AMERICAN BANKRUPTCY INSTITUTE

2019 Caribbean Insolvency Symposium

U.S. Track

ADR in Cross-Border Insolvency Cases

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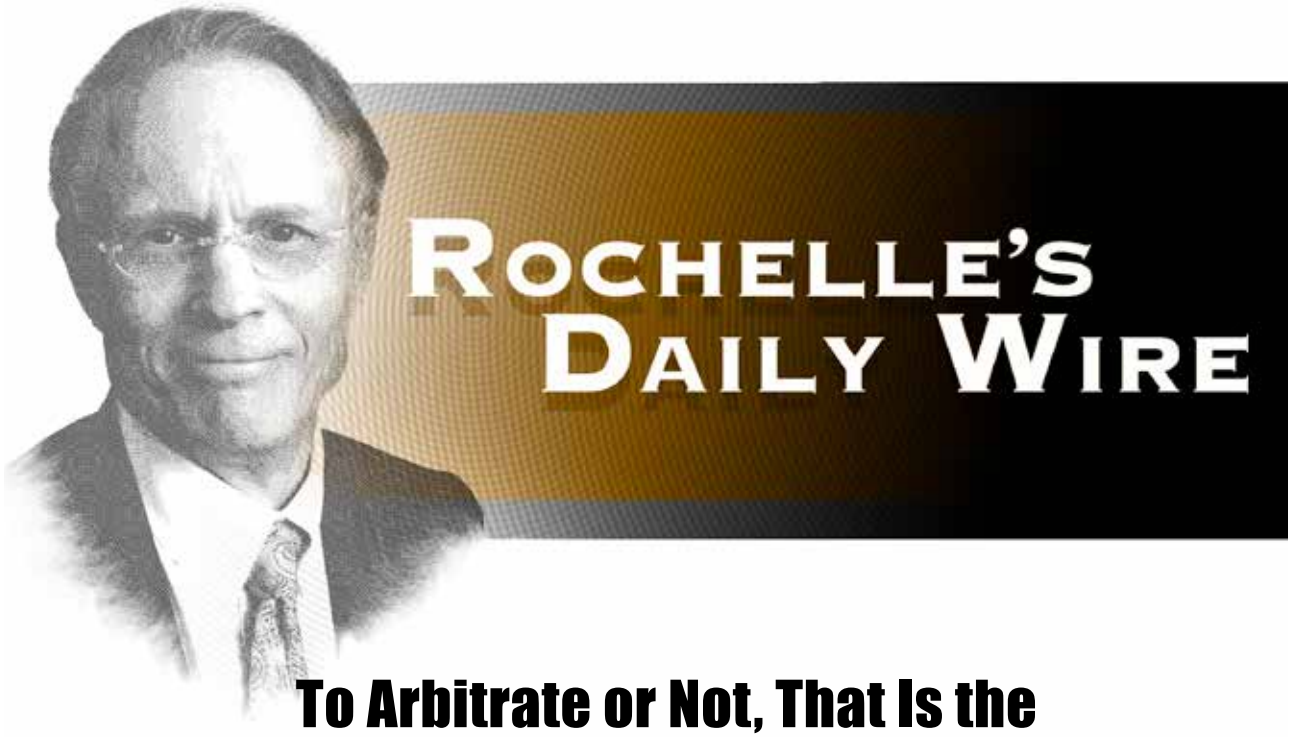

To Arbitrate or Not, That Is the Question

ABI Caribbean Insolvency Symposium

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Cayman Islands

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Table of Contents

Already primed to rule on nonjudicial foreclosure, the Supreme Court might take cases involving contempt, the automatic stay and trademarks.

Special Edition: Status Report on the Supreme Court

The Supreme Court denied petitions for *certiorari* yesterday in two creditors' rights cases: *Credit One Bank NA v. Anderson*, 17-1652 (Sup. Ct. *cert. denied* Oct. 1, 2018); and *Noble Energy Inc. v. ConocoPhillips Co.*, 17-1438 (Sup. Ct. *cert. denied* Oct. 1, 2018).

There is one bankruptcy-related case already on the high court's docket for the term that began this week: *Obduskey v. McCarthy & Holthus LLP*, 17-1307 (Sup. Ct.), reviewing *Obduskey v. Wells Fargo*, 879 F.3d 1216 (10th Cir. 2018). The date for oral argument in *Obduskey* is yet to be set.

Anderson was a moderately attractive case for Supreme Court review. However, there was not a clear-cut circuit split.

In *Anderson*, the Second Circuit refused to enforce an arbitration agreement, thus allowing a class action to proceed in bankruptcy court alleging violations of the discharge injunction. *Credit One Bank NA v. Anderson (In re Anderson)*, 884 F.3d 382 (2d Cir. March 7, 2018).

The petitioner argued that the Second Circuit had not followed Supreme Court authority regarding the enforcement of arbitration agreements. To read ABI's discussion of the Second Circuit opinion, click here.

Noble Energy was a petition for *certiorari* to the Texas Supreme Court. Significant sums of money were involved, but the petitioner wanted the U.S. Supreme Court to review the Texas courts' interpretation of federal bankruptcy law regarding blanket assumptions of executory contracts. Were the petitioner appealing a decision by a federal court of appeals, the case would have been more attractive for Supreme Court review.

Obduskey, where the appellant's brief on the merits was filed in August, is an important case for consumers. The outcome will decide whether the federal Fair Debt Collection Practices Act applies to nonjudicial foreclosures.

Amicus briefs have been filed on behalf of liberal members of the House and Senate, the NAACP Legal Defense & Education Fund Inc., and a national consumer law organization.

Three cases percolating from the courts of appeals are attractive candidates for grants of *certiorari* later this term.

In *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. April 23, 2018, *rehearing denied* Sept. 7, 2018), the Ninth Circuit held that a good faith belief that an action does not violate the discharge injunction is a defense to contempt, even if the belief is unreasonable. There is a stark circuit split, because the First Circuit this year refused to allow good faith as a defense to a discharge violation. *IRS v. Murphy*, 892 F.3d 29 (1st Cir. June 7, 2018).

The debtor in *Taggart* is expected to file a *certiorari* petition this week. To read ABI's discussions of *Taggart* and *Murphy*, click here and here.

The Tenth Circuit and the District of Columbia Circuit are the two appeals courts to hold that the automatic stay does not compel a lender or owner to return property automatically that was repossessed before bankruptcy. The courts of appeals for the Second, Seventh, Eighth, Ninth and Eleventh Circuits hold to the contrary and require the automatic return of repossessed property, on pain contempt. The circuits that compel immediate return allow the owner or lender to seek adequate protection after returning the property.

Although the outcome is a foregone conclusion, the issue was argued again in the Tenth Circuit on September 26 in *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, (10th Cir. 17-3247). The debtor is likely to file a petition for *certiorari* when the appeals court affirms on the authority of *WD Equipment v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. Feb. 27, 2017), where the Tenth Circuit held that passively holding an asset of the estate, in the face of a demand for turnover, does not violate the automatic stay in Section 362(a)(3) as an act to "exercise control over property of the estate."

To read ABI's discussions of *Davis* and *Cowen*, click here and here.

At conference on October 12, the justices will consider the *certiorari* petition in *Mission Product Holdings Inc. v. Tempnology LLC*, 17-1657 (Sup. Ct.). Granting the petition will permit the high court to decide whether the Fourth Circuit correctly decided the infamous case of *Lubrizol Enterprises Inc. v. Richmond Metal Finishers Inc.*, 756 F.2d 1043 (4th Cir. 1985).

In *Lubrizol*, the Richmond, Va.-based appeals court held that rejection of an executory license for intellectual property precludes the non-bankrupt licensee from continuing to use the license. The decision prompted Congress to add Section 365(n) and the definition of "intellectual property" in Section 101(35A). Together, they provide that the non-debtor can elect to continue using patents, copyrights and trade secrets despite rejection of a license.

However, Congress did not add trademarks to the list of intellectual property that a licensee could continue to use despite rejection. Most courts interpreted the omission to mean that rejection cuts off the right to use trademarks.

More recently, the circuit courts split regarding the continued use of trademarks after rejection. In *Sunbeam Products Inc. v. Chicago American Manufacturing LLC*, 686 F.3d 372 (7th Cir. 2012), the Seventh Circuit held in 2012 that rejection does not preclude the continued use of a trademark license.

However, the First Circuit pointedly disagreed this year with the Seventh by holding in *Mission Product Holdings Inc. v. Tempnology LLC (In re Tempnology LLC)*, 879 F.3d 389 (1st Cir. Jan. 12, 2018), that rejection ends the use of a trademark.

If the Supreme Court grants *certiorari* in *Mission Product*, the justices might expound broadly on the effects of rejection. The case also presents an interesting question of statutory interpretation: Did Congress intend to leave *Lubrizol* unaffected by omitting trademarks from the protection of Section 363(n)?

***Petitioner contends the Second Circuit was wrong to bar arbitration in view of the Supreme Court's decision in* Epic Systems.**

'*Cert* Petition Wants Discharge Violations to Be Arbitrated

Can a debtor be forced to arbitrate an alleged violation of the discharge injunction under Section 524?

That is the topic of a petition for *certiorari* filed on June 5, asking the Supreme Court to review *Credit One Bank NA v. Anderson (In re Anderson)*, 884 F.3d 382 (2d Cir. March 7, 2018). Despite an arbitration provision in a pre-bankruptcy agreement with a creditor, the Second Circuit upheld the two lower courts and refused to compel arbitration when the debtor mounted a class action contending that the creditor routinely violated the discharge injunction.

Although there is no circuit split on the arbitrability of an alleged discharge violation, the petitioner in *Anderson* contends that the Second Circuit was wrong in light of recently decided *Epic Systems Corp. v. Lewis*, 200 L. Ed. 2d 889, U.S.L.W. 4297 (Sup. Ct. May 21, 2018), where the Supreme Court compelled employees to arbitrate their wages and hours claims governed by the Fair Labor Standards Act.

Indeed, the petitioner in *Anderson* concedes that the Fourth, Fifth and Ninth Circuits agree with the Second Circuit and allow discretion to disregard an arbitration agreement when the lawsuit raises a "core" bankruptcy claim and arbitration would represent a "severe conflict" with the Bankruptcy Code.

The *Anderson* '*Cert*' Petition

Believing that the Second Circuit was wrong in view of *Epic*, the creditor-petitioner in *Anderson* interprets *Epic* to mean "that another federal statute can render an arbitration agreement unenforceable . . . only if that was Congress's clear and manifest intent." The petitioner in *Anderson* believes that "[n]othing in the Bankruptcy Code evidences a clear and manifest congressional intent to displace the Arbitration Act's command as to claims for violation of the statutory discharge injunction."

The petitioner believes that discharge violations are arbitrable because "[t]here is no indication in either [Section 524 or Section 105] . . . that Congress intended to preclude arbitration of Section 524 claims."

In other words, the petitioner believes that an arbitration clause in a pre-bankruptcy agreement can bar a debtor from resorting to bankruptcy court to enforce or seek redress for a violation of discharge. If that were true, a creditor with an otherwise enforceable arbitration agreement could dun a debtor after bankruptcy, knowing that the debtor could enforce his or her discharge only in arbitration.

If courts were to adopt the petitioner's view, many otherwise "core" proceedings in bankruptcy cases would disappear into arbitration. The standard sought by the petitioner might mean that a creditor could force a debtor to arbitrate a claim objection, an objection to the dischargeability of a debt, or even a fraudulent transfer or preference claim.

Possible Disposition of the *Anderson* Petition

Conceding there is no circuit split on the non-arbitrability of "core" claims involving a fundamental bankruptcy right, the petitioner wants the Supreme Court to put the appeals courts on the right track because "the lower courts have been flummoxed by the Bankruptcy Code, which [the Supreme Court] has never addressed for these purposes."

The petitioner well may be correct that *Anderson* cannot be squared with *Epic*, a 5/4 decision. However, the Supreme Court is not a court of error. Along with alleged violations of the U.S. Constitution, most Supreme Court cases resolve circuit splits.

Since there is no circuit split underlying *Anderson*, the petitioner forthrightly asks the Supreme Court, in the alternative, to "grant [the *certiorari* petition], vacate, and remand [to the Second Circuit] in light of its intervening decision in *Epic Systems*." A GVR, as it is called, seems more likely than a straight-up grant of *certiorari*.

The debtor-plaintiff in *Anderson* already waived its right to file a response to the petition for *certiorari*. Like *Tempnology*, the justices are likely to consider the *Anderson* petition and issue a disposition as early as September 27.

Subsequent to *Anderson* but the same day as *Epic*, a bankruptcy court in Florida reached the same result as the Second Circuit. To read ABI's discussion of *In re Bateman*, 14-5369, 2018 BL 181355 (Bankr. M.D. Fla. May 21, 2018), click here.

To read ABI's discussion of the Second Circuit decision in *Anderson*, click here. To read the Anderson *certiorari* petition, click here.

The petition is *Credit One Bank NA v. Anderson*, 17-1652 (Sup. Ct.).

New case seems inconsistent with Second Circuit's prior opinion compelling arbitration over an automatic stay violation.

Second Circuit Bars Arbitration in a Class Action for Violating the Discharge Injunction

Often solicitous of financial institutions caught up in bankruptcy litigation, the Second Circuit nonetheless held that the bankruptcy court properly exercised its discretion by refusing to allow arbitration in a class action alleging a violation of the Section 524 discharge injunction.

The unanimous opinion on March 7, written by Circuit Judge Rosemary S. Pooler, casts doubt on the continuing influence of *MBNA America Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006). *Hill* stood for the proposition that a court in the Second Circuit must order arbitration in a class action alleging a willful violation of the Section 362 automatic stay.

The new decision from the Second Circuit came down two days after the Supreme Court issued its opinion in *U.S. Bank NA v. The Village at Lakeridge LLC*, 15-1509 (Sup. Ct. March 5, 2018), prescribing the standard of appellate review for mixed questions of law and fact. The Second Circuit did not cite *Lakeridge* and might have stated the standard of review differently had it analyzed the high court's new authority regarding bankruptcy appeals.

Judge Pooler's decision picked the winner between two district judges in New York who had reached diametrically opposite results on the same facts. Another winner is Bankruptcy Judge Robert D. Drain of White Plains, N.Y., who made the decision that was upheld by the Second Circuit on March 7.

The Class Action

An individual got a chapter 7 discharge covering credit card debt. Despite the discharge, the credit card lender continued reporting the debt as charged off rather than discharged in bankruptcy. After having received a discharge, the debtor reopened the chapter 7 case and filed a class action in bankruptcy court alleging that the failure to report the debt as discharged was an attempt at bringing pressure to repay the debt and thus violated the discharge injunction under Section 524 of the Bankruptcy Code.

The lender filed a motion to compel arbitration, relying on a provision in the credit card agreement calling for arbitration of "any controversy." Bankruptcy Judge Drain denied the motion to compel arbitration in May 2015, and the lender took an immediate appeal, permitted by the Federal Arbitration Act.

District Judge Nelson S. Román of White Plains upheld denial of the motion to compel arbitration. Interpreting *Hill*, he said that a bankruptcy judge has discretion to "override an arbitration agreement" if the lawsuit is a core proceeding based on provisions of the Bankruptcy Code that "inherently conflict" with the Federal Arbitration Act.

Judge Román found the lawsuit to be core, even though it was a class action, because "discharge is clearly a right created by federal bankruptcy law" and all class members were bankrupts. He next held that arbitrating claims under Section 524 "would necessarily jeopardize the objectives of the Bankruptcy Code."

In *Hill*, the Second Circuit had compelled arbitration in a class suit alleging a violation of the automatic stay when the debtor had received a discharge, the case had been closed, and the automatic stay was no longer in effect. Judge Román distinguished *Hill* because the case before him involved the discharge injunction, which is the "central purpose" of bankruptcy and remains in effect "even after the conclusion of the bankruptcy proceedings."

"[A]rbitration of a discharge violation would jeopardize this central objective," Judge Román said. To the *Hill* analysis, Judge Román added a fourth consideration: uniformity. He said that the need for uniformity was "compelling" because there could be "wildly inconsistent" results in arbitration.

In a case decided in October 2015 called *Belton v. GE Capital Consumer Lending Inc. (In re Belton)*, Vincent L. Briccetti reached the opposite result, also interpreting *Hill*. To read ABI's discussion of *Belton*, click here. Judge Briccetti and the Second Circuit both denied motions in *Belton* for leave to appeal.

As it turns out, the Second Circuit largely adopted Judge Román's logic, aided by an *amicus* brief submitted by Professors Ralph Brubaker, Robert M. Lawless and Bruce A. Markell and Tara Twomey of the National Consumer Bankruptcy Rights Center.

Mootness

The Second Circuit considered whether the appeal was moot because the lender was willing to update the credit reports for everyone in the class.

Judge Pooler ruled that the appeal was not moot because "the question presented and the relief sought both remain unsettled."

The ruling on mootness is significant because the result in *Hill* turned in part on the creditor's repayment of debt allegedly collected in violation of the automatic stay. Therefore, a defendant's ploy like the one in *Hill* may no longer suffice to kill off an appeal in the Second Circuit.

The Standard of Appellate Review

Next, Judge Pooler dealt with the standard of review, which she said "has been inconsistently or improperly applied by this Court."

Without citing *Lakeridge*, which had been decided two days earlier in the Supreme Court, and without analyzing whether the case presented mixed questions of law and fact, Judge Pooler said that the court would conduct *de novo* review of the core status of the suit. Similarly, she said, the review is *de novo* regarding the bankruptcy court's conclusion that arbitration would cause a "severe conflict" with the Bankruptcy Code.

After *Lakeridge*, appellate courts must decide that review is primarily legal in nature, rather than factual, before concluding that review is *de novo*. Judge Pooler did not undertake that analysis.

In deciding whether review is *de novo* or for clear error, *Lakeridge* tells appellate courts to examine whether review primarily entails a legal or factual analysis. Finding a "severe conflict" between arbitration and the Bankruptcy Code might entail either a legal or factual analysis.

Depending on the particular facts giving rise to the alleged violation of the discharge injunction, appellate review might invoke the plain error rule if the appellate court's task focuses more on the facts underlying the conclusion of "severe conflict."

The Merits

Hill taught that the court has discretion to disregard an arbitration agreement if the proceeding is core and presents a "severe conflict" with the Bankruptcy Code. In deciding whether the class plaintiff-debtor in the new cases should have been obliged to arbitrate, *Hill* therefore provided the legal precedent, but the facts in that case were "easily distinguished," Judge Pooler said.

Because the creditor conceded that the issue was core, Judge Pooler was only required to analyze whether Congress intended for the statutory right to a discharge to be non-arbitrable, thus giving the bankruptcy court discretion to refuse to compel arbitration.

Judge Pooler said that discharge is the "foundation" and the "central purpose" of bankruptcy. Therefore, arbitrating a claimed violation of the discharge injunction would "seriously jeopardize" the proceeding because (1) the discharge injunction is integral to providing a fresh start, (2) the claim was made in "an ongoing bankruptcy matter," and (3) the bankruptcy court's equitable power to enforce its own injunctions is "central to the structure of the Code."

Perhaps undercutting *Hill*, Judge Pooler said that the "putative class action does not undermine this conclusion" because the automatic stay in *Hill* had become moot by closing the debtor's bankruptcy case.

Attempting to distinguish *Hill*, Judge Pooler said that violation of the discharge injunction, as opposed to an automatic stay violation, offends "the central goal of bankruptcy," contrasted with a violation of the automatic stay, which is no longer in effect in a closed case.

Further, Judge Pooler said the discharge injunction was "still eligible for active enforcement," compared with the automatic stay, which had lapsed. Judge Pooler did not consider that damages could be sought for a violation of the automatic stay by reopening a closed bankruptcy case.

Without citation of authority, Judge Pooler said that the discharge injunction is "enforceable only by the bankruptcy court and only by a contempt citation." Arbitration therefore presented "an inherent conflict with the Bankruptcy Code," Judge Pooler said, because "the bankruptcy court alone has the power to enforce the discharge injunction."

Having found an "inherent conflict," Judge Pooler quickly concluded that the bankruptcy judge did not abuse his discretion in ruling out arbitration.

What Remains of *Hill*?

It is at least arguable that *Hill* should have required Judge Pooler to impose arbitration. Since the Second Circuit was not sitting *en banc*, her three-judge panel could not overrule *Hill*.

In *Hill*, the issue was also core, but the appeals court required arbitration, overruling the two lower courts.

The *Hill* court concluded that arbitration would not "seriously jeopardize the objectives of the Bankruptcy Code," in part because the automatic stay "is not so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce." In the March 7 opinion, Judge Pooler neglected to note that the discharge injunction can be raised as an affirmative defense in any court.

Hill also found significance in the fact that the plaintiff's bankruptcy case had been closed. However, the debtor's case also had been closed in the appeal before Judge Pooler, but the bankruptcy judge had reopened the case to permit the filing of the class action.

Hill, therefore, may be limited in the future to class actions in district court seeking redress for violations of the automatic stay. *Hill* might not require arbitration if the debtor alone seeks

damages for an automatic stay violation under Section 362(k), and *Hill* might not apply to a class action in bankruptcy court seeking redress for an ongoing violation of the automatic stay.

The March 7 decision presents an opportunity for the Second Circuit to sit *en banc*, either to set aside Judge Pooler's opinion or overrule *Hill* outright. However, *en banc* rehearing is exceedingly rare in the Second Circuit. Stay tuned nonetheless.

The opinion is *Credit One Bank NA v. Anderson (In re Anderson)*, 16-2496 (2d Cir. March 7, 2018).

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The Emergence of Mediation in Cross-Border Cases[1]

In May of 2017, the authors of this article, principals of the cross-border mediation and consulting firm CBInsolvency LLC (CBI), worked on a presentation for the R3-Insol Europe Joint International Restructuring Conference in London. It was called "The Emergence of Mediation in Cross-Border Cases", a title we liked so much we have gratefully used it for this article.[2] While it is now common in U.S. bankruptcy cases to use mediation to resolve disputes, elsewhere the implementation of mediation in insolvency cases has been slow to develop for a number of reasons - local culture and antiquated insolvency regimes being primary.[3] However, courts, legislatures and practitioners are increasingly interested in innovative strategies in dispute resolution that conserve judicial resources by generating case resolutions at less cost and in less time, while minimizing the risk of lengthy appeals.

Cross-border cases, with the unique problems of multiple jurisdictions and the possibility of conflicting laws and/or rulings, are inherently good candidates for mediation. Recognizing this, the European Union Insolvency Regulation (2015/848, recast), much of which went into effect on June 26, 2017, suggests mediation for the resolution of the insolvency cases of groups of related companies in different countries, such as parent and subsidiaries or affiliates, by an appointed "coordinator" who could mediate toward a global restructuring among the "insolvency practitioners" in charge of the various proceedings in each country.[4] In a related development, judges are implementing procedures such as the Judicial Insolvency Network ("JIN") Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters to more effectively manage multi-jurisdictional disputes in cross-border cases, for increased cooperation among courts.[5]

Strategies for Using Mediation in Cross-Border Cases

A definitional moment at the outset is appropriate, as "cross-border case" is a broad term having different meanings depending on context. A cross-border case can involve proceedings of members of a corporate group in different countries, or a main

[1] Initially published in Insol World, 2nd Quarter 2018.
[2] CBI principals were accompanied by Panelists Fred Hodara (ret.) and Abid Qureshi of Akin Gump (New York), and Kevin Lloyd from Debevoise & Plimpton (London), to whom we owe our thanks for the good thoughts that came out of this Panel, some of which are reflected in this article.
[3] *See* Jacob A. Esher, *Insolvency Mediation Around the Globe*, Global Restructuring Review (January, 2018), viewable by subscription at https://globalrestructuringreview.com/article/1152900/insolvency-mediation-around-the-globe (non-subscribers may request a courtesy copy from the authors).
[4] Official Journal of the European Union, L 141, Vol. 58 at 19, 35 (June 5, 2015).
[5] *See* Jack Barton, *SDNY and Bermuda Adopt JIN Guidelines on Court Cooperation* (Global Restructuring Review, March 2017).

proceeding of a single entity in one jurisdiction with an ancillary proceeding, such as a Chapter 15 case in the U.S., in another.[6] For purposes of considering how mediation can best be used in cross-border cases, our definition of cross-border is any case in which the parties are from two or more different countries, whether or not insolvency proceedings in multiple jurisdictions may be involved.

Mediation could be premature in cross-border cases until threshold issues such as jurisdiction, eligibility, COMI and the like have been resolved so that the underlying dispute is justiciable and the parties are ready to negotiate. But even those threshold issues could be mediated. In the example of the *APR Energy* eligibility case cited above, the underlying dispute involved whether a creditor's lien was perfected. The foreign court had ruled it was not, and the Chapter 15 was filed for the purpose of enforcing this result in the U.S. Bankruptcy Court and halting redundant litigation. However, at the time of the writing of this article, recognition had been denied and the Chapter 15 case had been dismissed by the Bankruptcy Court. While the Bankruptcy Court decision was affirmed in part by the District Court, it was remanded on grounds that will likely result in recognition of the foreign proceeding and the equivalent of reversal. In that case, the underlying dispute could have been mediated at any point but mediation would more likely be availing if recognition is granted and litigation outside the Bankruptcy Court is stayed. It is at that point that the leverage of law and relative strength of position between the foreign representative and the creditor would provide an adequate base from which negotiations and mediation could be pursued.

So at the point that mediation can realistically be considered, how is it best implemented in a case? It is difficult to find sources of information to determine how mediation is used in cross-border cases, primarily due to the fact that mediation is inherently private and cases resolved through it do not usually result in reported decisions. Even when they do, the mediation itself is confidential. One recent reported decision from Australia, however, illuminates what we have experienced as an effective strategy for using mediation, and we thank Prof. Dr. Bob Wessels for bringing this to our attention.[7] The case, *In re Boart Longyear Limited,* involved two interdependent schemes of arrangement which had been proposed to the Australian Supreme Court in New South Wales, an unsecured creditor scheme and a secured creditor scheme. Creditor objections had been raised in the proceedings, so the parties had the benefit of the issues

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[6] The case of *Jones v. APR Energy Holdings Ltd. (In re Forge Group Power Pty Ltd.*), 17-2045 (N.D. Cal. Feb. 12, 2018) is a recent example of this, and dealt (erroneously, in our opinion) with the continuing controversy of whether Section 109 of the Bankruptcy Code is applicable to determine eligibility of a Chapter 15 case. *See* Daniel M. Glosband and Jay Lawrence Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?,* 24 Int'l Insolv. Rev. 28 (2015) (available at Wiley Online Library (wileyonlinelibrary.com)); summarized in Harvard Bankruptcy Roundtable, http://blogs.law.harvard.edu/bankruptcyroundtable/?s=glosband.); Glosband and Westbrook, *Opinion: No Debtor "Presence" is Required for Chapter 15 Recognition,* American Bankruptcy Institute Journal, May 24, 2015.

[7] *See In the matter of Boart Longyear Limited* (No 2) [2017] NSWSC 1105, viewable at www.caselaw.nsw.gov.au/decision/599a8cf0e4b058596cba97cd, as reported by Prof. Dr. Bob Wessels in his blog, http://bobwessels.nl/blog/2018-01-doc8-mediation-in-corporate-restructuring-proceedings/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+bobwessels+%28Prof.+Dr.+Bob+Wessels%29 (viewed on Feb. 15, 2018).

being framed with court oversight. At this point, presiding Judge Black cannily observed that mediation could resolve the objections, clearing the way for him to approve the schemes. Consequently, he ordered the parties to engage in mediation. The mediation was successful and the schemes were approved.

This strategy - to leverage the mediation at an appropriate time in court proceedings - is very effective, and we have mediated cases in which it has been used.[8] Often, the court will provide some useful thoughts for the parties to consider, which can help toward consensual resolution of the issues. In a large case which involves many disputed claims, obtaining a ruling on an important threshold issue common to the claims, such as on a motion to dismiss, can be singularly helpful in obtaining consensual resolutions of the other similarly-situated claims. Mediation of these claims prior to any court involvement is often premature and is less likely to be successful.

Of course, this is a generality and mediation can be just as successful when there have been no prior court proceedings involving the parties. One of the benefits of mediation is that it creates a forum where parties and their counsel have an opportunity to assess a dispute sooner than would be required in formal court proceedings. Mediating a dispute before positions have become further polarized and before substantial resources have been invested in seeking a court determination can be very productive. Even in cases where a cross-border filing might be exposed to a dismissal attempt, if the parties are prepared to negotiate the underlying dispute, using mediation and avoiding the costs and delay of a jurisdictional fight can be preferable to a proceeding on the merits with an unpredictable result. It is a matter of appropriate risk assessment, which is usually the foundation of the work involved in commercial mediation. If the mediation does not result in a meeting of the minds within an acceptable range of risk, little is lost as the process is not binding and the parties can always resume the courtroom activities.

Translation and Cultural Challenges in Cross-Border Cases

A discussion of mediation in cross-border cases would be remiss if it did not include process-driven issues, particularly language and culture. In our experience, mediations most often can be conducted in English, which is the world's commercial language in many respects. However, this is not always true, and translation services are sometimes needed. While differing languages can be solved through translation, it is commonly said that a large part of communication is non-verbal – things such as tone of voice, cultural mannerisms, idiomatic expressions and the like can pose significant communication challenges in cross-border cases even with translation services. A hired translator is often not equipped to interpret these nuances to the mediator, much less the opposing party, effectively.

In such situations, we have suggested that the party engage a local counsel or have counsel who is able to provide the nuanced interpretation on their team. We then

[8] The strategy was particularly effective in *In re Lehman Bros. Holdings Inc*., No. 08-13555 (SCC) (Bankr. S.D.N.Y.), in which CBI principals served as mediators. *See Id.,* Letter to The Honorable Shelley C. Chapman Regarding Eighty-Second ADR Status Report (2/23/2017, Docket No. 54893).

utilize the caucus, or separate meetings, with that team to ensure that we are getting the full breadth of the party's communication. It is often not possible to do this in a joint session, which heightens the formality and positioning between parties. Indeed, a hallmark of the mediation process is that it allows the mediator to serve as a buffer against the contentious positioning and argument that can often derail negotiation. The mediator is able to communicate the specific considerations and nuanced responses of the opposing party in a far more productive way using this approach.

Sometimes, having a familiarity with the legal and cultural milieu of parties can greatly enhance the mediation process, because it enables the mediator to empathize more readily, and so build trust. We have experienced this first hand in a number of mediations involving parties from Europe, China, and the Middle East. Understanding variations in practice and procedure similarly enhances the mediator's ability to assist parties in the cross-border context, as mediators need to be able to appreciate how those differences affect the relative negotiating positions of the parties.

Conclusion

We have observed a continuing trend toward a more party-autonomous dispute resolution culture, providing for parties' retention of greater control and decisional authority in cases. The International Bar Association's Mediation Committee has referred to this as "Consensual Dispute Resolution", or "CDR".[9] The emergence of mediation in cross-border cases is yet another aspect of this evolving approach to resolving insolvency cases with better results for debtors, creditors, and local economies.

[9] IBA Mediation Committee Newsletter, June 2015.

INSOLVENCY MEDIATION AROUND THE GLOBE[1]

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Seeing the development of mediation in insolvency cases over the past 10 or 15 years, and particularly the last five, has been pretty exciting. At least in the US, mediation has reached a tipping point and is commonly used from the most sophisticated reorganizations to the smallest pro bono cases. I had the good fortune and opportunity to serve as a primary mediator for six years in Lehman Brothers' New York Chapter 11 case, in which mediation was used most effectively. A recent status report filed in the *Lehman* proceedings stated that over US$3.1 Billion had been collected in 500 alternative dispute resolution (ADR) matters resolved with 593 counterparties. Of the 267 disputes that went through mediation and were concluded, 263 were settled and only four failed to reach settlement.

The reported *Lehman* mediation procedure involved the resolution of numerous affirmative derivative contract claims asserted by the Lehman Estate against multiple counterparties. This type of mediation procedure in insolvency cases is usually referred to as an "ADR Procedure" or a "Claims Facility", and these procedures have been used for decades in large US cases for large-scale recovery actions and disputed proofs of claim. In one of the first uses of a facility in the 1990s, the procedure implemented in the *Greyhound Bus* Chapter 11 case involved more than 3,000 claimants. Initial uses in subsequent cases resolved substantial numbers of disputed claims without resort to more expensive and time-consuming court processes, resulting in these procedures becoming a mainstay in large cases.

More recently, mediation has also been used to assist in the resolution of complex, multi-party plan disputes. While official reports of these mediation efforts are limited, there are excellent published articles (*see* References below) that provide illuminating anecdotal summaries highlighting mediation's effectiveness (and some failures) to resolve plan disputes in the US, including one of the largest efforts for the *City of Detroit* Chapter 9 case.

But what about outside of the US? This article takes a look at what's going on around the globe. Regrettably, the advance of mediation in the arena of international insolvency is slow.

Mediation and insolvency: A slow brew

It is difficult to find sources of information to determine the extent of use of mediation in insolvency cases, primarily due to the fact that mediation is inherently private and cases resolved through it do not result in reported decisions. However, we do know that,

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despite its recent growth, the use of mediation in insolvency cases is several years behind its use in commercial cases generally.

Using the US experience as a benchmark, it is possible to see how, as mediation becomes more prevalent and awareness of it increases in a jurisdiction generally, it will come into the insolvency practice there as well. Consequently, countries such as the UK and certain other countries in the European Union where mediation has a relatively robust presence generally are likely candidates for using mediation to resolve insolvency disputes.

Canada has already developed this to a significant extent, and mandates mediation in personal bankruptcy cases as well as farming matters. Similarly, France appears to be ahead in implementing mediation in matters involving distressed businesses, where pre-insolvency procedures known as *mandat ad hoc* (ad hoc mediation) as well as more formal conciliation, are commonly used. And Australia, generally a very mediation-friendly country, uses mediation to a significant extent in large insolvency-related cases in its Federal Court. Australia has developed national accreditation standards for mediators, and the Federal Court maintains a staff of Registrars of the Federal Court from which it appoints mediators to serve in appropriate cases.

However, mediation has not been used in insolvency cases in many countries due to antiquated insolvency regimes, which do not permit determinations of whether a company can be saved and under what terms. Instead, some of those countries provide a carte blanche to secured, governmental and even unsecured creditors, typically resulting in a quick liquidation of a debtor's assets.

For example, Russia's insolvency laws have been described by lawyers at Cleary Gottlieb Steen & Hamilton in *GRR's European, Middle Eastern and African Restructuring Review 2017*, as follows: "The Russian insolvency process lacks predictability and effective rehabilitation procedures and, thus, mechanisms that would incentivize a debtor to initiate insolvency at an early stage, with the most common outcome of the insolvency process being liquidation of the debtor rather than recovery of the debtor's financial position."

In jurisdictions like this, the leverage of law and relative strength of position between the debtor and its creditors do not provide an adequate base from which negotiations and mediation would be encouraged to be pursued.

However, there have been notable advances in insolvency reform in several countries. Recent improvements in insolvency procedures across Europe, most notably the French *Sauvegarde*, the Dutch *Akkoord*, the German Protective Shield, the Spanish Pre-*Concorso*, and the Romanian Preventive *Concordat* suggest that whether in or out of court, the desirability of achieving consensual restructurings and avoiding straight liquidations in cases is high. Developments in Singapore, discussed below, are also noteworthy. This is coupled with an increase in the awareness and development of mediation generally, which should lead to increased use of mediation in insolvency.

The European Parliament has promulgated rules and recommendations for the broader use of mediation generally in the cross-border context within the European Union. An extensive study on the 2008 EU directive – on certain aspects of mediation in civil and commercial matters – for the use of mediation for disputes in cases, and particularly cross-border matters, was completed in 2014 and updated in 2016 by the European Commission. While it indicates that mediation continues to develop in Europe, there is still a cultural roadblock in favor of arbitration and other adjudicative processes and judges remain reluctant to refer parties to mediation. Specifically regarding insolvency cases, the report states:

> One area where mediation remains underdeveloped is that of insolvency proceedings. It should be recalled that in its Recommendation on a new approach to business failure and insolvency, the Commission has 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 "Recommendation" in the quoted paragraph of the study refers to the recast European Insolvency Regulation (EIR), much of which went into effect on 26 June 2017. The mediation suggested by the EIR is for the resolution of the insolvency cases of groups of related companies in different countries, such as parent and subsidiaries or affiliates, by an appointed "coordinator" who could mediate among the "insolvency practitioners" in charge of the various proceedings in each country toward a global restructuring. UNCITRAL is working on model legislation to facilitate the cross-border insolvencies of multi-national enterprises as well. This clearly indicates that the seeds are being sewn for increasing the use of mediation in insolvency cases in Europe and the UK (however, Brexit has raised questions about the future viability of EU Directives in the country).

International advances in general mediation

While there is currently only limited use of mediation in insolvency matters outside the US, commercial mediation continues to grow everywhere. Consequently, it may be informative to look at a few highlights in the development of mediation globally, albeit not specific to insolvency. Many of these developments should be directly applicable to insolvency disputes, whether to resolve discrete litigated matters such as claims or recovery actions or to achieve ultimate restructurings. For example, there are interesting new developments (discussed below) in procedures to provide for the enforcement of mediated settlement agreements in a more effective way than to have to initiate an action on contract in the appropriate forum.

UNCITRAL continues to promote its Model Law on International Commercial Conciliation (MLICC) (in many parts of the world, the term "conciliation" is often used interchangeably with mediation). UNCITRAL has also proposed a multilateral convention on the recognition and enforceability of international mediated settlement agreements (iMSAs). This was explored in depth at the recent 65th session of the

UNCITRAL Working Group II on arbitration and conciliation in Vienna. A standardized, expedited enforcement scheme for iMSAs such as is available for arbitration awards is considered desirable to avoid the time, cost and expense of pursuing enforcement as would be required for the typical contract.

To address the issue of enforceability of mediated settlement agreements, mediation is sometimes used in combination with arbitration in hybrid processes such as the "arb-med-arb" process suggested by the Singapore International Mediation Centre and the Hong Kong Mediation Centre. This brings in the more developed protocols for arbitration awards, notably the New York Convention, as one answer to the enforcement of mediated settlement agreements. However, there is considerable controversy over engrafting arbitration rules, procedures and enforceability standards onto mediation, which has very different ground rules and expectations in confidentiality and party autonomy, not to mention enforceability of more flexible or creative resolutions imbued with subjective standards of fairness, such as issuance of an apology.

In some countries such as Thailand, the overwhelming presence of disputes clogging up the judicial system has been a primary motivator for establishing a mediation system. I, together with my colleague George Kelakos, a former vice president for international affairs at the American Bankruptcy Institute (ABI), was the lead mediation trainer during 2001 through 2005 for the ADR Office of the Judiciary in Thailand, training approximately 750 mediators for every civil court in the country through a program funded by US AID and the Thai non-profit Kenan Institute of Asia. This effort grew out of the ABI's efforts to help the country reform its insolvency laws.

Brazil is also an example: according to a Kluwer Mediation Blog article by Rio de Janeiro and Miami-based mediator Paul Eric Mason, *The Brazilian Mediation Wave – Will It Rise,* "Brazil is a country where new approaches and modalities are starting to be used to deal with disputes because, among other things, the Brazilian court system has a backlog of over 100 million cases….". Similarly there is a new mediation policy in Vietnam, where the Government of Vietnam issued Decree no. 22/2017 (24 February 2017) on Commercial Mediation.

In these countries, as in Russia, the development of mediation is a product of governmental action, as opposed to a more organic growth, as Tsisana Shamlikashvili - founder of the Scientific and Methodological Center for Mediation and Law – writes in her article *State of the Art: Mediation in Russia*:

> While in most western countries, mediation was developing mostly as a grassroots movement, Russia's model was much more top-to-bottom. The leading role of the state was in attempting to modernize its legal system, as well as the culture of conflict resolution prevalent in Russian society.

Since insolvency procedures are a product of governmental and judicial actions, mediation can readily be inserted, accelerating the development of its use considerably in any jurisdiction. An excellent example of this top-down approach is Singapore, which has implemented new insolvency procedures that resemble Chapter 11, while at the same

time developing and strengthening its mediation procedures. In fact, the Singapore Mediation Centre already maintains a mediator panel of insolvency experts.

Related developments in the judiciary

Singapore was also the site of a meeting earlier in 2017 which produced the Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Drawing from the existing ALI-III Guidelines of a similar nature, the JIN Guidelines represent the next generation of judicial cooperation in cross-border cases. "I believe that the guidelines speak for themselves as carefully considered, judge-developed guidelines to supplement and enhance statutory directives already in place under Chapter 15 of the Bankruptcy Code for cooperation and coordination in cross-border cases", stated Judge Robert Drain of the Southern District of New York Bankruptcy Court in a *GRR* news story reporting their adoption in New York and Bermuda. Along with Singapore, the US (SDNY and Delaware) and Bermuda, initial adoptees of the Guidelines include Canada (Ontario), England and Wales, the British Virgin Isles, the Cayman Islands and Australia (Federal Court and New South Wales).

Looking at these judicial efforts and considering the UNCITRAL and European Union efforts, one can easily see that the growth of mediation does not exist in a vacuum; rather, it is a part of a paradigm shift toward a more party-autonomous dispute resolution culture, providing for parties' retention of greater control and decisional authority. The International Bar Association's Mediation Committee has referred to this as "Consensual Dispute Resolution", or "CDR".

Where do we go from here?

As has been experienced in the US, it is beyond argument that mediation can be highly effective in resolving disputes and saving costs. However, getting parties to use it is often problematic without some form of court or regulatory compulsion. The European Commission study recognizes this quandary and states:

> The above shows that practices to incentivize [sic] parties to use mediation, apart from some specific instances set out above, are not yet generally satisfactory. Further efforts at national level – in line with the respective mediation systems in place – should therefore be made.

Current legislative, judicial and international commerce efforts to design more cooperative and efficient insolvency processes will yield better results for debtors, creditors, and the overall economy. Specific measures to support and encourage the use of mediation in insolvency cases are playing an important part in these developments, and can be critical to achieve success in complex, multi-party proceedings.

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