AMERICAN BANKRUPTCY INSTITUTE

2020 Virtual Winter Leadership Conference

Peace Bridge, or Bridge of Sighs: Cross-Border Mediation of Insolvency-Related Disputes

Presented by the Mediation and International Committees

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CONCURRENT SESSION

2020

Peace Bridge or Bridge of Sighs: *Cross-Border Mediation of Insolvency Related Disputes*

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Panelists
Patrick Shea – Gowling, Toronto [Moderator]
Simon Thomas – Godwin Proctor, London
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Title: *Peace Bridge or Bridge of Sighs*: *Cross-Border Mediation of Insolvency Related Disputes*

Program Blurb:

The negotiation of a successful restructuring is always challenging. Even when all constituencies are convinced of the benefits of a restructuring vs. a liquidation (which is not always the case), each constituency has its own goals and agenda. These factors are complicated in cross-border restructurings because of both "hard" or "legal" and "cultural" or "soft" differences. Over the last several years, mediation has become more and more prevalent in helping parties to a restructuring bridge the gap. In the United States, mediation is commonplace in bankruptcy cases, being used to resolve issues ranging from claims allowance to complex multi-party plan dispositive disputes. Mediation has also gained ground in the resolution of insolvency disputes in other jurisdictions around the world. As the global insolvency community has started to recognize the advantages of attempting a restructuring over immediately defaulting to a liquidation scenario, the use of mediation to resolve insolvency disputes or the hybrid med/arb process has become more prevalent. The use of mediation in cross-border insolvency cases has also gained credibility through recent pronouncements of the European Union and UNCITRAL, as well as the development and implementation of the Singapore Convention and the JIN Guidelines. Through a mock mediation, the panel of experienced judges and cross-border mediators and practitioners from various jurisdictions will illustrate the pitfalls and benefits of using mediation to resolve cross-border insolvency disputes. Panelists will also discuss how mediation morphed during the COVID-19 pandemic from a face to face system, to a virtual one through Zoom and other teleconferencing technologies.

Panel Hypothetical

Global Manufacturing, Inc. is a holding company incorporated in Delaware with its principal place of business in Dallas, Texas. Global's corporate officers and senior management, legal and accounting departments and consolidated purchasing operations are all located in Dallas.

Global has three operating subsidiaries: Wild North, Corp. located in Toronto, Canada, Westminster plc located in Manchester, UK and Rhine AG located in Frankfurt, Germany. Each of these entities manufactures goods which are sold globally. Each has its own employees and senior management.

Global Manufacturing has a senior secured credit facility with Mega Bank, guaranteed by Wild North, Westminster and Rhine, each of which has been the primary recipient of the loan proceeds.

While Wild North, Westminster and Rhine each nominally contract for their own raw materials and supplies, purchasing is actually done on a consolidated basis through Global in Dallas, enabling the companies to negotiate better pricing.

Global has filed for bankruptcy in the United States, along with its three foreign subsidiaries. Additionally, Wild North has filed a proceeding pursuant to the Companies' Creditor Arrangement Act ("CCAA") in Toronto, Westminster has filed a Company Scheme of Arrangement in London and Rhine has filed a proceeding under the German Insolvency Act in Frankfurt.

After numerous hearings before the applicable courts and numerous communications between the presiding judges, a cross-border protocol was developed pursuant to which, among other things, it was agreed that the determination of which entity was liable for which unsecured supplier claims would be determined in the United States.

After a hotly contested hearing at which creditors from around the world were permitted to express their objections and concerns, the U.S. Bankruptcy Court presiding over the cases has referred the supplier claims to mediation. The Hon. Barbara Houser, another sitting Bankruptcy Judge, has been appointed the mediator.

While customarily it is the parties who develop the mediation procedures without the input of the mediator, in this case, because of the number of foreign creditors who did business with Wild North and Rhine who are not familiar with mediation, a pre-mediation conference has been convened with the parties and the mediator to develop the parameters and procedures for the mediation.

MEDIATION OF INSOLVENCY-RELATED MATTERS IN THE UNITED STATES

How is mediation used in Chapter 11 cases in the U.S.

- Distinct matters such as claim objections, preference litigation and other types of contested matters where a large amount is at stake or there are a large number of similar cases where the court establishes a process that includes mediation (which is mandatory) as part of the resolution procedure to minimize the number of matters that go to trial
    - Such mediation is usually court-ordered and a mandatory part of the process
    - Sometimes it is the parties who seek it out
    - Some courts are very receptive to using this procedure (SDNY); some courts are not – not because they are opposed to mediation but because they will not order parties to do it (SD TX)
    - Effectively used in *Lehman* case for both mortgage indemnification claims and derivative swap claims, where massive numbers of lawsuits were filed, there were issues of law that were identical for each despite factual differences, and it would have been impossible to try every case.
    - These are usually two party disputes.
- Dispositive Issues relating to plan formation or to resolve an issue that would be highly contested and could impact confirmation of a plan. Used in *Adelphia* and *Tailored Brands* to resolve contested issues on asset distribution and valuation which could have significantly impacted or even scuttled confirmation.
- The Mediation Process
    - Picking the mediator
    - Getting parties to accept it as a dispute resolution method
    - Conflicts
    - Confidentiality
    - Good faith
    - Enforcement of agreement (cross-border component)
    - Styles

MEDIATION IN CANADIAN INSOLVENCY

E Patrick Shea, LSM, CS
Gowling WLG, Toronto, Ontario, Canada

Introduction. The adoption of a structured process that permits parties the opportunity to consensually resolve disputes with the assistance of a neutral third party can, in appropriate circumstances, increase the efficiency and reduce the cost of insolvency proceedings. This is important where time and money are at a premium. Mediation will not, of course, always be successful and litigation may be necessary to resolve disputes. The allocation dispute in the cross-border insolvency of Nortel Networks Inc. is an example of a situation where a mediated settlement was not possible, and litigation was necessary. While not an example of a successful mediation, Nortel is an example of the financial impact on stakeholder recoveries of the failure of parties to reach a negotiated settlement[1]. Even where mediation is not successful at resolving a dispute, it can narrow the issues that must be resolved through litigation[2].

This paper will, in a summary fashion, explore the opportunities that exists for mediation in Canadian insolvency proceedings and the jurisdictional basis for courts in Canada to facilitate mediation in the domestic and cross-border insolvency context. Examples will be provided of specific circumstances in which mediation has been used both successfully and unsuccessfully to resolve disputes with the objective of increasing the efficiency and reducing the costs of insolvency proceedings for the benefit of stakeholders.

Canadian Insolvency Regime. The Canadian insolvency regime is centered around two pieces of Federal legislation, the *Bankruptcy and Insolvency Act*[3] and the *Companies' Creditors Arrangement Act*[4]. The BIA provides for the both the liquidation–through bankruptcy–and the reorganization of insolvent corporations and individuals. The CCAA, on the other hand, provides only for the reorganization of insolvent corporations or corporate groups that have debt in excess of $5 million[5].

Under the BIA, both liquidations and reorganizations take place with a relatively small degree of court intervention. The Act contains extensive provisions that deal with almost all of the matters involved in the liquidation or reorganization of a debtor including the criteria for commencing proceedings, the administration of the estate once a proceeding has been commenced, the rights of the secured and unsecured creditors of the debtor, the procedures for proving claims, priorities among the various creditors, and the augmentation of the estate. The CCAA stands in stark contrast to the BIA. The original CCAA—which was enacted in the mid-1930's—provided only a framework for the debtor's reorganization and left many of the matters codified in the BIA to be dealt with by the court on a case-by-case basis. The CCAA has been amended and expanded over the years, but the manner in which a CCAA reorganization is administered is still determined to a very large extent by the courts, although in many instances the court supervising a CCAA proceeding is called upon to approve or sanction negotiated resolutions rather than resolve

[1] See *Nortel Networks Corporation (Re)*, 2017 ONSC 673 (CanLII).
[2] See *4519922 Canada Inc. (Re)*, 2015 ONSC 124 (CanLII).
[3] R.S.C. 1985, c. B-3 (the "**BIA**").
[4] R.S.C. 1985, c. C-36 (the "**CCAA**").
[5] CCAA, s. 3(1).

disputes.

Courts and Jurisdiction. There is no stand-alone "bankruptcy" or "insolvency" court in Canada. Both the BIA and the CCAA assign jurisdiction to the Superior Courts in each of the provinces[6]. The BIA provides that the specified courts in each of the provinces are "invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act..."[7]. The CCAA provides the court supervising a proceeding under the Act with extremely broad jurisdiction. Section 11 of the CCAA provides:

> *11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.*[8]

In terms of procedure, the BIA and the regulations promulgated under the BIA–the *Bankruptcy and Insolvency Act General Rules*[9]–contain fairly extensive procedures that are applicable where proceedings are commenced under the BIA. Where, however, the BIA and the General Rules are silent with respect to procedural matters, the ordinary court procedures applicable in the province where the proceeding is taking place apply[10]. The CCAA, by way of contract, does include detailed procedures applicable to proceedings under the Act and the rules of civil procedure in the province where the proceeding is commenced are applicable. As a result, there tends to be more procedural variation across Canada in CCAA proceedings than in BIA proceedings.

In many provinces, panels of Judges have been established to deal with insolvency matters. In 1991, the Commercial List was created in the Toronto Region for the hearing of actions, applications and motions involving commercial matters, including insolvency. The objective of the Commercial List is, in essence, to increase the efficiency and reduce the cost of insolvency proceedings for the benefit of all stakeholders. To this end, the Commercial List Practice Direction specifically refers to the use of mediation and others forms of alternative dispute resolution:

> *It shall be the duty of the case management judge and the obligation of counsel to explore methods to resolve the contested issues between the parties, including the resort to ADR, at the case conferences and on whatever other occasions it may be fitting to do so.*

On the Commercial List pre-trial conferences with a Judge are generally required in significant matters with a view to narrowing the issues that are to be determined. A common aspect of these pre-trial conferences is judicial mediation.

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[6] BIA, ss. 2 "court" and 183, and CCAA, s. 2(1) "courts".
[7] BIA, s. 183(1).
[8] CCAA, s. 11.
[9] C.R.C. c. 368. (the "**General Rules**")
[10] General Rules, s. 3.

Mediation by Proposal Trustee/Monitor. Under both the BIA and the CCAA, a licensed insolvency practitioner must be appointed to oversee the reorganization. Under the BIA the practitioner is referred to as a "Proposal Trustee" and under the CCAA the practitioner is referred to as a "Monitor". While there are a number of specific functions assigned to the Proposal Trustee and the Monitor[11], in practical application the specific role played by the Proposal Trustee or the Monitor in a reorganization varies from case-to-case. It is, however, common for the Proposal Trustee or Monitor to participate in the development of the plan and for the Monitor or Proposal Trustee to act as a *de facto* mediator to facilitate the consensual resolution of disputes between the debtor and stakeholders with respect to the contents of the plan and other issues[12]. The Proposal Trustee or Monitor acts as an Officer of the Court and is required to be neutral as between the various stakeholders and is well-suited to mediate disputes arising in the proceeding.

Use of Mediation in Canadian Insolvency Proceedings. Parties to disputes that arise during the course of proceedings under the CCAA or the BIA may elect to use mediation to resolve their disputes. In the CCAA reorganization of Essar Steel Algoma Inc. a dispute arose between Essar Steel and Cliffs Mining Company with respect to the supply by Cliffs Mining of iron ore pellets. A pre-filing dispute between Essar Steel and Cliffs Mining had led to litigation and the purported termination by Cliffs Mining of a long-term supply contract. The litigation and termination of the supply contract were instrumental in Essar Steel's decision to commence insolvency proceedings. Subsequent to commencing proceedings under the CCAA, Essar Steel and Cliffs Mining reached a mediated resolution to reinstate the supply agreement. The mediated settlement was approved by the court[13]. In the Alberta reorganization of Poseidon Concepts Corp., for example, an order was made approving a mediation process to address claims relating to the review, audit and restatement of the debtor's financial statements in an attempt to advance the reorganization[14]. Unfortunately, the mediation was not successful.

There are some specific issues that arise in Canadian insolvency proceedings that are particularly suited for judicial or extra-judicial mediation:

> **Assignment of agreements.** The BIA and the CCAA both provide for the forced assignment of agreements and require as a condition of any assignment that all monetary defaults be cured by a date to be specified by the court[15]. Mediation can assist the parties in reaching agreement on the quantum of the monetary defaults as well as how and when they will be "cured".
>
> **Supply arrangement.** Where reorganization proceedings are commenced, the expectation is that the debtor will operate on a cash-on-delivery basis. Suppliers are not obliged to

[11] See BIA, ss. 50(5)-(10) and CCAA, s. 23.
[12] See BIA, s. 50.5. The form of Model or Template Initial Order used in Ontario provides the Monitor with the ability to "advise the Applicant in its development of the Plan and any amendments to the Plan".
[13] See *Essar Steel Algoma Inc.(Re)*, 2017 ONSC 12 (CanLII). See also discussion in *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, (Re)*, 2000 CanLII 22488 (ON SC) relating to the use of mediation/arbitration to resolve pension-related issues in the CCAA proceeding.
[14] See attached **Appendix A**. See also See *4519922 Canada Inc. (Re)*, 2015 ONSC 124 (CanLII) where mediation narrowed the issues and permitted the development of a term sheet outlining a plan.
[15] BIA, ss. 84.1 and 66, and CCAA, s. 11.3(4). The BIA and the CCAA also provide for the disclaimer of agreements: BIA, ss. 65.11 and 65.2, and CCAA, s. 32.

provide credit to the debtor and can demand immediate payment in cash for goods and services supplied to the debtor[16]. This can strain the debtor's cash flow and it is common practice for the debtor to attempt negotiate to arrangements with its suppliers and mediation can also be employed to address going-forward supply issues.

Retail insolvencies. In the retail insolvency context, the key dispute that typically arises in Canada is as between the landlord(s) and the other stakeholders. The landlord wishes to preserve its broader interests and, in many cases, protect the interests of other tenants in the premises. The other stakeholders typically want to maximize the value of the debtor's assets, including the lease(s). This requires a balancing of the rights of the landlords and the rights of the debtor. The legal issues are typically well defined and understood and mediation can be employed to assist the parties in reaching a mutually agreeable resolution that balances their respective interests in a timelier manner than litigation.

Labour Relations Matters. The BIA and the CCAA do not permit a reorganizing debtor to disclaim or modify a collective agreement. Where a debtor requires amendments to a collective agreement as part of a reorganization, the debtor may apply to the court for an order authorizing the debtor to serve a notice to bargain notwithstanding that the collective agreement has not expired[17]. The court does not, however, have jurisdiction to amend a collective agreement at the request of the debtor (or the union).

The legislation applicable to the collective agreement will typically provide for the use of alternate dispute resolution to reach a collective agreement. In Ontario, the *Labour Relations Act, 1995* provides for the appointment by the Ministry of Labour of a Conciliation Officer or Conciliation Board to assist the parties to negotiate a collective agreement[18]. The Act also provides for the appointment of a mediator by the Ministry of Labour[19].

Mediation has been employed by the Court to resolve pre-filing grievances where the employees of a debtor are unionized. In the CCAA reorganization of AbitibiBowater Inc., for example, the Court appointed a "grievance claims officer" to mediate grievances under the collective agreement that were included in the claims' procedure[20]. Mediation has also been employed to deal with other issues involving disputes between a debtor and its union. In the CCAA reorganization of Air Canada, for example, a mediator was appointed to assist the debtor and its union to come to a resolution on the terms for a new collective agreement that would permit the debtor to successfully reorganize[21].

Determination of Claims. One of the key areas where mediation can—and often is—employed in a Canadian insolvency proceeding is in connection with the determination of

[16] BIA, s. 65.1(4) and CCAA, s. 11.01. Note the CCAA does contemplate that "critical" suppliers may be ordered to supply goods or services in credit: CCAA, s. 11.4.
[17] BIA, s. 65.12 and CCAA, s. 33.
[18] *Labour Relations Act*, 1995, SO 1995, c 1, Sch A ("LRA"), ss. 18 and 21.
[19] LRA, ss. 19(1) and 35.
[20] See *Kenny* v *Bowater Maritimes Inc.*, 2014 CanLII 26544 (NB LA). A similar procedure was adopted in the CCAA reorganization of Air Canada.
[21] See discussion in *Gélinas, Bellemare, Grivas*, 2006 CIRB 365 (CanLII).

claims against an insolvent debtor. Where creditors are only able to recover cents on the dollar, reducing the costs of determining disputes with respect to the amount owing has the potential to increase recoveries for creditors.

BIA. The BIA establishes a statutory claims procedure that leaves little room at the initial stages for mediation, although mediation is possible at the appeal stage of the process. The BIA requires that the trustee appointed to administer a bankruptcy or oversee a reorganization examine and determine the quantum of all proofs of claims filed against the debtor and provides the trustee with the jurisdiction to make any inquiries necessary to determine the claims filed against the debtor[22]. In the case of contingent or unliquidated claims, the trustee is required to determine whether the claim is "provable" and the quantum of the claim[23]. The trustee has the theoretical ability to seek advice and directions from the Bankruptcy Court with respect to claims, but in practice the trustee determines the claims based on information provided by the creditor and, if necessary, advice provided by counsel retained by the trustee[24]. The trustee's determination with respect to a claim is binding unless the creditor appeals the determination to the Bankruptcy Court[25]. An appeal by a creditor of the trustee's determination with respect to a claim proceeds as a Motion before the Bankruptcy Court[26]. At this stage, the Bankruptcy Court may refer the parties to mediation to resolve some or all of the issues.

CCAA. The claims procedure under the CCAA is quite different than what is contemplated by the BIA. The CCAA leaves the procedure by which a claim is proven and the procedure for determining disputes with respect to a claim to be established by the court on a case-by-case basis and the court has broad jurisdiction to determine how disputes with respect to claims ought to be determined. The CCAA provides only that where a claim is not admitted by the debtor "it is to be determined by the court on summary application"[27].

The standard practice in CCAA proceedings is for the court, on the application of the debtor, to establish a procedure for creditors to file claims and for any disputed claims to be determined. A common practice that has developed is for the court to appoint a "Claims Officer"–typically a retired judge or practitioner–to determine disputes. In the context of determining a claim, the Claims Officer may attempt to mediate a resolution[28].

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[22] BIA, s. 135. Note that the claims procedure in the BIA is in a part of the Act that deals with bankruptcy but is also applicable in reorganization proceedings. See BIA, s. 66.
[23] BIA, s. 135(1.1).
[24] At one point in time the BIA claims procedure required that the trustee apply to the Bankruptcy Court to have contingent or unliquidated claims determined, but that procedure was replaced with the current procedure. The trustee does, however, have the general ability to seek advice and directions from the Bankruptcy Court.
[25] BIA, s. 135(4). Note that another creditor or the debtor can apply to the Bankruptcy Court to a have a claim reduced or expunged: see BIA, s. 135(5).
[26] General Rules, s. 11.
[27] CCAA, s. 20(1).
[28] See *Montreal, Maine & Atlantic Canada Co. (Montréal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 1472 (CanLII)

The courts have also exercised their jurisdiction under the CCAA to order that claims disputes be mediated. In the CCAA reorganization of Muscletech Research and Development Inc., for example, the claims procedure established by the court contemplated some claims would be mediated[29].

Receiverships. While there is no legislation that establishes the procedure to be employed to determine creditor claims where a receiver is appointed, the Courts generally exercise their jurisdiction to establish claims procedure that resemble the procedures adopted in CCAA proceedings. There do not, to date, appear to be any reported cases the address mediation in the context of a claims' procedure established where a receiver is appointed.

Avoidance Proceedings. There are a variety of provisions in the BIA that can be used to attack pre-bankruptcy transactions to increase the funds available to creditors[30]. These provisions are also applicable in reorganization proceedings under the BIA and the CCAA[31]. Avoidance proceedings typically proceed as applications or actions under the applicable provincial rules of civil procedure. Mediation can be, and often is, employed as a means of reducing the cost of avoidance proceedings by resolving or at least narrowing the issues to be determined.

Approval by the Court. In mediation, the parties to the dispute ultimately control the outcome in the sense that they must agree to any solution of their dispute. In the insolvency context where third parties may be impacted by a mediated resolution, it is often necessary to have the resolution agreed to as among the direct parties to the dispute made binding on non-parties. It is common practice to have mediated resolutions approved by the court–the role of the court in this context is not to second-guess the resolution, but to ensure that the resolution is fair to other impacted stakeholders.

Cross-Border Mediation. Canada has adopted a slightly modified version of the UNCITRAL Model law on Cross-Border Insolvency in both the BIA and the CCAA[32]. Under both the BIA and the CCAA, once a foreign proceeding has been recognized, the court is required to "cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding"[33]. This provides the court with broad jurisdiction to authorize or direct the cross-border mediation of disputes in cross-border insolvency proceedings. Even outside of formal recognition proceeding, Canadian courts have recognized the benefits of using mediation to resolve disputes in the cross-border insolvency context. In *Roberts* v. *Picture Butte Municipal Hospital*[34], which pre-dates the current cross-border insolvency regime, the Alberta Court of Queen's Bench stayed litigation proceedings in Canada to permit the claim of a plaintiff to be determined in accordance with a plan of reorganization filed by the defendant under the *United*

[29] See *Muscletech Research and Development Inc. (Re)*, 2006 CanLII 27997 (ON SC). In the reorganization of Nortel Networks Corporation mediation was also employed, although without success: see, for example, *Nortel Networks Corporation (Re)*, 2015 ONSC 1354 (CanLII).
[30] See BIA, ss. 95-101.
[31] BIA, s. 101.1 and CCAA, s. 36.1.
[32] BIA, Part XIII and CCAA Part IV.
[33] CCAA, s. 52(1).
[34] 1998 ABQB 636 (CanLII).

States Bankruptcy Code. The plan contemplated that mediation would be used to determine disputed claims. Mediation was also employed in the cross-border insolvency of Nortel Networks Corporation[35].

Mediation in Personal Bankruptcy. Mediation is a statutory part of the Canadian personal bankruptcy regime.

> **Surplus Income.** The Canadian personal bankruptcy regime includes provisions that require a bankrupt to pay a portion of his or her post-bankruptcy income that is surplus to their needs to the trustee for the benefit of creditors. The amount of the surplus income that a bankrupt must pay is determined based on criteria established by the Superintendent of Bankruptcy–the government body responsible for the administration of the Canadian insolvency regime[36]. The BIA contemplates that mediation will be attempted to resolve disputes with respect to surplus income before resort is made to the Bankruptcy Court[37]. The mediation is conducted through the Office of the Superintendent of Bankruptcy in accordance with procedures that are prescribed by the Regulations to the BIA[38].
>
> **Conditions of Discharge.** Where an individual bankrupt is applying to be discharged from bankruptcy, the Bankruptcy Court has the jurisdiction to impose conditions that must be fulfilled by the bankrupt[39]. Creditors as well as the trustee have the right to oppose an application by a bankrupt seeking a discharge and to seek that conditions be imposed on the bankrupt[40]. Where a discharge is opposed only on the grounds that: (a) the bankrupt failed to pay amounts s/he was required to pay to the trustee; or (b) the bankrupt had the financial means to restructure, but chose bankruptcy instead, the BIA requires that the issues be mediated[41]. If a mediated resolution is reached, that resolution forms the basis for the bankrupt's discharge[42]. It is only if mediation is not successful or the bankrupt fails to comply with his or her obligations under the mediated resolution, that the Bankruptcy Court becomes involved[43].
>
> In practical application, discharge applications are typically disputed on a number of grounds in addition to assertions that the bankrupt should have paid more to the trustee or could have reorganized, and, for that reason, mediation is not commonly used to resolve discharge-related disputes.

Arbitration Clauses. It is not uncommon for the parties to an agreement to agree that disputes under the agreement by arbitration. It is generally accepted that the Court has jurisdiction to override such provisions[44].

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[35] See Nortel Networks Corporation (Re), 2017 ONSC 700 (CanLII), para 2
[36] BIA, s. 68.
[37] BIA, ss. 68(6) – (10).
[38] *Bankruptcy and Insolvency Act General Rules*, CRC, c. 368, s. 105. See **Appendix B**.
[39] BIA, s. 172(1).
[40] BIA, ss. 168.2, 170(1) and 170(7).
[41] BIA, s. 170.1(1).
[42] BIA, s. 170.1(4).
[43] BIA, s. 170.1(3).
[44] See the discussion in *Petrowest Corporation* v *Peace River Hydro Partners*, 2019 BCSC 2221 (CanLII).

Farm Debt Mediation Act. While the core pieces of insolvency legislation in Canada are the BIA and the CCAA, Canada has legislation – the *Farm Debt Mediation Act*[45] – that is available only to insolvent farmers. The FDMA is based on mediation of disputes between farmers and their creditors. The FDMA permits insolvent farmers to apply to a government official for a stay of proceedings and the appointment of a mediator to mediate a mutually acceptable resolution between the farmer and its creditors[46]. The general objective of the FDMA is to permit insolvent farmers with an opportunity to demonstrate to creditors the long-term viability of their operations[47].

Where a farmer applies for and is granted relief under the FDMA, a government-appointed administrator conducts a review of the farmer's financial situation and prepares a report. The administrator then appoints a mediator whose role it is to mediate a resolution between the farmer and its creditors. Unlike the BIA, the FDMA does not include comprehensive procedures for mediations.

The efforts to mediate a resolution under the FDMA are "protected" by a stay of proceedings that prevents creditors from enforcing their debts as against the farmer[48]. The general concept is that so long as the mediator is making progress and no creditor is being prejudiced by the delay in exercising its remedies the stay will be extended.

Unfortunately, the mediation process under the FDMA is not often used in practice. The inability to impose a solution, particularly in light of the availability of the BIA and the CCAA, limits the practical utility of the FDMA as a means to reorganize. However, the FDMA also includes provisions that restrict the rights of secured creditors as against farmers and is often relied upon as a basis to limit a secured creditor's enforcement rights.[49]

[45] SC 1997, c. 21 (the "**FDMA**"). See also *The Family Farm Protection Act*, CCSM c F15
[46] FDMA, ss. 5 and 6.
[47] See *M & D Farm Ltd.* v. *Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961, 1999 CanLII 648 (SCC)
[48] FDMA, ss. 12 and 13.
[49] FDMA, s. 21.

Appendix A

Poseidon Mediation Order

I hereby certify this to be a true copy of the original ORDER
Dated this 15 day of October 2013
for Clerk of the Court

Clerk's stamp:

CLERK OF THE COURT FILED
OCT 15 2013
JUDICIAL CENTRE OF CALGARY

COURT FILE NUMBER	1301-04364
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED;
	AND IN THE MATTER OF POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP, AND POSEIDON CONCEPTS INC.
DOCUMENT	**MEDIATION ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Kenneth T. Lenz Bennett Jones LLP 4500, 855 – 2nd Street SW Calgary, Alberta T2P 4K7 Ph. (403) 298-3317 Fx. (403) 265-7219 File No.: 11866.66
DATE ON WHICH ORDER WAS PRONOUNCED	October 11, 2013
NAME OF JUSTICE WHO MADE THIS ORDER	The Honourable Justice Strekaf

UPON the application of PricewaterhouseCoopers Inc. (the "**Monitor**") as court appointed monitor of Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (collectively, "**Poseidon**");

AND UPON having read the 17th Monitor's Report, dated October 10, 2013, and the pleadings and proceedings filed in these CCAA proceedings;

AND UPON noting the Order dated September 27, 2013, which, among other things, enhanced the Monitor's powers to permit the Monitor to prosecute and pursue claims on behalf of Poseidon;

AND UPON noting the consent of the secured lenders of Poseidon, namely The Toronto-Dominion Bank, as agent for itself and HSBC Bank Canada, The Bank of Nova Scotia, and National Bank of Canada (the "**Lending Syndicate**"), the consent of Franz Auer, Joanna Goldsmith and Marian Lewis,

being the representative plaintiffs (the "**Class Action Plaintiffs**") in the Actions commenced against Poseidon, Scott Dawson, Lyle Michaluk, Matt MacKenzie and Harley Winger (collectively, the "**Poseidon Defendants**"), respectively, in the Court of Queen's Bench of Alberta, Action No. 1301-00935, in the Superior Court of Ontario, Action No CV-12-46873600CP, and in the Superior Court of Quebec, Action No. 500-06-000633-129 (collectively, the "**Class Actions**"), the consent of the Poseidon Defendants and the consent of the Monitor, and the consent of the Plaintiff (the "**U.S. Plaintiff**") in the action commenced and pending in the United States District Court for the Southern District of New York styled *IN RE POSEIDON CONCEPTS SECURITIES LITIGATION*, having Court File Number 12-cv-1213 (DLC) (the "**U.S. Action**");

IT IS HEREBY ORDERED THAT:

THE MEDIATION PARTIES

1. Subject to any further Order of this Court, the Class Action Plaintiffs, the Lending Syndicate, the Monitor, the Poseidon Defendants and any other Eligible Person (defined herein) (collectively, the "**Parties**," each being a "**Party**," to the Mediation) shall participate in a mediation (the "**Mediation**") to address any claims, rights, obligations, or disputes resulting from, relating to, or with respect to the preparation, review, audit and restatement of Poseidon's financial statements and any other related matters (the "**Restatement**").

2. Any other person or entity that may have, or may be subject to, any claims, rights, obligations, or disputes resulting from, relating to, or with respect to the Restatement (an "**Eligible Person**") may also participate in the Mediation upon:

   (a) the acceptance and delivery of a Mediation Notice in accordance with, paragraphs 10 to 14 of this Order;

   (b) further Order of this Court; or

   (c) the consent of the Class Action Plaintiffs, the Lending Syndicate, the Monitor and the Poseidon Defendants,

   and thereupon shall be considered a Party to the Mediation.

3. All Parties to the Mediation shall participate in the Mediation in person and with representatives present with full authority to settle the claims (including any insurer whose policy may afford coverage for any of the claims) or, if not practicable, through counsel or other representatives, subject to those counsel or other representatives having access to representatives with full authority, and undertaking to promptly pursue instructions with respect to any proposed agreements that arise from the Mediation.

4. Pursuant to this Court's Order dated May 30, 2013 (the "**Representation Order**"), the Class Action Plaintiffs are representatives for the class as defined in the Representation Order (the "**Representation Class**"), and shall have full authority to settle any claims, rights or disputes relating to the Representation Class resulting from, relating to, or with respect to the Restatement.

5. The US Plaintiff may participate in the Mediation through his counsel and shall be a Party to the Mediation. The U.S. Plaintiff shall have full authority to settle any claims, rights or disputes resulting from, relating to, or with respect to the Restatement relating to the members of the class contemplated in the U.S. Action that are not members of the Representation Class. No notice of the Mediation to the class contemplated in the U.S. Action is required.

THE MEDIATION

6. The Mediation shall be conducted by the Honourable George W. Adams, Q.C. or, if Mr. Adams is unavailable, by such other mediator as may be agreed upon between the Class Action Plaintiffs, the Lending Syndicate, the Monitor and the Poseidon Defendants, or as may be appointed by a further Order of this Court (the "**Mediator**").

7. The Mediation shall be held in Calgary, Alberta, at a location to be agreed upon between the Class Action Plaintiffs, the Lending Syndicate, the Monitor and the Poseidon Defendants.

8. The Mediation shall be held on three (3) consecutive mutually available dates in April or May 2014, or such other dates agreed upon between the Class Action Plaintiffs, the Lending

Syndicate, the Monitor and the Poseidon Defendants. Additional dates may only be added, and adjournments of any dates may only be accepted, with the prior written consent of the Parties to the Mediation or a further Order of this Court.

9. The costs, fees and expenses of the Mediation, including facility fees and mediator's fees, shall be split equally by the Class Action Plaintiffs (1/3), the Lending Syndicate (1/3), and the Poseidon Defendants (1/3), and any other Party to the Mediation unless otherwise agreed to by the Parties to the Mediation in writing.

MEDIATION NOTICES

10. By October 31, 2013, any Party to the Mediation may send a notice (the "**Issuing Party**") in the form attached as Schedule "A" (the "**Mediation Notice**") to any proposed respondent to request their participation in the Mediation. Such Issuing Party shall provide a copy of such Mediation Notice to all other Parties to the Mediation.

11. If the proposed respondent agrees to participate in the Mediation, as described in this Order and the Mediation Notice, the proposed respondent shall unconditionally sign the Mediation Notice and return the signed Mediation Notice to the Issuing Party by no later than November 30, 2013.

12. Such proposed respondent may deliver the signed Mediation Notice to the Issuing Party by email, fax or courier.

13. Upon delivery of the signed Mediation Notice to the Issuing Party, the proposed respondent, the Class Action Plaintiffs, the U.S. Plaintiffs, the Lending Syndicate, the Poseidon Defendants and the Monitor shall negotiate the documentary production rights and obligations of the proposed respondent. If an agreement is reached, the proposed respondent shall become a Party to the Mediation for all purposes and subject to all the benefits and obligations of the Mediation and this Order. If an agreement is not reached, the proposed respondent shall not become a Party to the Mediation and shall not participate in the Mediation.

14. Upon receipt of a signed Mediation Notice, the Issuing Party shall send a copy to all Parties to the

Mediation and the Mediator.

STATEMENT OF ISSUES

15. By November 15, 2013, any Party to the Mediation that has not already delivered a Statement of Claim to a Party to the Mediation against which it seeks relief, shall deliver a Statement of Issues to all other Parties to the Mediation and to the Mediator, which shall be in a format similar to a Statement of Claim and shall identify the party against which it believes it has a claim, set out the relief sought, and set out the factual and legal basis for the claim.

16. Any Party who wishes to do so, may deliver to all of the other Parties to the Mediation a Reply, by no later than December 15, 2013.

PRE-MEDIATION DOCUMENT DISCLOSURE

17. No later than January 31, 2014, Class Action Plaintiffs, U.S. Plaintiffs, and the Lending Syndicate shall deliver to each other and to the Poseidon Defendants and to the Monitor all non-privileged records in their possession, power or control relevant to the Restatement and any other issues that arise from the Statements of Issues or Reply thereto delivered by any of the Parties to the Mediation.

18. Poseidon shall deliver to Class Action Plaintiffs, U.S. Plaintiffs, the Monitor and the Lending Syndicate all non-privileged emails and attachments and electronic documents in its possession, power or control responsive to the list of custodians, date range and search terms set out in Schedule "B" to this Order. The Poseidon Defendants other than Poseidon shall have the option of delivering to Class Action Plaintiffs, U.S. Plaintiffs, the Monitor and the Lending Syndicate either: (a) all non-privileged records in their possession, power or control relevant to the Restatement and any other issues that arise from the Statements of Issues or Reply thereto delivered by any of the Parties to the Mediation; or (b) all non-privileged emails and attachments and electronic documents in its possession, power or control that meet both of the following

criteria: (i) relate in any way to Poseidon; and (ii) are responsive to the list of search terms and to the date range set out in Schedule "B" to this Order.

19. Wherever possible, the Parties shall produce all records electronically, in native files types, with preserved metadata.

20. Any Party to the Mediation may submit a reasonable request to another Party for further production of relevant and material records subject to considerations of proportionality. Parties must make best efforts to respond to such requests as soon as possible.

21. Without limiting the generality of the foregoing, the Parties to the Mediation shall be entitled to disclose in the Mediation all records in their possession, power or control that may be subject to obligations of confidentiality with any other Party to the Mediation.

22. If a Party to the Mediation claims privilege over any document that would otherwise be producible under this Order, that Party will provide the other Parties to the Mediation with a list identifying the categories of documents over which privilege was claimed. A detailed privilege log identifying all privileged documents individually is not required.

23. Any disagreement with respect to claims of privilege on a category by category basis will be resolved in a one day arbitration before an arbitrator mutually agreeable to the Parties to the Mediation, failing such agreement, by an arbitrator appointed by the Court. The decision of the arbitrator will not be subject to judicial review or appeal. The decision of the arbitrator will be binding on the Parties solely for the purposes of the Mediation.

24. If a settlement of all claims is not reached at mediation, all documents over which privilege was claimed but which were produced pursuant to a ruling of the arbitrator will be returned to the Party that produced the documents and there shall be no waiver of privilege, or allegation of waiver of privilege, in any other proceedings.

25. The decision of the arbitrator shall not be referred to, relied upon, or referenced in any respect in any other proceedings and shall not form the basis for any plea of issue estoppel or any other

estoppel. Rather, any dispute regarding privilege shall be re-litigated as though it was being decided for the first time.

26. Disclosure of any privileged document or documents pursuant to the production requirements in paragraphs 17-18 of this Order shall be deemed to be inadvertent, and shall result neither in the waiver of any privilege over the document or documents, nor over any related documents or documents designated as privileged by the producing party, unless the producing Party indicates in writing that it intends to waive such privilege. The recipient of any such privileged document will return the privileged document to the producing party upon request of the producing party without delay.

CONFIDENTIALITY

27. Unless otherwise agreed in writing, or the Court orders otherwise, all information or records prepared for or in the Mediation, including Statements of Issues, Mediation Notices, and responses to Mediation Notices, and all written or other form of documentary material provided to, or prepared by the Mediator, the Parties to the Mediation, or third parties including the documents produced pursuant to paragraphs 17-26 of this Order:

(a) are protected by without prejudice / settlement privilege;

(b) must be treated by all participants in the Mediation as confidential;

(c) can only be used for the purposes of the Mediation;

(d) cannot be revealed or disclosed to anyone other than a Party to the Mediation, its legal counsel, its insurers and its experts;

(e) cannot be referred to, presented as evidence or relied upon on in any subsequent application or proceeding of a judicial or quasi-judicial nature for any purpose whatsoever including, but not limited to, impeachment; and

(f) are not admissible in any application, action, or proceedings of a judicial or quasi-judicial nature whatsoever.

28. Any communication made, document produced or created, or evidence given in the Mediation shall be subject to absolute privilege, as if delivered or made in a judicial proceeding. The fact that a communication is made, a document produced or created, and evidence given shall not be deemed to be an admission of relevance, nor an automatic waiver of any privilege, whether solicitor-client or otherwise, that would ordinarily attach to such communications, documents or evidence in the ordinary course of litigation.

29. The discussions, settlement negotiations, or any disclosures, including the Mediator's file, made during or for the purposes of the Mediation, are inadmissible in any other proceedings for any purpose. In particular, the Parties to the Mediation shall not rely on or introduce as evidence in any other proceedings the following:

(a) any views or proposals expressed or suggestions made by or to the other Parties or the Mediator in respect of the possible settlement of the matter, whether orally or in writing;

(b) any admissions or apologies made by any of the other Parties in the course of the Mediation, whether orally or in writing;

(c) the fact that any of the other Parties indicated willingness to accept a proposal or recommendation for settlement made by the Mediator; and

(d) any information provided to the Mediator in the course of the Mediation.

30. In order to preserve the confidentiality of the Mediation process, the Parties shall not file any documents or notices described in this Order with the Court, unless otherwise specifically directed by this Order or a further Order of this Court, however, no Party to the Mediation shall seek a Court Order to permit any such documents or notices to be filed with the Court.

31. In the event that the Parties to the Mediation (or any of them) reach a settlement, the terms of the settlement will be admissible in any Court or other proceeding required to approve or enforce it.

32. Any proved material breach of the confidentiality provisions of this Order shall be subject to the full range of sanctions available to the Court.

33. In the event that the Mediation is terminated without a settlement having been reached among all of the Parties, nothing in this order shall be construed as limiting the disclosure obligations of any party to a class proceeding or class action that has been commenced in the United States or Canada in relation to the Restatement.

MEDIATION BRIEFS

34. No later than three weeks prior to the Mediation, each of the Parties to the Mediation shall submit to each other and the Mediator a Mediation Brief, which details the significant facts, legal issues, and settlement position of the Party.

INSURANCE

35. At least one (1) month prior to the Mediation, each of the Parties to the Mediation against which a claim has been asserted by Statement of Claim or in a Statement of Issues shall disclose the following information to the Party that asserted such claim, all of which will be provided on a confidential and without prejudice basis:

    (a) The remaining limits on any responsive insurance policies; and

    (b) A summary of any reservation of rights asserted by the insurers in respect of such insurance policies.

TERMINATION OF THE MEDIATION

36. The Mediation shall be terminated only on the occurrence of any of the following circumstances:

    (a) A signed Declaration by the Mediator, filed with this Court, that a settlement has been reached between some or all of the Parties;

(b) A signed Declaration by the Mediator, filed with this Court, that further efforts of Mediation are no longer considered worthwhile;

(c) At 11:59 p.m. on the third day of the Mediation or at such later time as may be agreed to by all Parties; or

(d) By further Order of this Court.

STANDSTILL

37. None of the Parties to the Mediation shall commence or pursue any claims or proceedings resulting from, relating to, or with respect to the Restatement or any other issues that arise from the Statements of Issues or Reply thereto delivered by any of the Parties to the Mediation against any other Party to the Mediation between the date of this Order and the termination of the Mediation under paragraph 36 of this Order.

38. Subject to paragraph 39 of this Order, the running of time for any limitation period that applies to any claim that has been or could be asserted by any Party against any other Party relating to the Restatement shall be suspended from the date of this Order until the date that is sixty (60) days after the termination of the Mediation under paragraph 36 of this Order (the "**Standstill Period**").

39. With respect to any claim that has been or could be asserted by any Party against any other Party relating to the Restatement that would be governed by Québec law, the Parties to the Mediation shall be deemed, by consenting or agreeing to become a Party to the Mediation, to:

(a) agree that they are renouncing to the benefit of time elapsed for the prescription which has begun with respect to any claim, recourse, cause or right of action that any Party may assert against any other Party relating to the Restatement;

(b) agree that following the date of this Order, the prescription not already acquired for any claim, recourse, cause or right of action that any Party may assert against any other Party relating to the Restatement begins to run again for the same period; and

(c) agree that other than renouncing to the benefit of time elapsed, the Parties do not waive any other argument, position or defence that may otherwise be asserted by them in any legal proceedings.

40. Nothing in this Order shall preclude the Petitioner in the proceeding commenced and pending in the Quebec Superior Court, District of Montreal, styled *Kegel v National Bank of Canada*, having Court File Number 500-06-000642-138, from prosecuting that proceeding.

STAY OF PROCEEDINGS

41. Subject to any further Order of this Court, paragraph 13 of the CCAA Initial Order is hereby amended to extend the Stay Period to May 30, 2014.

AMENDMENT AND VARIATION OF ORDER

42. Any of the procedures or deadlines specified in this Order may be amended or varied by agreement in writing of all the Parties to the Mediation or further Order of this Honourable Court.

ASSISTANCE OF OTHER COURTS

43. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order.

J.C.Q.B.A.

4349566_2|NATDOCS

SCHEDULE "A"

Clerk's stamp:

COURT FILE NUMBER	1301-04364
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED;
	AND IN THE MATTER OF POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP, AND POSEIDON CONCEPTS INC.
DOCUMENT	**NOTICE OF CLAIM AND REQUEST FOR MEDIATION (MEDIATION NOTICE)**

TO: [Proposed Respondent]

RE: Notice of Claim and Request to Participate in Mediation ("Mediation Notice")

Date: ●

This Mediation Notice is provided to you in accordance with the Mediation Order dated October 11, 2013 (the "**Court Order**") granted in the Court of Queen's Bench of Alberta, Action No. 1301-04364, respecting Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (collectively, "**Poseidon**"). A copy of the Court Order is attached. All undefined capitalized terms in this Mediation Notice have the meanings ascribed to them in the Court Order.

Pursuant to paragraph 10 of the Court Order, the undersigned requests that you participate in the Mediation to address claims against or involving you resulting from, relating to, or with respect to the restatement of Poseidon's financial statements and any other related matters (the "**Mediation Claims**").

Pursuant to paragraph 13 the Court Order, if you accept this offer to participate in the Mediation by endorsing this Mediation Notice and delivering the same to the undersigned, you will be required to negotiate with the Class Action Plaintiffs, the U.S. Plaintiffs, the Lending Syndicate, the Poseidon Defendants and the Monitor to determine your documentary production rights and obligations. If an agreement is reached, you shall become a Party to the Mediation for all purposes and subject to all the

benefits and obligations of the Mediation and this Order. If an agreement is not reached, you shall not become a Party to the Mediation and shall not participate in the Mediation.

By signing and delivering this Mediation Notice to the undersigned, and only if you become a Party to the Mediation, you agree to a standstill of all limitation periods in respect of all Mediation Claims made or brought by any and all Parties to the Mediation as set out in paragraphs 37-40 of the Mediation Order as set out below:

STANDSTILL

1. None of the Parties to the Mediation shall commence or pursue any claims or proceedings resulting from, relating to, or with respect to the Restatement or any other issues that arise from the Statements of Issues or Reply thereto delivered by any of the Parties to the Mediation against any other Party to the Mediation between the date of this Order and the termination of the Mediation under paragraph 36 of this Order.

2. Subject to paragraph 39 of this Order, the running of time for any limitation period that applies to any claim that has been or could be asserted by any Party against any other Party relating to the Restatement shall be suspended from the date of this Order until the date that is sixty (60) days after the termination of the Mediation under paragraph 36 of this Order (the "**Standstill Period**").

3. With respect to any claim that has been or could be asserted by any Party against any other Party relating to the Restatement that would be governed by Québec law, the Parties to the Mediation shall be deemed, by consenting or agreeing to become a Party to the Mediation, to:

   (a) agree that they are renouncing to the benefit of time elapsed for the prescription which has begun with respect to any claim, recourse, cause or right of action that any Party may assert against any other Party resulting from, relating to, or with respect to the Restatement;

   (b) agree that following the date of this Order, the prescription not already acquired for any claim, recourse, cause or right of action that any Party may assert against any other Party resulting from, relating to, or with respect to the Restatement begins to run again for the same period;

   (c) agree that other than renouncing to the benefit of time elapsed, the Parties do not waive any other argument, position or defence that may otherwise be asserted by them in any legal proceedings.

4. Nothing in this Order shall preclude the Petitioner in the proceeding commenced and pending in the Quebec Superior Court, District of Montreal, styled *Kegel v National Bank of Canada*, having

Court File Number 500-06-000642-138, from prosecuting that proceeding.

Pursuant to paragraph 11 of the Court Order, the offer extended to you by way of this Mediation Notice shall expire if you do not sign and deliver this Mediation Notice to the undersigned by November 30, 2013.

[Issuing Party – Name, Title and Contact Information]

[Proposed Respondent] hereby agrees to participate in the Mediation and to all of the terms set forth in this Mediation Notice and in the Court Order dated October 11, 2013.

For and on behalf of
[Proposed Respondent]

Date: ●

[Name, Title and Contact Information]

SCHEDULE "B"

CUSTODIANS

1. Scott Dawson
2. Harley Winger
3. Dean Jensen
4. Neil Richardson
5. Lyle Michaluk
6. Cliff Wiebe
7. Matt MacKenzie
8. David Belcher
9. Sonja Sanborn
10. Doug Robinson
11. Stacey Kolenick
12. Joann Vispo
13. Kristen Schmid
14. Stacey Manista
15. Allyson Finstein
16. Jessie Heppenstall
17. Michelle Rye
18. Joe Kostelecky
19. Brad Wanchulak
20. Todd Studer
21. Brian Swendsen
22. Angus Jenkins
23. Jim McKee
24. Kenneth J. Faircloth

25. Wazir (Mike) Seth
26. Ryan McKay
27. Jenna Farquhar
28. Carrie Howell
29. Mitch Kersten
30. Cheryl Schell
31. Brian Erickson
32. Steve Swinson
33. King Schmeltzer
34. Ron Swinson

DATE RANGE

July 1, 2011 to April 9, 2013

SEARCH TERMS

	SEARCH TERM
1.	Allowance
2.	"Bad debt"
3.	Uncollectible
4.	Collectible
5.	Impaired OR impairment
6.	"Revenue recognition" OR "rev recognition" OR "rev rec"
7.	"EBITDA guidance" OR "EBITDA forecast"
8.	Profitability AND (analysis OR review OR report)
9.	"Revenue target"
10.	"Aged listing"
11.	"Aged account"
12.	"Aging report"

	SEARCH TERM
13.	"DSO" OR "Days Sales Outstanding"
14.	"Field ticket"
15.	Ticketing
16.	Billing AND (issue OR problem OR concern OR complaint)
17.	Invoicing
18.	Discrepancies AND (revenue OR contract OR price OR pricing OR term sheet)
19.	Complexities AND transaction
20.	"Credit approval"
21.	"Reverse revenue"
22.	Reversal
23.	"Credit check"
24.	"Cash deposit"
25.	"Watch list"
26.	"Revenue cycle"
27.	"Accounts Receivable" OR "AR" OR "A/R" OR "receivables" OR "receivable"
28.	Arrears
29.	"Write-off" OR "write-down"
30.	Auditor
31.	KPMG
32.	Caldwell
33.	"Interim review" OR "quarterly review"
34.	"Subsequent event"
35.	"Representation letter" OR "rep letter"
36.	"Management letter" OR "MLP" OR "ML"
37.	"Audit committee"
38.	"Financial statements"
39.	"Long-term contract" OR "long term contract"
40.	"Minimum commitment"
41.	"Take or pay"
42.	"Day to day"
43.	"Client base" OR "customer base"

	SEARCH TERM
44.	"Signed contract"
45.	TD
46.	Syndicate
47.	Lenders
48.	Bonus
49.	"Stock options"
50.	Warrants
51.	Backdate OR backdating
52.	"Internal Control"
53.	ICFR
54.	"Financial Reporting"
55.	Disclosure AND (problem, issue, concern)
56.	"Accounting personnel"
57.	Material AND (misstatement OR misrepresentation)
58.	Fraud
59.	Risk AND (revenue OR accounting OR audit)
60.	"Red flag"
61.	Weakness
62.	"National Bank" OR "NBC" OR "NBF"
63.	Sandy OR Edmonstone
64.	"Lawrence Bloomberg"
65.	"Louis Vachon"
66.	"Luc Paiement"
67.	"Ricardo Pascoe"
68.	"Greg Colman"
69.	"Connected issuer"
70.	"Due diligence"
71.	"Use of proceeds"
72.	Dividend
73.	"Accelerated program"
74.	"Capital budget" OR "capital program"

	SEARCH TERM
75.	"Special Committee" OR "SC"
76.	"The Committee"
77.	Investigation
78.	Investigate
79.	Restate OR restatement
80.	Overstate
81.	"Ernst & Young" OR "EY" OR "E&Y"
82.	"Interim report"
83.	OSC
84.	ASC
85.	SEC
86.	RCMP
87.	Whistleblower
88.	"Insider trading"
89.	"Non-public information" or "non public information"
90.	"Commitment Letter"

Appendix B

BIA Mediation Procedures

105 (1) For the purposes of subsections 68(8) and 170.1(2) of the Act, the procedures governing a mediation are as set out in this section.

(2) For the purposes of this section,

(a) the bankrupt and the trustee are always parties to the mediation;

(b) the trustee may act either personally or through a representative;

(c) an opposition to discharge made by a creditor or the trustee, referred to in subsection 170.1(1) of the Act, is deemed to be a request by the creditor or the trustee, as the case may be, for mediation; and

(d) a creditor who requests mediation is a party to the mediation.

(3) For the purpose of conducting a particular mediation, the Superintendent shall designate as mediator

(a) an employee of a Division Office, including Division Offices other than the one for the bankruptcy division in which the proceedings were commenced; or

(b) any other person with training or experience in mediation and whom the Superintendent considers qualified.

(4) On receipt of a request for mediation from a trustee under subsection 68(6) or (7) or 170.1(1) of the Act, accompanied by the most recent income and expense statement in prescribed form completed by the bankrupt, the official receiver shall refer the matter to the mediator, who shall set the time and place for the mediation. The time set for the mediation must be within 45 days after the official receiver received the request for mediation.

(5) The mediator shall conduct the mediation with all parties physically present, unless the mediator decides to conduct the mediation by telephone conference call or by means of any other communication facilities that permit all persons participating in the mediation to communicate with each other.

(6) The mediation must be held at the Division Office, at any other place that is designated by the mediator, or, if the mediation is conducted otherwise than with all parties physically present, at any combination of places necessary for that purpose.

(7) The mediator shall send a copy of the notice of the mediation, in prescribed form, to the bankrupt, to the trustee and to any creditor who requested mediation, at least 15 days, or any shorter period that may be agreed to by all the parties concerned, before the date set for the mediation.

(8) If, at any time before the mediation has started, the mediator believes on reasonable grounds that the mediation cannot proceed at the time scheduled, the mediator shall reschedule it, setting a new time and place.

(9) Except when it would constitute a second adjournment, the mediator shall, subject to subsection (13), adjourn the mediation at any time during the mediation if

(a) a party requests an adjournment and the mediator believes on reasonable grounds that the mediation would benefit from further negotiations or the provision of additional information;

(b) the mediator believes on reasonable grounds that one of the parties, other than the trustee in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, cannot continue the mediation for a certain period of time;

(c) all the creditors who were informed of the mediation in accordance with subsection (7) or (11) fail to appear at the mediation and the mediator believes on reasonable grounds, with respect to at least one of those creditors, that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute;

(d) in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, a party, other than the trustee, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute; or

(e) in any case other than the one referred to in paragraph (d), a party, other than a creditor, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute.

(10) If a mediation is rescheduled or adjourned, the new date set must be within 10 days after the date on which the rescheduling or adjournment occurs.

(11) If a mediation is rescheduled or adjourned, the mediator shall inform the parties of the new time and place.

(12) At any time during the mediation, the mediator shall, subject to subsection (13), cancel the mediation if

(a) there is an outstanding opposition to the discharge of the bankrupt by a creditor or the trustee on a ground referred to in paragraphs 173(1)(a) to (l) or (o) of the Act;

(b) the mediator believes on reasonable grounds that a party is abusing the rescheduling procedures;

(c) there has already been an adjournment and

(i) there is a request for adjournment under paragraph (9)(a), or

(ii) one of the circumstances referred to in paragraphs (9)(b) to (e) occurs;

(d) the mediator believes on reasonable grounds that one of the parties, other than the trustee in the case of a mediation requested by a creditor under subsection 170.1(1) of

the Act, cannot continue the mediation at all;

(e) all the creditors who were informed of the mediation in accordance with subsection (7) or (11) fail to appear at the mediation and the mediator believes on reasonable grounds, with respect to all of those creditors, that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute;

(f) in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, a party, other than the trustee, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute; or

(g) in any case other than the one referred to in paragraph (f), a party, other than a creditor, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute.

(13) Despite paragraphs (9)(b) and (d) and (12)(d) and (f), the absence of one or more creditors who requested mediation, or the inability of one or more creditors who requested mediation to continue the mediation, is not a ground for adjourning or cancelling the mediation if at least one creditor who requested mediation is present at the mediation, or is able to continue the mediation, as the case may be.

(14) In the case of a mediation under section 170.1 of the Act, if all of the creditors who requested the mediation cause the cancellation of the mediation under paragraph (12)(e),

(a) the opposition to discharge on the part of each of those creditors on a ground referred to in paragraph 173(1)(m) or (n) of the Act is deemed withdrawn; and

(b) the issues submitted to mediation are deemed to have been thereby resolved for the purposes of subsection 170.1(3) of the Act.

(15) For greater certainty, if

(a) a mediation under section 68 of the Act is cancelled under any of paragraphs (12)(a) to (g), or

(b) a mediation under section 170.1 of the Act is cancelled otherwise than under paragraph (12)(e),

the issues submitted to mediation are deemed to have not been thereby resolved for the purposes of subsection 68(10) or 170.1(3), as the case may be, of the Act.

(16) If a mediation is cancelled, the mediator shall send to the Division Office and the parties a notice of the cancellation, in prescribed form, setting out the grounds for the cancellation.

(17) No mediator or party to a mediation shall disclose to the public any confidential information concerning an issue submitted to mediation, unless the disclosure is

(a) required by law; or

(b) authorized by the person to whom the confidential information relates.

(18) If agreement is reached by all parties at the mediation, a mediation settlement agreement, in prescribed form and including all terms and conditions of the settlement reached, must be signed by the parties, and the mediator shall send copies of the agreement to the Division Office and the parties. The agreement is binding on the parties, subject to any subsequent court order.

(19) All payments made by a bankrupt under a mediation settlement agreement must be made to the trustee and deposited into the estate account.

(20) If the parties fail to reach agreement at the mediation, the mediator shall issue a notice in prescribed form to the effect that the issues submitted to mediation under subsection 68(6) or (7) or 170.1(1), as the case may be, of the Act were not resolved, and shall send that notice to the Division Office and the parties.

MEDIATION IN INSOLVENCY PROCEEDINGS: THE EUROPEAN UNION PERSPECTIVE

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Mediation in the European Union

In European Union there has been attention on mediation since 1998, when the European Commission made a Recommendation about alternative dispute resolution in consumer disputes.[50] In 2001, the Commission published a second Recommendation about the consensual resolution of consumer disputes.[51] Subsequently, a Green Paper on ADR has been delivered[52], a Code of Conduct for Mediators was designed, and in 2008 the Mediation Directive entered into force.[53] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (after this the Mediation Directive)*[54]

The Mediation Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services. The Directive seeks to facilitate access to alternative dispute resolution (ADR) and to promote the amicable settlement of disputes, by encouraging the use of mediation and by ensuring a healthy relationship between mediation and judicial proceedings.

Article 2 of the Mediation directive defines mediation as a "structured process, however, named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State". This definition is broad enough to cover insolvency matters as well. The Mediation Directive highlights that mediation can contribute to preserving an amicable and sustainable relationship between the parties. These benefits are even more pronounced in cross-border situations.

The Mediation Directive applies to cross-border disputes in civil and commercial matters covers disputes in which at least one of the parties is domiciled in a Member State other than that of any other party on the date on which they agree to use mediation or on the date mediation is ordered by a court. The principal objective of this legal instrument is to encourage the recourse to mediation in the Member States. For these purposes, the Mediation Directive encompasses five substantive rules:

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[50] Commission Recommendation 98/275/EC, 30 March 1998
[51] Commission Recommendation 01/310/EC, 4 April 2001
[52] COM (2002) 196m April 2002 (Green paper on alternative dispute resolution in civil and commercial law)
[53] B. Wessels, S. Madaus, Rescue of Business in Europe, Oxford University Press, 30 January 2020 - Law - 1552 p.
[54] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters *available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052*

- Member State have to encourage the training of mediators and to ensure high quality of their services.
- Every judge has the right to invite the parties to a dispute to attempt a mediation first if she/he considers it appropriate given the circumstances of the case,
- Agreements resulting from mediation can be rendered enforceable if both parties so decide. Such agreements can be approved by a court or certified by a public notary.
- Mediation takes place in an atmosphere of confidentiality. The provisions of the Directive require that the mediator is not obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation.
- The parties do not lose their possibility to go to court as a result of the time spent in mediation: the time limits for bringing an action before the court are suspended during mediation.[55]

While the mediation continues to develop in Europe, there is still a cultural roadblock in favour of arbitration and other adjudicative processes. In its 2016 Report on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, European Commission stated that certain difficulties were identified concerning the functioning of the national mediation systems in practice. These difficulties are mainly related to the lack of a mediation "culture" in the Member States, insufficient knowledge of how to deal with cross-border cases, the low level of awareness of mediation and the functioning of the quality control mechanisms for mediators. Further, the mediation is not yet sufficiently known, and a "cultural change" is still necessary to ensure that citizens trust mediation. The report also highlights that judges and courts remain reluctant to refer parties to mediation.[56]

Implementation of the Mediation Directive in the EU Member States

In 2016, the EU Parliament's Briefing Note titled "Achieving a Balanced Relationship between Mediation and Judicial Proceedings" analysed whether the purpose of the Mediation Directive as provided in Article 1, the "balanced relationship between mediation and judicial proceedings", had been achieved.[57] In its conclusion, the Note stated that "the key goals of the Directive remain far from being achieved." The mediation in the EU Member States is still used in less than 1 per cent of the cases in civil and commercial litigation. It appears that the only EU Member State, which has achieved more or less considerable progress in using mediation is Italy. The Italian legislator has adopted an opt-out mediation model, applicable to about 15% of all civil and commercial cases. In those cases, mediation is now playing a very significant role.[58] Following Italian example, Romania and Greece attempted to introduce similar legislative provisions introducing a

[55] EU overview on mediation *available at* https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do

[56] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee 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 available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542 at p.4

[57] Giuseppe De Palo & Leonardo D'Urso, Achieving a Balanced Relationship between Mediation and Judicial Proceedings (2016)

[58] Giuseppe De Palo, A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More …Directive (2018) *available at* www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf

requirement to attend a mediation information session before trial. However, in Romania, the Constitutional Court ruled this legislative initiative as limiting access to justice and thus unconstitutional. In the case of Greece, the latest piece of legislation aimed at implementing the EU Mediation Directive was adopted in November 2019. The new Greek Mediation Law provides that an initial first attempt to mediate will have to be followed in most civil and commercial cases over 30000 EUR value (as of March 15, 2020) and in most family law ones, namely the ones that refer to private rights that can be freely disposed of (since January 15, 2020).[59]

German Mediation Act (MediationsG)

German Mediation Act (*Mediationsgesetz*), which entered into force in July 2012, transposes the European Mediation Directive into German domestic law. The German Mediation Act covers all forms of mediation in Germany, irrespective of the form of dispute or the place of residence of the parties concerned. It promotes mutual dispute settlement by including a number of different incentives in the official procedural codes (e.g. the Code of Civil Procedure, *Zivilprozessordnung*). Henceforth, for example, when parties bring an action in a civil court, they will have to say whether they have already sought to resolve the issue via out-of-court measures, such as mediation, and whether there are specific reasons for not considering this course of action.[60] In 2017 the German Federal Government published an assessment report which provided, that despite the efforts of the legislator to incentivise conflicting parties to explore mediation the number of mediations in Germany remained at a consistently low level.[61]

Mediation and the EU legislation on insolvency

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings[62]

The Regulation on insolvency proceedings in its Article 72 contains a reference to mediation in a provision regarding the coordination of the insolvency of groups of companies ("Tasks and rights of coordinators"): "2. The coordinator may also: (a) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group; (b) mediate any dispute arising between two or more insolvency practitioners of group members".

[59] Haris Meidanis, Greece: Mediation Going Compulsory: And They Lived Happily Ever After? *available at* http://mediationblog.kluwerarbitration.com/2020/02/19/greece-mediation-going-compulsory-and-they-lived-happily-ever-after/

[60] Mediation in Member States – Germany available at https://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1

[61] Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren (Juli 2017) *available at* https://www.bmjv.de/SharedDocs/Artikel/DE/2017/071917_Bericht_Mediationsgesetz.html

[62] The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings *available at* https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848

Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) [63]

The European Commission highlighted the relevance of mediation to all civil and commercial matters, including the insolvency proceedings. The European Commission, in its Recommendation on a new approach to business failure and insolvency, tried to introduce two new actors in the area of insolvency – a mediator and a supervisor. It has also encouraged 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.
The Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency read as follows: (No. 17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be in control of their assets, and the appointment of a mediator or supervisor should not be compulsory but made on a case-by-case basis.

Further Section II B "Facilitating negotiations on restructuring plans" provided:

> "Appointment of a mediator or a supervisor
> 8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings.
> 9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case-by-case basis where it considers such appointment necessary: (a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;"

These provisions were later confirmed in Recital 18 and Article 5 of the proposed Restructuring Directive, prepared by the European Commission[64].

Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks[65]

In the final text, which was adopted as EU Directive on preventive restructuring frameworks, such a reference to mediation was deleted. It appears that the legislator was not willing to introduce new terms into the legislative landscape. Thus, instead of introducing two new types of actors, i.e. a

[63] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0135
[64] Proposal for a Directive of the European Parliament and of the Council of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52016PC0723&from=DE
[65] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) *available at* https://eur-lex.europa.eu/eli/dir/2019/1023/oj

mediator and a supervisor, the legislator preferred the term "practitioner in the field of restructuring" to identify the people and bodies who may take a leading role in facilitating, organizing or supervising restructuring plans.

According to Article 2 of the Directive on preventive restructuring frameworks, the 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out one or more of the following tasks: (a) to assist the debtor or the creditors in drafting or negotiating a restructuring plan; (b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority; (c) to take partial control over the assets or affairs of the debtor during negotiations.

Conclusion

The analysis of the EU legislation on insolvency and EU efforts to introduce alternative dispute resolution mechanisms provides that, in principle, mediation may have considerable potential concerning insolvency proceedings in Europe. However, the Member States are still reluctant to introduce mediation as a separate or formal stage of the insolvency proceedings. Such reluctance may well be explained by the lack of a mediation "culture" and the low level of awareness of mediation. The EU Mediation Directive leaves doors open for the use of mediators in insolvency proceedings. The EU Regulation on insolvency proceedings reserves mediation only to a limited number of situations related to coordination of the insolvency of groups of companies. The latest EU Directive on preventive restructuring frameworks, despite efforts of the European Commission, does not contain a direct reference to mediation though one could read between the lines of Article 2 that a 'practitioner in the field of restructuring' who would take on a role as a mediator or who facilitates or steers a mediation process would fall within the frame of the definition.

MEDIATION IN ENGLAND & WALES

Simon Thomas, Partner, Goodwin Procter (UK) LLP

What is mediation and why should parties use it?
Mediation is a flexible form of alternative dispute resolution (ADR), in which a neutral third party assists parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision whether or not to settle and on what terms.

There are numerous benefits to engaging with mediation, for example it can help parties work through a deadlock situation that can be created by competitive or positional negotiation; it can help preserve or enhance business relationships; produce outcomes that might not be possible via determination by the court or arbitration; and empower parties to actively participate in the process and control the outcome.

What are the primary sources of law relating to mediation in England & Wales?
The Civil Procedure Rules (CPR) are the primary source of law for mediations in England & Wales. In particular, the parties should have regard to the pre-action protocols that outline the steps that parties take prior to issuing a claim in the courts.

Is there any obligation to mediate in England & Wales?
In England & Wales mediation is a voluntary process. If a party refuses to mediate and such refusal is considered unreasonable, the refusing party runs the risk of court sanctions, namely an adverse costs order.

When can parties mediate in England & Wales?
Mediation can take place at any stage from before issuing court or arbitration proceedings through to appeal. However, getting the timing right will give mediation the best chance of proving cost-effective and successful. The optimum time will differ according to the nature of the case in question and relevant factors may change over time.

Is the mediation process confidential?
Yes, mediation is usually confidential, and the mediation agreement will typically require the parties to treat all discussions and documents as confidential and without prejudice. The confidentiality of the process can avoid issues being made public that the parties want to keep private, as might happen in court proceedings.

What is the mediation style in England & Wales?
There are different styles of mediation in England & Wales, but the most common is facilitative mediation in which, unlike a judge or arbitrator, the mediator will not decide the case on the merits but will work to facilitate agreement between the parties.

What happens at a typical mediation in England & Wales?
The mediator usually has discussions with the lawyers (or the parties if they are not legally represented) in advance of the mediation to ensure that any formalities have been complied with, and to identify the key issues. This helps to ensure that no time is wasted at the mediation.

A typical commercial negotiation will usually involve the mediator greeting the parties on arrival at the mediation session and showing each party to its own private room. Usually, the mediator will formally open the mediation with a joint session, attended by all parties and their lawyers. During this session, the mediator provides an overview of the process, their role and the procedure. Each party then has an opportunity to make an opening statement, giving its perspective on the dispute and highlighting points of particular concern. After the opening, the mediator will have private discussions with each party to assist in the negotiating process.

Ultimately, this may result in the parties reaching a settlement that is either documented at the mediation or shortly thereafter, usually in the form of a settlement agreement. Alternatively, the parties may use the discussions at the mediation as a springboard for further settlement talks after the mediation.

How successful is mediation in England & Wales?
Mediation does not always result in a settlement, but it generally has a high success rate. Mediators who responded to a recent mediation audit carried out by the CEDR in July 2018 reported that just over 74% of their cases settled on the day, with another 15% settling shortly thereafter.

Who pays the cost of mediation in England & Wales?
Who should bear the cost of the mediation is a matter for agreement between the parties? The parties commonly agree to share the mediator's fees and expenses and bear their own legal costs.

What is the future of mediation in England and Wales?
One of the fundamental principles in the CPR is what is known as the "overriding objective" which introduced proportionality to court proceedings, putting parties under pressure to resolve disputes cost effectively. Alongside the introduction of costs management, the obligation to produce costs budgets and a more robust approach to case management and compliance with court orders and directions, means that more parties are viewing the litigation process with less appetite than before and are considering alternative ways of resolving disputes (such as mediation) as a quicker and more cost effective resolution.

In December 2018, the Civil Justice Council, set up a working group to consider issues around ADR and published a report. This report set out 24 recommendations, many of which were directed at introducing more forceful methods to encourage parties to use ADR, though falling short of making mediation compulsory.

How are England & Wales positioned to use mediation in cross-border disputes?
There are international accords which may influence the future of mediation in England and Wales in cross-border disputes. For example, the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention", opened for signature in Singapore on 7 August 2019. The Convention seeks to facilitate international trade by furthering the promotion of mediation as a fast and cost-efficient way of resolving international disputes. At its opening, the Singapore Convention was signed by 46 countries, including China, India and the United States of America. It is currently unknown whether the United Kingdom will enter into the Singapore Convention now it has left the European Union on 31 January 2020.

How is mediation used in insolvency in England & Wales?
By its very nature, insolvency brings about disputes. In terms of litigation of claims, in most cases there are limited assets available and mediation provides a potentially more cost-effective and quicker option to settle disputes rather than pursuing litigation through the court system. Accordingly, mediation is becoming increasingly common as a means of resolving litigation claims in an insolvency context.

One area where mediation, in its formal sense, is not currently used is in respect of financial restructuring. Consensual restructuring outcomes (which avoid liquidation) are achieved without using a formal mediation process. In this scenario, utilising a formal mediation process would not fall within an insolvency practitioners' standard restructuring tool kit.

However, in practice, the skills of a mediator are those which are commonly deployed by insolvency professionals when trying to facilitate restructurings in order to maintain continuity of trading and business rescues, thereby avoiding liquidation.

In terms of the similarity of the role, insolvency practitioners are independent officers of the court and will deploy many of the same skills as mediators in trying to reach an acceptable outcome by building consensus through objectivity.

Examples in practice, whereby a consensual restructuring is agreed and liquidation is avoided, include insolvency professionals agreeing a Company Voluntary Arrangement (CVA) with a company's creditors. In order for the CVA proposal to be carried it requires sufficient support from the Company's creditors. Accordingly, whilst a formal mediation process is not utilised to avoid a liquidation scenario, the same outcome is achieved using a similar set of skills.

THE SINGAPORE CONVENTION ON MEDIATION

Jacob A ("Jack") Esher*
CBInsolvency LLC

THE SINGAPORE CONVENTION IS TO MEDIATION AS:

a. **Getting to Yes is to negotiation**
b. **The Model Law is to cross-border insolvency**
c. **The Hague Convention is to court-approved agreements**
d. **The New York Convention is to arbitration**
e. **All of the above**
f. **None of the above**

TODAY'S quiz (answer below) is about the recent United Nations Convention on International Settlement Agreements Resulting from Mediation - first signed on August 7, 2019 in Singapore by 46 countries (or "States") - also known as the Singapore Convention. One of the 46 countries is the US and most of the others are Asian, while European countries, the UK, and others are likely to join soon.

So what is it and why do we care? In a nutshell, the Convention provides an expeditious enforcement path for out-of-court international mediated settlement agreements resulting from commercial disputes ("IMSA's") in those countries that adopt it, similar to what the New York Convention does for arbitrations. To qualify for this protection, the Convention applies to IMSA's as to which either (i) two or more parties have places of business in different States, or (ii) the place connected with the subject matter of the IMSA or place where the obligations under the IMSA are to be performed are different from the parties' States. Consequently, the Convention could apply to, for example, two US parties with a dispute over a foreign investment or contract – a broader scope than what one might have assumed. But it does not apply to IMSA's reached through court proceedings, insolvency-related or otherwise, provided the IMSA is enforceable as a judgment (more on this below). Consequently, for our purposes, the Convention will have maximum utility in out-of-court restructurings and for the resolution of discrete disputes prior to initiation of an insolvency proceeding.

The Convention addresses a problem that has concerned the international dispute resolution community for years – namely, how to make enforcement of IMSA's as robust as arbitration award enforcement. Prior to this Convention, parties were sometimes reluctant to invest time and cost into mediation because there were no enforcement procedures in place. Enforcement of a mediated agreement would require the initiation of court proceedings the same as a mere contract would – "might as well start there if you might end up there anyway" was a common response. To avoid protracted court proceedings and the possibility of appeals, parties might choose arbitration over mediation because arbitration had the benefit of the long-standing New York Convention on arbitration award enforcement – there would be very few obstacles a party could interpose to their counterparty's enforcement of an arbitration award in a country that had signed on to the NY Convention. IMSA's will soon have similar protection.

Of course, most mediated agreements do not engender enforcement problems to begin with since the resolution is voluntary. However, when you start to have parties from different countries involved, the risk of noncompliance does increase. One of the work-arounds that developed, particularly in Singapore, was an "arb-med-arb" procedure – a mediation would be convened as an arbitration, conducted as a mediation, and an agreement, if reached, would be fashioned as an arbitration award so as to have the benefit of the NY Convention. To avoid overlap with the New York Convention for arbitrations, the Singapore Convention does not apply to mediated settlements reached through an arbitration process, so this process may continue to be used for some time until the Singapore Convention becomes operative in the relevant States.

Similarly, and as mentioned above, to avoid overlap with the Hague Convention for court judgments, the Singapore Convention does not apply to an IMSA that was approved by a court or concluded in the course of proceedings before a court, provided it is enforceable as a judgment in the State of that court. Since the Convention will not apply to a mediated agreement approved in a court-administered or supervised insolvency proceeding, foreign enforcement in countries that have adopted the UNCITRAL Model Law will likely first require that the foreign representative of the proceeding in which the mediated agreement was approved seek recognition of the foreign proceedings. Upon recognition, the foreign representative can seek enforcement of orders entered in the foreign proceeding, whether resulting from mediated settlement agreements or otherwise.

However, the Singapore Convention may be useful as a planning tool to consider before insolvency proceedings are initiated. An out-of-court mediated settlement among a debtor and some or all of its creditor constituencies could be reached outside of the U.S. and enforced in the U.S. in a non-bankruptcy court of appropriate jurisdiction under the Singapore Convention without need for a Chapter 15 case. In that regard, note that the Convention has enforcement exceptions such as for agreements which are contrary to the enforcing state's public policy (similar to Chapter 15), and agreements arising from a process that did not comply with basic mediation standards, such as mediator impartiality.

Whether an IMSA that goes beyond a simple two-party monetary resolution – for example an agreement between a debtor and a class of creditors embodying a complex out-of-court restructuring – can benefit from expedited enforcement remains to be seen. No doubt, creative parties will test the boundaries of the new Convention.

The Convention is notable as another step in the development of mediation as a preferred dispute resolution process generally, and the continuing growth of court and nation acceptance of it. The Convention will become effective after it has been ratified or otherwise entered into force by three signatories, and becomes effective 6 months after ratification in any State.

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including serving for six years as a primary mediator for affirmative derivative contract claims in the Lehman Brothers cases.

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on International Settlement Agreements Resulting from Mediation

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Contents

Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

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[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

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[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[5] Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: *(a)* if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or *(b)* as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.