Developments in International Mediation

By Jacob A. (Jack) Esher*

Mediation is receiving an increasing amount of attention in international commercial matters, including cross-border insolvency and restructurings. The global nature of business enterprises today, with exposure to litigation - and its expense and risk – in more than one forum, is a compelling reason to pursue mediation as a solution to contentious disputes. A recent International Bar Association Mediation Committee Newsletter states that "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]

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 there as well. 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.

The European Parliament has promulgated rules and recommendations for the broader use of mediation in the cross-border context within the European Union. This year, an extensive study was completed by the European Commission on the 2008 EU directive[2] 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:

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[1] IBA Mediation Committee Newsletter, June 2015.

[2] 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 Sep. 22, 2016).

> 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. [3]

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.[4]

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 US 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. One area that is receiving a lot of attention is UNCITRAL's proposed multilateral convention on the recognition and enforceability of international mediated settlement agreements (iMSAs). This was explored in depth at the recent 65th session of the UNCITRAL Working Group II on arbitration and conciliation in Vienna. An 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 conundrum. However, there is considerable controversy over engrafting arbitration rules, procedures and enforceability standards onto mediation, which has very different ground rules and expectations in

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[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1474566207231&uri=CELEX:52016DC0542, paragraph 2 (viewed on Sep. 22, 2016).

[4] *Id.* at paragraph 3.2.

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.[5]

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, our 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 and increase the prospects for a consensual resolution is a viable strategy to consider.

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[5] *Id.* at paragraph 3.5.