

# **P.R.I.M.E. Finance**

## **Panel of Recognized International Market Experts in Finance**



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**Complex financial transactions in the courts**

**Nick Segal – Grand Court, Cayman and Freshfields**  
**P.R.I.M.E. Finance Annual Conference 2018**  
**22 & 23 January, Peace Palace, The Hague**

# Topics covered

**Briefly consider two topics:**

- 1. The use (and potential for making wider use) of mediation (and ADR) in commercial litigation and bankruptcies: a UK and Cayman Islands perspective (will the US approach be followed?)**
- 2. Some recent developments in financial services litigation in Cayman**



# Mediation and ADR - I

## 1. The US approach in bankruptcy cases is not followed in England or Cayman:

- litigation culture – role and attitude of the court – is key
- bankruptcy proceeding in the US is in large part a court managed ADR process with the court creating the conditions for settlements or fast track adjudication
- in the US the whole case is managed by a single bankruptcy judge with a view to confirming a plan
- different in England and Cayman – even though is docketing the judge will only deal with issues brought to court by the debtor (or officeholder) or other parties



## Mediation and ADR - II

1. **The US approach in bankruptcy cases is not followed in England or Cayman (cont'd):**
  - but large UK restructurings of financial debt are dealt with by schemes (a form of pre-negotiated restructuring) with a limited role for the court
  - administrators and liquidators rarely if ever use mediation or ADR to resolve core issues in the case
    - save where there is a US connection e.g. Nortel and MF Global
  - in Cayman use schemes and official liquidation (and provisional liquidation) and adopt similar approach



# Mediation and ADR - III

## 2. The approach in England in commercial litigation: encouraging ADR

- Active case management
- The Court Guides (procedural guides)
- CMC will deal with ADR (in Commercial Court, information sheet covers ADR and at CMC judge can invite parties to use ADR and grant adjournments or direct disclosure of further documents to assist resolution by ADR)
- Lord Briggs' Chancery Modernisation Review concluded were compelling reasons why court should take more active role
- Adverse costs order against party who unreasonably refuses to consider ADR



## Mediation and ADR - IV

### 3. The approach in England in commercial litigation: forcing the parties to undertake ADR

- The court cannot compel parties to use mediation (ADR)
- To require unwilling parties to mediate would infringe article 6 of the ECHR (*Halsey*)
- But are dissenting views and see *Allassini v Telecom Italia* (CJEU): ordering parties to take part in a non-adjudicative process OK provided they can litigate if fail to settle
- And the court can adopt a robust approach in appropriate cases (by giving a direction that parties take serious steps to resolve the dispute and inform the court as to the steps taken and why they have failed)
- Can strike out case if party able to obtain full redress through ADR



## Mediation and ADR - V

### 4. The approach in Cayman in commercial litigation: limited role for mediation and ADR

- No equivalent to the English procedural rules and guidance requiring parties to consider mediation and other ADR
- No case law deciding that an adverse costs order will be made against a party who unreasonably refused to agree to ADR
- Is active case management but ADR hardly ever used in the FSD
- While many of the Grand Court judges are trained mediators there are few mediation and ADR facilities available
- position is the same in Bermuda but BVI has a Court-Connected Mediation programme and a rule that requires the court to encourage mediation (as a part of active case management)
- But is a willingness to consider new approaches and change



# Cayman FSD cases - I

## 1. Case load

- the FSD is very busy. The number of new cases filed in 2017 was the second highest on record - nearly 300
- E-filing starts in March
- many heavy cases – the *Saad* fraud trial lasted 9 months and involved a multi-billion dollar dispute

## 2. Recent trends

- court determination of fair value of shares of dissenting shareholders in statutory mergers
- rights and ranking of holders of redeemable shares
- avoidance actions (including unjust enrichment)





# Cayman FSD cases - II

## 2. Recent trends (cont'd)

- cross-border schemes of arrangement
- liability of directors and asset managers of funds
- cross-border trust litigation
- court to court communication

## 3. Some particular cases of interest

- Maintenance, champerty and commercial litigation funding (*Re A Funder v A Company*)
- foreign derivative actions (*Top Jet v Sino Jet*)

