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by J.J. Kilborn

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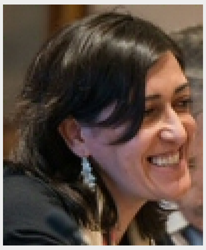

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Determinants of Failure ... and Success in Personal Debt Mediation

Jason J. Kilborn[*]

Abstract

For nearly thirty years, legislators in Europe and South America have looked to mediation as a preferred mechanism for resolving the rising problem of personal overindebtedness. This reliance has generally been misplaced, as voluntary personal debt conciliation has most often ended in failure. In some cases, however, mediation has fulfilled its promise of unburdening the court system and reconciling debtors and creditors gracefully, without formal intervention. What distinguishes failure from success in this context, and might legislators enhance the efficiency and effectiveness of personal insolvency regimes by incorporating these lessons?

This article offers some insight into these questions and proposes a new approach to mandatory mediation in the personal insolvency context. It reviews the institution of mediation as a prerequisite to court-driven personal insolvency proceedings in both longstanding systems--in France, Germany, Austria, and the Netherlands--as well as more modern regimes--in Ireland, Colombia, Chile, and Spain. After reviewing data on the failures and successes of these debt mediation mandates in recent years, this article reflects on how these results square with the predictions of mediation theory. Salient theoretical determinants of mediation success are then extracted and applied to the empirical experience of personal debt mediation. In particular, mediation theory and experience offer compelling explanations for both successes and failures in the contexts of mortgage foreclosure mediation (most notably in the United States following the financial crisis) and negotiated personal debt workouts in the modern United States and Europe, with surprising parallels from the world of Classical Islam. A framework for predicting successful personal debt mediation thus emerges, providing a foundation for a more sensible and selective approach to mandatory mediation in the personal insolvency context.

Introduction

Who would think that mediation would be a viable solution for a hopelessly insolvent debtor who has nothing to offer creditors other than a request that they forgive all their claims? No company in desperate financial distress would seriously consider mediation in this situation—an immediate, orderly liquidation in bankruptcy would be a much more rational response. Ironically, for individual debtors, with even less bargaining leverage over their institutional lenders, the path to legal relief from hopeless insolvency often leads through a required initial step of mediation.

Many European and South American legislators over the past few decades have adopted insolvency laws that extend discharge relief to individuals—both merchants and non-merchants—but some require, as a prerequisite to this new legal relief, that individual debtors (though *not* companies) seek a contractual, mediated resolution of their debt distress via a

[*] Professor of Law, John Marshall Law School (Chicago) and Van der Grinten Professor of International & Comparative Insolvency Law, Business & Law Research Centre, Radboud University (Nijmegen, The Netherlands), jkilborn@jmls.edu. I gratefully acknowledge the summer research support for this project granted me by the John Marshall Law School, as well as the invaluable research assistance provide by Maria Zambrano.

workout plan agreed to by their creditors.[1] The results in most cases have been predictably poor.[2] Creditors have very little incentive to agree to forego their claims in exchange for nothing in return, and the desperate financial situation of most individual debtors seeking insolvency relief makes it all but impossible to extend a reasonable offer of payment to creditors.

Nonetheless, policymakers continue to parade the Emperor through town, and though all can see that he has no clothes, no one seems brave enough to admit it.[3] Mandatory mediation in the personal insolvency context is little more than a cruel joke in most cases, and this paper examines empirical evidence of this catastrophic failure. On the brighter side, it also explores the possibility that mediation might be appropriate for a subset of personal insolvency cases. Experience has revealed that a notable fraction of personal insolvency cases do manage to avert the legal relief process through negotiated workout arrangements. What distinguishes these cases from the many, many others that failed, and might legislators craft more sensible mandatory mediation rules guided by the theory of successful negotiation and the revelations of practical experience accumulated over the first few decades of these personal insolvency mediations?

This paper attempts to answer these key policy questions and offer legislators a more sensitive and sensible approach to mandatory mediation in the personal insolvency context. Part I describes the personal insolvency regimes and mandatory mediation provisions in several longstanding European systems, in France, Germany, the Netherlands, and Austria, as well as in several more recently adopted procedures in Europe and South America, in Ireland, Colombia, Chile, and Spain. Part II surveys the (often sparse) empirical evidence of the failure and sometimes success of this required debt mediation. Parts III, IV, V, and VI turn to theory and practice to attempt to extract the most salient determinants of success in this context, as reflected in the evolving experiences of the eight personal insolvency systems examined here. The paper concludes with a brief proposal for reorienting mediation requirements in personal insolvency laws to take into account the indicators of inevitable failure and to incorporate the factors most likely to lead to success.

I. Mediation as Prerequisite to Formal Insolvency Relief

Commentators and policymakers have long expressed a preference for extra-judicial solutions to personal debt problems. One of the earliest proposals for alleviating the burdens of rising consumer debt set the tone, observing curtly, "[d]ebt issues should be kept outside the court as much as possible," in part because "[t]he judiciary must be relieved from numerous individual proceedings."[4] This sentiment continued to resonate nearly a decade later in a set of principles for treating consumer debt, advanced by one of the most prominent international associations of insolvency professionals, INSOL International. Its third of four principles

[1] *See* World Bank, *Report on the Treatment of the Insolvency of Natural Persons* ¶¶ 128-29 (2013).

[2] *See id.* ¶¶ 131-34 (discussing several key reasons for failure of these mediations).

[3] *See* Hans Christian Andersen, *The Emperor's New Clothes* (1837). Actually, like in Andersen's tale, at least one brave soul has pointed out the Emperor's nakedness: Sweden struggled with fruitless mandatory personal debt mediation for over a decade before finally recognizing the empirical reality and rescinding the requirement in 2007. *See* Jason J. Kilborn, "Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?," 80 *Am. Bankr. L.J.* 435, 458-59 (2007).

[4] Nick Huls et al., *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions* 246 (1994).

endorsed extra-judicial processes to save both time and money for debtors and creditors.[5] Likewise, when the Council of Europe issued its recommendations on legal solutions to debt problems, it also echoed the preference for mediated, out-of-court arrangements, noting that this approach was best suited "to find easier, faster, and cheaper solutions and to avoid an increased case load for the courts."[6]

Accordingly, this preference for third party neutral-supported negotiation finds clear expression in many of the largest, oldest, and most active personal insolvency regimes in Europe. It is also present in several of the newest and most recently reformed regimes in both Europe and South America. To lay the groundwork for an evaluation of the results of personal insolvency mediation, this section lays out the mediation requirements and court-driven alternatives in several salient models.

A. France: Fully Invested in Mediation

Lawmakers in France were the first to fully embrace mediation as a solution to individual overindebtedness. Indeed, they invested enormously in putting in place a country-wide network of mediation commissions, which remain to this day the center of the French response to treating the problem of excessive personal debt. Since its inception in 1990, the French model has revolved around the 117-odd "commissions on individual overindebtedness" set up in each of France's metropolitan and overseas *départements* (political subdivisions). These commissions are comprised of representatives of the local political and fiscal authorities, creditor interests, and debtor interests, but they are largely controlled by the central bank, the Bank of France, whose local representatives and case managers direct the day-top-day operations of each commission.[7]

In the early years of the new French system's operation, amicable conciliation among debtors and creditors was the only possible result. The Bank of France representatives would attempt to hammer out debt modification plans acceptable to both creditors and debtors, but this was the only option. Today, after nearly three decades of evolution of this structure through multiple amendments, the commissions retain their mediation role, but they now have several options for treating debtor applications: Based on the case manager's appraisal of each debtor's household financial situation, viable cases are still routed to a traditional, amicable mediation with the goal of negotiating a modification plan of up to seven years. If the case manager considers that approach unlikely to produce success, however, cases can be routed toward a commission- or court-imposed two-year moratorium and/or partial payment plan, or an immediate discharge of debt, with or without asset liquidation.[8] As will be discussed below, these exceptions have swallowed the rule almost entirely in recent years.

[5] INSOL International, *Consumer Debt Report: Report of Findings and Recommendations* 25-27 (2001).

[6] Council of Europe, Recommendation CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems, Explanatory Memorandum ¶ 34.

[7] *See* Henri Fraisse & Philippe Frouté, *Households Debt Restructuring: Evidence from the French Experience* (2012); Jason J. Kilborn, "*La Responsabilisation de l'Economie:* What the United States Can Learn From the New French Law on Consumer Overindebtedness," 26 *Mich. J. Int'l L.* 619, 635-39 (2005) [hereinafter Kilborn, France].

[8] *See* Fraisse & Frouté, *id.*; Kilborn, France, *id.* at 635-60; Circulaire du 22 juillet 2014 relative à la procédure de traitement des situations de surendettement des particuliers, Rectificatif no. 1 au BOAC no. 59, juillet-août 2014.

B. The Germanic Model: Counsellors Before Courts

The Germanic approach to personal debt mediation relies on existing debt counselling institutions, with courts retaining the central role once mediation either fails or is considered destined for failure. The structure and results of this model are similar among the three countries examined here, though the details differ somewhat.

1. Germany

In Germany, one of the documents that debtors must file to open a personal insolvency case is a certificate attesting that, in the six months preceding the insolvency filing, an attempt had been made to reach an out-of-court agreement with creditors on a proposed repayment plan, but such attempt failed.[9] The law places no restrictions on the length or other terms of such plans. Lawmakers anticipated that debtors would need the assistance of some intermediary, but rather than investing heavily in a new personal insolvency mediation system, as in France, the German law enlisted the aid of existing support networks by requiring that the certificate be issued by "a suitable person or office … on the basis of personal counselling and in-depth examination of the income and asset situation of the debtor."[10] The German states (*Länder*) are empowered to determine which "persons or offices" are suitable, and they have predictably relied on two sources: private lawyers and cost-free public debt counselling centers.

Given the limited means of the debtors affected, the bulk of this burden has fallen on the counselling centers, though it is estimated that lawyers mediate between one-third and one-half of these cases.[11] Some 1440 of these centers are spread throughout Germany.[12] They are supported financially by state and local authorities, but this support varies considerably among the states (the state of Hessen has offered *no* support since 2004) and is chronically insufficient.[13] As a result, debtors face long delays to see a counsellor and engage in the attempted debt mediation.[14] If this out-of-court mediation attempt fails, the court has an option to attempt another, court-backed attempt at striking a compromise arrangement, and a plan in this context can be approved by the acceptance (or non-response) by half of creditors, by number and value of claims. This second mediation attempt is engaged only if the court believes it has some chance of success, however, which has been the rare exception (only about 1-2% of cases conclude with such a court-backed plan).[15]

[9] InsolvenzOrdnung § 305(1)(1) [Germany].
[10] *Id.*
[11] Jan Heuer et al., *Der aussergerichtliche Einigungsversuch im Verbraucherinsolvenzverfahren: Inkasso-Unternehmen als Datenquelle für Verschuldungsundersuchungen* 21 (2005) [hereinafter Heuer, *Inkasso*]; Jan-Ocko Heuer, *Anwaltliche Schuldner- und Verbraucherinsolvenzberatung: Eine explorative Studie zur Rechtswirklichkeit anwaltlicher Insolvenzberatung im Rahmen des § 305 InsO* 76 (2009) [hereinafter Heuer, *Anwalt*].
[12] Antwort der Bundesregierung, 29 May 2017, Deutscher Bundestag: Drucksachen und Protokolle [BT] 18/12523, at 7 (Ger.) (tallying the counselling centers in each *Land*).
[13] *See, e.g.,* Werner Juste et al., Arbeitsgemeinschaft Schudlnerberatung der Verbände, *Positionspapier zur Finanziering der Schuldnerberatung* (2011).
[14] *See* Antwort der Bundesregierung, *supra* note 12, at 7 (noting an average wait time of 10 weeks); Jason J. Kilborn, "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States," 24 *Northwestern J. Int'l L. & Bus.* 257, 273-74 (2004) hereinafter Kilborn, Germany].
[15] *See* Kilborn, Germany, *id.*, at 276-77; InsolvenzOrdnung § 306(1); Heuer, *Anwalt, supra* note 11, at 50.

In the overwhelming majority of cases, therefore, a failed out-of-court mediation attempt transitions directly into a formal personal insolvency case with a standard[16] six-year "good behavior period," during which the debtor must maintain or seek suitable employment and relinquish to creditors all income in excess of the statutory exemption. If the debtor manages to make it through this period, a discharge of unpaid debt is the reward.[17]

2. The Netherlands

The situation in the Netherlands is parallel. Just like in Germany, an application to open a Dutch personal insolvency case must be accompanied by a "reasoned declaration that there are no real possibilities to reach an extra-judicial debt settlement, as well as the repayment capacity of the applicant."[18] Also as in Germany, this declaration must be issued by an intermediary authorized by the debtor's local authorities, which in most cases means the local credit counselling institution in the debtor's locale.[19] Once again as in Germany, these local credit counselling institutions are funded primarily by localities, which has left them chronically underfunded to serve the masses of new insolvency cases directed their way since the Dutch personal insolvency system was adopted in 1998. An increasing number of localities require counsellors to refuse to provide services to debtors with no hope of resolving their debt problems, the most common (and ironic) reason being insufficient income.[20]

Coordinated by a national association, the counselling agencies assess debtors' payment capacity in a relatively standardized way, and only if that calculation indicates sufficient payment capacity, they proceed to mediate proposed payment plans with creditors. Unlike in Germany, therefore, in plainly hopeless cases, Dutch counsellors can forego the pretense of a debt mediation and send debtors off to the formal insolvency system with an anticipatory declaration of "no real possibilities." The formal process mirrors the mediation stage, in that debtors are subjected to three years of statutory purgatory during which their payment capacity (often zero, determined by the courts generally in the same way as for the mediation stage) is collected for distribution to creditors, after which they receive a discharge of their unpaid debt.[21]

3. Austria

Austria's small system bears mentioning due to its unique combination of extra-judicial and successful in-court mediation. Austria also has a nationwide network of state-supported public counseling centers, and though these centers seem to be much better supported financially, with over 13.3 million Euros of annual, mostly public funding, they also

[16] The "standard" six-year period is shortened to five years for debtors able to pay administration costs in full, and three years for debtors also able to pay 35% of unsecured creditors' claims. InsolvenzOrdnung § 300. Such cases have been rare exceptions, however, as debtors in fewer than 20% of German personal insolvency cases have any income legally available to creditors. *See* Heuer, *Inkasso*, *supra* note 11, at 23; Heuer, *Anwalt*, *supra* note 11, at 51.

[17] *See* Kilborn, Germany, *supra* note 14, at 272, 279-86; Heuer, *Inkasso*, *supra* note 11, at 6-7.

[18] Faillissementswet art. 285(1)(f) [the Netherlands].

[19] *Id.* About half of all debt mediation is conducted by other entities, such as social services, but the practices and results of the debt counselling agencies are roughly equivalent to these other providers. *See* Jason J. Kilborn, "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands," 39 *Vanderbilt J. Transnat'l L.* 77, 89 (2006) [hereinafter Kilborn, Netherlands].

[20] Nadja Jungmann et al., NVVK, *Onoplosbare Schuldsituaties* 21 (2014).

[21] *See* Kilborn, Netherlands, *supra* note 19, at 97-105.

complain of financing shortfalls.[22] In stark and ironic contrast with German and Dutch law, Austrian insolvency law requires only particularly low-income debtors to seek the mediation assistance of these counselling centers (or other appropriate providers) as a prerequisite to opening a formal insolvency case: Mandatory out-of-court mediation is required only of debtors who lack immediately available funds to cover the costs of the formal insolvency proceedings. Like in the Netherlands, however, an actual mediation attempt is not required in every case, as this requirement is fulfilled by the submission of a declaration from the counseling agency that mediation "failed or would have failed."[23] One presumes that "would have failed" is the most common declaration in such obviously hopeless cases.

The really unique aspect of the Austrian model is a powerful *in-court* payment plan mediation stage.[24] Once admitted into the formal personal insolvency system, debtors face a(nother) mandatory mediation stage. They must propose a payment plan offering their creditors a certain percentage of their claims, equal to all of the debtors' foreseeable income in excess of the legally protected (statutorily exempt) minimum for the next five years, either paid in a lump sum or spread out in installments over a maximum of seven years. This plan is adopted by the affirmative vote of a majority of creditors voting, who are owed at least a majority of the claims of all creditors voting. Only if this mediation attempt fails, is the debtor admitted into the formal, coercive relief process, in which an appointed trustee collects and distributes to creditors all of the debtor's nonexempt income each year for the next seven years. At the conclusion of this period, if at least 10% of creditors' claims have been satisfied (or the court invokes an exception), the debtor's unpaid obligations are discharged.[25]

C. Ireland: Mediation Options for Mortgage Foreclosures and General Debts

Ireland revolutionized its personal insolvency legislation in 2013, introducing a gaggle of various solutions to various degrees and types of personal debt distress.[26] The traditional, statutory clean-slate form of relief, Bankruptcy, was made significantly more available, with an automatic discharge of debt after one year (three years from December 2013 to January 2016). No payments from future income are automatically required of a debtor in bankruptcy, but the system administrator can ask the court to require the debtor to turn over up to three years (up to five years before January 2016) of income in excess of the debtor's reasonable expenses, as measured against standardized living expense guidelines. In addition, a special form of expedited, immediate-discharge relief, the Debt Relief Notice (DRN), was created for debtors with particularly low debts, repayment capacity, and assets (currently less than 35,000 Euros in debt, 60 Euros of disposable income, and 400 Euros of assets beyond certain exemptions).

Two additional, mediation-based pathways to relief were also introduced in 2012: the Debt Settlement Arrangement (DSA) and the Personal Insolvency Arrangement (PIA). Both allow debtors to engage a so-called personal insolvency practitioner (registered with a new system

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[22] Dachorganisation asb, *Schuldenreport 2016* at 4, 19.
[23] InsolvenzOrdnung § 183(2) [Austria].
[24] German and Dutch law also provide for an in-court cramdown procedure for majority-accepted plans, but both are all but moribund. *See supra* note 15 and accompanying text; Jason J. Kilborn, *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010*, at 29-30 (2011).
[25] *See* Dachorganisation asb, *supra* note 22, at 14-15; Georg Kodek, *Handbuch Privatkonkurs: Die Sonderbestimmungen fur das Insolvenzverfahren natürlicher Personen* 165-202, 249-338 (2015).
[26] For an authoritative description of the various forms of insolvency relief in Ireland, see the "Detailed Guides" pamphlets on the website of the Insolvency Service of Ireland, http://www.isi.gov.ie/en/ISI/Pages/WP16000019.

supervisor, the Insolvency Service of Ireland) to mediate a repayment plan with creditors. Like in Austria, such plans are accepted and imposed on a dissenting minority upon the affirmative vote of creditors holding 65% of claims against the debtor. The most salient distinction between these two approaches is the type of claims addressed. DSAs apply only to unsecured debt, while PIAs encompass unsecured debt as well as up to 3 million Euros in secured debt (unless creditors agree to a higher threshold). The PIA was clearly designed to deal with a home mortgage foreclosure crisis ravaging Ireland (and other countries) at the time, and must be accepted by separate majorities of both unsecured and secured claims. Another distinction is the length of these plans. DSAs last five years (with a possible agreed extension to six), while PIAs last six years (with a possible agreed extension to seven).

As in the Germanic systems, the Irish scheme envisions most moderate-income debtors engaging one of the mediated solutions as a prerequisite for access to formal relief in bankruptcy. The transition rule is not nearly as clear and neat as in the Germanic laws, however. As a condition to opening a Bankruptcy case, the Irish law requires a sworn affidavit from the debtor (not a counselor or practitioner) attesting that the debtor has "made reasonable efforts to reach an appropriate arrangement with … creditors" by pursuing a mediated DSA or PIA "to the extent that the circumstances of the debtor would permit … such an arrangement."[27] The number of opened Bankruptcy cases from 2014 to 2016 exceeds applications for DSAs by 100-200 each year (about 25-50%), so significant numbers of middle-income debtors are likely *not* passing through one of the mediation stages first, but it is not possible to tell from public data what percentage of Bankruptcy filings is (or is not) preceded by a mediation attempt.

D. New Hispanic Solutions: Colombia, Chile, Spain

Just as Ireland was embarking on its radical new mediation-focused approach to personal insolvency, a similar movement was afoot on the other side of the Atlantic, which would soon make its way back to the European continent and unite three systems that might be grouped under the heading "Hispanic." Colombia, Chile, and Spain share a deep tradition of mediation as a less disruptive means of dispute resolution,[28] and all three applied this tradition to the new problem of personal debt.

1. Colombia

The first, short-lived Colombian law directed specifically at the problem of personal overindebtedness began just as the first such law in France had, more than twenty years earlier. It simply provided a mechanism for encouraging the mediated resolution of unpaid debts.[29] The proponents of this 2010 law hoped to leverage a reinvigorated system of conciliation to resolve stalemates between insolvent debtors and their creditors. Colombia had long relied on a form of mediation to reduce the burden on the judiciary. Among the first Colombian acts following its 1819 independence from Spain was a law of 1825 requiring that "no contentious civil procedure may be administered without a previous attempt at a conciliation before one of the municipal or parish judges [*alcaldes*]."[30] More recently, a 1991 law had created a nationwide system of public conciliation centers explicitly in order "to

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[27] Bankruptcy Act 1988 s. 11(4) [Ireland].
[28] *See infra* Part V.
[29] *See* Jason J. Kilborn, "Reflections of the World Bank's *Report on the Treatment of the Insolvency of Natural Persons* in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland," 27 *Pace Int'l L. Rev.* 316, 319-20 (2015).
[30] Hernán Fabio López Blanco, *Comentarios al decreto de descongestión de justicia*, 7 (1992).

decongest the judicial offices,"[31] and it was hoped that these centers could make personal debt mediation one of their primary objectives.

The 2010 law was struck down for procedural infirmities, but it was replaced at the end of 2012 with revisions to the Code of Civil Procedure that introduced a full-blown personal insolvency relief process.[32] As in the European regimes discussed above, the Colombian procedural law requires debtors to enter the personal insolvency relief system via the gateway of a mediation attempt, most likely supported by one of the (mostly free) conciliation centers, though (paid) notaries are also empowered to assist debtors in this context. The law imposes no particular terms for such negotiated repayment agreements, only restricting their duration to five years (with some exceptions for longer plans proposed by the debtor). Notably, as in the Austrian in-court process, the *out-of-court* mediation process in Colombia does not require creditor unanimity. To be binding on all creditors, a repayment agreement need only be accepted by at least two creditors holding more than 50% of the total claims against the debtor, not including claims for interest, fines or penalties. If—and only if—such a mediation fails, debtors can proceed to a second stage, a court-supervised liquidation of the debtor's nonexempt assets (if any) followed by an immediate discharge of unpaid debts—with no provision for required payments from the debtor's future income.[33]

2. Chile

Chilean legislators followed the lead of their Colombian counterparts two years later in adopting a framework to encourage mediated resolution of personal insolvency,[34] but with two important twists. Chile's Law 20.720 became effective in October 2014, introducing two pathways to relief for overindebted individuals. The first pathway, renegotiation, provides a mediation forum for debtors to engage their creditors with the assistance of a newly created entity, the Superintendent of Insolvency and Entrepreneurship, which also oversees the new system for both individuals and businesses. Without a robust network of counselors as in Colombia, Chile created and relied on a new government agency to facilitate mediated debt solutions for individual debtors. To further support the mediation process, Chilean legislators adopted the Colombian proxy approach to creditor voting: A repayment proposal is effective as to all creditors so long as it is adopted by at least two creditors holding a majority of the debtor's total debt burden.[35]

The second relief process, liquidation, is the equivalent of the traditional bankruptcy process in places like Ireland. Unlike the Irish Bankruptcy process, however, the Chilean liquidation process explicitly restricts creditors' access to debtors' future earnings as a source of value: Only remuneration for the three months following the announcement of liquidation proceedings are subject to seizure, and even then only the amount in excess of the normal

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[31] Law 23 of 21 March 1991 [Colombia]; *see generally* Harbey Peña Sandoval, *20 Años del Sistema Nacional de Conciliación en Colombia: Breve Análisis Normativo* (2011).
[32] Law 1564 of 12 July 2012 [Colombia]; *see* Kilborn, *supra* note 29, at 320-26.
[33] For a description and example of the process, see Claudia Sarmiento Rojas, "Me declaré en quiebra personal porque estaba ahogado por las deudas: Milton Lara," *El Heraldo*, 20 April 2014 (noting debtor's feeling of having "won the lottery" with new procedure, and most cases involve debtors with no asset value available for creditors).
[34] *See* Álvaro Espinosa, "Ley de Insolvencia y Reemprendimiento Chilena," 41 *Actualidad Jurídica Uría Menéndez* 157 (2015) (noting that Chilean legislators were influenced by the recently passed Colombian insolvency law).
[35] Law No. 20.720 art. 266 [Chile].

exemption limit.[36] Liquidation proceedings conclude with a discharge of the debtor's unpaid obligations.[37]

The most important contrast with Colombian (and European) law is that this second pathway to relief is not predicated on an attempted use of the first. That is, while the Chilean law invites debtors to negotiate with their creditors, and it provides a supportive agency to mediate such efforts, it does not require mediation as a prerequisite to liquidation and immediate discharge. Indeed, the provisions on renegotiation almost seem to anticipate failure of that process. If creditors fail to agree on the debtor's obligations and list of claimants, or if they fail to approve the proposed payment plan, the Superintendent initiates a process for creditors to agree to an immediate, simplified liquidation proceeding, and failing that, the case is turned over to the courts for a liquidation process, which again ends in a full discharge for the debtor.[38] Thus, while the Chilean law clearly favors and facilitates negotiated solutions, it is the first and only law analyzed here that does not require a mediation attempt in any case.

3. Spain

Most recently, Spain joined its South American cousins in finally adopting a proper personal insolvency law in 2015, with Law 25/2015 of 28 July 2015, amending the Bankruptcy Law (*Ley Concursal*) to provide a discharge procedure for both merchants and non-merchant individuals. Unfortunately, these new provisions seem to have incorporated almost none of the lessons learned from thirty years of experience with similar laws in other countries. The rules for mediated out-of-court payment plans are uniquely complex and counterproductive.

The gateway to the new Spanish personal insolvency system is set up quite the opposite way than one might expect. Debtors may enter the formal (bankruptcy liquidation-and-discharge) relief process directly if they have non-exempt assets of a liquidation value sufficient to cover the costs of the proceeding, 100% of privileged claims (including 50% of all public debts, such as tax and social security obligations[39]), and produce a dividend of 25% for general unsecured creditors.[40] Those who are unable to satisfy this threshold, however—that is, debtors with little or no present value to offer creditors—are required to proceed through a mandatory negotiation stage with creditors before accessing formal relief.[41]

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[36] Law No. 20.720 art. 276 [Chile].
[37] Law No. 2.720 art. 255 [Chile].
[38] Law No. 20.720 art. 267 [Chile].
[39] Ley Concursal [Law No. 22 of 9 July 2003, as amended] art. 91.4 [Spain].
[40] This exception was designed to preserve the former, more restricted discharge introduced by an earlier law, which did not require an extra-judicial attempt at a mediated arrangement at all. Matilde Cuena Casas, "La exoneración del pasivo insatisfecho," in *Comentarios a la Ley de Mecanismo de Segunda Oportunidad* 65, 101-02, 107-10 (Matilde Cuena Casas et al., eds., 2016).
[41] *See* Ley Concursal art. 178bis.3(3)-(4) [Spain]. The law is frustratingly contradictory on this point. It seems to have been hastily drafted in stages, and the two operative provisions are mutually inconsistent. The first, subsection (3) seems to require that every individual debtor have "at least tried" to achieve an extra-judicial agreement, whereas the very next provision, subsection (4) provides for cases in which the debtor "had not tried" to achieve an extra-judicial agreement, in which case the 25% payment to unsecured claims seems to substitute for the attempt. The courts have the unenviable task of sorting out these two irreconcilable provisions, and while ordinary canons of statutory construction would call for the more specific subsection (4) to govern over the more general subsection (3), the likelihood seems to be that *all* debtors will be required to undergo an out-of-court negotiation attempt.

Non-merchant individuals[42] pursue this extra-judicial payment plan mediation with the assistance not of debt counselors or a new, centralized coordinating institution, but of traditional notaries. The notary approached by the debtor can seek the appointment of a so-called bankruptcy mediator, who must have special mediation training,[43] but in low-value cases, the presumption seems to be that the (untrained) notary will conduct the mediation.[44] The terms of acceptable proposals are restricted by the law: public debts are excluded,[45] and private debts may be partially forgiven or extended, but over a period of no longer than ten years.[46] The Spanish law takes the approach of Colombian law, allowing the holders of a majority of affected claims to adopt a plan binding on all affected creditors. The required majority depends upon the terms of the plan: Adoption of a plan with a term not longer than five years and offering payment of at least 75% of claims requires the affirmative vote of holders of 60% of all claims affected by the plan. Plans longer than five years—up to a maximum of 10—or offering less than 75% payment to creditors require approval by the holders of 75% of all affected claims.[47]

If two months after initiating the case, the notary/mediator considers this negotiation destined for failure, or if it actually fails to achieve the requisite majority creditor vote (or if the debtor defaults on an agreed plan), a formal insolvency case is initiated.[48] A liquidation of the debtor's non-exempt assets immediately ensues, and if the proceeds of that liquidation cover administrative expenses and 100% of privileged claims (and, if no extra-judicial negotiation was attempted, at least 25% of general unsecured claims), the debtor receives an immediate discharge of unpaid debts. Debtors whose non-exempt assets do not cover the costs of the liquidation proceeding and 100% of privileged claims can obtain a discharge only by completing an additional step, complying with a payment plan lasting up to five years. This plan's principal if not sole purpose (the law is unclear on this) is to pay in full two types of debts that the new statute singles out as being not subject to discharge: public debts (only 50% of which are also by definition privileged claims) and alimentary obligations (child and spousal support).[49] If this plan is completed and the public and alimentary debts are paid in full, the debtor receives a discharge of all other unpaid debt. If this plan is *not* completed, the judge *may* grant a hardship discharge to a debtor who committed at least half of his or her non-exempt income to the plan for its entire five-year duration.[50]

II. Mediation in Action: Data and Evaluation

These mediation-centered approaches sound attractive in the abstract, but do they work in practice? A precise answer to this question is elusive, at least in part due to an inherent blessing of mediation that also turns out to be a curse. The privacy and confidentiality of mediation are great strengths in terms of encouraging candid dialogue and open, honest searches for solutions, but these characteristics also produce a troubling lack of transparency. Researchers and others who might like to evaluate the effectiveness of mediation are stymied

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[42] Merchants pursue this negotiation with the assistance of a paid "bankruptcy mediator" nominated through the merchant registrar or chamber of commerce. Ley Concursal arts. 232-233 [Spain].
[43] Ley Concursal art. 233 [Spain].
[44] Ley Concursal art. 242bis.1 [Spain].
[45] Ley Concursal arts. 231.5, 234.1 [Spain].
[46] Ley Concursal art. 236.1 [Spain].
[47] Ley Concursal art. 238.1 [Spain].
[48] Ley Concursal arts. 238.3, 242bis.1 [Spain].
[49] Ley Concursal art. 178bis.3-.6 [Spain]; *see also* Casas, *supra* note 40, at 136.
[50] Ley Concursal art. 178bis.8 [Spain]. No plans have been in place for five years yet, so it is unclear how this provision will be interpreted and applied by the judiciary when the time comes.

by an almost complete lack of information on the negotiation process and its results. Public court records allow for evaluation of the terms of imposed payment plans and other resolutions in formal insolvency cases, whereas mediated solutions remain all but entirely hidden. For some of these systems, even data on the numbers of mediations and various resolutions are hard to come by, and nowhere can one find comprehensive reports on the terms of mediated compromise arrangements. If mediation is to flourish as a preferred alternative to formal court intervention, its strengths should be broadcast and subjected to critical evaluation. Unfortunately, this section reveals that the little publicly available data paints a decidedly less rosy portrait of personal insolvency mediation.

A. French Mediation Model in Rapid Decline

In the personal insolvency system that seems to have embraced the mediation model most enthusiastically, the results have been increasingly unsatisfactory. The French commissions managed to reconcile creditors and debtors to agreed payment plans in 60-70% of cases for the first twenty years of the system, until the mid-2000s.[51] But these plans were often symbolic, the victories Pyrrhic. Until the late 1990s, the commissions were doing the best they could with limited tools, they were pressuring debtors to agree to patently unsustainable payment plans to achieve creditor consent, and debtors were constantly re-defaulting on these plans and reapplying for overindebtedness relief.[52] The legislature has intervened several times to reduce this revolving-door effect, each time eroding the central role of mediation in the process.

As the legislature offered the commissions more aggressive options for addressing more dire situations of financial distress, the commissions gradually began routing greater numbers of debtors away from mediation and toward more aggressive, effective, formal intervention. During the period from 2010 to 2016, the commissions administered between 180,000 and 200,000 cases each year (with a spike to 206,000 in 2014). In the first half of this period, from 2010 through 2013, the percentage of admitted cases concluding with a mediated, consensual plan fell from just under 49% to just under 35%. In the next three years, the percentage of successfully mediated arrangements plummeted, to 19% in 2014 and just under 13% in 2016.[53]

What were the commissions doing with the other cases? Many of them involved hopelessly insolvent debtors with little or no reasonable disposable income, who thus had no capacity to repay any significant portion of their debts. These cases were routed to an immediate discharge, in most cases (98%) without even a liquidation of the debtors' meager assets. Such cases accounted for just under 25% in 2010, rising steadily to over 42% in 2016. When the commissions assessed the reasonable living expenses of these debtors and subtracted this from their income to produce a monthly "payment capacity," they found that more than half of all applications indicated no repayment capacity at all.[54] No mediation could reasonably hope for success under such conditions, so the commissions skipped the conciliation stage entirely in these cases.

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[51] *See* Kilborn, France, *supra* note 7, at 640. Bank of France statistics on years following 2004 on file with author.
[52] *See id.* at 649-50, 655.
[53] Figures calculated from Bank of France official statistical announcements, on file with author.
[54] *See, e.g.,* Banque de France, *Le surendettement des ménages: Enquette typologique 2016*, at 7, 13 (2017).

The third general alternative to a negotiated plan or immediate liquidation is a plan imposed by the commission or a court. Even in cases where debtors had something to offer, creditors seem to have stopped responding to reasonable mediation attempts, preferring to force the commission to impose the proposed plan on them. This seems to be a function of a shrinking percentage of debtors able to offer full or nearly full payment to creditors over the term of a commission-proposed plan. Consequently, the law in effect since mid-2016 allows the commissions to forego the initial mediation stage and proceed immediately to an imposed plan if the debtor's resources do not appear likely to allow for full payment of creditors' claims over the seven-year maximum term of a repayment plan and "the commission's mission of conciliation appears from this fact to be manifestly destined for failure."[55] As of 1 January 2018, the legislature will take the next step, all but abandoning its initial enthusiasm for mediation, by explicitly providing for mediation only in cases where the debtor owns immovable property *and* a full-payment plan seems likely.[56]

That French creditors generally reject mediated plans offering less than full payment is also suggested by the snippets of available empirical data. Although no reliable, comprehensive public data exist indicating the terms of mediated or imposed plans (either with respect to payment amounts or percentage or even total duration), Bank of France statisticians have publicized some data that offer hints as to the terms of mediated plans.

First, analyses of cases filed and closed between June 2007 and December 2009 indicate that, in cases where some payment was expected of debtors, the average payment amounted to 26% of the initial debt in the first two years (approximately 300 Euros per month, judging by the average debt burden of about 28,000 Euros).[57] Given that the French law until 2010 allowed plans to extend over ten years, and still eight years from 2010 to mid-2016, one suspects that a payment of 26% over two years is, when continued over eight to ten years, a full-payment plan or very close to it. And since this 26% figure averages payments in both mediated and imposed plans, one suspects that agreed plans contained offers to creditors on the high side of the average.

Second, annual statistics on debtor characteristics for all cases opened in 2015 and 2016 indicate that fewer than 30% of debtors had a repayment capacity exceeding 250 Euros per month, with an average (non-mortgage) debt still hovering around 28,000 Euros.[58] With a reduction as of mid-2016 in the maximum term of a mediated plan to seven years, and debtor payment capacity still depressed, it is not particularly surprising that the commissions are not able to present offers that creditors are willing to accept. The small percentages of cases in 2015 and 2016 that concluded with agreed plans seems vaguely to correspond with the percentage of debtors with sufficient monthly payment capacity to offer full payment over seven or eight years.

One final important note is that, even in the heyday of mediated plans in the late 2000s, many of those plans cannot properly be considered successes. Bank of France statisticians have been most concerned about the persistent problem of debtor default and reapplication for overindebtedness relief. In the studies of late-2000s plans, they report that, among cases where debtors promised payment during the first two years, more than 25% defaulted and

[55] Code de la consommation art. L732-4 (2017) [France].
[56] Law of 9 December 2016-1691, art. 66(V) (amending Art. L732-1 of the Consumer Code) [France].
[57] Henri Fraisse & Anne Muller, "Les commissions de surendettement des ménages: de l'objectif de négociation à la prévention de la rechute," *Économie et Statistique* No. 443 (2011), 10-11.
[58] *See* Banque de France, *supra* note 54, at 5, 13-14; Banque de France, *Le surendettement des ménages: Enquette typologique 2015,* at 13-14 (2016).

refiled for additional relief within those two years, which includes nearly one-third of all those whose creditors accepted a mediated plan.[59] Many more likely defaulted in later years. Creditors might well have grown tired of agreeing to plans that led in significant degree to default.

Ironically, the personal insolvency system that most wholeheartedly endorsed the mediation model has all but abandoned it, as mediated solutions have become both less common and less effective. It has gone from producing mediated solutions in all cases to achieving a mediated outcome in very few cases. As of 2018, it appears mediation will become all but an afterthought, as the French system turns its back on negotiation and invests fully in its personal overindebtedness commissions to impose appropriate solutions based not on subjective mediation, but on the more-or-less objectively determined limits of debtors' payment capacities and the size of their debt burdens.

B. Little Success, But Glimmers of Hope in the Germanic Systems

The challenge of poor data reporting is even more acute in Germany, the Netherlands, and Austria, whose personal insolvency mediation systems are decentralized and only loosely coordinated. Once again, however, empirical and statistical analyses offer some tantalizing clues as to the degree and determinants of failure and success in this effort.

1. Germany

The latest public data on the results of debt mediation in German debt counselling centers is from 2012, and data from the largest state, North Rhine-Westphalia, is available only for 2011.[60] Luckily, this happens to be the peak of activity in Europe's second largest personal insolvency system by volume, with about 100,000 German consumer debtors initiating personal insolvency cases each year from 2007 to 2012.[61] The rate of successfully mediated workout plans varies notably from state to state, but from 2007 to 2012, attempted debt mediations resulted in a fairly steady average rate of about 16% accepted out-of-court plans.[62]

A more detailed picture is provided by an empirical study of nearly 1000 out-of-court insolvency mediations between March to June 2004.[63] The data for this study were extracted from the files of a large debt collection company, who was a creditor involved in 25% of all consumer insolvency cases in Germany in 2004. With a median debt of just over 28,000 Euros, and 87% of debtors reporting no income above the statutory exemption, the debtors in this study are very similar to those in recent years in France. Surprisingly, only half of these "no-income" debtors proposed a plan with no certain payment to creditors (payment would come only from unexpected income acquired in the future), meaning that one-third of all debtors proposed payments from income that would not be available to creditors if a formal insolvency case were opened. Nonetheless, only 7% of all proposed plans were accepted by creditors. All of the plans proposing payment only from uncertain future income were

[59] Fraisse & Muller, *supra* note 57, at 3, 11, 12 tbl. 4B; *see also* Fraisse & Frouté, *supra* note 7 (citing similar data).
[60] *Förderungen von Schuldner-/Insolvenzbertaung in den Bundesländern, Stand: 22.05.2013* (on file with author).
[61] Data from the official German statistical agency, DeStatis, on file with author.
[62] Compiled data from *Förderungen, supra* note 60, with extrapolation and analysis on file with author.
[63] *See id.*

rejected. The deciding factor for successful plans seems to have been the percentage of debt proposed to be paid, ranging widely from just under 4% to 100%, but with an average of 50%.

2. The Netherlands

The problem with data reporting transparency is especially acute in the Netherlands. The coordinating association for credit counselling agencies seems to have a political stake, or at least a strong pride factor, in reporting at least moderate success in its members' debt mediation efforts. In the years just before the Dutch insolvency law went into effect in December 1998, counsellors were able to reconcile creditors to proposed debt adjustment plans in about 35% of cases. Immediately after the new law went into effect, offering debtors more effective relief and creditors a reliable, trustee-driven collection system, successful mediation attempts began trending downward, to around 30% from 1999 to 2002, before plummeting to 15% in 2003 and a low point of 9% in 2004.[64]

To solve this problem—or at least the appearance of this problem—counselling agencies changed their approach and their reporting practices. Agencies stopped attempting mediation in an increasing number of cases, advancing a proposal to creditors in only 42% of cases by 2014.[65] Having thus culled the prospects down to the best candidates for an amicably mediated solution, the coordinating association of counsellors stopped reporting on the *numbers* of attempted and successful mediations, reporting only *percentages* of success after 2010.[66] Thus, the success figure for mediated plans rose gradually to 38% by 2010, remaining at about that level to the present. But if one recalculates the denominator of this fraction to include the nearly 60% of cases deemed "hopeless," where no attempt at a mediated plan was made, the success percentage drops back into the mid-teens. Here again, "success" must be loosely defined, as the rate of redefault and recidivism for Dutch debtors with mediated plans is on the rise. The coordinating association reports figures, not percentages, of recidivists, and that figure has quadrupled between 2012 and 2015 from 1300 to 5200.[67] By comparison, only 11,703 debtors were admitted into the Dutch statutory personal insolvency regime in 2015.[68]

The Dutch experience thus mirrors that in France. Before the insolvency law offered a reliable alternative, counsellors were relegated to pressing debtors into unsustainable plans, leading to a redefault rate of nearly one-third of cases.[69] After the adoption of the statutory debt adjustment system, creditors preferred to rely on that system's more predictable and reliably administered results, and counsellors eventually stopped even attempting a mediation in the majority of cases, since debtors' resources manifestly predicted failure of any such attempt.[70]

One more empirical study from the Netherlands offers a sense, though a bit dated, of the foundation for success in debt mediation. The study surveyed 1200 debt counselling files

[64] *See* Kilborn, Netherlands, *supra* note 19, at 89.
[65] Nadja Jungmann & Geerten Kruis, NVVK, *Het verhaal achter de cijfers: De doorstroming van de minelijke schuldhulpverlening naar de wettelijke schuldsanering* 8, 28-29 (2014).
[66] See the annual reports of the national coordinating association, the NVVK, at https://www.nvvk.eu/page/392.
[67] *See* NVVK, *Jaarverslag 2015,* Cijfers: Recidive, http://jaarverslag2015.nvvk.eu/cijfers/index.html.
[68] *See* Raad voor Rechtsbijstand, *Instroom Wsnp,* http://www.bureauwsnp.nl/bibliotheek/onderzoeken/instroom-wsnp.html.
[69] *See* Kilborn, Netherlands, *supra* note 19, at 89.
[70] Jungmann, *supra* note 20, at 70; Nick Huls, Nadja Jungmann & Bert Niemeijer, "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law," in *Consumer Bankruptcy in Global Perspective* 269, 273-75 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

from 10 agencies in 1997, just before the personal insolvency law was adopted, and the rate of successfully mediated plans (from both public data and the study's own results) remained just under 40%.[71] Nearly 70% of these files indicated a monthly payment capacity of less than 200 guilders (about 90 Euros, not adjusted for inflation from 1997), which over the standard three-year workout plan would pay off less than one-third of these debtors' average debt load.[72] The study concluded that the factor that most obviously distinguished debtors who obtained mediated arrangements and those who did not, was the percentage of total debt proposed to be paid off over the standard three-year plan. Net income available to creditors was not determinative alone; rather, this figure applied against the debt load predicted success or failure. Successfully mediated plans offered an average 56% debt repayment, while rejected plans offered on average only 27%.[73] Just like in Germany, creditors were willing to accept only plans that offered them a substantial *rate* of return, with an average of about 50%, with little regard for the absolute amount of payment or whether that represented the debtor's "best, honest effort."

3. Austria

While only low-income debtors are required to seek an out-of-court debt mediation before accessing the Austrian insolvency system, public counselling centers successfully mediate significant numbers of workout plans each year. These most likely involve cases of debtors with something significant to offer, but the contents of proposed and accepted plans are not public knowledge.[74] The number of attempts has declined from over 2100 in 2009 to about 1500 in 2014, but the rate of acceptance by creditors rose from 20% in 2009 and 2010, to 30% or more from 2012-2014.[75] These numbers are minimal in comparison with the 10,000 or so annual applications for admission into the formal insolvency system during these five years,[76] but the Austrian counselling centers are obviously doing something right.

The results of the *in-court* mediation are more striking, but they are likely explained by more hidden mathematical tricks. While refusal to accept the debtor's in-court mediation proposal would subject the debtor to seven years of standard nonexempt income collection and distribution by an appointed trustee, creditors force fairly few debtors to reach this stage. A consistent 70% of Austrian personal insolvency cases conclude with a court-mediated payment plan accepted by the requisite majority of creditors, and this has been true since 2000.[77] These agreed plans offer creditors less than the formal, coercive process would, almost by definition (five as opposed to seven years of nonexempt income), and a trustee bears the monitoring and administrative burdens in the formal relief procedure, yet a supermajority of Austrian cases end with an agreed plan. How can this be explained?

Perhaps this is a simple testament to the power of majorities to overcome resistance by a minority, as *in-court* plans are not "mediated" in the proper sense, but rather imposed on a dissenting minority by an agreeable majority. And the majority, notably, is counted in terms of creditors actually voting, excluding those who fail to participate in the voting meeting—and creditors worldwide are notorious for failing to participate voluntarily in low-value cases.

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[71] N. Jungman, E. Niemeijer, & M.J. ter Voert, WODC, *Van schuld naar schone lei: Evaluatie Wet schuldsanering natuurlijke personen* 4, 42, 49 tbl. 6, 73 (2001).
[72] *Id.* at 50 fig. 5.
[73] *Id.* at 52. The study provides no information as to the spread of offers, whether wide or narrow.
[74] Kodek, *supra* note 25, at 10 (noting an absence of information on out-of-court plans).
[75] *Id.* at 380 tbl. B.
[76] *Id.* tbl. C.1.
[77] *Id.* at 384 tbl. C.3.

It is unclear to what degree various judges engage in any kind of suasion of creditors in these processes, but it may well be that the presence of an authority figure like the judge explains part of this success story. The lion's share of the explanation, though, very likely lies in unseen manipulation of the denominator of the success fraction, as in the Netherlands. Because the formal relief process in Austria requires debtors to produce a dividend to creditors of at least 10% of their claims (in addition to the costs of the proceeding), the Austrian system effectively excludes most of the 70-90% of debtors with no payment capacity from seeking formal relief at all, including any attempt at a mediated solution, which is perfectly consistent with experience in France, Germany, and the Netherlands. Counselling centers and other observers have criticized this restrictive aspect of the Austrian personal insolvency law for years, with no legislative response.[78]

Consequently, the most reasonable conclusion from Austrian data is that, as in other countries' experience, creditors accept mediated plans only if debtors have something substantial to offer. At the very least, the *in-court* plans must be offering more than 10% of creditors' claims, and very likely the offers are significantly higher than this. As for the ordinary, extra-judicial, truly mediated debt workouts, the numbers here are quite small in comparison to entrants into the formal insolvency system, again leading to a conclusion that these debtors must be offering creditors an even more impressive repayment percentage. Including low-income debtors in the mix, the success rate for mediated solutions is likely not 70%, but closer to 7-10%.

C. A Mitigated Triumph for Irish Mediated Payment Plans?

Like in the Netherlands, Irish regulators seem to be under political pressure to present the new mediated arrangements in a positive light. A fair and functional perspective on the data, however, reveals a similar pattern to other European systems, with the exception of secured (mortgage) debt workouts. The Insolvency Service of Ireland (ISI) reports an astonishing degree of "successful outcome" for both DSAs and PIAs over the three-year life of these procedures, a nearly 83% success rate for (unsecured) DSAs and over 67% for (secured/home mortgage) PIAs.[79] Closer analysis of the actual data provided by ISI, however, seems to present a less thrilling report, though still impressive. Both DSA and PIA cases really begin with the issuance of a "protective certificate" by the court after confirming that applicant-debtors qualify for these procedures and their paperwork is in order. Insolvency practitioners have 70 days to mediate an arrangement with creditors, so annual data should reflect little if any administrative backlog (at least at the post-certificate stage). In 2015 and 2016, the rate of successful conversion from protective certificate to approved DSAs was about 70% (approx. 300 certificates, 225 DSAs), and the rate for PIAs was only about 50% (approx. 1300 certificates, 650 PIAs).[80]

To compare these figures with other countries' data, however, the many segments of the Irish system must be grouped more sensibly in terms of the goals pursued. The 50% success rate for PIAs—essentially mediated mortgage foreclosures—is not entirely surprising, as will be more fully discussed below.[81] The PIA has essentially no equivalent in other countries, though, particularly in light of the small homeownership rates of continental debtors.[82] So a

[78] *See, e.g.*, Dachorganisation asb, *supra* note 22, at 14, 18.
[79] Insolvency Service Ireland, *ISI Statistics: Quarter 4 2016* at 7.
[80] For the ISI data, see *id.* at 11 tbl. 7.1. ISI data analysis spreadsheet with recalculations on file with author.
[81] *See infra* Part IV.
[82] *See, e.g.*, Fraisse & Frouté, *supra* note 7 (noting a 5% homeownership rate among French debtors).

fair comparison would group all "ordinary" debtors together, both low- and medium-income. Recalculating the "success" rate of DSAs against a denominator of all debtors seeking relief from mainly unsecured debt (DSA protective certificates, approved low-income DRNs, and opened Bankruptcy cases) reduces the DSA success rate to less than 19%.[83]

Moreover, like Austrian in-court plans, DSAs (and PIAs) are not truly mediated in the sense that consensus is required. Only 65% creditor approval produces an agreed DSA, so an elevated success rate is somewhat to be expected. Unlike in Austria, the Bankruptcy alternative in Ireland to a failed DSA is substantially less attractive, offering only a maximum of three years of payments from debtors' disposable incomes, as opposed to the five years of a standard DSA, using the same living expense guidelines to calculate payment capacity. The curiosity here is that, given all of the powerful incentives, the success rate for DSAs is at best only 70-80%.

D. Mixed Results in the Modern Hispanic Experiment

The three countries grouped here as "Hispanic" are not necessarily fairly connected. While it is clear that Chilean legislators were influenced by contemporaneous developments to their north in Colombia, they took a decidedly different approach to debt mediation. On the other side of the Atlantic, it does not appear that Spanish legislators drew inspiration from any previous experience, as that dysfunctional system seems to be the result of local political compromises and economic risk aversion. The results of these thee more or less simultaneous new experiments differ dramatically, as well, with outcomes that are not surprising in light of the obvious aids and impediments to successful debt mediation that each regime incorporated.

1. Colombia

Reliable, public data is very hard to come by with respect to the results of the Colombian mediation-drive system. System-wide statistics are available only upon request to the Ministry of Justice. Moreover, even these data are not comprehensive, as only the conciliation centers report their data to the Ministry; notaries' activity remains entirely opaque.[84] More troubling, analysis of the data provided by the Ministry reveal that the figures provided by the conciliation centers do not correspond with the totals reported by the Ministry.

Bearing in mind these data complications, one thing is clear: Despite its longstanding system of conciliation centers, its extraordinary proxy system allowing the holders of a majority of claims to bind all creditors, and its exceptionally quick and effective discharge relief standing on the other side of a failed mediation, the Colombian system has produced surprisingly few mediated payment plans. As of October 2016, in its first four years of operation, this system had administered only 914 cases.[85] This in a country with more than 15 million debtors, 4.5 million of whom had negative entries on their credit reports.[86] For those cases administered in

[83] Spreadsheet with total figures and analyses for 2014-2016 on file with author; *e.g.*, for 2016, 226 approved DSAs, 312 DSA protective certificates, 357 DRNs, and 526 Bankruptcies (226/(312+357+526)=0.189).
[84] *See* Luis Álvaro Nieto, *Insolvencia (Negociación de Deudas) de Persona Natural No Comerciante. ¿Mito o Realidad?* (2016), online at http://www.centroarbitrajeconciliacion.com/Sobre-nosotros-CAC/Articulos-academicos (bemoaning the absence of reliable data on the numbers of cases, agreements, and defaults, in part because data are only available from the conciliation centers, not notaries).
[85] María Mercedes García Perdomo, "Oportunidades para salir de una crisis financier," *El Espectador*, 29 Oct. 2016 (citing data from the Ministry of Justice's password protected online data system, SICAAC).
[86] Redacción, ElHeraldo.co, "Insolvencia, un salvavidas a sus deudas," *El Heraldo*, 1 June 2015.

2016, 42% concluded with a mediated payment plan. Mediation failed in another 25% of cases, with the remainder either retracted or still in process as of late 2016 (often in extended litigation over claims objections).[87]

One commentator, associated with a conciliation center, offers two possible explanations for this low success rate. First, debtors often have few resources and present patently unacceptable plans to creditors with the intent of making their way to liquidation and a quick discharge. "If there is no viable proposal," this commentator asks, "what sense is there in sitting down to negotiate?"[88] Why not, he suggests rhetorically, simply proceed directly to the liquidation, avoiding the negotiation procedure, the payment of fees, and the mediator's management burden? Second, creditors often fail to engage with the process, preventing any possibility of a positive vote of the holders of 50% of the *total* claims against the debtor. If creditors holding less than 50% of the debtor's total debt burden appear at the voting meeting, the 50% margin can never be met, and this required threshold percentage cannot be modified by the mediator or court.[89] Even of the mediations that result in a "success," this commentator observes that approximately 20% of agreed plans are not fulfilled, which also leads to a liquidation and immediate discharge.[90]

2. Chile

Luckily, like in Ireland, the dedicated government agency created to supervise the new Chilean insolvency system has been very responsible in collecting and publicizing data on the operation of the new system. Initial reports are encouraging. Given the lack of a requirement for mediation before seeking immediate liquidation-and-discharge relief, it is somewhat surprising how frequently Chilean debtors have made use of the renegotiation process. This process has ended quite frequently with successfully mediated repayment agreements.

The Chilean experience demonstrates that debtors need not be compelled to engage in mediation. Those for whom mediation makes sense will engage that process voluntarily, and the majority of Chilean debtors have done so. The Superintendent reports that, in just over two years from the October 2014 effective date of the law through the end of January 2017,[91] a total of 3612 personal insolvency proceedings have been initiated, 2007 renegotiation proceedings and 1605 liquidations.[92] Over 80% of the renegotiation proceedings have concluded with an agreed repayment plan.[93] Even if the figures for renegotiations and liquidations are combined, still over 45% of all Chilean personal insolvency cases conclude successfully with a mediated payment plan. The terms of these plans are not public information, so it remains to be seen how durable these arrangements will be, but at least in the first instance, Chile's voluntary mediation process is among the most successful.

[87] Perdomo, *supra* note 85. Data obtained by the author directly from the Ministry of Justice for 2015 and the full year 2016 are comparable (for 2015, reporting 459 cases in administration, of which 203 agreed plans, 85 rejected plans, 129 in progress, and 42 "other," and for 2016, reporting 443 cases in administration, of which 215 agreed plans, 102 rejected plans, 103 ongoing, and 23 "other").
[88] Nieto, *supra* note 84, section 3.
[89] *Id.*
[90] *Id.* section 4.
[91] The Superintendent seems to have stopped reporting aggregate figures for the entire period of effectiveness of the new law, limiting releases to *annual* aggregate data each month, though the figures from January to June 2017 seem to be consistent with the aggregate data reported here. *See infra* note 92 and accompanying text.
[92] Superintendencia de Insolvencia y Reemprendimiento, *Boletín Estadístico: Procedimientos Concursales – Ley No. 20.720* (Feb. 2017) (reporting data from Oct. 2014 to Jan. 2017, on file with author).
[93] *Id.* at 6, 16 (reporting 1641 agreed repayment plans, of 1818 renegotiation attempts, so the success rate may rise).

3. Spain

The Spanish regime has suffered from all of the shortcomings of the Colombian structure, and it enjoys essentially none of the strengths. The results of the first year-and-a-half of operation of the new system have been expectedly disappointing. Indeed, an acute data transparency problem likely conceals even greater disappointment. Spain now has the dubious distinction of being among a very small number of countries whose insolvency law allows individuals to obtain a discharge, but business entity insolvency cases still vastly outnumber personal insolvency cases. In 2015 and 2016, personal insolvencies were only 14.5% and 18.6%, respectively, of the some-5000 total insolvency cases in each year.[94] Three-quarters of the individual debtors in each year were non-merchants, only about 650 cases each year.

No public source reports data on requests to notaries to initiate extra-judicial payment plan mediations, but a private request to the Notary Council revealed that only about 220 such requests were lodged each year in 2015 and 2016. No comprehensive data is available on the results of these negotiations or on the terms of the proposed plans. Another private data request to a judge in charge of consumer insolvency cases in Barcelona, however, confirmed what one would expect: Of a total of 190 mediation attempts in that region, only four have resulted in an agreed extra-judicial payment arrangement, a success rate of a miniscule 2%.[95]

III. Expectations Based on Mediation Theory: Improving on Creditors' BATNA

Whatever the philosophical or policy bases for these debt mediation mandates, one would hope that policymakers expected at least some substantial number of these negotiations to be successful. Otherwise, the imposed mandate is simply a wasteful hurdle standing between overindebted individuals and the discharge relief they really need. The few positive and many negative results described above might well have been predicted in advance if policymakers had considered negotiation theory, or practical experience with debt mediation, or both.

As for negotiation theory, the international mega-best seller, *Getting to Yes*,[96] offers one major clue. The Harvard Negotiation Project authors emphasize repeatedly that a key to successful negotiation is for the parties to "focus on interests, not positions," to find the underlying interests that unite the parties, rather than their stated conflicting positions.[97] It might take some creative framing to reveal these hidden shared interests, but the key is to "invent options for mutual gain."[98] This mutual gain is the *sine qua non* of a successful negotiation. Creditors should not be expected to accept agreed debt relief arrangements unless they can be shown that such arrangements represent some sort of gain over the alternative of continuing to pursue the debtor on unpaid debts or waiting for the debtor to enter the formal relief system, where a trustee will administer whatever value is available for creditors. In other words, as the *Getting to Yes* authors put it, "[y]ou should not expect

[94] Data from Instituto Nacional de Estadística, http://www.ine.es, online and on file with author.
[95] Special thanks to Prof. Matilde Cuena Casas for the data collection and for sharing her expertise on the new law.
[96] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Bruce Patton, ed., rev. ed. 2011).
[97] *Id.* at 42, 72.
[98] *Id.* at 58, 72.

success in negotiation unless you are able to make the other side an offer they find more attractive than their BATNA—their Best Alternative To a Negotiated Agreement."[99]

In business negotiations, even in the distressed workout context, one can easily identify shared interests and a solution that promises something more than creditors' BATNA. Though the gains may be imbalanced, getting a business deal done almost always promises at least some perceived mutual benefit to the parties. Even in the context of distressed loan renegotiation, if a business debtor has something to offer in the future, creditors might even be expected to accept a loss if that loss is smaller than they would suffer without the renegotiated agreement (BATNA), and especially if there is any reasonable potential for a small gain.

This seldom seems to be the case in the personal insolvency context (and likely seldom the case for SME business debtors). These debtors often have little or nothing to offer creditors, and their only interest is obtaining a discharge of most or all of their debt burden. This can hardly be framed as serving any interest shared with creditors. Creditors' primary interest is obtaining at least *some* payment on their claims, or avoiding further loss. A zero offer serves only the interests of debtors and compares unfavorably with creditors' BATNA. The most obvious BATNA is to continue to pursue debtors endlessly on their debts in ordinary collections. Creditors can choose whether and to what degree to limit their own expenses for these pursuits, they can wait until the debtor returns to better fortune, and the state-sponsored collections process often bears much of the burden as creditors return for repeated collections attempts. Even if formal insolvency relief is an alternative for the debtor, that is at least *as* attractive to creditors—if not more so—than agreeing to release the debtor for nothing or next to nothing. At least a trustee will generally bear the burden of investigating the debtor's payment capacity and ensuring that whatever is available is squeezed out for creditors' benefit. And if nothing is available, at least the creditor will not have wasted time and effort carefully considering the debtor's no- or low-value offer.

It is thus clearly senseless and wasteful to force debtors to "negotiate" plans offering zero and even very low payments to creditors as a prerequisite to obtaining discharge relief. No such plan could be expected to produce anything but a failed negotiation, and as presented here, years of experience in Europe and elsewhere has shown that over and over. French legislators were fully committed to negotiated solutions when they introduced their new personal insolvency system, but they accepted this reality and gave the commissions sensible alternatives to mandatory mediation when negotiation appeared obviously pointless. Today, only a small fraction of French cases begins with a required debt mediation. The empirical study of German proposals discovered, to the surprise of no one, that creditors accepted *none* of the proposals offering no (certain) payment. Dutch counselling agencies addressed the problem of flagging success rates by foregoing a mediation in a majority of cases, certifying in most that negotiation would be hopeless. Ireland offers low-income debtors a non-negotiated Debt Relief Notice solution, and even higher-income debtors can be admitted into Bankruptcy without a negotiation if a negotiated solution is not supported by the debtor's circumstances. While the relatively new Hispanic regimes have not internalized this lesson yet, commentators in Colombia are already bemoaning the senseless formality of requiring debt mediation for no- and low-income debtors.

[99] *Id.* at 181.

IV. Primary Practical Determinant of Success: Significant Percentage Payment Offer

If it is clear that low- and no-payment offers are not worth advancing, how much of an offer represents sufficient "mutual gain" for creditors, laying the groundwork for a sensible negotiation? In light of the successes reported above, there must be a subset of cases for which mandatory mediation is more sensible. In which of these cases might mandatory debt mediation be expected to produce sufficient success to warrant the effort before allowing the debtor into a formal relief system? Identifying a specific threshold is probably impossible, as creditors and situations differ substantially from debtor to debtor and country to country. Adding to the negotiation theory, however, some suggestions emerge from a further review of recent practical experience with debt mediation.

One suggestion that seems to emerge repeatedly from analyses of successful debt negotiation is that absolute numbers are less important than relative percentages. That is, creditors evaluate their gain in terms of their *rate* of return (or loss) on investment. An offer of 4000 Euros is highly likely to be rejected if the creditor's investment (loan) amounts to 4,000,000 Euros, but from a debtor who owes only 20,000, this 20% return is much more likely to be greeted favorably. The moderate-income debtors surveyed in the German and Dutch studies reported above, for example, were able to achieve mediated plans, but only as the percentage payment to creditors rose above a sufficient threshold.

Where is the magical margin? More and closer empirical study would be required to answer this question convincingly, but the sweet spot seems to be in the region of 40-50%, at a minimum. French creditors seem to demand (or the commissions *think* they demand) 100% repayment, perhaps over an extended period. But creditor demands seem to be more moderate in other countries where available evidence offers some indication. The German study indicated an average successful offer of 50% (thought with widely varying offers, and no indication of the density of offers near this median), and the Dutch study similarly reported an average *successful* offer of 56% (with an average for *rejected* offers at 27%).

In the United States, consumers frequently attempt to negotiate discounted repayment arrangements with creditors, often with the assistance of intermediaries. One high-profile debt negotiator (who styles himself the "Debt Go To Guy") offers a tantalizing insight into the percentages of debt most often demanded (and forgiven) by US creditors in settlement negotiations. Consistent with the German and Dutch studies explored above, this US report reveals that most general unsecured creditors settle for a minimum of 40% payment, with some particular creditors (e.g., cell phone companies, certain banks, medical debt collectors) demanding 50% and even 65%.[100] Similar advice is offered by a large, national legal-self-help organization, who quotes the range of successful settlements as "around 30 to 50% of the debt."[101]

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[100] Jesse Niesen, *Debt Settlement – What Percentage of a Debt is Typically Accepted in a Settlement?,* SelfGrowth.com (Feb. 13, 2010), http://www.selfgrowth.com/print/831832 (describing these as "actual averages settlements the industry leading settlement companies are seeing" for various types of debts).

[101] Linda Thompson, *Strategies for Negotiating With Creditors,* Nolo.com (undated), http://www.nolo.com/legal-encyclopedia/strategies-negotiating-with-creditors.html; *see also* Lucy Lazarony, *Striking a deal with a debt collector,* Bankrate.com (Oct. 20, 2003), http://www.bankrate.com/finance/credit-cards/striking-a-deal-with-a-debt-collector-1.aspx (again suggesting a common acceptance range of 40 to 60 percent among Canadian creditors).

While all of these sources report some success for debtors making slightly lower offers, it seems likely that a critical mass of success emerges only from offers in the region of 50%, and certainly no less than 25%. Limiting the mediation mandate to debtors reasonably able to make offers in this broad range would alleviate a huge, largely unproductive burden on counseling centers and debtors in the countries discussed above.

One particular debt negotiation context deserves special note, in part because it confirms creditors' orientation on accepting only high-value offers that improve on their BATNA. Among the systems examined here, only Ireland gives special attention to housing debt and mortgage renegotiation. The PIA is specifically designed to facilitate debtors' retention of their homes by encouraging creditors to accept modified mortgage terms. This effort has been fairly successful, with half to two-thirds of cases achieving an agreed debt modification. State and federal governments and courts in the US likewise have instituted a wide variety of generally effective programs to encourage mortgage banks to mediate foreclosures and agree to modifications of their claims.[102]

Mortgage modification is a context in which negotiation could be expected to play a meaningful role. The existence of a valuable asset presents the shared interest that lies at the heart of negotiation theory, as preserving the value of the home is both parties' concern. Improving on creditors' BATNA of seizing this value is a challenge, though a fairly easily quantifiable one. Foreclosure sales as a matter of course depress the value of the seized homes, and the process of foreclosing and then carrying and marketing the home for resale is not cost-free for creditors. Particularly when home values are depressed across the board, as in recent years in US and European housing markets, creditors can fairly predictably count on experiencing a significant loss in the average home foreclosure.[103] Debtors have been successful in averting foreclosures and achieving negotiated mortgage modifications (including principal reductions) in cases where they have been able to offer future payments that demonstrably improve on creditors' BATNA of taking this foreclosure loss.

The success of mortgage modification in Ireland and the US is likely explained in large part by this mathematical truism. Irish banks have made clear that they agree to mediated PIA deals only in cases where "the bank will achieve more financially by agreeing to write down a portion of the debt than they would by repossessing that home" and liquidating the devalued property in foreclosure.[104] Experience in the US has been the same, as mortgage servicers have agreed to modifications "only if the result is 'net present value positive' for the investor," meaning that "the expected cash flow from the modified loan … is greater than the expected cash flow from not modifying the loan."[105] A valuable asset and a credible stream of payments exceeding its distressed value are the core of successful mortgage renegotiation, when and only when debtors' and creditors' shared interest (and ability) to preserve this value converge.

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[102] *See, e.g.*, Alan M. White, *Foreclosure Mediation: An Experiment that Worked*, http://ssrn.com/abstract=2724732 (draft on file with author); Robert Clifford, *State Foreclosure Prevention Efforts in New England: Mediation and Assistance*, New England Public Policy Center Research Report 11-3 (Sept. 2011); Daniel Gill, "Bankruptcy Court's Mortgage Modification Program a Success," 29 *BloombergBNA Bankruptcy Law Resource Center* 209 (Feb. 23, 2017).
[103] *See* White, *id.*, at II.D.
[104] Jerome Reilly, "People with huge debts most likely to get writedown," *Sunday Independent*, 23 Mar. 2014 (quoting David Hall, Director of the Irish Mortgage Holders Organisation, and noting "this means couples deep in debt but whose homes are still in positive equity will not get a write-down and face the nightmare prospect of losing their family residence").
[105] White, *supra* note 102, at II.D.

Even in this shared-interest context, however, impressive success rates have emerged thanks in large part to aggressive governmental intervention to make mortgage modification more financially attractive—or to make it less attractive for creditors to pursue their BATNA of rejecting modification proposals. To goad banks into finding amicable solutions for an acute mortgage crisis, the Irish Central Bank in 2011 adopted a supervisory framework, the Code of Conduct on Mortgage Arrears, and imposed workout targets,[106] requiring lenders to make "every reasonable effort … to agree an alternative arrangement with the borrower."[107] The US reaction was more aggressive. US federal and state governments developed programs to use public funds to refinance distressed mortgages or to pay mortgage creditors for agreeing to mortgage loan modifications.[108] These payments increased the net present value of an agreed modification, hopefully boosting it over the expected value of creditors' BATNA of foreclosure. Some programs operated conversely, reducing the value (or even the availability) of the BATNA of foreclosure. Lawmakers and courts often denied creditors the right to foreclose—or imposed other sanctions—if they failed to negotiate "in good faith" or to thoroughly evaluate the net present value balance of foreclosure versus modification.[109]

These interventions demonstrate the shared interest, mutual gain, and degree of effort required to set the stage for successful debt mediation. These types of shared interests and concerted efforts are most often present in the context of mortgage modification, spurred by the presence of real value and a strong public policy of home preservation. Such value and efforts are rarely present or warranted in the context of renegotiation of ordinary, unsecured distressed personal debts. Only a substantial and credible offer of payment can improve on creditors' BATNA and provide the necessary foundation for an ordinary debt renegotiation.

V. Second Practical Determinant of Success: Persuasive Intermediary

Even if the debtor can offer creditors a substantial repayment, and especially if he or she cannot, an equally important factor for mediation success is a trusted and persuasive intermediary. Commentary on mediation is replete with emphatic observations on the crucial role of the mediator.[110] Especially in the context of individual debtors negotiating workout arrangements with (often institutional) creditors, the World Bank has also emphasized that providing trained counselors to assist debtors in presenting and negotiation their proposals is absolutely vital.[111]

Even more important than assisting debtors, however, is the intermediary's ability to persuade naturally skeptical and even hostile creditors. True, a hallmark of traditional mediation is a disinterested mediator who vigilantly abjures sharing his or her opinion on the

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[106] Jochen R. Andritzky, *Resolving Residential Mortgage Distress: Time to Modify?*, IMF Working Paper WP/14/226 (2014), at 9, 12, 20, 22.

[107] Bank of Ireland, *Code of Conduct on Mortgage Arrears* § 56(a) (2011, rev. 2013). The Code does not appear to require lenders to accept principal reductions, so long as it accepts other "alternative repayment arrangements." *See id.* § 39. Under grilling from government inquiry, for example, the chief executive of the Bank of Ireland publicly announced that "[d]ebt write-off is not a policy we have." "BOI not offering debt write-offs," *The Irish Times*, Sept. 14, 2011.

[108] *See, e.g.*, Clifford, *supra* note 102, at 3, 15-20.

[109] *See* White, *supra* note 102, at IV.A., IV.C.; Clifford, *supra* note 102, at 8-10; Gill, *supra* note 102; *see also* Melanie L. Cyganowski & Lloyd M. Green, "Good Faith and Mediation Sanctions in the Bankruptcy Courts," 25 *Norton J. Bankr. L. & Practice* 171 (2016) (noting the divergent constructions of "good faith").

[110] *See, e.g.,* Leslie A. Berkoff, "The Importance of the Right Mediator," *Am. Bankruptcy Inst. J.* 38 (April 2017); Fernando Vieira Luiz, "Designing a Court-Annexed Mediation Program for Civil Cases in Brazil: Challenges and Opportunities," 15 *Pepperdine Dispute Res. L.J.* 1, 78 (2015).

[111] World Bank, *supra* note 1, ¶¶ 135-37.

parties' positions or the best resolution of the dispute, much less attempting to persuade either side. But in the particular context of debt mediation, the Colombian system uses language that more accurately reflects the desired outcome and the process designed to achieve that outcome. The Colombian debt mediation process is called "conciliation," a word that intentionally contrasts with mediation in that the conciliator is expected to play a more prominent role "by evaluating the position of both parties, the possible outcome for the case in court, and even advising the [parties] on available solutions."[112] The quite explicit public policy goal in mandating debt mediation is not simply to empower the parties to resolve their own disputes as they see best, but to alleviate the burden on the courts, reduce public and private litigation expense, and promote private arrangements whenever possible.[113] To be effective in such a persuasive role, the conciliator must enjoy the trust and confidence of both parties and perhaps occupy a position of authority that allows him or her to exercise a significant degree of moral suasion.

Colombia historically used another word for such an authoritative, persuasive conciliator that ties this process to a long dispute-resolution tradition dating back to medieval Spain and even further back to the beginnings of Islam in seventh- and eighth-century Arabia. The conciliator was called an *alcalde*.[114] The early-1800s Colombian conciliation law was following its predecessor in the Spanish Cádiz Constitution of 1812, which also required conciliation before litigation.[115] This 1812 Constitution established that the local justice of the peace of each Spanish town (the *alcalde*) was to serve as conciliator along with two men, *hombres buenos*, named by each party. The *alcalde* would suggest solutions to end the litigation, not necessarily driven by legal conclusions or rights, but by his view of the "best" resolution. Indeed, essential to being an *alcalde* was not legal training, but "one's standing in the local community," to occupy a position of persuasive influence over the parties.[116]

The Spanish institution of *alcalde* dated much further back, to the 700-year Moorish occupation. The word *alcalde* is a Spanish derivation of the Arabic term, *al-qadi*.[117] While *qadi* is often translated in English as "judge," this fails to capture the essence of this position, relevant to the current discussion of conciliation. The term developed from the word for administration of justice (*qada'*) to refer to specialists who had preserved the specifics of Islamic law in the decades following the death of the Prophet Muhammad in 632 C.E.[118]

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[112] Luiz, *supra* note 110, at 8.

[113] *See id.* at 44 (noting the intention that non-adversarial processes would alleviate an immense backlog in Brazilian courts); *see also supra* notes 22-23 (noting the name of the first Colombian conciliation law on "decongesting the judiciary" and the more recent similar law from 1991); Kilborn, *supra* note 24, at 23-24 (noting that cost-savings is the primary goal of encouraging extra-judicial solutions); World Bank, *supra* note 1, ¶ 130.

[114] *See supra* note 26 (quoting the 1825 law requiring conciliation before one of these *alcaldes*).

[115] Areas in North America that had been under Spanish influence also inherited this institution from Spain, though it quickly faded away in the US. In Spanish Florida, for example, legal reformers explored the idea of retaining the *alcalde* conciliation tradition specifically for disputes over debt, hoping that conciliation would foster mutually beneficial compromise solutions "that would ensure the creditor's recovery, even while protecting the debtor from being forced into abject penury." Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*, at 209 (2017). In both Florida and California, however, reformers were hesitant about, and ultimately rejected, this non-adversarial approach. *See id.* at 215, 219, 222, 227-28.

[116] *See id.* at 212-13 (2017).

[117] *Id.* at 228.

[118] Joseph Schacht, *An Introduction to Islamic Law* 24-25 (1964); Wael B. Hallaq, *The Origins and Evolution of Islamic Law* 63-68 (2005).

These men were not specially trained; rather, their devotion to Islam motivated their private study, and through "the sheer virtuousness of their knowledge," these pious scholars achieved notoriety and authority in the eyes of their communities to say what God's law was.[119] They had no coercive power to enforce their "rulings" on Islamic law; rather, they relied on suasion and authoritative expertise to convince the parties that their views were the one, true way. Thus, in Moorish Spain (*Al-Andalus*), each region had an appointed *qadi*, who occupied an official position, but again who lacked authority to enforce decrees on the proper application of Islamic law to individual disputes. The esteem of these pious experts, however, was such that litigants seldom refused to accept a *qadi*'s judgments.[120]

A *qadi* derives his knowledge of Islamic law not only from the Holy Qur'an, but also from stories (called *ahadith*) of the Prophet Muhammad's behavior and application of Qur'anic doctrine (called his *sunna*).[121] Three of these stories recount the Prophet's intervention as debt mediator. In the first commonly retold account, Muhammad intercedes in a debt collection dispute that had erupted into a loud verbal altercation in the mosque attached to his home. Emerging from his room, Muhammad curtly ordered the creditor to accept 50% of the debt in full satisfaction, directing the debtor to pay this amount. The disputants agreed.[122] In a similar *hadith*, Muhammad's wife, 'A'isha, recounts another similar incident in which the Prophet overheard a debtor asking for remission from his creditor, who refused. When Muhammad demanded to know who was refusing to do a good deed, the creditor relented.[123] A third and final story involves a man who had suffered a property loss and resulting debt crisis. After the community offered the man charitable support, he still could not pay his entire debt, so the Prophet seems to have ordered a discharge, saying to the man's creditors, "Take what you find [of the man's existing property], and you will have nothing beyond that."[124] The creditors in each of these cases retained the prerogative under Islamic law to insist on their rights to payment and reject Muhammad's remission arrangements, but the Prophet seems to have used his overwhelming religious authority to persuade them to do "the right thing."

No *qadi* could be as persuasive as the Prophet himself, but the "sheer virtuousness of their knowledge" made them much more authoritative than the average, untrained individual, even one imbued with "official" judicial power. Medieval Spanish rulers retained this Islamic office in the form of the *alcalde* to leverage the natural persuasive influence of local elders and other respected people.

The longstanding tradition of conciliation in South America seems to have lost this orientation on a mediator with natural leverage. This deviation has led to predictably negative results. The conciliation centers in Colombia have enjoyed very little success in brokering negotiated debt solutions, despite their training and experience in mediation and success in other contexts. Even a trained mediator cannot bring to bear the crucial persuasive authority upon which the office of *alcalde* depended. The newer Spanish approach of relying on notaries is predictably even less successful, as these notaries have neither mediation training nor any gravitas in the eyes of creditors. The Chilean success story is the one bright spot in the Hispanic experience with debt mediation, and it seems likely that a significant part of this

[119] Hallaq, *id*, at 65-66, 77, 166-67, 181-84.
[120] *See* Joseph F. O'Callaghan, *A History of Medieval Spain* 142-45 (1975).
[121] For a detailed description of Classical Islamic law doctrine, see Jason J. Kilborn, "Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity," 85 *Am. Bankruptcy L.J.* 323 (2011).
[122] Bukhari 41:600, 606; 8:447, 460; 49:868, 869, 873; Muslim 10:3780, 3781.
[123] Muslim 10:3779.
[124] Muslim 10:3777-3778.

success is attributable to the guiding force of a central government regulator, the Superintendent of Insolvency and Entrepreneurship. The contrast among these three systems at least suggests, if not demonstrates, that the choice of intermediary is an especially important factor in the likely success or failure of personal debt mediation.

A similar story has played out in Europe. Regimes in which a persuasive intermediary can exert suasion over creditors have enjoyed greater success in debt mediation, whereas those without this central, authoritative figure (and without the presence of factor number one, a substantial offer to creditors) generally have not. Before negotiated arrangements were all but abandoned by French case administrators in recent years, the guiding influence of the Bank of France was vital in overcoming resistance by creditors. The acceptance rate for negotiated plans rose from 45% to over 60% in two years in the early 1990s after the Bank of France used its influence to organize working groups to lobby credit organizations to support the new debt relief process.[125]

In Germany and the Netherlands, on the other hand, which like Colombia rely on public counselors to mediate debt solutions, results have been predictably unimpressive. However well-trained these counselors might be in negotiation generally, they have little gravitas in the eyes of creditors—perhaps just the opposite if they are regarded as representing debtors. The Austrian experience with counselors is more positive, though the relative numbers of debtors seeking mediated arrangements is quite small, and we have little information on the offers being presented to creditors. The striking aspect of the Austrian system is the 70% acceptance rate for *in-court* "mediation." It seems reasonable to conclude that part of this success is again attributable to the presence of a judge, a respected authority figure who doubtless makes it clear that agreed arrangements are preferred, though the opposite results of the in-court process in Germany offers reason to be hesitant about this conclusion. Finally, the Irish mortgage crisis was slowly resolved only after the Central Bank intervened, from a position of both regulatory authority and respected expertise, to spur creditors to consider and accept foreclosure workouts.

The constellation of factors that produce successful mediated arrangements in these countries is difficult to tease apart. There does, however, seem to be a fairly consistent correlation between higher (and lower) levels of agreed workouts and the presence (or absence) of a persuasive intermediary. It is thus not only important to provide some support mechanism for debtors to formulate and present their proposals to creditors, such as counselors or notaries, but also to leverage, if possible, the persuasive power of a respected intermediary along the lines of the *alcades* of Hispanic tradition.

VI. A Third Option?: The Ambiguous Benefit of a Thumb on the Scales

A final contributor to debt mediation success moves yet another step further away from the traditional mediation model. When neither the debtor's offer nor a persuasive intermediary can overcome resistance by a few holdout creditors, the law might *force* agreement by excluding unreasonably negative votes. Court-based regimes for corporate reorganization have long facilitated successful plans by allowing an agreeable majority to accept a workout arrangement, which is then imposed on a dissenting minority.[126] This same approach appears in several of the personal insolvency systems discussed above, even with respect to plan negotiations entirely outside the purview of a court.

[125] *See* Kilborn, France, *supra* note 7, at 639-40.
[126] *See, e.g.*, 11 USC § 1129 (including "cram-down" provisions for overcoming more widespread dissent).

As just noted, the Austrian personal insolvency regime adopts this approach for *in-court* plans, with a not surprising spectacular degree of success. The relative success of the new Irish negotiation processes might also be attributed to rules for imposing majority-accepted plans, likewise with the very successful Chilean law, which gives legal force to plans adopted by as few as two creditors holding a simple majority of claims against the debtor. Oddly, however, an almost identical approach in Colombia has all but failed entirely, as has the less aggressive but somewhat similar majority-voting approach in Spain.

Perhaps these latter failures are a function of the mediators, who exercise little or no influence over creditors in goading them to attend the voting process and support debtors' plans. In any event, given the ambiguous evidence of the effect of this "thumb on the scales" approach to majority-ruled mediation, it is not clear that this tactic actually contributes meaningfully to successful mediation outcomes, especially in the presence of weaknesses in the first two factors (substantial offer and persuasive intermediary).

Conclusion: A More Sensitive and Sensible Selective Mediation Requirement

Mediation can be a useful part of the personal insolvency resolution process, but it has distinct limitations. Ignoring these limitations leads to a terrible waste of time and effort, scarce resources that are desperately needed where they can be most effective. Current debt mediation mandates all too often are blindly applied to debtors who have no capacity to make a substantial offer of payment over a reasonable period of time. This is destructive folly.

Policymakers need to learn from the experiences of longstanding regimes like those in France and the Netherlands, as well as emerging ones, like the one in Ireland, where system administrators have abandoned efforts to press all debtors into a meaningless negotiation, routing more and more directly to needed, formal, coercive relief. These three systems have developed processes to identify debtors with meaningful payment capacity—gauged in terms of flexible but standardized income and expense guidelines—and only in those cases to pursue private, voluntary, mediated arrangements. Only in such cases can creditors and debtors pursue shared interests and mutual gain, essential elements of successful negotiation. Moreover, assigning the administration of such negotiation to a respected, persuasive intermediary, such as a government regulator like the central bank or the new Chilean Superintendent, is among the few ways to convince creditors to accept the sacrifices that public policy demands of them in this context.

Along with the goal of resolving more disputes outside the courts, however, regulators should avoid pressing debtors or allowing them to be pressed into unsustainable arrangements. The high default rates for plans in France and Colombia reveal the negative consequences of overly ambitious pursuit of private solutions. Success in this context should not be measured simply in terms of achieving private agreements and unburdening the courts, but doing so in a way that offers a responsible, durable solution to the personal debt distress to which these relief systems are designed to respond.