

ROUNDTABLE



EFFECTIVE DISPUTE RESOLUTION



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EFFECTIVE DISPUTE RESOLUTION R O U N D T A B L E



EFFECTIVE DISPUTE RESOLUTION

In the current financial climate, corporate disputes are inevitable. Such conflicts often result from a combination of factors, and developing a comprehensive dispute resolution strategy has never been more important. A company needs to manage risks and deal with conflicts as soon as they arise. There will be questions about whether a conflict should be resolved in court, via arbitration or through other forms of alternative dispute resolution. Since there is no 'one size fits all' approach, each solution has its pros and cons. ►►

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In the fallout from the financial crisis, have you seen an increase in commercial disputes? What is the nature of this conflict?

Thorsen: There has absolutely been an increase in commercial disputes as a result of the financial crisis. The gloves have come off. Clearly, we have seen a tremendous number of suits filed by homeowners against their lenders – and everyone else who has ever touched their loan. More surprisingly, however, over the last 18-24 months, large companies, particularly in the financial sector, have been much more likely to bring an action against another company, large or small, than they were pre-2008. When times were good, companies could afford to avoid a dispute and ‘make it up on the next deal’. In the last two years, however, this Kumbayah attitude has disappeared, as companies fight to the death – literally – to keep distressed assets off their books – even if it means bringing an action against customers and would-be customers.

Zawicki: The reasons for this increase should first and foremost be searched for in payment delays, which have resulted in the fact that entrepreneurs, awaiting delayed performance on the part of their debtors, have problems with regulating their other liabilities – in relation to entities which also have their obligations towards third parties. With permanent delays in payment, which have specifically affected certain sectors in Poland, such as construction and developer, a vicious circle is created. The subsequent reasons for increased procedural activeness are the loss of liquidity and attempts at withdrawing from projects and investments which, due to fluctuations in the exchange rate, have become economically unprofitable. Next are the risky market undertakings – the unsuccessful investments in currency options which have led a large number of previously well prospering companies to the brink of bankruptcy.

Greenspan: I have noticed more careful evaluation of claims and litigation and a greater focus on recovering assets. Two results of the financial crisis have been conservation of resources and tightened budgets. Companies are less likely to pursue the more marginal claims and are more interested in maintaining business relationships. I have seen increased interest in and questions about the use of arbitration or alternative dispute resolution mechanisms in the context of international relationships.

Portwood: There has been an increase in the number of commercial transactions that have turned sour in the wake of the financial crisis giving rise to intense pre-contentious activity. The actual number of these pre-contentious situations that have resulted in the issuance of proceedings is not, however, significantly higher than in the pre-crisis era outside the realm of small claims, and in particular those in the field of real estate. The appetite for full-blown proceedings has not increased as a result of the crisis: parties still prefer to be masters of their own destiny. Equally, we have seen no change in the trend of matters settling at the tribunal’s door – this is still an often encountered scenario.

Shaw: Litigation usually increases in bad economic times. When money is tight, the stakes in commercial disputes are much higher, as is the importance of securing a fast and cost-efficient resolution to a client’s disputes. Alternative dispute resolution (ADR) has become a vitally important cost-cutting tool in this respect. In my practice, I’ve noticed franchisors becoming less tolerant of master franchisees who don’t develop the company brand as

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GEOFFREY B. SHAW

quickly as promised.

Kiernan: Some areas of commercial dispute have expanded as a result of the crisis, and others have diminished. We have seen many disputes in which someone who lost substantial money in the meltdown of the financial markets sought to hold someone else responsible for avoiding or mitigating those losses. Those litigations have been somewhat fewer than many predicted, possibly because so many individuals and entities did not see the meltdown coming that it has become more difficult to blame any defendant for not having seen and protected against the risks. But there have still been many of them. We have also seen numerous litigations relating to the sorting out of interests following financial failures.

Schwartz: In the US, there has been a good deal more securities litigation. Many of the problems with the troubled financial institutions have affected shareholders, borrowers, other businesses, etc., pretty harshly and litigation is a natural outgrowth of that. Anytime there is widespread or severe financial losses, be it in a sector or for a large business, litigation follows. Those cases are a part of the inevitable fallout from a crisis. What is interesting, I think, is that the litigation we are seeing is as much between plaintiff classes who have been allegedly injured and the financial institutions that have failed as it is between similarly sized large financial institutions. Large banks, for example, play so many different roles that they are fighting about the same broad issues with all sorts of plaintiffs.

Siciliano: South Africa has been protected from the worst of the financial crisis, largely because of its position both geographically and within the global economy, but also as a result of the substantial investment that has been made in the country’s economy in preparation for the 2010 FIFA World Cup. As a result, while we have not seen an increase in litigation to the extent originally feared, there has been a marked increase in disputes relating to financial transactions. Most of these disputes arise out of breaches of payment obligations in contracts and include defaults by individuals as well as by companies, particularly those involved in property development. Institutions that guarantee credit have also seen a rise in defaults on the part of their clients’ customers in various sectors of the economy. ▶▶

How important is it to act early when a dispute arises, and assess related risks and liabilities?

Kiernan: It is almost always extremely important to assess a case's strengths, weaknesses, opportunities, risks and costs as early as practicable in the litigation process. Many disputes can be settled early for less money than the cost of litigating them. Others can be narrowed with an early motion, or can be higher risk than they initially appear. In most instances, lawyers in even the most complex cases will be able, if careful, to avoid excessive cheerleading to make a disciplined preliminary assessment of risks, upsides, prospects for a successful outcome and initial strategic course that holds up well over the life of the dispute. These assessments can be important to early decisions about whether to settle or litigate, how to allocate resources, what to expect from the course of the litigation and what personnel may need to devote substantial resources to advancing the client's position.

Thorsen: It is not important to act early when a dispute arises... if you want to lose your dispute. Acting early is the single most important thing one can do when faced with a dispute. By taking immediate steps to secure documents and electronic data within the control or possession of the company, one can ensure that the information to be used to support its position in the dispute will be available when the need arises. Additionally, immediately sending a litigation hold letter to the other side will help ensure that your adversary also keeps whatever information it may have relevant to the matter. The more you outwork your adversary on the front end, the more you will be the one driving the direction and pace of the dispute. This also includes using all tools available, including experts and legal advisers, from the outset, to assess the particular risks and liabilities.

Schwartz: There is no substitute for being proactive and assessing whether litigation is likely or necessary. The costs and benefits of a resolution that may be less than ideal have to be weighed against the costs and benefits – and the uncertainties – of any litigation. I think firms do best when they are constantly assessing the litigation risk from any troubled business relationship and preparing accordingly. And by the way, 'preparing accordingly'

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CHRISTOPHER E. THORSEN

can mean lots of different things, including pre-emptive settlements, buyouts, and the like. The worse time to try and figure out how to deal with a troubled relationship is when you are under the litigation gun.

Greenspan: It is of great importance to act early. A company that evaluates the risks and liabilities early will be able to take a proactive approach and will be better positioned to manage risks and control its exposure – or take advantage of opportunities. An early assessment of risk and exposure is essential to developing an effective strategy. An early evaluation allows the company to shape the process and explore the benefits of early resolution before the opponent invests too much time and effort, making it more costly to resolve. An early evaluation also facilitates more effective budgeting, allocation of resources, and development of in-house and outside 'teams'.

Shaw: Early deployment of dispute resolution tactics can go a long way to ensuring growth and prosperity, and avoiding strained relationships and costly litigation. This is true in most commercial relationships, but especially so in franchising relationships where some parties have ongoing dealings regardless of disputes. By ensuring the use of mandatory communication procedures, ombuds programs, industry advisory councils and peer review panels, our clients are better positioned to limit the risks and liabilities that may arise in the future.

Portwood: It is essential for both claimant and respondent to any potential dispute to act early when a dispute arises. Without an early assessment of risks and liabilities, including an assessment of quantum, a party will be tempted to take action and decisions that are not in its best interest whether in terms of settlement potentiality or in terms of court room strategy and success. A chess player who starts his or her game with a strategy will invariably do better against an opponent who makes his or her moves in the dark. The same is true for litigation.

Siciliano: The dispute resolution process can often take longer than expected. Memories fade, witnesses pass away or disappear and documents are destroyed. It is therefore essential that every single document relating to the dispute is collected and handed to the legal adviser at the very earliest sign of a dispute and that all relevant witnesses are consulted and detailed statements of their evidence taken. The merits of a case and the attendant risks and liabilities can only be properly assessed once all the relevant documents have been considered and all the relevant witnesses consulted. It happens all too often that this aspect of the proceedings only takes place shortly before the arbitration or trial is due to commence, at which stage substantial costs will have been incurred and the likelihood of a settlement on favourable terms has diminished.

Zawicki: Commissioning a specialised law firm at the earliest stages of the dispute is a key issue. This should take place, in first order, in relation to disputes before national courts, because civil procedure in Poland is extremely rigorous and the errors made at the preparatory and evidence collection stages may prove irreversible and irreparable. Money well invested in legal services at the early stages of the proceedings proves to be very beneficial. At times, we were asked to take over representation in disputes in their later stages, but it was not always possible, due to the earlier errors resulting from the lack of procedural experience, to bring the disputes back on the right track. ▶▶

What considerations should companies make when deciding whether to resolve a matter through mediation, arbitration or litigation?

Shaw: Mediation lies at the middle ground of the spectrum of dispute resolution methods. It is more advanced than basic first-stage communication, but less formal than arbitration or litigation. Often the impartiality of a good mediator allows parties to frame the dispute to align with a mutually beneficial resolution. The fixed time and cost of mediation allows for resolution of commercial disputes without disrupting the ongoing viability of the industry relationship. Mediation focuses on the needs and potential zones of compatibility between the parties. In contrast, arbitration and litigation are rights-based processes, with the challenge being to ensure that the remedy, achieved through the rights asserted, aligns with the underlying need.

Greenspan: As with any endeavour, a company must evaluate the short and long-term costs of all options, including lost opportunity costs and diversion of resources. To determine which option to pursue, companies should assess their exposure – the potential cost of a litigation defeat, the cost of pursuing different approaches, the publicity that could affect the company, the company’s long-term relationship with the opponent, and the time factor. Mediation has the advantage of being private, if the parties so desire, is flexible, so you can set up the rules you want, and is generally non-binding, meaning that the company need not commit to a final position and can explore options at a relatively modest cost. Arbitration has the advantage of creating a schedule with defined decision points, which helps the parties focus on the bottom line. Litigation provides a basis to assess risk and a way to level the field. In many situations, it may be necessary to proceed through litigation up to a point before embarking on mediation or arbitration.

Thorsen: The key considerations are: the difference, and similarities, in the expense of resolving a dispute through the various forums; whether the matter would benefit from more or less expansive discovery and fact investigation; whether the appellate backstop is a benefit or a detraction; whether you are dealing with rational parties or irrational parties; whether one of the parties desires to keep the dispute ‘private’; what is the analysis of the particular judicial jurisdiction in which the litigation would be filed; and would the client benefit from a decision maker – arbitrator, mediator, judge or jury – with a professional background in the particular area of dispute.

Schwartz: First of all, arbitration is litigation. It is litigation in a different environment, but anyone who believes that arbitration is not litigation is only fooling themselves. Arbitration is scary. It is not cheap, though it may be cheaper than courtroom litigation. Maybe. You are at the whim of arbitrators who may or may not be skilled at case management, hence it may be cheaper than courtroom litigation, but that will always be the case. Much depends on the choice of the arbitrator. But with a good arbitrator, the process can go smoothly, relatively quickly, with a focus on the key issues in the dispute. Courtroom litigation is a different process entirely. There are more rules, more structure. These rules and structure create a degree of procedural certainty, at least about how the litigation will be conducted. But courtroom litigation often means juries and juries are unpredictable. Courtroom litigation allows for appeals and there is a chance to get errors corrected. That chance is generally not there in arbitration.

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DEBORAH E. GREENSPAN

Which is better? It depends on the dispute. There is no formula that can be used or checklist that can be followed to help decide which is better. It is a judgement call.

Kiernan: For most defence counsel, avoidance of a jury, with all of its inscrutable capacity to render decisions outside the bell curve of expected outcomes, is a high priority. That speaks well for arbitration over litigation. The main appeals of arbitration are that it will usually be faster and less expensive than litigation – assuming the arbitrators are prepared to be disciplined about their availability for hearings on a timetable consistent with the parties’ desire, and about other aspects of the process – and the decision-maker is going to devote more personal time and energy to understanding the specific dispute – a particularly valuable tendency if the litigation is complex. Litigation may be particularly desirable to a party that believes discovery will be essential to its development and presentation of its case. Mediation is often very helpful for getting a dispute settled, especially but not exclusively when the parties want to have continuing dealings going forward, or when principals are ready to think about settlement early but concerned that negotiating too early may be perceived as a sign of weakness.

Zawicki: This depends on the nature of the agreement/enterprise, which is the hotbed for the later conflict. If this is a significant dispute with a transnational nature, between entities from various countries, then there is generally not much choice – as the contract between the parties most often includes a binding arbitration, as well as mediation, clause. In other cases, submitting the dispute for arbitration and mediation is voluntary and all the parties must agree. Mediation is always worth recommending – as it can lead to avoiding a further dispute. In general, the benefit of arbitration may be its total confidentiality and the professional nature, while the usually wider instance path and sometimes lower costs – for example, the maximum court fee in Poland amounts to less than €25,000 – are offered by the judiciary. We present these elements to the client – if they still have the choice of the forum. The role, which the client is to play in the potential dispute – the plaintiff or the defendant – is of significant importance, as well, as it determines the procedural strategy.

Portwood: Parties to a dispute rarely have the luxury of deciding at that moment which dispute resolution mechanism to use. ADR decisions are almost invariably taken at the time of contracting. At that stage, parties should try to be as aware as possible of the type of dispute that may arise in the future, the international or ►

domestic nature of the dispute, the need for alacrity, the likelihood that, despite the dispute, a continued commercial relationship with the counterparty will be necessary and so on. It should be with these considerations in mind that the decision as to which type of dispute resolution mechanism should be taken. If the relationship is of an ongoing, long-term nature, parties should consider including in their dispute resolution an amicable process of dispute resolution, such as mediation or conciliation as a precursor to litigation – whether arbitration or judicial proceedings – since this may help in preserving the underlying relationship. In one-off transactions, mediation may be less effective and pre-arbitral or pre-judicial ADR may prove to be an unwanted hindrance to swift dispute resolution.

Siciliano: Mediation, arbitration and litigation are all viable methods of resolving disputes in South Africa. However, mediation is not a preemptory part of the litigation process. Furthermore, the concept of mediation has not yet become entrenched in the psyche of the business community and there is a general suspicion as to its effectiveness in resolving disputes. It is therefore important to ascertain that all parties to the dispute are genuinely committed to participating fully in the mediation process and to using their best endeavours to resolve the dispute through mediation. There are two significant advantages to choosing to refer disputes to arbitration, rather than seeking to resolve them through litigation. In arbitration proceedings, the parties are able to appoint an arbitrator with expertise in the area of the dispute whereas, in litigation, the judge appointed to determine the dispute may have no experience in the industry in question. Arbitrations are conducted according to a timetable agreed upon between the parties and can therefore be resolved far quicker than the traditional legal process would allow.

Do most companies benefit from formulating a ‘dispute strategy’ to map out their objectives and tactics?

Greenspan: Yes. It is important to have a clear strategy but to be prepared to revise that strategy as events warrant. The process of determining a strategy allows the company to realistically assess the case, the cost and benefits of different approaches, and of resolution. It also promotes well rounded and prompt decision making. If the case is significant – in terms of publicity, dollars, or potential effect – it is important for the company to be decisive and show leadership. Mapping the strategy and objectives allows the company to be proactive, as opposed to reactive. The com-

pany should view the tactics and strategy as potentially fluid so that adjustments can be made as necessary.

Portwood: A ‘dispute strategy’ is of great benefit to any company faced with a contentious situation. Does the company wish to maintain an ongoing relationship with the counterparty? What is the origin of the dispute and is it endemic? What resources does the company wish to devote to the case? When should outside counsel be retained? When should experts become involved? How should evidence be preserved? These are the types of issues that should be covered by the dispute strategy.

Schwartz: It is hard to see how a company that intelligently maps out its objectives and sets out goals from litigation will not be better off than a business that takes an ad hoc approach. Businesses need to be fully prepared for litigation. They need to have processes available for conducting litigation, for choosing the right counsel, for working with experts. As an expert, it is much easier to deal with a client when that firm understands litigation institutionally so that I can get questions answered, I can get data and documents when I need them and, generally, get the required assistance from the client. The worst thing is to find an institutional resistance to doing the things that firms need to do to win a lawsuit, while at the same time expecting counsel and experts to win. Outside counsel and experts are not the enemy. The firms that are prepared for litigation know this.

Shaw: In highly competitive industries, an effective dispute resolution strategy is crucial. Conflict is a regular occurrence in many commercial applications. In many ways, disputes are anticipated line items when budgeting for legal expenses for many major companies. Skilful dispute resolution strategies, especially those including early intervention, are vital tools for those companies in managing legal costs.

Siciliano: Any company that takes the time to formulate a strategy in relation to the litigation and determine what their objectives are and what tactics they can use to achieve those objectives will benefit enormously. Very often, litigation is instituted not necessarily because the parties intend to follow the process through to its ultimate conclusion, but in order to achieve a different objective, such as, at a very basic level, using the litigation as a tool to create the delay necessary to make a lower settlement offer, payable immediately. Without determining right at the start what the objective is, a party will never be able to use litigation effectively and will usually never achieve the result it intended. In those instances litigation will always be an end in itself and never a means to an end.

Thorsen: One of my recurring themes is that the more you outwork your opponent the more likely it is that you will beat your opponent. From the perspective of a litigator, most often, the clients who view the resolution of a dispute as a success had a clear objective for what they wanted to achieve in the end and a strategy, or roadmap, for how to best achieve the desired results. By doing this, clients, lawyers, experts, and others have a clear set of objectives by which to guide their decisions at key crossroads during the dispute. In contrast, those disputes that have ‘left the tracks’ are almost always the result of lack of clear objectives and an ever-changing dispute resolution strategy, which makes it impossible for attorneys and clients to effectively analyse the cost-benefit of each decision point. Without a dispute strategy, you will find yourself floundering. ►►

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Zawicki: One of the basic elements of this process is the formulation, at the earliest possible stage, of a trial and negotiation strategy indicating the business priorities as well as preparing the alternative scenarios of the development of the events. This strategy allows for a fast reaction to new factors. In this manner, conducting a dispute is under control, from beginning to end, and the client has a feeling of security and is convinced as to the selected strategy. Unfortunately, this is not a common practice in Poland.

How should companies approach the task of gathering background information on a case? What key areas should be covered?

Schwartz: This is where lawyers and experts come in. There are three key questions: what is the nature of the dispute? What is the relevant law? What are the relevant facts? And just below those questions we find a whole set of issues that relate to affirmative defences, other controlling agreements and the like. Figuring out how to address these questions so that businesses can make intelligent legal and policy decisions requires the knowledge of lawyers and experts. Good lawyers and experts will need and want to work closely with the business people to determine what information is available and the best way to get it. The client will need to be ready to identify the key people whom the lawyers and experts need to speak to in order to gather facts. It is often the case that the most valuable background information comes from such interviews. They can provide some of the most helpful facts and provide an early warning of where the bad facts might be.

Siciliano: The collection of evidence is essential to successful litigation. In general, the areas to be covered when collecting such evidence include documentation, witnesses and the preservation of tangible items, the state or condition of which could be relevant to the issues in dispute. A company should collect all documentation that exists and that may be relevant to the issues in dispute and ensure that it is stored properly. This includes physical paper and drawings, which should be stored, so that writing does not fade as well as electronic documentation, which should be stored on a hard drive so that there is no possibility of it being lost. Statements should be taken from all witnesses to preserve their memory of events. Tangible objects that are relevant to the issues in dispute must also be preserved. If it is possible that the object in question might undergo changes before the trial commences, photographs should be taken to preserve the state or condition of the object as it was at the time the dispute commenced.

Kiernan: The most important challenge in gathering background information is to make sure to hunt for the bad facts with as much zeal as is employed to understand the good ones. Companies are best served in the early stages of a dispute by developing a sympathetic but also rigorously objective assessment of its strengths and weaknesses. That process is often essential irrespective of whether the objective assessment leads to settlement or litigation.

Thorsen: One simple objective should drive all decisions in this regard: preserve as much information as possible. Employees come and go. Decision-makers come and go. In-house counsel come and go. Outside counsel come and go. Electronic and hard documents disappear over time. With each dispute of any sig-

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TIM PORTWOOD

nificance, a company should assume that it will take at least 18 months, and as many as 10 years to resolve – some even more than that. Preserving the electronic and documentary evidence for both the company and its adversary is vital. Copy hard-drives of key witnesses immediately. Stop automatic deletion procedures. Inform potential witnesses of the need to preserve information. Interview witnesses and record key favourable statements, particularly of employees. Involve inside or outside counsel in the process immediately in order to maintain the attorney-client privilege with regard to the fact investigation process.

Portwood: Background fact gathering should be centralised and overseen by a small number of persons assigned to the case. They should be given full authority and freedom to undertake what investigations they wish. Often in-house persons are not the best placed to do this since they may not have the independence to pose the difficult question or the authority to obtain the full answer. It is advisable therefore to involve outside counsel early on, who can interview all those involved in the matter and who can marshal all relevant documentary evidence including electronically-stored material.

Greenspan: There are several key steps, and a company should have a predetermined process to ensure that it takes appropriate and prompt action. The key areas include: identification of the in-house personnel with knowledge of the facts; compilation of documents and factual information necessary to evaluate the case; determination of the areas of the company affected by the case; instructions to the communication team and in-house personnel to develop media messages and assure appropriate management of media and stakeholders; early evaluation of the potential exposure or potential recovery if the company is a plaintiff; assignment of a key point person or team; investigation to determine whether there are similar/comparable cases that provide guidance on exposure or trends; identification of the vulnerabilities and the incentives of the opponent; identification of sources of funds – for example, insurance coverage, co-defendants, or plaintiffs; and identification of the relevant courts and law.

Zawicki: The basic matter is establishing the strategy and the possible scenarios for the development of the situation. The field ►►

of information as well as its sources, which will be necessary to conduct the dispute, should be indicated. It is very important not to allow one to sink in the overload of irrelevant information and not to divert the court's or tribunal's attention from the essence of the case. The second fundamental issue is the relevant selection of people and mutual communication. Mutual understanding, good communication and the awareness of striving towards the same objective are the pillars of the effective preparation of evidentiary material.

Shaw: In the global economy, businesses involve wide ranging, interdependent relationships. It is critical to understand these relationships as they evolve in order to effectively approach a case. Management of electronic information, such as emails and spreadsheets, is also of increasing importance. Companies should have document retention policies that are regularly imposed, reviewed and updated. Often, the ability to effectively identify and remedy individual disputes will have the welcomed side effect of pre-empting future disputes along the same lines with other commercial parties.

What advantages can be derived from using expert witnesses to provide an independent perspective?

Siciliano: The use of independent expert witnesses to support a party's case in respect of technical matters within the area of expertise of the particular expert carries a lot of weight in arbitration and litigation proceedings. In South Africa, the experts appointed by the parties are required to meet before the commencement of the litigation or arbitration proceedings with a view to debating the issues in dispute, finding agreement on those issues in respect of which they agree, and generally narrowing the issues in dispute. The judge or arbitrator will rely heavily on the evidence of the experts in determining the dispute.

Shaw: Expert witnesses present many of the same advantages and challenges in an ADR context as they do in litigation. A properly qualified expert can lend a great deal of credibility to one's case, but opposing counsel may try to create a battle over the appropriateness of using an expert. Ontario law was recently updated to require they be strictly impartial and highly qualified to eliminate a sense that experts were increasingly viewed as

'hired guns', so it's important to make sure your expert is iron clad. Early communication of an expert's opinion may assist in early resolution.

Greenspan: The usefulness and advantages of experts depend on the nature of the case. If the parties have vastly different views of the 'damages', it may make sense to seek an independent viewpoint for purposes of internal planning and evaluation. In the context of an actual dispute resolution process, a presentation by an expert can help persuade the opponent of their own risks and vulnerability. In addition, an expert may assist in a presentation to insurance companies or to management. An expert can be persuasive in the context of an alternative dispute resolution process and can help educate a mediator. Consider the expert to be a tool that can be deployed where it is advantageous to the company.

Zawicki: In terms of expert opinions, one should, in first order, think about their nature. Insofar as an expert opinion is commissioned and presented by a party to the trial, and not the common court of law or the arbitration tribunal, then it should be treated as an element of argumentation of a given party – in relation to which the 'independent perspective' seems to be less convincing. If, however, the court or arbitration tribunal requests such an opinion, then the meaning of the evidence from the expert's opinion cannot be underestimated. There are disputes which to be settled imminently require special information from experts, which any court or tribunal, even referred to as the 'highest expert', simply does not have. The practical question is thus the issue of the relevant selection of an expert or a team of experts. The parties' proxies should show their initiative and be proactive, proposing alternative solutions to the ruling bench.

Thorsen: The use of expert witnesses to provide an independent perspective is critical throughout the life of the dispute. Early on, a consulting expert can help analyse the strengths and weaknesses of a particular case – even before a lawsuit is filed or an arbitration demand is submitted. He or she can help drive discovery to obtain information a client and its counsel may not know to ask for. The expert witness can also prove essential in settlement discussions and mediation – if the other side respects your expert, they are likely to give more credence to the opinions espoused by that expert about your case. Finally, at trial or in an arbitration, the expert is often the most important witness in the entire case, as he or she is relatively independent and presumably has a particular expertise that no one else in the room has on the subject matter of the dispute.

Schwartz: Expert witnesses are crucial. A good expert, hired early, will help develop a cogent theory of the case, assess the reasonable level of damages, and help assess what discovery is useful and necessary. In antitrust cases this is essential, but too often firms get penny wise and pound foolish and direct their counsel not to hire experts until the latest possible date. This is a serious error. In cases involving claims for damages, you need an expert who can provide a reasoned initial estimate of damages so that the expected value of a case can be rationally determined. I say again: experts are crucial. There is a tendency to think experts are a necessary evil whose involvement should be deferred. That is a misguided notion. Properly used by lawyers, experts can be critical members of the 'team' and they can bring a lot of value to the development of litigation strategy and the conduct of that litigation. ►►

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STEVEN SCHWARTZ

Portwood: Experience shows that the use of an expert witness is rarely useful before the background evidence has been properly investigated, gathered and marshalled. The use of an expert witness too early may lead to an inaccurate view of the case that can taint important strategic decisions to the detriment of the litigant. Further, expert witnesses tend to be most helpful where technical issues are involved.

When using arbitration, what expectations should the parties have about the process? What factors tend to lead to success?

Zawicki: In arbitration, the parties may assume that the proceedings will be confidential. This is sometimes the key issue and this is the decided advantage of arbitration over the common judiciary. I would not, however, assume that arbitration has to be very quick and inexpensive – complicated disputes, specifically of an international nature, require a large input of time and resources for the preparation of the procedural stance as well as time for the arbitrators to become familiar with it. The idea of ‘fast-track arbitration’ has appeared not without reason. A characteristic trait of arbitration is the professionalism of the arbiters – in the sense that they not only possess the relevant legal knowledge, but also life and business experience and often deep insight into the field of business which the dispute regards. After finishing the arbitration, specifically international arbitration, I would also expect a court battle for the setting aside of the arbitral award, or concerning its recognition and enforceability – thwarting the effects of the arbitration.

Shaw: Unlike mediation, arbitration is an adjudicative process where rights-based claims lead to parties coming out either winners or losers. Arbitrations are essentially private courts. Therefore, the information tendered is confidential to the parties. This can be of extreme importance to the disputants. The forum is chosen by the parties and is non-governmental in nature. This gives the parties much more control over the process, but they should also be aware that arbitration is not as regulated or accountable as courts. For instance, rarely is an adverse arbitration decision appealable.

Siciliano: When using arbitration, the arbitrator is able to control the process far more strictly than a court, simply because of the access that a party has to an arbitrator that is appointed at the commencement of the process as opposed to a judge who is only appointed to adjudicate the dispute when a matter is ripe for trial. The parties should expect the arbitration to be conducted in accordance with the agreed timetable. However, once the arbitration commences, the evidentiary rules and the process for leading evidence is substantially the same as that used in court. As a result, in order to ensure success, a party should prepare for arbitration in the same manner that it prepares a case for litigation.

Kiernan: The choice of good arbitrators and effective arbitration rules is extremely important. Good arbitrators are attentive from the outset of the dispute, thoughtful about the right procedures to follow to ready the dispute for hearing, effective at narrowing the issues before the hearing begins, conspicuously fair-minded, and unafraid of disciplining the advocates to pres-

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KAMIL ZAWICKI

ent their cases efficiently and in a timely fashion.

Greenspan: Parties should be realistic about arbitration: an arbitration process can be nearly as expensive as litigation. To the extent that arbitration is binding, it presents an all or nothing option. To conserve costs and manage risk, a party facing a potential arbitration should consider attempting to narrow the issues to be submitted for resolution. In that way, the parties can ‘hedge’ the risk and limit the issues that will be decided by the arbitrators. One factor that can affect the success of the process is the selection of the arbitrator. The subject matter of the dispute should be taken into account when selecting the arbitrator. An arbitrator with crucial substantive knowledge in the area of dispute will likely have a more educated and practical view than would a typical judge. Other factors that tend to lead to success are the same factors one would focus on in standard litigation.

Thorsen: It has been my experience that clients’ expectations about arbitration and the realities of arbitration are two very different things. The first expectation that a client needs to have is that arbitration can be expensive – sometimes more expensive than litigation. ‘I thought arbitration was supposed to be less expensive’, is a phrase that clients almost always yell back at me. The more procedural rules in arbitration start to mirror those of litigation, the more they cut down on the relative ‘efficiency’ of arbitration. Keep in mind the arbitrator gets paid at a rate that is often higher than your legal team...and she or he gets paid by you instead of the taxpayers. Additionally, the arbitrator becomes key, particularly if the arbitration agreement does not provide for any appellate review. You had better pick the right arbitrator, since you only have one juror instead of 12.

Portwood: Parties to an arbitration should not expect the proceedings to be conducted rapidly unless there is an agreement upon a fast-track procedure – in which case great care needs to be taken over the choice of arbitrators to ensure that they have experience of fast-track proceedings and have the availability in their diaries to manage such a case. On the other hand, parties can expect there to be a thorough investigation of the case often to the detriment of strict adherence to pre-agreed procedural rules. ►

Parties can expect a tribunal to apply the applicable law astutely although there is a tendency to seek a 'just' result as opposed to a purely legally correct one. Costs tend to be relatively high, particularly as compared to litigation on continental Europe.

Schwartz: Don't think that arbitration is a panacea. Don't think that arbitration will be inexpensive. Don't think that you will be able to control the process. Arbitration is expensive. It might be less expensive than courtroom litigation, but that is not even necessarily the case. Arbitration may be more manageable than courtroom litigation, but even that is not necessarily the case. A strong arbitrator, or arbitration panel, can prove as difficult to deal with as a strong judge. A strong panel or individual arbitrator can force the arbitration in a different direction from what the litigants want. And there is no such thing as 'making a record' since arbitration is not typically appealable. Sometimes arbitration is a great approach, but it is not litigation nirvana.

What advice would you give to companies on managing the cost of dispute resolution, in both a domestic and international context?

Portwood: When embarking on a litigation, in order to be able to control costs, a company should sit down with counsel at the outset and work out a detailed schedule of what action needs to be taken when and what cost is estimated to be involved. If there is any slippage, this can be dealt with early on. Nasty surprises can be avoided for both the client and counsel if this is done properly.

Shaw: Maintaining effective early intervention and communication strategies to manage risks and avoid conflicts that have to be adjudicated is crucial – as is opting for the less costly option of mediation, rather than arbitration or litigation, whenever possible. Given that businesses often run into disputes in foreign jurisdictions, ensuring there are clearly defined terms for the applicable law and allocation of costs in arbitration agreements is vital to minimising costs.

Schwartz: I would give three pieces of basic advice. First,

Figure out how much is really at stake. Calibrate the amount of estimated cost to take account of the difficulty of the issues, the amount at stake and the importance of avoiding defeat.

JOHN S. KIERNAN

choose your outside counsel wisely. Find experienced counsel who can litigate the case to get it ready for trial and then try it, if need be. The right law firm will depend on the jurisdiction, the issues and the scope of the case. If you expect a case to move to trial, hire experienced trial counsel. Second, choose your experts wisely and early. Make sure that the expert has the ability to manage a case of the scope of your case. Don't focus on rates; focus on the total cost of the expert's work. Make sure that your expert actually has the expertise you need. Then, once you hire the expert, let him or her do the work they need to do. Don't micromanage, but make sure you understand what they are doing, why they are doing it and whether their work is leading them towards helpful results. If not, you need to know if it is because they need more information or, perhaps, that the answer is actually not helpful. Finally, part of managing costs is managing expectations. Litigation is expensive; don't think you can do it on the cheap. Have realistic expectations about what the lawsuit will cost. If lawyers or experts give you cost estimates that seem too good to be true, they probably are. If they promise results or say they can assure an outcome, run.

Greenspan: The first and perhaps most important factor is to plan ahead. When negotiating contracts, try to incorporate dispute resolution terms, including applicable law and procedures, into the agreement. If the parties have agreed, for example, to a mediation process before litigation, the company might be able to reduce costs. This is particularly important in the international context – that is, where companies have multiple contracts in different countries to produce services or products. Through the contractual arrangement, the company can attempt to standardise the process and thereby reduce the cost inherent in multijurisdictional disputes. The second factor is to ensure proper contacts with insurers. Disputes with the insurers can add to the cost significantly. A third important factor is to train the in-house team to recognise disputes that can benefit from alternative mechanisms so that those disputes can potentially move to the resolution process before the company incurs significant costs. In addition, make sure that there is a clear 'leader' in the company who can respond, make decisions, provide guidance, and ensure consistency.

Thorsen: Apart from improving operations to avoid disputes on the front-end, companies can do a lot to manage the cost of dispute resolution. If a company sees the same type of dispute over and over again, often it can craft arbitration or other ADR agreements to minimise the cost of dispute resolution. The agreement can clearly define limited procedures in the event of a dispute. After all, if parties can agree to the rules of dispute resolution before there is a dispute, the less money the parties will spend arguing over what the rules ought to be once a dispute arises. Once a dispute arises, formulate a 'dispute strategy' and a budget for its execution. You will be amazed at how this simple step will reduce the cost of dispute resolution. Seek out and be creative on fixed-fee type arrangements with counsel, experts, mediators and arbitrators.

Kiernan: Figure out how much is really at stake. Calibrate the amount of estimated cost to take account of the difficulty of the issues, the amount at stake and the importance of avoiding defeat. Talk with the lawyers regularly about what they are doing ►►

and why they are doing it. Ask the lawyers to present alternatives in degrees of intensity or compromise to attach to various aspects of the dispute. Think early and often about settlement options.

Zawicki: I would suggest a cost/benefit ratio analysis, if the choice between a common court of law and arbitration is still possible. This analysis would take the objectives of the given subject, the level of the case's complexity, the procedural role and strategy as well as the relevancy of confidentiality into account – so that the selection between arbitration and the common court of law is a rational choice, also from the point of view of the foreseen costs. Not just numbers, but rather the entire context of the case, should be of decisive meaning here. In terms of arbitration itself – be it domestic or international – I would recommend detailed preparation of the initial stages of the proceedings in cooperation with the arbitration tribunal, drafting a specific plan of action, as well as the common indication of the disputed and undisputed issues to manage the costs of each arbitration.

Siciliano: In South Africa, contingency fee arrangements are only allowed in certain specified circumstances and in terms of strict rules. Normally, lawyers charge by the hour for their services. Unfortunately, although a successful litigant will be entitled to recover his or her costs from the losing party, those costs are measured according to a set tariff, which is task rather than time-based. As a result, a successful litigant will invariably never recover all its costs. It is therefore important for companies to manage the costs of dispute resolution. In order to do so, companies need to obtain estimates as to the cost of the dispute resolution process. It is difficult to estimate the cost of dispute resolution because the process must take account of so many variable factors. However, it is not impossible to provide an estimate based on previous experience. Companies should therefore request an estimate of the cost at the commencement of the process, together with periodic reviews of the estimate in order to ensure that costs stay within budget.

To what extent are the challenges and complexities of dispute resolution amplified in cross-border situations? Are there any steps that companies can take to reduce these challenges?

Thorsen: The differences in cultures, legal systems, laws, the rule of law, procedures, etc. all amplify the challenges and complexities of dispute resolution. Rest assured, cross-border dispute resolution is almost always going to be more expensive relative to domestic dispute resolution. Inefficiencies mean higher cost, and where one, both or several sides to a dispute have to undergo a crash course in these fundamental variables, that adds to the cost. In order to reduce these challenges, the more a company can work into a dispute resolution agreement on the front end before any dispute has arisen, the less there will be to fight about once a dispute does arise. Things to consider are: the forum of the dispute resolution; agreement as to jurisdiction; dispute resolution procedures; and creative alternatives to cross-border disputes in the event a dispute were to arise.

Shaw: The increasing commonality of cross-border relationships can make for complex dispute resolution scenarios, for example

when component parts of a final product are manufactured by multiple different entities operating in different countries. In the event of a dispute it becomes difficult to bring multiple parties under one arbitration agreement. Many companies find it useful to establish joint ventures or consortium arrangements with provisions for mandatory international commercial arbitration to avoid the difficulties of negotiation arbitration agreements after disputes arise.

Siciliano: The challenges presented by cross-border situations depend largely on language barriers and the legal systems of the countries involved. Where the parties to the dispute and their legal advisers are able to speak the same language and where the legal system of a particular country is understood and is credible, it is easier for the parties to participate in a dispute resolution process that they believe will provide an acceptable result.

Greenspan: Different legal systems and cultures definitely amplify the complexities and challenges. If the parties are operating under different assumptions about the risks, the effect of litigation and the potential outcomes of litigation, it will be more difficult to fashion an effective alternative process. To help alleviate these issues, it is particularly helpful to spell out dispute resolution mechanisms in any contractual relationship and to specify applicable law.

Kiernan: The biggest impact of cross-border disputes usually relates to the differences in business culture or dispute-resolution culture between the disputing parties. One way to reduce these differences is for companies to enter contracts compelling them to pursue alternatives to litigation before litigating business disputes between them. Another valuable step is to make sure to spend time understanding the cultural sensitivities and sensibilities of the adversary.

Portwood: Cross-border disputes raise language, cross-cultural and cross-legal system problems all of which can be relatively challenging, particularly in fact intensive disputes. In order to cope with such challenges, it is important for companies to retain counsel experienced in managing cross-border disputes preferably between the nationalities involved. It is also advisable for companies to appoint several internal persons with similar experience and the necessary language capabilities.

Zawicki: It is obvious that several elements cause a higher level of complication in cross-border disputes. These are the issue of the choice of law, jurisdiction as well as the appropriate forum. Significant disputes of a cross border-nature have a common trait in terms of principle: their result, both in the form of a verdict of a common court of law as well as an arbitral award, often must be recognised or its enforceability must be ascertained on the territory of a given state. And complications may arise here – the specifics of international arbitration as well as the pro-arbitration nature of the convention regulations are not always fully understood and accepted by the traditionally set common courts of law. For this reason, the detailed and explicit settlement of the issue of the applicable law and jurisdiction, as well as the due presentation of this subject matter, at the dispute stage, are of vital importance. This should minimise the risk of unfortunate surprises at the stage of the recognition proceedings. ■