

INSOLVENCY, LIQUIDATION &

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Jack Esher of CBInsolvency LLC



About Jack Esher

Jacob A. (Jack) Esher has over 30 years of experience as a former insolvency law practitioner in the US, and began serving as a mediator in matters 25 years ago. He is a co-author of the American Bankruptcy Institute's Bankruptcy Mediation (2016), and was the founding and presiding chair of its ADR Committee from 1994 to 2001. He most recently served for several years as one of the principal mediators in numerous large and complex disputes in the Lehman Brothers bankruptcy, and has trained over 750 mediators for the Thailand Judiciary.

In addition to Jack, his firm, CBInsolvency LLC (CBI), is composed of Daniel Glosband, a former partner with Goodwin Procter LLP, who has practiced in the international insolvency arena for over 30 years, participated in the drafting of the UNCITRAL Model Law on Cross-Border Insolvency, and co-drafted Chapter 15 of the US Bankruptcy Code; and Hon. Leif M. Clark (ret.), a former US Bankruptcy Judge with 25 years of judicial experience as well as over 20 years of mediation experience in a broad array of matters. CBI's model is to assist other professionals on a cost-effective basis and not directly represent clients.

Insolvency disputes inevitably rise during periods of economic turbulence, and the recent global financial crisis has left uneven opinions and priorities within businesses worldwide. In such situations, it's very important that credit holders, as well as directors and management, are aware of resolution avenues and the latest in regulatory legislation; advice only a well-experienced insolvency practitioner can provide.

Here Jack Esher of CBInsolvency LLC discusses the challenges involved in insolvency scenarios, his thought leadership in implementing mediation and arbitration in insolvency proceedings, and touches on the positive benefits of resorting to such alternative dispute resolution methods in resolving such business circumstances.

Your firm CBInsolvency LLC deals primarily in cross-border commercial insolvency; what are the particular challenges involved in this work?

Cross-border insolvencies often involve a range of thorny problems that require experience and specialized knowledge to navigate. Choice of law and forum, differences in treatment of secured and priority creditors, differences in legal systems and cultures, conflicts of law,

competing claims of jurisdiction, recognition and enforcement by one country of rulings and judgments entered in another country are just a few of the challenges likely to arise in many such proceedings.

You specialise in dispute resolution by mediation and arbitration; how do you approach insolvency matters with these methods?

Our firm, CBI, uses a team-based approach that allows us to combine the unique knowledge and experience base of our principals to suit the needs of the engagement and provide a tailored resolution process that may involve mediation, neutral evaluation, arbitration, or some combination of these. We find that mediation is particularly effective when the dispute involves multiple parties who all have strongly held

positions, who all believe that what they want is what is right, and who believe that what the other sides want is wrong, unfair, unreasonable, and incompatible with their goals.

often derails direct negotiation, greatly increasing the prospects for resolution. Mediation has become the preferred alternative in insolvency matters by a wide margin.

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How commonly are insolvency matters resolved through mediation, as opposed to arbitration, and how do the benefits differ between them for insolvency scenarios?

Arbitration is essentially an adjudicative process using a third party decision-maker, similar to a judge. The parties cede their decision-making authority to the arbitrator and the result is not predictable. Mediation, by contrast, is a negotiative process which allows parties to keep control and decision power over their business disputes until they reach a consensual resolution. The mediator serves as a buffer against the contentious positioning and argument that

Being a thought leader, after founding the American Bankruptcy Institute's ADR Committee, you co-authored a guide surrounding Mediation on US bankruptcy matters and you also were the lead mediation trainer for the Thailand Judiciary for several years – what impact did this have in the legal sphere and how important do you believe awareness of ADR in this segment is?

Mediation in the US largely grew from grass roots efforts in the field on a somewhat ad hoc basis. Mediation in Thailand came from the judiciary creating the ADR Office and training mediators to serve in the civil courts there. In both cases, raising the awareness of

ADR and an understanding of how it can be effectively used with minimal risk to clients has been key to its success. This has primarily come from writings such as the ABI's most recent Bankruptcy Mediation and from ADR trainings to practitioners and judges. It has had a profound impact on all aspects of resolution of disputes in and out of the courts.

As a leader in this field, what is your 'golden nugget' of advice for legal practitioners in insolvency?

Practitioners are missing a golden opportunity in cases, and putting their clients in positions of increased risk by not seeking out mediation before resorting only to the court process. Negotiations often founder between an unrealistic expectation on one side and a lack of compromise on the other. This is where the mediator goes to work. As effective as I know mediation to be, I continue to be amazed at how the process allows settlements to arise from starting points that seemed impossible to bridge.

Is there anything else you would like to add?

Sophisticated business clients are no longer required to put their fates in the hands of a time-consuming and increasingly costly legal system over which they have little control. Consensual dispute resolution - CDR - is the way. **LM**

FIRM PROFILE

CBI is a unique assemblage of highly skilled and experienced insolvency professionals with extensive judicial, international, and dispute resolution experience who have come together to offer a unique suite of services to the cross-border insolvency community:

- Mediation, arbitration and other dispute resolution services uniquely matched to the special demands of cross-border cases;
- Advisory services to assist professionals in developing appropriate strategies in cross-border cases;
- Expert witness services, including expert opinions for schemes of arrangement;
- Foreign representative services, to localize the proceeding's representative in the US to amplify presence and bolster strategic know-how.

CONTACT

Jacob A. (Jack) Esher, Esq.
Principal of CBInsolvency LLC
34 Atlantic Avenue
Swampscott,
MA 01907
USA

T: +1 (617) 947-3273
F: +1 (617) 449-9511
E: esher@CBInsolvency.com
W: www.CBInsolvency.com

