Navigating Difficult Dynamics: Communication and Negotiation when Restructuring Turns Contentious

IWIRC@ABI
Washington, DC

Meet the Panelists

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Disclaimer

Any similarity to actual persons or actual events are purely coincidental. Only a few lawyers were harmed in the making of these case studies.

Case Study 1

Management Disputes

The Situation:

- Debtors' management held differing views on the best strategy for exiting Chapter 11. The CEO and the board wanted a fast sale process; the CFO wanted a different approach and was openly resistant.
- The financial advisor (FA) was closely aligned with the CFO — not the CEO and board — creating conflicting professional loyalties.
- The result: obtaining financial information for the Chapter 11 and for due diligence was a constant struggle; the FA and CFO impeded the sale process.
- Added layer: the CFO and FA were both male and had strong negative views about working with women, directly affecting their cooperation with female counsel.

Case Study 1: Outcome & Lessons

What Happened:

- Despite resistance, counsel pushed toward the sale strategy directed by the CEO and board.
- The company was ultimately broken apart and sold in four separate divisional sales.

Key Takeaways:

- When professionals (FA, counsel) are not aligned with the same principal, establish clear lines of authority and governance early.
- The client's stated exit strategy should drive the case, professionals who undermine that strategy need to be managed, and if necessary, replaced.

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Case Study 2

Singapore Maritime Fraud

The Situation:

- Multiple banks in Singapore held bills of lading to various cargo (some of which were fraudulent) as security and the cargo was carried on almost 100 vessels (which were bareboat chartered to one entity and mortgaged to the banks).
- Significant operational expenses were incurred by the bareboat charterer on a daily basis, which no party wanted to bear. By this time, the bareboat charterer and vessel owners were clearly insolvent.
- The bareboat charterer wanted to terminate the bareboat charters, but the vessel owners/ mortgagee banks refused.

The Core Dilemma:

- Bareboat charterer applied to Court to disclaim the bareboat charters as unprofitable contracts — a complex case with different stakeholders.
- Vessels are expensive to operate daily. Who bears those costs while litigation drags on?

Case Study 2: What Happened

The Solution — Insolvency Mediation:

- Mediation focused on the specific disputed issues: termination of the bareboat charters and allocation of operating expenses.
- Outcome: Some vessels were resolved in the mediation; and the remaining vessels were decided in the disclaimer application.

Insolvency Mediation: A Cross-Jurisdictional View

Singapore

- Available before or during formal insolvency proceedings; used for specific disputed issues; voluntary but court-encouraged.

United States

- Common in Chapter 11 cases; bankruptcy judges in many offer cost judicial mediation.
- Not mandatory

Canada

- Used for specific finite issues within insolvency proceedings not the whole case.
- Mediators are typically former insolvency or bankruptcy judges.

Common Thread: Mediation is issue-specific, voluntary, and most effective when parties are willing to engage in good faith.

Case Study 3

The Uncooperative Debtor-in-Possession

Industry: Family-owned business

The Situation:

- A family-owned business facing severe liquidity issues and pressure from its lenders and suppliers enters CCAA proceedings (Canada's equivalent of Chapter 11 DIP) for the purpose of a going concern sale of the business.
- After the CCAA is initiated, the CEO/shareholder/director wants to retrade agreed Sale Process and DIP Agreement claiming a lack of understanding of the CCAA process prior to filing, despite months of discussions with his advisors.
- Feeling a loss of control (due to oversight by the court appointed Monitor &DIP lender) and overwhelmed by the CCAA process (speed &volume of court materials for his review), he uses delay tactics and threat of litigation to regain control.
- He refuses to review and sign court documents in a timely manner, including the asset purchase agreement (APA) and court materials seeking approval of the sale. All court materials and Monitor Report being filed with the Court on short notice annoying the Court and potentially impacting the reputation of the Company's advisors.

Case Study 3: Resolution

What Happened:

- After the Monitor accepted an offer in the sale process, he refused to sign the APA, wanting to renegotiate the APA (for his benefit). This resulted in the Court approval hearing being rescheduled. He also requested that company counsel seek a release for the directors.
- The recoveries in the sale process were in line with expectations, but the delays extended the CCAA process resulted in higher professional fees and DIP borrowings which will reduce distributions to creditors.
- On closing of the sale process, all employees were terminated including the CEO, however he refused to resign as a director or agree to the Monitor having enhanced powers to run a claims process and wind down the business.

Case Study 3: Lessons

- Set boundaries early and consistently. Rewarding obstruction with concessions only encourages more obstruction.
- Know when to say no— even when other professionals are inclined to accommodate.
- Reputational integrity matters: professionals bear the reputational cost of a difficult client's behavior.

Key Takeaways

1. **Identify the human dynamics early**
   - Shareholder disputes, management misalignment, and difficult debtor principals are often the biggest obstacles— not the law.
2. **Use the right tools for dispute resolution**
   - Insolvency mediation, judicial mediation, and structured negotiations can resolve specific disputes more efficiently than litigation.
3. **Know when to hold the line**
   - Accommodating obstruction invites more of it. Professionals must be willing to say no, even under pressure.
4. **Manage professional alignment**
   - When advisors are not aligned with the same client objectives, establish governance and reporting lines at the outset.
5. **The universal challenge of gender bias**
   - Bias in insolvency proceedings is real. Develop strategies to maintain effectiveness and authority.

Discussion & Audience Q&A

Panel Discussion Prompts:

- Have you encountered a case where personal dynamics (shareholder conflict, management disputes) derailed the insolvency process?
- How do you approach a situation where a professional colleague is not aligned with your client's objectives?
- What strategies have you used to maintain professional authority with a difficult or uncooperative client?
- How has your jurisdiction's approach to insolvency mediation evolved, and when do you recommend it?

Thank you!