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Grounded in Good Business: Litigation vs. ADR

When seeking to resolve a business dispute, the general counsel of a firm is faced with several options. Given his or her legal background, it would not be surprising if litigation naturally came to mind. Indeed, many firms pursue litigation because it gives them the greatest possible legal protection. Furthermore, the pre-trial discovery process allows the firm to gather and analyze as much data as possible about the dispute. Despite its popularity, there are viable alternatives to litigation.

Arbitration

Two main forms of alternative dispute resolution (ADR) are arbitration and mediation. Both arbitration and mediation provide an opportunity to be heard in a less formal and therefore less intimidating setting than the courtroom (Erickson). Instead of bringing a case before a judge and a jury, parties seeking to resolve disputes through arbitration present their case to a private decision-maker called an arbitrator. Arbitration is an adversarial, adjudicatory process in which a neutral arbitrator hears evidence and arguments and then issues a binding decision. It is worthwhile to note that anyone with a legitimate claim can file a lawsuit— the defendant does not need to agree to be sued. In contrast, arbitration is a product of an agreement by all parties to a dispute— a party that has not agreed to arbitrate cannot be compelled to do so (Erickson). Arbitration is common for many types of disputes, "including employment, construction, breach of contract, real estate taxation, credit card, banking and legal fees, among others" (Erickson).

Mediation

In contrast to arbitration and litigation, mediation is non-adversarial, non-adjudicatory and does not have a third-party decision-maker. Instead, it can be thought of as a facilitated negotiation, where the mediator guides the parties toward making a mutually acceptable settlement. Therefore, mediation is not "binding" for each party must agree to the resolution, and no one can be forced to accept a particular settlement. Nevertheless, mediation has proven to be so effective that many judges require it before hearing a civil case. Moreover, statistics show 97 to 98 percent of all disputes settle, and mediation helps to speed up that process (ADR). Litigation, arbitration and mediation each have significant risks and rewards associated with them.

Advantage of ADR: Cost-Savings

Proponents of ADR emphasize that it is usually quicker, less expensive, and more efficient than litigation. According to the ADR forum, the average time for filing to judgment was 16 ½ months for arbitration, compared to 25 months for litigation. Time spent on litigation can not only increase workload, but also reduce business revenue, since the business has fewer resources in time and money to invest into the business. The savings in time can translate to lower counsel fees. The cost savings become apparent in the case of Georgia- Pacific, which adopted ADR into its overall legal strategy in 1995. Over the course of ten years, the company's estimated savings were approximately $32 million in nearly 600 cases, or about $54,000 per case (Raynor).

Arbitration is faster (and therefore less expensive) partly due to limited discovery. Limited discovery in arbitration is supposed to speed up resolution and reduce expenses and is said to be one of the reasons parties agree on arbitration (Carper). Another feature that makes arbitration faster is the limited grounds for an appeal. In fact, Carper and LaRocco argue, "One of the key reasons that arbitration is so effective is that the right to challenge an adverse reward is limited by state and federal law. If the losing party fails to comply with the reward, the prevailing party can seek to confirm the award in court." The limited scope of arbitration makes it less expensive and shorter than litigation. However, many lawyers value the appeals process provided by litigation and consider limited grounds for judicial review of arbitration decisions a key disadvantage of arbitration. Therefore, it is important to weigh the benefits and detriments of having the option to appeal a decision versus having a decision made in a quick, cost-effective fashion. For instance, "if the case is a straight breach of contract case with no novel legal issues, [t]he likelihood that an appellate court would reverse the trial court in a case like [that] is not very substantial" (Goldberg). Therefore, in a straight breach of contract case, it is reasonable to use arbitration to capture cost and time savings. Similar to arbitration, mediation can also lead to financial savings. In fact, it is the least expensive out of the three processes and has a high settlement rate. However, if mediation does not succeed the firm may have to spend more time and money pursuing arbitration and litigation to resolve the dispute.

Although well-managed arbitration hearings are usually completed more quickly and at less cost than court proceedings, that is not always the case. For instance, it is important to keep in mind that "the

larger and more complex the dispute, the more discovery will be allowed into arbitration. The more discovery, the larger and more expensive the process" (Carper). Likewise, when large awards are made, parties often file a judicial challenge at the end of the process, prolonging the case (Erickson). Nevertheless, ADR has other significant advantages.

Advantage of ADR: Expertise

One such advantage is expertise. Modern business involves complex interactions and technically sophisticated subjects. It may be difficult to explain these issues a judge or a jury, who are likely to know little about such topics. The parties to a dispute can choose a neutral mediator with years of experience in the subject involved in the dispute. Accordingly, the mediator or arbitrator will find it much easier to understand the specifics of the dispute and the dispute may be able to be resolved more quickly than it would be in court (Goldberg). In addition, since the parties can agree on the qualifications they want the arbitrator to have or even choose the arbitrator they want, they are more likely to be more confident in the decision.

Advantage of ADR: Privacy

A factor that may work to the detriment of litigation is that court proceedings take place in public. In fact, in many states, trials can be televised, giving trials broad exposure (Carper). Therefore, by choosing litigation a firm may run the risk of negative publicity and damage to their reputation. For publicly traded companies, negative publicity due to trial proceedings or decisions may have an adverse impact on stock prices. Indeed, "a firm's brand can be greatly served by keeping potentially damaging information out of the public arena" (Raynor). ADR is held in private offices and conference rooms and thus, it helps companies avoid unwanted publicity.

Advantage of ADR: Conflict Reduction

Another key reason why parties choose ADR is to avoid conflict escalation. Litigation is an adversarial process that places responsibility on each party to prove that it is right, and the other side is wrong (Carper). The adversary system often makes conflict worse. While arbitration also puts one side against the other, it less formal, and more flexible and encourages the parties to work together. Mediation, however, is not adversarial. It can reduce tensions caused by conflict. Mediators use techniques that encourage the parties to focus on interests, rather than rights. Mediators can also diffuse emotions by

allowing parties to vent in private caucuses (Carper). According to Carper and LaRocco, "parties seldom leave mediation with hard feelings." As a result, mediation is more likely to preserve a business relationship than arbitration or litigation. Moreover, mediation can be more creative than arbitration or litigation in finding solutions. Since the mediator can meet with parties in private caucuses, the mediator knows more about the real interests and priorities than either of the parties know separately. Therefore, the mediator can use the information to come up with a proposal neither party could have devised separately (Goldberg). The preservation of business relationships is a significant advantage to resolving business disputes.

Abraham Lincoln predicted the importance of litigation alternatives when he wrote, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser— in fees, expenses and waste of time." Since statistics show that 97 to 98 percent of all disputes settle, it makes sense to approach disputes proactively and engage in mediation. Not only can mediation favorably impact the bottom line, it can also result in maintenance of a valued business relationship, and good public relations. If mediation does not work, arbitration may be more appropriate. Arbitration offers privacy, significant cost savings over litigation, as well as an option to choose an expert in the subject of the dispute. Litigation could be the best route if the party wants to go to trial, is strongly set in its position, or wants to set a precedent. Undoubtedly, each case has its own needs and one cannot advocate a particular dispute resolution process for every conflict. However, considering ADR as part of the overall dispute resolution strategy simply makes good business sense.

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