

IPOS
Mediation

Mediate
Facilitate
Negotiate

INSOLVENCY MEDIATION

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Insolvency can give rise to many and varied causes of action against many and varied respondents, many unsuspecting but some entirely unsuspecting. In terms of corporate insolvency, liquidators will be charged with collecting in available assets, which will include pursuing available causes of action.

These might be claims, for example:

- against former directors for Wrongful Trading under S.214 of the Insolvency Act 1986 (the Act) for an Order that they contribute to the insolvent company's assets;
- against creditors of a company who received property or other assets from the insolvent company in circumstances where the transaction can be impugned as a Preference under S.239 of the Act; or
- against any person who has received a gift or discounted asset where such transaction can be challenged as an undervalue transaction under S.238 of the Act.

There are many other types of claim office-holders may bring, but in all cases they will only wish to do so in the expectation that they will swell, rather than deplete, the eventual pool of money available for distribution to unsecured creditors. As we all know, however good a claim might be, if there is no return at the end of it, it's not worth pursuing.

WHY MEDIATE INSOLVENCY DISPUTES?

Mediation provides a cost-effective, speedy and flexible tool for the negotiation and resolution of insolvency claims. Commerciality and pragmatism is at the core of the process.

Those are features that drive most negotiations of course, but insolvency claims often throw up unique situations, can be hugely complex and are often replete with high emotion. This heady mix can make normal bilateral negotiations tricky, but these are just the kinds of situations where the involvement of a third party neutral mediator can prove extremely beneficial.

Directors who have lost their sole source of income but are now being asked to pay for the decisions they made (in their eyes necessary to save their business), decisions often made in extreme circumstances but which are now

being scrutinised (in their view with the benefit of 20/20 hindsight), may well take the view that life is a little unfair and be resistant to engage in meaningful negotiations. There is often a feeling of righteous indignation. Office-holders can be commercial but they also have statutory obligations and their actions can sometimes be hard to understand by those in the cross-hairs. This can be particularly so where the liquidator is from a firm of restructuring and turnaround specialists earlier consulted in connection with financial difficulties the company was experiencing prior to insolvency.

Often insolvency actions are multi-party. For instance, several directors may be pursued. Proceedings can soon become unwieldy, with directors blaming each other for the demise of their business, but with some more willing than others to engage in dialogue.

It helps if their approach is harmonised so meaningful discussions can progress. Sometimes when several linked businesses crash, there can be issues between different office-holders, with competing claims to the same assets. Whole families can get drawn into insolvency proceedings and even prior matrimonial settlements placed under the spotlight. These are just some examples of situations where a mediator can help, breaking down barriers to effective communication and building a framework in which effective deal-making can progress.

The added value a mediator can bring is of course no less significant when it comes to personal insolvency, where trustees in bankruptcy will, for instance, often be claiming interests in jointly owned property only to be faced with unexpected and late disclosed deeds of trust suggesting the bankrupt's interest may be a little less than had been assumed. A mediation can be an extremely useful environment in which to test, early on, the inevitable scepticism that will arise in these types of cases.

Our mediators can mediate all insolvency related claims including those concerning:

- Wrongful trading
- Miffeasance/breach of Directors' fiduciary and other duties)
- Transactions at an undervalue
- Knowing receipt
- Dishonest assistance
- Claims against office-holders e.g. relating to their duty to account for realisations
- The Duomatic principle and section 1157 Companies Act 2006
- Equity of Exoneration defences
- Transactions defrauding creditors
- Proof of debt disputes

WHAT IS MEDIATION?

Mediation is the use of a neutral third party to facilitate the negotiated settlement of a dispute. Any type of dispute can be mediated, whether or not it has reached litigation. It is an entirely voluntary process, operating on a confidential and without prejudice basis.

So (unless all parties agree otherwise, and subject to statutory obligations) there is no associated publicity and no mention in legal proceedings (absent a settlement) of anything said during the negotiations.

A mediation usually takes place over the course of a single day in a suite of rooms at a convenient location or remotely via video. There is no standard format, but it usually includes a series of meetings, mostly between the mediator and the respective parties in private, plus one or more joint meetings with some or all of the parties present.

The process is very flexible, with the mediator suggesting tailored procedures, but nothing happens without the parties' agreement.

If a settlement is reached, and statistics suggest that this happens in the overwhelming majority of cases, then the parties will enter a binding contract expressing their agreement in terms of their own choosing. Unlike a judge or arbitrator, the mediator does not deliver any form of judgment or award.

WHY IPOS MEDIATION?

IPOS Mediation is one of the UK's longest-established mediation providers and home to many of the profession's most respected and experienced mediators, working both domestically and internationally. Its team of specialist mediators helping to resolve insolvency disputes has an unrivalled depth and breadth of experience across this sector.

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