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The Business Case for Effective ADR: The Rush to Judgment

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Sometimes, we humans get some strange ideas in our heads. Let's start with the notion that any hiccup in a business relationship must be the fault of one of the parties thereto. Yes, this can happen. Yet, more frequently, this failure is triggered primarily by external factors, including changing economic conditions, supply chain disruptions and even a lack of due diligence by one or both parties.

In other words, we often do not reap what we believe we have sowed (or, the best-laid plans of mice and men …) due to any number of functionalities. Yet we—as an economy, as a society and as individuals—tend to look for responsible hobgoblins, over which we can prevail with a public allocation of blame (including generous damages) rather than accept the fact that stuff happens, independent of the flagrant malfeasance.

Incongruous Systems

The motors of a legal regime and those of business differ dramatically from one another.

Civil law is based on principles of justice and societal equity. It is a slow-moving (in evolution and in action) and backward-focused system. It values correct outputs so that citizens and businesses might count on jurisprudential consistency when inking their contracts.

Conversely, businesses exist to serve various constituencies. They serve their shareholders with profits; their employees with meaningful work, a safe work environment, compensation and benefits; their community with taxes paid and in giving back through community engagement; and society by producing products or offering services of general utility and serving as bastions of economic well-being and motors of innovation.

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In order to pursue all these interests, businesses need to be forward-looking, agile and decisive, ready to assume risks in the hopes of great rewards.

As courts are backward-looking, businesses are forward-looking. As courts are contemplative, businesses are dynamic. As courts must focus on the details in order to produce a correct outcome, businesses must employ strategic vision to inform the design of their path to success.

Arbitration typically provides an incremental improvement over litigation. Overall, it is a more streamlined process than litigation and is not subject to appeal. The parties can choose their arbitrators and dictate procedures to conform optimally to the needs of the case. Yet, unfortunately, parties rarely take advantage of the full breadth of options available to them in arbitration and end up spending more time and resources than necessary.

The only things of which we can be assured in both litigation and arbitration are that legal fees will be considerable and that the business entity and its management will need to redirect substantial human resources from performing its core business function to pursuing the fight.

The Solution: A Change in Mindset

Considering that challenging overview of the horizon of adjudicative dispute resolution options, the legal profession takes the lead in developing, promoting and supporting the best possible means to facilitate our clients' pursuit of their respective missions and the strategies supporting those missions. There is no one-size-fits-all solution. Yet there is articulated herein a simple template for consideration that can facilitate orientation toward process utilization that can be adapted to serve our clients' best interests. This embraces three elements: conflict avoidance, intelligent use of arbitration and best use of mediation.

Conflict avoidance

Conflict avoidance should be a basic tenet of the lawyer's playbook. The following two points, among others, should be considered.

Working closely with the client and their litigation counterparts, transactional attorneys should include in their clients' contracts the identification of "flashpoints," metrics that will trigger action in anticipation of the potential inability to fulfill contract terms. This will afford the parties the opportunity to take joint action to rectify or minimize occurrence and impact.

Additionally, businesses, with the help of counsel, should engage conflict-avoidance specialists to be integral parts of their external relationships and projects. These specialists should be empowered to work as a bridge between business partners to assure that any potential conflict does not blossom into a dispute.

Intelligent use of arbitration

A commercial contract's dispute resolution clause cannot be relegated to midnight's birth: It must be just as well thought out and articulated as the rest of the contract. It must be comprehensive, precise and tailored to the dynamic of the business relationship. Failure to fulfill these requisites can lead to hundreds or thousands of hours of unnecessary time dedicated to arbitration.

Arbitral institution rules and model clauses offered by many entities are a great starting point in drafting, particularly if using those of specialized arbitral institutions, such as The Hague Court of Arbitration for Aviation. Yet drafting attorneys should keep in mind precisely what can go wrong and how an arbitral process can most efficiently resolve a potential dispute—getting from filing to a defensible award as quickly as possible, including consideration of the potentiality of interim and emergency measures. How this should be approached depends on the specifics of the business relationship, which may vary based on industry, sector and function.

Best use of mediation

Some arbitral counsel belittles mediation as ineffective and avoid its use at all costs. This is typically the result of their having participated in mediations that were not optimally focused and structured. Among the levers for effective mediation are using a highly experienced mediator with appropriate industry familiarity or expertise, identifying and discussing the realistic goals of mediation with the mediator prior to a mediation session and seeing the mediation as a process rather than a date on the calendar, in which gains can be either incremental or absolute.

Some dispute resolution–administering institutions have articulated or are developing innovative models to increase the impact of mediation and its ability for the parties to advance their dispute resolution agenda. These include JAMS, with its Mediator-in-Reserve model, permitting precision interventions at strategically important junctures and The Hague Court of Arbitration for Aviation, with its protocols for incorporation of experts into the mediation process, in order, among other advantages, to define efficiently a zone of potential accord and thus pave the way toward streamlined settlement.

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