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The Effect of Insolvency on International Mediation - The European and Spanish Perspectives

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Abstract

*This paper studies the effects that the opening of insolvency proceedings produces on international mediation clauses, procedures and agreements. This topic has remained vastly overlooked in the past, despite the increasing use of mediation to address insolvency situations. The analysis required is twofold. First, it is necessary to determine the law that will govern the substance of those effects. In this private international law stage, the European Insolvency Regulation constitutes the cornerstone of the system for cross-border insolvencies in every EU Member State and inspires the regime contained in the Spanish Insolvency Act. In both instruments, the *lex fori concursus* plays a central role and should override the solutions provided in the law of the place of mediation and the law governing the contract underlying the mediated dispute.*

Assuming that this first analysis leads to the application of Spanish law, the article demonstrates that the Insolvency Act contains a very friendly treatment of mediation in the context of financial constraints. However, such regime does not eliminate the need to introduce numerous procedural adaptations to the mediation process, even if not apparent in the provisions of the Act. The paper explores the content of those adaptations and makes proposals to secure the protection of the collective interests present in the insolvency while respecting the core principles of the mediation process.

I. Introduction

The relationship between insolvency and ADRs has been a traditionally controversial topic. Insolvency is typically a judge-driven procedure that brings together a pool of creditors in order to manage their collective concern and decide whether to rescue the insolvent party or to liquidate her estate to distribute the proceeds among creditors. ADRs, on the other side, intend to avoid judicial involvement, are based on party autonomy and tend to affect exclusively the individual interests of the parties involved. In the last decade, research and practice in this field have focused primarily on the relationship between insolvency and arbitration,¹ whereas the effect of insolvency on mediation has remained vastly overlooked.

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¹ The literature is vast. See, Penadés Fons, M., 'International arbitration and *vis attractiva concursus*', in Schmidt, J., Esplugues Mota, C. & Arenas Garcia, R. (eds.) *EU Law after the Financial Crisis* (Cambridge: Intersentia, 2016), 237; Vorburger, S., *International Arbitration and Cross-Border Insolvency: Comparative Perspectives*

The aim of this article is to explore the effects that the opening of insolvency proceedings has on the mediation clauses, procedures and agreements that involve the insolvent debtor. It does not address, however, the use of mediation to manage insolvency situations, although that is unquestionably an area of growing interest and ample potential benefits.²

When the crossroad between insolvency and mediation includes an international dimension (either the insolvency has cross-border elements or the mediation affects parties from different countries), the questions generated by their interaction have a double nature. First, it is necessary to establish the law that will govern the effects that insolvency produces on the mediation commitments of the ailing party. Once this law has been identified, the focus turns onto the specific solutions provided by the applicable legal system. These two steps define the structure of this paper. Section II studies the relevant private international law rules contained in the European Insolvency Regulation and the Spanish Insolvency Act on cross-border insolvencies. Assuming that Spanish law becomes applicable after that first exercise, Section III looks at the regime set forth in the Spanish Insolvency and Mediation Acts to address, expressly or implicitly, the insolvency of a party involved in mediation.

II. The Law Applicable to the Effects of Insolvency on Mediation

Insolvency and mediation fall within the wide umbrella of civil and commercial matters covered by the legislative competence of the European Union. This has resulted in two relevant instruments that define the regulation of these disciplines in every Member State. The fundamental regime of mediation is found in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.³ The content of this Directive is the basis for the Spanish Mediation Act (hereafter, ‘SMA’),⁴ which applies to both domestic and international cases. Cross-border insolvencies,

(The Hague: Kluwer International, 2014); Benedetelli, M. V., ‘Cross-border insolvencies and international arbitration in the EU: a playing field for regulated *forum shopping*?’ (2012) 4 *Les Cahiers de l’Arbitrage* 783; Kröll, S., ‘Arbitration and Insolvency – Selected conflict of laws problems’, in Ferrari, F. and Kröll, S. (eds.), *Conflict of Laws in International Arbitration* (Berlin: Sellier, 2011) 211; Lazic, V., ‘Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings should be given Effect in Arbitration’ in Kröll, S., Mistelis, L., Perales Viscasillas, P. and Rogers, V. (eds.), *Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (London: Kluwer Law International, 2011) 337; Bate, M. and Stepek, M., ‘Swiss Federal Tribunal Renders Noteworthy Decision on Impact of Foreign Bankruptcy on International Arbitration’ (2010) 6(3) *The European and Middle Eastern Arbitration Review* 77; Baizeau, D. ‘Arbitration and Insolvency- Issues of Applicable Law’ in Müller, C. and Rigozzi, A. (eds.), *New Developments in International Commercial Arbitration* (Zurich & Basel: Schulthess, 2009) 97; Markert, L., ‘Arbitrating in the financial crisis: insolvency and public policy versus arbitration and party autonomy - which law governs?’ (2009) 2(2) *Contemporary Asia Arbitration Journal* 217; Wagner, P., ‘When two worlds collide – the dilemma between insolvency and arbitration’ (2012) II *Yearbook on International Arbitration* 119; Vidal, D., ‘Arbitration and Insolvency Proceedings: Comments on ICC Awards and Other Recent Decisions’ (2009) 20(1) *ICC International Court of Arbitration Bulletin* 51; Kaufmann-Kohler, G. and Lévy, L., ‘Insolvency and international arbitration’ in Peter, H., Jeandin, N. and Kilborn, J., *The challenges of insolvency law reform in the 21st century: facilitating investment and recovery to enhance economic growth* (Zürich: Schulthess, 2006) 257.

² For instance, in Spain, which is the focus of this paper, a so-called ‘insolvency mediation’ (*mediación concursal*) was introduced in 2013 in the Spanish Insolvency Act through the *Ley 14/2013*, of 27 September, *de apoyo a los emprendedores y su internacionalización* (BOE n. 233, of 28 September 2013).

³ OJ L 136, 24.5.2008

⁴ *Ley 5/2012*, of 6 July, *de mediación en asuntos civiles y mercantiles* (BOE n. 162, of 7 July 2012).

on the other side, are governed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereafter, 'EIR').⁵ The Regulation is primarily a private international law instrument and provides for a complete set of rules on international jurisdiction, applicable law and recognition and enforcement for all insolvency-related matters. It applies when the centre of main interests of the debtor is located in a Member State. When the centre is located outside of the European Union, the law of each Member State applies. In the case of Spain, the relevant regime is found in the part of the Spanish Insolvency Act⁶ (hereafter, 'SIA') dedicated to private international law matters (articles 10-11 and 199-230 SIA), which in essence mirrors the rules of the Regulation.⁷

Pursuant to article 2(1) SMA, parties involved in mediation have the freedom to choose (expressly or impliedly) the application of the Spanish Act to govern their mediation. If no choice has been made, the Act will apply when the mediation involves a Spanish domiciliary *and* takes place in the Spanish territory. In these two cases (choice and application by default), the Act will govern the effects of the mediation clause and the commencement, conduction and termination of the mediation process. What this Act does not provide, however, is the effect that the insolvency of one of the parties should have on the operability of its rules. If the insolvency proceedings are opened abroad, does the foreign insolvency law have any impact on the operation of the Spanish mediation? And, vice versa, if a Spanish party is declared insolvent, what is the relevance of the Spanish insolvency regime on the mediation agreements and procedures located abroad?

Neither of these questions is expressly addressed by the European Insolvency Regulation, which does not even refer to mediation anywhere in the text. However, this silence does not equal to lack of response. The comprehensive scope of the Regulation implies that its rules on applicable law should also cover the mediation clauses, procedures and agreements involving the insolvent party. This is in line with the principle of legal unity that inspires the Regulation, according to which the law of the Member State of the opening of insolvency proceedings (the *lex fori concursus*)⁸ shall determine 'all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned' (recital 66). This rule is found in article 7 EIR and covers matters such as '(c) the respective powers of the debtor and the insolvency practitioner', '(d) the conditions under which set-offs may be invoked', '(e) the effects of insolvency proceedings on current contracts to which the debtor is party' and '(f) the effects of the insolvency proceedings on proceedings brought by individual creditors' (all listed in art. 7(2) EIR). Each of these matters can be relevant in the context of mediation.

The European legislator, however, is aware that this model is bound to interfere with the rules which govern the international transactions of the debtor, disturbing the certainty of their enforceability and the legitimate expectations of the parties (recital 67). It is for this reason that

⁵ OJ L 141, 5.6.2015, p. 19–72.

⁶ *Ley 22/2003*, of 9 July, *Concursal* (BOE n. 164, of 10 July 2003).

⁷ It is for this reason that the explanations on the Regulation contained in this Section are equally applicable to the equivalent provisions found in the Spanish Insolvency Act.

⁸ Pursuant to article 3 EIR, the jurisdiction to open insolvency proceedings lies on the Member State where the debtor has the centre of main interests.

articles 8 to 18 EIR provide for a number of exceptions to the general rule. Some of these might be equally relevant in mediation cases.

It follows from the abovementioned letter (c) that the *lex fori concursus* will define the distribution of powers between the debtor and the administration to conclude new mediation clauses, participate in negotiations and dispose of the estate to reach mediation agreements. Depending on the legal system, this might also include the requirement that the insolvency court approves any agreement reached through mediation, either directly by the debtor or through the intervention of the administration. Given that the *lex fori concursus* is determined by the debtor's centre of main interests, it will not always coincide with the personal law of the insolvent party, which is frequently defined by other criteria that depend on the nature of the person (natural or legal) and the legal system involved (nationality, domicile, habitual residence, central administration, legal seat, etc.). The potential disparity between the solutions provided in the *lex fori concursus* and the personal law, which frequently governs all aspects of capacity in ordinary mediation circumstances, makes it necessary to limit the regulatory scope of the *lex fori concursus* exclusively to the consequences that are strictly related to the insolvency (possible loss of procedural capacity, limitation of powers to manage and dispose of the estate and role of the administrator).

According to (d), it will also be for the *lex fori concursus* to determine whether the parties involved in mediation can agree to set-off reciprocal credits to settle their dispute. Given the frequent disparity among the legislation of the Member States on this matter, this rule aims to harmonise the treatment that all creditors receive in relation to the same debtor. Article 9 EIR, however, contains a relevant exception to protect the security function that set-off mechanisms (contractual and legal) serve in practice. Even if the *lex fori concursus* prohibits creditors to demand the set-off of their claims against the claims of a debtor, their right will remain operative when such a set-off is permitted by the law applicable to the claim of the insolvent debtor. Generally, this law will be determined by the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations.⁹

Finally, letters (e) and (f) require a combined reading for the purpose of this paper. As ADR mechanism, mediation could be understood to be included in the formula "proceedings brought by individual creditors" referred to in letter (f). The specific scope of this provision had been a source of controversy from the adoption of the original Insolvency Regulation in 2000.¹⁰ However, it has become clear since the approval of the Recast in 2015 that letter (f) refers exclusively to court lawsuits and arbitration proceedings. This is evidenced by the exception to that rule found in article 18 EIR, which provides that 'the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms

⁹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6–16) [hereafter, 'Rome I'] and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.7.2007, p. 40–49) [hereafter, 'Rome II'].

¹⁰ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1–18).

part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat'.¹¹

The exclusion of mediation from this provision has relevant consequences. According to the leading interpretation of the Insolvency Regulation¹², the jurisdictional model adopted by the Regulation is based on the rejection of a wide notion of *vis attractiva concursus*. That is, the jurisdiction of the insolvency court will only reach those disputes and claims which are directly derived from insolvency proceedings and are closely linked with them. On the contrary, the jurisdiction for the resolution of ordinary civil and commercial claims which do not have an inherent insolvency nature and could have arisen outside the context of collective proceedings will continue to be determined by the generally applicable rules on international jurisdiction such as the Brussels I Regulation recast¹³ or the Lugano Convention.¹⁴ This is a European rule of *vis attractiva concursus* that cannot be overridden by national approaches, at least when the civil and commercial claim falls under supranational instruments like the Brussels I Regulation recast or the Lugano Convention.¹⁵

While recital 19 of the Mediation Directive declares the legislative aim to ensure that 'mediation should not be regarded as a poorer alternative to judicial proceedings', the exclusion of mediation from the scope of articles 7(2)(f) and 18 EIR and from the narrow conception of *vis attractiva concursus* should result in the application of the general rule of article 7 without exception. The *lex fori concursus* will always define the validity and operability of mediation clauses that have not been triggered at the time of the opening of insolvency, the binding effect that they may have *vis-à-vis* the insolvency administration, the possibility to continue pending mediation processes, the enforceability of mediation agreements against the insolvent estate and the option to conclude new mediation clauses in contracts negotiated during the insolvency proceedings. Whether this result is reached via the specific provision for contracts in article 7(2)(e) (due to the undeniable contractual nature of mediation) or through the general rule in article 7(1) EIR does not seem to make any practical difference for the purposes of identifying the applicable law.

It follows from this explanation that the effects of insolvency on multi-tiered dispute resolution clauses that include mediation followed by litigation or arbitration might not always be

¹¹ The exclusion of meditation from this provision is also supported by Bělohávek, A. J., 'Effects of Opening (Commencement) of Insolvency Proceedings on Pending Lawsuits and Similar Proceedings under Article 15 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings and under Article 18 of the European Parliament and Council Regulation (EU) No 2015/848', (2016) VII *Czech Yearbook of International Law* 65, 79.

¹² Virgós Soriano M. and Garcimartín Alférez, F., *The European Insolvency Regulation: Law and Practice* (La Haya: Kluwer Law International, 2004) 60-63 and Carballo Piñeiro, L., "Vis attractiva concursus in the European Union: its development by the European Court of Justice" (2010) 3 *InDret* 1. See also Penadés Fons, M., 'International arbitration...', *cit.* n. 1, 243-245 (arguing in favour of excluding arbitration from this European rejection of wide *vis attractiva*).

¹³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351/1, 20.12.2012, p. 1-32).

¹⁴ Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 339/3, 21.12.2007, p. 3-27).

¹⁵ For the analysis of civil and commercial claims which fall outside of the European instruments, see Penadés Fons, M., 'International arbitration...', *cit.* n. 1, 245-247.

governed by a single law. Whereas the impact on the mediation stage will always be subject to the provisions of the *lex fori concursus*, the operability of the second stage of the clause will be subject to the narrow notion of *vis attractiva concursus* and the national laws declared applicable by articles 7(2)(f) and 18 EIR.

III. The Effects of Insolvency on International Mediation under the Spanish Insolvency Act

Pursuant to Article 2(1) SMA, the power to dispose of rights and obligations defines the scope of mediation in civil and commercial matters. In general, one of the possible effects of the opening of insolvency proceedings is that the debtor is dispossessed of her estate and might lose her rights to manage her assets and rights. This loss of rights could pose some conceptual challenges to the survival of mediation in the context of insolvency, just as in the past the concept of ‘arbitrability’ was one of the problematic aspects of the interaction between insolvency and arbitration.

However, the fact that the power of disposal might be lost by the debtor does not mean that such power disappears. If at all, it is transferred entirely or partially to the administration, who will gain (sometimes under the supervision of the court) the same powers that have been taken away from the insolvent party. It is a reallocation of powers rather than an elimination thereof, and it is for this reason that civil and commercial matters should not lose their ‘mediability’ just because a party is subject to insolvency proceedings.¹⁶

This view is shared by the Spanish legislator and was the driving force behind the amendment in 2011 of the main provision in the Spanish Insolvency Act regulating the effects of insolvency on mediation and arbitration. According to article 52 SIA,

‘1. The declaration of insolvency, by itself, shall not affect the mediation clauses and arbitration agreements subscribed by the insolvent party. Should the court understand that said clauses and agreements could be prejudicial for the conduction of the insolvency, it shall be authorised to order the suspension of their effects, notwithstanding the provisions in international treaties.

2. Arbitral proceedings pending at the time of the declaration of insolvency shall continue until the final award, subject to the application of subsections 2 and 3 of the article above.’¹⁷

¹⁶ Together with article 52 SIA examined below, the possibility to have State-sponsored mediation in insolvency proceedings (the abovementioned ‘*mediación concursal*’) is a very clear evidence of this point.

¹⁷ Translation by the author. As explained later in this Section, articles 41 and 51(2) and (3) SIA refer to the distribution of powers between the debtor and the administration. The original version of article 52 reads:

‘1. La declaración de concurso, por sí sola, no afecta a los pactos de mediación ni a los convenios arbitrales suscritos por el concursado. Cuando el órgano jurisdiccional entendiera que dichos pactos o convenios pudieran suponer un perjuicio para la tramitación del concurso podrá acordar la suspensión de sus efectos, todo ello sin perjuicio de lo dispuesto en los tratados internacionales.

2. Los procedimientos arbitrales en tramitación al momento de la declaración de concurso se continuarán hasta la firmeza del laudo, siendo de aplicación las normas contenidas en los apartados 2 y 3 del artículo anterior.’

As opposed to the clear distinction in articles 52(1) and (2) SIA between arbitration agreements and pending arbitration proceedings, mediation is only referred to in the first part of the provision. Despite this omission, it is useful to divide the analysis between mediation clauses that have not been triggered at the time of the declaration of insolvency (Part A) and the possibility to continue with mediation processes that are in place before the opening of insolvency (Part B). In addition, Part C of this Section explores various procedural aspects that are relevant in the two scenarios covered by the preceding Parts. Finally, Part D looks at the possibility to conclude new mediation clauses after the declaration of insolvency and Part E examines the enforceability of mediation agreements in the context of insolvency.

A. The effect of insolvency on mediation clauses

The main message that follows from article 52(1) SIA is that the opening of insolvency shall not affect the validity and operability of the mediation clauses subscribed by the ailing party. Insolvency is (at least in principle) a non-event. It follows that new mediation processes will be able to commence after the opening of the collective proceedings, although the specific role of the debtor and of the administrator in this process will depend on the allocation of powers ordered by the court at the outset of the insolvency.¹⁸

This regime represents a radical shift of approach compared to the pre-2011 solution, which not only omitted any reference to mediation but also provided that the declaration of insolvency rendered arbitration agreements ‘without any value or effect’.¹⁹ Seeking to escape from the hostility of this rule, some commentators and courts argued that the provision did not apply to international arbitration.²⁰ While this discussion might have lost some relevance in light of the permissive regime introduced after the amendment, it is important for the purposes of mediation to explain very succinctly why this interpretation seems misplaced and article 52 SIA should apply to domestic as well as international cases.

First, it was argued that the reference to international conventions in the provision demonstrated the legislative intention to extract international disputes from the rule, leaving them subject exclusively to supranational instruments. Given that the main conventions on arbitration (New York Convention 1958 and Geneva Convention 1961) do not include any reference to insolvency, the supporters of this position argued that arbitration should remain unaffected by the financial failure of a party. This argument is unworkable in the case of mediation, as it is a field that to date lacks any international regulatory framework²¹ and hence

¹⁸ See Part B for an explanation of the different options that can be ordered by the insolvency court regarding the capacity and powers of disposal of the debtor.

¹⁹ The pre-2011 version of article 52(1) SIA read: ‘The arbitration agreements to which the debtor is a party will be rendered without any value or effect during the conduction of the insolvency, notwithstanding the provisions in international treaties’ [Translation by the author]. Original: ‘*Los convenios arbitrales en que sea parte el deudor quedarán sin valor ni efecto durante la tramitación del concurso, sin perjuicio de lo dispuesto en los tratados internacionales*’.

²⁰ See, for instance, the Judgment of the Provincial Court of Barcelona (Section 15) of 29 April 2009; Heredia Cervantes, I., *Arbitraje y concurso internacional* (Cizur Menor: Civitas, 2008) 94; Pérez del Blanco, G., *Efectos procesales de la declaración del concurso: La vis atractiva concursal* (Madrid: Reus, 2007), 236-240; and Perales Viscasillas, P. ‘Los efectos del concurso sobre los convenios arbitrales en la Ley Concursal 22/2203 (I)’ (8 y 9 de junio de 2004) 6035 y 6036 *Diario La Ley* 1838, 1852.

²¹ Besides the European Directive, which obviously is not a ‘international convention’.

it is unconceivable that the legislator intended to refer to an inexistent regime. Second, the mentioned interpretation of article 52 SIA was based on the narrow notion of *vis attractiva concursus* established in article 11 SIA, which coincides with the narrow approach adopted at EU level (explained in the previous Section). Given that such rule excludes international civil and commercial claims from the exclusive jurisdiction of the insolvency forum, it was advocated that international arbitration should be equally excluded and continue to operate in accordance with its ordinary rules. Again, this argument cannot be applied to mediation given that the rule of *vis attractiva* does not cover mechanisms of self-determination and is limited to procedures that involve a third-party adjudicator and lead to a final and binding decision (litigation and arbitration, as evidenced by article 18 EIR).

Leaving this discussion aside, the relevant point in practice is that the positive treatment currently conferred to mediation is not absolute. The court is allowed to order the suspension of the effects of mediation clauses if it concludes that they are prejudicial for the insolvency. This power is also a novelty of the 2011 reform and its meaning raises various questions, also when referred to arbitration agreements. They concern the effects of the measure, the jurisdiction of the court in international cases, the procedure to make the order and the definition of the substantive test for the application of the provision.

To start with, the wording of article 52(1) SIA seems to indicate that the reach of the measure is limited to the suspension of the effectiveness of the clause, but it cannot produce its invalidity or nullity. As a result, the operability of the clause should revive when the insolvency proceedings come to an end or if the court lifts the measure on the basis that the risk for the insolvency has disappeared. During the period of stay, however, the impossibility to resort to mediation will produce the activation of the appropriate dispute resolution mechanisms. In international cases, this will include either arbitration (if the parties agreed to it and the arbitration agreement has not been equally suspended pursuant to article 52 SIA) or litigation (which for civil and commercial claims will remain subject to the ordinary rules of international jurisdiction²² due to the already mentioned narrow notion of *vis attractiva concursus*). In domestic settings, however, the consequence of the suspension of the mediation clause could be substantially different. Whereas arbitration would become available subject to the same conditions mentioned for international cases, the recourse to court would be dominated by the exclusive jurisdiction of the insolvency court due to the wide notion of *vis attractiva concursus* found in article 8 SIA for claims that lack an international element.

As for the international jurisdiction to approve the measure, the vague reference to ‘court’ in article 52(1) SIA makes it difficult to define whether it refers to any court, to the court where mediation would take place in case of being activated or to the insolvency court. The latter seems to be the right answer, both for domestic and international cases and regardless of whether mediation would take place in Spain or abroad. The possibility to suspend a mediation clause on the basis of the harm it causes on the collective proceedings derives directly from the event of insolvency and is regulated by insolvency rules, *ie* it is an insolvency matter and not a civil and commercial issue. Based on the distinction between insolvency and non-insolvency questions used by the Insolvency Regulation and the Spanish Act to allocate international

²² Rules found in European, conventional and domestic instruments depending on the case.

jurisdiction, the application of article 52(1) SIA should belong exclusively in the insolvency court.

Another procedural question left open by the provision is whether the suspension of a mediation clause can be adopted by the court at its own motion or whether it is necessary that a request is made by an interested party. If the aim of the provision is the protection of the collective interests of the insolvency, it seems that the best interpretation would be to allow the court to order the suspension of harmful clauses at its own initiative, particularly because neither the debtor nor the creditors are under any obligation to communicate to the court the existence of their mediation clauses. This possibility, however, should not mean that the decision could be made *inaudita parte*. Drawing a parallel from the regime provided in article 61(1) SIA, which allows for the termination of contracts that are not ‘in the interest of the insolvency’, the court should hear the debtor, the administration and the other signatory (or signatories) of the clause before deciding on the suspension. Giving these parties the opportunity to present their case will allow the court to learn more accurately about the implications of leaving the clause operative and will strengthen the motivation of the decision with the view of a potential challenge.²³

Besides this purely procedural dimension, the determination of the possibility to order the suspension *ex officio* has a very important consequence. Given that the court’s power is only contemplated by the first paragraph of article 52 SIA, the nearly unanimous interpretation is that it only applies to mediation clauses and arbitration agreements that have not given rise to individual procedures. That is, once a party starts either of them, the power of the court ceases to exist. Undoubtedly, this might cause a ‘race to the mediator/arbitrator’, which requires clarity about the chronological yardsticks. Focusing on mediation, article 16 SMA provides that mediation commences either when both parties agree on it (eg. by choosing a mediator or sending their request to the institution) or when one of the parties decides to trigger the mechanism unilaterally in accordance with the terms of the clause (eg. by sending the request to the other party, to the institution or to the pre-selected mediator). If any of these acts has taken place before the court has started to consider the suspension of the mediation clause, the court will have lost its power. That is, based on the logic of *lis pendens*, it seems appropriate that the relevant point in time *vis-à-vis* the initiation of mediation should not be the moment when the decision to suspend is made but the commencement of the judicial process where such question is discussed. If, as has been argued above, the court can examine this matter *ex officio*, legal certainty will require that the court communicates this to the affected parties at the earliest possible time.

The last and probably most important question raised by the power to suspend mediation clauses is the content of the test that must be satisfied to conclude that a clause is prejudicial for the insolvency process. Nothing is stated in the provision. The starting point should be that the mere existence of a mediation clause and the possibility to commence new mediation processes are not *per se* a source of harm for the interests of the insolvency, as the permissibility of this situation was the basis of the reform that introduced the current regime of article 52(1) SIA in 2011. It is true, however, that there might be certain situations where mediation can unfold uneconomic consequences and hence an anticipatory suspension could be beneficial. In

²³ Decisions by the insolvency court can be challenged pursuant to article 197 SIA.

these cases, the driving force should be the protection of the interests of the collective proceedings and not those of the counterparty to the mediation clause, of a certain group of creditors or of a third party, who are not the beneficiaries of the provision. At least hypothetically, this would include scenarios where it could be proved (not without difficulty) that the mediation clause is an instrument put in place by the debtor and a creditor to reach an enforceable agreement that in the future could be used to escape from the restrictions of the *par conditio creditorum*.²⁴

What cannot be forgotten is that, if the key concern in a situation of insolvency is the insufficiency of financial resources, the suspension of the mediation clause in the context of an international dispute will reactivate the other applicable dispute resolution mechanisms. As explained above, even if arbitration has not been agreed or has been equally suspended, the rejection of a narrow notion of *vis attractiva concursus* at EU and Spanish levels will open the possibility to start court proceedings before any competent court under the rules on jurisdiction for civil and commercial claims. Compared to the cost and time required by mediation, the risk of having court proceedings commenced against the insolvent estate in a foreign jurisdiction should make it very exceptional that the suspension of the mediation clause is a measure in the interest of the insolvency.

B. The effect of insolvency on pending mediation procedures

Unlike the first part of the provision, article 52(2) SIA does not include any reference to mediation. This silence should not have any negative or extinctive meaning. If the solution in article 52(1) SIA is the continuation of the effectiveness of mediation clauses and no other effect is provided by the Act, the only possible interpretation must be that mediation procedures pending at the time of the opening of insolvency shall be continued until their finalisation, either because an agreement has been reached or because the time for negotiations has come to an end unsuccessfully.

This reading is in line with the regime provided by article 61(2) SIA for contracts with reciprocal obligations whose performance is still totally or partially outstanding for both parties when the insolvency is declared. They continue to operate and remain enforceable, just as the reciprocal obligations required in a mediation process (loyalty, good faith and mutual respect)²⁵ remain fully in force despite the insolvency of one of the parties.

The fact that mediation can continue does not imply, however, that it remains completely unaltered after the declaration of insolvency. To the contrary, some procedural adaptations need to be introduced, most of which apply equally to new mediation procedures commenced after the opening of insolvency.

The main adaptation concerns the possible limitation of the powers of the debtor over her estate, rights and obligations. As regulated by article 40 SIA, the concrete effects of insolvency on this matter will depend in the type of insolvency. When the opening of insolvency was

²⁴ It seems, however, that this would be better achieved through the conclusion of an arbitration agreement due to the benefits conferred by the New York Convention on the recognition and enforcement of foreign arbitral awards (1958).

²⁵ All provided in article 16(1) SMA.

requested by the ailing party, the debtor will preserve her powers of administration and disposal of the estate, although their exercise will be subject to the intervention of the administration, who will authorise each act ('intervention' status). On the other side, when insolvency was declared at the request of a creditor, the powers of the debtor will be suspended and the administration will have to intervene on her behalf in every patrimonial act ('suspension' status). These two regimes can be amended and tailored by the judge to the specific circumstances of each insolvency.

Applied to mediation, this solution means that if the debtor is subject to intervention, she will be able to continue to participate in the negotiations but any proposed agreement will have to be authorised by the administration before being formally adopted. In the case of suspension, the administration will replace the debtor in the negotiations and will be able to reach an agreement without her consent.

This solution is coherent with the regime contained in articles 51(2) and (3) SIA on the role of the debtor and the administration in court and arbitration proceedings pending at the time of the opening of insolvency.²⁶ According to article 51(3) SIA, in situations of intervention the debtor will preserve her procedural capacity to participate in the proceedings, but the administration will have to authorize in advance any settlement, waiver of rights or withdrawal of claims that could affect the insolvent estate. Similarly, article 51(2) SIA states that in suspension cases the administration will appear on behalf of the debtor, with the peculiarity that any settlement, waiver or withdrawal will require the authorisation of the insolvency court after consulting with the debtor and with any other party to the insolvency proceeding that the court deems appropriate. This additional layer of security is justified by the *res judicata* effect generally produced by judgments and awards, which do not follow from a mediation agreement.

In addition, article 51(2) SIA allows for the 'suspended' debtor to be present in proceedings with separate representation and defence as long as she does not perform any act that falls within the competence of the administration and that she provides sufficient security that any expenses will be not be covered by the estate. It is very uncertain whether it would be appropriate to extend this solution to mediation cases. Mediation is not based on the intervention of a third party with authority to render a final and binding decision, which could be the reason why the additional level of scrutiny produced by the presence of the debtor would be beneficial. Instead, the success of mediation depends on the existence of a fluid channel of communication between the parties and it is arguable that this could be distorted by the participation of the debtor.

Finally, in both cases considered by articles 51(2) and (3) SIA the costs produced by a settlement, waiver or withdrawal will be imputable to the insolvency estate, which arguably is a solution that could be extended to the costs that follow from a mediation process in which a settlement had been sought.

It is relevant to note that when the debtor does not respect the restrictions to her powers imposed by the intervention and suspension statuses, article 40(7) SIA does not provide for the invalidity

²⁶ The application of articles 51(2) and (3) SIA to arbitration is provided in article 52(2) SIA.

of the acts. Instead, the administration will be able to either approve them *ex post* or apply for their invalidation by the insolvency court. The counterparty involved in the mediation as well as any creditor present in the insolvency will have the right to request the administration to make a decision as to the filing of the setting aside application. Similarly to the decision to suspend the mediation agreement pursuant to article 52(1) SIA, this is purely insolvency matter. Therefore, it should fall within the exclusive jurisdiction of the insolvency court, even in the case of international or foreign mediations. If no action has been taken in a month since that request, the possibility to invalidate the debtor's act will expire and the agreement will be shielded from any later challenge. The same result will be reached in cases when no request was made by the relevant parties if the insolvency concludes with a collective agreement or with the liquidation of the estate.

Besides this major adaptation, the possible intervention of the administration makes it advisable that the mediation process is provisionally suspended in order to allow for the new management to familiarise themselves with the details of the negotiation and the underlying transaction. This could be agreed by the parties pursuant to the principle of procedural party autonomy recognised in article 10(1) SMA, in line with the similar solution provided by article 51(2) SIA for court and arbitration proceedings in 'suspension' cases (5 days of stay).

C. Procedural aspects of mediation procedures conducted during insolvency

Together with the adaptations explained in the previous Part, the coincidence of insolvency and mediation raises additional procedural questions that need to be addressed.

The first involves the interruption of limitation and prescription periods. Pursuant to the general rule contained in article 4 SMA, the request to commence mediation in accordance with article 16 SMA suspends the counting of the limitation and prescription periods for the civil and commercial claims submitted to mediation. This regime, however, becomes inapplicable after the declaration of insolvency, as article 60 SIA provides for the interruption of those periods during the whole insolvency process. According to articles 7 EIR and 200 SIA, this is one of the insolvency effects governed by the *lex fori concursus*, with the consequence that when the insolvency proceedings are opened in Spain, the rule in article 60 SIA will be relevant to any international mediation involving the debtor, regardless of its seat and the law governing the dispute.

The second question concerns conflict of interests. The impartiality and neutrality of the mediator are two fundamental principles of the mediation process.²⁷ These factors are examined in light of both the relationship between the mediator and the parties, and the interests of the former in the outcome of the dispute. Given that the administration of insolvency proceedings is allocated to firms and professionals that are frequently very active in the field of dispute resolution for civil and commercial disputes, it will be imperative to reassess whether the mediator has some connection, relationship or interest (personal or professional) with the newly appointed administration. Should that be the case, the mediator will have to disclose it to the parties and might even be disqualified to continue acting as mediator. In that scenario, a

²⁷ See, for instance, articles 7, 8 and 13 SIA.

new mediator would need to be appointed following the procedure originally agreed by the parties.

The third procedural matter relates to confidentiality. Article 9 SM, in line with article 7 of the European Mediation Directive, proclaims that confidentiality is one of the cornerstones of the mediation process, to the extent that parties are not allowed to disclose any information obtained through mediation unless both parties agree to it in writing or when a motivated request is sent to the parties by a criminal judge. In contrast with this strict regime, the collective interests protected by the insolvency proceedings and the requirement that the administration reports to creditors and the court about the state of the businesses of the insolvent estate makes it necessary to soften, by way of exception and subject to the principle of proportionality, the high level of confidentiality surrounding mediation. This would not mean that parties alien to the mediation clause would be allowed to be present in the negotiations or have access to specific documents produced therein. However, it should authorise those third parties (creditors) to receive information about the progress of the mediation process and the position maintained by those representing the insolvent estate.

The fourth issue affecting the conduction of mediation is the prohibition of set-off of reciprocal credits. Subject to the choice-of-law rule explained in Section II, article 58 SIA provides that no compensation will be allowed after the declaration of insolvency, with the only exception of those cases in which the requirements for it were satisfied at the time of the opening of insolvency. In the case of set-off mechanisms designed by the parties by way of contract, it will be necessary to look for those requirements in the agreement between the parties. In the event of legal set-off, the relevant conditions imposed by Spanish law are found in article 1196 of the Spanish Civil Code. Without a doubt, these limitation will hinder substantially the prospects of success of those disputes submitted to mediation where both parties have claims against each other.

The final procedural aspect derived from insolvency concerns the possibility to elevate the mediation agreement to a notarial deed or have it homologated by a court. According to article 25(2) SMA, before proceeding to formalise the agreement into a deed the notary will assess that the result of the mediation complies with the provisions of the Mediation Act and is not contrary to Law. Within this ample test, the insolvent status of one of the parties will require the notary to check that the insolvency rules (domestic and international) have been respected during the mediation process and that the agreement reached by the parties does not violate any insolvency principle, particularly the *par conditio creditorum*.

The same analysis will have to be conducted in the judicial context if the agreement is homologated by a court. In terms of international jurisdiction, this is not a purely insolvency matter, as demonstrated by the fact that a request for homologation is not regulated by insolvency rules and can exist in scenarios of full solvency. Consequently, the jurisdiction to homologate a mediation agreement will continue to belong to the court that had sponsored the mediation, as generally provided by article 25(4) SMA.

D. The conclusion of mediation clauses after the declaration of insolvency

Article 44(1) SIA declares that the declaration of insolvency does not interrupt the professional and commercial activities of the debtor. This includes the continuation of business relationships, the negotiation of new deals and the conclusion of contracts. In this context, it is not unconceivable that the debtor and her contracting parties may consider the inclusion of mediation clauses in their agreements, even with regard to pre-existing contracts. In all these scenarios, the existence of an insolvency proceeding cannot constitute a reason for the ineligibility of mediation. In fact, it might constitute the best-suited option in terms of expense and celerity in light of the financial circumstances imposed by the insolvency of one of the parties.

The only limiting factor will be the need to respect the restrictions to the patrimonial powers of the debtor ordered by the insolvency judge. In cases of intervention, the debtor will be allowed to carry out the negotiations and even propose mediation as one of the dispute resolution methods, although the agreement on it would need to be authorised by the administration (preferably in advance, but also *a posteriori ex* article 40(7) SIA). In situations of intervention, it will be for the administration to assume full responsibility and conduct the totality of the contractual dealings.

E. The enforcement of mediation agreements against an insolvent estate

For the purposes of enforcement, the silence of the Insolvency Act and the contractual nature of an ordinary mediation agreement should produce the application of the insolvency rules for contracts. When the agreement had been reached before the opening of insolvency, it will be necessary to separate between cases where only one of the parties has obligations to perform toward the other and situations where the agreement contains reciprocal obligations that are awaiting performance by both parties (articles 61(1) and (2) SIA, respectively). In the first case, the unilateral obligation will be included in the active or passive balance sheet of the insolvency. In the latter, both parties will remain bound by their promise and forced to perform in accordance with the agreement. By way of exception, however, article 61(2) SIA grants the court the power to terminate bilateral contracts when it considers it to be ‘appropriate for the interest of the insolvency’. Even if article 61 SIA could be generally applied to mediation, it is not clear to what extent this particular power is applicable to mediation agreements. According to article 61(2) SIA, unless otherwise agreed by the parties, the decision to terminate the contract needs to be followed by the calculation of damages produced to the innocent party and the compensation to which it is entitled. This requirement implies that the court-ordered termination is not a gratuitous measure, so if the mediation agreement contained reciprocal obligations to pay, it is difficult to see what alternative means of compensation the court could order to terminate the agreement. It is for this reason that if article 61(2) SIA is to apply to mediation agreements, it should be limited to cases where the agreement also contains non-pecuniary obligations which could be translated into economic compensation in the event of termination.

Outside the contractual facet of mediation agreements, there is also the possibility that the result of the negotiation between the parties is formalised into a notarial deed, a court judgment or an arbitration award. While generally enforceable, the effectiveness of these titles should be

substantially reduced in the event of insolvency. One of the traditional effects of the opening of collective proceedings is the prohibition of any act directed at the individual enforcement of rights. Article 55 SIA is a clear example of this. The extraterritorial effect of this type of prohibition is guaranteed in every Member State pursuant to articles 19 and 20 EIR, which provide for the automatic recognition of the insolvency proceedings opened anywhere in the European Union and of their effects. This impediment, however, does not render mediation agreements fully ineffective; rather it limits their utility. The agreement will constitute a valid title to prove the existence of a credit and will allow the beneficiary to join the list of creditors of the insolvency along with other credits contained in contracts, administrative decisions, judgments or awards.

In the specific case of mediation agreements that have been homologated by a court, the request to be included in the list of creditors will not be filed before the court that homologated the agreement, which is ordinarily competent for the enforcement of agreements pursuant to article 26 SMA. Instead, the request will be submitted to the insolvency court, as part of its exclusive jurisdiction to deal with the recognition of credits and their inclusion in the passive side of the estate.

Finally, when the agreement is contained in a foreign deed, judgment or award, article 27(1) SMA refers to the general requirements of recognition and enforcement contained in the Spanish Act on international legal cooperation in civil matters.²⁸ Besides the prohibition of individual enforcement, the jurisdiction to rule on the recognition of the foreign decision should remain with the court competent for those actions in non-insolvency situations.²⁹ The homologation of a foreign decision is not an action that derives exclusively from the insolvency event or is directly related to it. Rather, it is an ordinary action frequently undertaken outside insolvency contexts and which does not produce *per se* the patrimonial reduction of the debtor's estate. Primarily, it is a formal validation of the allocation of rights and obligations contained in the foreign decision and does not need to be followed by a physical transfer of rights and assets between the parties. The same reason has been invoked by Spanish caselaw to respect the jurisdiction of the *Salas de lo Civil y Penal* of the *Tribunales Superiores de Justicia* to recognise foreign awards despite the existence of insolvency proceedings conducted in Spain against the losing party.³⁰ It would be coherent, therefore, to follow an equivalent approach to the recognition of foreign decisions based on mediation agreements.

IV. Conclusion

This paper has studied the effects that the opening of insolvency proceedings produces on mediation clauses, procedures and agreements. This topic has remained vastly overlooked in the past, despite the increasing use of mediation to address insolvency situations. The analysis required is twofold. First, it is necessary to determine the law that will govern the substance of those effects. In this private international law stage, the European Insolvency Regulation constitutes the cornerstone of the system for cross-border insolvencies in every Member States and inspires the equivalent regime contained in the Spanish Insolvency Act. In both

²⁸ *Ley 29/2015*, of 30 July, *de cooperación jurídica internacional en materia civil* (BOE n. 182, of 31 July 2015).

²⁹ This step will not be required in those cases in which the foreign decision is automatically recognised in Spain, as provided in article 36 Brussels I Regulation recast.

³⁰ Judgment of the Provincial Court of Pontevedra (First Section), of 27 September 2013.

instruments, the *lex fori concursus* plays a central role and should override the solutions provided in the law of the place of mediation and the law governing the contract underlying the mediated dispute.

Assuming that this first analysis leads to the application of Spanish law, the article demonstrates that the Insolvency Act contains a very friendly treatment of mediation in the context of financial constraints. However, such regime does not eliminate the need to introduce numerous procedural adaptations to the mediation process, even if not apparent in the provisions of the Act. The content of those adaptations, as proposed by this paper, seeks to secure the protection of the collective interests present in the insolvency while respecting the core principles of the mediation process.