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Harmonizing the Rules of Mediation in Insolvency and Restructuring in the EU

Comparative Study of Spanish, Portuguese and Dutch laws

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EXECUTIVE SUMMARY

Using mediation in insolvency and restructuring is a rising trend worldwide. This is due to the various advantages of mediation in comparison to court litigation. It has been an established practice in the US for decades, and it is now frequently used in several Asian countries as well. So far, it has been very successful in resolution of disputes in complex multi-party restructuring proceedings.

Establishing a practice of mediation in restructuring has been on the EU's agenda as well; however, the developments in this field have been rather slow in the EU. In its Recommendation of 12 March 2014 on a new approach to business failure and insolvency ("**Recommendation on Restructuring**"), the Commission recommends member states to adopt preventive restructuring frameworks involving mediator on a case-by-case basis to assist parties in the successful running of their negotiations on a restructuring plan. In 2016, the European Parliament and the Council of the EU drafted a proposal for an EU directive in accordance with the foregoing suggestion of the Recommendation on Restructuring. However, in the final Directive (EU) 2019/1023 ("**Restructuring Directive**"), all explicit references to mediation were removed. It is no longer clear if mediators can be involved in preventive restructuring frameworks. In principle, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters ("**Mediation Directive**") is applicable also to the insolvency matters; however, not every member state applies it within this context. Therefore, currently, there is no EU instrument directly addressing the matters of cross-border mediation in insolvency and restructuring.

To make the Recommendation on Restructuring work in practice, legal scholars and practitioners have been suggesting the EU to conduct legislative works to harmonize national rules and practices of the member states on mediation in insolvency and restructuring and to expand this practice within the EU. One example is the European Law Institute's project named Rescue of Business in Insolvency Law ("**ELI Business Rescue Project**"), which recommends that the member states should adopt explicit statutory rules regulating involvement of mediators in insolvency and restructuring disputes. For this purpose, the ELI Business Rescue Project suggests that the EU should conduct necessary studies on the desired use of mediation in insolvency and restructuring matters in the member states, and define which topics can be addressed under an EU regulation.

My research is based on the ELI Business Rescue Project's foregoing recommendations and aims to support the future studies entailed by it. My main research question is "To what extent the national rules of the EU member states for cross-border mediation in insolvency and restructuring can be harmonized at the EU level?" Due to time and length constraints, I limited my analysis to the following topics: (i) the types of insolvency and restructuring disputes that can be subject to mediation, (ii) the roles and qualifications of the restructuring mediator and (iii) the content of the mediated restructuring plan. I first analysed to what extent the EU legislative framework regulates the foregoing matters. Then I studied how these matters are regulated in Spain, Portugal and the Netherlands. I limited my analysis only to these member states again due to the same constraints and as these states have a relatively established practice in this field. This way, I aimed to identify whether further harmonization at the EU level is necessary regarding the foregoing three topics of cross-border mediation in insolvency and restructuring and if yes, to what extent these can be addressed under an EU regulation. I conducted my analysis in reference to the framework designed under the Recommendation on Restructuring regarding these matters. In the end of my research, I concluded the following.

Mediation Directive is applicable to cross-border insolvency matters; however, not many states apply it within this context. As per the Mediation Directive, the mediator is responsible for conducting mediation and assisting parties to reach a settlement on their dispute. The mediator shall exercise his/her duties in an effective, impartial and competent way. However, different member states apply

different standards of qualification and training for the mediators. As mediation is based on party autonomy, parties are free to determine the content of their mediation agreement in accordance with the applicable contracts law. The Regulation (EU) 2015/848 on insolvency proceedings ("**EIR 2015**") regulates certain procedural matters regarding formal insolvency proceedings with cross-border effect. The Restructuring Directive governs the substantive rules on the preventive restructuring frameworks. The EIR 2015 indicates the general framework for the roles of an insolvency practitioner and leaves it to *lex concursus* to define the specific tasks. The Restructuring Directive assigns several roles to the practitioner in the field of restructuring ("**PIFOR**") including a mediatory role. It governs qualifications of both the insolvency practitioners and the PIFORs. Accordingly, they shall exercise their duties in an effective and competent way and receive the necessary training. The content of the restructuring plan is not regulated by the EIR 2015, while the Restructuring Directive sets forth the minimum content of the restructuring plan and provides a non-exhaustive list of measures that can be included in the plan.

In Spain and Portugal, mediation in insolvency and restructuring is regulated by law. Whereas, in the Netherlands, there are two different unregulated practices in this field, namely turnaround mediation and a pilot project testing court-mandated mediation in formal insolvency proceedings. The Spanish OCPA procedure is limited to payment disputes between the SMEs and their creditors. The Portuguese RERE procedure addresses to any dispute between the debtor and its creditors. Dutch turnaround mediation includes every hardship the debtor may encounter, while in Dutch pilot project, various disputes related to insolvency proceedings are addressed to mediation. All restructuring mediators in the foregoing systems are primarily responsible for facilitating the negotiations between the debtor and the creditors to settle their disputes. The Spanish insolvency mediator and the Portuguese restructuring mediator are also responsible for various auxiliary roles prior to and after the negotiations. The Dutch turnaround mediator has much broader roles as s/he is the manager of the restructuring process. The Mediator appointed within the context of the Dutch pilot project assumes roles similar to that of a regular conflict mediator. All the foregoing systems require the restructuring mediators to have sufficient educational and professional backgrounds in mediation, insolvency and restructuring. The Spanish OCPA and the Portuguese RERE procedures additionally require the restructuring mediators to complete a special training on mediation in restructuring. Both the Spanish OCPA and the Portuguese RERE procedures govern the minimum content of the restructuring plan and provide a non-exhaustive list of restructuring measures that can be included in the plan. In Dutch turnaround mediation, any type of measure to resolve any hardship of the debtor can be included in the restructuring plan. In Dutch pilot project, mediators follow the sample mediation agreement provided by the mediation bureau of the court.

My analysis indicated that the current EU instruments are alone insufficient to address every aspect of cross-border mediation in insolvency and restructuring and further harmonization can be achieved under a new EU regulation. I suggest that this regulation, for now, can only address informal and/or hybrid restructuring of the pre-insolvent debtors. It can only extend to the mediation-suitable pre-insolvency disputes that arise between the debtor and its creditors, or among the creditors themselves before or during the restructuring process. The restructuring mediator should first be responsible for assisting the debtor and the creditors in drafting or negotiating the restructuring plan, provided that s/he can assume additional preparatory roles before the negotiations, if necessary. Rules governing the qualifications of the restructuring mediator can extend to requirements regarding his/her level of education, professional background and neutrality. They can also define the training and accreditation standards and establish an EU-wide licensing and accreditation system. The new EU regulation can follow the minimum content of the restructuring plan set forth under the Restructuring Directive, provided that it includes a non-exhaustive list of restructuring measures that are convenient to resolve mediation-suitable pre-insolvency disputes. It can also give a right to the member states to refuse enforcement if the content of the restructuring plan is manifestly contrary to their public policy.

OVERVIEW OF MAIN FINDINGS

My research aims to support the future studies entailed by the ELI Business Rescue Project to define which topics of cross-border mediation in insolvency and restructuring can be addressed under an EU regulation to harmonize the national rules and practices of the member states in this field. Due to the time and length constraints, I limited my analysis to the following topics of cross-border mediation in insolvency and restructuring: (i) the types of insolvency and restructuring disputes that can be subject to mediation, (ii) the roles and qualifications of the restructuring mediator and (iii) the content of the mediated restructuring plan. I analysed to what extent the new EU regulation can govern these topics.

I first studied the current EU legal framework on mediation, insolvency and restructuring to determine if harmonization on the foregoing topics have already been sufficiently established at the EU level in accordance with the framework designed under the Recommendation on Restructuring. My analysis indicated that the Mediation Directive, the EIR 2015 and the Restructuring Directive elevated the national rules and practices of the member states to a certain level. However, they are insufficient on their own to address the foregoing topics of cross-border mediation in insolvency and restructuring. Therefore, I concluded that further harmonization is necessary regarding these topics under a new EU regulation. Based on my comparative analysis of the Spanish, Portuguese and Dutch laws, I found that the new EU regulation could govern these topics to the following extent:

- **Types of insolvency and restructuring disputes that can be subject to mediation**

For now, the new EU regulation can only govern mediation in informal and/or hybrid restructuring of the pre-insolvent debtor. Only the mediation-suitable pre-insolvency disputes that may arise between the debtor and its creditors or among the creditors themselves before or during the restructuring process can be subject to this EU regulation. That said, further in-depth analysis is necessary to identify which pre-insolvency disputes exactly are suitable for resolution through mediation. This EU regulation can address particular disputes by using opt-in and opt-out methods.

- **Roles and qualifications of the restructuring mediator**

The new EU regulation can primarily assign the restructuring mediator the role of assisting the debtor or creditors with drafting or negotiating the restructuring plan. It should allow the restructuring mediator to maintain a facilitative or an evaluative approach in exercising this role. It may also allow the restructuring mediator to assume additional preparatory roles prior to drafting and negotiating the restructuring plan, when necessary. These may be listed non-exhaustively. As to the qualifications of the restructuring mediator, the EU regulation can govern the level of education, professional background and neutrality of the restructuring mediator. It can also set forth the standards for training and accreditation of the restructuring mediator, including the content of this training on mediation in restructuring, whether it will be given on a continuous basis and the institutions that are authorized to provide this training and to accredit the successful candidates. An EU-wide licensing and accreditation system for the restructuring mediators can also be established by this EU regulation.

- **Content of the mediated restructuring plan**

The new EU regulation can follow the minimum content of the restructuring plan as set forth under the Restructuring Directive, provided that it includes a non-exhaustive list of restructuring measures that are convenient to resolve the mediation-suitable pre-insolvency disputes. Further in-depth analysis is necessary to identify which type of restructuring measures exactly would serve this purpose. The EU regulation can also allow the member states to refuse enforcement of the restructuring plan if its content is manifestly contrary to their public policy.

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