AMERICAN BANKRUPTCY INSTITUTE

2017 Annual Spring Meeting

CONCURRENT SESSION

The Potential for, and the Challenges of, Mediation in Cross-Border Insolvencies

Hosted by the International and Mediation Committees

William A. Brandt, Moderator
Development Specialists, Inc.; New York

Peter L. Borowitz
Mangrove Mediation; Bonita Springs, Fla.

Jacob A. Esher
MWI - CBI; Beverly, Mass.

Hon. Justice Glenn A. Hainey
Superior Court of Justice; Toronto

2017

American Bankruptcy Institute

Mediation and International Committees

2017 Annual Spring Meeting

The Potential for, and the Challenges of, Mediation in Cross-border Insolvencies

Panel Members:

Justice Glenn A. Hainey

Peter L. Borowitz

Jacob A. Esher

Moderator:

Bill Brandt

Saturday, April 22, 2017

Marriott Marquis, Washington D.C.

The Potential for, and the Challenges of, Mediation in Cross-border Insolvencies

American Bankruptcy Institute

Mediation and International Committees

2017 Annual Spring Meeting

I. Brief overview and update on the current use of mediation in insolvency matters
   A. Current use, custom and adoption in the U.S.
      1. Are there jurisdictional variations?
      2. Why is acceptance so solid in some regions and not in others?
   B. Current use, custom and adoption in Canada
      1. Are there jurisdictional/provincial variations?
      2. Why is acceptance so solid in some location and not in others?
   C. Current use in cross-border cases (defined as cases in which there are two or more proceedings in different jurisdictions, such as a Chapter 15 non-main proceeding in the U.S. and a main proceeding elsewhere)
      1. Use in U.S./Canadian matters, advantages and reservations
      2. Use in other locales and insolvency matters – where has it been adopted and where resisted

II. Essential differences in cross-border cases
   A. More threshold issues such as jurisdiction and necessary parties
   B. More logistical issues such as location, language/use of interpreters and what to eat
   C. Mediation in person or by telephone

III. Specific challenges
   A. Lack of authority of party representative, particularly governmental agencies as parties
      1. Use of mediator proposals for "cover"
      2. Differing dynamics between principals and advisers
   B. Conflict of laws (defining the litigation alternative)

1. Ability of U.S.-based mediator to evaluate issues disputed under foreign law

C. Cultural challenges

1. Adverse impact of aggressive/competitive negotiation styles
2. Role of barristers in U.K.-based jurisdictions
3. Incorrectly interpreting body language and/or facial expressions

IV. Benefits and suggestions

A. Same basic benefits as in domestic cases (minimizing positional bargaining, reaching creative and solid resolutions, party-centered, finality, time and cost savings, etc.)

B. Creating a forum where there may not be one otherwise in multijurisdictional cases

C. Use of Med-Arb process

Mediation in Cross-Border Cases
ABI Annual Spring Meeting 2017

By Jacob A. (Jack) Esher,
Mediator and Arbitrator
MWI
CBInsolvency LLC
jackesher@me.com

The global nature of business enterprises today, with exposure to the expense and risk of litigation in more than one forum, is a compelling reason to pursue mediation as a solution to contentious disputes in cross-border cases. A recent International Bar Association Mediation Committee Newsletter states: "The alternative dispute resolution (ADR) for the new generation is consensual. Consensual dispute resolution (CDR) has developed as a new trend within the emergence of ADR. CDR covers all forms of party-autonomous methods of dispute resolution such as mediation, collaborative law and negotiation, which allow parties to keep full control and decisive power over their business disputes." [1]

Recent action by the European Parliament and UNCITRAL signal a desire to move from adjudicative to consensual dispute resolution. Coupled with legal developments in a number of countries, this nudge towards mediation should make it an attractive tool in cross-border insolvency and restructurings. Indeed, disputes that arise in cross-border court processes such as in cases under the Model Law on Cross-Border Insolvency (enacted in the U.S. as Chapter 15 of the U.S. Bankruptcy Code) are increasingly likely to be mediated, by order of the court or courts managing the dispute. Examples include disputes over recognition, COMI, discovery, avoidance actions applying the law of the foreign proceeding and recovery on other causes of action.

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 in cases is high. In the UK, schemes of arrangement are based on obtaining the consent of at least 75% of the impaired creditor classes, similar to the majority rules for creditor consents in Chapter 11 cases. Courts handling cross-border cases are increasingly looking for ways to elicit cooperation from other courts handling aspects of cases, and have formed a group, the Judicial Insolvency Network, to begin work on developing protocols in this area.[2] However, the adjudicative process upon which courts operate is not structured to deliver consensual results, and it often achieves the opposite through increased polarization between parties. Mediation is a process that is designed and structured to build consensus.

[1] IBA Mediation Committee Newsletter, June 2015.
[2] http://www.straitstimes.com/singapore/courts-crime/new-forum-looks-at-managing-cross-border-insolvency-cases (viewed on March 10, 2017).

The European Parliament has promulgated rules and recommendations for the broader use of mediation in the cross-border context within the European Union. An extensive study was completed in 2016 by the European Commission on the 2008 EU directive[3] on the use of mediation for disputes in cases and particularly cross-border matters. While it indicates that mediation continues to develop in Europe, there is still a cultural roadblock in favor of arbitration and other adjudicative processes:

> However, 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 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. A number of respondents in the public consultation argued that mediation was not yet sufficiently known and that a "cultural change" is still necessary to ensure that citizens trust mediation. They also stressed that judges and courts remain reluctant to refer parties to mediation. [4]

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.[5]

More globally, UNCITRAL continues to promote its Model Law on International Commercial Conciliation (MLICC) (in many parts of the world, the term "conciliation" is often interchangeably used with mediation). Known in the U.S, as the Model Mediation Act, it has been adopted only by six states. However, many states already have legislation encouraging or supporting the use of mediation, or prefer that this continue to be left to the courts to develop. The deployment of mediation tends to repel efforts of standardization, primarily due to local differences in the way courts function, and even in the way individual judges handle cases. In order to fit into the particular district or judge's cases, the mediation procedure also is localized.

However, certain aspects of how mediation is implemented in cases cry out for standardization. One area that is receiving a lot of attention is UNCITRAL's proposed multilateral convention on the recognition and enforceability of international mediated

---

[3] 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, OJ L 136, 24.5.2008, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN (viewed on March 10, 2017).

[4] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1474566207231&uri=CELEX:52016DC0542, paragraph 2 (viewed on March 10, 2017). The full report is annexed as Appendix A.

[5] *Id.* at paragraph 3.2.

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. This brings in the more developed protocols for arbitration awards, notably the New York Convention, as one answer to the enforcement of mediated settlement agreement. 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 Europe and beyond, as has been experienced in the U.S., 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 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. Respondents highlighted the following measures in national law as particularly useful: requiring parties to state in their applications to courts whether mediation has been attempted which would not only remind judges examining court applications, but also lawyers who advise the parties of the possibility to use mediation, obligatory information sessions within the framework of a judicial procedure and an obligation of courts to consider mediation at every stage of judicial proceedings, in particular in family law matters.[6]

The bankruptcy courts in the U.S. have extensive jurisdiction over creditor claims and a debtor's causes of action, making it easier to implement a comprehensive mediation protocol in a case in the U.S. Because of this, and despite a few exceptions, U.S. courts are more likely to mandate that parties at least try mediation before (or during) the clobbering in court. Consequently, the use of a companion Chapter 15 proceeding to a foreign-based based main proceeding to get recalcitrant parties into mediation is a viable strategy to consider to enhance the prospects for a consensual resolution.

[6] *Id.* at paragraph 3.5.

APPENDIX A

Brussels, 26.8.2016
COM(2016) 542 final

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

1. INTRODUCTION

1.1. Objective

Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters,[7] including the area of family law, 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 sound relationship between mediation and judicial proceedings. It applies in cross-border disputes to civil and commercial matters and had to be transposed into national law by 21 May 2011. This evaluation of the application of the Directive is carried out in accordance with Article 11 of the Directive.

The objective of securing better access to justice, as part of the European Union's policy to establish an area of freedom, security and justice, encompasses access to judicial as well as extrajudicial dispute resolution methods. Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. It is more likely that parties voluntarily comply with agreements resulting from mediation. These benefits are even more pronounced in cross-border situations.

While mediation is generally beneficial in civil and commercial matters, its particular importance should be highlighted in the area of family law. Mediation can create a constructive atmosphere for discussions and ensure fair dealings between parents. Moreover, amicable solutions are likely to be long-lasting and can address in addition to the child's primary residence also visitation arrangements or agreements concerning the child's maintenance.

1.2. Context

The Directive has been the first measure to encourage mediation generally in civil and commercial disputes. Following the adoption of the Directive, further work related to mediation has been carried out at EU level:

- Since 2012, improving the quality, independence and efficiency of judicial systems has been a central feature of the European Semester. The EU Justice Scoreboard feeds the European Semester and assists Member States to improve the effectiveness of their justice systems. The Scoreboard also contains data on activities undertaken by Member States to promote the voluntary use of ADR methods. The Commission encourages the collection and sharing of information on the practices and methods to promote the voluntary use of ADR. The promotion of ADR includes tailor-made publicity (brochures, information sessions), the collection and publication of data, and the evaluation of the effectiveness of ADR methods and of the availability of legal aid for ADR.[8]

[7] OJ L 136, 24.5.2008, p. 3.
[8] See http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf

- In the framework of the *European Judicial Network in civil and commercial matters*, a working group elaborated a set of recommendations aimed at enhancing the use of family mediation in a cross-border context, in particular in child abduction cases. A separate section in the *European e-Justice Portal* dedicated to cross-border mediation[9] in family matters was created to provide information on the national mediation systems.
- Furthermore, through its *"Justice Programme"*[10] the Commission co-finances various projects concerning the promotion of mediation and training for judges and practitioners.
- Finally, Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the "ADR Directive")[11] and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the "ODR Regulation")[12] ensure that consumers can turn to quality alternative dispute resolution entities for all kinds of contractual disputes with traders and establish an EU-wide online platform for consumer disputes that arise from online transactions with traders (www.ec.europa.eu/odr).

1.3. Sources of information

This report is based on information gathered from different sources:

- In 2013, a study on the implementation of the Directive was carried out.[13] The study was updated in 2016.[14]
- A working group in the *European Judicial Network in civil and commercial matters* in 2014 prepared a paper on advancing international family mediation in cases of international child abduction.
- The results of the study and Member States´ experiences with the application of the Directive were discussed at a meeting of the *European Judicial Network in Civil and Commercial Matters* in July 2015.
- Finally, a public online consultation[15] was conducted from 18 September until 18 December 2015. 562 answers were submitted by interested individuals, mediators, judges, attorneys, other legal practitioners, academics, organisations, public authorities and Member States.

[9] https://e-justice.europa.eu/content_crossborder_family_mediation-372-en.do
[10] See for more information: http://ec.europa.eu/justice/grants1/programmes-2014-2020/justice/index_en.htm
[11] OJ L 165, 18.6.2013, p. 63.
[12] OJ L 165, 18.6.2013, p. 1.
[13] http://bookshop.europa.eu/en/study-for-an-evaluation-and-implementation-of-directive-2008-52-ec-the-mediation-directive--pbDS0114825/
[14] http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=DS0216335
[15] http://ec.europa.eu/justice/newsroom/civil/opinion/150910_en.htm

2. GENERAL ASSESSMENT

The evaluation shows that overall, the Directive has provided EU added value. By raising awareness amongst national legislators of the advantages of mediation, the implementation of the Mediation Directive has had a significant impact on the legislation of several Member States. The extent of the Directive's impact on Member States varies according to the pre-existing level of their national mediation systems:

- 15 Member States already had a comprehensive mediation system in place prior to the adoption of the Directive. In these Member States, the Directive has brought about limited or no changes to their system.
- 9 Member States either had scattered rules regulating mediation or mediation in the private sector was based on self-regulation. In these Member States, the transposition of the Directive triggered the adoption of substantial changes to the existing mediation framework.
- 4 Member States adopted mediation systems for the first time due to the transposition of the Directive. In these Member States, the Directive triggered the establishment of appropriate legislative frameworks regulating mediation.

Where the transposition of the Directive triggered the adoption of substantial changes to the existing mediation framework or the introduction of a comprehensive mediation system, an important step forward in promoting access to alternative dispute resolution and achieving a balanced relationship between mediation and judicial proceedings has been made.

However, 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 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. A number of respondents in the public consultation argued that mediation was not yet sufficiently known and that a "cultural change" is still necessary to ensure that citizens trust mediation. They also stressed that judges and courts remain reluctant to refer parties to mediation.

Respondents in the public consultation recognised the important role of mediation in particular in family law matters (especially in proceedings concerning the custody over children, access rights and child abduction cases), besides the commercial disputes.

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Statistical data on mediation

The study and the public consultation show that it is very difficult to obtain comprehensive statistical data on mediation, e.g. the number of mediated cases, the average length and success rates of mediation processes, with a special focus on cross-border mediation. In particular, there is no comprehensive and comparable data for entire jurisdictions. However, in the consultation many mediators provided data concerning their own activity, in particular the number of mediations conducted, and - often impressive - success rates. Others stated that success rates depended on the number of

parties, the subject matter at stake and the individual situation, factors which they consider to have also an impact on the length of proceedings. Others regret the fact that without a reliable database it is very difficult to make the case for mediation and its effectiveness and to gain public trust. Overall, respondents seemed to agree that mediation achieves significant cost savings in a wide range of civil and commercial disputes and in many cases significantly reduces the time required to resolve a dispute.

Whilst it is acknowledged that due to the "unofficial" nature of mediation compared to formal court proceedings, it is more difficult to obtain comprehensive data on mediation, a more solid data basis would be of significant importance to further promote the use of mediation. The *European Judicial Network in civil and commercial matters* has started work to improve national data collection on the application of Union instruments in civil and commercial matters, including Directive 2008/52/EC.

3.2. Scope (Article 1(2))

Almost all Member States have extended the scope of their measures transposing the Directive beyond cross-border to domestic cases. Only 3 Member States have chosen to transpose the Directive with respect to cross-border cases only, using the "cross-border" definition of the Directive. The extension of the scope to domestic cases is to be welcomed since the number of domestic cases exceeds that of cross-border cases by far. The rules of the Directive thus extend beyond its scope, to the benefit of the users of mediation. The extension to internal cases also shows that Member States have generally wanted to treat internal and cross-border cases alike. Taking into account the content of the rules of the Directive, there is indeed no reason to differentiate between the two types of cases.

Furthermore, it should be noted that whilst in practice, family law appears to be the area where mediation is used to the greatest extent, the Directive applies to all civil and commercial matters. 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.

3.3. Quality control mechanisms (Article 4(1))

3.3.1. Codes of Conduct

The adoption of codes of conduct at national level is perceived by stakeholders as an important tool to ensure the quality of mediation. 19 Member States require the development of and adherence to codes of conduct whereas in other Member States providers of mediation set their own codes of ethics. In some cases, Member States went beyond the minimum requirements of the Directive, making adherence to codes of conduct compulsory for mediators and mediation organisations. The *European Code of Conduct for Mediators*[16] plays a key role in this context, either because it is directly used

[16] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

by stakeholders or has inspired national or sectorial codes. In some Member States, adherence to the European Code is prescribed by law, whereas in other Member States the Code is applied in practice without being prescribed by law. Most stakeholders were of the opinion that the encouragement of the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services required by the Directive has been effective. It therefore appears that with regard to codes of conduct, the implementation of the Directive is overall satisfactory.

3.3.2. Quality standards for the provision of mediation services

18 Member States have rules relating to quality control mechanisms concerning the provision of mediation services. Most Member States have obligatory accreditation procedures for mediators and run registries for mediators. Where the legislation does not provide for registries or accreditation procedures, mediation organisations have usually set up their own. There currently exists a great variety of quality control mechanisms in the EU.

In the consultation, a large number of respondents were in favour of developing EU-wide quality standards for the provision of mediation services, among them in particular many mediators. There was, however, hardly any support from Member States.

Respondents in favour of developing European-wide quality standards were divided between those in favour of EU-wide uniform standards which they consider necessary in order to further promote the take-up of mediation and those in favour of minimum standards which would ensure consistency, but which would also make it possible to take into account local differences in mediation cultures. Others stressed that European standards should be based on the highest existing national standards in order to avoid that they become a product of the lowest common denominator.

Respondents against developing European-wide quality standards argued that such standards are not necessary for the success of mediation, that national standards are too different, that the development of these standards should be left to Member States, or that self-regulation in each national market is sufficient. They also stressed that Member States have significant cultural and legal differences concerning dispute resolution which affect the way in which parties use mediation. Uniformity would restrict consumer choice and lead to disputes. At the most, the European Union should promote and facilitate the sharing of good practices.

Taking into account the reluctance of Member States against binding EU-wide quality standards, but also the significant support from stakeholders, one way forward may possibly consist in the provision of EU funding for a stakeholder-driven development of EU-wide quality standards for the provision of mediation services in the context of the work of the European Committee for Standardization (CEN) on the basis of Regulation (EU) No 1025/2012 on European standardisation, for instance for a CEN Workshop agreement (CWA). Despite the fact that in principle CWA work should be fully market-driven, such funding is possible if considered as "necessary and suitable for the support

of Union legislation and policies".[17]

3.4. Training of mediators (Article 4(2))

17 Member States encourage training or regulate it in part or in detail in their national legislation. Going beyond the minimum requirements of the Directive, most Member States regulate the initial training of mediators and make it mandatory. Many also impose a requirement for further training. In Member States where training is not regulated, mediation organisations usually provide training on a voluntary basis.

In the consultation, a large majority of respondents considered that the encouragement of initial and further training of mediators required by the Directive had been effective. Others stressed the levels of disparity and divergence between different Member States as regards the creation, recognition, growth and development of the profession of mediator. In their opinion, there is some common ground, but little synergy between the various jurisdictions as regards training and the setting of standards. They consider that the training of mediators across Europe varies substantially as regards the hours required and the content of the training.

In cases concerning mediation in family matters, the *European Judicial Network in civil and commercial matters* has highlighted the importance for citizens of an access to mediators who have been trained specifically in international family mediation and in child abduction cases.

In order to further promote the training of mediators, the Commission will continue to co-finance various projects concerning training on mediation through its *"Justice Programme"*.

3.5. Recourse to mediation (Article 5(1))

All Member States foresee the possibility for courts to invite the parties to use mediation or at least to attend information sessions on mediation. In some Member States, participation in such information sessions is obligatory, on a judge's initiative (e.g. in the Czech Republic) or in relation to specific disputes prescribed by law, such as family matters (Lithuania, Luxembourg, and England and Wales). Some Member States require lawyers to inform their clients of the possibility to use mediation or that applications to the court confirm whether mediation has been attempted or whether there are any reasons which would stand in the way of such an attempt. In some Member States, schemes for mediation were developed to meet the requirements of specific proceedings, for example where strict time-limits apply. For instance, in the Netherlands, the pre-trial judge will mainly discuss the possibility of cross-border mediation with the parents who want to engage in mediation in cases of parental child abduction. Cross-border mediation starts the day after the pre-trial hearing and is concluded within three days. In case of a successful outcome, the results are then immediately presented to the judge dealing with the case. In the United Kingdom, at any time during judicial proceedings judges must

[17] See Article 15(1)a) of Regulation (EU) No 1025/2012, OJ L 316, 14.11.2012, p. 12.

consider whether alternative dispute resolution systems, including mediation, could be appropriate to settle the dispute. In such cases, the judge will invite the parties to refer their dispute to that system.

A significant majority of stakeholders considered practices aimed at motivating parties to use mediation as not effective. They stated that such invitations happen too rarely because judges do not know or trust mediation. Respondents who considered practices as effective referred mainly to the family law area.

The above shows that practices to incentivise 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. Respondents highlighted the following measures in national law as particularly useful: requiring parties to state in their applications to courts whether mediation has been attempted which would not only remind judges examining court applications, but also lawyers who advise the parties of the possibility to use mediation, obligatory information sessions within the framework of a judicial procedure and an obligation of courts to consider mediation at every stage of judicial proceedings, in particular in family law matters.

3.6. Legislation making the use of mediation compulsory or subject to incentives or sanctions (Article 5(2))

It follows from the study that mediation is compulsory in certain specified cases in 5 Member States. For instance, in Italy mediation is compulsory in many and various types of disputes, in Hungary and Croatia in certain family matters.

Many Member States promote the use of mediation by providing financial incentives for the parties. 13 Member States provide financial incentives for mediation through reductions or a full reimbursement of the fees and costs of court proceedings if an agreement is reached through mediation during suspended court proceedings. For instance, in Slovakia 30%, 50% or 90% of court fees are refunded, depending on at what stage of the proceedings a mediated settlement is reached. In some Member States, mediation itself is offered free of charge or at low costs, according to the economic situation of the parties.

There are also financial incentives in the form of legal aid. Member States apply different rules for different types of disputes or mediation processes. For example, in Germany, legal aid always applies to court mediation, but is limited with regard to out-of-court mediation. In Slovenia, it applies only to court mediation. In Luxembourg, legal aid is available for court mediation and family mediation conducted by a certified mediator. In Italy, legal aid is available for compulsory mediation. In this context, it should be stressed that Article 10 of Directive 2003/8/EC extends the right to legal aid in cross-border disputes to extrajudicial procedures, including mediation, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

5 Member States impose sanctions as a means to promote the use of mediation. In

Hungary, there are sanctions for parties which after having concluded a mediation agreement, go to court nevertheless or do not fulfil the obligations assumed under a mediation agreement. In Ireland, sanctions apply for an unjustified refusal to consider mediation. In Italy, the successful party in litigation proceedings cannot recover costs if it has before rejected a mediation proposal that had the same terms as the court judgment. Sanctions exist also in cases where mediation is compulsory and the parties do not make use of it, but go to court instead. In Poland, if a party which had previously agreed to mediation without justification refuses to participate in it, the court may order it to pay the costs of the proceedings, irrespective of the outcome of the case. In Slovenia, the court may order a party which without justification rejects the referral of the case to a court-annexed mediation to pay all or part of the judicial expenses of the opposing party.

The question whether mediation should be compulsory or not is controversial. Some stakeholders conclude that the lack of compulsory mediation impedes the promotion of mediation.[18] Others on the other hand consider that by its very nature mediation can only be voluntary in order to function properly and that it would lose its attractiveness compared to court proceedings if it was rendered compulsory.

It is important to remind that compulsory mediation affects the exercise of the right to an effective remedy before a tribunal as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

A majority of stakeholders is in favour of a more compulsory approach towards mediation. However, a majority of Member States and academics are opposed. Among those in favour of a more compulsory approach, one group of respondents advocated making mediation compulsory for certain categories of cases (such as commercial cases, family law, employment law or small claims). To a lesser extent, making mediation compulsory for any type of case was supported.

There was generally little support for sanctioning the lack of use of mediation, although there was some support for imposing the costs on parties which reject mediation without reasons. Incentivising parties to use mediation was more generally supported. Examples of useful incentives mentioned by respondents are lower court fees for parties that have tried mediation prior to filing their claim, effective and attractive fiscal deductions, mediation free of charge or at least financial support of mediation services by the State.

The use of incentives seems helpful to motivate parties to use mediation. The costs related to the resolution of a dispute are an important factor for parties when deciding whether they attempt mediation or go to court. Therefore, financial incentives which make it more attractive in economic terms for parties to use mediation instead of resorting to judicial proceedings, can be considered as best practice. The imposition of mediation within the framework of a judicial procedure might be considered where the parties may - because of the nature of their relationship - have reasons for repeated disagreements or even court litigation, such as in certain family matters (e.g. rights of

[18] See the European Parliament's study: *"'Rebooting' the mediation directive"*: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042

access to children) or in neighbour disputes. It should be stressed that also in such cases, the right of access to the judicial system which is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union must be respected.

In light of the above, Article 5(2) of the Directive can be considered appropriate.

3.7. Enforceability of agreements resulting from mediation (Article 6)

All Member States provide for the enforceability of mediation agreements as prescribed by the Directive. Some Member States went beyond the requirements of the Directive: Belgium, the Czech Republic, Hungary and Italy do not explicitly require the consent of all parties to the dispute for a request for the enforceability of the mediation agreement. In Greece and Slovakia, an enforceability request can be made by one of the parties without explicit consent from the others. Under Polish law, by signing the agreement, parties give their consent to request the court's approval for enforcement.

There may be exceptions to the general enforceability of mediated agreements. Such exceptions may be, for instance, when the agreement is contrary to public order or against the interest of children in family disputes.

A majority of stakeholders considers practices concerning the enforceability of agreements resulting from mediation as effective. They argued that a need for the enforcement of a settlement arising from mediation is extremely rare. In their view, the very nature of mediation makes it likely that having given their assent, parties will abide by the agreement. Some respondents who consider practices as not effective are of the opinion that all agreements resulting from mediation should be enforceable regardless of the will of the parties. Indeed, in order to ensure the effectiveness of mediation, best practice could consist in allowing one party to request the enforceability of the agreement even without an explicit consent of the other party.

3.8. Confidentiality of mediation (Article 7)

Confidentiality of mediation is protected in all Member States as required by the Directive and the Directive has therefore been correctly implemented. Some Member States went beyond the requirements of the Directive and introduced stricter rules. For instance, in Malta, mediators must keep confidential whether an agreement was reached during mediation and that information may only be divulged if the parties expressly agree to it in writing.

A large number of stakeholders consider practices concerning the confidentiality of mediation as effective. However, an issue mentioned by several respondents is that whilst mediators have a duty of confidentiality, there is no general right to refuse to give evidence for mediators like for other legal professions such as lawyers. There are, however, no indications that in practical terms, Article 7 would not sufficiently protect confidentiality of mediation.

3.9. Effect of mediation on limitation and prescription periods (Article 8)

All national laws ensure that that parties who choose mediation are not subsequently prevented from initiating judicial proceedings by the expiry of limitation or prescription periods during the mediation process. The Directive has therefore been correctly implemented in this respect.

The suspension of limitation and prescription periods is particularly important in cases where strict deadlines apply in the judicial proceedings, for example in child return proceedings in the context of parental child abduction.

A large number of stakeholders consider practices concerning the suspension of limitation or prescription periods during the mediation process as effective. Among them, some stressed that in their jurisdictions this was guaranteed thanks to the transposition of the Directive into national law.

3.10. Information for the general public (Article 9)

13 Member States have included the obligation to spread information about mediation in their national legislation. A variety of measures were adopted to inform citizens and businesses about mediation (e.g. online information on the websites of competent national bodies, public conferences, public promotion campaigns, TV spots, radio broadcasts, posters, etc.). In all Member States, information on the advantages of mediation and useful practical information on costs and procedure is also provided by associations of mediators, bar associations, or the mediators themselves.

Nonetheless, the study shows that awareness regarding mediation remains low and that information remains lacking for potential parties. This affects the efficiency of mediation services negatively, as confirmed by stakeholders in 18 Member States. Information is not only lacking for parties but also for legal professionals; this constitutes an additional obstacle to the potential widespread use of mediation in at least 10 Member States. In the consultation, a majority of respondents consider the provision of information for the general public as not effective. Among those who consider it as effective, many stated that information made available on the internet e.g. by courts, ministries, mediation organisations or chambers of commerce is most effective. Other effective mechanisms mentioned are information brochures, personal court visits or information events such as mediation days.

The European Commission is co-financing projects concerning the promotion of mediation through its *"Justice Programme"*. Furthermore, on the website of the *European e-justice Portal*[19] there is a significant amount of information available on the mediation systems of the Member States and about whom to contact. It should be explored through the *European Judicial Network in civil and commercial matters* how knowledge of the available information could be further disseminated.

[19] https://e-justice.europa.eu/content_mediation_in_member_states-64-en.do

4. CONCLUSIONS

The Mediation Directive was introduced to facilitate access to alternative dispute resolution, promote the amicable settlement of disputes and ensure that parties having recourse to mediation can rely on a predictable legal framework. This policy objective remains valid today and for the future: mediation can help to avoid unnecessary litigation at the taxpayers' expense and reduce the time and cost associated with court-based litigation. It can in the longer term create a non-litigious culture in which there are no winners and losers, but partners. The Mediation Directive has introduced different ways to promote the amicable settlement of cross-border disputes in civil and commercial matters and provided a European framework for mediation as a form of out-of-court or alternative dispute resolution.

Based on the study, the public online consultation and the discussion with Member States in the *European Judicial Network in civil and commercial matters,* it appears that the implementation of the Mediation Directive has had a significant impact on the legislation of many Member States. Apart from setting certain key requirements for the use of mediation in cross-border disputes concerning civil and commercial matters, the Directive has given impetus to a wider take-up of mediation also in a purely domestic context across the EU. This is due in particular to the fact that most Member States have extended the scope of their measures transposing the Directive to domestic cases. Overall, the Directive has provided EU added value by raising awareness amongst national legislators on the advantages of mediation, introducing mediation systems or triggering the extension of existing mediation systems.

The extent of the Directive's impact on Member States varies according to the pre-existing level of their national mediation systems. Difficulties concerning the functioning of the national mediation systems in practice are mainly related to the adversarial tradition prevailing in many Member States, an often low level of awareness of mediation and the functioning of quality control mechanisms.

The evaluation shows that there is no need at this time to revise the Directive but that its application can be further improved:

- Member States should, where necessary and appropriate, increase their efforts to promote and encourage the use of mediation through the various means and mechanisms foreseen in the Directive and addressed in this report. In particular, further efforts at national level should be made to increase the number of cases in which courts invite the parties to use mediation in order to settle their dispute. The following can be considered as examples of best practice in this regard: requirements for parties to state in their applications to courts whether mediation has been attempted, in particular in family law matters obligatory information sessions within the framework of a judicial procedure and an obligation on courts to consider mediation at every stage of judicial proceedings, financial incentives making it economically more attractive for parties to use mediation instead of resorting to judicial proceedings, ensuring enforceability without necessarily requiring the consent of all parties to the agreement.

- The Commission will continue to co-finance mediation-related projects through its *"Justice Programme"*. It is also in principle open to provide EU funding to a stakeholder-driven development of European-wide quality standards for the provision of mediation services. Furthermore, the Commission will continue to consult the *European Judicial Network in civil and commercial matters* to further promote the take-up of mediation, e.g. in order to obtain a more solid data basis on the use of mediation and to increase awareness of the public, in particular of the information available on the website of the *European e-justice Portal* on the mediation systems of Member States.

MEDIATION IN CANADIAN INSOLVENCY

Hon Mr Justice Glenn Hainey
E Patrick Shea, LSM, CS

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 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

---

[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).
[6] BIA, ss. 2 "court" and 183, and CCAA, s. 2(1) "courts".

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.

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

---

[7] BIA, s. 183(1).
[8] CCAA, s. 11.
[9] C.R.C. c. 368. (the "**General Rules**")
[10] General Rules, s. 3.
[11] See BIA, ss. 50(5)-(10) and CCAA, s. 23.

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 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

---

[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.

[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.

employed to assist the parties in reaching a mutually agreeable resolution that balances their respective interests in a more timely 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 claims against the 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

---

[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).
[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 proceeding: see BIA, s. 66.
[23] BIA, s. 135(1.1).

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].

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]. In the CCAA reorganization of Nortel Networks Corporation various matters in the claims process were referred to mediation[30].

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[31]. These provisions are also applicable in reorganization proceedings under the BIA and the CCAA[32]. 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.

---

[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)

[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, for example, *Nortel Networks Corporation (Re)*, 2016 ONSC 2732 (CanLII).

[31] See BIA, ss. 95-101.

[32] BIA, s. 101.1 and CCAA, s. 36.1.

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[33]. 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"[34]. 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*[35], 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 States Bankruptcy Code*. The plan contemplated that mediation would be used to determine disputed claims.

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

---

[33] BIA, Part XIII and CCAA Part IV.
[34] CCAA, s. 52(1).
[35] 1998 ABQB 636 (CanLII).
[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).

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.

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*[44] – 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[45]. 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[46].

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[47]. 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[48].

---

[42] BIA, s. 170.1(4).
[43] BIA, s. 170.1(3).
[44] SC 1997, c. 21 (the "**FDMA**").
[45] FDMA, ss. 5 and 6.
[46] See *M & D Farm Ltd.* v. *Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961, 1999 CanLII 648 (SCC)
[47] FDMA, ss. 12 and 13.
[48] 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.

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.