

Mediation and the Resolution of Complex Supply Chain Issues

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The Financial Times reported on Thursday the 11th of April that:

“Parts for the troubled Boeing 737 Max aircraft are stacking up across the global supply chain, raising the financial stakes for manufacturers as uncertainty continues over when the grounded plane will be cleared to return to the skies. The fallout of the 737 Max crisis has spread to companies that supply crucial parts of the aircraft, following Boeing’s decision last week to cut 737 production from 52 aircraft to 42 per month from mid-April.”

Having spent 30 years as In-House Counsel to several global Aerospace Companies, this crisis appears to be shaping up into a series of international legal disputes for Boeing. Its General Counsel and the Board will have to review together with their Insurers, the steps to be taken to head off or mitigate these disputes, before they come to overwhelm the Company and distract it from what its stakeholders actually want to do and that is supply aircraft. When crisis such as this hit a Company, the automatic reaction is to pull in the draw bridges, see those questioning the Company as the enemy and to call out the lawyers to provide a robust defence. In the situation Boeing finds itself in, this would likely hinder a return to normalcy, rather than benefit the Company and its stakeholders. Boeing’s priority has to be to find a quick and effective resolution with its suppliers.

Supply chains are a critical element of a global manufacturing network. It permits a manufacturer to source quality products, at best prices from anywhere in the world, with just in time delivery terms. It has changed the way goods are manufactured and ensures that benefits from a particular industry such as Aerospace or Automotive are spread the world over. Supply chains are therefore an integral part of how a Company does business today and the relations formed with suppliers are critical to its performance. In addition, in highly regulated industries, such as Aerospace, suppliers have to be prequalified and replacing suppliers once qualified can be a lengthy and expensive process. Supply chains once established, can therefore be viewed as a valuable asset of the business, not to be toyed with.

This being said, what does Boeing now do to deal with the fact that it: has had to ground the 737 Max; has slowed down its own production of the aircraft; and faces cancellations of orders. It is reported that the cost to Boeing of the hiatus in deliveries of the new aircraft is \$1bn per month. The cost to its suppliers of this slowdown is not yet known, but to many smaller suppliers it

may very well become an existential question. Can they survive and what is the cost to Boeing if they do not?

Given the critical relationship a manufacturer has with its supply chain, it cannot afford to permit disputes to interfere with its performance. Whether it likes it or not Boeing will have to find a mechanism to deal with these potential disputes in an effective and expedient manner, before supply issues further deteriorate their ability to deliver aircraft, once the regulators agree the 737 Max can once again take to the skies.

What we know about litigation, is that long term the outcome is uncertain and it is not conducive to maintaining relationships. The process is adversarial and is not flexible, permitting only the legal issues presented to a tribunal to be dealt with. This does not address the needs, interests and priorities of the parties. It also leads to an imposed decision, rather than the parties being able to work out a resolution for themselves, thus hindering future relationships.

What I have found when dealing with supply chains and ensuring that they remain robust, is that a different type of dispute resolution mechanism is needed. One that addresses issues in real time and brings about a consensual outcome. Mediation provides this mechanism. Whether Boeing has built this mechanism into its supply chain terms, is not known, but many other global companies are now doing so to ensure that critical supplier relationships are maintained.

Mediation is a consensual process agreed to by the parties to the supply agreement and permits for a third party neutral to be brought in when an issue first arises, before parties become entrenched in mudslinging. It is in fact facilitated negotiation, which permits not only the strict legal positions of the parties to be explored, but also their actual needs and requirements, in order to move to a settlement. Because it is not only the legal issues that are discussed, the process permits for flexible outcomes that deal more with the future of the relationship and how it can be maintained. For example, in the Boeing situation, it might lead to a supplier providing parts for other Boeing aircraft to substitute for orders delayed or lost on the 737 Max. It might also call for Boeing accepting orders being delivered, even though technically the parts are not yet needed. The process also permits for sub suppliers and others affected by situation to be brought into the mediation, thereby resolving all potential disputes at one time. The outcomes through mediation are endless, whereby in litigation there is a winner and loser and usually no party is fully satisfied.

The other benefit mediation affords, is expertise in the person selected to be the mediator. Particularly, in highly technical industries such as Aerospace,

having a mediator that has knowledge of the intricacies of supply chains and the technology related to them, can assist the parties to find a practical solution. Something a Court and Judges are ill equipped to do. The American Arbitration Association has for example, established a special mediation and arbitration panel of former Aerospace Counsel known as the Aerospace, Aviation and National Security Panel with significant and relevant industry experience. This panel exists to deal with precisely the type of supply chain crisis Boeing is now facing.

Boeing now has a choice. To take a pragmatic view of the legal and practical issues the grounding of the 737 Max has caused to its supply chain and find an expeditious solution through mediated settlements or to go to war with the very companies that are its life blood. The choice for any rational thinking Board, is an obvious one.

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