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SPECIAL REPORT

MANAGING RISK & RESOLVING CRISIS

The effective use of alternative dispute resolution

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LITIGATION RISK

The effective use of alternative dispute resolution

BY CLAIRE SPENCER

In recent years, alternative dispute resolution (ADR) has grown in popularity, especially mediation as a forerunner to the more formal arbitration process. Corporate business disputes continue to arise with greater frequency, especially in cross-border cases as companies seek to globalise, and ADR is playing a pivotal role in resolving many conflicts. There are several reasons for this. Parties are increasingly disinclined to initiate litigation. Court queues are getting longer, delays are common and the whole process can be extremely expensive. Speed is vital in minimising the impact of a business dispute, and a poorly-managed or lengthy conflict can result in significant losses.

In the right situations, ADR (both mediation and arbitration) can be a highly successful remedy to all these problems, and allows the parties involved a measure of control over proceedings while maintaining confidentiality in most cases. "Using ADR as a business tool for managing conflicts is a trend that is on the increase, as businesses become more aware of the increased risks they now face on a regular basis," says John Heaps, Head of Litigation and Dispute Management at Eversheds. "Businesses are becoming increasingly understanding about issues concerning dispute resolution and want to achieve the best result with minimum impact on day-to-day business. ADR is one way to do this." Mediation is now accepted to the extent that many courts will insist that parties at least attempt it, or sometimes insist upon it, before bringing a grievance to a hearing in court.

In cross-border disputes, an advantage of ADR is that it removes the regional bias that can spring up in local legal proceedings. "The growth of global transactions has caused companies to turn to international arbitration to resolve cross-border disputes," points out Claire P. Gutekunst, a partner at Proskauer Rose. "They want to obtain a neutral forum and highly qualified decision makers, often outside the disputants' home countries, thus eliminating the 'home court advantage' of resolving a dispute in one country's court system." Shifting the conflict to non-partisan territory can make all the difference. Even mediation, which used to be considered a 'soft touch' by the international business community, has become a firmly-established option in cases involving multiple parties and jurisdictions.

One of the major benefits of mediation is that it allows all parties to avoid the acrimony of litigation, which can destroy commercial relationships. Often companies that choose mediation are already in a reasonable and receptive frame of mind. According to Mike Lind, a managing director at ADR Group, the reason the mediation process is so effective is because parties who participate typically do so with the intention of defusing the situation and moving forward. "Conversely," he says, "litigation and arbitration are adversarial and determinative in nature. The process of mediation does not focus exclusively on legal rights and positions. It enables parties to reach informed decisions based on commercial expediencies."

As a result, the success rate of mediation tends to be high, at around 80 percent. By virtue of consenting to mediation, the implication is that both sides are seeking an amicable resolution rather than adopting a winner/loser mentality. Furthermore, mediation seeks a conclusion that will best suit the businesses, rather than relying heavily on legislation and legal precedents. If mediation proves unsuccessful, the parties can still resort to arbitration. The success of this next step will again be dependent on the underlying motives of the parties in dispute. "If both parties truly wish to resolve the matter through the ADR process, the success rate is very high," notes Gregory E. Wolski, a partner in Fraud Investigation & Dispute Services at Ernst & Young LLP. "But issues can arise if one or both parties view the process as a precursor to litigation. As an arbitrator, it is next to impossible to accurately identify the mindset of the parties during the ADR process."

An additional benefit of mediation is that it safeguards reputations, which are dragged into the limelight if formal litigation is used. Of course, if mediation does succeed, the parties involved have, with the aid of an impartial expert, reached a solution without resorting to costly court action. Furthermore, the parties are free to choose the format of mediation (online, written, telephone, etc.), allowing them to customise and schedule proceedings more conveniently than is the case with litigation. Mediation is therefore easy to conduct due to its relative brevity and informality. "It enables parties to settle their differences without the need to incur the very high costs typically associated with litigation, to do so quickly and without oppressive procedures, in private and in a way that leaves open the possibility of being able to do more business together," explains Jonathan Leslie, Head of Litigation and Dispute resolution at Travers Smith. "No one nowadays really thinks that a suggestion of mediation is a sign of weakness or lack of commitment to one's case, but if it is mistaken for that, then any loss of image can be restored soon enough if litigation has to ensue."

Advisers agree that the sooner a company starts preparing for disputes, the easier they will be to resolve – provided the right people are involved. According to Mr Wolski, anticipating typical disputes and drafting specific clauses in the purchase agreement can help considerably in avoiding or minimising disputes after the fact. "Each party should be thinking about the possibility for disputes before they even sign the agreement. In that way, safeguards and examples can be built in to help mitigate or avoid a dispute. Certainly, after closing, the review of available documentation also can help to mitigate or eliminate the need for

ADR for certain of the perceived disputed items," he says. Of course, it is still the case that many companies take a reactive approach to dispute, but this often prolongs the conflict. It may be that ADR is completely unsuitable for a set of circumstances, but identifying this sooner rather than later will still save time and money, particularly in light of the increasing costs of arbitration. One caveat, however, is that mediation can fail if it is begun too early. In such cases, advance preparation can cause parties to 'harden' their standing on the matter, which quashes any hope of reaching a compromise later on.

Many practitioners encourage companies to include an ADR or mediation provision in their commercial contracts to diminish the reactive approach that can lead to failure. On the whole, it is seen as a good idea – particularly if both parties wish to avoid litigation and preserve their business relationship. "This has proven to be one of the most effective ways for organisations to manage or minimise their litigation or general risk exposure. The value of such a clause is that it requires the parties to consider mediation as a mainstream procedure, not a soft, optional private process," says Mr Lind. Parties are likely to be amenable to such clauses at the time of establishing a contract, but less so in the heat of a dispute. It is also unlikely to be seen as a weakness or a concession if it is included in the main agreement. Furthermore, mediation is non-binding, and as such, there is nothing to lose by its inclusion. But unless the agreement is drafted correctly, the parties involved may end up with a pointless and unenforceable clause in their agreement. At the end of the day, if there is no inclination to mediate, it will not be effective no matter how well it is worded, or how proficient the mediator might be. Some experts believe that such clauses are therefore superfluous, particularly as mediation can be undertaken at any time, and may put each party on guard from the outset.

An effective mediator or arbitrator is essential for success in ADR, but it is necessary to distinguish between the two, as different qualities are required for each role. "In mediation, the prime factor is the personal qualities and experience of the mediator," explains Mr Heaps. "The selection of the mediator also turns on style, depending on whether the parties prefer someone who is facilitative or someone who takes a more proactive evaluative approach. In arbitration, law is a key component in most disputes, and legal knowledge combined with subject matter knowledge are often of equal relevance in the choice of arbitrator."

M&A is a frequent source of conflict requiring ADR. Ms Gutekunst believes the major disputes often arise out of the lack of precision in parties' representations and warranties. "For example, there often is a change in the company's financial or business condition between the signing of the contract and the closing of the transaction that the purchaser argues was a 'material adverse change'. But the parties have failed to define that term with sufficient specificity in the contract, which leads to protracted litigation," she says, adding that clearly delineating in the contract which liabilities will remain with the seller and which will be transferred to the buyer can eliminate conflict after the deal is done. In addition, failure to address differences in accounting practices from the start can soon lead into problems. These can, and probably will, occur as early as the post deal closing mechanisms, so both parties need to be sure that their methods align well in advance of this point.

While these two factors do crop up with some regularity, it is still the case that there is really no such thing as a generic dispute, which will always cause problems. No two agreements are the same, and therefore ADR processes will be equally unique. They are influenced by the attitude and motives of the parties involved. Mr Leslie believes that the mediator or arbitrator must isolate the root causes of the problem. "Disputes almost inevitably arise where positions are not made clear or when important things are left unsaid or not contradicted," he says. "Avoiding difficult discussions is often the underlying cause of all disputes and it is usually better to spell positions out at the appropriate time rather than avoid the issue and hope for the best." Either way, the message is clear – however nebulous or unpredictable a dispute might be, it is wise for the parties involved to move swiftly to an agreeable outcome. Acting late, or on incomplete or erroneous information, can be terminal to ADR, costing time, money and a business relationship if it fails. But done properly, ADR can restore a partnership through the best means available. ■

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Claire Gutekunst is a partner in Proskauer's Litigation and Dispute Resolution Department. Since 1983, Claire has been an advocate for corporate, law firm and individual clients in resolving complex commercial disputes.

For example, Claire represented CPC International Inc. (now part of Unilever) in a $63 million fraud and breach of contract action against McKesson Corp. and Morgan Stanley & Co. Incorporated arising out of CPC's purchase of the C.F. Mueller Co. from McKesson. She has represented several other purchasers, including Berlitz International, Inc., in similar actions relating to acquisitions in which the seller breached its contractual representations and warranties.

Claire has represented The Metropolitan Life Insurance Company and other companies against claims of breach of contract and fraud brought by former employees. She has defended Avis and Budget in numerous consumer class actions. She also has represented clients in matters involving claims of securities fraud, RICO violations, accountants' liability, unfair competition, fraudulent conveyances and breach of fiduciary duty, among others. Claire has represented various parties in complex bankruptcy proceedings, including the Chapter 11 Trustee in the $1.4 billion bankruptcy of Allegheny Health, Education & Research Foundation and related entities.

Claire is experienced at both the trial and appellate levels as well as in all areas of pre-trial discovery and prejudgment remedies. She practices in the state and federal courts, in various arbitral forums and as an advocate or mediator in mediations.

Claire is a member of the Executive Committee of the International Institute for Conflict Prevention and Resolution (CPR) and a member of CPR's National Task Force on Diversity in ADR. She is a member of the ADR Advisory Group for the Commercial Division of the New York State Supreme Court, where she also serves as a volunteer mediator. Claire also is a member of the General Commercial Advisory Committee for the AAA's New York Regional Office. She has served on the ADR Committee of the New York City Bar Association.

Claire is a Vice President of the New York State Bar Association, where she serves on the Executive Committee and the House of Delegates. Claire also is Chair of the Membership Committee and a member of the Executive Committee of the Commercial & Federal Litigation Section, the Special Committee on Court Structure and Judicial Selection and the Committee on Minorities in the Profession. She previously served as a member-at-large of the Executive Committee, chaired the Committee on Women in the Law and the Strategic Planning Advisory Committee, and served on the Task Force on Court Reorganization and the Ad Hoc Committee on the Jury System. From 1997 to 2006, Claire served on both the New York State Judicial Screening Committee and the First Department Judicial Screening Committee. Claire is a Maryann Saccomando Freedman Fellow of the New York Bar Foundation. She chairs the Advisory Council for the YWCA-NYC Academy of Women Leaders and previously chaired the Legal Advisory Committee for the YWCA's Women's Employment Program. In November 2006, Claire received the Mary Rousmaniere Gordon Award for volunteer service to the YWCA-NYC.

Claire received both an A.B. magna cum laude in political science and economics and an A.M. in economics from Brown University.

She received her law degree from the Yale Law School, where she was an Articles Editor of the Yale Journal of World Public Order.

Claire has authored several articles concerning mediation and has been a panelist at numerous CLE programs on topics relating to ADR and the jury system.