The use of mediation to improve global restructuring outcomes in a post-pandemic world

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Writing exclusively for GRR, **Debra Grassgreen**, president of the International Insolvency Institute and senior partner at Pachulski, Stang, Ziehl & Jones in San Francisco, and **Scott Atkins**, president of INSOL International and Australian chair/ head of risk advisory at Norton Rose Fulbright in Sydney, make a case for why mediation has an important role to play in global restructuring reform going forward.

Simplicity and flexibility

Well prior to the outbreak of covid-19, jurisdictions across the world were already seeking to simplify their domestic insolvency processes and create flexible restructuring alternatives, to enable viable entities experiencing financial distress to have better prospects for recovery.

Those jurisdictions deemed simplicity and flexibility to be particularly important for micro, small and medium-sized enterprises (MSMEs), which commonly encounter significant liquidity constraints when in financial distress. They recognised that the costs and delays of formal insolvency processes, including reorganisation processes ranging from the Chapter 11 debtor-in-possession model in the United States, to the external administration models in Singapore (judicial management), Australia (voluntary administration) and the United Kingdom (company voluntary

arrangement), are often prohibitive for MSMEs and may leave little alternative to liquidation and piecemeal breakup of the business. Such outcomes often result in lost productivity and jobs and create long-term economic instability.

The trend towards simplifying restructuring and insolvency processes and making them more flexible has been intensified by the pandemic. In addition to practitioners, policy makers and international organisations taking active steps to crisis-contain through stimulus, fiscal strategies, and insolvency prevention and mitigation measures, there has been a global push to create more efficient, effective insolvency processes particularly for MSMEs, which the World Bank estimates represent over 95% of enterprises and more than 60% of employment worldwide.

The adoption and implementation of new *formal* insolvency processes in jurisdictions around the world has certainly had a role to play in dealing with MSME insolvencies pre- and post-covid. For example, In Australia, with effect from 1 January 2021, a new small business restructuring (SBR) process was introduced for small businesses with outstanding debts of less than AU$1 million (US$745,000). The SBR process enables directors to appoint a small business restructuring practitioner while a restructuring plan is developed to be put to creditors. There is also now a streamlined liquidation process for those entities.

Similarly, in Singapore, with effect from 29 January 2021, a six-month trial period for a new simplified insolvency program (SIP) commenced. This has now been extended until 28 July 2022. The SIP consists of both a simplified debt restructuring program and a simplified winding up program for eligible micro and small companies, defined as companies with an annual revenue of less than S$1 million (US$745,000) and S$10 million (US$7.45 million), respectively. The simplified debt restructuring program is monitored by a restructuring adviser and dispenses with many of the usual reorganisation processes.

In the US, meanwhile, Subchapter V of Chapter 11 was introduced from February 2019 to enable small businesses to conduct a streamlined reorganisation. The original debt limit for Subchapter V was US$2,725,625, though that limit was increased to US$7,500,000 as part of covid-19 relief legislation.

However, as a number of these measures are temporary, there may be a potential wave of bankruptcy cases when the measures end.

Benefits of mediation

In the longer term, mediation can be used effectively in restructuring matters. Until recently, outside the US, little attention has been paid to the benefits mediation may offer as a core component of flexible insolvency frameworks.

But the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) – which are designated by the Financial Stability Board as global standard setters for insolvency systems – recently identified some of

those benefits in two key publications.

In a workout context, recommendation B4 of the revised edition of the **World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes**, released in April 2021, notes that workout negotiations will typically be enhanced when they leverage informal techniques, such as voluntary negotiation or mediation or informal dispute resolution.

Likewise, the UNCITRAL Legislative Recommendations on the Insolvency of Micro and Small Enterprises, **adopted in July 2021** by UNCITRAL, recognise the use of mediation and conciliation to lower barriers of access to insolvency proceedings.

A mediator can play a critical role in building trust and consensus among disparate stakeholders and guide a financially distressed debtor and its creditors towards a quick, inexpensive and flexible outcome, including resolving complex creditor disputes and adopting a restructuring plan.

The facilitative role that a mediator can play is especially important in countries with an under-developed informal workout system. In those jurisdictions, workout negotiations are often hampered by creditor hold-outs, which arise due to a lack of trust that creditors have access to equal information about a debtor and that they will be treated equitably under a workout plan involving senior creditors and other stakeholders.

The key task for a mediator is to ensure greater transparency in the information available to creditors so that cooperative negotiations can proceed and creditors can have confidence that they are working towards a shared goal.

Cross-border insolvencies

Mediation has a critical role to play in a cross-border insolvency context too, when coordination difficulties among creditors with competing claims in multiple jurisdictions and operating under often very different insolvency regimes are even greater. A mediator may assist parties in parallel insolvency proceedings to negotiate a framework or protocol for cooperation and coordination across jurisdictions, and may also assist courts to narrow and resolve substantive disputes.

Indeed, the appointment of a mediator on that basis can be seen to fall directly within the form of cooperation contemplated by Article 27(a) of the UNCITRAL Model Law on Cross-Border Insolvency (1997): "the appointment of a person or body to act at the direction of the court". Such an appointment would satisfy the obligation that courts in Model Law countries have under Article 25 to cooperate to the maximum extent possible with foreign courts and foreign representatives.

The potential use of mediation in tandem with the Model Law strengthens the effectiveness and flexibility of the Model Law and its operation as a modern, harmonised and fair insolvency framework, and may see more

courts investigating mediation as a viable means for cooperation, cost and time savings, and more successful outcomes in complex cross-border matters, going forward.

The introduction of new court procedural rules in local jurisdictions can support this process too, by providing courts with the power to refer parties to mandatory mediation at any point of an insolvency process. Rules of this kind operating specifically in an insolvency context are currently very limited globally, though.

A new tool that could facilitate the role of mediation in a cross-border restructuring and insolvency context is the **United Nations Convention on International Settlement Agreements Resulting from Mediation** (also known as the Singapore Convention on Mediation), which entered into force on 12 September 2020.

The Singapore Convention provides a globally-consistent framework for the cross-border enforcement of international settlement agreements reached during a mediation process involving claimants and assets in multiple jurisdictions. Mediated settlements now have "teeth", as a result, allowing mediation to be harnessed effectively in various stages of cross-border insolvency and restructuring processes.

By providing parties with a uniform and efficient framework, the Convention provides clarity and certainty of business outcomes, enhancing the possibility of an expedient resolution and giving parties in the mediation process confidence. It may even play a key role in achieving consensus among creditors.

Of course, a treaty's effectiveness and uniformity not only hinges on application and interpretation, but also on widespread adoption and acceptance. While the Singapore Convention is still in its infancy compared to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), its uptake from 46 signatories on the first day the Convention opened for signature, to the current 54 signatories and six parties, is promising.

Technology

Recent advancements in technology could also support the growth of mediation as an adjunct to more efficient and effective insolvency processes. Covid-19 has already sparked digital enhancements and we can expect to see a further increase in online ADR processes – including in an insolvency context – in future years.

This trend will be enhanced by a strong international enabling framework of digital dispute resolution tools, such as the **APEC Collaborative Framework** for Online Dispute Resolution of Cross Border Business-to Business Disputes, the **European Online Dispute Resolution Platform** and the **UNCITRAL Technical Notes on Online Dispute Resolution**.

Blockchain and AI also have the potential to achieve greater efficiency and cost savings and avoid time delays by processing the complex information of multiple creditors, bringing together hundreds of parties in a simultaneous forum and ensuring effective, clear communication and outcomes in the negotiation process.

A word of warning though: the ongoing focus must be on using technology to ensure meaningful engagement and participation for creditors, and it will be important to carefully manage confidentiality, privacy and data protection issues.

Mediation has a clear role to play in restructuring reform. It is important for this to be at the forefront of the minds of governments, regulators, policy bodies and practitioners alike across the globe in the post-pandemic recovery period ahead.

*The writers this week spoke on a panel, "Potential Uses of Mediation in Debt Restructuring and Insolvency***",** *alongside GRR's editor* ***Kyriaki Karadelis****, at the* ***Singapore Convention Week 2021****, held from 6 to 10 September. The week-long series of events related to international dispute resolution also featured the inaugural UNCITRAL Academy, jointly organised by the Singapore Ministry of Law and United Nations Commission on International Trade Law (UNCITRAL).*

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