Plan Mediation as an Effective Restructuring Tool
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Justice Ramesh, thank you for your very wonderful and overly flattering introduction.

I am delighted to be with you this afternoon and to have this opportunity to tell you about my experiences as a mediator in multiparty plan negotiations and insolvency related commercial disputes. I am a very lucky man to do work that I love and to have been invited to speak with you about an ADR process that has taken hold and is being used successfully in the United States. Mediation of reorganization issues tends to promote compromise, save time, minimize costs and yield more favorable consensual outcomes. As you will see shortly, I am an unapologetic enthusiast when it comes to mediation. Mediation works well in practice and advances the reorganization purposes of chapter 11.

I look forward to explaining some of my experiences with mediation, both as a judge and a private mediator, and to helping you understand how this innovation in insolvency practice is being utilized with increasing frequency and success in the United States. It is a great honor for me to return to Singapore as a guest of the Singapore Academy of Law to discuss this subject that I consider a forward-looking development that I think should be embraced here and in other jurisdictions.

Before getting into the main focus of my remarks - the use of mediation to promote the reorganization objectives of chapter 11 and the possible adoption of these mediation techniques by other insolvency regimes including Singapore of course, I will mention a few things about my own background and how I became involved in mediation. It happened by accident really and has evolved to the point of becoming a defining characteristic of my current resume.

I started out as a lawyer in private practice more than forty years ago and have had the good fortune of a varied career in restructuring and commercial litigation that has included roles as a practitioner and more recently as a federal bankruptcy judge in a number of very significant cases. Like so many pivotal and transformative occurrences in life, I fell into bankruptcy law and restructuring by chance; in my case that happened a long while ago in 1977. I have been doing stimulating work ever since. It never gets old, and I still find problem solving in the restructuring field to be enormously stimulating and rewarding, the more complex and convoluted the assignment, the better. I find tremendous satisfaction in counseling parties and helping them find solutions to complicated and politically challenging restructuring problems. Reaching consensus releases endorphins and gives me a terrific feeling of accomplishment. For some people running does that – but for me, it's mediation.

Good luck and hard work is central to every successful career, and mine is no exception. I was fortunate from the outset to have world class colleagues and mentors who cared enough about me and my place in the profession to give me pointers on negotiating strategy and the art of the possible in relation to dispute resolution.

There are masters of every craft, and I have been inspired by some great and enduring role models including the late Harvey Miller. I have come to recognize that the key to success in restructuring is not found in course materials or in lectures - including this one. The negotiating dynamic of a restructuring needs to be observed first hand and experienced with a discerning eye. Successful restructurings do not come easily. Often they involve false starts, twists and turns and then fresh starts. Seeing opportunity in one of those unexpected twists is an important part of the art.

Getting to yes in any restructuring calls for intensive and sustained dedication to the often elusive goal of building consensus. Achieving global resolution among multiple parties competing for present and future value is an iterative process that benefits from persistence, patience and diplomacy and adherence to the rule of law. In the United States, this occurs within a well-developed network of specialized courts, sophisticated professionals and commercially motivated parties in interest. The rules of engagement are well understood and include strategies, statutory regimes and codified rules of procedure designed to promote agreement among parties with adverse claims, interests and points of view. The adversarial nature of bankruptcy and the uncertainty as to how a court will rule on unsettled issues often will promote resolution of disputes by agreement rather than by judicial decree. The incentives favor compromise and are designed to encourage parties to settle.

The centerpiece of U.S. insolvency practice is chapter 11 of the bankruptcy code and its systematic approach to claim classification and treatment. Plan formulation frequently is the product of protracted negotiations that take place with awareness that confirmation can occur over the objection of certain classes but also with the knowledge that the objective in almost all instances is a consensual outcome. The so-called cram down plan is often threatened but rarely accomplished. Objectors, more often than not, eventually fall into line.

Typically, the main architect of a restructuring plan is an experienced practitioner for the debtor or a chief restructuring officer. The debtor has the exclusive right to propose a plan for a period of time that can be extended, and often is, for cause. Negotiations regarding the treatment of creditor claims take place with the aid of experienced legal counsel, financial advisors and investment bankers. It is an exercise in the equitable allocation of enterprise value and the resolution of disputes regarding legal entitlement. Quite often disagreements will arise as to the valuation of the enterprise in question or the proper treatment and classification of claims.

With increasing frequency neutral parties have been brought on board to assist with plan negotiations when parties are unable to resolve such disagreements on their own. These neutrals are judges and former judges like me or respected senior practitioners that are invited by the parties themselves or by the court to become participants in the negotiations. Mediators function as facilitators for building consensus and avoiding potentially costly and uncertain litigation, as intermediaries to improve communications and as sources of independent insight on relative risk and reward.

The U.S. insolvency regime depends on a rich ecosystem of specialized lawyers, financial advisors, investment bankers, turnaround consultants and distressed investors. Lately, mediators

have been introduced into this ecosystem as a new invasive species. The mediator has become an effective force for promoting compromise in plan negotiations and has served as a catalyst to successful restructurings in a number of large and visible cases. In fact, 91% of all bankruptcy judges who responded to a survey a few years ago reported having some experience with mediation in chapter 11 cases. And in the U.S. Bankruptcy Court for the Southern District of New York, which is where I used to work, 25 of the 73 currently pending "mega" cases have relied on formal mediation to some degree. It is against this backdrop that I will be telling you about my own experience as a mediator, both as a sitting judge and more recently as a retired judge. I am convinced that the right mediator can be hugely beneficial.

Choosing a mediator, however, does not follow a single predictable path. In some cases, parties will agree among themselves on an acceptable candidate and propose that name to the court or may agree to appoint that individual to serve as a private mediator without a court order. In other situations, the court may nominate the mediator from an approved list or may decide a contested matter in which different names are proposed for the assignment. I have been selected as a mediator using each one of these different alternatives. It is noteworthy that parties seem to believe that certain mediators may be better choices for their clients than others based on individual background, demeanor, personality and style. All neutrals are not created equal because each mediator brings a unique set of experiences to the table. Do you want someone who is forceful and can "knock heads" or someone more laid back and nuanced with a softer and more diplomatic manner? Do you want someone to analyze the law or to be a creative and possibly intrusive force in the negotiations? In short, what characteristics are needed for the problem that needs to be solved? One size does not fit all restructurings.

I will now tell you how I became convinced that mediation and insolvency go together naturally.

My positive experience with mediation began when I was a sitting bankruptcy judge. During the Lehman bankruptcy, I had a crushingly heavy workload that included multiple Lehman affiliates and a multitude of related adversary proceedings - many of these lawsuits arising out of complex derivative transactions that had been originated by Lehman.

The case load was overwhelming and well beyond the capacity of any single judge. As a way to address this massive case management problem, I adopted a set of mandatory procedures on notice to all parties that stayed all of the litigation and referred the cases concerning the interpretation of derivative contracts to mediation before a blue ribbon panel of experienced private mediators. It was a manifest need that was the mother of this particular invention.

I have no first-hand knowledge of what occurred in any of these mediations because mediators and judges in the United States generally do not communicate with one another directly, but the results were reported to me on a monthly basis and speak for themselves. The mediation protocol in Lehman yielded settlements of hundreds of these cases and resulted in the collection of several billion dollars for ultimate distribution to creditors. From the point of view of the court, the mediation procedures proved to be an impactful way to promote settlements that benefited the parties and the court. While a great many cases were handled in this manner, each case in essence was a two party dispute between Lehman and one of its counterparties and did not extend to interacting with the multiple parties involved in simultaneous and mutually

dependent plan negotiations. I am about to describe that much more complicated ad hoc process to you now.

My exposure to multiparty negotiations began right after confirmation of the Lehman plan of reorganization. I was asked by one of my judicial colleagues to mediate disputes in the American Airlines bankruptcy case in 2012. The issues were quite complicated and involved negotiations between the airline and each of its three labor unions that touched on the treatment of employees, the adequacy of the Debtor's business plan and a possible merger with another air carrier. I enjoyed the assignment and had a wonderful time getting back into the world of actual negotiations. One thing led to another, and before I knew it I had a list of very complex chapter 11 cases that I had successfully mediated as a judge for other judges in my court including Residential Capital, MF Global and Excel Maritime. Since my retirement five years ago, I have been engaged by court order and by private agreement in plan mediations in a number of mega cases, and I will tell you about certain of those mediation experiences later in this lecture.

I recognize that I bring to the role of mediator insights derived from time spent on the bench in the Southern District of New York. That exceptional vantage point has given me valuable perspectives on the interplay between negotiations that occur out of court and rulings made in court. As a retired judge, I have a keen appreciation for how bankruptcy judges in the United States exercise their discretion; as a mediator, that experience has been particularly valuable in helping parties assess the risk of adverse outcomes. That kind of guidance better informs parties regarding the risks and foreseeable consequences of their actions and tends to promote settlements.

As a sitting bankruptcy judge in complex chapter 11 and chapter 15 cases (chapter 15 being the UNCITRAL Model Law as adopted in the U.S.), I was exposed to the work of the most prominent lawyers and financial advisors in the insolvency field. I know that my own analytical abilities and legal skills were enhanced as a result of having witnessed the work of outstanding professionals who dealt with the most daunting restructuring problems of all time during the Global Financial Crisis. To my great relief, many of those problems were settled without the need for judicial involvement as a result of the hard work of others in conference rooms and not court rooms.

But hard work is only part of the skill set needed to bring parties together in a restructuring. A number of intangibles seem to matter as much or more. The experience of the key players and the instinct of knowing how to get to a deal are vital. It helps to be intuitive, creative and doggedly persistent in the pursuit of an agreement while also being sensitive to the non-verbal cues in the room. It is important to know the facts and the value proposition, but it is also essential to listen with heightened emotional intelligence to what is being said and how points are being expressed or deflected. Ultimately, effective mediation requires a well-developed understanding of human nature.

The goal of a mediator in complex negotiations is to build trust, delve deeply and to find ways to change minds and bridge differences. In doing this work, I have come in contact with mediation parties from all over the world, some of whom are quite stubborn and difficult. The unpredictable human element is what makes mediation such a fascinating and at times frustrating

activity. It is so very difficult to change people's partisan views and to open their minds to the benefits of compromise.

Mediation of complex disputes is not just about competing propositions grounded in law and finance but an in-depth and immersive form of counseling and a kind of deal therapy. Solving business problems calls for uncovering hidden incentives. What appears true on the surface may in fact be a false indicator and not what is really driving negotiating behavior. It takes time and the building of relationships based on mutual respect to get beneath the surface and to find the foundational principles of each party's stated position. Mediation is an informal search for what parties actually need that will enable them to reach an agreement that is satisfactory. Posturing often obscures the truth.

But things almost never go as planned. People, even those you know well and think you understand, will often surprise you, and not always in good ways. Mediation parties have undeclared agendas. They will on occasion form alliances and then without warning break them. To improve the odds of getting to an agreement, the core motivations and aims of each participant in the negotiations must be uncovered and understood. That often will occur in private meetings with coffee, phone calls, email exchanges and text messages. What happens between formal sessions can be the most important time spent. People are different in private than they are in public, and they are influenced by circumstances that may not be readily visible to the mediator.

At times, undisclosed external factors will influence behavior during a mediation. A particular settlement proposal will be made and evaluated not just on the merits of the current negotiation but in relation to metrics associated with unrelated but comparable transactions. Expected recoveries and negotiating positions may also be derived from the pricing of distressed debt, both acquisition prices in the secondary market and current trading prices

Parties that are active in the market for distressed debt are naturally concerned about market perceptions of their behavior and the perceived consequence of agreeing to claim treatment that varies materially from market benchmarks. I am also aware that behaviors and positions taken in one case may be cited as precedent in negotiations down the road with potential implications for recoveries to be realized in those other settings.

These external market related factors may be unavoidable distractions, but they are best disregarded in dealing with the particular issues present in a current mediation. Parties need to concentrate on the legal risks and variables that apply in each case. The market clearly matters but should not be allowed to override informed discretion and attention to distinguishing factors. Every market includes outliers.

It is important for decision makers to be directly involved and committed to the process of compromise and settlement and to appreciate the adverse consequences of a failure to reach resolution under the circumstances presented in the matters being mediated. All parties should want to avoid lost opportunity cost, wasted time, and the ongoing costs and risks of uncertain litigation. That is especially true in cross border settings where the sources of legal uncertainty may be multiplied to the point of utter confusion.

A posture of toughness and rigid resolve is not helpful in settings like this. Such attitudes are counterproductive and get in the way, making it more difficult to overcome differences and work toward a settlement. Parties too often are willfully blind to the vulnerabilities of their own positions and approach negotiations with an unrealistic sense of entitlement.

This leads to the regrettable and it seems inevitable tendency for parties and their advisors to stake out extreme bargaining positions based on their own self-interested assessment of the issues and resulting unreasonable expectations. This can become the justification for painfully small incremental moves and a laborious process of inching forward in a manner that prolongs the inevitable compromise when parties begin to approach the point of relative indifference and finally reach an agreement.

Without revealing any of the details that should remain confidential, I will now turn my attention to some particular lessons learned in recent mediations.

During the past eighteen months, I have served as court appointed mediator in four major cases that are still pending in the Southern District of New York. These cases are Toisa Ltd (a Greek shipping company with a fleet of ocean going and specialized off shore vessels); Pacific Drilling (an ultra-deep water drilling company with seven technologically advanced drilling rigs); Nine West (a wholesaler and distributor of branded apparel that was the target of a disputed leveraged buyout in 2014); and Oro Negro (a Mexican oil drilling company with five now idle jack up rigs that I believe were manufactured at the Jurong shipyard).

The first three of these mediations have yielded consensual outcomes and agreements by multiple stakeholders to support comprehensive restructurings. Plans of reorganization have been confirmed in these cases. The fourth one remains unresolved and also happens to be the first ever mediation authorized under the model law on cross border insolvency. I have been working side by side, and very cooperatively I might add, with the conciliador in the main Mexican concurso mercantil proceeding. Our shared goal as mediators has been a commercially reasonable restructuring that will bring to an end a highly contentious multi-pronged and multi-jurisdictional battle between bondholders located all over the globe and the Mexican Debtor. Collateral litigation has been brought in Singapore in relation to ownership of the rigs through five Singaporean special purpose entities. Just last week, I filed a notice in court announcing that this mediation has terminated without an agreement although I remain hopeful that future progress is possible with the ongoing assistance of my Mexican colleague.

I am not going to reveal the specifics of the bargaining that occurred in any of these cases. Those negotiations are entirely confidential and subject to mediation privilege. Confidentiality is a core value of mediation, and nothing I say here will disclose anything confidential. I am able, however, without attribution to extrapolate some general principals and guidance from these recent experiences. Each case is different, but I can suggest some overlapping themes that I believe are instructive.

Before giving you those themes, I should tell you about the large scale of these multiparty negotiations. So many people are involved that crowd control and event planning become

important aspects of the mediation. The challenge for the mediator is getting to know the key decision makers who have differing perspectives and strong points of view regarding the issues in dispute. That is a necessary prerequisite to finding the best way to reach consensus.

Toisa, for example, included about twenty secured lenders spread throughout Europe, China and Australia. The mediation took place in London and was attended by over seventy individuals. I met with all of them and their advisors privately in advance of the formal mediation sessions in order to find out what mattered most to each of the parties, to build a relationship of trust with those most affected by the dispute and to weigh the intensity of their feelings. I did the same thing with the controlling equity holder of the company. This sort of preliminary assessment and relationship building is essential in establishing a baseline for the negotiations.

Pacific Drilling also involved a very large number of affected parties. There the main issue in dispute was the entitlement of the equity sponsor to contribute new value and thereby control the reorganization process under the so called new value exception to the absolute priority rule. The sponsor had invested and lost $1.7 billion and proposed a material new investment based on a rights offering that would enable it to recapitalize the company in exchange for a meaningful equity stake in the reorganized company.

That approach was opposed by bondholders that held the so-called fulcrum security and were prepared to invest their own funds and to equitize their claims as a way to take over control of the company. The mediation turned into an extended transparent competition for the right to invest in the reorganization and ultimately ended with an agreement by the equity holder and the bondholders to share the new investment opportunity on acceptable terms. The robust state of the capital markets at the time played an important role in the outcome.

These examples serve as a prologue to my list of general observations about recurring themes in the mediation of reorganization plans. Here is my fifteen point list:

First, restructuring negotiations are essentially about capturing and distributing future value and resolving disputes over absolute and relative entitlement. Fair and equitable allocation of enterprise value is a big issue that often breeds conflict.

Second, those parties that have leverage will use it to their advantage and will threaten or engage in disruptive behavior as a means to increase recoveries. Leverage may relate to position in the capital structure or the active prosecution of claims that impact the rights of other stakeholders.

Third, holders of the fulcrum security (meaning the break point in the debt stack as determined by enterprise value) reasonably expect to end up in control of the equity of the reorganized business. Disputes based on valuation may give rise to uncertainty as to which security should be deemed the fulcrum, and the mediator may need to help resolve a clash of conflicting expert opinions.

Fourth, financial advisors provide critical valuation perspectives and in complex cases play a major role in determining strategies and guiding stakeholders. They are important players, and

the mediator needs to communicate with them, understand their point of view and evaluate their work product.

Fifth, out of the money sponsors will want to be released from all claims and to be compensated for getting out of the way. Sometimes the sponsor will be the target of litigation and will need to pay dearly for the desired release.

Sixth, claims against insiders or other third parties with the potential to augment the estate may be settled or preserved for post reorganization litigation; how properly to value those claims is almost always unclear and will vary. It is an "eye of the beholder" sort of variable.

Seventh, the mediator needs to work behind the scenes to cajole, make recommendations and keep pressing the parties between formal mediation sessions. To give peace a chance, the mediator must keep the conversation going.

Eighth, the mediator will need to provide a risk adjusted assessment of the likely outcome of legally uncertain issues. Confidence in the unbiased judgement of the mediator is critically important. And remember, that judgment is art, not science.

Ninth, mediations are contextual and to succeed require a clear eyed appreciation for the consequences of failure. Parties need to focus on those risks and will settle only when they are ready and believe that the negotiations have reached the inflection point.

Tenth, difficult negotiations that stall in the search for acceptable restructuring terms can be restarted by looking to the capital markets for refinancing solutions. Parties already in the capital structure can be called upon to help with refinancing. And sometimes an orderly sale process can resolve disputes as to valuation.

Eleventh, inter-creditor conflict and misalignment are often the most tenaciously difficult problems to solve in any restructuring. Relative deprivation among creditors is a highly motivating principle. Recoveries will be evaluated not in the abstract but in relation to allocations being made to others and perceived fairness in the shared pain of the restructuring.

Twelfth, litigation, at least in the United States, can be so terribly expensive that the avoided cost of ongoing litigation is a form of currency that can be used to promote settlement agreements.

Thirteenth, there are multiple other currencies, and they are not easy to value. Cash, as the saying goes, is king, but everything else (from equity to warrants to contingent claims against third parties) must be valued with expert opinions that depend on assumptions and point of view. Some settlements can be achieved based on uncertainty as to the true value of these forms of consideration.

Fourteenth, my personal mediation style is unconventional and at times confrontational. I will pointedly tell distressed investors when they are overreaching and their thesis is wrong. They don't always agree, but mostly they do seem to listen. It is important, in my view, for the mediator to be direct and blunt.

And fifteenth, I consider it to be my job to analyze, to persuade, to provoke, to encourage creative alternatives and to relentlessly urge the parties to recognize the value of an agreement. Persistence in the dynamic setting of a complex negotiation is necessary and a virtue. Eventually, it is time to make a deal or suffer the consequences.

These didactic takeaways, while lengthy, are not intended as an exhaustive list, and I cite them to point out selected lessons I have gleaned from my own mediation experiences. Those experiences are necessarily anecdotal, but I believe fairly representative of the issues that arise in multi-party mediation sessions. My impression is that beneficial aspects of the process itself, rather than the personality and techniques of the mediator, are what can open pathways to consensus.

Having just delivered such a long list of observations, I expect it may be hard to integrate these points by just listening. Some further synthesis and explanation are needed so that you may better appreciate how these experiences can be applied to improve the likelihood of successful outcomes in business restructurings that are being negotiated, not in the US, but under other insolvency systems. I happen to believe that some or all of these elements of the process of plan mediation potentially may be applied successfully in jurisdictions other than the U.S. including Singapore.

My most essential conclusion that ties together the entire list is that mediation occurs within separate judicial and commercial contexts, and these separate drivers interact with differing degrees of power and influence in promoting agreements among stakeholders. I am reminded of an expression I have heard that there is no such thing as bad pizza. Some pizza may be simply fantastic but even ordinary pizza is good enough to eat, sometimes even cold. That is true for mediation as well.

Sometimes a mediation is truly inspired, but a suboptimal mediation that falls short of a grand bargain can still be enough to help. Even an unsuccessful mediation adds value by increasing mutual understanding of the issues that stand in the way of a deal. The process is what matters, and simply having a well informed and respected honest broker in the middle of the negotiations is a means to improve communications and clarify positions. It also establishes a foundation for building to a later agreement. Often parties will make a deal weeks or months after a mediation has ended without an agreement.

It all boils down to this: a strong mediation program adds value to any advanced insolvency regime and encourages the rehabilitation of distressed businesses by offering a negotiation shock absorber to increase the odds that stakeholders will figure out that a resolution is in their mutual interest. Mediation doesn't always work, but mostly it does and for that reason alone is worth trying. One of the beauties of plan mediation is that it can be implemented with relative ease — parties themselves can agree to give it a try or the court can order it or informally recommend that it be considered as an option.

For jurisdictions where mediation is not yet a well-accepted procedure, the practice needs to be spread by dedicated proponents like me — these can be parties who have seen the value of

mediation in other settings or judges who are willing to encourage alternative dispute resolution in appropriate cases.

I believe that Singapore when compared with other jurisdictions in Asia is leading the way in recognizing the synergistic correlation between a strong independent judiciary and access to equally strong indigenous resources in mediation and arbitration. My core thesis is that Singapore's increasing visibility as an insolvency destination can be further elevated by including recourse to plan mediation of the sort I have described to you this afternoon.

Justice Ramesh has made this point in his decision in IM Skaugen SE. There he stated, "I see tremendous utility in deploying the services of a neutral third party skilled in mediation techniques and with the relevant domain knowledge. Such a party can play the invaluable role of building consensus between the debtor and the creditors in the development of the restructuring plan, and build trust in the process." Justice Ramesh, I agree with you wholeheartedly.

I should also emphasize an obvious final point – a plan mediation in the United States that ends with a term sheet or a restructuring support agreement ultimately will be evidenced by the detailed language of a plan of reorganization. Those plan provisions are explained more fully in a disclosure statement. Creditors are able to vote on that plan and the bankruptcy court later will hold a hearing to confirm the plan. Assuming that the consensual plan satisfies confirmation standards, the court will then enter a confirmation order. Thus, the foreseeable end product of any successful plan mediation is a confirmation order that is entered by a United States federal court following a full and fair public hearing. That order makes binding and enforceable the various agreements reached in the mediation. For a mediator, it is tremendously fulfilling for an agreement in principle made during a plan mediation to become the foundation of a restructuring that becomes effective. In other jurisdictions, I assume that plan mediation outcomes likewise will find their way into binding and enforceable restructuring agreements.

Each negotiation is unique and not all of the points noted in this lecture will apply in every situation, but mediation is a tool that can promote consensus, preserve value and minimize costs and delay. My own empirical experience shows that mediation works in a variety of settings, and I believe it can and should be embraced by other forward looking restructuring regimes as a desirable means to encourage agreements to restructure the debtor-creditor relationship, especially in those situations where the parties themselves need some extra help. I fully expect mediation to be adopted more widely and to be accepted as a natural adjunct to sophisticated commercial courts worldwide.

Many thanks for your attention to these remarks.