Mediation in cross-border insolvencies

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Abstract:

This chapter argues that mediation should be understood as a restructuring infrastructure tool capable of supporting preventive restructuring, cross-border coordination, and EU external legal influence. It examines the evolving role of mediation within the European Union's (EU) insolvency and restructuring framework, with a particular focus on cross-border disputes. The EU's ongoing efforts to harmonize diverse national insolvency systems have been bolstered by the adoption of the EU Directive on Preventive Restructuring 2019/1023, which aims to facilitate access for debtors in difficulties to restructuring frameworks whilst creating efficient, fair, and equitable outcomes for both creditors and debtors. In parallel, there has been an increasing interest in integrating Alternative Dispute Resolution mechanisms, notably mediation, into insolvency and restructuring practices. Mediation, as an out-of-court method of resolving disputes, is gaining traction due to its cost-effectiveness, efficiency, and privacy, particularly in pre-insolvency stages. Within the field of civil and commercial law, the EU Mediation Directive 2008/52 was adopted to facilitate access to dispute resolution and to promote the amicable settlements by encouraging the use of mediation in cross-border disputes. The Mediation Directive aims to ensure a balanced relationship between mediation and judicial proceedings. More recently, the Singapore Mediation Convention entered into force, which provides a framework for the cross-border enforcement of international settlement agreements reached through mediation. This chapter outlines the benefits of mediation, its legislative development at the EU level and in a global context, and its role in the insolvency landscape. Furthermore, it explores how the EU can employ mediation as a tool for resolving cross-border insolvency disputes, while also extending these practices beyond its borders to strengthen global trade relations. The chapter concludes by underscoring the potential for mediation to foster a more cohesive and resilient global economic framework, promoting cooperation between the EU and Third Countries.

Key words: Insolvency, Restructuring, Cross-Border, Mediation, ADR, Pre-Insolvency, Out-of-Court Settlement, Preventive Restructuring Directive, Singapore Mediation Convention, UNCITRAL Model Law on Cross-Border Insolvency, European Union, Third Countries.

A. Introduction

In the intricate and highly heterogeneous landscape of international commerce, insolvency is a particular challenge, amplified by the cross-border nature of modern business operations. Within the European Union (EU), insolvency law has undergone a considerable evolution, particularly with the European Insolvency Regulation in 2000,[1] and its Recast in 2015,[2] marked by a persistent effort to coordinate the diverse national systems of the Member States, with the aim to achieve efficient, equitable, and fair outcomes for both creditors and debtors, particularly in cross-border situations.[3] More recently, new developments have taken place in the national restructuring frameworks of the EU Member States with the adoption and transposition of the EU Directive on Preventive Restructuring 2019/1023.[4]

One of the pivotal developments in the evolving field of insolvency and restructuring is the increasing appetite for integrating alternative dispute resolution (ADR) mechanisms. These mechanisms include negotiation, conciliation, mediation, and arbitration. This chapter will particularly focus on the growing emphasis on mediation, as an effective tool for resolving insolvency disputes and for the conduct of restructuring negotiations.[5]

The complexities of litigating major cross-border insolvencies in multiple fora can cause delays, inefficiencies, and increased costs, leading to a renewed interest in seeking alternative ways.[6] Thus, the focus shifts from adjudication of insolvency disputes towards resolution in an out-of-court setting by using ADR mechanisms. Scholars put forward the view that mediation could help avoid the inherent shortcomings of litigation, especially in workout and pre-insolvency stages.[7] Today, viable businesses in financial

1 Insolvency Regulation 1346/2000
2 Insolvency Regulation Recast 2015/848
3 Ghio, p. 116 et seqq.; Wessels, TvOB 2015, 207 (209).
4 Restructuring Directive 2019/1023.
5 Wessels, Eurofenix 2016, 24 (25).
6 Sussman/Gorskie in Rovine, p. 166.
7 Wessels/Madaus, p. 127.

difficulties need effective national and cross-border preventive restructuring frameworks which would enable them to continue operating. Mediation provides a way of solving legal conflicts without pursuing in-court legal actions, with the help of a third party, namely the mediator, and without (significant) involvement of the judiciary. Mediation is a widely encouraged tool, particularly at the EU level, as it is known to have many benefits, such as its relative cost and time efficiency as well as privacy.[8]

As the EU continues to define, refine, and harmonise its insolvency framework, there also lies a parallel opportunity to further develop and extend these advancements beyond the Union's borders. The integration of robust mediation mechanisms can facilitate smoother cross-border insolvency and restructuring processes, fostering an environment of legal certainty and mutual trust. Enhancing mediation mechanisms, not limited to Member States, but also through collaboration with Third Countries could significantly bolster international trade relations, by providing a more stable and predictable environment for cross-border investments.

This chapter is laid out as follows: Section B explores the benefits of mediation and the significant role it plays in achieving consensual outcomes. Section C explores the development of mediation at the EU level and its influence on national practices, along with an evaluation of the legislative efforts in creating an EU mediation framework. Section D analyses the function of mediation within the EU insolvency and restructuring landscape. This is followed by Section E, which examines how the EU could further integrate mediation as a tool for restructuring and for solving cross-border insolvency disputes to also serve as a model for strengthening legal and economic ties with Third Countries, exploring the benefits and challenges of extending these mediation practices beyond the EU. The chapter concludes by highlighting the potential for a more cohesive and resilient global economic framework, underpinned by cooperation between the EU and its global partners based upon shared objectives and legal standards.

B. Mediation as a tool for amicable resolution

Although mediation does not have a commonly agreed definition, it is generally accepted that it is a relatively inexpensive, time-efficient, as well

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8 'European E-Justice, EU Rules on Mediation' (europa 17.11.2021) <https://e-justice.europa.eu/63/EN/eu_rules_on_mediation> (last accessed: 4.8.2024).

as practical instrument aiming to resolve conflicts in an amicable manner with the consent and participation of the stakeholders around a dispute.[9] At its core, mediation offers a voluntary, confidential, and structured yet flexible process where an impartial, neutral third party, the mediator, facilitates communication and assists the parties to a dispute in negotiating to promote understanding, reconciliation, and to reach a mutually satisfactory agreement.[10] Although it is typically considered that participation in mediation is voluntary, it can also be mandated by law or by courts in some jurisdictions.[11]

Mediation has numerous advantages over traditional litigation, particularly in the context of insolvency proceedings. It is generally less expensive than court litigation due to lower legal fees and faster resolution times,[12] reducing the time needed to resolve disputes, which is crucial in cases such as restructuring and insolvency where prolonged uncertainty can further damage financial stability of the parties. Mediation emphasizes collaboration and voluntary decision-making, often leading to more durable and amicable solutions. A smooth mediation process relies on cooperation as the parties themselves try to resolve their disputes with the assistance of the mediator, who lacks decision-making power.[13] The mediator remains neutral and impartial, ensuring a balanced process where all parties are heard and respected. The success of mediation generally depends on the negotiation skills of the parties, enhanced with the support of the mediator, and their good faith.[14] Parties retain control over the outcome, with the mediator guiding the process rather than dictating the terms of the resolution. In other words, the mediator does not impose a decision but helps the parties explore options, brainstorm creative solutions, and negotiate a settlement.[15] The collaborative nature of mediation helps preserve trust and business relationships that might otherwise be irreparably harmed if the conflict is addressed through litigation. Mediation could help the parties to

9 Eidenmüller/Griffiths, ‘Mediation in Cross Border Insolvency Procedures, The Practitioner’s Resort of Choice in Disputes Concerning Insolvent Undertakings’ (insolventiemediation) <https://insolventiemediation.nl/media/uploads/file/11-Cross-Border-Mediation.pdf> (last accessed: 10.8.2024).
10 Art.3 no. a Mediation Directive 2008/52/EC.
11 Stipanowich/Lamare HNLR 2018, 1 (46); Welsh, ABI Law Review 2009, 427 (432).
12 Mocheva/Shah, TDM 2017, 1 (2).
13 Heath, INSOL World Sup. 2021, 6 (9).
14 Jokubauskas, Societal Studies 2017, 244 (248).
15 Hopt/Steffek in Hopt/Steffek, p.12.

separate the people from the problem, focus on the interests, and work out a common solution.[16]

The informal and supportive environment of mediation can alleviate the stress and adversarial tension, a symptomatic of court proceedings. Parties also have more flexibility in crafting creative solutions that address their specific needs and interests, rather than being bound by rigid legal procedures and precedents. Mediation can serve as a tool to solve multiple conflicts within one process, potentially offering pragmatic solutions that were not envisaged before, which is often the case after the mediator has discussed with both parties separately in caucuses. Additionally, agreements reached through mediation often enjoy higher compliance rates, as parties are more likely to adhere to solutions that they have actively participated in creating.[17]

Procedurally speaking, mediation is arguably more flexible and simpler compared to litigation, as the rules are often decided by the parties themselves or tailored according to their preferences.[18] Moreover, there is the important benefit of confidentiality, as opposed to public court proceedings.[19] Discussions in mediation are confidential, promoting open communication and honest negotiation without fear of repercussions. As the mediation process lays within the autonomy of the parties, it is not bound by a rigid schematic and can vary case-by-case.[20] However, generally speaking, it consists of four phases: the parties (1) at the intake phase, agree to mediate and choose their mediator, (2) hold caucuses and plenary meeting during the exploration phase to inform the mediator in order to identify individual interests and common grounds, (3) examine and negotiate different possible solutions with the assistance of the mediator during the negotiation phase, and finally, (4) in the concluding phase, lay down the solution in a settlement agreement and sign.[21]

The practice of mediation has deep and ancient roots, with various forms utilized across different cultures and settings for millennia. Its popularity has fluctuated throughout history, often rising and falling in response to the prevailing social, economic, and political climates. Mediation has

16 For more information, see Fisher/Ury, p. 22 et seqq.
17 World Bank Group International Finance Corporation, ‘Mediation Essentials’, 2016, 5.
18 Rec. 6 Mediation Directive 2008/52/EC.
19 Rec. 23 Mediation Directive 2008/52/EC.
20 Alexander in Hopt/Steffek, p. 20.
21 van de Griendt/Schutte, p. 8.

gained prominence during periods when parties seek amicable resolutions over adversarial or contentious methods, especially when faced with the prospect of lengthy and costly legal battles or the harsh penalties that might be imposed by the courts. For example, in late medieval and early modern Europe, debtor-merchants often turned to mediation as a way to negotiate with their creditors.[22] At that time, failing to repay debts could lead to severe consequences, including imprisonment. Mediation offered a way to settle disputes without resorting to the punitive measures of the legal system, providing more humane and pragmatic solutions that were beneficial to both parties.

Mediation as we recognize it today began to take shape in the mid-20th century, gradually gaining momentum as an alternative to overburdened and costly judicial systems. The United States played a pivotal and pioneer role in this development, while its spread to the EU has been taking some time.[23] Compared to the US, the use of mediation, particularly in the field of restructuring and insolvency, is less common in many EU jurisdictions.[24] In literature, the lack of evolution in the mediation framework and the low utilization of mediation, despite its many benefits and a strong policy support, is referred to as the 'mediation paradox'. The EU has increased its efforts in the past decades to promote mediation and to address this paradox.[25]

The limited use of mediation in the EU may be attributed to a certain degree of scepticism and a lack of knowledge about the process. Mediation could be perceived as a stalling tactic by the counterparty, or it can be considered as a (mandatory) bureaucratic step prior to litigation, resulting in a waste of time and resources. While courts and national legislators have experimented with mediation – for instance, Dutch courts with pilot programs in insolvency cases[26] and the Italian legislator studying the effects

22 de Ruysscher in Beerbühl/Cordes, p. 84.

23 Mocheva/Shah, TDM 2017, 1 (2); Menkel-Meadow in Steffek/Unberath, p. 419 et seqq

24 Wessels Eurofenix 2016, 24 (24); European Commission, 'Green Paper on alternative dispute resolution in civil and commercial law', 19.4.2002, COM(2002) 196 final; Section 652 no. a US Alternative Dispute Resolution Act 1998.

25 De Palo, 'A Ten-Year-Long 'EU Mediation Paradox', When an EU Directive Needs to Be More …Directive' (European Parliament, 1.11.2018) <www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf> (last accessed: 8.8.2024).

26 Adriaanse/van Beukering Rosmuller, TvA 2014, 113 (115); Draaijer/van Hees, 'Pilot Mediation in Faillissementszaken', Tijdschrift voor Insolventierecht 2013, 244 (246).

of mandatory mediation[27] – there is a lack of comprehensive data on the factors contributing to its success or failure. This significantly limits the ability to fully evaluate and understand the potential of mediation.

However, in contrast to the lingering scepticism, mediation offers a dynamic and beneficial alternative to dispute resolution through litigation. Its emphasis on collaboration, confidentiality, and voluntary participation aligns well with the goals of achieving equitable and efficient outcomes. The long legacy and historical evolution of mediation underscores its enduring relevance and adaptability, gradually making it a key component of modern legal systems worldwide. The adoption of mediation within the European Union reflects this global trend, driven by the EU institutions' commitment to improving access to justice and promoting efficient dispute resolution.

C. The EU Mediation Directive

In the evolution of the European Union's mediation framework, the EU Mediation Directive in civil and commercial matters 2008/52/EC (henceforth 'Mediation Directive') was adopted in May 2008. It represents a central pillar to increase awareness regarding ADR mechanisms across Member States. This directive is a legislative instrument that has played a crucial role in promoting mediation as a viable alternative to litigation within the EU.[28] The development and employment of mediation have gradually increased in the last two decades. This is partly due to the fact that mediation has become a more regulated area in law as a result of several legislative efforts and improving practices. This was not an easy journey because of a strong opposition due to a fear that regulated mediation processes might 'stifle the experimentation and flexibility which seemed to lie at the heart of these processes, and which make them potentially so attractive'.[29]

The Mediation Directive's primary objective is to promote the amicable settlement of disputes by encouraging the use of mediation whilst ensuring a balanced relationship between mediation and judicial proceedings.[30] This directive applies to cross-border disputes in civil and commercial matters, excluding revenue, customs, or administrative matters, as well as

27 De Palo et al., p. 8.
28 Mediation Directive 2008/52/EC.
29 Wallis in Schonewille/Schonewille, p.10.
30 Art. 1 no.1 Mediation Directive.

disputes involving state liability for acts or omissions in the exercise of state authority, namely the *acta iure imperii*.[31] Hence, the Mediation Directive is intended to facilitate access to mediation procedures in cases where a party located in one Member State has a civil or commercial dispute with a party from another Member State.[32]

The scope of the Mediation Directive was initially intended to cover a broader range of topics and more fields of law, but during its development, it was narrowed down to cross-border commercial and civil matters due to a resistance to regulating mediation in certain jurisdictions and apply it over all legal domains.

One of the key drivers behind this directive was the recognition of the aim to improve access to justice by promoting the use of ADR, and the need for a coherent and consistent approach to mediation across the EU with introduction of a predictable legal framework and harmonising mediation practices for cross-border disputes.[33] Prior to its adoption, mediation practices varied widely among Member States, with significant differences in the context, availability, regulation, and quality of mediation services.[34] The directive aimed to bridge these gaps by establishing minimum common rules that Member States would adopt into their national legislation, and hence, contribute to the ultimate objective of forming an area of freedom, security, and justice within the EU.[35]

The Mediation Directive ensures that parties have the option to use mediation as an alternative to judicial proceedings. The Commission emphasizes that mediation should not be viewed as a poorer alternative to merely alleviate the burden on the court system, but rather, where suitable, as one of the available methods for dispute resolution within a modern society.[36] To foster mediation as an integral part of the dispute resolution

31 Art. 1 no. 2 Mediation Directive.

32 Art. 2 no. 1 Mediation Directive.

33 European Commission, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law', 19.04.2002, COM(2002) 196, 5.

34 European Commission for the Efficiency of Justice Working Group on Mediation, 'The Impact of the CEPEJ Guidelines on Civil, Family Penal and Administrative Mediation', 16.5.2018, CEPEJ (2017), 8.

35 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 2.

36 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 4.

landscape, Member States are to incentivize its use and, where appropriate, even make it compulsory, provided that the parties are not prevented from exercising their rights of access to the judicial system.[37]

The directive also highlights the importance of confidentiality in mediation. It mandates that mediators and parties involved in the process must not disclose information arising from the mediation sessions, except under certain circumstances, such as with the consent of the parties or for overriding public policy considerations.[38] The mediators are granted an immunity and they cannot be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of, or in connection with, the mediation process. This confidentiality provision aims to foster an environment of trust, enabling parties to communicate openly and negotiate freely without fear of information being used against them in potential subsequent proceedings.

Another important aspect of the directive is its focus on the enforceability of mediated agreements. To enhance the credibility and reliability of mediation, the directive requires Member States to ensure that agreements resulting from mediation can be made enforceable. This may be achieved either by incorporating the agreement into a court judgment or by having it authenticated by a public authority.[39] By providing a clear path to enforceability, the directive reinforces the practical utility of mediation as a tool for resolving disputes.

The Mediation Directive also addresses the training and accreditation of mediators. These provisions focus on quality assurance in order to help build confidence in the mediation process and to ensure that parties receive effective, impartial, and competent assistance. Recognizing that the quality of mediation is heavily dependent on the skills and expertise of the mediator, the directive encourages Member States to ensure that mediators adhere to high professional standards as well as to support the development of codes of conduct and effective training programs.[40]

Although it was hoped that the adoption of the EU Mediation Directive would significantly promote and increase the use of mediation across Member States, this goal has not been fully achieved for two main reasons. The first is the lack of practical provisions and guidelines. Whilst the

37 Art. 5 no. 2 Mediation Directive.
38 Art. 7 Mediation Directive.
39 Art. 6 no. 2 Mediation Directive.
40 Art. 4 Mediation Directive.

Mediation Directive aimed to set minimal standards for certain matters, such as confidentiality, it did not attempt to regulate the national mediation practices. Due to lack of guidance on how to put mediation into practice, its use remains relatively sparse, despite the records showing a high rate of settlements when parties resort to mediation.[41] The second is that the directive does not bring a clear and predictable legal framework. The final text watered down the ambitious wording and definitions of the initial drafts and compromised on a minimum set of standards.[42] The fear of stifling the natural development of mediation in practice and of negatively affecting its flexibility and diversity through implementation of a rigid regulation resulted in a lack of harmonization. The Member States were left with a very large margin of appreciation, allowing a considerable flexibility in how they implement and interpret the legal text based on their own local culture and practice. This somewhat defeats the purpose of having a clear and predictable framework for cross-border disputes.

Studies and evaluations on the impact of the Mediation Directive show that despite the national legislative developments in the mediation landscape, there is a problem in the practical application, due to the absence of a mediation 'culture', insufficient knowledge or awareness particularly dealing with cross-border cases, and absence or inadequacy of quality control mechanisms.[43] Therefore, there is unawareness or reluctance in resorting to mediation and courts remain hesitant to refer parties to mediation procedures. As a result, despite an average of 75 % success rate with mediation cases across Europe, this option was brought into play in only 1 % of conflicts.[44] Besides, the legal frameworks and practice remain divergent within the EU, leaving legal uncertainties unaddressed.[45] Thus, studies reveal that the Mediation Directive fails to sufficiently increase the use of mediation and close the gap between Member States in the interpretation, application, and regulation of mediation.

41 Schonewille/Lack in Schonewille/Schonewille p. 20.
42 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final.
43 European Commission, 'Report on the application of Directive 2008/52/EC', 26.8.2016, COM(2016) 542 final, 2.
44 European Parliament, 'Parliamentary question – O-000169/2012', 11.12.2012, verbatim report.
45 De Palo et al., p. 162.

Surprisingly though, in its report on the application of the Mediation Directive, eight years after its adoption, the Commission argued that no revision of the Directive was required.[46] The Commission did, however, acknowledge that the use of mediation remains weak and that this could be improved by court-application.[47] Again, while highlighting the untapped potential of mediation, the Commission leaves its development – or the lack thereof – unchanged.

Nonetheless, the directive has served to raise awareness on the usefulness of mediation and spurred further initiatives aimed at understanding of mediation among businesses, legal professionals, and the general public. On the one hand, in some countries, it led to the creation of comprehensive mediation systems, whilst in some others, it triggered the improvement and enlargement of the existing systems.[48] Overall, it is reported that there have been a very limited number of cross-border mediation cases. Consequently, the directive's impact on the growth of mediation is more significant in jurisdictions where the transposition also applies to domestic cases.

Despite its shortcomings, the Mediation Directive has been crucial in shaping a cohesive and effective mediation framework within the European Union. By promoting mediation, ensuring minimum standards such as confidentiality, guaranteeing enforceability, and emphasizing the quality of mediation services, the directive has laid the groundwork for a future more integrated and cooperative approach to dispute resolution. As mediation continues to gain traction, the directive serves as a groundwork to be built upon to further enhance the role of mediation in both domestic and international contexts. The EU should continue its efforts to evolve the mediation framework, as well as the principles and provisions of the directive for the purposes of enhancing legal coherence and for fostering stronger relations both within and beyond its borders.

46 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 4.

47 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 12.

48 European Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive', 16.3.2016, 77.

D. The role of mediation in the current EU insolvency and restructuring framework

Prior to delving into the specific role mediation could play in the field of insolvency and restructuring, it should be stated that insolvency matters fall within the field of civil and commercial law, and thus would be considered within the scope of the Mediation Directive.[49] However, mediation remains largely underdeveloped in the field of insolvency and restructuring.[50] The main legislative texts regarding the EU insolvency framework, namely the European Insolvency Regulation and its Recast, have not addressed the use of mediation for such disputes.[51] Neither does the recent Commission Proposal for Harmonizing Certain Aspects of Insolvency Law include any provisions with regard to mediation.[52]

Nevertheless, in its report on the application of the Mediation Directive, the Commission recognized the potential and benefits of mediation for enhancing the efficiency and fairness of restructuring proceedings and has taken proactive steps to encourage the incorporation of mediation into the national restructuring frameworks.[53] The integration of mediation is thus deemed to be beneficial not only in insolvency and liquidation-oriented proceedings, but also in rescue and restructuring proceedings. Traditionally focused on litigation and court-driven processes, leading organizations in the insolvency field increasingly acknowledge the benefits of out-of-court restructuring and the use of mediation for restructuring purposes,[54] particularly during the negotiation phase, preceding the court approval of a restructuring plan.

49 Vriesendorp et al in Gant, p. 138.

50 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 5.

51 European Insolvency Regulation Recast 2015/848.

52 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on harmonising certain aspects of insolvency law', 7.12.2022, COM(2022) 702 final.

53 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 5; B.9 no. a, European Commission, 'Recommendation on a new approach to business failure and insolvency', 12.3.2014.

54 World Bank Group, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', 2021, 20.

Through various initiatives and guidelines, the Commission attempted to integrate the use of mediation, by focusing primarily on the role of mediation in restructuring. For example, the Commission Recommendation on a New Approach to Business Failure and Insolvency encouraged the Member States to incorporate mediation as a key component of their national restructuring frameworks.[55] This recommendation underscores the importance of early intervention and amicable settlement in preventing the escalation of insolvency cases into full-blown bankruptcy situations. It encourages the appointment of mediators by courts where they consider it necessary in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan.[56]

A mediator can serve as the facilitator for the development of restructuring plans during pre-insolvency procedures, without the need to formally open court proceedings.[57] Mediation fosters a collaborative environment where stakeholders can engage in constructive dialogue, which is particularly important in cases where the debtor aims to avoid insolvency by negotiating a business roadmap and restructuring plan with its creditors. Moreover, such dialogue is crucial for the preservation of ongoing business relationships essential for the debtor's future viability. For instance, a mediated agreement might allow a business to continue operations, thereby preserving jobs and maintaining supplier relationships, which can be beneficial for the broader economy.[58]

However, Member States were selective or even dismissive vis-à-vis this recommendation, meaning that many Member States, except from certain minor adjustments to their national legal framework, did not implement or disregarded the initiative completely. Consequently, variations persisted among the approaches adopted by different states, signalling ongoing disparities.[59]

55 Recommendation 8 and 9 no. a, European Commission, 'Recommendation on a New Approach to Business Failure and Insolvency (2014/135/EU)', OJ 2014 L74/65.

56 Boon/Madaus in Adriaanse/van der Rest, p. 242.

57 European Commission, 'Staff working document impact assessment accompanying the document Commission Recommendation on a new approach to business failure and insolvency', 12.3.2014, SWD (2014) 62 final, 33.

58 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 6.

59 Eidenmüller/van Zwieten, ECGI 2015; European Commission, 'Inception Impact Assessment, Initiative on Insolvency DG JUST (A1) 2016/JUST/025 Insolvency II', 3.3.2016, 4.

The Commission proposed a restructuring legislation which was adopted in 2019 as the EU Directive on Preventive Restructuring 2019/1023 (henceforth, 'Restructuring Directive') which has a primary objective to provide Member States with a coherent framework that allows businesses in financial difficulties to restructure at an early stage, thereby avoiding insolvency and maximizing value for all stakeholders involved.[60] Central to this framework is the concept of preventive restructuring, which seeks to address financial distress before it becomes irreversible, thus preserving businesses, jobs, and economic value.

From the earlier drafts of the Restructuring Directive, it was clear that the Commission envisioned mediation to play a crucial role in the preventive restructuring processes.[61] However, prior to its adoption, the draft text of the Restructuring Directive was amended several times leading to the deletion of explicit reference to mediation and its definition[62], as some Member States were reluctant for the inclusion of training and qualification requirements as well as the appointment of mediators.[63]

Thus, the adopted Restructuring Directive has not followed with the earlier efforts in introducing mediation within the EU restructuring landscape.[64] The omission of explicit reference to mediation raises questions as to the completeness of the Restructuring Directive. Nonetheless, there continues to be some room for implementing mediation within the context and purpose of the Restructuring Directive, thanks to the traces of mediation breadcrumbs left in the final text. Instead of actively promoting mediation, it permits Member States to include out of court procedures within the national restructuring framework[65], and to put in place provisions limiting the court involvement to where it is necessary and proportionate, provided

60 EU Restructuring Directive 2019/1023.

61 Recital 18 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.11.2016, COM(2016) 723 final.

62 Vriesendorp et al in Gant p. 142.

63 For more information, see Presidency of the Council of the European Union, 'Note to the Permanent Representatives Committee on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (8830/18)', 15.5.2018, 5.

64 Vriesendorp et al in Gant, p. 143; EU Restructuring Directive 2019/1023.

65 Recital 4 and Art. 4 no. 5 Restructuring Directive; Fannon/Gant/Finnerty, p. 185.

that the rights of relevant stakeholders are safeguarded[66]. It also introduces a practitioner in the field of restructuring (often abbreviated as 'PIFOR') who, among others, has the task to assist the debtor or the creditors in drafting or negotiating a restructuring plan.[67] Here, the traces of mediation from the earlier drafts are noticeable as this practitioner seems to be taking over the tasks of the mediator previously promoted by the Commission in its earlier communications and proposals.[68]

The PIFOR assists in designing a restructuring plan that addresses the interests of all parties involved and this process could be interpreted as to include facilitating discussions, identifying common grounds, and helping to overcome obstacles to agreement.[69] The wording of the process somewhat resembles the definition provided for mediation and the role of the mediator in the draft directive. The origin of this wording was a formulation in the proposal stating that 'the appointment of a restructuring practitioner, whether a mediator supporting the negotiations of a restructuring plan or an insolvency practitioner supervising the actions of the debtor, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs'.[70] This process, which could thus be interpreted as a mediation procedure, was introduced with the idea that the chances of reaching a consensual restructuring plan is higher and one that can be approved by the relevant authorities and implemented effectively. On the other hand, the very wide scope of the PIFOR roles raises questions as to its coherence and credibility, as it covers a spectrum ranging from tasks reminiscent of mediation and implying voluntariness and confidentiality, to reporting responsibilities to the court, and to potential subsequent functions for the implementation of a restructuring plan.

66 Recital 29 and Art. 4 no. 6 Restructuring Directive.

67 Art. 12 no. 12 and Art. 5 no. 3 Restructuring Directive.

68 European Commission, 'Recommendation on a new approach to business failure and insolvency', 12.3.2014; European Commission, 'Proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.11.2016, COM(2016) 723 final.

69 Recital 30 and Art. 5 no. 3a Restructuring Directive

70 Recital 18 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.11.2016, COM(2016) 723 final.

One of the key provisions of the directive is the introduction of early warning mechanisms designed to alert debtors to financial difficulties at an early stage.[71] There is no pre-defined list of available tools, however, they should aim to encourage debtors to seek professional advice, to include consideration of mediation as a means to negotiate with creditors and other stakeholders, to help identify and implement restructuring solutions before a business' financial situation further deteriorates.[72]

The directive includes revolutionary provisions to ensure the adoption of restructuring plans. Once a restructuring plan is negotiated and approved, it can be made binding on all affected parties, including dissenting creditors, provided that certain conditions are met, also known as the cram-down.[73] This enforceability is crucial for the credibility and effectiveness of restructuring, as it assures parties that their agreements, which may have been developed through mediation, will be respected and upheld by the legal system. Similarly, restructuring plans would have a higher chance of being agreed upon by voting parties if they had the chance to have inputs and interventions during the drafting of the plan, or if they went through a mediation process first. This is a more sustainable alternative as opposed to the plan being forced by the court.

The overarching aim of the directive is to create a more consistent and predictable environment for restructuring across the EU, making it easier for businesses to navigate financial difficulties and prevent insolvency.[74] This directive encourages Member States to search for new ways in rescuing businesses and avoiding adjudication.[75] This is also strengthened by the European Insolvency Regulation Recast, which, compared to the previous regulation, has a broader scope to include public proceedings based on insolvency related laws for the purpose of rescue, adjustment of debt, and restructuring.[76] However, whilst the Preventive Restructuring Directive represents a significant advancement in the EU's approach to restructuring as it places a strong emphasis on early intervention and the prevention of insolvency by facilitating the restructuring of viable businesses facing financial distress, it can be argued that it misses the opportunity for integrating an explicit mediation provision in the EU legal framework for restructuring

71 Art. 3 Restructuring Directive.
72 McCormack, p. 226.
73 Art. 11 Restructuring Directive.
74 Recitals 1 and 2 Restructuring Directive.
75 Jokubauskas, Societal Studies 2017, 244 (247)
76 Art. 1 EIR Recast.

and insolvency, and amalgamating potentially conflicting roles within a single individual. The references to mediation in the directive, though clear and convincing for those familiar with the *travaux préparatoires*, are merely implied and are vulnerable to different interpretations. Thus, the role of mediation in this field remains to be determined by national legislators and this results in, once again, an underdeveloped concept, open to potential divergences between Member States.

E. Further regulatory approaches: strengthening relations between the EU and Third Countries

I. Advantages of integrating mediation into cross-border insolvency and restructuring frameworks

Cross-border insolvencies occur when a debtor has assets or creditors in more than one country. As soon as more than one jurisdiction is involved in insolvency proceedings, cross-border insolvency laws come into effect.[77] These situations can present complex challenges due to the involvement of multiple jurisdictions, each with its own legal system, rules, and procedures. The intricacies of these cases often lead to conflicts of laws, jurisdictional disputes, and complications in the recognition and enforcement of insolvency proceedings.[78] Divergent legal standards and practices can lead to inconsistent outcomes, lengthy litigation, and increased costs, ultimately reducing the value of the debtor's estate available for distribution to creditors. Mediation could offer a promising solution for some of these challenges by providing a flexible, collaborative, and efficient tool for cross-border insolvency and restructuring matters. One of the primary benefits of mediation in cross-border insolvencies is its ability to provide a neutral ground for parties from different jurisdictions to come together and negotiate. Unlike litigation, which is adversarial and often conducted within the legal framework of a single jurisdiction, mediation allows for a more inclusive process where all parties can participate on an equal footing. This neutral environment encourages open communication and fosters trust, making it easier to reach consensus.

77 Bork, p. 1; Wessels, p. 1 et seqq.
78 Recital 8 EIR Recast.

The use of mediation could facilitate development of a restructuring plan among the debtor and multiple creditors and could also assist resolution of disputes within cross-border collective insolvency proceedings. The nature of insolvency inherently involves a multitude of competing claims and interests, which can lead to lengthy and costly legal battles if not managed effectively. Mediation can offer a pathway for resolving multiparty disputes, emerging between various stakeholders, including creditors, debtors, shareholders, employees, and other parties with vested interests. Experience shows that mediation can provide a forum where these parties can negotiate directly, aiming to find mutually acceptable solutions that can expedite the resolution process and reduce the overall costs associated with insolvency. Compelling examples highlighting the growing importance of mediation in high-profile cross-border insolvency and restructuring cases are the Lehman Brothers and General Motors cases.[79] In Lehman Brothers, mediation facilitated the resolution of nearly 95 % of disputes, streamlining the complex process of settling claims among numerous stakeholders in one of the largest bankruptcies in history.[80] Similarly, in the General Motors case, mediation played a crucial role in addressing post-bankruptcy claims that could have jeopardized the company's restructuring, ensuring a smoother path to recovery.[81] Both cases, involving large multinational companies, underscore the value of mediation in achieving efficient, collaborative resolutions in complex cross-border insolvency situations.[82]

A noteworthy case further underscores the growing importance of mediation in cross-border insolvency: the InterCement Brasil S.A. case.[83] This appears to be one of the first instances in which Chapter 15 provisional relief was granted under the U.S. Bankruptcy Code in connection with

79 Mocheva/Shah, TDM 2017, 1 (9); Dasan/Seow, 'Mediation in international insolvency disputes' (IAA 20.9.2015) <https://insolventiemediation.nl/media/uploads/file/25-Mediation-in-International-Insolvency-Disputes.pdf> (last accessed: 7.8.2024).

80 In re Lehman Brothers Holdings Inc., Case No. 08–13555 (JMP) (Bankr. S.D.N.Y. September 15, 2011).

81 In re General Motors Corp., Case No. 09–50026 (REG) (Bankr. S.D.N.Y. June 1, 2009).

82 For more examples on mediation in large case insolvencies see Esher, ICR 2015, 349 (249 et seqq.).

83 Watson/Schaden, 'New York court recognises Brazilian mediation in Ch15 first' (GRR, 17.7.2024) <https://globalrestructuringreview.com/article/chapter-15-court-issues-provisional-relief-brazilian-creditor-mediation-process?utm_source=New%2BYork%2Bcourt%2Brecognises%2BBrazilian%2Bmediation%2Bin%2BCh15%2Bfirst&utm_medium=email&utm_campaign=GRR%2BAlerts> (last accessed: 3.8.2024).

a court-supervised mediation process initiated in Brazil. A protective injunction proceeding was commenced in Brazil in support of an interim, court-supervised mediation process initiated by InterCement under Brazil's Bankruptcy Law, in furtherance or preparation of either an extrajudicial proceeding or a judicial reorganization.[84] The São Paulo Bankruptcy and Restructuring Court granted a 60-day injunction barring creditor action, and shortly thereafter the U.S. Bankruptcy Court for the Southern District of New York granted a provisional stay in the Chapter 15 cases. The Brazilian mediation later led to an agreement in principle with certain creditors and was converted into a consensual *recuperação extrajudicial* proceeding. In the subsequent Chapter 15 recognition analysis, the U.S. Bankruptcy Court treated the Brazilian mediation, together with the Brazilian extrajudicial and judicial reorganization proceedings, as part of the restructuring activity supporting Brazil as the debtors' centre of main interests. The case therefore underlines mediation's emerging role as an instrument in cross-border insolvency, potentially opening the door to deeper cross-jurisdictional collaboration in complex insolvency matters and facilitating cooperative resolutions in international restructuring cases.

Mediation can help preserve the value of the debtor's estate by facilitating faster and less adversarial resolutions through a simple, private, and flexible process, which is particularly important for small and medium sized enterprises (SME).[85] Litigation may be particularly burdensome for such businesses due to the cost, duration, and complexity, as well as its adversarial nature which can lead to reduced productivity, job losses, and long-term economic instability.[86] In this context mediation can serve as a restructuring support tool within the national framework,[87] as well as cross-border insolvencies, where the debtor has business operations and relationships with creditors, suppliers, and customers in multiple countries.

Furthermore, mediation can enhance fairness and transparency of insolvency proceedings. By involving all relevant parties in the negotiation process, mediation ensures that each stakeholder has a voice and can contribute to the formulation of a resolution.[88] In fact, the mediator's facilita-

84 Bacelar, International Journal of Open Governments 2022, 221 (224).
85 World Bank Group, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', 2021, 33.
86 Atkins/Grassgreen, INSOL World Sup. 2021, 10 (10).
87 Sarra in Omar/Gant, p. 248; Madaus, Eurofenix 2017, 14 (15).
88 Recital 17 European Commission, 'Recommendation on a New Approach to Business Failure and Insolvency (2014/135/EU)', OJ 2014 L74/65.

tive role can discourage creditor holdouts which could arise due to a lack of trust, suspicion of information asymmetry, or fear of unequal treatment in case of involvement of different types of creditors. Mediation's inclusive and problem-solving approach could lead to more equitable outcomes, better compliance, and reduce the likelihood of disputes arising from perceptions of bias or unfair treatment. At the same time, the parties to a mediation enjoy privacy. This is particularly important for saving face, the business reputation and relations, but also for keeping commercial confidentiality.

The flexibility of mediation is another advantage. Mediation allows parties to craft bespoke solutions to the specific circumstances of the insolvency case. This is particularly important in cross-border insolvencies, where rigid legal frameworks may not adequately address the complexities involved. Through mediation, parties can explore a wide range of options, including debt restructuring, asset sales, and payment plans, to arrive at a solution that maximizes the value of the debtor's estate and meets the needs of all stakeholders.

In addition, mediation can significantly expedite the resolution of cross-border insolvency cases which is coupled with the need for reducing (court) cases and ensuring stability in the market. Traditional court proceedings in multiple jurisdictions can be protracted and cumbersome, often leading to delays that exacerbate the financial distress of the debtor. Mediation, by contrast, offers a more streamlined and efficient process. Mediators skilled in handling cross-border disputes can facilitate swift negotiations, helping parties to identify common interests and develop practical solutions that can be implemented more quickly than court judgments.

The overall simplification of national restructuring and insolvency frameworks has been a trend in the national and EU legislative efforts in the past decade. The practical application of mediation-like tools in insolvency law is supported by various national initiatives or legal reforms within Member States, such as Belgium, France, and Italy, which have implemented specific provisions to integrate mediation into their restructuring frameworks, offering structured out of court processes as part of the proceedings. These legislative reforms highlight a growing recognition of mediation as a vital component in restructuring and insolvency frameworks. In Belgium, Book XX of the Code of Economic Law encourages a mediation process as a pre-emptive measure to avert insolvency, allowing companies to restructure their debts out of court with the assistance of a restructuring practitioner, *herstructureringsdeskundige*.[89] France has similarly integrated mediation-like processes into its insolvency proceedings through the *mandat ad hoc* and *conciliation*, which provide a structured environment for debtors and creditors to negotiate settlements provided that certain conditions are met.[90] Italy's Crisis and Insolvency Code also reflects this trend by offering businesses access to the *composizione negoziata della crisi*, where the negotiations over a restructuring plan are facilitated by an impartial expert, with the goal of preserving the business and safeguarding jobs.[91] These national frameworks illustrate how mediation can be effectively woven into the legal fabric, providing flexible, efficient solutions that address the specific challenges of (cross-border) insolvencies.

In conclusion, the integration of mediation into cross-border insolvency and restructuring frameworks offers significant potential to address the complex challenges that arise when dealing with multinational cases. As seen in the Lehman Brothers and General Motors cases, mediation can play a pivotal role in facilitating efficient, collaborative resolutions across jurisdictions. In the EU, many national frameworks illustrate how reforms have already embraced or begun to incorporate mediation, setting the stage for broader adoption across the Union. As these practices continue to evolve, mediation could become an essential tool in ensuring fair, transparent, and expedient outcomes in cross-border insolvencies, ultimately benefiting all stakeholders involved.

II. Challenges in integrating mediation into cross-border insolvency and restructuring frameworks

There are several key issues to be addressed regarding cross-border insolvency and restructuring mediation, to include (1) the lack of a clear and predictable EU mediation framework, (2) little to no guidance on the practical application of mediation, (3) inconsistent enforcement mechanisms

89 See Art. I.23,7°/01 and XX.29/2 Belgian Code of Economic Law; For an overview of the Belgian restructuring framework see Taşman/Vanmeenen, HERO 2023.

90 See Art. L611–1 – L611–17 French Commercial Code (*prévention, mandat ad hoc, conciliation*); For an overview of the French restructuring framework see Ghio in Boon/Koster/Vriesendorp, p. 48.

91 See Art. 12 and 21 Italian Insolvency Code by Law No. 155 of 19 October 2017 *(composizione negoziata della crisi)*; See also Speranzin/Marotta, Revista General de Insolvencias & Reestructruciones 2022, 207.

across the EU, and (4) the ambiguity surrounding the role of mediation in EU (cross-border) insolvency and restructuring.

A significant hurdle to integrating mediation into the insolvency and restructuring framework is the varying degree of acceptance and familiarity with mediation across different Member States. While some countries have relatively well-established mediation cultures, others are still in the early stages of adopting this approach. This lack of uniformity, combined with limited experience in handling cross-border cases and insufficient awareness of mediation processes and quality control mechanisms for mediators are some of the impediments for the application and effectiveness of mediation in cross-border insolvency cases.[92] Ensuring the enforceability of mediated agreements stands out as a key challenge. Differences in enforcement mechanisms across jurisdictions can undermine the effectiveness of mediation, as the enforceability of settlement agreements often hinges on the parties' willingness to comply. The EU framework could enhance the credibility and reliability of mediation as a tool for resolving cross-border insolvency disputes by standardizing the process, which would help ensuring that agreements reached through mediation are legally binding and enforceable across all Member States.

Another challenge is the ambiguity surrounding the role of mediation and the need for mediators with expertise in cross-border insolvencies. These cases often involve intricate financial structures and complex legal issues that require not only specialized knowledge but also an understanding of language and cultural differences. The success of mediation in insolvency heavily depends on the mediator's expertise, which extends beyond general training and negotiation skills to include a deep understanding of insolvency law and financial matters. Identifying mediators with the appropriate qualifications and experience is therefore crucial for the effectiveness of the mediation process.[93] To address this, the EU should encourage Member States to develop robust training and accreditation programs for mediators, ensuring they are well-prepared to manage the unique challenges of cross-border insolvency mediation. Furthermore, the EU legislator needs to address the broad range of tasks and functions assigned to the practitioner

92 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 4.

93 Heath, INSOL World Sup. 2021, 6 (8).

in the field of restructuring, and resolve any potential conflicts between them throughout the restructuring process.

Although challenges remain, such as the varying levels of acceptance across Member States and the need for specialized mediators, these are outweighed by the substantial benefits of mediation. The EU should continue to strengthen its legal framework to support mediation in cross-border insolvencies, as it is poised to play an increasingly vital role in managing the challenges of global business operations and financial distress. Mediation remains a highly effective tool for addressing the complexities of cross-border insolvencies. Its ability to provide a neutral, efficient, and flexible process for dispute resolution makes it particularly well-suited to the multi-jurisdictional nature of these cases. While the Restructuring Directive missed the opportunity to fully develop an EU mediation framework in the restructuring and insolvency domain, the continued evolution of national restructuring frameworks presents an opportunity to integrate mediation more deeply into EU insolvency law. As Member States implement the directive and refine their approaches, the role of mediation is likely to become increasingly important in enhancing the prospects of successful restructuring and contributing to broader economic stability.

III. Overcoming challenges and addressing EU relations with Third Countries

The European Institute of Peace puts mediation at the forefront of global diplomatic and policy context and advocates for EU leadership should also apply to the EU influence across wider international matters, which would include insolvency and restructuring, stating that the EU 'is a powerful global actor pursuing multiple objectives on the world stage, [deploying] its capabilities, whether political, security, economic or regulatory, more strategically to shape reality' and regarding the role of the EU in mediation, the institute argues that a review of the EU's mediation concept would provide an opportunity to generate debate and to define the parameters of the future of EU mediation frameworks as it would necessitate long-term commitment which, 'given its global reach and longstanding presence in most countries in the world, the EU is well placed to provide'.[94]

94 Keating, 'Time to step up EU mediation?' (European Institute of Peace, 1.6.2020) <www.eip.org/publication/time-to-step-up-eu-mediation/> (last accessed: 3.8.2024).

As discussed in the previous sections, the EU has made some progress in integrating mediation within its insolvency and restructuring frameworks, yet there remains considerable potential to further enhance this integration. By advancing mediation practices, the EU can not only improve its internal insolvency processes but also strengthen its relations with Third Countries. This section explores how the EU legislator can further push the integration of mediation in the restructuring and insolvency domain, and the benefits this would bring both within the EU and on the global stage.

To fully realize the potential of mediation in insolvency and restructuring, the EU legislator can focus on refining and harmonizing the existing legislative frameworks. The Mediation Directive and the Restructuring Directive have established a foundation, but additional steps are necessary to enhance their effectiveness. A comprehensive framework dedicated specifically to mediation in insolvency and restructuring, and the key actors for its effective practice, could be introduced, which could mandate that mediation services be available and set clear standards for their application.

It could be proposed that the EU should develop a legislative instrument requiring courts and insolvency practitioners to consider mediation as a preliminary step before proceeding into formal insolvency actions. This could be implemented through legislation motivating the courts to encourage mediation, and compulsory information sessions about mediation ensuring that all parties involved are aware of and consider mediation as a viable option. Uniform mediation standards should also be established to ensure that mediators in insolvency cases are adequately trained and accredited, with their functions clearly identified and delineated with respect to mediation's fundamental principles of voluntariness and confidentiality, thereby assuring functional clarity and maintaining high levels of expertise and professionalism.

In the context of cross-border insolvencies, also beyond the EU, mediation plays a crucial and increasingly indispensable role where the challenges of coordinating among creditors across multiple jurisdictions with differing insolvency regimes. The involvement of a mediator can be pivotal in facilitating parallel insolvency proceedings by helping parties navigate frameworks or protocols for cooperation and coordination across borders. In addition to aiding parties, mediators can also assist courts by narrowing and resolving substantive disputes that arise during these complex processes. Court appointment of the mediator can be critical not only within the EU, but also beyond. The United Nations Commission on

International Trade Law (henceforth 'UNCITRAL') Model Law on Cross-Border Insolvency (henceforth 'Model Law') stipulates that there should be cooperation and direct communication between the courts of different nations.[95] The appointment of a mediator in cross-border insolvency cases aligns closely with the cooperative mechanisms envisioned by Article 27(a) of the UNCITRAL Model Law as this provision explicitly allows for 'the appointment of a person or body to act at the direction of the court', thereby providing a legal foundation for courts to integrate mediation into the insolvency process.[96] Such an appointment not only fulfils the courts' obligations under the UNCITRAL Model Law, which mandates maximum cooperation with foreign courts and representatives, but also enhances the overall efficiency and effectiveness of cross-border insolvency proceedings.[97] Interpreting mediation as being part of the framework of the UNCITRAL Model Law would significantly bolster its flexibility and operational capacity as a modern, harmonized, and equitable insolvency support system. As courts recognize the benefits of mediation, such as cost and time savings, improved cooperation, and higher success rates in resolving complex cross-border disputes, we can expect a growing trend for its use. Hence, introducing new court procedural rules in local jurisdictions empowering courts with the authority to refer parties to mandatory mediation at any stage of the insolvency process would formalize and enhance the role of mediation in these proceedings. However, the existence of such rules specifically tailored to insolvency cases remains limited on a global scale. Expanding these procedural frameworks would be a significant step toward more consistent and effective management of cross-border insolvencies, ensuring that mediation becomes a standard practice rather than an exception in the international insolvency landscape. Moreover, the EU legislator could encourage establishment of cross-border mediation bodies comprising of mediators with separate divisions, including those who are experts in cross-border insolvency and restructuring. From an international perspective, and over time, such mediation bodies pioneered by EU can evolve to contribute to cross-border cooperation and/or inspire the setup

95 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, arts. 25–26.
96 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, art. 27.
97 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, art. 25.

of more international mediation bodies complemented with cross-border insolvency divisions.

International mediation agreements often come without enforceability clauses, as to increase transactional costs as well as unpredictability.[98] Ensuring that mediated agreements are recognized and enforceable across Member States – and beyond – would necessitate development of clear EU-wide definitions, guidelines and procedures for the mutual recognition of mediation outcomes. The enforceability of mediated agreements should be rationalized, thereby enhancing the practical utility of mediation outcomes. Inspiration could be drawn from the United Nations Convention on International Settlement Agreements Resulting from Mediation (henceforth Singapore Mediation Convention), which came into force in September 2020.[99] It aims to facilitate the enforcement of international mediated settlement agreements across borders, offering a streamlined process that reduces the need for litigation in different jurisdictions.[100] This convention applies primarily to commercial disputes and provides the signatory countries with mechanisms to recognize and enforce mediated settlement agreements according to their procedural rules, unless, for example, in situations where the agreement is contrary to public policy or if the mediation process was flawed.

In the realm of cross-border mediation, the Singapore Mediation Convention plays a crucial role by providing legal certainty and assuring parties that their mediated settlement agreements will be recognized and enforceable in signatory states. This assurance encourages parties to opt for mediation in cross-border disputes, as it offers a reliable enforcement mechanism. The streamlined process of enforcement significantly reduces the time and costs associated with cross-border dispute resolution, making mediation a more attractive option. As such, this convention provides incentives to use of international mediation in cross-border insolvencies.

Adopting a mediation framework inspired by the Singapore Mediation Convention could align the EU's mediation practices not only within the internal market but also with those of third countries, facilitating smoother cross-border transactions and dispute resolutions. This alignment would strengthen international cooperation, as the EU would be able to establish

98 Lo, CAAJ 2014, 119 (129).
99 UN Convention on International Settlement Agreements Resulting from Mediation 2019.
100 Singapore Mediation Convention, Preamble, 3.

stronger legal and commercial ties with Third Countries by providing a reliable mechanism for resolving cross-border disputes.

As a key global standards setter, the use of EU definitions and practices could inspire Third Countries and vice-versa, leading to further international harmonization. The importance of establishing a cohesive and reliable legal framework for cross-border disputes cannot be overstated, as 'in an ever-increasing globalised world, disputes (...) do not stop at the outer boundaries of the European Union'.[101] Offering such a stable and predictable legal environment would also enhance the attractiveness of the EU as a destination for trade and investment, ensuring that cross-border disputes can be resolved efficiently and amicably. The adoption of such principles would boost confidence among international investors and creditors, knowing that their mediated agreements will be respected and enforceable across borders. This would enhance legal certainty and predictability for businesses operating internationally and additionally, lead to a more robust and effective system for managing cross-border disputes within the EU, contributing to the overall stability and growth of the European economy.

Promoting the use of mediation through the sharing and continuous updating of know-how, including adherence to the European Code of Conduct for Mediators, could prove useful, as such initiatives can help align practices and advance the goals of globalization by reducing cross-border transaction costs associated with legal uncertainty, which stems, inter alia, from the need to gather information on applicable yet differing mediation laws, which may discourage the use of mediation in cross-border disputes.[102] This alignment would facilitate cross-border mediation with Third Countries by promoting consistency and interoperability in mediation practices. In his key-note speech to the Singapore Global Restructuring Initiative Conference 2024, Judge Hon. Drai, very notably stated that 'over the last 25 years, mediation in all the foregoing forms has become commonplace in the realm of financial distress in the US, except for mediation in out-of-court, pre-bankruptcy workouts. Interestingly, during the last decade European states (...) incorporated mediation in their law in just that pre-insolvency proceeding context', to imply that, from the perspective of incorporating mediation in insolvency law, pre-insolvency stage, some EU

101 Hopt/Steffek in Hopt/Steffek, p. 8.
102 Alexander in Hopt/Steffek, p. 138.

Member States are before the USA.[103] This statement is maybe outside of general expectations and perceptions, but it certainly merits consideration and deeper analyses, which are beyond the scope of this contribution.

In addition to legislative measures, promoting awareness and education about mediation is vital. Educational campaigns across the EU could be launched to inform businesses, legal professionals, and the public on the benefits of mediation and associated processes. These campaigns could include workshops, seminars, and online resources to broaden the understanding and acceptance of mediation. Incorporating mediation training into the curricula of law and business schools would ensure that future professionals are well-versed in mediation practices. Such educational initiatives would help embed mediation into professional practice and foster a culture that values ADR methods. Additionally, providing EU support for the establishment and operation of mediation centres, particularly in regions where mediation is less developed, could further advance the integration of mediation. These centres could serve as hubs for mediation-related training, resources, and services.

Furthermore, technological solutions, such as secure online platforms for virtual mediation sessions, electronic knowledge and data repositories, and AI-assisted mediation tools could further support cross-border mediation. These platforms, in addition to enabling parties from different countries to participate in mediation without the need for physical travel, would make the process more efficient and accessible, at least by breaking the language barriers. Recent studies argue that (AI-assisted) e-mediation is a practical and cost-effective way to address out-of-court conflict resolution, fostering more intensive use of mediation across the Globe.[104]

If the EU further develops its legislative framework and practical implementation tools, it could position itself as an important participant in a broader international dialogue on mediation in insolvency, sharing its experience while also learning from third-country practices and global standards. EU experience may serve as a source of inspiration for national reforms, while education, training, and technical assistance could create opportunities for mutual learning between the EU and third countries. Rather than promoting a fixed model, such cooperation could support the

103 Drain, 'Beyond the Court: Mediation in Restructuring and Insolvency Cases' (SMU, 4.8.2024) <https://ccla.smu.edu.sg/sgri/blog/2024/08/04/beyond-court-mediation-restructuring-and-insolvency-cases> (last accessed: 8.8.2024).

104 Giacalone/Giacalone Diritto del Commercio Internazionale 2022, 343 (358).

gradual convergence of definitions, methods, and principles, while remaining attentive to local legal cultures and institutional needs.

In conclusion, advancing mediation integration within the EU insolvency and restructuring framework is a strategic move that could enhance both domestic and international dispute resolution processes. By refining legislative frameworks and enhancing practical application, promoting education, strengthening cross-border mechanisms, and engaging with Third Countries, the benefits of mediation can be more fully harnessed. These efforts will not only improve the efficiency and effectiveness of insolvency and restructuring proceedings within the EU but also bolster relations with Third Countries, fostering a more stable, reciprocal, and cooperative global economic environment.

F. Conclusion

The integration of mediation into the EU insolvency and restructuring framework represents a critical evolution in managing financial distress and disputes. Mediation, with its inherent flexibility, confidentiality, and collaborative nature, offers a valuable approach to resolving insolvency issues, which have traditionally relied on more adversarial and rigid legal processes. Integrating mediation could enhance insolvency resolution both within the EU and in its interactions with Third Countries.

Mediation has emerged as a valuable alternative to traditional litigation in insolvency cases. Its benefits, ranging from cost-efficiency and speed to the preservation of business relationships, make it an appealing choice for resolving disputes. Historically, mediation has grown from a less formal practice into a recognized and widely accepted method of dispute resolution. This evolution underscores its potential to address complex insolvency cases effectively, especially when parties face significant financial and operational challenges.

The EU has made attempts in embedding mediation within its insolvency and restructuring framework through legislative initiatives. The Mediation Directive established fundamental standards for cross-border mediation, with the aim of facilitating more consistent and effective dispute resolution across Member States. The Restructuring Directive clearly leaves room for integrating mediation into preventive restructuring efforts. Nonetheless, this remains short of enhancing the use of mediation in practice due to lack of a clear and predictable EU mediation framework. The current laws provide limited guidance on the practical application of mediation, along with consistent enforcement mechanisms across the EU, and are marked by ambiguity surrounding the roles of mediation and mediator in EU cross-border insolvency and restructuring.

Mediation promises a significant capacity to address the complexities of multiple jurisdictions in cross-border insolvencies. These cases involve multiple legal systems and conflicting interests, which can lead to protracted and costly disputes. Mediation provides a neutral platform where stakeholders from different countries can collaboratively negotiate solutions. This approach not only accelerates the resolution process but also reduces the costs and disruptions associated with multi-jurisdictional litigation. The ability of mediation to foster cooperation and mutual understanding is particularly valuable in these situations, enabling tailored solutions that address the unique needs of all parties involved.

To further enhance the integration of mediation within the EU insolvency and restructuring framework, several measures can be considered from refining legislative frameworks, promoting education, to strengthening cross-border mechanisms. In parallel, cooperation with international organizations and Third Countries could contribute to the development of shared standards and mutual learning in mediation. These efforts will not only improve the efficiency and effectiveness of insolvency and restructuring processes within the EU, but also support more reciprocal relations with Third Countries, contributing to a more stable and cooperative global economic environment.

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