Implementing a Corporate ADR Policy and Formulating ADR Guidelines

Wolf von Kumberg
B.A., LL.B, LL.M (Cantab), FCIArb
Member Arb DB Chambers

"I was never ruined but twice: once when I lost a lawsuit, and once when I won one." Voltaire 18th Century Enlightenment French Writer

Voltaire's simple statement rings as true today as it did over 200 years ago. Litigation in any guise, wherever carried out in the World, rarely brings the benefits sought and often comes at a high cost. Judicial process, while claiming to ultimately lead to the determination of disputes, usually leaves both the successful party and the losing party dissatisfied. This is because the parties have turned the dispute and the decision over to a third party to judge, based on their findings of fact and determination of the law to be applied. True, the loser can normally appeal, but that only exasperates the cost and extends the time needed for an ultimate determination.

As an in-house lawyer, who spent thirty years being responsible for the global legal affairs of several aerospace/technology companies, I encountered disputes across the Globe. It became clear to me that litigation in all its guises and even arbitration, often did not serve the objectives of the Company I served. Business requires that decisions be made in the best interests of its stakeholders, this includes the shareholders, management, employees and the wider community in which it operates. Rarely in my experience is that best interest served through protracted litigation.

The cost of litigation is not only the costs of the court or arbitral procedure and the lawyers each party must retain. There is a lost opportunity cost that must be added, which includes: business relationships; management and employee time to work on preparing the case, diversion of resources from the business to fighting the lawsuit, reputational cost if the case is newsworthy, uncertainty affecting the share price. This lost opportunity cost is in fact the most harmful to a business when litigating and speaks to finding alternative ways for dealing with disputes.

A favourite illustration of mine is that of Litton Industries Inc., a Company where I worked for 13 years. It was a leader in the inertial guidance system marketplace. Honeywell was also growing its presence in this market and seen as a bitter rival. The two companies entered into protracted patent and competition litigation that stretched over many years and ended up in numerous appeals. Both parties spent tens of millions of dollars on the lawsuits, without any resolution in sight. Litton diverted R&D funds needed to strengthen its product base, into funding the lawsuits. Engineers, needed to develop its new product line, were required to prepare the various stages of the lawsuit. Top management was consumed by the litigation and the shareholders no longer knew what direction the Company was taking. In fact, the Company was in

decline and in the end the best option was to sell itself to Northrop Grumman Corporation. Northrop reviewing the litigation decided that it would attempt a facilitated negotiation (mediation) to settle the matter with Allied Signal, the new owners of Honeywell. The result was a settlement that had been available to Litton early in the litigation. Had Litton accepted a negotiated settlement years before and avoided the enormous lost opportunity cost, it might still be in business today. But businesses are run by people and people have egos and emotions which often guide the way in which disputes are handled, rather than looking rationally at the real needs and objectives which should govern the outcome. All litigation is a gamble no matter how strong a party feels their case to be, because the outcome is in the hands of a third party that might not see the case in the same way. As a result, litigation is uncertain, while a settlement that parties can negotiate between themselves is their own decision and leads to a final resolution both can live with.

This important lesson was not lost on me and at Northrop we set about implementing an ADR process that would assist the business in both managing its disputes and provide an objective basis for making decisions as to how disputes were to be handled, ultimately leading to a final resolution. The key reason for business to implement a formal Dispute Management System, is to put objective controls in place to manage the risks inherent in disputes, thereby avoiding the subjective and emotional approach illustrated by Litton.

Another instructive example of how ADR permits vital projects to continue, was that of New York Wireless. After 9/11 in New York, a lesson learned was that the emergency services could not effectively communicate with each other. A wireless system had to be implemented to permit this communication to take place in the future. Northrop Grumman was awarded the contract. As part of the implementation it needed some software developed by a Korean Company. The Korean Company and Northrop had a Licence Agreement, which had been used on previous projects. Northrop was of the opinion it could use the software on this project as well. The Korean Company objected and felt the Licence did not cover this particular use and threatened an injunction if the software was used. Without the software this critical infrastructure could not be built. It was a clear example of where the parties needed to find a quick way out of the impasse. Lengthy litigation to determine whether Northrop had the rights or not, would not get the project completed on time. Mediation was turned to and involved the CEO of Northrop and the President of the Korean Company. Even though the Korean Company was much smaller, the fact that Northrop's CEO was willing to attend the mediation broke the logjam. The Companies settled not only the immediate dispute, but included the potential for the use of the Korean Company on future projects. A true example of how mediation can deliver a win/win solution, in a minimum amount of time, permitting the contract to be completed.

A final example of how ADR can be employed effectively to govern long term relationships, is one involving a joint venture agreement. Joint ventures are notorious for not having an adequate dispute resolution mechanism to deal with issues arising between the parties. This often leads to litigation when a dispute arises, that in turn leads to the relationship being damaged or ceasing to work

altogether. Northrop was entering into a joint venture with another major Aerospace company to deliver critical equipment to the US Airforce. The joint venture partners could not afford to have a falling out, which would jeopardise the programme. The solution found was to build a Dispute Board into the agreement. Any issue arising between the parties could be taken to the Board for informal advice. If the parties desired, the Board could also render binding interim decisions that the parties had to abide by and the dissatisfied party could, if it later desired, go on to arbitration, but the performance had to continue. It was a practical solution that permitted the programme to be run effectively without the threat of litigation derailing performance.

These are all examples of how ADR can assist in mitigating the effect of disputes and in some cases, prevent the dispute from arising in the first place. There is little question that contentious litigation destroys relationships, robs business of vital resources be it financial or human capital and rarely ends with a positive result. A wise business will look for ways to avoid disputes and where that is not possible to mitigate their affect, through strategic use of ADR. This position is supported by the American Arbitration Association "Dispute Wise" studies carried out in both the USA and in Europe (1).

Dispute Escalation

Disputes of any kind, develop over a series of phases or steps. Professor Friedrich Glasl, described this process in his book "Confronting Conflict" (1999), as an escalator.

The first phase he called "Win-Win" was summarised as: tension; increasing unpleasant debate and preparation for adversarial action.

The second phase he called "Win-Lose" was summarised as: poor communications; litigation or arbitration; exaggerated claims and the exchange of threats.

The third and final phase he called "Lose-Lose" was summarised as: destructive blows; aim to destroy the other party; will to win is all encompassing; the drive to defeat the other party is stronger than self-preservation.

What Professor Glasl illustrates, is that when communications break down, parties lose the ability to compromise and start the process of assessing their positions based on rights, rather than needs. Commercial relationships only work, when both parties see their needs being met and programs are managed based on compromise, not strict legal rights. While contracts clearly have a legal foundation, over their lifetime they must be interpreted and reinterpreted countless times and agreement found on differences that arise. In most cases that is precisely what happens in most contracts, otherwise they would not be used in commerce. It is in those cases where these differences escalate into conflict and conflict into disputes, because communication and the ability to compromise is lost, that Glasl's escalator takes over.

So, what can a Business do to avoid getting onto Glasl's escalator or once on it to get off, before it reaches the top?

Recognition that Disputes Will Occur

As with any business process, there must first be a recognition that an event will occur and that there should be a procedure established for dealing with it. A dispute in the context of running a business, while unidentifiable and whether internal or external, should be an anticipated event. Being a risk that every business can through analysis recognise, it can then be planned for.

Increasingly businesses are preparing for disputes by instituting "Dispute Management Systems". These are formal internal processes institutionalising how conflict, both internal and external to the business when it arises, will be dealt with. The objective being to implement a policy by which corporate risk from disputes can be dealt with in a systematic and rational manner. This avoids the haphazard and often emotional approach taken by most businesses (Litton approach) to a dispute and permits the business to retain a certain amount of control over the process of the dispute and its ultimate outcome.

Steps in implementing a Dispute Management System

Risk is the possibility that an event will occur and adversely affect the achievement of business objectives.

A risk factor is a circumstance (internal or external to the organisation), which tends to increase the likelihood of an adverse event occurring.

So how do you assess the risk of conflict to a business and then measure the risk factors to establish a Dispute Management System?

Stages of Risk Assessment:

(a) Risk Identification: Identify characteristics and quantify conflict risks to the business;
(b) Risk Evaluation: Evaluate the potential significance of the risks indicating the relative importance of each risk factor to the business.

Some Common Conflict Risk Factors to Consider

1. Review the contracts and programme management process – what are its weaknesses and where can it be improved when conflict arises?
2. Review supply chain terms and conditions, management and controls – are they robust enough and how is conflict dealt with when it arises?
3. Is there a formal project management and conflict awareness training?

4. Is there a formal ADR process that provides objective guidelines once a conflict is identified?
5. Does past programme and contract performance indicate poor governance and lack of management oversight?
6. Does the business suffer from weakness in financial controls?
7. Is there a lack of contract and programme monitoring and review?
8. Are there clear contract clauses dealing with conflict management and are they being implemented?
9. Is there a written contracts review procedure whereby business objectives and risk factors are identified and mitigation processes put in place?
10. Is there an adequate contracts management sign off procedure?
11. Is there a formal review of conflict history arising from poorly performed contracts and lessons learned reporting? What has been learned from yeahpast adverse events?
12. Is there a conflict review procedure, which formally reviews the status of all conflicts on a 3 or 6 months' basis, with recommendations and a resolution road map?

Designing an Effective Dispute Management System

Once areas of conflict risk are identified, an effective dispute management system can be inserted into a formal ADR policy, incorporating the following processes:

- A forensic review of traditional conflict points both internal and external to the business;
- Drafting of model dispute clauses to adequately cover identified conflict risks;
- Adequate training and education of employees dealing with customers, contractors and suppliers to the business;
- Consideration of appropriate **ADR tools** to address conflict risks to the business and where appropriate building them into the disputes clause;
- Systematic review of actual conflicts facing the business through a formal conflict review procedure to assess the most appropriate means for resolution utilising ADR tools.

ADR Tools for Consideration when addressing specific conflict risks (David these have all been described in more detail in Chapter **X** of the book but could be expanded on here if needed.):

1. **Negotiation**

   Benjamin Franklin said that "By failing to prepare you are preparing to fail." It is a trite saying, but too often not headed. Particularly we as lawyers or business people feel that negotiation is in our blood. We know how to do it well, so why have someone teach us how to do it. But as with

anything done well, there are several key factors in setting up an effective negotiation. Michael Leathes in "Negotiation Things Corporate Counsel need to Know but Were not Taught", summarises them as follows:

- be perceived appropriately by the other party;
- understand as much as possible about those you negotiate with;
- have the best possible information you can get;
- know your real leverage and focus on the other party's;
- think carefully about where the other side is coming from;
- distinguish between what they want and what they need;
- separate fact from fiction and fairness from unreasonableness;
- know when to talk and when to walk;
- bring your own side along with you;
- know where best to turn for support;
- be skilled in listening, questioning and deep exploration;
- focus and do not let yourself be distracted; and
- generally, be psyched up for the task.

Negotiation between the parties directly or through their advisors is the mechanism by which the vast majority of issues and disputes are resolved. While there is still a relationship between the parties and we are at the low end of the Glasl escalator, negotiation is normally successful. As the relationship deteriorates and communications become fraught, direct negotiations lead to failure and the need for a neutral to assist in helping to resolve the dispute becomes necessary.

It is at this point that brining in a neutral to facilitate the negotiation is an effective tool. Someone who the parties feel is credible and trustworthy, who can help bridge the communication gap, by having them actively listening to each other's needs, rather than simply arguing about their rights. This need not yet be a mediator, but simply a trusted neutral. Where relationships have not yet deteriorated so badly that parties no longer hear each other, this will often lead to negotiations ending in agreement.

2. Ombudsperson

Ombudsperson programmes have widely been used by companies to deal with both internal and external issues that arise from time to time, enabling a third party to discuss matters with the parties on a confidential basis. Ombudspersons generally making recommendations on how the problem can be resolved, but it is up to the parties to decide whether to accept them or not. This tool is often seen in business/consumer matters or employee issues within a company. It can be effective if the parties have confidence that the Ombudsperson is truly neutral and where problems can be discussed at an early stage. Parties are generally free to proceed to raise the dispute to a further legal stage, if the Ombudsperson process fails to resolve the matter.

This is a good mechanism for maintaining ongoing relationships, be they within or outside of the business and demonstrates to employees and customers that a Company has a process in place to deal with complaints.

3. **Expert Determination**

This is often used when the parties have an impasse that requires a neutral expert to use their expertise to review the matter in dispute and provide an expert opinion. For example, in a building dispute about the quality of steel used meeting the specification, an engineer expert in steel production could review the material used and render an opinion as to its quality. The opinion can be binding or non-binding on the parties, although in many jurisdictions there is legislation that covers expert opinions and deals with the process and effect of an expert opinion.

This is an effective mechanism, where there is a technical matter at issue that an expert can provide an opinion on, that the parties will accept and move on. The risk is that where the opinion is legally binding, the parties must be confident in both the process and the expert as they will be stuck with it.

4. **Dispute Boards**

These Boards have traditionally been used in construction projects and are a contractual mechanism. Usually built into the contract from the outset, these Boards are generally composed of one or three neutrals having the required expertise needed by the project. The parties are meant to include the Board in project meetings and to discuss issues with it, as they arise. Depending on the type of Board chosen, a non-binding or binding determination is rendered to resolve the matter, often before it becomes an ingrained dispute. The strength of the process is that it allows the project to be performed, for even where a party disagrees with a determination, they must continue performance pending litigation or arbitration. In fact, most determinations are not contested.

This is a good mechanism to build into long term contracts, for projects that are technical in nature and that require the parties to continue performance, while disputes are dealt with separately. It is effective when the parties chose board members with the experience and credibility to be listened to and whose advice or decision, will be accepted.

5. **Mediation**

   Dealt with in more detail below.

6. **Med/Arb**

   This is a hybrid process by which the parties agree to engage in mediation, with the intention of submitting all unresolved issues to final and binding arbitration. It is usually advised that the arbitrator should not be the same person who served as the mediator. The reason being, that parties will reveal information in mediation which is meant to remain confidential. It will be difficult for the arbitrator not to be biased once confidential information is known, which is an essential characteristic for an arbitrator to have.

   This is a mechanism often used in stepped dispute clauses, where the dispute is elevated from one ADR mechanism to the next, to find the appropriate one to resolve the dispute. Given that mediation is becoming more commonly used in most commercial disputes at some point in the disputes resolution process, it is natural to include it before arbitration in a disputes claus

7. **Early Neutral Evaluation**

   This is a mechanism used by parties, where they wish to have an evaluation of the merits of their respective cases by a professional, without it being binding. Often that individual is a retired judge, who the parties feel has the credibility to determine the strengths and weaknesses of each party's case.

   This mechanism is useful where the parties are entrenched with respect to liability and valuation issues. One party may have conceded liability but disagrees on the level of damages claimed. A respected neutral can in such cases often render an opinion that the parties will accept, due to that neutral's prior experience. Before agreeing to settle, parties often want to know how strong their case is and this mechanism allows them to explore that.

8. **Mini Trial**

   This is a method of resolution, which aims to find a commercial rather than legal solution to the dispute. It is also a non binding process. The parties each select a representative to a tribunal and a neutral is selected as the chair. A brief presentation, which is strictly limited in content and length is then made to the tribunal, after which the tribunal confers. The strength of the process is in the fact that the party representatives come to have a better understanding of the other party's position and the neutral can play a role, much as a mediator in helping to reality check positions. A resolution is not limited to the facts before the tribunal and a settlement can encompass many different business considerations.

   This mechanism is a variation on having a mediation. It allows the parties to make a more structured submission to the tribunal. The fact that there is a neutral involved helps the discussion to move from positional negotiation, to an exploration of interests and needs. While not used very often, it has its place where parties are still relatively cooperative and genuinely looking for ways to resolve a dispute amicably.

9. **Arbitration**

   Dealt with in more detail below.

Making a Dispute Management System Work

The most important element of an effective dispute management system is to ensure that channels of communication are kept open. The parties have a relationship, because of their ability to communicate their needs and objectives through a contract. This relationship of trust can only continue, while the parties are able to speak with one another. As described above, when communications start to be blocked and positions are entrenched, trust breaks down and leads to enhanced conflict and eventually to a dispute. Therefore, having a mechanism in the dispute management system that permits discussions to be elevated to other levels of management (multiple contact points), that are not entrenched in the day to day administration of the contract, is a means of permitting communication to continue, trust to be maintained and issues to be resolved at an early stage. The process should also have built into it a means of bringing a neutral in to assist with discussions and negotiations, where the parties themselves are no longer able to communicate. This could be an ombudsperson if a less formal process is needed, neutral assisted negotiations or a mediator.

The dispute management system should be supported at the highest levels of management and the policy promulgated if possible by the Board. This will give

the process legitimacy and help to make it part of the Company culture. Through it, if used properly, issues and conflicts can be resolved at an early stage without an adversarial process. The more companies adopt a formal dispute management system, the greater their awareness of dispute avoidance and management, creating a general corporate culture that will lead to better contract performance and protect the bottom line for all stakeholders

Drafting Considerations for Model Disputes Clauses

Appropriate disputes clauses in all relationships entered into by the business, be they external or internal, are an essential tool in dealing with conflict risk. From employment contracts, to dealing with customers, contractors, consultants, joint ventures or supply chain, appropriate consideration must be given to the way conflicts arising in those relationships should be dealt with. There is no one size fits all solution. Each clause should be tailored to the needs of that particular relationship, with sufficient flexibility to deal with unexpected events. That is why often a mixed mode approach is best, blending several ADR tools together to permit a variety of approaches to settling a conflict or dispute.

Stepped Clauses are often employed to generate a mixed mode approach, permitting an escalation of response both by elevating the matter to more senior management and by employing a variety of ADR tools. For example, on might start through negotiation by the programme management teams involved in the programme, failing resolution escalating the negotiation to a senior management team in each company, failing which facilitated negotiation or mediation involving the CEO of each company could be employed. Thereafter a variety of other ADR tools can be built into the disputes clause, ultimately ending with arbitration as a last-ditch measure if all else fails. The key to these stepped clauses is to ensure that there is a precise time frame, clearly identifiable at which time one process ends and the next is moved into. While critics claim that it might not be the appropriate time to move into the next step, the stepped clause give parties who are in conflict and thereby reluctant to make concessions a pre-planned framework enabling all aspects of the conflict to be explored with the objective of being settled.

Drafting Tips

Is the clause fit for the purpose given conflict risks identified by the business;

Is it responsive to the needs of the parties;

Does it respond to the expectations of the parties respecting time and expense to resolve the dispute;

Are the ADR tools being employed adequate and do they provide flexibility;

Is the time frame moving from one step to the next realistic;

Has sufficient attention been paid to the level of management to be employed at each step;

Are risks appropriately allocated between the parties?

Matters to be addressed in the Disputes Clause:

- Notice – To whom must it be given and when
- Scope of the clause – what does it cover
- Rules and Institutions to be adopted – are formal rules to be adopted and should an institute administer the process.
- Time Periods between the various steps and any conditions precedent should be clearly set out if the clause is to be legally enforceable
- Party Representatives at each stage – should consider progressively senior management at each stage
- Location of the negotiations or mediation – or if an arbitration, the seat is critical because it affects the administration of the arbitration and enforceability of the award under the New York Convention.
- Information Exchange – how much information is to be exchanged by the parties before each stage. This becomes a crucial question in arbitration as discovery should be limited to that agreed in the clause.
- Privilege and Confidentiality of documents and the process – is there to be any and if so to what extent. This is important in mediation to provide parties with the confidence to openly disclose information, but can also be important in arbitration.
- Tolling of limitation periods while the ADR steps are being employed, so that an action does not become time barred.
- Provisional and interim relief – availability while ADR steps are being employed could be crucial to preserving and protecting property.
- Continuing Performance of the contract and right of termination, while the ADR steps are being employed. This is important to continued performance until the dispute is determined.
- Selection of Neutrals for each step in the process – by whom and fall back if process fails. This is crucial to permit the various steps in the clause to be employed.
- Settlement formalities and enforcement. This is important in the context of both mediation and arbitration, as both the settlement or award must be enforceable if the clause is to be effective.
- Costs and fees throughout the process. This determines how the parties contribute to the costs and whether these are recoverable in the event of an arbitration, by the successful party.

- Form of award if the matter goes to arbitration. Should it be a reasoned award or simply a decision, without support

Key Provisions in a Stepped Clause

Negotiation

Most issues that arise in a commercial context are resolved by the parties themselves, through negotiation. After all, the parties entered into the relationship, initially through a negotiation and as questions or differences arise, the parties resolve these by utilising the same process. As described in Glatz's escalator, negotiation becomes more difficult, when lines of communication breakdown. Parties typically become entrenched in their own positions and it becomes more difficult for them to view the issue objectively. Particularly when lawyers become involved, the discussion becomes rights based, rather than looking at interests and needs.

Typically, a stepped clause will start with a requirement that the business managers directly responsible for a contract engage in "good-faith notice and negotiations as a condition precedent to initiating a more formal procedure such as mediation and/or arbitration.

Good faith, negotiation requirements are often divided into several steps, each involving a more senior level of management. Normally it would start with the management involved in the programme itself. This management is most involved in the issues and has the most knowledge, but as stated also becomes entrenched and has a personal objective in ensuring that their position is successful. Where this level of negotiation is not successful, after an express period of time, it is common to move the negotiations to a more senior level of management, not involved in the day to day administration of the contract and therefore looking at other factors, such as relationships and future business to help resolve the conflict. In many cases given greater objectivity permits a resolution to take place.

Finally, it is not uncommon after a specified period of time to raise the matter to the CEO level. The CEO will normally evaluate the conflict and its resolution based on what is best and most reasonable from the perspective of the stakeholders in the Company, its shareholders, employees and the community at large. This gives much greater scope for a resolution being found, if both CEOs approach the conflict from this position. Increasingly there may be a provision that if direct negotiations fail, the parties will appoint a neutral to facilitate the negotiations.

It is only after negotiation fails, that a stepped clause permits the parties to move on, typically to assisted negotiation with the aid of a neutral, the most common process being that of Mediation.

Mediation

Key characteristics

- Mediation is a consensual process that parties can contractually agree to utilize.
- The mediator has no power to bind the parties. Instead, he or she serves as an objective facilitator.
- Discussions with the mediator are confidential and without prejudice to encourage the parties to be candid about strengths and weaknesses.
- Mediations are held in an informal setting, usually over a one to three-day period. Each party is required to bring a person with settlement authority.
- Mediation offers numerous advantages over other forms of dispute resolution
    - Parties decide how their dispute is to be resolved rather than having it decided for them by a third party.
    - Helps to preserve relationships by permitting parties to resolve issues early on, keeping open channels of communications, that would normally be damaged or destroyed through litigation.
    - Business management gets involved in the settlement process at an early stage.
    - Experienced mediators facilitate negotiations, minimize posturing by overzealous advocates and provide reality checks on strengths and weaknesses.
    - Allows parties to explore interests and not simply legal rights.
    - Tends to be cheaper and faster than litigation or arbitration, in particular reducing lost opportunity costs.
    - Permits international parties to cross cultural barriers.
    - Process is flexible, giving the parties the ability to structure the format in the way they believe most conducive to reaching resolution.
    - Voluntary settlements substantially reduce the risk that one party will seek to set aside the resolution, such as occurs with appeals from court orders or motions to vacate arbitration awards.

Issues to consider

1. When to mediate

The argument is often made that mediation is not effective if carried out too soon after a dispute arises. Until the parties fully understand the elements of the dispute and the evidence, it is difficult to determine the strengths and weaknesses of each others case. This being the case, building a mediation provision into a disputes clause, the argument goes, may require mediation to take place before the dispute is ripe for the process. This is in fact, very much a lawyer's approach to what mediation is all about. It is not a position that is necessarily best for a business that has an interest in resolving its disputes at an early stage, with minimal cost and upholding relationships. Mediation is not about determining legal positions which is rights based, a court does that. It is about a neutral assisting the parties to establish their true interests and helping them to find a way to achieve them through a settlement. This can be done in many ways and the legal position and reality checking is certainly useful, but not definitive. In a business dispute it is often about the relationship and determining how it might be maintained, or best excited from. This can be considered much earlier than the dispute arising or formal steps being taken.

The reason why it is good practise to include mediation in a contractual disputes clause is fundamentally because it then requires the parties to take that step, before they can launch into formal contentious litigation or arbitration. Without such a clause, the parties having fallen out and communication having broken down, it is often difficult to get them to agree to anything. Requiring them to take the mediation step permits parties to review the issues in dispute, with a neutral party and see them from a perspective that is not only rights based but permits all interests to be explored.

It is true that not all mediations lead to a settlement, but almost all parties leave a mediation understanding their own case and that of their opponent in a much broader light. Most cases that have had mediation will ultimately go on to settle. Often that is because the issues are narrowed and through a second mediation or simply negotiation, those remaining can be resolved.

2. Who should the mediator be

Parties have to be confident in the mediator that is appointed. The greatest strengths that mediators have is that they are neutral, credible and trusted. This allows the parties to build up a relationship which permits them to be open and divulge their true interests and fears, permitting an eventual resolution to be found. Sometimes the mediator needs a certain technical expertise, but often that is not needed. A mediator will bring a certain style and approach to the way the

mediation is handled and that is a more important quality. Mediator selection is therefore the most critical choice that can be made by the parties.

Mediators are usually chosen by the party representatives, but sometimes parties are sophisticated enough to choose their own mediators, usually from a list that the parties exchange with each other. There are also institutions that will appoint the mediator, or will do so as a default position where the parties can not agree. There are also Institutions such as the International Mediation Institution (IMI) that maintain a website of credentialed mediators, whose qualifications are vetted and who maintain a feedback digest in which third parties will comment on the style, approach and expertise of the mediator.

3. Language and place of the Mediation

Clearly the mediator must be understood and the parties have to be able to openly express themselves to the mediator in a language in which they are comfortable. Having translators takes away much of the intimacy and report that the mediator needs. It is better in circumstances such as that to have a co mediator that speaks one of the languages and the other mediator that speaks the language of the other party. The two must work closely together, but it permits the parties to feel they are being heard.

As to the place of the mediation this is both the venue where it will take place and the legal seat of the mediation itself. The venue is either arranged through the mediator or an institution, if it is involved. It should be a neutral venue so that all parties are comfortable with it and consist of sufficient rooms to have a joint meeting room and breakout rooms for each of the parties.

As to the legal seat, this is often less important than for arbitration (see below), nevertheless it can still be important in some jurisdictions, where either the choice of mediator or the subject matter that can be mediated might be restricted. It is therefore important that these matters are first checked by the legal representatives prior to agreeing a specific seat.

Arbitration

Arbitration is typically the ultimate dispute resolution method chosen by parties contracting with each other from different jurisdictions. This is largely because neither party wants to give the other "home court advantage". Some of the considerations to take into account when deciding whether arbitration or litigation is to be chosen in the disputes clause are described below.

Arbitration Versus Litigation – Issues to Consider

- Does arbitration provide a safer alternative than foreign judicial system? Is foreign court system expeditious, trustworthy, reliable and fair?

- Does arbitration provide demonstrable cost and time savings over litigation in foreign courts?
- Does litigation provide surer means to enforce the outcome (judgment versus award)?
- How does each forum handle discovery issues?
- Would a dispute process benefit from expertise in the decision-maker?
- Is the subject matter of the transaction one that would benefit from a private, as opposed to public, dispute resolution process?
- Are there any local law requirements or constraints?

The key characteristics of Arbitration are the following:

- Agreement to resolve disputes privately outside the framework of national courts. It requires a written arbitration agreement (can be in the main contract or in a side agreement) between the parties.
- The parties determine the mechanism pursuant to which the arbitration will be carried out, e.g., whether it will be ad hoc or institutional (using the rules of an existing arbitral institution).
- Arbitration is conducted by a Tribunal normally consisting of one to three arbitrators.
- Arbitration results in a final, binding and enforceable determination of the parties' rights and obligations in the form of an award. (As explained later, the seat of the arbitration and the New York Convention are key to the award's finality and enforceability).

Other considerations for inclusion in the arbitration clause:

Arbitration: Ad Hoc or Institutional

- Preference is to use Institutional arbitration. The Institution will help administer the proceeding, and its Rules will govern the conduct of the arbitration.

- The chosen Institutional body will have its own set of governing rules. These rules may be modified from time to time, so one must consult the most current set of rules before making a final decision. Also, there may be reasons to modify the current set of rules. Factors to consider when choosing rules include:
- Extent to which the rules may be modified
- Who chooses arbitrators/how many
- Any nationality/professional criteria
- Previous history with a particular party. Where a customer has previously agreed to an acceptable institution, attempt to use it again.
- Administrative/arbitrator costs. This can vary between fixed fee based on value of the dispute or hourly rates.

- Joinder of parties/issue consolidation
- Limits on discovery
- Issuance of award
    - Timeliness
    - Reasoned decision

Language

- Arbitration proceedings should specify the language in which the arbitration is to be conducted
- Specify that all documents produced in the arbitration are to be in in that language or translated into that language at the expense of the producing party

Governing Law

- Clause should encompass performance and interpretation of the contract and any other (including non-contractual) claims arising from or related to the contract

Privacy

- Arbitration proceedings are not a matter of public record, but need to ensure that other party maintains confidentiality
- Confidentiality is particularly important if the proceeding will involve sensitive information

Continuing Performance Obligation

- Parties to continue performing notwithstanding any dispute

Limitations on Damages

- Consider whether to exclude categories other than compensatory damages, e.g., indirect, consequential, incidental, multiple or punitive damages. (Tie this in to the Contract limitation provision.)

Reasoned Award

- Consider whether a reasoned award (decision) is desired. In most cases, this should be included

Summary

Disputes are a clear and ever present risk to a Company. The fact that they are often unforeseen and the costs unquantifiable, make them a particularly hazardous risk. As discussed herein, much can be done to help identify the conflict risk factors to a business and through the implementation of a formal Dispute Management System, many conflicts can be avoided or certainly managed to minimise that risk. With careful drafting of appropriate disputes clauses, those conflicts that do develop into disputes will have a framework for resolution, without having to resort to litigation. No risk factor can be fully eliminated, however, through appropriate planning and objective use of ADR tools the cost of disputes to a business can effectively be managed and certainly reduced. In addition, focussing on a consensual, rather than a contentious means of resolving its disputes all stakeholders of the business will be better served.