

Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Systems Design

Corporate Dispute Resolution Strategies to Make Mediation and Arbitration Better Alternatives

BY E. NORMAN VEASEY

This article is centered on the desirability of instilling a particular culture in corporate decision making on responsible and effective dispute resolution methods.

In business-to-business transactions, the parties should consider together what can go wrong with the developing happy courtship and marriage. That thinking is not unlike the concept of considering a pre-nuptial agreement.

Let me begin with my takeaway and go from there. The takeaway is that when the negotiation of a transaction is underway, the parties should be earnestly focused on the best contractual methods of resolving disputes that could arise in a less-than-best case scenario. There must be an early discussion of the dispute resolution clause, which may be as crucial as some of the important substantive

provisions in the written agreement embodying the transaction.

In any transaction negotiation the parties do not want a dispute to arise. Absent an agreement on an alternative method, litigation will be the default. And, in some cases the litigation default may be appropriate. If, for example, there is a jointly recognized desirability for a judicial precedent, the only meaningful way that can happen is in litigation. But, absent that kind of consideration, the alternatives to litigation should be explored.



will shape the decision on the best dispute resolution strategy for a particular matter.

At the negotiation stage of a business transaction, when the parties should be considering the possibility that a future dispute might emerge, what metrics should the corporate decision maker consider in weighing the pros and cons of negotiation, mediation, arbitration, or litigation? The key to making an informed decision involves a careful analysis of risks and rewards, which is particularly important, of course, in complex business transactions.

Normally, it will be the corporate general counsel who is the principal point person in the quest for the optimal method for seeking a successful outcome of a dispute. Today there is more pressure than ever on GCs to avoid disasters in dispute resolution. The GC's goal, is to provide the company with the best opportunity for an optimal and cost-effective outcome of a dispute.

Why is the GC such an important player in this analysis? Usually the GC wears many important hats. In our book, *Indispensable Counsel*, my co-author Christine Di Guglielmo and I stated that the GC should be the partner-guardian, blending the business function with her role as guardian of the corporate integrity. E. Norman Veasey & Christine Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* 59-68 (Oxford 2012).

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DECISION-MAKING METRICS

There is, of course, no uniform or generally preferred system for resolving business disputes. One size does not fit all. Many factors

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Commentary

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cases to be made by the firm, something quite alien to the dispute resolution world.

The actual task of handling complaints has become a highly sophisticated activity. Disagreements exist about what constitutes such a thing. A strict reading for the ESMA/EBA guidelines makes a customer's remark about the color scheme in a bank branch into a reportable complaint requiring investigation and a final response on the subject.

The United Kingdom, in possible breach of the MiFID Org Regulation, allows firms to exclude cases from their complaint handling where there is no allegation of a financial loss or material distress or inconvenience. Even then, a cross customer can easily allege the cost of a reply-paid envelope and enter the exciting world of regulated complaint handling.

There is a growing consensus that customers need not complain in writing. Many find it difficult to write or just communicate more naturally out loud. Third parties, like friends, loved ones, and caregivers, can always complain if authorized to do so on behalf of the person involved. The firm has to assume until it discovers otherwise that the customer gave the necessary authorization. (Very few people complain on other people's behalf without being asked to do so!)

Undertaking an investigation within a business is a skill of its own, involving a combination of bravery and tact and a basic grasp of employment law. Regulators expect neutrality but must know that employees are not independent of those who pay them.

Hardcore complaint handlers have stories to share about handling "impossible complainants." (See the author's YouTube videos on the subject at <https://bit.ly/2Ujrnb> and <https://bit.ly/2MCxiEk>.) Upset people do not always conform to standard cultural norms of communication. They range from customers who are too upset to explain themselves coherently to racist obscene bigots.

In the middle of all this sometimes charges a lawyer who typically does not understand the

Model Procedure

The question: What's the use of complaining?

The answer: A lot. Raising your voice in a bunch of industries in the United Kingdom is the first step in resolution processes that lead to consumer satisfaction.

The conclusion: Resolution via complaints is "easily the most important to most people of all the forms of ADR."

products concerned or how to obtain the best outcome for his or her client.

In many cases, the skills required of complaint handlers are people-related but not as mediators would recognize them. Matching communication methods—do not ring a customer who has written to you and try to telephone someone who has rung you—and trying not to discuss sensitive

consumer credit issues in the workplace or with someone awoken by the firm's telephone call are all part of the skillset.

Idealists argue that complaint handling is an excellent way to prevent the recurrence of incidents. Disgruntled customers are a source of intelligence but only a partial, slightly unreliable source. Firms do plenty of appalling things without their clients realizing this.

Complainants tend to be concentrated among the more articulate members of the population with the time, confidence or drive to raise things. Equally, some firms are much better at making it easy to complain and at identifying the "I don't want to complain but" complaint cases. Those, in particular, capture a more accurate picture of what is happening.

* * *

Deposit institutions reported 615,802 new complaints about current accounts alone to the U.K. Financial Conduct Authority in 2019's second half. See <https://bit.ly/2UfuBMP>. There were 4.2 banking and credit card complaints reported for every 1000 accounts. This omits all the cases that the firms concerned failed to spot.

Yet we do not hear very much about customer complaint handling as a dispute resolution form. In many countries, notably in Europe, it is the most regulated form and easily the most important to most people of all the forms of ADR.

In practice, if you complain to your builder and he or she visits your home and fixes the problem on the spot, that is far better ADR than a mediation and a good deal more efficient and less painful for everyone than a small claims procedure or class-action arbitration. 

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DISPUTE RESOLUTION IN THE FOREFRONT

Before I discuss mediation, arbitration, or litigation and the pros and cons of each, I would urge the reader to consider unassisted negotiation between the parties of the dispute arising from the transaction, as well as other possible

extra-contractual disputes that could present opportunities for a global resolution of a wide range of *inter-partes* interactions.

Such a wide vision, as distinct from the tunnel vision focused only on the narrow dispute arising out of the discrete transaction at issue, is often used by a skilled mediator when the dispute resolution alternative of mediation kicks in.

As part of their study of dispute resolution protocols, John Lande and Peter Benner have urged business decision makers to adopt what they call "planned early dispute resolution," or

PEDR, systems. The emphasis of their PEDR system is on the word "Early:"

[T]o advance the companies' interests and gain favor with the C-Suite, general counsel presumably would take the initiative to develop such systems and direct their staff and outside counsel to faithfully use a PEDR system

John Lande and Peter W. Benner, "How Businesses Use Planned Early Dispute Resolution,"

34 *Alternatives* 53 (April 2016) (available at <https://bit.ly/2Zh5lbt>).

Perhaps one lesson here is for the GC and the business people negotiating the transaction to involve litigators early in the business negotiation strategy. Such an emphasis on the holistic concept of dispute resolution, as distinct from the linear and myopic reliance on litigation, can transform the company's culture. *Id.* at 57.

Effecting this kind of cultural shift in the mindset of the transactional lawyers is not always easy as there may be an inertial barrier in that area:

We found that disputes usually are left to legal departments where often there are often minimal incentives to change as long as the departments operate within budget, try to control outside legal costs, and avoid bad results. In that environment, innovation commonly is not rewarded and does not flourish.

Peter W. Benner & John Lande, "How Your Company Can Develop a Planned Early Dispute Resolution System (Part 2)," 34 *Alternatives* 67 (May 2016) (available at <https://bit.ly/2ALumT1>).

Lande and Benner have concluded that:

Our recommendations require lawyers and executives to think different than the traditional way of handling business disputes. (*Id.* at 68).

The litigator's perspective at the negotiation stage of the business transaction can add value in at least two respects: (1) educating the business people to the pitfalls and costs of litigation, and (2) cementing the control that should be exercised by the business people throughout by carefully crafted dispute resolution clauses in the transaction documents.

Consider the variables, such as the following, which may be among those that drive the GC's decision that mediation probably should be employed before arbitration or the litigation default:

- Is the dispute domestic or international?
- What is the subject?
- Are the predominating issues legal or factual?
- Who is on the other side?

- What court or courts would likely have jurisdiction?
- What is the importance of confidentiality?
- What skills should the neutral have?
- How can the delays and costs of discovery in arbitration be contained?
- What experiences have the GC and her advisers had with dispute resolution processes?

Keeping Options Open

The task: Systematizing the approach to business disputes.

The methodology: Address the potential for disputes early by dealing with it in your contract. The first resolution step is negotiation.

The advice: When a former Chief Judge of the nation's bellwether judiciary for commercial matters says that there is no uniform or generally preferred system for resolving business disputes, his preference for an ADR approach must be heeded.

ANALYZING TRENDS

It is common for transaction documents to prescribe that the parties to the transaction must engage in an escalating, step-by-step process for dispute resolution. That is, in a business-to-business transaction, the first dispute resolution step is often a requirement that particular executives—perhaps by title and perhaps at sequential seniority levels—of the respective companies meet and attempt to negotiate a settlement.

This step should not be a pro forma, check-the-box, exercise but a meaningful, sincere, and crucial dispute resolution mechanism. If that fails, a common provision is to require often with some specificity in the details, that the process moves to mediation.

This also is a crucially important step. If the mediation fails to produce a settlement, the most important question is, what is to be next?

The overarching question normally involves a disciplined risk/reward analysis in selecting

arbitration or litigation at this juncture. In his outstanding book, *Mediation Practice Guide: A Handbook for Resolving Business Disputes* (American Bar Association 2d 2003), Philadelphia attorney Bennett G. Picker notes that greater attention is being paid to dispute resolution clauses in contract negotiations and increasing use is being made on "progressive, multi-step contract clauses that require, for example, executive negotiations followed by mediation followed by arbitration." [*Editor's note:* the author notes that Picker provided valuable input on early drafts of this article.]

In a transnational transaction, mediation is a particularly viable option and, if further dispute resolution steps are needed, the parties will often conclude that international arbitration is a better dispute resolution process than adjudication in certain foreign court systems.

The beauty of both mediation and arbitration of international disputes is often centered on the application of international conventions—e.g., the time-honored New York Convention governing the enforcement of international arbitration awards and the recent Singapore Convention regarding recognition of internationally mediated settlements. The Singapore Convention is new and its effectiveness may have defenses that could be a barrier to enforcement. So, its effectiveness has not been fully tested.

A domestic dispute often requires a different analysis, however. It is here that opinions are mixed and it is domestic dispute resolution on which this article is focused.

SOLVING DOMESTIC ARBITRATION

Some problems that GCs have experienced with domestic arbitration, when viewed in hindsight, could have been avoided. The GC may come to recognize that there are effective ways to cure many of the concerns with careful drafting, better processes for the selection of effective neutrals, and streamlining the entire process, particularly discovery, to achieve a speedy and successful resolution.

Respected commentators have noted that arbitration can be problematic and may not enjoy the hoped-for outcomes of being quicker and less expensive than litigation. For example, David Burt, former senior in-house counsel in the DuPont Legal Department and a consultant to the CPR Institute [*Alternatives'* publisher], has observed:

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In business-to-business matters, executives want efficient, good-enough justice from arbitration. They want a way forward in valued but threatened relationships. Often they don't receive it. Arbitration has become bloated and slowed by U.S. discovery, obstructed by heavily-briefed motions practice, and even sometimes coarsened by incivility. Efforts at right-sizing individual proceedings are intimidated by the suppressive fire of overlawyering.

David H. Burt, "A Call for Corporate Leadership to Sustain and Reinvigorate a Culture of Arbitration," 36 *Alternatives* 43 (March 2018) (available at <https://bit.ly/3e32ice>).

Nevertheless, Burt concludes that much depends on in-house counsel, noting that:

Part of our job ... [as] in-house lawyers must [be to] advise ... colleagues to temper expectations, but also stress arbitration's ... strength:

- Certainty;
- Excellence of judging, especially where the default venue doesn't offer a secure rule of law;
- Increased confidentiality;
- Empowerment of parties to design the process, which is best done at the moment of contracting but sometimes possible at the moment of disagreement; and
- Better potential to preserve business relationships compared to litigation.

Burt notes, however, that some litigators can be part of the problem by tending to engage in overlawyering, thus making some arbitrations bloated and slow:

Lawyers who assume that their charge is to chase every tiny advantage contribute to the system's deterioration. ... Throwing every tool in the Federal Rules of Civil Procedure at a private arbitration rarely serves the client, although it might serve counsel's interests. ...

One final word to outside counsel. Be trial lawyers, not litigators. If something will

not make much of a difference at the hearing, exercise some leadership and don't ask for it.

NEUTRAL SELECTION

The Effective Mediator: The importance of selecting the best available neutral is common to both mediation and arbitration, whether domestic or international. One wants a mediator who can keep the negotiation going, consider creative solutions to the dispute (perhaps by also incorporating resolving extra-contractual problems), and press the combatants to seek common ground—being very reluctant to take a failure to reach agreement for an answer.

For a mediator, one wants a professional who is absolutely impartial, possesses strong negotiating skills, and has the training and experience to understand the challenges presented by the mediation process. This paradigm mediator should be an optimal blend of styles that are both facilitative and evaluative. See Picker, *Mediation Practice Guide*, at n. 7. I regard mediation as an art form blending these skills.

The Effective Arbitrator: If a dispute may be headed to arbitration, one wants to be able to select arbitrators with other outstanding professional skills in managing disputes, including those likely to arise in discovery. In the end, one would want arbitrators whose skills can result in keeping things on track and managing the process in a way that won't let the arbitration get out of control.

Sometimes the categories of expertise for the arbitrator (e.g., retired judge, expert in the subject matter) are negotiated and specified in the written agreement memorializing the transaction. Sometimes the decision is made ad hoc once the dispute arises.

Thus, quite different skills may be implicated in each category: in arbitration the neutral will be called upon to make *decisions* (perhaps suggesting that the category of retired judge may be appropriate); whereas, in mediation more of an art form may come into play because the goal of the mediation process is not a decision, but it is getting the parties to consider a range of options in arriving at a *settlement*.

In a mediation the neutral is a facilitator. Some former judges are excellent at the mediation art form as well as managing arbitration. Some former judges who are outstanding in managing the process of arbitration may be too decision-oriented to be effective mediators.

In deciding on the kind of neutral to select—either in the transaction agreement or after the dispute has arisen—it may be desirable in certain situations to have a neutral who is an expert in the field at issue.

For example, in today's high-tech world, a thorough knowledge of the technology applicable to the dispute is often a key consideration. Selecting an arbitrator with experience in a specialized field may or may not be practicable. But having experienced arbitrators is not only a modern consideration but also that kind of selection process has historical roots.

In a recent online memo, American Arbitration Association Vice President P. Jean Baker not only reminded us of the following relevant history but also pointed to it as an ancient precursor of the 21st century trend in some high-technology areas to seek neutrals who possess expertise in "cutting-edge technology," particularly when high-tech business disputes go global. See P. Jean Baker, "Arbitrators Provide Technical Expertise, Confidentiality," *Law & Business Media* (Feb. 28, 2020) (available at <https://bit.ly/2RtiF8P>).

In the Middle Ages, Italian merchants were keen to settle disputes without the costs and delays of litigation arising not only in bilateral business-to-business disputes but also in conflicts involving industry standards and practices. These merchants didn't want judges learned only in the law; they wanted neutrals who understood the business mores of diverse industries. So they often turned in those days to a form of arbitration, involving merchant-neutrals. *Id.*

Baker also reminds us of the long-revered arbitration benefit of confidentiality. As she notes:

Many times, business disputes—especially those involving technology—involve some kind of proprietary or confidential information, in which case the companies want to protect those details from public exposure. If you go into litigation, the court proceedings are public, meaning anybody can sit in and view them [unless the judge seals the courtroom and the record]. Arbitration, on the other hand, is inherently private. *Id.*

ADR COMMUNITY TRENDS

In the 2015 *Business Lawyer* article linked above,

we surveyed the then-recent studies, which I will now touch on, as they are still valid.

In 2008, the College of Commercial Arbitrators convened a national summit to consider the growing concerns of businesses regarding litigation. One of the chief concerns leading to that summit was that arbitration was becoming as costly and lengthy as litigation.

Participants at the summit overwhelmingly (about 90%) believed that the chief benefit of arbitration over litigation *should be* its promise of speed and economic efficiency. But it was similarly the belief of almost three-quarters of the participants that, in general, arbitration, as it was then being practiced in many iterations, had failed to deliver on that expectation.

One of the reasons these summit participants concluded that arbitration often failed to provide a speedy and economic experience is that most outside lawyers who participate in arbitrations are litigators, used to trying cases in court. Because of that background, they pursue lengthy and expensive trial practices, including discovery. About half of the summit participants thought that “excessive discovery” was the cause of arbitration becoming costly and inefficient.

The participants noted that it is not unusual for litigators to agree to litigation-like procedures for discovery, even to the inappropriate extent of using standard civil procedure rules as binding, because that’s what they do.

Similarly, the summit participants concluded that arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices especially because it is the parties’ arbitration and they have agreed to wide-ranging discovery. More than 60% of the participants felt that too-lengthy hearings, as well as ineffectually controlled discovery, contributed to the inefficiency and cost of arbitration.

In 2011, the RAND Institute for Civil Justice conducted a study of attitudes in business-to-business arbitrations. That study, although limited in scope, revealed several things. First, about 60% of the respondents felt that arbitration is often faster than court litigation. But only a bare majority agree that arbitration was cheaper than court litigation. Many of the respondents with the most experience in arbitration disagreed with the contention that it saved money *or* time.

One thing that respondents concluded, by a large majority, was that many arbitrators tend to compromise the outcome when rendering their

decisions. This was regarded as unfortunate.

One RAND study factor that significantly weighed in favor of arbitration was that arbitration could avoid excessive, emotionally driven jury verdicts. Other important factors included confidentiality and the ability of the parties to select their arbitrators.

A factor weighing against arbitration in the view of some participants was the absence of plenary appellate rights that would be available in certain litigation, particularly where a strong appellate precedent is deemed by the parties to be desirable.

Although there are relatively recent rules provisions of some ADR entities (e.g., the CPR Institute, JAMS, AAA) that permit incorporation in some contracts of appellate ADR panels and provide for their implementation, this process is rarely undertaken. Also, of course, it does not allow for the imprimatur of a precedent from a court of record.

And I might add my own opinion that insurance companies traditionally tend to prefer arbitration over litigation because of confidentiality, no plenary appeal, no precedent, no jury and no punitive damages. Those of the opposite view in the various surveys that informed our 2015 article cited as negative factors the costs of arbitration, the length of time for a decision, the lack of clear-cut decisions, and lack of arbitrators with expertise.

Although there appears to be a fear of the “judicialization” of arbitration proceedings—that is, the greater control over the process by law firms and less control by the companies—studies have concluded that most companies favor arbitration of international disputes. It is important to keep in mind the favorable attitudes of businesses toward the efficacy of international arbitration are distinct from their uneven attitudes toward domestic arbitration.

In 2014, Thomas J. Stipanovich and Ryan Lamare reported on the results of a 2011 survey of Fortune 1000 companies’ corporate counsel. The results of this study showed, again, that ADR mechanisms are used in search of a time-saving, cost-effective method of dispute resolution.

This report noted, however, that companies were using mediation more widely and domestic arbitration less widely in recent years. Nearly half of the respondents stated that they frequently or always voluntarily submitted disputes to mediation, while almost half said they rarely or never voluntarily submitted domestic disputes to arbitration. Thomas J. Stipanovich

& J. Ryan Lamare, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations,” 19 *Harvard Neg. L. Rev.* 1 (2014) (available at <https://bit.ly/2YGi8DB>).

My thesis is that (1) domestic arbitration bottomed on a carefully-drafted agreement and strong management by the arbitrator need not rival litigation for excessive costs and delays, and (2) mediation should be employed whenever feasible.

FROM THE INTERVIEWS

As previously noted, five years ago, my co-author, former Delaware Chancellor Grover Brown and I not only surveyed the literature but we also interviewed 19 GCs to inform our 2015 *Business Lawyer* article. As to domestic dispute resolution, the results of those interviews included the following points:

- One of the nearly universal opinions of the GCs was that confidentiality was usually an important positive factor in favor of arbitration. The affirmative views about the value of confidentiality included: recurring or hoped-for future business between the parties, secret commercial or scientific information, concerns about the company’s reputation, not revealing certain business or litigation strategies, not upsetting customers with a public display of problems (such as uncertain supply), and the like.
- Most GCs embrace mediation, not only because it may avoid arbitration or litigation, but also because it tends to introduce *rationality* and right-sizing into the thinking of the decision makers on both sides of the dispute. The mediation process may also reveal important information from an opposing party.
- In fact, certain executives who might be intransigent on settlement considerations may come away from the mediation session having experienced a “cold shower” of reality and awareness of downside probabilities that could arise in litigation or arbitration.
- Good mediators will insist that executives who have decision-making authority must be present at the mediation sessions. The benefits of that insistence include: (1) educating the decision makers on both sides of the reality of the strengths and weaknesses

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of the merits of both sides and what may lie ahead if they do not settle; and (2) having present at the mediation executives in authority on both sides to be able to agree on the terms of a settlement, whether it is in the form of compromising the legal and factual issues in the dispute and/or in the form of a new deal between the parties.

THE FACTORS: COST V. NON-COST

The advantages and disadvantages of the litigation default are obvious. What is not so obvious to the GC and other corporate decision makers is the optimal risk/reward analysis between litigation and arbitration. In both, there are cost factors and non-cost factors.

Cost factors involving lawyers' fees, arbitrators' fees, delay, executive time, the extent of discovery, and the like that must be carefully and realistically evaluated in both litigation and arbitration scenarios. This is where the learning process resulting from an attempt at mediation—successful or not—can be helpful.

As to non-cost factors, confidentiality is often a key factor favoring arbitration. If the dispute is between companies with continuing relationships, trade secrets, business strategy, or for other reasons, the privacy of arbitration may be considered a definite plus and sometimes may trump countervailing issues.

Of course, other non-cost issues may affect the choice of arbitration vs. litigation. For example, litigation could likely default to an unfriendly forum, so arbitration might be better because the parties have the ability to weigh in on the selection of the decision maker.

The lack of a plenary appeal in arbitration, although viewed by many of the GCs we interviewed as potentially problematic, could be seen by some decision makers as a plus because it gives the arbitrator more leeway to streamline the proceedings without inordinate fear of reversal.

Because most of the excessive costs and delays in some domestic arbitrations are attributable to pre-hearing discovery, the parties should make the selection of an efficient manager one of the highest priorities in selecting an arbitrator or arbitration panel.

As Delaware Chief Justice for twelve years (1992-2004) and before/after that judicial service, more than 50 years as a litigator and Fellow of the American College of Trial Lawyers, I have seen that litigators can run amok with discovery and over-try a case. But they can do good work if they are properly fenced in by a carefully crafted contract and a stern no-nonsense judge or arbitrator. Both should be the goals in dispute resolution.

Common sense is always a guide. Analyzing the level of discovery, including e-discovery, that is essential and proportionate to the issues should provide the good arbitrator with good guidance. An arbitrator, absent contractual provisions to the contrary, may permit or limit discovery to the extent that he or she feels necessary to adjudicate the dispute properly.

And, given the extremely high barrier needed to reach vacatur of arbitration disputes, an arbitrator has a great deal of discretion in determining what and how much discovery should be permitted to provide for a fair hearing. (The limited grounds for vacatur are discussed in our 2015 article. See E. Norman Veasey and Grover C. Brown, "An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions," 70 *Bus. Law* 407, 427-430 (2015) (available at <https://bit.ly/3dVUFnI>). In the words of Justice Elena Kagan: "The potential for those mistakes is the price of agreeing to arbitration. ... The arbitrator's construction holds, however good, bad or ugly." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2070-71 (2013).)

CONTRACT PROVISIONS

One way to attempt to mitigate the cost/delay problems is through careful drafting of the contractual dispute resolution clauses or by the procedural decisions of the arbitrator(s) at the preliminary hearing stage. There are numerous methods that top managerial arbitrators use in controlling discovery and mitigating delays.

In the transaction's drafting process, the dispute resolution mechanism under consideration should have two dimensions. First, there are the essential provisions. I like to refer to the 10 provisions derived from a famous 2003 article by John M. Townsend ("Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins," 58:1 *Disp. Resol. J.* 28, 32 (February-April 2003)

(available at <https://bit.ly/2WSGmuE>)), which I have paraphrased as follows:

1. Unequivocal agreement to arbitrate (perhaps after exhausting the negotiation and mediation steps).
2. Articulate what disputes will be arbitrated (broad or narrow clause).
3. What rules will govern the arbitration (e.g., AAA, CPR, JAMS).
4. What institution, if any, will administer the arbitration (e.g., AAA, CPR, JAMS).
5. The seat of the arbitration.
6. In an international agreement, the language of the arbitration.
7. The applicable substantive law.
8. The procedural law that will apply.
9. The number of arbitrators (whether a single arbitrator or a panel), their special qualifications (if any), and how they will be chosen.
10. An agreement that judgment may be entered (and in what court) on the award.

Second, I think there are some key points that each negotiator must have as a mindset in the drafting process:

- Think through what you are trying to accomplish by the dispute resolution provision.
- Think through what legal or factual issues may arise, depending on the nature and provisions of the contract.
- Consult with counsel experienced in litigation, mediation, and arbitration.
- Advance planning is key. Do not wait until the substantive terms of the negotiation are being agreed to and drafted. Avoid the problem when the negotiators are experiencing "deal fatigue" and scrambling at the last minute to find boilerplate dispute resolution clauses.
- Consider including provisions such as expediting the process with time limits to be enforced by the arbitrator, prohibiting interrogatories or requests for admissions, limiting the scope and number of document requests, the number and length of depositions, award of attorney's fees and interest, etc.

* * *

Dispute resolution decisions are intensely contextual and depend upon many factors.

First, intense and skilled negotiations between the parties is crucial.

Second, mediation with a skilled and experienced mediator is ordinarily a low-risk/high-reward, promising scenario. Moreover, it bears emphasis that effective use of the optimal processes of well-crafted ADR clauses coupled with the deployment of seasoned and skilled neutrals, holds the promise of being more economical and swifter than the distraction of litigation.

Here are the overarching issues: Is the dispute resolution process under contemplation more likely than not to end in disaster

if arbitration is the default after failure of the escalating settlement steps? If the arbitration can be set up with the safeguards referred to in this article—specifically, state-of-the-art best practices and high-quality neutrals—the likelihood of disaster should be sufficiently diminished so that a speedy and well-managed arbitration is more likely than not to result.

So, the clutch question that the parties should ask themselves when they are negotiating the business transaction or later when the dispute has arisen is this: Is the dispute resolution under

contemplation more likely than not to end in disaster if litigation is the default? Or is arbitration the better road to resolution?

I think arbitration can be the better road in most circumstances, absent special considerations (e.g., the parties' perceived need for a judicial precedent). Substantial attention must be paid to drafting an excellent dispute resolution clause with a tightly-controlled arbitration process. Furthermore, substantial due diligence should be devoted to the selection of the best available neutral. ■

ADR Ethics

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based upon each individual plaintiff's injuries. The resolution, which appears to be typical for mass settlements, was widely publicized.

But a June 3 news report identifies Mediator Togliatti's father, George Togliatti, as the Vice President of Security, Surveillance and Safety at Mandalay Bay at the time of the shooting, a role he remained in until shortly before his

daughter was appointed as one of the mediators in the case. See Katie Wilcox & Bianca Buono, "One mediator in Las Vegas shooting settlement is daughter to former MGM security Vice President," *12News KPNX* (Phoenix) (June 3) (available at <https://bit.ly/2zadWTH>).

According to the report, Mediator Togliatti notified the lawyers of this conflict, and the attorneys agreed to have her serve anyway.

The press has found letters from two of the plaintiffs' attorneys disclosing and minimizing Mediator Togliatti's conflict, one stating that

her father's MGM position "may motivate her to get the matter resolved."

Yet some plaintiffs claimed to be unaware of her father's position until recently. And several plaintiffs now question the settlement agreement's legitimacy.

Plaintiff Michelle Leonard, who suffered knee and ankle injuries in the attack, maintained, "This is why I'm speaking out. Because this is wrong." See *12News KPNX* report above.

Another plaintiff, Roger Kenis, opted out *(continued on next page)*



CPR

THE INDUSTRY ELITE

CPR thanks its Panel of Distinguished Neutrals for over four decades of service in arbitration, mediation and mini-trial matters involving billions of dollars worldwide.

Contact cprneutrals@cpradr.org for our guidance in selecting a neutral for your commercial matter.

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Biotech

Certified Public Accountants

China Business Mediation

Construction

CPR/CMAP Joint Panel

CPR/CAM Joint Panel

CPR/CAMARB Joint Panel

Cross Border Disputes

Cyber

Deal Facilitation

E-Discovery

Employment

Energy Oil & Gas

Entertainment

Environment

Franchise

General Counsel

Global

Healthcare & Life Science

Hedge Funds

Insurance

Insurer-Policy Holder Coverage

Judicial

Municipal Bankruptcy

Real Estate

Sports Law

Taxation

Technology / IP

Trademark

