan within 90 days of entry of the order for relief. The court may grant an extension if this is required due to circumstances for which the debtor should not justly be held accountable.<sup>99</sup> The reorganization plan must be reasonable and concluded in good faith.<sup>100</sup> If the settlement is disputed by a single creditor, it does not mean that the settlement will be not approved by the court. Which ADR method(s) shall be applicable depends on the parties.

Reorganization plans often include various changes to debtor/creditor obligations, such as interests rates on outstanding debts, reinstatement of contracts, modification of liens, or contract amendments. Furthermore, creditors normally reduce or modify the debt, so they can become shareholders of the reorganized company. The parties are basically free to agree on the changes to mutual obligations. The principle of freedom of contract is therefore applicable. The parties are essentially only restricted by the goals of Chapter 11.

Pursuant to case law, ADR in insolvency cases must ensure a fair balance of the interests of the parties. For instance, in the *Matter of Sargeant Farms, Inc.*, the bankruptcy court concluded that mediation must ensure equality of the parties.<sup>101</sup>

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95 *Supra* note 42, Art. 1123.

96 *Supra* note 9.

97 Hopt, K. J. ed., *Mediation: Principles and Regulation in Comparative Perspective*, R. Kulms *Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination*, 1245-1328:1301.

98 *In Re Southeast Banking Corp.*, 314 B.R. 250 (Bankr. S.D. Florida 2004). [interactive]. [accessed 18 September 2017]. < <https://www.courtlistener.com/opinion/1870804/in-re-southeast-banking-corp/>>.

99 *Supra* note 42, Art. 1221.

100 *Supra* note 97.

101 *If the parties cannot agree to the terms of compensation prior to the mediation, then the Court determines a minimum hourly rate and maximum fees, without prejudice to the mediator to seek further fees and costs if the mediation process so.*

Since a reorganization plan must be approved by the court, case law has formed certain criteria which the court should assess: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.<sup>102</sup> A reorganization plan cannot merely deal with the changes to debtor/creditor obligations. It must encompass various circumstances which may impact confirmation and execution of the reorganization plan. Moreover, additional requirement for the *good faith* and *feasibility* of the plan have been formed in case law. These non-statutory requirements restrict application of the principle of freedom of contract. If a reorganization plan fails to satisfy these requirements, the bankruptcy court will not to confirm it. However, perhaps the major incentive for the parties is to reach an agreement through negotiation and find a common business solution.

#### *The Good Faith Requirement*

The good faith requirement<sup>103</sup> is intertwined with the policies and objects of Chapter 11: preserving going concerns and maximizing property available to satisfy creditors, giving the debtor the opportunity to make a fresh start, discouraging debtor misconduct, and achieving fundamental fairness and justice.<sup>104</sup> Case law confirms that in assessing whether a plan has been filed in good faith, “the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.”<sup>105</sup>

A reorganization plan must aim to accrue debtor’s assets and trigger business. This means that the debtor must pursue economic activities and manage assets in the most efficient way possible. If a reorganization plan meets all of the established criteria, this is a win-win situation for the debtor and the creditor(s).

#### *The Feasibility Requirement*

Feasibility is another seminal requirement for a reorganization plan under Chapter 11.<sup>106</sup> The reorganization plan must be realistic and workable,<sup>107</sup> meaning that the debtor must be able to fulfill the new obligations to the creditors and restore business activities. A reorganization plan must be realistic and enforceable, based firstly on the debtor’s

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102 *Supra* note 98.

103 *Supra* note 42, Article 1221(a)(3).

104 *In Re American Capital Equipment, Llc* 688 F.3d 145 United States Court of Appeals, Third Circuit: Pursuant to the case law, “Specifically, under Chapter 11, the two recognized policies, or objectives, are preserving going concerns and maximizing property available to satisfy creditors. [interactive] [accessed 18 September 2017]. <<https://www.leagle.com/decision/infco20120725086>>.

105 *Ibid*.

106 Peeples, P. 2009. The Use of Mediation in Chapter 11 Cases, ABI LAW Review. 401-426, 402.

107 *Supra* note 104: “*The Bankruptcy and District Courts found that the Fifth Plan was not feasible, and we agree. Although § 1129(a)(11) does not require a plan’s success to be guaranteed, see In re Applied Safety, Inc., 200 B.R. 576, 584 (Bankr.E.D.Pa.1996), the plan must nevertheless propose a realistic and workable framework*”.

financial capacities. The court must also consider the ongoing litigation procedures that the debtor is part of: “In considering feasibility, the bankruptcy court must evaluate the possible impact of the debtor’s ongoing civil litigation . . . A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely.”<sup>108</sup> Furthermore, only one reorganization plan which addresses specific insolvency problems is permissible: “the plan must be reasonably likely to succeed on its own terms without a need for further reorganization on the debtor’s part.”<sup>109</sup> Therefore, it must be workable in the future. For this reason, the court must anticipate how the debtor will participate in the specific market after the reorganization.

In general, the principle of freedom of contract is restricted in the conclusion of a reorganization plan. Case law implies that the principle of freedom of contracts is restricted:

- A fair balance between the debtor’s and creditors’ interests must be established. This means that the reorganization plan must establish a balance between continuation of the debtor’s business and fast and reasonable repayment of the debt;
- The interests of all of the debtor’s creditors must be protected. Although they may not have participated in the ADR procedure due to the specifics of insolvency disputes, the reorganization plan may not treat the creditors unequally. This requirement is based on the premise that even without the consent of all of the creditors, the reorganization plan (cramdown) must ensure continuity of the debtor’s business and that the debtor will be able to repay debts in the future;
- The reorganization plan must be workable and reasonable. This is directly linked to a complex assessment of the debtor’s position (the amount of debt, assets, the market, business opportunities, and changes in the market).

In the United States, the ADR system is based on the object and purpose of Chapter 11. It allows the parties to efficiently conclude a reorganization plan, which is seminal to ensure continuity of the debtor’s business activities and to satisfy the financial interests of the creditor(s). ADR encourages the parties to negotiate debt repayment and reach an agreement. ADR mechanisms make it possible to reach a fast solution that is acceptable for both parties and that will be confirmed by the court. Similar to that of the reorganization plan procedure, the primary goal of a peaceful settlement in French insolvency law is continuity of the debtor’s business activities. Although this kind of agreement is concluded between the debtor and the principal creditors, it may not impede on the rights of non-signatory parties. If the debtor fails to fulfil the agreement, this usually means that the debtor cannot handle the financial burden, in which case other insolvency law measures must be applied.

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108 *Supra* note 104.

109 *Supra* note 104.

## Conclusions

ADR has been recognized as a suitable instrument for solving insolvency disputes. The major pro-debtor countries (France, the United States) have introduced successful ADR models for insolvency disputes. In both countries, the main purpose of ADR in insolvency disputes is to avoid debtor bankruptcy (winding up). The ultimate goal of ADR in insolvency cases is the conclusion of a peaceful settlement (a reorganization plan) which ends the dispute. Contract law is therefore applicable. However, due to the specifics of insolvency disputes, application of the main principles of contract law is complicated. There is also the problem of cram down. In the major pro-debtor countries, peaceful settlement (reorganization plan) is agreed between the debtor and the principle creditors, meaning that not all of the creditors necessarily agree with it. Thus, it is the bankruptcy court responsible for confirming the peaceful settlement (reorganization plan) that has to assess its impact on other creditors. Some statutory laws (for instance, Chapter 11) establish requirement for reorganization plans, and case law has developed some other important criteria. French insolvency legislation is less thorough. However, in both countries, the parties' free will is restricted by the key goal of dispute resolution: continuation of the debtor's business. A peaceful settlement (reorganization plan) can only affect the non-signatory parties in the case of a cram down. If a peaceful settlement is not confirmed by the court, it has no impact on non-signatory creditors.

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## ALTERNATYVUS GINČŲ SPRENDIMAS NEMOKUMO TEISĖJE

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**Santrauka.** Dažniausiai nemokumo ginčai yra nagrinėjami teisiniu būdu, kuris turi ryškių trūkumų: neišsprendžiama „bendro turto“ problema, nutraukiamas verslas. Todėl kyla klausimas, ar nemokumo ginčai gali būti be bylos nagrinėjimo teisme. Būtent alternatyvus ginčų sprendimas (AGN) tapo atsvara teisminiam nemokumo ginčų nagrinėjimui. Priešingai nei bylos nagrinėjimas teisme, AGN leidžia išvengti pagrindinių teismo nagrinėjimo trūkumų. Pirma, juo siekiama taikaus ginčo sprendimo, kuris leistų susitarti tarp skolininko ir kreditorių, antra, juo siekiama sutaikinti skirtingus esminiu interesus nemokumo ginčiuose (skolininko verslo tęstinumas ir kreditorių reikalavimų patenkinimas). Trečia, ginčas nėra nagrinėjamas viešai. Pagrindinės skolininkui palankių nemokumo režimų nustačiusios šalys (Jungtinės Amerikos Valstijos ir Prancūzija) pateikė AGN procedūras sprendžiant nemokumo ginčus, kurie gali būti vertinami kaip AGN vystymo pagrindas kitose valstybėse.

**Reikšminiai žodžiai:** nemokumas, nemokumo teisė, alternatyvus ginčų sprendimas, taikus susitarimas, restruktūrizavimas.

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