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TRANSNATIONAL ALTERNATIVES: Growing Role Of Alternative Dispute Resolution In Transnational Insolvency Cases

By
Dennis C. O'Donnell
Milbank, Tweed, Hadley & McCloy LLP
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By Dennis C. O'Donnell*

The use of alternative dispute resolution (ADR) in domestic insolvency cases has grown exponentially over the course of the past 20 years. During this time, through both court-annexed programs and the individual initiatives of judges and parties, ADR has been used to address a wide array of disputes, ranging from garden-variety avoidance actions to case dispositive plan formulation disputes. The use of ADR to address transnational disputes between parties outside the insolvency context has even deeper roots, dating back to at least the adoption of the New York Convention in 1958, and is now an alternative to traditional litigation available to sophisticated parties through dozens of specialized ADR providers. As U.S. chapter 11 cases have grown increasingly transnational in scope, there has been a convergence between these two worlds. While bankruptcy courts had always found ways to use ADR to address bankruptcy-related disputes that straddled national borders, such disputes have arisen with greater frequency in recent years, thereby providing, as illustrated herein by developments in large chapter 11 cases over the past decade, courts and litigants with a greater range of opportunities for creative ADR solutions.

A. Early Development of Transnational ADR

1. Generally

The use of ADR to address transnational commercial disputes has grown rapidly over the last fifty years. Arbitration has led the way among other ADR techniques. The New York Convention was adopted in 1958 and the UNCITRAL Model Law followed in 1985.[1] In the intervening decades and in the years that have followed the adoption of the 1985 Model Law, arbitration has become firmly established as the ADR option of choice for transnational business enterprises.[2] An array of international arbitral organizations,

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* Dennis C. O'Donnell, of counsel in the Financial Restructuring Group at Milbank, Tweed, Hadley & McCloy LLP, has extensive experience in corporate reorganization and bankruptcy-related litigation matters, including in alternative dispute resolution contexts. Notable representations have included the official committees of unsecured creditors of Enron Corp., Refco Inc., Lehman Brothers Holdings Inc. and Arcapita Bank. For significant contributions and research assistance, he would like to thank associates Jared E. Joyce-Schleimer, Brian Sturm, Eluard Alegre, Matthew Brod, and Nicole J. Lee.

1 International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges v,* v-vi (Hague 2011).

2 *Id.* at vi ("The Model Law on International Commercial Arbitration issued by UNCITRAL (the United Nations Commission on International Trade Law) in 1985, and as amended in 2006, has been adopted in over seventy countries and federal states."); *see also* Jean-François Poudret and Sébastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION § 1.4, at 90 (2nd ed.

such as the International Center for Settlement of Investment Disputes (ICSID) and the World Intellectual Property Organization (WIPO), are now available to such parties as dispute resolution fora.[3]

The use of mediation in the international context has been a more recent phenomenon. As an ADR mechanism, third-party neutral mediation is well established in the legal ethos of most common law jurisdictions—such as the United Kingdom, the United States, and Canada.[4] In the rest of the world, however, including many European, Latin American, and Asian nations with civil law traditions, mediation had traditionally not been as prevalent domestically and thus not as attractive as an approach to transnational business disputes.[5] The adoption of the UNCITRAL Model Law on International Commercial Conciliation (the "UNCITRAL Model Law") in 2002 has gone far to overcome these hurdles and foster the more widespread use of mediation on a transnational basis.[6]

2. Insolvency Context

The use of ADR in the insolvency context has developed more recently and fitfully than in the general commercial context. While bankruptcy courts had always found ways, through the appointment of examiners, special masters, and other methods, to address otherwise intractable insolvency-related disputes, it was not until the early 1990s that recourse to ADR techniques became widespread.[7] Regular application of

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2007) ("On numerous points, the Model Law contains rules which are universally recognised in the practice of international commercial arbitration. On other points, it is a guide which no legislature can henceforth ignore, even it decides not to adopt the Model Law as such."); Tony Cole, *Authority and Contemporary International Arbitration*, 70 La. L. Rev. 801, 802 (2010) ("While arbitration has existed in one form or another for centuries, and has at times even had a central role in both domestic and international dispute resolution, its recent rise to prominence and acceptability on the contemporary international scene has been both abrupt and overwhelming.").

3 Other major associations include the American Arbitration Association (AAA), Chartered Institute of Arbitrators, JAMS International, and the Permanent Court of Arbitration (PCA).

4 *See* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 468 (2007) ("[W]ith the exception of Canada, Australia, the United Kingdom, and some other common law countries, commercial mediation/conciliation practice outside the United States has yet to develop on a broad scale.").

5 *See* A. Ingen-Housz, Address to Irish Commercial Mediation Association: *A Few Thoughts on Cross-Border Mediation* (June 5, 2008); Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 913, 916-17 (2001) (discussing cultural and ethnic impacts on mediation models).

6 William K. Slate, *et al.*, *UNCITRAL (United Nations Commission on International Trade Law) Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73 (2004) (discussing development of, and aspirations for, the Model Law); Robert N. Dobbins, *UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly*, 3 PEPP. DISP. RESOL. L.J. 529 (2003) (same).

7 *See* Jacob A. Esher, *Alternative Dispute Resolution in U.S. Bankruptcy Practice*, 4 S. NEW ENG. ROUNDTABLE SYMP. L. J. 76 (2009) ("*Esher*"); Ralph R. Mabey, *et al.*, *Expanding the Reach of*

ADR principles to insolvency-related disputes that were clearly transnational in nature has taken even longer to evolve.

In its early stages, the adoption of ADR techniques by U.S. bankruptcy courts was predicated on the bankruptcy court's inherent powers under section 105 of the Bankruptcy Code, its right to promulgate procedures by local rule pursuant to Bankruptcy Rule 9069, and it authority under section 1104 and 1106 to appoint mediators to address discrete disputes.[8] Encouraged by other statutory enactments targeted at streamlining federal court litigation generally, a number of pioneering jurisdictions, including the Southern District of California and the Middle District of Florida, adopted local rules or general orders compelling mediation in bankruptcy cases in the late 1980s and early 1990s.[9]

These early efforts were validated by the passage of the Alternative Dispute Resolution Act of 1998, which required that each federal district court authorize, by local rule, the use of ADR in "all civil actions, including adversary proceedings in bankruptcy."[10] In the ensuing years, the use of ADR in U.S. bankruptcy cases, whether pursuant to local rule or on an *ad hoc* basis, has increased dramatically.[11] Almost fifty percent of bankruptcy courts now have local rules or general orders requiring mediation in specified matters and bankruptcy judges have become ever more willing to utilize ADR techniques in novel ways to address both domestic and international disputes.[12]

As a general matter, ADR has been utilized in three contexts: (i) to resolve disputes and achieve consensus with respect to plans of reorganization, (ii) to resolve single creditor disputes, and (iii) to resolve multiple creditor claims of the same nature.[13] These categories emerged early in the evolution of bankruptcy-related ADR and, despite increasingly complex chapter 11 cases, most of the ADR ordered or agreed to today continues to fit into these categories.[14]

In the plan context, bankruptcy courts have been using ADR techniques, of one type or another, for twenty years to address plan disputes. Early examples, on the

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Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR, 46 S.C. L. REV. 1259 (1995) ("*Mabey*") (collecting cases); Michael S. Wilk and Shaarik H. Zafar, *Resolution of Domestic and International Bankruptcy Issues through Mediation*, 9 A.B.A. J. 19 (2005) ("*Wilk*").

8 *Mabey*, 46 S.C. L. REV. at 1283-1302; *Wilk*, 9 A.B.A. J. at 20.

9 *Mabey*, 46 S.C. L. REV. at 1319-20.

10 28 U.S.C. § 651(b); *see Bankruptcy: The Next Twenty Years*, NAT. BANKR. REV. COMM. (Oct. 20, 1997) (recommending mediation procedures for use in bankruptcy courts).

11 *Esher*, 4 S. NEW ENG. ROUNDTABLE SYMP. L. J. at 80-81; *Wilk*, 9 A.B.A. J. at 20.

12 *Esher*, 4 S. NEW ENG. ROUNDTABLE SYMP. L. J. at 80-81.

13 *Mabey*, 46 S.C. L. REV. at 1267.

14 *Id.* at 1265-66.

domestic side, include *In re Public Service Co.*,[15] where the bankruptcy court appointed an "examiner" to "mediate" an impasse in plan negotiations,[16] and *In re R.H. Macy & Co.*, where Cyrus Vance, former US Secretary of State, was appointed to mediate plan-related disputes.[17] Along similar lines, but in the international context, was the use of examiners to mediate plan-related disputes in *In re Olympia & York Realty Corp.* and *In re Maxwell Communication Corp*. In both cases, the debtors were subject to dual insolvency proceedings in competing jurisdictions and the examiners were directed to seek to harmonize the corporate governance and insolvency law principles of the relevant fora.[18]

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15 *In re Public Serv. Co. of New Hampshire*, 99 B.R. 177 (Bankr. D.N.H. 1989); *see also In re A.H. Robins Co.*, No. 85–01307-R (Bankr. E.D. Va. Aug. 13, 1986) (order appointing examiner in *Robins* provided him with the authority to investigate and evaluate matters relevant to the debtor's business operations including "monitor[ing] the progress of the formulation of a plan of reorganization" and "evaluat[ing] and suggest[ing] proposed elements of a plan."); *In re Ionosphere Clubs, Inc.*, Nos. 89 B 10448 (Bankr. S.D.N.Y. Mar. 30, 1989) (examiner appointed and directed to seek to "achieve a consensus among the parties so that a consensual plan of reorganization may be proposed, confirmed and consummated consistent with the Bankruptcy Code"); *In re Apex Oil Co.*, 111 B.R. 235, 237 (Bankr. E.D. Mo. 1990), *rev'd on other grounds*, 132 B.R. 613 (E.D. Mo. 1991), *aff'd in part, rev'd in part*, 960 F.2d 728 (8th Cir. 1992) (examiner appointed, *sua sponte*, by court and granted authority to take "any necessary and appropriate actions in furtherance of assisting the Court and parties in bringing these proceedings to a just, prompt and economic disposition."); *In re Eagle-Picher Indus.*, No. 1-91-00100 (Bankr. S.D. Ohio June 5, 1992) (appointing mediator to "assist the several constituencies in their efforts to negotiate a consensual chapter 11 plan of reorganization.").

16 *In re Public Serv. Co.*, 99 B.R. at 182-83 (observing that that "statutory language, providing that an examiner shall investigate 'any other matter relevant to the case or to the formulation of a plan'" is broad enough to encompass "plan mediation"; and appointing examiner because "in this case a clear impasse on rate level negotiations has occurred, multiple plans of reorganization are imminent, and there is a need as indicated above for an examiner to mediate during the 60–day period set forth in this court's order terminating exclusivity."); *see also In re UNR Indus., Inc.*, 72 B.R. 789, 795-96 (Bankr. N.D. Ill. 1987) (directing that "[t]he primary role of the [examiner appointed in that case] shall be to determine whether negotiations toward a consensual plan of reorganization are at an impasse. In making this determination, the Examiner shall have full power to inquire of various parties as to their positions in negotiations and to mediate any differences that exist.").

17 *See Wilk*, 9 A.B.A. J. at 21 (discussing *Macy's* mediation); Stephanie Strom, *Vance Picked to Mediate a Macy Plan*, N.Y. TIMES, Feb 23, 1994, at A1; Cassandra G. Mott, *Macy's Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 OHIO ST. J. ON DISP. RESOL. 193 (1998); *see also In re El Paso Elec. Co.* No. 92-10148 (Bankr. W.D. Tex. Jan. 15, 1993) (appointing mediator to "(1) investigate whether negotiations for a consensual plan were at an impasse, and conduct mediation between the parties to develop a consensual plan."); *In re MCorp Fin.*, Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Bankr. S.D. Tex. 1989) (mediation, conducted through two settlement judges, to develop a consensual plan of reorganization).

18 In the *Olympia & York* case, the debtor was subject to dual insolvency proceedings in the US and Canada and the examiner was appointed to (i) harmonize the Canadian and US proceedings; and (ii) bring about a consensus among the parties regarding corporate governance issues. *In re Olympia & York Realty Corp.*, No. 92 B 42698-42702 (Bankr. S.D.N.Y. 1993); *see* Jeremy Opolsky, *Court-to-Court Communication and Cross-Border Insolvency Protocols*, 2011 NORTON ANN. REV. OF INTL. INSOLVENCY 10 (2011); Jay Lawrence Westbrook, *International Judicial*

ADR has also been used to aid in the resolution of claims disputes with a common nexus of law or fact. An early example of this use of ADR can be found in *In re P.A. Bergner & Co. Holding Co.*, in which a mediator was appointed to undertake the resolution of hundreds of personal injury claims and several thousand disputed trade claims.[19] Numerous other courts followed suit and – in what was during the 1990s and remains today the most common use of ADR in U.S. bankruptcy cases – appointed mediators to address claims of a specific legal or factual nature.[20]

Negotiation, 38 TEX. INT'L L.J. 567, 575 n. 51 (2003); Sean Dargan, *The Emergence of Mechanisms for Cross-Border Insolvencies In Canadian Law*, 17 CONN. J. INT'L L. 107, 121 (2001).

In the *Maxwell Communications* case, the debtors were subject to insolvency proceedings in both the US and the UK, and the examiner was appointed, at the urging of Maxwell's creditors, to resolve conflicts among the jurisdictions and, ultimately, to develop a coordinated plan and scheme that harmonized US and UK insolvency law. *See* Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Communications Corp*, Case No 91-15741 (Bankr. S.D.N.Y. Jan. 15, 1992); *see generally* Evan D. Flaschen and Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L. J. 587, 590-92 (1998); Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2534 (1996); M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?*, 27 INT'L LAW. 881, 899-900 (1993).

19 *In re P.A. Bergner*, Case Nos. 91-05501 to 05516, Order Approving Implementation of An Alternative Dispute Resolution Procedure Including Mandatory Mediation (Bankr. E.D. Wisc. Feb. 11, 1993); *see Mabey*, 46 S.C. L. Rev. at 1273 (reporting that ADR procedure in *Bergner* resulted in 1,215 claims in the approximate amount of $1.2 billion being resolved); *see also In re Best Prods., Inc.*, No. 96-35267 (Bankr. S.D.N.Y. 1996) (mediator appointed who resolved more than 85% of disputed claims); *In re Quality Beverages*, 216 B.R. 592 (Bankr. S.D. Tex. 1995) (mediator appointed to mediate settlements of preference actions and turnover actions); *In re Sunrise Energy Servs., Inc.*, No. 3-95-34176-SAF-1 (Bankr. N.D. Tex. 1995); *Herman's Sporting Goods, Inc. v. Am. Motorists Ins. (In re Herman's Sporting Goods, Inc.)*, No. 93-31529 (Bankr. D.N.J. Nov. 15, 1993) (approving an alternative dispute resolution procedure for resolution of personal injury and product liability claims against the debtor); *In re Walter Indus., Inc. f/k/a In re Hillsborough Holdings Corp.*, Nos. 89-9715-8P1 to 89-9746-8P1 (Bankr. M.D. Fla. May 6, 1993) (authorizing debtor to employ mediator pursuant to claims resolution procedure); *In re Columbia Gas Transmission Corp.*, No. 91-804 (Bankr. D. Del. Aug. 27, 1992) (mediator appointed to address calculation of rejection damage claims resulting from debtor's rejection of gas purchase and sale contracts); *In re Child World, Inc.*, No. 92-B-20887 (Bankr. S.D.N.Y. 1992) (debtor sought and court authorized standing ADR procedure for resolving certain tort and insurance claims, including the use of mediator); *In re U.S.H. Corp.*, No. 91-B-11625 (Bankr. S.D.N.Y. 1991) (mediator appointed to help resolve approximately twenty multimillion dollar construction related claims); *see generally* H. Slayton Dabney, Jr. and Dion W. Hayes,, *Bankruptcy Lawyers Better Tune Up Their ADR Skills – Best Products is One Case Wherein Mediation Really Worked*, AM. BANKR. J. at 1 (June 1999).

20 *See Mabey*, 46 S.C. L. REV. at 1273 (collecting cases); *Escher*, 4 S. NEW ENG. ROUNDTABLE SYMP. L. J. 85-87 (discussing use of ADR with respect to contingent and unliquidated claims and observing that "[t]hrough carefully crafted step-by-step procedures, [an ADR claims] facility promotes the exchange of necessary information and maximizes the prospects of reaching a negotiated settlement through a mandatory offer-counteroffer procedure.").

Closely related to the use of ADR to address claims of similar nature prior to confirmation has been the incorporation of claims mediation procedures into confirmed plans of reorganization for implementation post-confirmation.[21] Most noteworthy in this regard during the early years of chapter 11 ADR was the claims resolution facility approved in the *Johns-Manville* case.[22] In *Johns-Manville*, the confirmed plan of reorganization established a settlement fund to compensate parties who claimed injuries resulting from exposure to asbestos as well as a claims resolution facility to address the claims of such claimants.[23] The claims resolution facility made available to claimants a number of options to prove up their claims. Individuals with asbestos-related disease were first required to seek to settle their claims by a mandatory exchange of settlement offers with claims facility representatives.[24] If a settlement could not be reached, the claimant could then elect mediation, binding arbitration, or traditional tort litigation.[25] The only restriction on recovery imposed by the claims facility procedures was that the claimant could not obtain punitive damages.[26]

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21 There are numerous early examples of the incorporation of claims mediation procedures into confirmed chapter 11 plans. *See, e.g,. Kubicik v. Apex Oil Co. (In re Apex Oil Co.)*, 884 F.2d 343, 345 (8th Cir. 1989) (plan incorporating claims facility for personal injury and wrongful death claims); *In re Eagle Bus Manufacturing, Inc.*, 134 B.R. 584 (Bankr. S.D. Tex. 1991), *aff'd sub nom., NLRB v. Greyhound Lines (In re Eagle Bus Manufacturing, Inc.)*, 158 B.R. 421 (S.D. Tex. 1993) (confirmed plan of reorganization sought to liquidate claims of various personal injury and workers' compensation claimants through the use of an ADR procedure); *In re DI Distributors, Inc.*, No. 89-295-JFK (Bankr. D. Del. Nov. 1, 1994) (approving claims resolution facility for asbestos related disease claims); *In re Buchanan*, No. 90-04050JC (Bankr. S.D. Miss. Nov. 25, 1992) (appointing "special master" to liquidate contingent claims, accepted by contingent claimant class); *In re Amatex Corp.*, 107 B.R. 856 (E.D. Pa. 1989) (Giles, J. and Scholl, B.J.) (claims resolution facility); *In re Continental Airlines Corp*., No. 83-04019-H2-5 (Bankr. S.D. Tex. Aug. 27, 1986) (creditors may consent to resolve disputed claims through binding arbitration instead of through the bankruptcy court).

22 *Kane v. Johns-Manville Corp*., 843 F.2d 636 (2d Cir. 1988) ; *see also In re Joint Eastern and Southern Districts Asbestos Litigation*, 878 F.Supp. 473 (S.D.N.Y. 1995) (approving re-negotiated Manville trust plan that preserved, in modified form, the ADR options available under the original plan); *see generally* Manville Personal Injury Settlement Trust, *A History of the Trust* (1995), http://www.mantrust.org/history.htm.

23 *Kane*, 843 F.2d at 640.

24 *Id.*

25 *Id.*

26 *Id* A similar post-consummation claims resolution facility was incorporated into the confirmed plan in the *A.H. Robins* case, which established a settlement fund for the benefit of parties claiming injuries resulting from the use of the Dalkon Shield intrauterine device. *In re A.H. Robins*, 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *see* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 618 n.4 (1992) ("*Vairo*"). The *A.H. Robins* plan, like the *Johns-Manville* one, provided claimants with a number of options to seek compensation for their injuries, including (i) "instant settlement offers," in connection with which a claimant would receive a token cash sum ($725) in exchange for a release of claims against the debtor; and (ii)accelerated binding arbitration to those claimants willing to limit their maximum recovery. *See Vairo*, 61 Fordham L. Rev. at 634, 645.

Finally, mediation has often been used address and resolve single creditor claims.[27] For example, in the *Sacred Heart Hospital* case,[28] mediation was used to resolve a $7.3 million priority tax claim based upon unemployment compensation payments made to former employees of the debtor. The debtors objected to the claim, asserting that the proper claim amount was $2.4 million and the claim was not a tax claim entitled to priority. Thereafter, the parties requested that the court appoint a mediator.[29] Within ten weeks, the mediator had narrowed the issues and that the parties had agreed to fix a claim at $2.5 million. The issue regarding priority had not been settled and required a decision by the court based upon Pennsylvania tax law. The court stated that, while such a hearing was necessary, it was quite brief, and the mediation was a success.[30]

As the foregoing account of the early use of ADR by U.S. bankruptcy courts shows, the advocates of ADR made great strides in fostering its usage in insolvency matters during the 1990s. However, with the notable exceptions of the *Olympia & York* and *Maxwell Communication* cases, the resulting uses of ADR related primarily to domestic disputes, largely because the debtors at issue more often than not had domestic and not international footprints. A clear set of precedents was established for the use of ADR with respect to any matter, regardless of its scope or domestic/transnational character, but the widespread use of ADR with respect to transnational insolvency disputes would have to await the coming of chapter 11 cases that were indisputably transnational in scope and character.

B. Developments in Large Cases Over Past Decade

Building on the above-enumerated precedents from the first decade of insolvency-related ADR, bankruptcy courts in large cases over the past decade have made ever more frequent use of ADR to address a similar array of issues. Indeed, as the chart annexed hereto – detailing the use (or non-use) of ADR in 70 cases (the "Case Study") – evidences, ADR, of one form or another, has been ordered or agreed to in a substantial percentage (60%) of chapter 11 cases relating to debtors with assets in excess of $1 billion in the years between 2000 and 2011. Given the size of such cases, the parties and issues involved have been, by definition, broader and, by force of geographical circumstance, more transnational in scope. In response, courts have grown more expansive and nuanced in their use of ADR to efficiently address difficult issues that would otherwise have consumed vast quantities of judicial resources and time.

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27 *See Carabetta Enters. v. City of Ashbury Park (In re Carabetta Enters., Inc.),* No. 92- 51917, Adv. Pro. No. 93-5267 (Bankr. D. Conn. Mar. 19, 1995) (contract dispute regarding rights to develop property referred to mediation); *In re Kovalchick*, 175 B.R. 863, 870 (Bankr. E.D. Pa. 1994) (indicating that dispute between debtor and secured creditor sent to mediation); *In re Salant Corp.*, No. 90-B-12037 (Bankr. S.D.N.Y.) (authorizing retention of mediator to mediate a single $1.7 million union claim); *In re MCorp Financial*, Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11, at 7 (Bankr. S.D. Tex. 1989) (referring two disputes regarding single-creditor claims over $50 million to mediation).

28 *See In re Sacred Heart Hospital of Norristown*, 190 B.R. 38 (Bankr. E.D. Penn. Dec. 20, 1995).

29 *Id.* at 39.

30 *Id.* at 39-40.

The categories of ADR utilized have not changed significantly: the use of examiners or mediators to address plan impasses remains the most challenging use to which ADR has been put, with mediation of claims disputes relating to claims of similar character the most frequently invoked use of ADR. However, given the general acceptance of ADR techniques, courts have become more inclined to use ADR on multiple levels in large chapter 11 cases, combining, for example, a standalone mediation on plan issues with a broad-based claims mediation process in a single case. The impetus for putting in place ADR programs in new large cases is no longer merely speculative (*i.e.*, predicated on theoretical assumptions about likely benefit), but based on proven results in other large cases.

Given the limited scope of this article, it is not possible to address the uses to which ADR has been put in all of the cases summarized in the Case Study. However, a number of large chapter 11 cases – all well known to the restructuring community and discussed in detail below – provide a helpful overview of the emerging use of ADR in the transnational context.

1. *Enron: Examiner as Plan Facilitator and Derivatives Mediation*

The *Enron* case offers an example of the use of ADR that bridges the gap between the pioneering days of the 1990s and more recent trends in chapter 11 mediation. It involved both the appointment of an examiner, whose role was gradually broadened to that of a "plan facilitator" directed to mediate plan disputes among a number of domestic and foreign affiliates,[31] and a wide-ranging claims mediation process that has become the template for many subsequent claims mediation processes.

Enron filed for bankruptcy on December 2, 2001,[32] describing itself as "a holding company of subsidiaries . . . engaged in the worldwide management of energy assets . . ." with assets of $24 billion and liabilities of $13 billion.[33] One of those subsidiaries, wholly-owned Enron North America Corp. ("ENA"), ran a business focused on trading electric power and natural gas and developing power projects, and reported, on a standalone basis, assets of $13.7 billion and debt of $8.8 billion (plus off-balance sheet and contingent obligations). Shortly after filing, the debtors sought approval of debtor-in-possession (DIP) financing under a $1.5 billion revolver, which was approved and availability thereunder immediately reduced to approximately $275 million, so that

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[31] As set forth in the Case Study, examiners and mediators have been appointed for similar "plan facilitation" purposes in other recent chapter 11 cases. *See, e.g.*, *In re Dynergy, Inc.*, Case No. 11-38111 (Bankr. S.D.N.Y. Dec. 29, 2011); *In re Tribune Co.*, Case No. 08-13141(Bankr. D. Del. Sept. 1, 2010); *In re Tousa, Inc.*, Case No. 08-10928 (S.D. Fla. Aug. 27, 2010); *In re Circuit City Stores, Inc.*, Case No. 08-35953 (Bankr. E.D. Va. June 24, 2010); *In re Hawaiian Telecom*, Case No. 08-02005 (Bankr. D. Hawaii Oct. 13, 2009); *In re LandAmerica*, Case No. 08-35994 (E.D. Va. May 21, 2009); *In re Northwest Airlines Corp.*, Case No. 05-17930 (Bankr. S.D.N.Y Mar. 30, 2007).

[32] *In re Enron Corp., et al.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y.) (hereinafter, "Enron").

[33] *Enron* (No. 2867) (examiner interim cash management report), at 7 (quoting Petition, Ex. A, ¶ 3).

Enron's cash could be freed to repay intercompany liens held by ENA.[34] The debtors also negotiated a sale of ENA's profitable "wholesale trading business," approved over objections of ENA creditors.[35]

Simultaneously, the debtors sought authorization to continue use of their centralized cash management system, whereby funds in subsidiaries' accounts were transferred daily to an Enron concentration account.[36] The same ENA creditors that had objected to the wholesale trading business sale moved to remove ENA from Enron's cash management system, claiming ENA's cash flow (i) was sufficient to service its operations and (ii) once swept into Enron, was disbursed to other subsidiaries to ENA's detriment. The creditors' committee proposed that ENA receive a superpriority administrative expense claim and "junior lien" (subordinate to the DIP lenders) in the amount of any transfers, plus interest, with detailed recordkeeping. The bankruptcy court generally agreed, additionally imposing a temporary freeze on transfers of cash from ENA and Enron.[37]

Appointment of Examiner. Against this backdrop, the bankruptcy court appointed an examiner, Harrison J. Goldin, to investigate any issues engendered by ENA's participation in Enron's cash management system, including the extent to which Enron held assets that could repay ENA's "junior lien" and cash advances, and the allocation of ENA overhead costs.[38] The examiner was also tasked with participating in meetings of the joint debtor/creditor committee responsible for approving ENA expenditures and reporting any "improper" ENA expenditures.[39]

The examiner's role quickly expanded, such that, by May 2002, his duties included, among other things, investigating intercompany claims and transfers among Enron and various subsidiaries, including ENA, and reporting on methodologies for repaying intercompany advances and the effects of modifications to the debtors' DIP financing on ENA.[40] Reflecting these growing responsibilities, in April 2002, the bankruptcy court directed the examiner to "serve as a facilitator of a chapter 11 plan in

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34 *Enron* (No. 2867), at 9-11.

35 *Enron* (No. 2867), at 13-15. The trading business was said to have generated $2-3 billion in profits in the year preceding Enron's bankruptcy filing. *Id.* at 13. Objectors argued that the sale was not beneficial to ENA because ENA was to receive no up-front payment, the profit-share to be escrowed for DIP lenders and ENA creditors was speculative, and Enron traders joining the buyer had incentive to use their knowledge of ENA trading positions to their advantage and ENA's detriment. *Id.* at 15.

36 *Enron* (No. 2867), at 11-13. Funds swept into the concentration account were booked as accounts payable due from Enron to the respective subsidiary, with offsets for various overhead expenses paid by Enron. *Id.*

37 *Enron* (No. 2867), at 15-25.

38 *Enron* (No. 2867), at 26-27. Overhead costs included the use of intellectual property. *Id.* at 29.

39 *Enron* (No. 2867), at 2.

40 *Enron* (No. 5415), at 2-3 (examiner report re status and exclusivity).

the ENA chapter 11 case" and file a report and recommendation regarding the same and any further extension of ENA's exclusive filing period.[41]

Embracing this broader mandate, the examiner embarked upon an ambitious plan of action: (i) participating in numerous meetings and calls with ENA constituents to develop a list of issues and promote open dialogue; (ii) preparing a comprehensive outline of issues and meeting with groups to narrow the issues and begin the negotiating process; and (iii) urging the ENA constituents to form a subcommittee to more effectively collaborate with the examiner in the formulation and negotiation of an ENA plan of reorganization.

As negotiations progressed, the debtors and creditors' committee shifted their focus from developing a separate ENA plan to formulating a joint plan for all debtors based upon a global resolution of all relevant issues, with different recoveries for creditors of different debtors.[42] Noting that the development was to be applauded, and seeking to encourage the acceleration of the plan process for all debtors, the examiner offered to assist on this still broader front.[43] In the ensuing months, the examiner (i) encouraged the formation of a working group of key affiliate representatives to promote the exchange of information, including confidential information, in connection with the formulation of a joint plan; and (ii) facilitated meetings among that working group, the debtors, and other key constituents.[44]

A global compromise was reached in July 2003, and announced jointly by the examiner, debtors and creditors' committee. The parties' progress and, ultimately, the compromise, was reflected in five successive iterations of a joint chapter 11 plan. In the "laborious" negotiations leading to the global compromise, the examiner emphasized issues including substantive consolidation; inter-debtor transactions in which the debtors' model assumed certain assets belonged to Enron and not ENA; the validity of certain inter-debtor accounting practices; the diminution of cash available to ENA in a joint framework; and ENA governance.[45] Still further negotiations and issues encompassed the treatment of guaranty claims, a litigation trust, and overall corporate governance. At the end of the day, the examiner was able to fully carry out his "plan facilitation" mandate, and assist the key parties in interest in successfully addressing all material issues relating to the ultimately confirmed *Enron* chapter 11 plan.[46]

Mediation of Trading Cases. At the same time that the Enron examiner's plan "facilitation role" was playing out, the *Enron* court initiated, *sua sponte*, a mediation

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41 *Enron* (No. 5415), at 3 (citing order dated April 24, 2002). ENA received a shorter extension than other subsidiaries. *Id.*

42 *Enron* (No. 7539), at 6.

43 *Enron* (No. 7539), at 7.

44 *Enron* (No. 9181), at 5-7.

45 *Enron* (No. 15193), at 5-6.

46 *Enron* (No. 15193), at 8-9.

process with respect to a group of "trading claims" involving hundreds of millions of dollars in value. Judge Arthur Gonzalez appointed his Southern District of New York colleague, Judge Allan L. Gropper, as a mediator with respect to all adversary proceedings involving wholesale or retail trading issues and, in the process, conferred on him, "the broadest possible discretion as mediator."[47] The commitment of the *Enron* court to the mediation process, and the skills and gravitas of the mediator, ultimately led to an array of settlements, pursuant to which complex derivative claims that could have consumed years of litigation were settled expeditiously on terms that were generally favorable to the *Enron* debtors and their estates. This template for mediation of complex claim dispute has been utilized in a number of subsequent cases, including, most notably, the *Lehman Brothers* case.[48]

It is apparent that, in both situations, the examiner/mediator's role as a neutral, with *effectively enhanced powers*, was important and beneficial in reconciling the diverse interests of multiple creditors, including foreign creditors, and the debtor entities that were not necessarily similarly situated. Notable advantages of using an examiner for this purpose included (i) independent court authority to investigate facts relevant to mediation mandate; (ii) full recourse to, and standing, with, the bankruptcy court in the event of procedural disputes; and (iii) ready access, through the examiner's subpoena power, to critical documents and analysis. Such advantages better equipped and positioned the examiner to quickly gain (with the assistance of teams of professionals) an in-depth understanding of the issues; and (ii) the power to both make recommendations regarding settlement options, and to be persuasive in doing so.[49] The use of sitting judges (such as Judge Gropper) offered similar advantages. While the potentially coercive effects of this practice have sometimes been criticized,[50] if such appointment is accompanied by a

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47 *Enron* (No. 9533), at 1.

48 As set forth in the Case Study, other recent cases have adopted *Enron*-like ADR processes with respect to claims of a particular type or amount. *See, e.g., In re LandAmerica Financial Group, Inc., et al.*, Case No. 08-35994 (Bankr. E.D. Va. Dec. 1, 2011) (No. 4734); *In re Circuit City Stores, Inc., et al.*, Case No. 08-35953 (Bankr. E.D. Va. Mar. 9, 2011) (No. 10107); *In re Motors Liquidation Company, et al., f/k/a General Motors Corp., et al.*, 09-50026 (Bankr. S.D.N.Y. Oct. 25, 2010) (No. 7558); *In re Tousa, Inc., et al.*, Case No. 08-10928 (S.D. Fla. Jan. 15, 2010) (No. 3509); *In re Pilgrim's Pride Corporation, et al.*, Case No. 08-45664 (Bankr. N.D. Tex. Apr. 9, 2009) (No. 1435); In *re WCI Communities, Inc., et al.*, Case No. 08-11643 (Bankr. D. Del. Feb. 24, 2009) (No. 1230); *In re Northwest Airlines Corporation, et al.*, Case No. 05-17930 (Bankr. S.D.N.Y. Dec. 14, 2006) (No. 4224); *In re Calpine Corporation, et al.*, Case No. 05-60200 (Bankr. S.D.N.Y. Aug. 15, 2006) (No. 2469).

49 The use of an examiner for "plan facilitation" or any other ADR-related purpose has been criticized by certain commentators. *See Mabey*, 46 S.C. L.Rev. at 1312 ("The use of an examiner as mediator should, however, be recognized for its limitations, including the accompanying threat of informal sanctions.")

50 The use of a sitting judge as a mediator can raise, even more starkly, the "informal sanctions" issue, which arises out of "the unspoken implication that the a court may be inclined to rule against a party on other issues," in the current or a future case, "because of that parties [*sic*] unwillingness to engage in ADR." *Mabey*, 46 S.C. L. REV. at 1304 n. 166; *id*. at 1303-04 ("The use of settlement judges who sit in the same district as the trial judge may prompt the parties to the mediation to consider its impact on their appearances before the settlement judge in other cases.").

detailed set of mediation procedures relating to a single class of claims, a level playing field can be maintained while the likelihood of successful resolution is increased.[51] For similar reasons, foreign parties in interest, who are generally leery of ADR options, may be more likely to engage in the ADR process if it is coordinated by a neutral party with either judicial credentials or a judicial imprimatur.

In light of the *Enron* experience, both examiners and mediators that are sitting judges appear well-suited to act in neutral capacities in future cases that are transnational in scope and involve highly complex and case-determinative issues. Indeed, the *Enron* case was likely the inspiration for the recent direction to the examiner appointed in the *Dynegy* case, to "make reasonable efforts to facilitate discussions among parties in interest regarding issues of contention in the Debtors' cases (including with respect to plan negotiations) [and to] act as mediator between or among parties in interest to the extent the examiner determines mediation may be beneficial to the progress of these cases."[52]

2. *Lehman Brothers and Derivatives Mediation*

The lessons learned in *Enron* regarding the benefits of mediation on multiple levels of large chapter 11 cases were put very effectively into practice in the more recent *Lehman Brothers* case. Although plan issues in that case were ultimately resolved through global negotiations outside of any ADR forum, the use of ADR in the Lehman Brothers chapter 11 cases is a prime example of how most of the claims side of a case can be directed to mediation, thereby enabling the Court to devote its time and resources to case-dispositive plan and litigation issues.

Infamously the largest bankruptcy in history, insolvency proceedings relating to Lehman Brothers Holdings Inc., *et al.*, spanned sixteen nations, involved $639 billion in assets, $613 billion in liabilities, and resulted in more 66,000 claims.[53] Derivative contracts alone numbered over 6,000, involving more than 900,000 underlying transactions.[54] ADR was used in various aspects of the case, most notably in the form of a structured mediation process targeted at the non-judicial resolution of the thousands of derivatives contract-related termination disputes and claims. In this connection, the

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51 *See* Robert J. Keenan, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. Cal. L. Rev. 1449, 1497 (1990) (arguing that sophisticated attorneys can provide procedural safeguards against indirect judicial coercion).

52 *In re Dynergy Holdings, LLC*, Case No. 11-38111 (Bankr. S.D.N.Y. Dec. 29, 2011) (No. 276) at 7.

53 *In re Lehman Brothers Holdings Inc., et al.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y.) (hereinafter "Lehman") (Nos. 2 & 7581); International Protocol Proposal, Presentation to United States Bankruptcy Court for the Southern District of New York by Alvarez & Marsal North America, LLC, at 3 (Feb. 11, 2009).

54 *Lehman* (No. 4903), at 12 (debtors' response in support of Derivatives ADR Procedures) ("If ever a case existed where a category of contract disputes would have a significant impact on the administration of a bankruptcy case, it is these cases with relation to these Derivatives Contracts.").

bankruptcy court entered orders establishing ADR procedures for the mediation of (i) derivatives-related claims asserted by counterparties against the debtors (the "Claims ADR Procedures"); as well as (ii) the affirmative claims of the debtors based upon (x) derivative contracts (the "Derivatives ADR Procedures"); (y) derivative contracts with special purpose vehicle counterparties (the "SPV ADR Procedures"); and (z) derivative contracts valued at below $1 million (the "Tier 2 ADR Procedures").[55]

In retrospect, employing mediation for purposes of claims management provided an extra-judicial forum for resolution of many of the more difficult negotiations the Lehman debtors faced during their chapter 11 cases. In authorizing the Derivatives ADR Procedures, the court found that substantial value could be recovered, and judicial efficiency promoted, if expedient resolution of such matters was achieved without trial.[56] To date, mediations regarding affirmative claims of the debtors have resulted in recoveries of over $1 billion for the estates,[57] and mediations of claims against the estates may ultimately result in the mitigation of an even greater amount of claims.

Establishing the procedures that have governed these processes, however, engendered some controversy and skepticism on the part of various counterparties and raised a number of transnational issues. In connection with seeking approval for the first set of Derivatives ADR Procedures, for example, parties raised issues regarding jurisdiction, scope, sanctions, venue, and the standing of the creditors' committee to participate in the ADR process.[58]

With respect to jurisdiction, the objectors argued that the bankruptcy court lacked personal jurisdiction and the power to order mediation with respect to parties located outside of the United States that had not filed proofs of claim. With the objective of implementing generally applicable procedures, the debtors' sole response was that such jurisdictional issues were not yet ripe for adjudication: (i) nothing in the proposed ADR procedures prohibited such counterparties from ignoring an ADR demand, when and if received (and bearing the risks of such non-compliance); (ii) seeking to resist such a demand on jurisdictional grounds at the time of receipt; and/or (iii) participating in good

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55 *Lehman* (Nos. 5207, 8474, 11649 & 14789). The Tier 2 ADR Procedures involved streamlined procedures based upon the Derivatives ADR procedures. *See Id.* (No. 11649).

56 *Lehman* (No. 5207), at 1-2.

57 *Lehman* (No. 26369), at 1-2 (March 2012 status report noting settlements had been achieved in 187 ADR matters involving 209 counterparties, with debtors to receive an aggregate of $1,072,457,507).

58 *Lehman* (No. 4903) (summarizing and responding to objections). Similar issues were raised, and adjustments made, in advance of the bankruptcy court's authorization of the Claims ADR Procedures. *See Lehman* (No. 8277) (summarizing and responding to objections; providing revised proposed order). With respect to creditors' committee participation, as the debtors noted, they worked closely with the creditors' committee to create the Derivatives ADR Procedures, which accounted for the creditors' committee's consent rights to settlements and provided for appropriate and efficient oversight, including via the creditors' committee's participation in the mediations. *Lehman*, (No. 4903) at 24; *Lehman* (No. 4911) (statement of creditors' committee in support of Derivatives ADR).

faith in the Derivatives ADR process, fully aware that the ADR process was non-binding.[59] In the end, the Lehman court approved the Derivatives ADR protocol over the objections of such parties based, in part, upon the inclusion in the order of language affirmatively assuring such counterparties that their rights would not be compromised by good faith participation in the ADR process should no settlement be reached.[60]

With respect to scope, the objectors argued that "a person or entity who exercised or failed to exercise duties in relation to" a derivatives contract (*i.e.*, a trustee that was not the real party in interest) should not be considered a "derivatives counterparty" for purposes of mediation. While mediations to settle contract disputes typically include the contractual counterparties, in the case of derivative contracts, the counterparties are, at times, shells (the "SPVs") that lack employees and act through a trustee, collateral agent or security holders. Thus, participation of the counterparties' agents (*i.e.*, a trustee, collateral agent or security holders agents) was generally required to commence and effectively conduct mediations. [61]

The Derivatives ADR Procedures, as originally adopted, included notice provisions that enabled the debtors to seek the assistance of such trustees or collateral agents in acting on behalf of the SPVs with respect to the proposed mediations. However, it was the *Lehman* debtors' experience that many of these SPVs ignored their ADR demands and were completely unresponsive to further inquiries. Complicating this situation further – or perhaps explaining it in part – was the fact that many of the SPVs were foreign entities with little incentive to engage with the debtors. Moreover, many of the trustees did not actively participate in the procedures under the existing Derivatives ADR Procedures, stating that they lacked authority under governing indentures or trust agreements to act in this way on behalf of the SPVs and their beneficial holders.[62]

The debtors addressed this quandary by seeking authorization for the SPV ADR Procedures. These supplemental procedures required mandatory participation by the SPVs, beginning with SPVs' written designation, due within sixty days of an ADR demand, of parties with authority to negotiate all disputed amounts on behalf of their beneficial holders. Failure to identify such an authorized designee could be grounds for sanctions at the court's discretion.[63]

The first public test of the SPV ADR Procedures is reflected in the *Lehman* debtors' November 2011 motion for sanctions against an SPV counterparty that had refused to designate a representative and participate in the mediation process.[64] The counterparty at issue was based in Indonesia and had also repeatedly violated the

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59 *Lehman* (No. 4903). at 13.

60 *Id.* at Ex. C (comparison provided of final and original proposed orders).

61 *Id.* at 16-17 & Ex. C.

62 *Lehman* (No. 13009), at 6.

63 *Id.* at 5, 8.

64 *Lehman* (No. 22817).

automatic stay by commencing a lawsuit and taking other actions to enforce its claims against Lehman in Indonesia. The counterparty had ignored repeated attempts by the debtors to engage it in a dialogue, and the likelihood of obtaining effective jurisdiction appeared low. All the foregoing notwithstanding, the *Lehman* debtors sought sanctions under the SPV ADR Procedures order because to have allowed one counterparty to evade participation in the SPV ADR process would have been to invite numerous other SPVs to act accordingly, thereby delaying the resolution of the hundreds of outstanding disputes with SPVs.[65] In the end, the threat of sanctions worked. Without any admission of wrongdoing, and to its credit, the errant counterparty ultimately stipulated that it had settlement authority and would participate in good faith in the mediation process.[66]

3. *Nortel and Intercompany Claims Mediation*

Whereas the *Lehman Brothers* case put into practice the lessons learned in *Enron* on the claims side, the *Nortel* case offers a recent example of an effort (not entirely successful to date) to apply its "plan facilitation" lessons. Asset value was liquidated relatively quickly in *Nortel*, but agreement on how to allocate the resulting proceeds among constituencies located across several jurisdictions has proven elusive. Mediation has been the tool chosen to resolve the complex disputes standing in the way of consensus. If such consensus is ever achieved, the *Nortel* case will likely be viewed as the most successful effort to date of using ADR to address and resolve issues that are truly transnational in scope.

At its height in 2000, Nortel, a wireless telecommunications developer and servicer, reported approximately $30 billion of annual revenue and employed nearly 93,000 people worldwide. The liquidity crisis that precipitated the January 14, 2009 Canadian and U.S. bankruptcy filings of Nortel Networks, Inc., *et al.*,[67] resulted from the company's highly leveraged debt position, in combination with competition for telecom innovation, high operating expenses, decreasing demand, and the deterioration of the global economy.[68]

Soon after its filing, Nortel began a comprehensive liquidation, selling business segments and its book of some 6,000 patents for telecommunications, internet, wireless, and other technology. By June 2009, the debtors had entered into a settlement agreement (the Interim Funding and Settlement Agreement, or "IFSA"), as among its Canadian, U.S., and other foreign subsidiaries (from Europe, the Middle East and Africa, known as the "EMEA" debtors). The IFSA was intended to resolve, on an interim basis, issues relating to allocation of the sales proceeds, as well as postpetition cross-affiliate claims.

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65 *Id.* at 1-2 & 18-19.

66 *See Lehman* (No. 23690).

67 *In re Nortel Networks Inc., et al.*, Case No. 09-10138 (JKG) (Bankr. D. Del.) (hereinafter "Nortel").

68 *Nortel* (No. 7403), at 3-4.

The sales were exceedingly successful—while early projections valued the debtors' assets at around $3.7 billion, sales proceeds ultimately totaled $9 billion.[69]

Following their early success in negotiating the IFSA, however, the various debtor groups, the creditors' committee and the *ad hoc* group of bondholders were unable to reach a similar agreement as to the final allocations of the sales proceeds or intercompany claims. The parties attempted to reach consensus from June 2009 to May 2010, meeting twice for face-to-face negotiations that highlighted an extreme divergence of views as to the proper scope of allocation procedures. From May 2010 forward, the parties shifted focus to comprehensive settlement discussions on allocation, voluntarily exchanging 42,000 documents and holding further in-person meetings in August and September 2010.[70]

The parties then engaged Hon. Layne Phillips, a retired U.S. federal judge, to conduct formal non-binding mediation sessions. The parties exchanged briefs, and 125 representatives attended mediation over a five-day period in November 2010, followed by further sessions with 115 representatives over a three-day period in April 2011. Although this initial round of mediation ended without a complete resolution on allocation, the parties succeeded in narrowing the related issues substantially.[71]

In April 2011, the U.S. and Canadian debtors and the creditors' committee, arguing that the issues had been narrowed sufficiently to permit judicial resolution therof, sought to have the U.S. and Canadian courts, in joint session, establish an "Allocation Protocol" to make streamlined and expedited determinations of the remaining issues.[72] The EMEA debtors objected, however, arguing that the parties had agreed to submit any remaining allocation issues for decision in a "private, transnational arbitration."[73] The U.S. and Canadian debtors disagreed.[74]

In June 2011, the Canadian and U.S. courts stated that the dispute regarding whether the courts or arbitration should decide the remaining allocation issues would necessitate careful drafting of separate rulings, with the potential for delay of the allocation proceedings and with risk of inconsistent decisions and appeals. Thus, while the courts' decisions were pending, they directed the parties to further mediation. The

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69 *Nortel* (No. 7403), at 7 (noting $9 billion sales outcome); *Nortel* (No. 5322) (Hr'g Tr. at 63:3-11) (noting $3.7 billion projection, including patent sale); *see also Nortel* (No. 5935) (order approving sale of patents).

70 *Nortel* (No. 5307), at 10-11.

71 *Nortel* (No. 5307), at 10-11, 19-20. Mediation briefs and specifications of allocation issues, resolved and unresolved, remain confidential.

72 *Nortel* (No. 5307), at 1-2.

73 *Nortel* (No. 5531), at 2.

74 *Nortel* (No. 5571), at 2-5.

courts also suggested that, if the parties agreed, the mediator should be given expanded authority to serve as an arbitrator.[75]

The parties have since selected a mediator, Hon. Warren Winkler, the Chief Justice of Ontario. On April 24, 2012, the mediator met with parties to outline the mediation process going forward, a process he referred to as "one of the most complex trans-national legal proceedings in history."[76] Notably, the mediator warned that the alternative to a mediated outcome would be a lengthy litigation process, which would deplete much of the funds now available to creditors. Said the mediator, "This would be a catastrophic outcome for some, and unsatisfactory for most, of those affected by this case."[77] The mediator stated that he would not repeat steps that had not yielded a resolution, such as bringing parties together for extended mediation sessions, instead envisioning a process wherein he would meet with the various parties individually in an effort to find common ground.[78] Thereafter, he might call for broader meetings of multiple parties if he determines there may be alignments of interests and the foundation for a possible agreement.[79]

4. *Washington Mutual Plan Mediation*

Finally, the *Washington Mutual* case provides a compelling example of ADR at its best – a case where all of the hot-button issues in a chapter 11 case, both plan-related and otherwise, were presented, somewhat unceremoniously, to a mediator, and global consensus nonetheless ensued.

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75 *Nortel* (No. 5822), at 2-3. Concurrently, the U.S. bankruptcy court considered amended claims of the EMEA debtors, filed in June 2011 under U.S., English, French and Irish law, which alleged that the U.S. and Canadian debtors jointly controlled Nortel's operations and allowed the siphoning of funds from the EMEA affiliates through a complex series of transactions. In March 2012, the U.S. bankruptcy court dismissed the EMEA debtors' fiduciary duties claims but did not dismiss certain secondary claims. The court noted that the parties' dispute would now move to mediation alongside the allocation issues, and that the court was "hopeful that for the sake of the parties and the estates of both the U.S. Debtors and the Canadian debtors, settlement can be attained." *Nortel* (No. 7403), at 8-9 & 61.

76 *The Nortel Mediation: Opening Remarks of Chief Justice Warren K. Winkler*, http://nortelmediation.com/li/pdf/Nortel_Mediation_Opening_Remarks_of_the_Mediator_April_24_2012.pdf (Apr. 24, 2012), at 2.

77 *Id.* at 6.

78 *Id.* at 9.

79 *Id*. Concurrently with this mediation, the parties will separately mediate a dispute concerning the termination of Nortel's pension and long-term disability plans. Unable to reach a consensual termination agreement with the committees appointed to represent the plans' participants, Nortel is seeking to enlist the aid of a mediator in setting forth terms to timely terminate the benefits payments, which are currently costing the liquidating estate nearly $2 million per month. *See Nortel* (No. 7463), at 4-9. This dispute, however, is expected to be easier to resolve and not to interfere with the allocation and intercompany claims mediation. Said a representative of the committee of Nortel retirees, "The likelihood is that this is going to be done before the 'Queen Mother' of all mediations." Steven Church, *Nortel Bankruptcy Judge Sends Pension Dispute to Mediation*, BLOOMBERG (Apr. 18, 2012), http://www.bloomberg.com/news/2012-04-18/nortel-bankruptcy-judge-sends-pension-dispute-to-mediation-1-.html.

The use of mediation in the bankruptcy cases of Washington Mutual, *et al.*,[80] entailed an effort to resolve a variety of litigated issues that threatened the confirmation of a chapter 11 plan. When Washington Mutual Inc. ("WaMu") filed for chapter 11 protection on September 26, 2008, it was the sixth-largest bank in the United States, listing $32 billion in assets and over $8 billion in liabilities.[81] Just prior to WaMu's petition date, on September 25, 2008, the Office of Thrift Supervision had seized WaMu's banking subsidiary, Washington Mutual Bank, and sold its assets to J.P. Morgan Chase ("JPMC") for $1.88 billion, plus the assumption of all of Washington Mutual Bank's deposit liabilities.[82]

Within months of WaMu's petition date, multiple litigation actions were instituted among the Debtors, the Federal Deposit Insurance Corporation (the "FDIC"), JPMC and numerous holders of the WaMu debtors' various equity and debt securities.[83] On May 21, 2010, and, as modified, on October 6, 2010, the WaMu debtors, JPMC, the FDIC, the official committee of unsecured creditors, and certain noteholders of the WaMu debtors (the "Settlement Noteholders") announced a Global Settlement.[84] The Global Settlement provided for the compromise and release of numerous litigation claims as well as the resolution of numerous proofs of claim.[85] The WaMu debtors' Sixth Amended Joint Plan (the "Original Plan") incorporated the Global Settlement, and was filed on October 6, 2010.[86]

Numerous parties objected to the Original Plan and the Global Settlement incorporated therein, including the official committee of equity security holders, holders of certain preferred securities issued by the debtors, the United States Trustee, and several noteholders and individual creditors and equity holders.[87] These plan objectors argued, among other things, that (i) the Global Settlement was not fair and equitable, (ii) the releases granted in the Original Plan were overly broad and unnecessary, and (iii) the Original Plan failed to meet the "best interest of creditors" test because it paid postpetition interest at the contract rate, rather than the Federal Judgment Rate.[88] Although the bankruptcy court found that the Global Settlement underlying the Original

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80 *In re Washington Mutual, Inc., et al.*, Case No. 08-12229 (MFW) (Bankr. D. Del.) (hereinafter "WaMu").

81 *WaMu* (No. 1), at Ex. A.

82 *WaMu* (No. 5549), at 2.

83 *See id.* at 3-7.

84 *Id.* at 7.

85 *Id.* at 9.

86 *Id.* at 7.

87 *WaMu* (No. 6528), at 2.

88 *Id.* at 18, 60, 87.

Plan was reasonable, it nevertheless denied confirmation of the Original Plan due to the plan objectors' other arguments.[89]

In response to the order denying confirmation of the Original Plan, on February 7, 2011, the WaMu debtors filed the Modified Sixth Amended Plan (the "Modified Plan").[90] The Modified Plan, in an attempt to address the concerns articulated in Judge Walrath's opinion denying confirmation of the Original Plan, sought, among other things, to limit the release provisions the court found objectionable, provided that late-filed claims would be paid with post-petition interest, and provided for post-petition interest payment at the contract rate.[91] Nevertheless, the bankruptcy court denied confirmation of the Modified Plan in an opinion dated September 13, 2011.[92] In denying the Modified Plan, the bankruptcy court held that (i) only the Federal Judgment Rate, and not the contract rate, could be applied for postpetition interest purposes,[93] and (ii) concerns regarding the Settlement Noteholders' use of non-public information created colorable claims of insider trading that justified granting the equity committee's motion for standing to seek equitable subordinate such claims.[94]

In the order denying confirmation of the Modified Plan, the bankruptcy court ordered that the parties enter mediation in an effort to resolve plan issues and the equity committee's claim for equitable subordination.[95] As with other issues raised in WaMu's bankruptcy cases, the particulars of the mediation process engendered much controversy. For example, when the WaMu debtors filed a statement on the bankruptcy court's docket arguing that the mediation must be limited to the legal issues contained within the equity committee's standing motion (*i.e.*, equitable disallowance of the Settlement Noteholders' claims based on insider trading allegations), the equity committee, certain holders of the debtors' trust preferred securities argued that myriad open issues remained and that mediation must include plan issues.[96] Following a hearing on the scope of mediation, Judge Walrath indicated that she did not want to entertain "another contested confirmation hearing without trying to have this mediated and resolv[e] all issues."[97] Accordingly, the bankruptcy court appointed Judge Raymond Lyons, a bankruptcy judge for the District of New Jersey, as mediator regarding "(a) the resolution of any impediments to confirmation of the Modified Plan and (b) the [equity committee] standing issue."[98]

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89 *Id.* at 109.

90 *WaMu* (No. 6697), at 1.

91 *Id.* at 8-11.

92 *WaMu* (No. 8612).

93 *Id.* at 77-78.

94 *Id.* at 137.

95 *Id.* at 138.

96 *WaMu* (No. 8737); *WaMu* (No. 8739), at 2-4.

97 *WaMu* (No. 8774) (Hr'g Tr. at 83:21-23).

98 *WaMu* (No. 8780) at 1-2.

Despite the arguments raised regarding the prospect of a full plan mediation, by all accounts the plan mediation itself resulted in a confirmable plan of reorganization. Indeed, news accounts leading up to the introduction of the WaMu debtors' Seventh Amended Joint Plan (the "Seventh Plan") suggested that the mediator was effective in joining parties into a prospective settlement of plan issues.[99] The resulting, mediated Seventh Plan called for, among other concessions, the noteholders to contribute $75 million to the reorganized debtor entity in exchange for the releases granted to them.[100] The Seventh Plan was confirmed on February 24, 2012.[101]

C. Future of Transnational Insolvency ADR

In light of the growing prevalence of ADR in large transnational cases, as evidenced by the precedents analyzed in the Case Study, and the results achieved in the ADR efforts discussed at greater length herein, the future of transnational insolvency ADR appears bright. Make no mistake about it, the full potential of ADR on the transnational front has yet to be realized. However, templates have been established that should accelerate the use of ADR in large chapter 11 case to come.

Indeed, it is hard to imagine that any large chapter 11 case in the future will reach closure without the establishment of a full array of ADR protocols relating to claims matters. The time of bankruptcy judges is just too precious to squander on fact-intensive, often repetitive debates about claim validity that can be better handled in the ADR context. But the final frontier is the world of a transnational debtor's foreign affiliates and their often independently appointed administrators. Until it becomes commonplace for such foreign representatives (and their creditor constituencies) to participate willingly in ADR proceedings, core plan and allocation issues are likely to remain within the purview of the bankruptcy court and not an examiner/mediator appointed to address impasses with respect to such issues. That said, *Nortel*, following in the footsteps of *Enron*, and *Maxwell Communications* and *Olympia & York* before that, has created a persuasive precedent for seeking to resolve transnational intercompany value allocation and governance disputes through ADR.

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99 *See, e.g.*, Stephen Church, *WaMu Shareholders Support $7B Settlement Plan*, BLOOMBERG (Dec. 13, 2011), http://www.bloomberg.com/news/2011-12-13/washington-mutual-settles-shareholder-dispute-preventing-bankruptcy-exit.html.

100 *WaMu* (No. 9179), at 6.

101 *WaMu* (No. 9759).

USE OF ADR IN LARGEST CHAPTER 11 CASES
2000-2011

	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
1	Lehman Brothers Holdings Inc.	2008	691	SDNY	08-13555	Yes	Claim Specific	Claim Specific: ADR procedures adopted with respect to (i) debtors' affirmative claims based upon derivatives contracts; (ii) the same, with SPV counterparties, (iii) the same, where the settlement demand was less than $1 million; and (iv) claims of creditors against debtors. ***See* Discussion in text of article *supra*.**
2	Washington Mutual, Inc.	2008	328	DEL	08-12229	Yes	1. Case Dispositive 2. Claim Specific	1. Case Dispositive: Mediation ordered among all key constituencies with respect to plan confirmation issues, including potential equitable subordination of claims, validity of releases, and appropriate postpetition interest rate. ***See* Discussion in text of article *supra*.** 2. Claim Specific: Mediation ordered, *sua sponte* by court, with respect to disputed individual severance claim.
3	WorldCom, Inc.	2002	122	SDNY	02-13533	Yes	Major Creditor	Mediation ordered with respect to a variety of claim-related and plan compliance issues relating to several significant creditors.
4	General Motors	2009	91	SDNY	09-50026	Yes	Claim Specific	ADR procedures approved as to disputed litigation claims (in an amount of $500,000 or higher), providing for "Capping Procedures," pursuant to which claimant could voluntarily submit its claims for nonbinding mediation, followed by binding arbitration.
5	CIT	2009	80.4	SDNY	09-16565	Yes	Major Creditor	Motion to compel arbitration granted relating to tax sharing agreement with former affiliate; conflicting plan provisions deemed to subject Bankruptcy Code-related rights to arbitration.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
6	Enron Corp.	2001	78	SDNY	01-16034	Yes	1. Case Dispositive (Examiner/Plan Related) 2. Major Creditor 3. Claim Specific	1. Case Dispositive: Appointment of examiner with mandate that broadened over time to include "plan facilitation" responsibilities. **See Discussion in text of article *supra*.** 2. Major Creditor (a) Mediation ordered as to civil contempt suit related to court order approving sale of debtor assets. (b) Mediation between reorganized debtor and former law firm regarding malpractice claim. 3. Claim Specific (a) Mediation ordered as to claims asserted in two class action suits (securities litigation and employee benefits suit) (b) Mediation ordered as to certain debt declaratory judgment cases. (c) Mediation ordered as to certain "trading agreements" relating to derivatives contracts and the termination thereof. ***See* Discussion in text of article *supra*.**
7	Conseco, Inc.	2002	72	N.D. IL	02-49672	No	N/A	N/A
8	Pacific Gas & Electric Company	2001	43	N.D. Cal.	01-30923	Yes	Claim Specific	Claim Specific: Mediation ordered between debtor and public utility commission regarding order compelling debtor to implement servicing agreement with second governmental agency.
9	MF Global	2011	40.5	SDNY	11-15059	No	N/A	N/A
10	Chrysler	2009	39	SDNY	09-50002	No	N/A	N/A
11	Thornberg Mortgage	2009	36	D. Md.	09-17787	Yes	Major Creditor	Major Creditor: Arbitration ordered between debtor and insurer regarding extent of insurance coverage.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
12	Refco Inc.	2005	36	SDNY	05-60006	Yes	Major Creditor	Major Creditor: Post-Effective Date arbitration permitted to proceed between insurer and debtor relating to payment of defense costs under D&O policy.
13	Global Crossing, Ltd.	2002	35	SDNY	02-40188	Yes	1. Major Creditor 2. Major Creditor	1. Major Creditor: Arbitration permitted to proceed with respect to key vendor relating to contract dispute, where contract involved trans-Atlantic cables. 2. Major Creditor: Mediation ordered to resolve competing administrative expense claims.
14	IndyMac Bancorp, Inc.	2008	33	C.D. Cal.	08-21752	Yes	Major Creditor	Major Creditor: Mediation ordered between debtor and former directors and officers regarding entitlement to proceeds of D&O insurance policies.
15	UAL Corporation	2002	30	N.D. Ill	02-48191	Yes	1. Claim Specific	1. Claim Specific: ADR procedures, contemplating offer exchange process and mediation, with respect to preference actions, proposed but not approved by the UAL court. 2. Major Creditor: Mediation and/or arbitration ordered with respect to a variety of claims disputes with significant creditors.
16	General Growth Properties	2009	29.6	SDNY	09-11977	Yes	1. Major Creditor 2. Claim Specific	1. Major Creditor: Mediation ordered between debtor and parties to contingent stock agreement relating to valuation issues. 2. Claim Specific: ADR procedures, contemplating offer exchange process and mediation, approved with respect to all personal injury claims.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
17	Calpine Corporation	2005	29	SDNY	05-60200	Yes	1. Major Creditor 2. Major Creditor	1. Major Creditor: Mediation ordered between debtor and party to asset purchase agreement with respect to contractual dispute relating to asset purchase agreement. 2. Major Creditor: Mediation ordered between debtor and claimant regarding alleged post-Effective Date violation of plan injunction by continued prosecution of state law action against debtor.
18	Lyondell Chemical Company	2009	27	SDNY	09-10023	Yes	1. Major Creditor 2. Case Dispositive	1. Major Creditor: Mediation ordered between debtor and plaintiffs with respect to prepetition employment discrimination claims 2. Case Dispositive: Examiner appointed to investigate plan formulation process, including with respect to (i) selection of a sponsor for equity rights offering under their exit financing; (ii) necessity of new DIP financing; and (iii) proposed litigation reserve in plan. No plan facilitation powers granted, but findings influence plan process.
19	New Century Financial Corporation	2007	27	DEL	07-10416	No	N/A	N/A
20	Colonial BancGroup	2009	26	M.D. Ala.	09-32303	No	N/A	N/A
21	American Airline	2011	25	SDNY	11-15463	No	N/A	N/A
22	Adelphia Communications Corp.	2002	25	SDNY	02-41729	Yes	1. Major Creditor 2. Major Creditor 3. Major Creditor 4. Major Creditor	1. Major Creditor: Mediation ordered between debtor and alleged joint venture partner with respect to dispute concerning prepetition recapitalization agreement. 2. Major Creditor: Mediation ordered between debtor and significant vendor with respect to disputed claim. 3. Major Creditor: Mediation ordered between debtor and significant vendor with respect to disputed claim. 4. Major Creditor: Mediation ordered between debtor and secured lenders regarding lenders' entitlement to payment of "grid interest."

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
23	Delta Air Lines, Inc.	2005	24	SDNY	05-17923	Yes	Major Creditor	Binding arbitration implemented between debtor and airline pilots union with respect to section 1113 rejection of collective bargaining agreement motion.
24	Mirant Corporation	2003	22	N.D. Tex.	03-46590	Yes	1. Case Dispositive 2. Major Creditor 3. Major Creditor 4. Major Creditor 5. Major Creditor 6. Major Creditor	1. Case Dispositive: Examiner appointed with expansive powers relating to claims, postpetition transactions, and formulation of a plan. Examiner is to monitor plan negotiations and, if necessary, mediate disputes among key constituencies. 2. Major Creditor: Mediation ordered between debtor and significant vendor with respect to amount of administrative claim. 3. Major Creditor: Mediation ordered between debtor and alleged joint venture partner. 4. Major Creditor: Mediation ordered between debtor and counterparty to asset purchase agreement regarding pricing dispute. 5. Major Creditor: Mediation ordered between debtor and significant customer/vendor regarding claims objection. 6. Major Creditor: Mediation ordered between debtor and several state and county taxing authorities regarding property tax dispute.
25	Capmark Financial Group	2009	20.6	DEL	09-13684	No	N/A	N/A
26	NTL Incorporated	2002	20	SDNY	02-41316	No	N/A	N/A
27	American Home Mortgage Investment Corp.	2007	19	DEL	07-11047	Yes	Major Creditor	Mediation ordered with respect to dispute with secured lender regarding collateral securing warehouse line of credit.
28	Delphi Corporation	2005	18	SDNY	05-44481	Yes	Claim Specific	1. Claim Specific. Mediation, contemplating informal offer/counteroffer process and mandatory mediation, with respect to certain prepetition litigation claims, including automobile liability, general liability, products liability, and emissions claims. 2. Claim Specific. Mandatory mediation ordered as necessary precursor to estimation hearing with respect to all disputed claims.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
29	Reliance Group Holdings, Inc.	2001	17	SDNY	01-13404	No	N/A	N/A
30	Guaranty Financial	2009	16.8	N.D. Tex.	09-35582	No	N/A	N/A
31	BancUnited Financial	2009	15	S.D. Fla.	09-19940	Yes	Major Creditor	Mediation ordered to resolve disputes between debtors and FDIC in connection with information access agreement entered into to provide debtor holding company with access to documents under the control of the FDIC as a result of its seizure of debtor's subsidiary bank.
32	Northwest Airlines Corporation	2005	15	SDNY	05-17930	Yes	Claim Specific	ADR procedures approved for litigation largely focused on employment issues, but flexible enough for use with respect to any claims that would be time-consuming to litigate, as necessary. Objections to the motion to establish ADR procedures noted the international nature of the Debtors' business and the possible burden placed upon a dispersed creditor body to conduct arbitration in one location.
33	Yukos Oil Company	2004	14	S.D. Tex.	04-47742	Yes	Major Creditor	Arbitration with Russian Federation was sought, but case was dismissed before a determination on the issue was made
34	FINOVA Group, Inc.	2001	14	DEL	01-0697	Yes	Claim Specific	ADR procedures established, contemplating mandatory mediation, with respect to claims pending in MDL lawsuits.
35	Charter Communications	2009	13.8	SDNY	09-11435	Yes	Major Creditor	The debtor and a key counterparty agree, by so ordered stipulation, to submit a contract dispute for resolution by binding arbitration.
36	Fremont General Corporation	2008	13	C.D. Cal.	08-13421	Yes - Examiner	1. Case Dispositive 2. Major Creditor	1. Case Dispositive: Examiner appointed to investigate whether certain lenders offered debtor a discount in exchange for payment inside and outside a confirmed plan and whether debtor may have breached any fiduciary duties in forgoing such discount. 2. Major Creditor: Mediation ordered with respect to the payment of fees and reimbursement of expenses incurred by advisors to certain official and unofficial committees.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
37	Downey Financial Corp.	2008	13	DEL	08-13041	Yes	Claim Specific	Mediation consensually undertaken, and paid for by debtor's estate, between FDIC and former officers and directors regarding any claims FDIC may have against former directors and officers.
38	Tribune Company	2005	13	DEL	08-13141	Yes	1. Case Dispositive 2. Claim Specific	1. Case Dispositive: Mediation ordered for the purpose of "assisting the parties in resolving disputes in connection with the formulation and proposal of a confirmable plan of reorganization," including with respect to claims arising out of a prepetition LBO. 2. Claim Specific: Mediation ordered among relevant parties in interest, including the Department of Labor and the IRS, regarding a number of ERISA-related issues. 3. Claim Specific: Mediation ordered among relevant parties in interest regarding putative class proof of claims alleging FLSA minimum wage violations.
39	NRG Energy, Inc.	2003	12	SDNY	03-13024	Yes	Major Creditor Dispute	Appointment of examiner was also sought, but the motion was ultimately withdrawn. Arbitration of major creditor dispute granted on parties' joint motion.
40	Federal-Mogul Corporation	2001	12	DEL	01-10578	Yes	Case Dispositive	Mediation ordered between debtors and *ad hoc* committee of asbestos claimants in order to consensually address the asbestos-related issue that needed to be addressed for the debtors to consummate a plan of reorganization.
41	R.H. Donnelley	2010	11.8	DEL	09-11833	No	N/A	N/A
42	Dynegy	2011	10	SDNY	11-38111	Yes	Case Dispositive/Examiner (Plan Related)	Examiner permitted to conduct an unfettered investigation of debtors with respect to (i) the conduct of debtors in connection with the prepetition 2011 restructuring and reorganization of debtors and their non debtor affiliates (including, without limitation, pre-petition transactions), (ii) any possible fraudulent conveyances, and (iii) whether Dynegy Holdings was capable of confirming a chapter 11 plan. (emphasis added). ***See* Discussion in text of article *supra*.**

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
43	Nortel	2009	9	DEL	09-10138	Yes	Case Dispositive	Mediation ordered among all relevant parties with respect to an allocation protocol relating to the allocation, on a cross-border basis among various domestic and foreign affiliates, of the proceeds from various asset sale transactions. ***See* Discussion in text of article *supra*.**
44	Dana Corporation	2005	9	SDNY	06-10354	Yes	Claim Specific	1. Claim Specific: ADR procedures, contemplating an exchange of offers, mandatory mediation, and optional arbitration, established with respect to (a) claims arising out of commercial litigation; (b) state law tort claims, including personal injury and wrongful death claims; and (c) certain large-dollar or unliquidated vendor and supplier claims. 2. Major Creditor: Mediation ordered with major vendor relating to assumption of executory contract and allowance of administrative expense claim.
45	Lear Corp.	2009	6.9	SDNY	09-14326	No	N/A	N/A
46	HomeBanc	2007	6.8	DEL	07-11079	No	N/A	N/A
47	Delta Financial	2007	6.6	DEL	07-11880	No	N/A	N/A
48	SemGroup	2008	6.1	DEL	08-11525	No	N/A	N/A
49	Franklin Bank Corp.	2008	5.5	DEL	08-12924	No	N/A	N/A
50	NetBank	2007	4.8	M.D. Fla.	07-04295	No	N/A	N/A
51	Luminent	2008	4.7	D. Md.	08-21389	No	N/A	N/A
52	PMI	2011	4.2	DEL	11-13730	No	N/A	N/A
53	PFF Bancorp	2008	4.1	DEL	08-13127	No	N/A	N/A

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
54	Pilgrim's Pride	2008	3.9	N.D. Tex	08-45664	Yes	1. Claim Specific 2. Major Creditor 3. Major Creditor	1. Claim Specific: ADR procedures established for personal injury claims, requiring, among other things, an exchange of settlement offers and mandatory mediation. 2. Major Creditor: Mediation ordered regarding debtors' proposal to idle underperforming plants, with representatives of all relevant constituencies ordered to participate in mediation before former bankruptcy judge. 3. Major Creditor: Motion for relief from stay by personal injury plaintiff deferred, and ultimately denied, in favor of mediation under the ADR procedures adopted in prior order.
55	LandAmerica	2008	3.8	E.D. Va.	08-35994	Yes	1. Case Dispositive 2. Claim Specific	1. Case Dispositive: Mediation ordered among all relevant constituencies to resolve (i) inter-estate issues; (ii) global settlement of lead case litigation; and (iii) plan of liquidation for certain of debtors. 2. Claim Specific: ADR procedures, contemplating mandatory mediation, established for avoidance actions.
56	Circuit City	2008	3.7	E.D. Va.	08-35653	Yes	1. Case Dispositive 2. Claim Specific	1. Case Dispositive: Mediation J52ordered between debtors and official committee of unsecured creditors regarding disputed plan of liquidation. 2. Claim Specific: Procedures established for avoidance action adversary proceedings, including mandatory mediation provisions.
57	NewPage Corporation	2011	3.5	DEL	11-12804	No	N/A	N/A
58	WCI Communities, Inc.	2008	2.9	DEL	08-11643	Yes	Claim Specific	ADR procedures established with respect to construction-related claims (construction defect, breach of express/implied warrant, negligent, etc), requiring exchange of offers, mediation, and/or optional arbitration.
59	TOUSA	2008	2.8	S.D. Fla.	08-10928	Yes	1. Claim Specific 2. Case Dispositive 3. Major Creditor	1. Claim Specific: Uniform procedures established for all adversary proceedings, including mandatory mediation with a designated list of mediators. 2. Case Dispositive: Mediation regarding plan of liquidation in which all key creditor constituencies are ordered to participate. 3. Major Creditor: Mediation ordered with respect to pending state court action relating to product defect claims.

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	Company	Date	Prepetition Assets (billions) US$	Court	Case No.	Use of ADR (Yes/No)	ADR Type (Case Dispositive, Major Creditor Dispute, or Claim Specific)	Summary
60	Sea Containers	2006	2.7	DEL	06-11156	Yes	Major Creditor	Motions for relief from stay granted to permit joint venture partner to proceed with arbitration regarding change of control provisions and intercompany claims related to debtor's interest in Barbados joint venture.
61	Integra Bank Corporation	2011	2.4	S.D. Ind.	11-71224	No	N/A	N/A
62	Dura Automotive	2006	2.1	DEL	06-11202	No	N/A	N/A
63	Verasun	2008	1.9	DEL	08-12606	No	N/A	N/A
64	General Maritime	2011	1.8	SDNY	11-15285	No	N/A	N/A
65	Linen n. Things	2008	1.7	DEL	08-10832	No	N/A	N/A
66	Tropicana Entertainment	2008	1.7	DEL	08-10856	Yes	Major Creditor	Mediation ordered with respect to administrative and priority claims for, and avoidance claims against, former management and equity owners of debtor.
67	Quebecor	2008	1.7	SDNY	08-10152	Yes	Claim Specific	Mediators appointed, pursuant to ADR procedures order, to assist Quebecor Litigation Trustee to "streamline" handling of avoidance action disputes.
68	Hawaiian Telecom	2008	1.6	D. Hawaii	08-02005	Yes	Case Dispositive	Mediation ordered with official committee of creditors and secured lenders in attempt to reach agreement resulting in consensual plan.
69	Borders	2011	1.4	SDNY	11-10614	No	N/A	N/A
70	Movie Gallery	2007	1.4	E.D. Va.	07-33849	Yes	N/A	N/A