Interview

Edward Dijxhoorn: 'Mediation Can Help Deeply Conflicted Parties to Try to Find Agreement Quickly and at Relatively Low Cost'

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Edward Dijxhoorn[1]

How and why did you first start using mediation?

My colleagues at Marree en Dijxhoorn Advocaten (the Netherlands) and I have always sought to understand and help solve our clients' problems instead of rushing straight into litigation. My entire practice initially consisted of insolvency law, mainly working as an official receiver. For years I have recognized that negotiation and mediation are good ways to solve problems directly without recourse to the law courts. In particular I saw that mediation can be used to better resolve disputes between official receivers and third parties.

How common is the use of mediation in insolvency situations today?

Today mediation is used relatively little in insolvency cases in the Netherlands. Why? First, people are not aware of mediation. Second, those receivers who do know about mediation typically do not think that they need 'soft skills' like this. Insolvencies take place in a tough commercial world with strict legal hierarchies, and receivers have significant legal powers. Receivers are used to finding buyers for the assets of insolvent companies and are typically good at negotiating with external parties. However, because of their privileged legal status they are reluctant to negotiate on a level playing field with internal stakeholders such as the management of the insolvent company.

Similarly, company management may be reluctant to negotiate with receivers in good faith. To explain this I often tell receivers the following story: a neuroscientist called David Rock developed the SCARF model which

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is in effect an extension of the hierarchy of Maslow. He argues that there are five important domains of human social experience: 'Status', 'Certainty', 'Autonomy', 'Relatedness' and 'Fairness' (SCARF). Put yourself in the position of a manager of a company which has just gone bankrupt, especially when he or she is also the owner who has just lost their life's work. That person lost their status, they do not have any certainty (i.e. income) and do not know how to get a new income. They lost their autonomy because, having always been in charge, one day the receiver walks in and says: "Thank you very much, I am in charge here now." He lost his relatedness, because after the bankruptcy everybody who used to look up to him now blames him for letting the company down. He already scores negatively on four measures of wellbeing from the outset and then after a couple of months the receiver comes and says "I'm of the opinion that you did a lot of things wrong here and if you still have any money left privately I'm going to try and take it from you." In that situation it is understandable that the manager doesn't want to speak with the receiver and he certainly doesn't want to negotiate. Everybody knows that if you give the receiver a finger, he will try to cut off your whole hand.

While receivers often recognise that this is the situation, few of them at present recognise the value of using a mediator to help bridge the gap between themselves and management.

Why do you think mediation is valuable in insolvency disputes?

Take the scenario of an insolvency where things were done contrary to insolvency principles (i.e. against the law). It typically takes three years before the proceedings to recover lost assets even begin, and they cost a lot of time and money. Furthermore, the outcome is binary – in the eyes of the courts either there was mismanagement or there was not. The financial stakes can be very high and the receiver doesn't know for sure whether he will win the case or not. This used to be a win-win for the receiver himself: if he wins he recovers the money and gets paid and if he loses he has generated many billable hours and gets paid anyway. However, courts and judge commissioners are increasingly using key performance indicators (KPI's) to assess whether receivers are working effectively. These KPI's give receivers greater freedom to use their own judgement, for instance, to negotiate immediately with a view to recovering 20% of the assets rather than waiting 3-5 years for an uncertain shot at 100%. If you give most creditors of an insolvent company the option to recover 20% of what is owed to them today or have an unknown probability of an 80% recovery in three years' time or more, they will typically take the 20% now.

What future do you see for mediating insolvency disputes?

I take great satisfaction from helping people to get on with their lives. Last month I mediated a dispute between two entrepreneurs which took a total of six hours to resolve from start to finish. In insolvency disputes a mediation may take a bit longer, but after one or two meetings the parties involved can establish reasonably well whether or not an amicable settlement can be reached. Because mediation is well suited to resolving insolvency disputes I believe it will be used more frequently in future. However, it will take a long time before all parties in insolvency disputes really embrace mediation as part of their toolkit. Judge commissioners can play a major role in this. When they feel that an amicable settlement is in the interest of the insolvent estate they should do more to encourage both the receiver and other parties to at least try to the bridge the gap through mediation. At the end of the day nobody wants the receiver to waste time and money on legal proceedings. Mediation can help deeply conflicted parties to try and find agreement quickly and at relatively low cost. Nor is this a small-company phenomenon. Mediation has proved to be successful in highly complex cross-border insolvencies such as the bankruptcies of Fortis and KNP Qwest.

I have been a lawyer for forty years. I still practise as a lawyer but I spend more and more time practising as a mediator. In three years' time I hope to focus solely on working as a mediator and promoting mediation through the Foundation for Insolvency Mediation (*Stichting Insolventie Mediation*) which I am one of the founders of.

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