*Comments to the new EU regulation on insolvency proceedings*

# Amendments in respect of jurisdiction and their impact on domestic law

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## 1. Introduction

With the same "aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects" (recital 8 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [Regulation 2000]), the current Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the Regulation) seeks to "improve the application of certain of its provisions" (recital 1). Among such provisions are those concerning international jurisdiction, the only type of jurisdiction, as is obvious given the nature of the legislation, regulated by the Regulation. In the pages that follow I will address these provisions from the perspective of Spanish law, paying attention to the changes imposed on our internal legislation on account of the changes introduced by the Regulation.

In this analysis I will ignore the amendments to the rules establishing international jurisdiction, which are not substantial and are essentially aimed at "preventing fraudulent or abusive forum shopping" (recital 29), so as to focus on the novel provisions regulating the examination of jurisdiction and jurisdictional grounds for challenge (arts. 4-6). Unlike the previous regulation, which was silent on the possibility of reviewing jurisdiction and confined itself in recital 22 to claiming that the "principle of mutual trust" should form the basis on which a jurisdictional (or any such other) dispute should be resolved - whereby "the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinise the court's decision" -, the Regulation does provide for the possibility of examining and contesting jurisdiction.

## 2. Mandatory nature of the rules on international jurisdiction: *sua sponte* examination and at the request of a party

2.1. Article 4(1) of the Regulation states that: "A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) [main insolvency proceedings] or (2) [territorial insolvency proceedings]."

That is, the rules on international jurisdiction are mandatory: *sua sponte* examination of this procedural requirement is set out and specific reasons for admissibility are expressly called for ("shall specify the grounds on which the jurisdiction of the court is based, and, in particular..."). Because what matters is that the legally determined forum is respected, granting the judge broad powers: "In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity

to present their views on the question of jurisdiction" (recital 32).

As I understand it, these regulatory provisions on the subject of *sua sponte* examination of international jurisdiction and supporting reasoning, as well as its authentic interpretation, must serve to supplement art. 10(4) of the Spanish Insolvency Act (abbrev. LC), which regulates the *sua sponte* examination of this requirement in the Spanish legal system: the rule in art. 38 of the Spanish Civil Procedure Act (abbrev. LEC) will apply, pursuant to which a judge's abstention "will be pronounced *sua sponte* after hearing the parties and the public prosecutor's office and as soon as the lack of international jurisdiction becomes apparent"; but now, together with the mandatory hearing of the public prosecutor's office, the judge "should require" the debtor to provide additional evidence and, although the Insolvency Act is silent in this respect, he "should" also hear the debtor's creditors, because this procedure is not incompatible with the rules on internal examination and because it can be useful to achieve the ultimate intended effect, which is simply to determine jurisdiction in accordance with the provided legal criterion.

2.2. The Regulation also provides for the examination of international jurisdiction at the request of a party in the main proceedings.

2.2.1. In this regard, art. 5(1) of the Regulation provides that the "debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction"; given that, as stated in recital 34, "any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings".

It is debatable whether the right to a jurisdictional challenge also extends to a "creditor who has acquired by virtue of *inter vivos* acts, within the 6-month period prior to the request [for opening insolvency proceedings], exclusive title to the debt after falling due", given that, under art. 3(2) LC, such creditor does not have standing to request the opening of insolvency proceedings. In my opinion, the answer must be in the affirmative because his status as party to the proceedings is not excluded (art. 63(1) LEC) and because the objective of the provision excluding standing differs from that pursued by the jurisdictional challenge.

Unlike art. 10(1) LC - intended exclusively with regards to applications for dismissal for lack of territorial jurisdiction in necessary insolvency proceedings -, art. 5(1) also provides for motions for dismissal for lack of international jurisdiction and in voluntary insolvency proceedings (though obviously here the debtor is excluded from making such application).

2.2.2. And the rule is completed with paragraph 2 thereof: "The decision opening main insolvency proceedings may be challenged [on grounds of lack of international jurisdiction] by parties other than those referred to in paragraph 1 […] where national law so provides." Under Spanish law it must be understood that this rule refers to the line-up of persons with standing - to request the opening of insolvency proceedings – other than the debtor (or, where applicable, his heirs) and the creditors: in the case of a legal person, the shareholders or members who are personally liable under current legislation for the debts of the former (art. 3(3) LC); and in the case of insolvency proceedings regarding an estate, its executor. At the stage when an application for dismissal for lack of jurisdiction can be made, interested third parties cannot request to intervene in the insolvency proceedings (for example, in an objection to the opening of necessary insolvency proceedings) or to be joined

as a party to the proceedings - under the aegis of art. 13 LEC -, nor can insolvency practitioners appointed in the decision opening the insolvency proceedings when international jurisdiction is already definitely determined.

2.2.3. I insist that this possibility of jurisdictional challenge through a motion for dismissal is a novelty in the regulation on insolvency proceedings, as it is not provided in either Regulation 2000 or the Insolvency Act. The reason – to which I referred earlier - must be sought in the Insolvency Act, which embraced the criterion of Regulation 2000, where nothing is said about the possibility of reviewing (international) jurisdiction and confining itself in recital 22 to claiming that the "principle of mutual trust" should form the basis on which a jurisdictional (or any such other) dispute should be resolved. Now the criterion must be deemed altered and the rule of this regulatory provision must be incorporated into our domestic law.

2.3. Recital 34 goes on to say that "[t]he consequences of any challenge to the decision to open insolvency proceedings should be governed by national law". In our country this means by the rules regulating applications for dismissal for lack of jurisdiction in the Civil Procedure Act (arts. 63 *et seq.*), although with the special features given by art. 11 LC.

2.3.1. In necessary insolvency proceedings, a debtor's motion for dismissal for lack of jurisdiction is facilitated by the adversarial nature of his statement in the system established by the Insolvency Act: he may file such motion within the five days following that on which he was requested to make his objections. Other creditors and those with standing to request the opening of insolvency proceedings (including, as mentioned earlier, creditors whose standing is excluded under art. 3(2) LC) may also apply for dismissal for lack of jurisdiction within ten days from publication of the decision opening insolvency proceedings as prescribed by art. 23(1) LC (art. 12(1) LC).

2.3.2. The provision on the *sua sponte* examination and, therefore, the mandatory nature of the rules governing this requirement, obviously exclude a submission agreed between the debtor and all creditors prior to the opening of insolvency proceedings by a court of another country. The question arises as to whether, in the absence of examination on the judge's own initiative or at the request of those with standing to file the motion for dismissal for lack of jurisdiction, it is possible to admit that there has been tacit submission. In the earlier bankruptcy system, the case law admitted such tacit submission for territorial jurisdiction because the alternative would be to open the door to a motion for annulment of proceedings when the lack of jurisdiction is observed *ex post* and such possibility was excluded, since both the (Entrenched) Judiciary Act (abbrev. LOPJ) and the Civil Procedure Act do not deem proceedings null for lack of territorial jurisdiction. However, such a conclusion cannot be accepted in respect of the international jurisdiction set out by mandatory rules because in the case referred to the motion for annulment of proceedings would be justified (first ground of nullity in arts. 238 LOPJ art. 225 LEC).

2.3.3. As I said before, I believe that the rule in art. 12(2) LC provided in said Act for internal territorial jurisdiction can apply to the motion for dismissal for lack of international jurisdiction. Consequently, unlike what happens in general civil proceedings (cf. art. 64 LEC), the filing of a motion for dismissal for lack of international jurisdiction shall not stay the insolvency proceedings, although, according to the same

rule, the judge cannot make a pronouncement on the insolvent debtor's objections without first adjudicating on the question of jurisdiction raised, after hearing the public prosecutor's office.

3. **The exception: dispensable nature of the rules regulating jurisdiction in group coordination proceedings**

Where insolvency proceedings have been opened for several companies of the same group in the courts of different countries, the Regulation provides for (as one of its novelties) the possibility of group coordination proceedings. Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group (art. 61(1) of the Regulation). However, where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court (art. 62).

Both provisions, nonetheless, are dispensable since, according to art. 66(1) of the Regulation, "[w]here at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction."

4. **International scope of the jurisdiction**

4.1. According to article 6(1) of the Regulation: "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them". A similar rule is contained in art. 13 LEC: in the international sphere, the insolvency judge's jurisdiction covers only those actions which have as their legal basis insolvency legislation and are directly linked to the insolvency proceedings.

Art. 6(1) of the Regulation mentions, as an example, avoidance actions, and recital 35 thereof also refers to "actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings". But these are not the only examples.

Obviously, the problem will arise when it comes to defining the scope of these actions and, consequently, the court of competent jurisdiction to hear the relevant disputes; because both the Regulation and the Insolvency Act merely set a general criterion (the Regulation specifies with regards to the aforementioned two cases): actions that do not fall within such criterion are not affected by the force of attraction of the insolvency proceedings and therefore, may be brought before courts (or even arbitral tribunals) other than that of competent jurisdiction to hear the insolvency proceedings. Indeed, the explanatory notes to the Arbitration (Amendment) Act 11/2011 of 20 May, when justifying the alteration of art. 52(1) LC to maintain the subsistence of arbitration agreements after the opening of insolvency proceedings, refers in paragraph IV to these actions which it classifies as "mere civil actions which, even though they might come to have an impact on the insolvent debtor's equity, they could have been brought regardless of the opening of insolvency proceedings". And it then goes on to provide some examples of these: "This is the case, among others, of actions concerning the existence, validity or amount of a debt, those aimed at collecting a debt owed to the debtor, those seeking recovery of third-party assets in possession of the insolvent debtor and disputes relating to reorganisation plans concluded between the debtor and its creditors before the opening of insolvency proceedings". And also recital 35 of the Regulation mentions others; in particular, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings.

4.2. Where an action such as that referred to in sub-article 1 is related to another action based on civil and commercial law brought against the same defendant, the insolvency practitioner may bring both actions in the courts of the defendant's domicile or, in the case of an action against several defendants, in the courts of either one's domicile, provided such courts are of competent jurisdiction according

to the rules set out in Regulation (EU) No. 1215/2012 (art. 6(2)). This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law (recital 35 of the Regulation).

Article 6(3) of the Regulation completes the rules by providing that, for the purpose of paragraph 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

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